ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 24, 2025
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 24, 2025, in Washington, D.C. The following members, liaisons, reporters, and consultants were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr. (via Teams)
Judge Jane J. Boyle (via Teams)
Judge Timothy Burgess
Dean Roger A. Fairfax, Jr.
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Michael Mosman
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Brandy Lonchena, Esq., Clerk of Court Representative (via Teams)
Catherine M. Recker, Esq.
Justice Carlos Samour
Sonja Ralston, 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 T. Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee
Kyle Brinker, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Dr. Elizabeth Wiggins, Director, Research Division, Federal Judicial Center

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

Opening Business

Judge Dever opened the meeting and welcomed the in-person attendees as well as those participating remotely: Judge Birotte, Judge Boyle, Ms. Lonchena, and Professor Coquillette.

Judge Dever said that several members were completing their second terms, and he briefly highlighted some of the contributions each had made. Judge Nguyen did an extraordinary job as chair of the Rule 17 Subcommittee and a member of the Rule 6 Subcommittee. Dean Fairfax made major contributions to the consideration of amendments to Rules 6 and 16. And Ms. Recker (whose second term had been extended) did extraordinary work on the Criminal Rules Emergency provision, Rule 17, and Rule 6. He said that Judge Nguyen, Dean Fairfax, and Ms. Recker would be invited to make any final comments at the end of the meeting.

Next, Judge Dever recognized Judge John Bates, who was attending his last Criminal Rules meeting as chair of the Standing Committee. He described Judge Bates as an absolute All Star in the federal judiciary and as a public servant. He noted that Judge Bates has performed many important duties for the judicial branch beyond his service as a United States District judge: Director of the Administrative Office of U.S. Courts, Chair of the Advisory Committee on Civil Rules, and Chair of the Standing Committee. He embodies everything that's right about public service in the United States and being a citizen leader. Judge Dever expressed his gratitude for Judge Bates' service.

Others participating in the meeting were recognized next. Judge Dever welcomed Ms. Dubay, the new Chief Counsel and Secretary to the Standing Committee, noting that she brought an extraordinary amount of experience. Ms. Dubay clerked on the Eastern District of New York, practiced at Hunton and Williams, and held a variety of positions with increasing responsibility in the Administrative Office of U.S. Courts, the Federal Judicial Center, and the North Carolina Judicial Standards Commission. Judge Dever also recognized Scott Myers, who would be retiring after twenty years of service at the Administrative Office of U.S. Courts. Judge Dever thanked Kyle Brinker, the Rules Law Clerk, for his extraordinary work, noting that Mr. Brinker would be joining Kirkland and Ellis at the end of his term with the Rules Committees. Finally, Judge Dever acknowledged the members of the public observing the meeting and thanked them for their interest.

A senior inspector with the U.S. Marshals Service provided his contact information and noted the security procedures in the building.

Judge Dever noted that the Committee's next meeting would be November 6, 2025. The location (which would not be Washington) had not yet been determined.

Professor Beale took the floor to note this was Judge Dever's last meeting as chair of the Advisory Committee and to comment on his many contributions. Recalling that Judge Bates had been described as "an All Star," she called Judge Dever "an All Star recidivist." He served six years as a member of the Committee, plus a what he called his "bonus year." During his term as a member, the big lift (in which Ms. Recker also participated actively) was the emergency rule, now Rule 62. It was unlike anything that Professor Beale had participated in before with many,

many, many nighttime calls. Congress was involved, and it was a cross-committee project, but criminal cases are very different than civil cases and the Criminal Rules Advisory Committee had the most difficult assignment. Moreover, Congress gave only two years to get the whole thing done, which required action at warp speed under the Rules Enabling Act process. For Judge Dever's remarkable effort as the chair of that Emergency Rules Subcommittee, he was "rewarded" by shortly thereafter being appointed to serve as chair of the Committee. Another major accomplishment was the completion of a successful amendment to Rule 16 (expert discovery), which was the first substantive expansion of the rule's disclosure obligations in decades.

What characteristics allowed Judge Dever to make these many contributions? Professor Beale quoted Martin Luther King, Jr.'s statement that the ultimate measure of a person is not where he stands in moments of comfort, but where he stands in times of challenge and controversy. She said that was the situation in which Judge Dever really stepped up—not the easy things that all agreed upon, but the harder things, where you need to find true north, try to get agreement on it, and move the group ahead.

Another online source identified three C's of leadership, which Judge Dever has exemplified. The first "C" is competence. Judge Dever has a deep understanding and knowledge of the rules and how they apply in a wide variety of cases and proceedings. The second is commitment. Professor Beale explained that the reporters often emailed and texted with Judge Dever on nights and weekends to get a reaction or approval of a draft or directions on how to move forward. So although all of the members work hard—and the reporters appreciate that hard work—Judge Dever's commitment as chair far surpassed that of any member. The final "C" is character, which is knowing what is right and having the courage to act on it. Judge Dever's character has been inspiring, and Professor Beale expressed her great gratitude for his contributions to the rule of law, fairness, and the improvement of the criminal justice system, and especially his support of and assistance to the reporters.

Professor King began by commenting that the thing about Jim that she had come to appreciate so much was that he had a strong common sense compass that always steered us in the right direction. If we veered around from time to time, he brought us back and that was really special. She also praised his generosity and his forgiving nature. She said he laughed off the reporters' stupid mistakes like addressing him as "Dave" in emails, which she did once. Judge Dever was very patient, and he listened to everyone. Moreover, despite his calm, easygoing manner, he always seemed to keep us on track. In hundreds of meetings and committee calls, Judge Dever always ended on time despite making everybody feel they had been heard. That was magic. She thanked Judge Dever for being such a wonderful leader and during the years he had been on the Committee and then as chair.

Judge Dever responded by expressing gratitude to the reporters, saying that only the chair can appreciate how much they do, and the wisdom, dedication, and intellectual force they bring to the process. He then turned to the main agenda for the meeting, paraphrasing Teddy Roosevelt, who once observed that the greatest professional gift that each of us can receive is the opportunity to work hard at work worth doing. That, Judge Dever said, is what we get to do on the Criminal Rules Advisory Committee. He said it had been his great privilege to serve as a

member of the Advisory Committee, to serve with the reporters, and to serve with all of the members.

Judge Bates asked to speak. First, he thanked Judge Dever for his kind remarks, saying it had been a pleasure to serve in the rules community for many years and to be a part of the Criminal Rules Advisory Committee. He praised the wonderful work that had taken up the Committee's time and efforts over Judge Dever's years as chair. He said it had been especially engaging and enlightening to participate in developing some of the amendments to the criminal rules, particularly Rule 62 and all the other rules that Judge Dever mentioned.

Judge Bates commented that one of the most memorable things that he had been involved with as part of the rules process was actually not a rule amendment but legislation. When COVID hit, in early March 2020, Judge Campbell, Judge Kethledge (then the chair of the Criminal Rules Advisory Committee), Judge Furman (liaison from the Standing Committee to Criminal Rules), and Judge Kaplan, with some help from the reporters, put together legislation that was included in the first CARES Act that went into effect within about three weeks. The legislation enabled the federal criminal justice system to keep running during COVID. Because more than ninety percent of cases are resolved by pleas, then followed by sentencing, the CARES ACT provisions were needed to allow those pleas and sentencings to take place remotely. Judge Bates characterized that as an example of the flexibility that the rules process has and can contribute to the efforts of the federal judiciary.

Judge Bates echoed the comments that have been made about Judge Dever's even disposition, his ability to run a good and timely meeting, and his extraordinary willingness and aptitude to hear from everyone. Chairs also have their own views, and sometimes they have to hear from others before weighing in. He noted that Judge Dever had done that remarkably well and been a contributor to the rules process.

Then Judge Bates announced that Judge Dever would be the new chair of the Standing Committee. So Judge Dever would continue to attend the Criminal Rules Committee, rather than leaving it behind altogether. Judge Bates also announced that Judge Mosman would be the new Criminal Rules chair. He said the Committee would be in good hands, and the work would continue.

After thanking Judge Bates, Judge Dever called for a motion to approve the minutes, with the proviso that would allow the correction of any typographical errors. The motion passed unanimously.

Noting that the agenda book included draft minutes from the Standing Committee meeting at page 60 and the report to the Judicial Conference at page 93, Judge Dever recognized Ms. Dubay for any comments about these materials or the detailed chart tracking the proposed amendments at page 102. Ms. Dubay said just the day before she had the pleasure of delivering her first Congressional package (which did not include any amendments to the criminal rules). She described the process: she hand delivered the package to the Supreme Court and then walked over to Congress and hand delivered it to representatives for the Vice President (as president of the Senate) and to the Speaker of the House.

Judge Dever asked Mr. Brinker if there was anything in particular in the chart on page 109 of pending legislation that would directly or effectively amend the federal rules. Mr. Brinker mentioned two things that were not in the agenda book because the text only very recently became available. They were both bills that were reintroduced from last Congress, and appeared in the November agenda book. First, the Sunshine in the Courtroom act of 2025 would permit court proceedings to be photographed, recorded, broadcast or televised at the discretion of the presiding judge. Second, the Trafficking Survivors Act Survivors Relief Act of 2025 (which he had informed the Committee about in November) would permit a person who had been convicted of a nonviolent federal offense as a result of having been a victim of trafficking to move the convicting court to vacate the judgment and enter judgment of acquittal. Mr. Brinker said no action had been taken on either bill since its introduction, and that the Rules staff would continue to monitor any developments.

Rule 17

Judge Dever then turned to Rule 17, thanked Judge Nguyen for her leadership of the Subcommittee, and asked her to present the Subcommittee's recommendation.

Judge Nguyen expressed appreciation for the full day at the November meeting for discussion of the prior subcommittee draft, saying that the feedback from three panels of speakers and the full Committee had been incredibly useful to the Subcommittee. The Subcommittee attempted to produce a revised draft that would implement the key takeaways, focusing on areas where there appeared to be broad consensus or support expressed by the speakers, as well as by the members of this Committee.

Judge Nguyen framed the discussion by noting several key takeaway points. First, the Subcommittee heard a directive from the committee members to take an incremental approach, a narrower amendment, that would somewhat loosen the *Nixon* standard. So instead of requiring admissibility, the new draft proposes something slightly less restrictive. The Subcommittee recognized that there are multiple districts in which there's no Rule 17(c) problem, and it wanted to leave the practice in those districts alone, not upend them. But in the districts in which there was very limited—or virtually nonexistent—Rule 17(c) practice, loosening the *Nixon* standard will help. She reminded the Committee of prior discussion since the beginning of the Rule 17 project about different districts having very significantly different interpretations of Rule 17(c). The Subcommittee's goal was to bring some limited uniformity to Rule 17(c) practice. So the first point was a slight loosening of the *Nixon* standard (with details to be provided later in the meeting).

The second point was the need to provide for ex parte subpoenas, which judges in some districts had held were not permitted under Rule 17(c).

The third takeaway was the importance of maintaining protections (including motions to quash and strong protective orders) so that the revised rule would not open up the floodgates and increase the burden on already very busy district judges.

Judge Nguyen then directed the Committee's attention to page 2 of the Subcommittee's discussion to sum up the substantive revisions. She noted the agenda book included both the redline and clean drafts.[2] Focusing on the text of the proposed amendment, Judge Nguyen noted several new provisions. First, (c)(1)(B) essentially clarified and provided that the rule allows subpoenas for proceedings more than just simply trials. Second, (c)(1)(B) and (c)(2)(B) codified the loosened *Nixon* standard. And third, (c)(2)(A) and (c)(3) and (4) address when a motion is required. Under (c)(2) no motion was required unless the subpoena seeks personal and confidential information about a victim, or unless the subpoena is sought by an unrepresented party.

Next, ex parte motions are permitted, and if there is no motion required, there is no requirement of disclosure to the other party unless required by a local rule or court order. Judge Nguyen noted that throughout the changes the Subcommittee tried to leave a lot of discretion for the district judges to order something different than the default provided by Rule 17. So, for example, as provided on line 32 of the clean version, the court may for good cause permit the party to file the motion ex parte. She noted again that (c)(2) clarifies that there is no need to turn over the information to the opposing party absent a court order. Again, this built in discretion for differing practices in the districts that want to have a different rule.

The draft's (c)(5) clarifies when a subpoena recipient must produce the items to the court rather than to a requesting party. And finally, (c)(6) provides that disclosure of information and other items between the parties, including information and items the parties obtained by subpoena, is regulated by Rule 16 and other discovery rules. And that implemented the idea of moving incrementally and not doing a wholesale revision of the rules.

Judge Nguyen then called on the reporters to provide any additional details and comments on the Subcommittee's work.

Professor King thanked Judge Nguyen for her terrific summary and then directed the Committee's attention to language that had been at the root of some of the ambiguity and disputes about how the rule applies, which the proposed amendment would remove. The deleted language, on lines 20-23 of the redline, has been the source of dispute about whether Rule 17(c) applies to more than trial. Other language in the rule has been the source of disputes about where the subpoenaed material has to be produced and to whom. Does the material subpoenaed have to be turned over to the opposing party if you can proceed ex parte?

Ambiguous language in the current rule has been the source of that conflict. So one of the Subcommittee's main missions has been to clarify the provisions that gave rise to those disputes, and provide at least a presumption of what can and cannot be done. The rule often includes an "unless" clause that allows district judges to respond to the particular circumstances of a case or for an individual district to create a rule that's still consistent with the rule but accommodates those particular circumstances.

[2] All references to line numbers and portions of the draft amendment in these minutes refer to the version in the Committee's April 2025 agenda book.

Professor Beale noted that the draft also attempted to clarify other issues. As previously noted by a number of members and other commenters, the current rule does not always indicate which provisions are applicable to subpoenas for testimony versus subpoenas for the production of material. The Subcommittee's draft tries to clarify that. And the current rule doesn't indicate which provisions are relevant to grand jury subpoenas and which are not. The proposed rule tries to clarify that as well. That clarity would be very helpful to courts and parties moving forward. She also noted that although the Subcommittee was trying to resolve conflicts among the courts, the proposed amendment would also allow for considerable variation in practice, from district to district and judge to judge. But the proposed amendment does set a default that attempts to change the practice in the districts that have provided the least opportunity for the defense to get really important and needed information. She expressed hope that bringing that baseline up would be both acceptable and helpful moving forward.

Before moving to specific discussion, Judge Nguyen sought to get a sense from the Committee members about the general framework, which is different than the draft that was the basis for the discussion at the November meeting. She asked first for comments from members of the Subcommittee.

A defense member said that generally speaking this draft was a vast improvement over every other draft considered over the last three years. She said she was very proud of the work of the Committee, and she liked this framework immensely. She would also have specific comments later. Noting that she was a relatively new member, she said she had joined after a great deal of work had gone into a very expansive change of the rule and a lot of variations on how a subpoena might be obtained in different categories. She thought the Subcommittee had been responsive to the feedback in November, and had a much more reserved and incremental approach. The Subcommittee pivoted and sought to insure that the revisions would not lead to increased litigation and increased work for the courts. She noted there were options within this draft that would do that. And she thought it addressed very cleanly the identified issues. She also noted wryly that joining the Committee halfway through this process had been a little like the nightmare in which you have to take an exam, but you didn't actually go to the class. In her case, she said, she'd been to about half of the classes. She thought it had been a great effort by the Subcommittee both before and after she joined to identify precisely what problem we were trying to address. And, she thought, this draft went a long way toward that.

Judge Dever spoke next, noting that he had not earlier welcomed Sonya Ralston from the Department of Justice. Ms. Tessier, who previously did a wonderful job as the Department's representative, had joined the Colorado Attorney General's office.

Since Ms. Ralston was now a member of the Subcommittee, Judge Dever invited her to make comments. He also noted that the Department's perspective had been tremendously helpful throughout the process, first with Mr. Wroblewski, then Ms. Tessier, and now Ms. Ralston.

Ms. Ralston said it was a real pleasure to participate, noting she shared the previous speaker's feeling about the exam nightmare a little. But fortunately, she had been able to borrow the notes from some excellent "classmates," so she felt pretty well caught up. She agreed that the Department of Justice is happy with the structure that the Subcommittee has worked out. It is

clearer, more specific and provides the type of guidance needed. The Department appreciated the clarity and the specificity of the way the proposed amendment was broken down into the different subsections and the way it was organized, which helps crystallize the issues and make it clear.

A judge member of the Subcommittee agreed that the rule is much better than it was. She was, however, unsure about what proceedings other than trial that the amendment would apply to. Judge Nguyen deferred discussion of that question until later in the meeting.

Noting that she was first seeking general comments before walking through specifics, Judge Nguyen solicited general feedback from other committee members. A judge member commented that this was a slight move towards getting something that is outside of the *Nixon* framework, though we could not know exactly how much looser. But it would definitely be better.

Judge Bates asked for more of an explanation of the Subcommittee's approach, which is a national rule, but one that leaves a lot of flexibility on almost all issues to local courts, and indeed even to individual judges. But the wide variation is, to some extent, the issue that we are trying to address, and this rule would continue to allow that.

Judge Nguyen agreed. The proposed amendment was an attempt to move incrementally to loosen the *Nixon* standard and to clarify that ex parte motions are available for districts that prohibited ex parte practice altogether—which means that the defense attorneys did not obtain the information—and for districts that require in all circumstances that the recipient must turn any information obtained over to the other side, which prohibits both sides from obtaining information, because they did not know what they would get. But there is already a lot of flexibility in other districts. We wanted to maintain that because we recognized that the nature of the criminal cases and the extent of criminal litigation really does vary from district to district. The amendment is not meant to restrict the district judges in the districts where they already have developed a way to work out Rule 17(c) subpoena practice.

Professor Beale commented that the redline version, lines 35-38, provided a good example of this approach. A motion and order are not required before the service of a non-grand-jury subpoena, unless (3) required by the existing victim provisions, or (4) the subpoena is sought by a self-represented defendant or a local rule or a court order requires a motion. So there is a strong nudge towards not requiring a motion except for cases involving victims or self-represented defendants. What we heard at the meeting in November is that it would be far too much trouble to require motions in most cases. The parties don't want them. Judges don't want them. But in some districts, judges may at least consider a local rule requiring motions and court orders. And in some subset of cases (or in many cases), some individual judges may feel strongly about requiring a motion. So the compromise on various points is to set a new baseline but allow for individual judges to vary. That could also be useful in individual cases, or with a certain litigant who's been a real problem and has been abusing subpoenas; a judge might require a motion and order in such cases. The proposed amendment strikes a balance. It will not produce complete uniformity (though it could if no districts adopt any different local rules). Judges would know more than they would ordinarily in their general supervision of a case, and if something

was going really, really wrong, they might require the parties to do something more. That, she said, is one way of thinking about how the Subcommittee responded to that information that we got in November. It would be too much for the courts and for litigants to require a motion and order in broad swaths of kinds of cases. So then the Subcommittee had to decide how to pare back the motion requirement.

Professor King also responded to Judge Bates's question. There are places in the proposed amendment where judges have authority to depart from the default, but there are also places in the rule that correct misunderstandings of the existing language. For example, some judges now say Rule 17 does not allow ex parte subpoenas, or a subpoena for a sentencing. Some interpreted the rule as requiring a return to the court for a subpoena before trial. Some said Rule 17 did not allow a subpoena for impeachment material. She had read one decision in which a magistrate judge thought it would be an ethical violation to order an ex parte subpoena. Although the proposed amendment would not bring consistency to every point where there is now inconsistency, on various points where there had been very restrictive interpretations, it would tell litigants and judges that's not what this rule means. For those points it's much clearer. And then for the places in which the courts want to have more motions, the proposed amendment permits but does not require them. And if you want to be strict about how you interpret good cause for ex parte fine, but the rule doesn't prevent ex parte motions. That's the balance the Subcommittee was trying to strike.

Judge Nguyen noted it would also be useful to focus on another issue: how to handle personal and confidential information. The Subcommittee discussed that issue extensively, and in the prior draft discussed in November there were two categories of information: (1) protected information including personal and confidential, subject to many restrictions and the protections, and (2) everything else. That led us down the path of how much judicial supervision should be involved. At the November meeting there was uniformly an unfavorable response to judicial supervision in all instances for protected information. The camera reviews would dramatically increase litigation and court time. With this particular draft, the Subcommittee also tried to address that issue with very helpful feedback from the Department of Justice. For personal and confidential information about a victim, for example, a motion will continue to be required.

She noted some concern had also been expressed about whether the proposed amendment was an attempt to move the Criminal Rules to something closer to civil discovery. No we are not. She pointed out that certain showings required for the motions, such as identifying the items sought with particularity. So that was the attempt to work out that rule, and we would get into specifics later in the meeting.

Ms. Ralston commented that from the Department of Justice perspective, the proposed amendment addressed two different types of procedure, which she characterized as "when procedure" and the "how procedure." She thought most, perhaps all, of the places where the current draft would leave discretion to the local rules or to the individual judge are on "how" questions, not "when" a subpoena is available. She thought that was an appropriate distinction for those questions of local practice, where it might be more appropriate for a court to say this is "how" we do it here (e.g. about how many motions are required) versus the standard for "when" subpoenas are allowed.

A defense member said he had attended his first meeting in November, and he had been very impressed with the way that the Subcommittee organized the meetings. After hearing the panel in New York and the different perspectives that were presented to us from around the country by witnesses from DOJ, defense attorneys, and professors, the member had wondered how the Committee would be able to take that range of diverse opinions and put something together. It just seemed like an almost impossible task. But after having reviewed this version of the proposed amendment and the comments, he was very impressed. He agreed with a previous speaker that it gathered all of those perspectives and crafted an incremental step forward, but an important one. His overall sense of the clean version was that it was more permissive. He hoped the district courts would see it as giving more permission to be more open with the way that discovery can occur and not necessarily as restricted. And even though the courts could fashion rules for themselves as to how they want to interpret some of these changes, the sense from the Committee (hopefully to be conveyed, not only through the rule but in in the comments) is that we want this process to be more open for defense counsel. It is incremental. The defense bar would like to go to the outside extreme on discovery, to get everything that it needs. But he recognized the need for compromise in terms of how to move forward. He said the proposed amendment encapsulated a compromise between what both sides wanted, and what the judges would recognize as important in the process. As to the Department of Justice, something that he was a little surprised to learn was how much it uses the Rule 17 subpoena process.

Judge Nguyen moved on to the specifics of the rule, using the red line and the memo discussion that tracked it. The first issue on which the Subcommittee sought feedback was on lines 24-27.

Professor King noted that some style changes had altered the lines referred to in the reporters' memo. The reporters noted their gratitude to the style consultants for their reviews of multiple drafts, often overnight and on weekends. Professor Beale added that there were a few additional style changes, not shown in the agenda book, that the reporters had agreed to make. She said that if the Committee did reach agreement on the proposed amendment, it would not need or want to discuss the remaining minor style issues.

For the Committee, and especially new members, Professor Beale quickly sketched out the process. If approved at this meeting, the proposed amendment would be a long way from submission to the Supreme Court. If the Committee approved a draft of the proposed amendment text and committee note, they would go next to the Standing Committee. Standing would have an opportunity to review, comment, and decide whether it is ready to go out for publication. Publication would get more feedback from a broader audience.

Judge Dever emphasized that the beauty of the rules process is getting the perspectives of so many stakeholders: practitioners, judges at every level, academics, and the public, and multiple opportunity to reflect and revise.

Professor Beale turned to Line 26 in the redline, listing the types of proceedings where a non-grand-jury subpoena was available, not only at trial. This was intended to respond to some decisions holding Rule 17(c) subpoenas were available only for trial. We did not think that was

what the rule ever was intended to do, but certainly that was not what it should be doing moving forward.

She continued that the most recent submission we received from NACDL says the draft rule is far too limited in specifying only trials and three or four types of hearings where materials could be subpoenaed. NACDL, she said, had not noted the language "unless the court permits otherwise." That was, she noted, the kind of language to which Judge Bates referred earlier, leaving discretion to individual courts. The point of the list was to identify things where in 100% of the cases a judge would say absolutely you can get a subpoena for this proceeding. But it also left open the flexibility for subpoenas in other kinds of evidentiary hearings. The Subcommittee discussed the list at length, and members could provide more details about the relatively infrequent but occasionally important need for subpoenas in some of the other very early pretrial proceedings. The idea was to list the proceedings for which the Subcommittee thought subpoenas should be available, and the question was whether revocation should be on that list.

Judge Bates asked the purpose of the "unless the court permits otherwise" language. He asked what the Subcommittee intended. It did not provide for a variation by local rule. Did the omission of local rules mean the Subcommittee was not anticipating that a court could change that by local rule?

Judge Bates said his question was sort of the flip side of expanding, allowing for a subpoena in another type of proceeding, but instead whether a court individually, a judge individually, or by local rule could contract the list. If the amendment includes revocation proceedings, could courts adopt local rules saying no subpoenas are available in revocation proceedings? Could a local rule contract the list?

Judge Nguyen responded the Subcommittee had not construed it that way or discussed that possibility. She said the idea, as the reporters had explained, was to list the common proceedings in addition to trials at which subpoenas had been allowed, including detention, suppression, sentencing—not 2255s. But then what about revocation? It was not meant to be construed in the fashion Judge Bates had suggested. Professor Beale said there is a little implication to the contrary, but it could be stronger. A judge member interjected that she did not favor revising the proposed amendment to allow for a local rule on this point.

Professor Beale commented that there was an implication in the current language: unless the court "permits" is positive. Unless the court "permits" more, subpoenas are available only for these proceedings. That was what the Subcommittee meant. If that implication is not sufficient, it could be made stronger, e.g., "[u]nless the court permits for additional proceedings, non-grand-jury subpoenas available for …."

Judge Bates commented that it seemed clear to him that "[u]nless the court permits" in the first sentence did not apply to the rest of the subsection, which sets forth the new non-*Nixon* standard and there's no ability for a court to change that by local rule or for an individual judge to apply a different standard. The reporters agreed. "[u]nless the court permits" was only in that one sentence. The reporters both said it could be clearer, and agreed with Judge Bates that the "unless" clause does not apply to the loosened Nixon standard stated there.

Professor King responded that in the revocation context the need for greater protection or less protection, different procedures, confrontation, etc., is decided on an individual basis as a due process matter. The Subcommittee did not really talk about local rules in the context of revocations. The Subcommittee had anecdotal information about particular cases in which judges granted subpoenas for evidentiary hearings like a motion for new trial on jury misconduct or whatever. So it did not add local rule here, though it could be added.

Professor King also directed people's attention to the note here, which makes a comment about habeas cases not being included.

Professor Beale noted that on page 133 of the agenda book, starting with line 37 of the committee note, the unless clause explicitly recognized the discretion of the court to permit a Rule 17 subpoena to produce items in other evidentiary hearings not listed in the rule in which a party may be allowed to present witnesses or evidence. Examples include preliminary hearings, new trial hearings, or revocation hearings. If revocation hearing came out of the brackets in the text, that portion of the note would also be revised. The present use of Rule 17 subpoenas in such proceedings is not as common, in part because of difficulties, cost limitations and delay that may arise when subpoena practice is imported into these less formal or more expedited proceedings. And yet in the Subcommittee's discussion, members were able to identify very unusual situations that had arisen where they had been able to get subpoenas and would use them. It was thinking on a case-by-case basis, but that could be changed. Then, as Professor King said, the provisions are not applicable to hearings in 2254 and 2255 proceedings, where a court may apply subpoena provisions of the Federal Rules of Civil Procedure.

A judge member indicated the view that local rules on which proceedings would introduce too much variation.

A member asked if it was the intent of the Subcommittee that the hearings that are specified—trial, suppression, detention—are mandatory, where they have to be available, the court has no discretion?

Professor King replied it was not mandatory in the sense that the court had to grant a subpoena whenever requested. It was meant to convey that the types of hearings listed were not ruled out by the text. But the movant must satisfy the other requirements of the rule. She noted that the word "available" is used several times in the rule—e.g., it's available without a motion or only with the motion—it did not mean that it would be granted, but only that it is possible to get a subpoena.

Judge Dever said that was a great question. And part of it was designed to respond to a line of cases in some districts holding that you can use a Rule 17(c) subpoena only for a trial and nothing else. The amendment tries to address that issue, raising the floor.

A defense member spoke to encourage the inclusion of revocation on the list. She commented that revocations had been more and more important recently. The use of subpoenas had been primarily for witnesses; that would not be affected at all by the current proposal. But both parties might need to subpoena different information, whether from a treatment agency or

an employer. She noted that even probation doesn't necessarily have access to everything because of strict confidentiality laws and the fact that a lot of therapy is group therapy. There had been a number of recent issues in her district, so she suggested including revocation, thinking it was the one area where both the defense and government would need that ability. She thought listing it in the text as opposed to under the unless clause made sense. A judge interjected that she agreed.

The member also addressed one point in the reporter's memo about the ability to subpoena probation. The member thought that would be a waste of time, because probation works for the judge. Her office would never serve probation with a subpoena, but it would use a motion if they thought probation's file would hold information that either the government or defense wants. But it would never occur to them to subpoena probation, because that would in essence be subpoenaing the judge. They could subpoena a probation officer for testimony, but again they are the court's officer. They would just simply be made available or she would be told they're not available.

Ms. Ralston said that the Department did not have strong feelings about this one way or the other. She thought the issue about probation officers was probably the most significant one, and the Department did not have a direct interest in it. That would be up to the judges. Leaving it in the judge's individual discretion would allow for the cases where it is the most significant, like a revocation based on a new law violation where there is additional evidence that would be akin to a criminal charge. But lots of revocations are not that. Because there is so much variation, and the rules of evidence don't apply it is different. But she noted there is evolving case law in different courts about how much evidence is required to sustain a revocation. That may change even outside of the rules.

A judge member said she had recently had many people on probation or supervisory release who beat up their wives. She was aware that was something not all judges dealt with, but she felt it was important to do so and she liked to have the police officers to be subpoenaed. The probation officer would be involved too. She commented forcefully that beating your wife is serious.

A magistrate judge member said they are sometimes referred these matters for reports and recommendations. He had cases where the Justice Department sought to establish new law violations, it became a mini trial, and both sides needed discovery. He had one a few years ago for Judge Bates that involved domestic violence in another jurisdiction. That jurisdiction was not prosecuting the case, but the Justice Department wanted to deal with it as a potential supervised release violation. It was like a trial, and he thought both sides would have liked more discovery than they had. So he supported including revocation.

Ms. Ralston pointed out that the issue was subpoenas for records or documents, not subpoenas for testimony, which would be available. Those are covered in a different part of Rule 17.

Professor Beale said there are no restrictions on subpoenas for testimony and is not being changed. But there might be treatment records or something else that would require a subpoena for production.

A member suggested that a police report could be important. And there are many other documents relevant to domestic violence.

Professor Beale agreed that type of proceeding does occur, is important, and is contested. In this proposal, if the Committee deleted the brackets, then revocation would be included as one of the designated proceedings. Then it would be clear to the parties and the court that subpoenas for production of the reports and so forth would be available.

A judge member not on the Subcommittee said he favored removing the brackets and including revocation proceedings in the rule. If probation officers had documents perhaps a subpoena was not the answer, but he had never experienced that issue. But he had not thought about the concern about underlying information such as local police reports that form the basis of the revocation allegation.

Another member noted that a common piece of evidence that the government often wants is body camera footage from that incident. That would be also a subpoena item.

Judge Bates agreed with the comments that had been made with respect to revocation. Noting he was not expressing his own views, he was confident that there was a body of district and magistrate judges who, more for efficiency's sake than anything else, would ask whether we would be turning revocation proceedings into more than they need to be. He thought that many judges would instinctively feel that way, that we don't need to complicate revocation proceedings and don't need to have subpoenas for records flying around.

A judge member said that the vast majority of the revocations that he had were resolved with a defendant agreeing to plead to one or two. So it is a pretty narrow slice of that practice, because by the time they get to the court are going to plead.

A member noted that the draft committee note groups together revocation and proceedings under Rules 5.1 and 33 on that list of not as common but potential areas where the subpoenas should be permitted. Noting there seemed to be consensus about removing the brackets from revocation, he asked whether there had been further discussion on Rule 5.1 preliminary hearings and new trial motions, and whether there were any other proceedings that were discussed but failed to make that list other than those three.

Judge Nguyen responded that the Subcommittee had considered—with the perspective of the defense attorneys as well as the DOJ—the various types of proceedings that are the one-offs. The listing could get very long if it included all of the one-offs. The Subcommittee thought the "unless the court permits otherwise" language would cover those very rare occasions where a judge might exercise her discretion to allow subpoenas in one particular proceeding. With the brackets removed from revocation, it would be necessary to see if revisions to the committee note would be needed to match any changes the Committee has made in the text.

The member asked, more substantively, because the Subcommittee did select those three proceedings to mention, whether Rule 5.1 and 33 hearings were in a separate category. Here's a long list, but you know those three were highlighted in the committee note. Was there any discussion about those two in particular?

Professor King said preliminary hearings had come up, and the concern was that there was generally not sufficient time for subpoenas. They are rare because the proceedings are so quick. She said there had been little discussion of Rule 33 motions for a new trial.

Judge Dever said there was a discussion about hearings under Rule 5.1. Where there is a preliminary hearing with a detention hearing then they will be able to get a subpoena for the detention hearing. It was just narrowing it down. He recalled some discussion on a preliminary hearing, given the standard that the judge will be applying, as long as their client has not been detained, the defense will use the subpoena later in the process. But again, the proposed amendment leaves the discretion. There was discussion that when the detention hearing and preliminary hearing are combined, the judge obviously has to address the probable cause before she addresses detention. If she doesn't find probable cause, she's not going to reach detention. So to the extent there's a subpoena for that type of hearing the defendant will be able to get it.

Professor Beale commented that if the text passed, then the Committee would also have to vote on the note. There could be changes in the note, and changes in the note would be required if the Committee made changes in the text. If the Committee removed the brackets for revocation hearings, revocation would be removed from the sentence of the note that lists examples of proceedings that are not designated. So if the member thought another proceeding should be listed as an example of the kind of thing that a court might allow a subpoena for on a case-by-case basis, it would be appropriate to include it in the note. But it would not have to be listed, because the examples are not an exhaustive listing.

Judge Nguyen said she thought she was hearing consensus on removing the brackets and including revocations as proceedings for which subpoenas would be available.

Another member asked why detention hearings are on the list in the rule, rather than in the advisory committee notes, meaning they are the type of hearings where presumptively you could receive a subpoena. And there are other proceedings, where a subpoena may be authorized with the court's permission. The member wondered why detention hearings were treated differently than preliminary hearings. Detention hearings are also very early, and they are preliminary. Often they are done by proffer.

Professor King responded that both sides wanted them. Defense attorneys had many anecdotal illustrations of when a subpoena for documents or something else was essential for a detention hearing. And there is something about detention that's more impactful than some of the other proceedings.

Professor Beale recalled that a defense member on the Subcommittee had provided the example of a case in which she had represented a noncitizen in a detention hearing, and invited the member to describe that case.

The member explained that detention hearings do not necessarily happen quickly. She represented a Canadian citizen, and the defense probably filed ten different requests to alter his detention status. She had Canadian experts come and testify. It was very involved. Professor King noted it is not just the initial detention hearing, it's the reconsideration.

Judge Nguyen explained that the inclusion of hearings on line 26 was either produced by consensus, with both sides wanting them, or commonly identified hearings where it comes up often. The committee notes then explained that for the more rare one-off cases, we don't need to list them all. That was the general intent of why certain proceedings were called out in the rule.

Noting that an earlier speaker said it is pretty rare to ask for a subpoena for a revocation hearing, a defense member commented it would be equally rare to ask for a subpoena for a detention hearing. But she thought the Subcommittee included detention hearings because the Bail Reform Act anticipates the ability to present witnesses and evidence at that hearing. That was a congressional decision, so detention hearings made the list because of that statutory authority. But she also noted that subpoenas, even in trial, are kind of rare. Trials are extremely rare. She commented that the Committee was considering an important process, particularly to the defense that has a very limited ability to get certain information in advance of some of these proceedings. But what was put on the list were places where either there was statutory authority to be able to have that access, or where the Subcommittee felt it was common. Including sentencing might not have been intuitive before the passage of the Sentencing Reform Act. But now sentencing is one of (if not the most) important, contentious, and lengthy parts of the process. Having the ability to subpoena information is important often on both sides (since the government can no longer rely on a grand jury). She acknowledged that none of this is extremely common, but what ended up on the list were the proceedings in which subpoenas have been used most often in a rare arena. Professor Beale added it was also a policy judgment that in those designated hearings, it ought to be clear that you can seek a subpoena for documentary evidence.

Judge Bates said he was hearing that subpoenas in detention hearings would be rare. He agreed, saying he had never seen a detention hearing where there was any interest in subpoenaing documents. But he was in a district that does not have a lot of discovery to begin with. And later consideration of changing a detention decision might be a context where a subpoena would be more warranted or more likely to be sought. He wondered whether putting detention in the text of the rule would send a signal to the bar of an expectation subpoenas will be utilized, when that would almost never be true in the initial detention hearings, which have a real time constraint. The timeliness factor for detention hearings does not exist as much with preliminary hearings or suppression hearings, etc. Would we be encouraging something that we don't need to be encouraging for the initial detention hearing?

A defense member responded that the changes to the language that make it seem now that the possibility of a subpoena is more permissive are important. That encourages a permissive attitude toward subpoenas, even for detention hearings and even though that is unlikely because of the time frame. The member agreed that in that initial detention hearing there would be almost no chance that you would use a subpoena. But as an earlier speaker had noted, when there is a motion for reconsideration of the detention hearing, counsel wants to know that subpoenas are available. And perhaps the judge being informed that there is more permission available for the

subpoena process would be influenced later, when the trial process comes up, and is going to have a mindset of permissiveness carried over from that initial part of the process. And so, although practically speaking there will be few subpoenas at these early stages, the overall goal was instilling a mindset of greater permissiveness in the bar and the court. The goal was not that counsel would believe they had to seek subpoenas, but that they would know they could. And the court knows they could, and that informs the rest of the process as well.

To address Judge Bates's concern about sending a signal, a member asked whether it would be helpful to revise the draft committee note, perhaps with a word or phrase like "unusually" or something that's a little stronger than "less often." The note might say "in unusual, very unusual circumstances, subpoenas would be available in detention hearings." The issue could be addressed either by removing detention from the list in the text, but having it listed in the committee note with proceedings under Rules 5.1 and 33, or retaining it in the text, but then modifying with language in the committee note.

Ms. Ralston offered two comments. First, the issue of delay would be a significant deterrent to the party seeking the subpoena because the person whose ox is gored is the person who wants to change the status quo. So whoever is trying to appeal the initial detention would be the person who has the burden to produce the evidence, and the person who is burdened by the delay that would be caused. Those incentives kind of go hand in hand, making it true that this will not happen often. And second, an alternative, if you wanted to be a little more restrictive about it, would be to say "hearings on detention after initial appearance." That would make it clear that it would not apply to all proceedings that would fall within the language of the Bail Reform Act: "upon the appearance before a judicial officer." That language includes the defendant's appearance at arraignment and then there's detention, kind of instantaneously as part of that. The inclusion on the list for availability of subpoenas would be only for a small subset of cases that there is some kind of subsequent detention hearing, like where it's put over for a couple of days or appealed to the district court or something like that.

Responding to Ms. Ralton's point about incentives, a defense member agreed that there would not generally be a need or even an incentive to issue subpoenas when the detention happens at the initial appearance. But just because that initial appearance detention setting only rarely requires subpoena she did not favor limiting the rule to subpoenas for only subsequent detention proceedings. She thought that would be slicing it too fine to accommodate a rare situation. In her experience, if the defense had to parse through a rule that said, well, not for the first time, but subsequent nine hearings, that would overly complicate something that will not generally be much of an issue. She favored leaving detention hearings in the rule and not worrying about the fact that they would very rarely be an issue at the initial stage.

Another member said there was a very varied practice among districts. It was not uncommon when the government moved for detention in her district the defense would take time to prepare their best first pitch to the court. That could happen weeks into the case. There might be an initial detention order pending the hearing, but the hearing had not yet occurred and so there was time to get a subpoena if one was needed. And she certainly could get a subpoena under her district's current practice. She had not personally done so in thirty years, but the availability had not resulted in either party rushing to the court to try to subpoena information

because they want it at this early stage for some reason other than the bail hearing. She said the information sought was often very, very limited. There may be an employer issue, or maybe the file in a case that doesn't involve an immigration criminal violation, but a person whose status is part of that proceeding. Sometimes that is an item the government gets for the defense. She could envision other times trying to subpoena a piece of that. So it is very rare, and she stressed that there are varying practices around the country, and it was not uncommon in her district that the defense has as much time as it needs to make our best first pitch at the first detention hearing.

Another member said it is routine for the government or the defense to seek some time to prepare for the detention hearing. It never happens on the first day, and he thought it would not be helpful to try to draw the between first and subsequent detention hearings. But because subpoenas for detention hearings are rare, he favored not to listing them in the rule, and instead adding them in the committee note to the list of what the court can consider in an appropriate case, rather than have it presumptively be permitted.

Judge Nguyen agreed with Judge Bates that it might send a signal that at the detention hearing maybe you ought to think about getting a subpoena if you have information that relates to the District Court's determination of whether somebody should be detained or not. But she was not troubled by that, because for her it was cabined by the romanette requirements that you must have information that is possessed by the recipient of the subpoena, that is not reasonably available from any other source, and most importantly that you are seeking information that is likely be admissible or to lead to evidence that's admissible in the designated proceedings. And so for her, even though rare, detention is such a big deal in the criminal context that she was not that troubled by having it included in the list.

She then raised the question whether to take a straw poll of the Committee whether to retain detention hearings in the list of proceedings in the text.

A member asked whether courts give less weight to something that is in the committee note but not the text. Professor Beale responded that before we get to the courts, the first question might be whether counsel would read the committee note. Would they read the rule and know they could ask for subpoenas? Or if the rule did not list a proceeding, would counsel say it's not listed, so I guess we can't get subpoenas? Either advocates or judges may or may not look at the committee note. We have often heard that people don't know what's in the committee notes, and of course, the rules pamphlet the government produces does not include the committee notes.

Judge Bates said there is a difference between having something in the text and in the committee note, and there are many who feel that counsel won't necessarily look at committee notes. But in this situation, he thought having it in the committee note, not in the text, seemed somewhat consistent with the rarity of the situation. Everyone agreed it was very rare, and he identified four different stages at which it might arise. It may rarely occur in the initial two or three day period, or a longer period than the previous speaker had identified, even for an initial hearing. Or on appeal to a district judge, the defense counsel may want to explore those facts further. And another context was reconsideration of detention. So there are many different contexts, but all of them very rare. And he thought if something was really rare, maybe the better

places was the committee note rather than the text. But he acknowledged there are some who don't look at the committee notes.

Professor Coquillette said he agreed with Judge Bates. It does make a difference whether something is in the committee note or in the text, and traditionally if something is important it should go in the text because many people don't read the committee note. On the other hand, this is obviously a very marginal thing, and so he thought it was a legitimate decision for the Committee.

Professor King reminded the Committee that one of the reasons detention hearings were in the text was because of the statutory authorization for evidentiary hearings. The Committee should take that into account when deciding where to place these hearings in the rule.

Judge Dever followed up on that point. The statute gives the defendant the right to have witnesses and other things. The Subcommittee thought the rule should comport with the statute. And it should be in the text because, as others have said, we hoped everyone who participates, either as an advocate or as a judge, at least reads the text. If they read the committee note, that was a bonus. But the statute authorizes the defense to call witnesses and present evidence. The Subcommittee thought it was worthy of being in the text for that reason though, as everyone said, it is rare.

Ms. Ralston asked a practical question: the Bail Reform Act said that the defendant shall be offered the opportunity to present witnesses, cross examine, and present information by proffer or otherwise. Was the rule's "reasonably likely to be admissible" the same standard as a proffer? Then you don't have to go through the whole subpoena process to get the information, because the thing you would say to get the subpoena is the same thing you would say under the statute to make the showing.

A defense member responded that there may be competing proffers, for example the government saying the defendant is chronically unemployed, and the defense saying the defendant has always had employment. It would be rare, but there are times when proffers alone might not be all you want to present to the judge. And under the Bail Reform Act, one of the defendant's rights is to try to marshal that information. This is the very rare way that a defendant would be able to do that. She said because just because something was rare, that did not make it unimportant. The Bail Reform Act was a drastic shift in how release and detention issues were handled in the country. It is no small proceeding. So that something as rare did not make it less important.

Judge Bates asked what the evidentiary standards are at detention hearings. Because the standard in the proposed amendment is items that would likely be is admissible in the designated proceeding. Did the modified *Nixon* standard make sense in a detention hearing? What are the constraints in terms of admissible evidence in detention proceedings?

A member responded that in practice there are very few constraints. You can proceed by proffer. That is an acknowledgment that this is so early and the parties are scrambling. The parties are given a lot of leeway, especially the defense. Counsel make assertions based on what

their clients have told them. And that's entirely legitimate. The rules of hearsay, rules of evidence don't really come into play as a practical matter in detention hearing. So he agreed that Judge Bates had raised an additional issue of what the substantive standards mean when a court or even a litigant was trying to figure it out. The *Nixon* standard was changed by this rule. With respect to a subpoena in a detention hearing, was there any limitation there at all? Ms. Ralston observed that the statute says that the rules of evidence do not apply.

A member responded that under this standard, if you were to get a subpoena, although admissibility is different than it would be at trial because the rules of evidence don't apply—just as they don't apply in suppression hearings and sentencing—but the other prongs incorporating the modified *Nixon* standard do apply. The reason this would be rare is that defense (or government) would have to be able to articulate with particularity what they are seeking under the subpoena. That's part of the *Nixon* standard that was not being changed, and would still apply to this proceeding. The party seeking the subpoena would also have to establish that the person being served has the information being sought. It would be very early in the game to be able to establish that, but it might be possible. And then finally, the party seeking the subpoena must establish that it cannot get it any other way. The defense might be able to get employment records with a release from the defendant. So there are multiple layers and a reason why it is rare. But the admissibility part of the standard is only one part, and the other parts still do apply even in proceedings where the rules of evidence do not apply.

Judge Dever noted there was consensus to leave revocation in, and the question now was having detention in the text or the suggestion of perhaps strengthening the language, recognizing sort of the unusual nature of it in the committee note. He asked for a show of hands of members who favored retaining detention hearings in the text, as reflected on line 26 of the redline version, page 128, and then a show of hands of those who would remove detention from the text. A clear majority of the Committee favored retaining detention hearings in the text.

Judge Dever gave members a ten minute break.

After the break, Judge Nguyen turned to the issue on line 30 of the redline. She noted this was a big issue, and there was no unanimity among Subcommittee members on what *Nixon*'s admissibility standard should be. This was the critical issue that started this whole endeavor of attempting to improve Rule 17(c). The alternatives in brackets were that the item contain information that is "likely to be admissible evidence" or that it is "likely to lead to" admissible evidence? She asked to hear from both DOJ and the defense attorney members of the Subcommittee first to articulate why they thought one standard was better than the other. Also, she asked them to discuss whether, in practice, it would make a difference.

A defense member spoke first, observing that this issue was important and could make a difference. Before the last meeting, the identified problem was that there are districts interpreting *Nixon* so restrictively that there was virtually no opportunity for the defense to subpoena items under Rule 17(c). Last fall, after reviewing a very expansive draft proposal from the Subcommittee, this Committee decided that a more incremental approach would be preferable. It should preserve practice in districts where the defense had access to subpoenas, but it should also provide a loosening of *Nixon* to signal change in the other districts. She pointed out that the

Nixon standard is not just about admissibility. It has a particularity prong, and at the meetings in Arizona and then last fall in New York the witnesses identified problems with both having to state with particularity what they want in a subpoena as well as admissibility. The proposed amendment loosens only admissibility, so it is already a very incremental and narrow approach to the problem the Subcommittee had identified. And consistent with this, as between "likely admissible" and "likely to lead to admissible evidence," she favored "likely to lead to admissible evidence." She thought this would move the ball forward in the most meaningful way. And it more accurately reflected the practice in good districts and would not increase subpoena practice in those districts that are already allowing the defense access to 17(c) subpoenas. She asked the Committee to recall that the initial proposal from the New York bar included a fairly expansive standard of allowing the defense in certain circumstances, to subpoena information "material to the preparation of the prosecution or defense." But that expansive language was rejected. At the November meeting, Lisa Miller, then the Deputy Assistant Attorney General, suggested to the Committee that the Department might be able to support "likely admissible." The member recognized that there was nothing binding about that conversation. But in addition to suggesting that the Department might be able to support "likely admissible," Ms. Miller had also suggested the addition of a catch-all "interest of justice" provision. That would have given the courts more flexibility beyond the "likely admissible" standard. The Committee ultimately concluded, though, that "interest of justice" was too undefined, would likely not promote uniformity, and would certainly lead to increase in litigation. But nonetheless, it had been suggested by the Department's representatives.

In the member's view, the two standards being considered—"likely admissible" versus "likely to lead to admissible evidence"—were both narrower than what Ms. Miller had suggested. "Likely admissible" might not change the practice in restrictive districts, and it could undercut practice in places where Rule 17 is working well. She thought that "likely to lead to admissible evidence" was a standard that most moderate courts are applying now, so it would not increase subpoena practice in those districts. But it most clearly sent the signal that the amendment is meant to be a change and allow for broader practice in the most restrictive districts. She noted in addition there is a safety net that will allow every district or each individual judge to set their own procedure with respect to subpoenas. She thought it was an overstatement to say that "likely to lead to admissible evidence" was going to blow off the barn doors. To the extent there was a sharp increase in subpoena requests in any given district or before any given judge, she thought that the court would look very closely at why that was occurring and cabin the practice if that was appropriate within their own district. But "likely admissible" would not change much of the current *Nixon* standard in the most restrictive districts.

Another defense member spoke next. She said the New York City Bar Association's proposal was motivated by the problem that in some districts the "likely to lead to admissible" or even "likely admissible" simply is not practiced. It was important not to do damage to the districts in which the status quo is a standard of "likely to lead to" admissible evidence. But it was equally important to loosen the standard sufficiently for districts—like the member's—where the biggest obstacle is being able to point to that evidence is admissible. The member said that at the meeting in Phoenix we heard from many of the defense practitioners that the admissibility requirement caused the most difficulty. So if the goal for this rule was to loosen the

standard, then "likely to lead to admissible evidence" would be the most effective way to encourage districts like hers to be more permissive. The member also noted that Ms. Miller said in her testimony in New York that the status quo permits some investigation. But that is the status quo in some districts, not in all. The member said uniformity was a worthy aspirational goal, and a goal that she would like to achieve.

Ms. Ralston responded. First, she challenged the idea that reasonable particularity is a significant limitation. A search warrant requires reasonable particularity, and "all documents containing the defendant's name" qualifies as reasonably particular. But it was not a significant limitation on the amount of information that was being sought. She thought that was also true in civil discovery, although she had never been a civil practitioner. People fight over the terms that will be searched in an electronic discovery because the search has to be in some sense "particular," but that didn't preclude a very lengthy, expensive, and large production of discovery. In criminal cases the government already provides tremendous discovery, and anything that significantly adds to the time and expense and volume of that practice has a cost for speedy justice, which is important not just for defendants, but also for the public and for the goals of criminal justice.

Second, what Ms. Ralston had heard from her colleagues throughout the country, in the U.S. Attorney's offices, was strong opposition to "likely to lead to." She thought that opposition indicated that standard was already the practice in very few districts, if anywhere. No one had said that they wanted to really restrict what was happening now, but everyone opposed a vast expansion. So she questioned the factual premise.

Finally, Ms. Ralston expressed concern that "likely to lead to" did not necessarily have a limiting principle. She asked "to lead to" after how many steps? She said it is very easy to tell a story about how the butterfly flapping its wings in Tokyo caused the tornado in Alabama, and that type of "but for" causation is expansive. It would be a large change from the *Nixon* standard stated by the Supreme Court, and from the way it is practiced in most, if not the overwhelming majority of, districts today. The "likely to be admissible" standard leaves room for situations where if the defense were to put on a case, if there were a need for impeachment of some witness, if there is a need for rebuttal, where you won't know until trial that something is admissible until we have been through more of the proceeding. But it doesn't relieve you of the necessity of explaining relevance and authenticity, or reasons to believe at least that the thing you're looking for would meet those standards. She thought that it would be an expansion of the rule as it currently stood, and the Committee in November expressed rather clearly that it was looking for an incremental change. Ms. Ralston contended that "likely to be admissible" was the incremental change that required painting a more specific picture of what you are looking for. To say that is my case, this is the picture puzzle, and this is the missing piece. If I find this information, it will complete the story. And it would not be the fishing expedition that was a large part of the rationale behind the *Nixon* rule.

A member asked Ms. Ralston whether the Department's concern was that "likely to lead to" would create an exponential increase in documents provided in discovery. He commented that everyone who handled criminal cases had seen an exponential rise in the amount of discovery. But he wondered how to quantify that in regard to this proposed change.

Ms. Ralston responded that the breadth of what the Department was already turning over—the breadth of what the rules required, what the Constitution required, and as a matter of policy, how much beyond that the Department went—indicated that there is not much need for broad, expansive additional discovery authority because so much was already being provided. Beyond that, there were concerns, to be discussed more later, about privacy and about potential intimidation (even if not intentional) discouraging participation in the criminal justice process by witnesses and other members of the public. Ms. Ralston thought it was not necessary for the rule to be that broad, especially at first. But if the Committee adopted the "likely to be admissible" standard and found it had proved insufficient after a number of years, additional change would be possible. Rolling back a broader change would be much more difficult. She said the Department remained unconvinced that there was a problem that needs to be solved, but to the extent the standard was to be loosened, it thought that the more incremental change was most appropriate.

In response to Ms. Ralston, Professor Beale reminded the Committee that discovery from the government was not the issue. The government "discovery" that is now producing these massive amounts of material includes material the government has been able to obtain by search warrants and by grand jury subpoenas and so forth. And everyone appreciated that the volume of material had been increasing. But the proposal concerned material held by third parties. Rule 16 does not cover it, and the argument was that the defense requires things that the government never thought to look for, and so the defense cannot get them from the government. It is not part of existing discovery. And the argument was there are things—data, documents, etcetera—held by third parties, and that a vehicle was needed to obtain them. The speakers in Phoenix expressed concern about the tight interpretation of *Nixon* in some districts that would not allow defense counsel to obtain material to carry out their obligation to prepare the defense. They described the problem of counsel saying "I need to see these records. I don't know for sure what's in there. I don't know if they will help my client or hurt my client. But I know that they are critical to making our case." Some of those witnesses would say the problem is that they had never seen the material in question, because they had no way to get it from these third parties other than a subpoena. So, Professor Beale said, the question was whether the Committee thought the witnesses had described enough of a problem. And if there was a problem, was this enough of a solution to say the material being sought is "likely to be admissible" when you don't know what's in there, because you haven't been able to get it.

Ms. Ralston responded that "likely" does a lot of work. She likened the idea that it's unknown to Schrödinger's box—I don't know what is in there until I open it. But that does not prevent counsel from saying "I think what's in the box is X." For example, I want the video from the convenience store across the street from where the robbery allegedly happened. I think the video will show the robbery, and show it was not my client. That is likely to be admissible because the video likely captured the scene, and whatever it shows, it would probably be admissible. You know it's going to be relevant. You know it's going to be specific, and it's going to be authentic. She thought that type of situation, which had been used as an example of the problem, would be covered by likely to be admissible. Likely to be admissible leaves room for situations in which the defense says I don't know exactly what's there, because it would cover cases in which counsel says "if it is as I believe it to be" then it be would admissible.

Judge Bates said he was thinking of the Standing Committee, which does not have the in depth experience of the Subcommittee. He asked for one or two examples of information that the defense would want that might be reached by a "likely to lead to evidence" standard, but not under a "likely to be admissible" standard. He asked for a concrete example of it that you couldn't get under the more restrictive standard.

A defense member offered two examples, one of material sought by the defense, and the other sought by the prosecution. The defense example arose in a qui tam investigation that led to a prosecution. During the investigation, emails were seized from a business that employed the client as either president or an employee. In criminal discovery, the government provided the emails that had been seized. The defense sought a subpoena for other emails that would have put context to the emails that had been seized by the government. They sought to subpoena the other emails that were critical to the theory of the defense to put context to the emails that had already been provided. The emails were interwoven, in fact, in terms of dates and exchanges. The member said the court denied that request because the defense could not establish how the emails would be admissible, and particularity also came into play a bit because the court expected to be told the verbatim content of the emails. The member thought "likely to lead to admissible evidence" would have produced a different result. And, she said, the defense attorney in that case very much believed it would have produced a different result.

Another member followed up on that example, to further define the "likely admissible" versus "likely to lead to." In an instance where your defendant might say, I know that other people were involved in e-mail exchanges related to this issue, but I don't know who they are, the "likely to lead to" admissible allows a defense attorney to first subpoena the business, perhaps to find out who else might have been on e-mail communications, and then potentially issue another subpoena to someone that is now disclosed as part of that group of people that might have been on communications with the defendant. The defendant may not have been involved in the transaction or discussion. It might be a third party now that was involved in that discussion. Perhaps you thought it was only internal company people that were dealing with it, but now you find out a subcontractor may have been involved. So you get a chance to potentially come back to the court and say this developed now and I need to issue another subpoena. The court under a "likely to lead to" standard would be potentially more open to approving such a request, seeing that you had recovered information. It might then allow you to issue another subpoena, because that seems likely now to lead to that information. The member thought that the "likely to lead to" provides more opportunity, more openness to collecting this information on behalf of your client. He did agree that both standards were more expansive than current standards. But given the difficulty of amending the rule, he advocated making the change as broad as possible the first time around, with the likely to lead to versus likely admissible.

The speaker who had offered the first example added that there is some form of open file discovery in many districts. The government has trained on what the member thought was called smart evidence gathering and discovery procedures because in this age of data it is very easy for cases on the government side to be overwhelmed with ESI and other information. In the past, the government seized every computer and every phone in a home, even if it was the teenager's phone, and whatever you thought was covered by the warrant. But, she said, it is now common practice to be more discerning at the moment of seizure. The two examples just discussed show

that the government's more restrictive seizures limited the defense, when it sought access to what the government had not seized and thus did not turn over in discovery. Because electronically stored evidence is overwhelming everyone, the last thing the member would do is subpoena terabytes of random information, in the hope that it might lead to something. The rest of the requirements—that she was particularly looking for something that was going to be relevant and be admissible or likely lead to admissible evidence—cabined where subpoena practice would go.

Her other example concerned the government seeking information by subpoena. In the member's district, one of their jails did not provide call logs automatically. The government served a subpoena to get them in one of her trials. It was a cold case trial. The member thought the government was hoping there was something on those calls. But the government served the subpoena without making a motion, and the judge who later learned of it expressed surprise. The member presumed, though there was no motion, that the government thought it could satisfy the *Nixon* standard. In that case they asked for recordings of every call that the defendant had made from the jail. She observed that the only standard the government could have met in that situation was "likely to lead to admissible evidence," because the calls could have included clients reading a bedtime story to their kids or calling their mother. So it could only be the hope that the client said something, coded or otherwise, that they could point to as an admission. None of those records were introduced in that particular case, because nothing was there. The member thought the example highlighted the standard that prosecutor must have been operating under. But since the government did not make a motion, it did not put its argument on the record.

A judge member responded to Judge Bates' question, noting that he handled many cases from what is called Indian Country that involve offenses that are rare in other districts, such as sex crimes. In a child sex abuse case it was pretty common to have a defense theory that involved school records as a potential source for further defenses, for other possible perpetrators. For example, there may have been reason to believe that there are complaints about other perpetrators or other caregivers. School records could be very important that way. But if the defense had only the client's statement that another child told him what happened at school, that would not meet the higher standard. It was common in those cases for the defense to seek the school records and follow up on a lead that there was a possible other perpetrator.

A practitioner member provided another possible example. In a complicated Medicare fraud context, the grand jury may subpoena certain categories of data about a patient or about a nursing home resident, but not other categories about that same patient or resident. Those other categories could be very important for the defense to have a broader understanding of that patient or that resident's medical situation that might undermine the government's theory that based on the categories of information they have. But without those records, it would not be possible to present that defense. Of course not all of the records would necessarily support the defense theory, but the defense could not determine that until it saw them. Defense counsel might get a very good idea from the client who had been rendering those services, but without the records, it would not be able to present the defense.

Ms. Ralston asked how those examples fell in the margin between "likely *to be* admissible" and "likely *to lead to* admissible evidence." In each example, it sounded that the

records themselves would (if they showed what the defense thought they would) would likely be admissible. These would be original records, about business documents, business records, public records, things that for that reason would not be hearsay. If they showed what the defense thought they would, they would also be relevant, i.e., "it wasn't my client," or "the billing and treatment context shows no mens rea for fraud." She understood why the defense would want these documents, but not how they were on the margin.

Ms. Ralston noted that the language "would lead to" allowed for more chains of events. Counsel wants the emails in order to get the names, so that counsel can talk to that person, so that counsel can learn more about them, so that counsel can get their personal records. This could go on and on and on. And that the thing you thought would be admissible could be ten steps down the road. Ms. Ralston did not think it was necessary to go that far to solve any of the problems that had been articulated by her colleagues and all the way back to the Phoenix meeting. These are things that could be solved by "likely to be admissible" based upon the understanding that "likely" means if the record says what counsel thinks it will say.

Judge Nguyen asked again whether the choice of "likely to be admissible" or "likely to lead to admissible evidence" really made any practical difference in the end. She noted she was especially interested in hearing from her district court colleagues who had the experience. Because in her view, the particularity requirement was really important. You had to articulate why it is that you needed this information. In the sex crime example, if you had a lead that caused you to believe that these records might be relevant, and if the records showed what you thought, it would bear out the lead. She thought a subpoena was just as likely to be approved under the "likely to be admissible" versus "likely to lead to admissible," as a practical matter, once the court understood the narrative. The judge could see why you needed it. You'd described it with sufficient particularity. You've told the court that you could not get it from any other source. The government didn't have it to turn it over under Rule 16. And if the lead bore out, it would be "likely to be admissible." She echoed Ms. Ralston's point that "likely" does a lot of work. She asked committee members to think whether there would be other judges (at Standing and then multiple stages after that) who would not be as familiar and had not struggled with the very subtle differences between the two options. They might be concerned that "likely to lead to" would put us a little bit too close to civil discovery and an expansive discovery tool. She suggested that the chances of succeeding in this incremental reform might be improved with a loosened *Nixon* standard less permissive than "likely to lead to."

A judge member expressed the view that "likely to be admissible" was much better than "likely to lead to admissible evidence," which she said does not make sense and was confusing.

Ms. Ralston asked a follow-up question about particularity. The Department had read "reasonable particularity" to be descriptive of the item, not descriptive of the reason you should get it. The only part of the rule that talks about the reason that you should get it is the admissibility question. The particularity is "I want emails from my client held by the employer." That is describing the item that you want and not the reason why you think you should get it.

Judge Nguyen agreed and said she had been making the more general point that in an effort to get the subpoena there has to be a reason why you think this relates to whatever defense

you think you're going to craft and if you can meet that standard. She asked if her district court colleagues disagreed and saw a significant difference between the two standards.

One member responded that he was still not sure how he came out on that question. In giving the example concerning school records he had been trying to answer Judge Bates's question. Returning to that example, he imagined a defense attorney came to him with a request seeking school records that named someone else the child complained about at school. The member might ask counsel "do you believe the records will give you the actual name?" Counsel might reply he did not know. And if the judge asked whether counsel believed the records would tell what happened, counsel might again answer he did not know. At that point, the member thought the defense had not identified something that was going to be admissible. But if you said you thought when you got those records, then you would be able to follow up this lead for the defense. Then the answer would be likely be yes. So in that scenario the standard could make a difference. For most production, if you get what you want and then that would take you to what you think will support your theory. There was usually one more step.

Ms. Ralston commented that the rule used the word "item," which it defined to include information. Asking the agent "did you investigate other disclosures the child made about potential perpetrators?" would be a perfectly admissible question. It would be based on the information from the record, even if the record itself was not admissible. She thought that the information contained in the school record, even if not the record itself, would be admissible as a form of cross examination to cast doubt on the government's investigation, to say there is reasonable doubt.

The member who had suggested the example agreed the defense could ask an agent that question. But that would be a lesser defense than following up on a lead that would give you another perpetrator.

Ms. Ralston said she did not read the rule to be saying that if you made the showing to get the school record based on "likely to be admissible" that would preclude using the information in the record you got to follow up in some other way. She was saying that you have to have enough reason to think that the first thing will get will be useful in the proceeding.

The member who provided the example said he was just answering the question whether the typical person seeking records like this could make the showing that what they want was likely to be admissible. In his opinion, typically in the scenario he had described, the answer was no. You could not describe it.

Judge Bates commented that in this scenario he was not sure that the defense counsel must respond "I don't know" to those questions. There had to be a basis, something that lead them to suspect that in those records there would be something. So they had to be able to say "I have received information that someone else has made complaints," something beyond the "I don't know." Why, he asked, wouldn't that be encompassed by "likely to be admissible," rather than "lead to" admissible evidence? The member who provided the example responded that the cue you got to seek more information would be vague. Your client tells you that his daughter told him she'd complained about somebody else at school also or something about that.

Judge Bates said that was what you would be telling the judge. That would be the basis on which you thought there would be information in the records you were seeking. So it not be "I don't know," it would be "I suspect based on this information." Judge Bates thought that "lead to" raises the concern about enabling fishing expeditions. That, he said, was what the Committee needed to consider. Is there a concern about fishing expeditions? He thought there needed to be some specific language that cut off what is commonly called a fishing expedition, where there's no basis for really seeking the record, so just a hope.

In response to a question whether this could be addressed in the advisory notes, rather than the text, Judge Dever stated the standard must be the same in the text and the note.

A member said he shared the concern about fishing expeditions. Also, more broadly, since we were trying to change the rule to make it broader in different respects, it might be wise not to get overly ambitious. That might be counterproductive in the long run. He noted that there was a section saying for a lot of these subpoenas, you don't need a motion or an order. So we are already making those kind of changes that loosen the rule, to permit more flexibility. Given that, he thought it might make sense to go with the "be" admissible standard and not with the "lead to" admissible evidence standard.

Another member agreed with the comment that if "likely to lead to" would result in the failure of the amendment, he would certainly support the more conservative approach and say "likely admissible." His more fundamental question was whether "likely admissible" would be enough to change the mindsets of the courts around the country on this particular issue. Because, he noted, that was ultimately what the Committee was trying to do. The Committee was trying to loosen the *Nixon* standard. He wondered if the district judge members thought "likely admissible" would loosen the *Nixon* standard enough to convince them if defense counsel were standing in front of them that they would be more likely to approve a subpoena. If so, he would support that "likely admissible." Or was that not enough to move the needle in the restrictive districts? But if "likely to lead to" would push the courts and the Standing Committee too far, and they would not accept it, then he would accept the more incremental approach. So, he asked, would the language do enough to convince the courts where this restrictive practice is in place to loosen the standard?

Judge Nguyen responded that there was no question the proposed amendment would loosen it a little bit, but it was a question of taking an incremental approach or loosening it a lot. She said "likely to lead to" is definitely broader and harder for the judges to apply. There would be questions of how far we go. That was Ms. Ralston's point: how many steps do we permit in order for the evidence to finally be shown to be likely to be admissible? They both loosen the *Nixon* standard. There was no question about that.

Another member said it was not only the standard, but also what was in the committee notes. The member understood that not everyone reads the notes, and they cannot suggest something in the notes that's not in the text. But he thought lines 60-74 and 75-87 really explained what the Committee was trying to do with this change, and that *Nixon* has been much too strictly interpreted in some jurisdictions. There is an attempt to loosen that standard and to give some examples of where it has been misapplied in the past. The member said he preferred a

more incremental approach. He thought the "likely to be admissible" combined with what the committee note said the Committee was attempting to do would go a long way to pushing jurisdictions like his own, which traditionally had provided very little discovery, post *Nixon*.

Other district judge members who had not spoken to the issue were invited to respond to Judge Nguyen's question on the difference "likely to be" versus "likely to lead to."

One member commented that this had not been one of the issues of greatest concern to him. He had interpreted the term "likely" to be a limiting term that had sufficient meaning to provide a standard that could be administered by district judges. Fishing expeditions were a big concern to him, and he thought he might be attaching more significance to the limiting use of "likely" than others would. If he was misreading the significance of "likely," then the fishing expedition concern would really bother him.

A judge member expressed the view that "likely" means we are not sure that it would be admissible evidence or would lead to admissible evidence.

Another judge member said he shared the concerns about "likely" and about the possibility of fishing expeditions. If committee members favored a more incremental approach, he thought it might be better not to include "likely," see how it played out, and revisit it if necessary.

Professor Beale commented that the Committee had been discussing whether the standard should be "likely to be admissible," or "likely to lead to" admissible evidence. "Likely" was in both tests.

Noting that she was making an argument by analogy from a past Civil Rule, Professor Struve said Civil Rule 26(b) previously included a definition of the scope of discovery, which was bifurcated. It provided for discovery about material that was relevant to any party's claim or defense. And it also said that for good cause the court may order discovery of any matter relevant to the subject matter of the action. She suggested that if there were hesitation about allowing broad access under the "likely to lead to" standard, the rule could bifurcate it and say "likely to be admissible," or for a good cause on motion the court could allow a subpoena for material "likely to lead to" admissible evidence. That would be an intermediate option between the binary that the Committee was considering.

A defense member of the Subcommittee commented on fishing expedition concerns. She acknowledged the concern was in the case law. But she said with the advent of ESI, defense attorneys are generally not interested in subpoenaing vast amounts of data in the hope it might lead to something that's admissible. She wanted to give an example of a one-step request to illustrate the point regarding emails about a particular meeting. The emails themselves might not be admissible, but they might reveal the name of someone who attended a meeting, and that person's testimony could be subpoenaed. She thought the concept of fishing expeditions clouded the argument with something horrible everyone was afraid of. But defense attorneys did not want to do that. It doesn't help. A judge responded that the member was a good defense attorney, and she would not do so. But sometimes defense attorneys did so.

Ms. Ralston commented that not everyone had the same incentives to resolve something quickly. But she thought everyone was assuming something that hadn't been specifically stated: the subpoena requester must have a good faith basis to believe that the thing requested will be as they are expecting it to be. That assumption of good faith was doing a lot of the work. It was being read into the "likely to be admissible." She suggested the requirement of a good faith belief might be spelled out more in the note, explaining that the party requesting a subpoena need not know for sure what was in a document before being able to subpoena it, but must have a good faith basis, like the good faith belief to ask a question in court. Good faith, she said, is the general rule for everything. And because it was the general rule, it was being assumed and not made explicit. But when you start to think about "the lead to" it got harder and harder to articulate that reason to believe that the item sought was there. The lack of a requirement in the text that the person seeking the subpoena articulate the basis for belief was one of the reasons the Department viewed "lead to" as particularly dangerous.

On the good faith point, Professor Beale noted that as a matter of style and general rules etiquette good faith requirements are not included in individual rules. Including it in one rule might suggest it was not required in any other rules. In the Subcommittee there was a suggestion to put good faith in the text, but the Subcommittee declined to do so because that would be inconsistent with the general approach in the rules. She knew of nothing prohibiting mentioning good faith in the note. She observed, however, that it could be problematic to mention it for only one particular issue.

Ms. Ralston said the Committee could do it in terms of defining what it means for something to be "likely to be admissible." If you can articulate why you think whatever is there is there.

Noting there had been some discussion of about what the facts have to be and when facts have to support certain things, Professor King pointed out that if there is a motion to quash, the proposed amendment required a showing that each designated item be described with reasonable particularity, and facts must be stated showing that each item satisfies (c)(1)(B)(i)-(iii), which includes the "likely to be possessed." You must show facts supporting whatever standard the Committee came up with, whether it was "likely to be admissible" or "likely to lead to" admissibility. That was lines 39-41 on page 128 of the agenda book.

Judge Bates noted that Professor King was assuming the proposal would retain "state facts" after discussion. Another judge who said she believed in clarity asked if this could be stated clearly, perhaps at the beginning of the rule.

Judge Dever asked for another straw vote of committee members, reminding them that they were not at the end of the process. He suggested that members not let the perfect in their own minds to be the enemy of better. He asked for a show of hands of members who supported the language of "likely to be admissible"? Then he asked for a show of hands on "likely to lead to" admissible evidence.

By a vote of 8 to 4, members supported "likely to be admissible." A member who had voted for "likely to lead to" noted he viewed "likely to be admissible" as the compromise

position, and he would support it if that were necessary to secure approval in the Standing Committee.

Judges Dever and Nguyen noted that they would be calling for a vote on the proposed amendment as a whole at the end of the discussion of particular issues, and Judge Nguyen asked the Committee to consider two interrelated issues together. On lines 48, 51, 53, 57, and 58 the question for the Committee to discuss was whether the motion and order requirement for subpoenas for personal and confidential information should also apply to prospective witnesses, and the notice provision as well. The Subcommittee had bracketed it. Currently the motion, order, and notice requirements applied only to victims. The Department had urged that witnesses have the same privacy interests as victims, and that the rule should provide the same level of protection: a motion and order required before you can seek personal and confidential information pertaining to prospective witnesses, who should also be given notice.

Ms. Ralston thanked the Committee for considering the Department's suggestion, which had been added since the November meeting. She said that the Department thought this addition to the rule was important to protect the integrity of the process and privacy interests in light of the two expansions of subpoena authority being made in the proposed amendment. The first change was the expansion of the *Nixon* standard. In the Department's view, if there were a substantive expansion of the universe of available information, it would be important to restrict the rule with the requirement of a motion. She noted that many districts now require a motion for any subpoena under Rule 17. The proposed amendment would narrow that to a smaller scope of situations in which you need a motion. The Department was proposing that the narrowing of the motion requirement be restricted somewhat. The amended rule would still narrow the times when you needed a motion, but not narrow the motion requirement quite as much as the Subcommittee had previously considered. The Department sought to protect this information for prospective witnesses, she said, for largely the same reasons as the protection of victims. People's knowledge that really sensitive information about them could be disclosed without any intervention from a court and without any notice to the person could really dissuade them from participating in the process. Witness participation is a critical element to meeting the government's burden beyond a reasonable doubt in criminal cases. Anything that would dissuade people from participating would make it that much harder to do justice for victims, for the public, and to serve the ends of the criminal justice system. The Department thought it was important to create a balance. The Department accepted that in appropriate circumstances this information could be obtained by subpoena, but oversight by the court was an appropriate middle ground. As the draft currently stood, it did not require notice, though it permitted the court to order notice in appropriate circumstances. The Department thought that was a very balanced approach, balancing the interests of the witnesses and the needs of defendants to secure this information.

Responding to some of the points in the reporters' memo, Ms. Ralston characterized the issue about legislatures as somewhat of a red herring. The statutes addressing limitations on subpoenas had been focused on the government's use of grand jury subpoenas because the availability of Rule 17 subpoenas had been so limited. The lack of additional protections like those in the CVRA should not be taken as an affirmative statement by Congress that such protection is unwarranted. Rather, it was not necessary at the time to consider it. And the idea that witness credibility is always central proved too much. By that logic, there would always be

an incentive to seek as much personal information about the witness as possible. Their medical records might show that they have some perception impairment or other things. People are rightly sensitive about that information being obtainable without their consent, without their knowledge, and without any intervention by the court. She thought these types of subpoenas would be sought by ex parte motions. The Department was not saying that notice to the government should be required, but it thought that the court should be involved in the process. She thought the concerns about knowing who will be a witness were overblown. The reason a party would want someone's information is because they thought that person would be a witness. Personal information is most likely to be relevant as impeachment information, and there is no need to impeach somebody if they're not going to be a witness. As to defining what personal and confidential means, she noted that was not a unique issue. The Department was seeking to include witnesses in the existing provision governing subpoenas to victims. To the extent there is ambiguity about the term personal and confidential, it was already in the rule and had to be dealt with.

Professor Beale commented that the statutory provisions to which the reporters' memo referred included, among other things, the Stored Communications Act and some of the banking provisions do deal specifically with notice: these people get notice, and these people do not. So there are statutory provisions that do contemplate that type of limitation on notice. These provisions were not included in the current reporters' memo, but had been in earlier memos. Ms. Ralston acknowledged that the proposed amendment does include the language "unless the statute provides otherwise, the court may …." Finally, Professor Beale commented that the defense bar felt very strongly about this issue.

A practitioner member responded, noting that over the three years that the Subcommittee had been considering Rule 17, it had met many times, and the reporters and the law clerks had provided numerous, excellent, and sometimes very dense memos. The Subcommittee had spoken by Zoom with experts, including in house and outside counsel to the tech industry, the banking industry, education, healthcare, and billing regarding privacy protections and notice to individuals whose records are being sought. The Subcommittee learned, as Professor Beale suggested, that not all statutory and regulatory regimes treat privacy protections similarly. Some expressly provide for privacy protections and notice, the most prominent being HIPAA and FERPA. Others reflect deliberate policy choices not to require notice. The Stored Communications Act, for example, does not require notice for non-content data, because Congress decided the holders of that data ought to be able to sell it. Still others expressly prohibit notice, such as the Bank Secrecy Act. Specifically with respect to suspicious activity reports, there is an absolute statutory prohibition on notice.

The member said that in all this time, through all these conversations, no one complained about witnesses' personal and confidential information being subpoenaed. In her view, adding prospective witnesses to victim provisions of 17(c)(3) would be a fix for something no one said was broken.

During the three years, the Subcommittee spent considerable time and research looking into what is meant by personal and confidential when we evaluated the protected and unprotected categories of information. Beyond the statutes and regulations that explicitly address protected

information, there was a broad range of personal and confidential information that people hope or expect to keep private that is not protected by law. In one of the memos we had many different examples of that information, and she named some: motor vehicle records, IP addresses, passwords, diaries, calendars, hotel registries, contact lists, death certificates, data records, in cars, and emails between employees and employers.

The member argued that the breadth and indeterminacy of personal and confidential makes adding prospective witnesses to 17(c)(3) burdensome and problematic. In her view, Rule 17 is not the appropriate vehicle to deal with the evolution of privacy interests. Some of the burdens that we identified in Subcommittee meetings include the inability to identify the person or entity whose information is sought, no known contact information for the person whose information is sought, too many people and entities involved, and the possibility that advance notice might lead to the destruction of evidence. Returning to her point that notice to prospective witnesses was a fix for something that was not broken, she commented that the most important thing the Committee learned at the November meeting came from Ms. Miller, the Deputy Assistant Attorney General for the Criminal Division. When asked whether she thought there was a greater risk to victims and witnesses in districts that had interpreted *Nixon* more permissively, Ms. Miller said she had not noticed a trend. Similarly, Mr. Randall, from the U.S. Attorney's Office in the Western District of North Carolina, said he had no sense of current abuses. The member emphasized the Department's proposal would be a very significant addition. The Subcommittee had expended an extraordinary amount of effort trying to understand what personal and confidential meant, and indeed in one of our memos it was referred to as a mystery.

Another defense practitioner began with the observation that in the rule making process the first step was to identify a problem. Personal and confidential information about witnesses had not been identified as a problem. And the next step was determining whether a remedy could be provided by the rule by a rule change consistent with the Rules Enabling Act. She thought the Department's proposal failed on both of those counts. We held two hearings where practitioners were invited to address the Committee. As the prior speaker had highlighted, at the November meeting, it heard from Ms. Miller, who was the Deputy Assistant Attorney General at the time but had practiced in the Southern District of Florida, where there is no motion required to get a subpoena, and from Mr. Randle, who was chief of the Criminal Division in the Western District of North Carolina, which similarly did not currently require a motion to serve a subpoena. In response to Judge Nguyen, both said very clearly that they were not aware of any problem or any trend in this area. And, the member said, there was good reason for the lack of any problems or negative trends. State and federal legislatures have deliberated privacy issues and enacted privacy laws that were already doing the work necessary in this area. They had identified the means by which information can be disclosed. Often it includes the requirement of a court order. That meant the defense would be required, under those privacy laws—regardless of Rule 17—to go to the court, and those laws also stated who had to provide the notice and how. Those were carefully crafted laws across all States and within the federal code. Given the multitude of laws already in place, and in the absence of any articulable problem, the member suggested that adding prospective witnesses here arguably violates the Rules Enabling Act. It would certainly cause confusion and a lack of clarity, leading to disparity among districts, and undoing the primary goal of this work. Instead of fixing the narrow interpretation of *Nixon* in a few districts, it would drastically change the practice in many districts, resulting in extensive—and in the

member's view—unnecessary litigation on the meaning of many things, including what or who a prospective witness is, and when they become that. And every word used to describe privacy would be litigated.

The Committee had suggested that in addition to this incremental approach, another goal would be to limit the work of the courts on the front end. Adding a motion requirement for prospective witnesses, the member said, would not do that. Instead, it would increase the work of the district courts around the country, including districts where the Department had already acknowledged motions were not required now and there was no problem.

Finally, the member responded to the earlier observation that not all defense a attorneys—and generally not all attorneys—always act ethically. The member noted that the Federal Defenders represented roughly seventy percent of criminal defendants in federal court, and the CJA panel represented at least an additional twenty percent. These lawyers had their livelihood before the court. They took their ethical obligations as seriously as their counterparts in the U.S. Attorneys' Offices. So, though she understood the concern and respected that there are instances where folks cross a line on both sides of the aisle, the member urged that rule drafting should not address those few instances of that type of conduct, but instead should promote uniformity as much as possible among our very different districts. In her view, the Department's proposed change would undermine all of the work that has been done on Rule 17(c). Under the Rules Enabling Act, the Criminal Rules should neither abridge nor enlarge substantive rights. Privacy laws are vast and varied, and they are honored. To add some additional layer within this rule, in her view seemed to contravene that requirement.

A judicial participant started by saying how helpful the New York meeting had been for him. It expanded his understanding of the problem, and he had come into that meeting with some doubts about whether we could come up with a proposal that he could envision becoming a rule. He characterized the current draft as a tremendous improvement. He agreed with the hope that the Committee would not lose sight of the fact that reform of this rule is badly needed, and this is a really good rule. He said he would express a concern but also his willingness to support the rule whether the Committee made the change he would suggest. He noted that the last thing he would want to do is promote unnecessary motion practice by lawyers. He did not want counsel to have to file motions unnecessarily, and he certainly did not want his judicial colleagues to have to spend time reviewing meaningless motions.

The Department's proposal dealt with the privacy interests of ordinary citizens that have been drawn into a criminal case because they happen to be witnesses. Those privacy interests, the member said, were important. He acknowledged that state and federal laws already provide privacy protections, but they vary a lot from state to state, and there were many legitimate privacy interests not captured by a state or federal privacy law. He was willing to devote his time to reviewing and deciding whether this is the kind of subpoena that should be served or not in this limited class of cases. He recognized there were some dangers, including the danger that the exception of requiring a motion would swallow the general rule. But this rule would give districts that wanted to take a different approach to do so, and even individual judges. He suspected that his district would adopt a local rule requiring a motion for these subpoenas. But he understood why many other districts might not want to do that. And to the Rules Enabling Act

point, the member was generally in favor of trying to find a national consensus approach where that was possible. But this was an area where he expected wide disagreement. Districts that had no experience with granting 17(c) subpoenas, where nobody even tried to get a subpoena, would view this rule as a very substantial change. On the other hand, there were many districts that were used to uninhibited practices and might see this as a constraint. This might be a situation, he thought, where for the time being absolute uniformity was not needed. The argument about the exception swallowing the rule did concern him. And the option allowing districts and judges to do things differently persuaded him that despite his concerns he would rather have this rule in whatever form it is than to have no successful reform. He wanted to express his concern but also acknowledge the other side. And he thought the rule was just an amazing improvement, and a much needed reform. Like a prior speaker, he wanted to see it enacted.

Another judicial member agreed that the proposal would make the rule so much better. She praised the structure, and said it made sense.

Judge Bates asked if this provision left room for variation among districts. It seemed to set a rule that could not be changed by court order or local rule.

Judge Dever responded, pointing to lines 37-38 on page 128 of the materials. The proposal set a general rule when a motion is not required, and then when it can be. He noted that the Subcommittee had discussed the ubiquity in many districts (including his own) of protective orders that get entered at the beginning of the case, the requirement that the lawyers meet and confer about topics if there's a disagreement about some issues—sort of case management of issues as you get closer to trial. He thought the rule was taking all of that into account, giving that discretion to the trial judge to manage that. A one count 18 U.S.C. § 922(g) case is different than a multidefendant human trafficking case. A court will be concerned with different interests in connection with the protective order.

Professor King drew the Committee's attention to the text on page 128, lines 36-38, which states: "A motion and order are not required unless subsection (c)(1)(3) or (4), a local rule or a court requires them."

Judge Bates said it does not say a local rule or court order could not require them. It seemed to him that (c)(3) said a motion is required. Professor King agreed: for a victim, a motion is required. And the Department's proposal would require a motion for a prospective witness as well. She agreed with Judge Bates that if the Committee added witnesses to (c)(3), courts would have no latitude to allow the parties to proceed without a motion. An earlier speaker clarified that he had been talking about latitude for local rules to *add* a requirement of motions for witnesses if it were not included in the rule. He had been explaining why, if he did not prevail in his view that witnesses should be added to (c)(3) he would be able to deal with that by a local rule adding such a requirement.

Judge Nguyen clarified that speaker's district might require a motion when it comes to personal and confidential information for prospective witnesses, but the presumptive rule would require that only for personal and confidential information as to victims. The speaker agreed: assuming that the Committee did not share his concern to the same degree, he understood that a

district could, by local rule, decide to require a motion for personal or confidential information about a witness. That had given him the comfort that if he could get his district to agree, they could do that by local rule. He could live with that while we gained experience with the implementation of the rule. Judge Nguyen confirmed that if the Committee decided not to include a requirement of a motion and notice for prospective witnesses, line 38 would permit the speaker's district to enact a local rule.

Professor King pointed out that the committee note addressed this situation. On lines 106-14, the note to this provision encouraged courts to use protective orders: "Other requirements stated in the rule or otherwise available to the court are adequate to control potential abuse of the subpoena by parties, and districts that have required under the prior language, the rule may continue to do that by local rule or court order." But the key was that judicial oversight before service was no longer required by the revised text of the rule, as it had been under the rule. Some judges read the current rule to require a motion for every subpoena. The Subcommittee draft said that was no longer required by the rule, but you can add a motion requirement in your court—or for this case—if you wanted to do so.

Judge Nguyen commented that expanding the motion and notice requirement to cover perspective witnesses as a presumptive rule would be contrary to the incremental approach, which the Subcommittee had been encouraged to implement.

A member made a similar point: not including that requirement allowed districts to preserve their practice. She said she would not be surprised if her district adopted such a local rule requiring a motion. But it allowed districts that did not now require motions to continue that practice in the absence of showing of any problem. She had previously noted that the Western District of North Carolina and the Southern District of Florida did not require motions according to speakers at the November meeting. At the same meeting Mr. Beirne said that in the District of Massachusetts you did not need a motion once a trial date was set. He said in the Varsity Blues case it was clear there was going to be a lot of discovery raising privacy issues, and there was an extremely well-crafted, restrictive protective order from the beginning of the case. When subpoena practice began closer to trial, they did not need a motion and were still covered by the protective order. So, she said, there were a multitude of different ways that districts were already addressing this issue. It was being dealt with.

Ms. Ralston responded to some of these points. First, on the scope of the Rules Enabling Act, the Department was proposing a motion requirement, which was clearly procedural. Second, there had been a suggestion that the Department was seeking to fix something that was not broken. In the Department's view, however, the *Nixon* standard was currently providing a safeguard, so perhaps nothing was "broken" yet. But once you relaxed the *Nixon* standard, then it might be "broken." She asked the Committee to consider the potential unintended consequences of broadening the substantive standard of what you can subpoena and the showing you have to make to do so. That expansion would allow the parties to seek a broader scope of information, which would raise significant and real concerns for people who are involuntarily in this process about very sensitive aspects of their life or information that could put them in danger. Whether the change the Department proposed was incremental would depend on the baseline. A number of courts have said you have to have a motion. Moving from always requiring a motion to rarely

requiring a motion would be a big change. And going from always requiring a motion to requiring a motion slightly more than rarely would be a more incremental change. So how incremental the change would be depended on your baseline. She did not think there had been a comprehensive survey of current practice. But she acknowledged that the proposed amendment did allow for local rules to be more protective, and she suspected that the Department might encourage courts to adopt those more protective local rules.

Professor Beale said that one of the things that gave the Subcommittee confidence and comfort that it would not be suddenly opening the door to new problems by relaxing the *Nixon* standard, was that those new problems did not seem to exist in the districts where subpoena practice had not been restricted. No one at the hearings had identified significant problems where courts had taken a narrow view of *Nixon*. So if you expanded something significantly, which would be happening in some districts, you might expect that they would have the same sort of experience in the districts that presently have more expansive subpoena practice. But the proposed amendment had the safeguard that individual districts that had a greater concern, or who felt that the nature of their caseload or something else demanded more protection, could adopt a local rule. That, she said, is where the Subcommittee came down: both having this ability of individual districts to adopt local rules and the experience in so many districts where this was working well. She observed that Ms. Miller had identified two problem cases. But in response to a follow-up question, Ms. Miller said they arose from Rule 16 discovery. They had nothing to do with subpoenas. As an earlier speaker said, sometimes lawyers don't do what they should, and these problem cases Ms. Miller identified were both clear violations of Rule 16 and protective orders. But there had been no showing that in districts with more permissive subpoena practice there has been a big problem without notice to the witnesses and so forth.

A member followed up, commenting on the people who testified at the November hearing. The Federal Defender in the Southern District of Florida said that he had access to the subpoena on his desktop. It was pretty permissive. But secondly and really importantly, he told us that in his district they had the second highest in volume for trials and indictments. That is the district in which Ms. Miller practiced, and they did not see problems. If there were no problems in the second highest volume district, where the defense attorneys could keep the subpoena form on their desktop, the member thought that was powerful evidence that this was not a problem. The purpose of the mini conference was to assemble people with a wide variety of experience.

A member asked Ms. Ralston what part of the proposed amendment causes the Department concern. She had acknowledged it was not a problem at present, but broadening or loosening the *Nixon* standard was going to lead to a problem. What aspect, specifically, did she think would lead to that problem?

Ms. Ralston responded that moving from evidence that is "admissible" to evidence that is "likely to be admissible" opened a broader category of things to be sought. That widened the potential for subpoenas seeking sensitive information about witnesses. She acknowledged that not every district currently restricted subpoenas narrowly to evidence that would be admissible and that there have not been broadly identified problems in those districts. But even where the local practice was broader than *Nixon*, *Nixon* was the law. There was always the backstop, the opportunity for the person or the government to move to quash a subpoena that was far too

broad. So even in places where it was the practice that you could go broader, everyone was operating against this backstop, and knew it was still there. Once you took away that backstop and changed the standard, what happens might not be the same as the experience in districts that currently have a broader subpoena practice. But she could not predict the future and say there would absolutely be a problem. Ms. Ralston agreed that protective orders go a long way, and that in many situations a motion is required by statute. So she could not say this was a huge category. Ms. Ralston added that as between the requirements of a motion and notice, the motion part was much more important to the Department than notice.

Judge Dever asked for a straw poll for the issue on pages 116-18, lines 48, 51, and 52: whether to add a motion and order requirement for personal confidential information about prospective witnesses as well as a discretionary notice requirement. He noted there was no change in the victim requirements. The proposed additions concerning prospective witnesses failed by a vote of 11 to 1.

Judge Dever said that it was helpful to have the straw polls before taking a vote on the complete draft, and he reminded everyone that if the amendment moved forward, it would be published and the Committee would get a great deal of additional input. He adjourned for a 30 minute lunch break.

Rule 43

After the lunch break, the Committee paused its discussion of Rule 17 to hear the Rule 43 Subcommittee report from Judge Birotte, who was speaking from England and dealing with a significant time difference. The Committee had received a communication from Judge Brett Ludwig asking it to consider amending Rule 43 to extend the courts' authority to use video conferencing beyond initial appearances, arraignments, etc. Judge Ludwig's view was that the courts had learned some important lessons from COVID, and the CARES Act gave the courts a lot of flexibility and some access that had not previously been available. There were several districts throughout the country that either did not have detention centers or were so large that people had to travel many hours to get to court. Video conferencing under the CARES Act was a good remedy for that.

This Committee had dealt with proposals to expand the use of videoconferencing in the past, and it declined to make any changes. But when we received this communication, we thought we should look at it again given the experience under the CARES Act. The reporters had prepared a memo for the Subcommittee identifying potential areas (listed on page 149 of the agenda book) where we might want to consider whether the rule needed to be amended: preliminary hearings, waiver of indictments, suppression hearings, ancillary things and forfeiture, etc.

This had been a difficult issue for him personally, Judge Birotte said, because in his district video conferencing helped, though it was not entirely necessary. His district did not have some of the challenges like those in Alaska, where people travel some 600 miles. He had also heard there were huge distances in other districts, and it took a great deal of effort to get people into court.

But at the end of the day, particularly in consultation with defense members, the Subcommittee concluded that no changes were warranted. Presently Rule 43 allows some flexibility with respect to video conferencing, and he suggested that some judges might need to be more educated about the flexibility that Rule 43 already allows. But the overall sentiment was that given the serious nature and the weight of the proceedings, no expansion of video conferencing was appropriate. Defendants need to understand and appreciate the seriousness of the hearing, and being in person was the preferred method. He invited comments from other members of the Subcommittee in case he had missed anything, but said that the Subcommittee's view was that Rule 43 did not need to be amended at this time.

A subcommittee member said they had gone through the very comprehensive list that the reporters had provided on various types of hearings, and he had thought of another that might qualify. But after very careful consideration, the Subcommittee did not see any room for expanding video participation.

After hearing no other member wished to comment, Judge Dever thanked Judge Birotte for chairing the Subcommittee and also thanked the reporters for their excellent work. He noted a reference in the materials to all the times that the Committee had considered the issue, in 2024, 2020, 2017, and the other dates referenced.

The Subcommittee's recommendation was not to amend Rule 43 or other related rules in the manner suggested by Judge Ludwig. Procedurally, that would mean removing it from the Committee's agenda. Judge Dever asked for a show of hands of those in favor of accepting the Subcommittee's unanimous recommendation to remove the suggestion from the agenda. There was unanimous approval, and Judge Dever said they would inform Judge Ludwig. He thanked Judge Birotte for staying with the Committee, despite Internet issues, and for his excellent work as chair of this Subcommittee. Judge Dever also said as a personal matter it had been a real pleasure working with Judge Birotte.

Judge Birotte responded saying Judge Dever's reputation loomed large and that as chair of Standing he expected Judge Dever would be sure the Criminal Rules Committee minded its Ps and Qs. Judge Birotte asked to be excused at that point.

Rule 17

The Committee then returned to its discussion of Rule 17. Judge Nguyen thanked all present for their patience, saying there were just a few additional issues to discuss which she thought would go more quickly.

On line 64 of the redline, as currently written, a self-represented party could get a subpoena only by way of motion, with the showings discussed earlier and a court order. And then the subpoena return had to be to the court. The question for discussion was whether to include the bracketed language: "unless the court orders otherwise," to give the court some flexibility in determining where the subpoena is going to be returned. For example, sometimes a self-represented party is a lawyer. So did the Committee want the District Court to have discretion to say since you are a lawyer, you can have the return to you directly instead of

returning it to the court, which might feel it was not necessary to review? She asked if there were any strong feelings on this issue about it one way or the other. Before any member commented, Professor Beale noted an error in the agenda book discussion of this issue on page 119. The second bullet against including this provision was included by mistake.

Judge Nguyen noted the other arguments on page 119 for including an unless clause in the text saying that the bracket language will preserve the judge's discretion to determine whether a motion was needed. She asked if the district judges want greater discretion in dealing with subpoenas for self-represented parties, to have greater control. The sense of the room was that the judicial members did favor more discretion.

A member commented that she understood there might be a change from referring to "unrepresented" rather than self-represented people, and she thought self-represented was the right phrase in the criminal context.

Professor Beale noted that Professor Struve had raised this issue because of the interest in uniformity across different sets of rules.

Professor Struve responded that on substantive grounds she supported the use of "self-represented," and she thought it would work perfectly well for the Criminal Rules to use that term. But it would not work as well to try to insert it into the other sets of rules—which is what she had been thinking of proposing—because they had about twenty other places where they already used the term "unrepresented," one of which would be hard to change. If the Criminal Rules would like to use "self-represented" and be a model for best practices, she would support that.

Professor Beale commented that only one Criminal Rule at present used "unrepresented"—Rule 49. This would be largely a consistency and style issue because "unrepresented" includes people who are representing themselves. Professor Struve said that she expected the community that discusses matters affecting self-represented litigants would comment adversely if the other sets of rules were published using the term "unrepresented," which is not the current parlance.

Judge Dever noted that often self-represented defendants have standby counsel. He had cases in which returns went to standby counsel and not to the court. The proposed amendment would give the judge the discretion to do that for self-represented defendants who had standby counsel.

Judge Nguyen clarified that the Committee preferred to retain the term "self-represented" (as opposed to unrepresented), and to delete the brackets because we want to allow discretion in cases involving self-represented defendants.

Ms. Ralston asked whether the amendment should (as it did in other places) add "unless a court order or local rule provides otherwise" to account for the self-represented defendant with standby counsel. Professor King asked if she were envisioning a local rule stating that "if a self-represented party is appointed standby counsel, then in this district…."? That had not been

considered in the Subcommittee. Professor Beale suggested that the Committee could defer consideration. It was a fairly minor issue that had not been discussed, and they had no information about how often rules would deal with the possibility of standby counsel and where returns should be sent. The Committee could come back to that issue after publication when considering possible changes. Alternatively, Professor King suggested, it could put "or local rule" in brackets between the court and orders. The brackets would trigger conversation on this point at Standing and upon publication. Ms. Ralston replied she did not have strong feelings about the issue, but she had wondered if the judges might think that would be more efficient.

A member said she was not sure it would matter in practice. As written, the amendment gave the court a lot more control over that self-represented individual—who might say "this rule says you could give me permission to have it." She thought it was better to leave it addressing only what the self-represented person's rights are. An attorney acting as standby counsel is an attorney before the court, and the judge could choose to do anything under Rule 17 that would apply to an attorney. That could become a bartering point: I'll let your standby counsel have it. So the member suggested that the rule address only what the self-represented person's rights were, or limitations on them.

Judge Nguyen stated that she understood that the Committee favored removing the bracket from the redline but leaving out local rules for now. Seeing no additional hands, she moved on to the last issue on which the Subcommittee was recommending discussion. She noted it would skip item F, and move to the issue on page 120: should the rule encourage courts to consider protective orders or in camera review for potentially sensitive material? This had been in the background, but the Subcommittee didn't have a chance to focus on whether it should be addressed explicitly in the rule. As Judge Dever had noted earlier, protective orders are fairly routine. So, she asked, was there a problem that we needed to address by putting that into the rule? Professor King commented that this was indirectly referred to on line 110 of the committee note, which says other requirements in the rule or otherwise available to the court are adequate to control potential abuse of the subpoena process by the parties. Protective orders could be mentioned there. Or there could be a separate provision in the text, but the Subcommittee did not get to that. Professor Beale added that one reason it was not a higher priority on the Subcommittee was that courts generally have authority to use protective orders and use them in lots of different contexts. The question was whether there was a special reason to emphasize that here.

Judge Dever said part of what prompted the Subcommittee's discussion was hearing a lot at the November meeting in New York about how often the protective orders are in place and these things get negotiated between lawyers. The first question in all rulemaking is whether there is a problem. And the Subcommittee really did not hear that was a problem. But the Subcommittee wanted to know whether the Committee thought that the rule should expressly deal with the topic.

A member said his own view from his practice and familiarity with other judges in the Ninth Circuit was that this was not a problem. He thought there was wide use of protective orders that were easily negotiated. He did not think the Committee needed to address it.

Ms. Ralston asked whether there needed to be some clarification that a protective order governing discovery would also apply to subpoena returns. She understood that at the November meeting there had been many comments that subpoenas are not discovery. She asked whether there was any lack of clarity about that, because she thought it would be obvious. But she was concerned about any ambiguity, because the Department viewed protective orders as very important. One district judge member commented that she did not think there was any ambiguity.

Noting that she was not hearing any problems, Judge Nguyen suggested that the text not be amended to include a measure that nobody was very concerned about. But an addition on line 110-11 of the committee note to identify protective orders as one of the common control tools district courts use would be an option.

Professor King said the note might read: "otherwise available to the court comma, including protective orders, comma are adequate to control." The whole sentence, beginning on line 109 would read:

> Other requirements stated in the rule or otherwise available to the court, including protective orders, are adequate to control potential abuse.

Judge Nguyen noted many heads nodding, and she concluded the Committee favored including that reference to protective orders.

Judge Nguyen asked for any additional comments or concerns.

Judge Bates said he had additional questions, some of which related to the structural points discussed earlier. In (c)(2)(B) the rule stated that a movant must show certain things. It must describe each designated items with reasonable particularity, and "state facts showing…." He asked would it always be "facts"? The Committee note said that was intended to eliminate the possibility of speculation. But as noted in the earlier discussion, sometimes the movant has a reasonable, good faith belief but may not be able to state clear unambiguous facts. He suggested that "state facts" was a little narrower than what the Committee might mean. Did it mean explain why each item satisfies (1)(B)(1) through (3), which would be a little broader than stating facts?

Judge Nguyen stated her view that the Subcommittee intended to say something along the lines of make a showing that satisfies (1)(B)(1) through (3), and that was another way to say it.

Judge Dever commented that in terms of practice with subpoenas in his district and what the member had described, the Subcommittee drafted the rule to say what the court receives. They do say "This is why I need the video: my client was gambling at the casino an hour before any five thousand dollars was seized from him, and the video will show he won the money and it was not drug proceeds. I need the casino video to show that that's not drug proceeds." Judge Dever said those are "facts," instead of just saying the casino might have some information. A judge agreed the court needed facts.

Ms. Ralston said "facts" paralleled the rule under the Fourth Amendment for getting a warrant. Suspicion or speculation is not sufficient. You have to provide reasonably articulable facts. She urged that we not use less specific words in this context.

A member responded that was covered. The amendment required the movant to state a lot of things, one of which was a description of each item with reasonable particularity. The member thought that covered similar language you might find in warrants. The member did not see a big difference or have strong feelings about "state facts." She thought "make a showing" here would be stating facts. But she thought "state fact showing" was a bit of an awkward way to read that clause of the rule, whereas "make a showing" was a more legalistic way of explaining what the party needs to do.

Judge Nguyen said she did not feel strongly about it because, like the prior speaker, she read "state facts" as make a showing. She did not think it was so restrictive that you could not make a good faith proffer based on belief that you get from your client, as in an earlier example.

A member asked what exactly is "make a showing"? The member thought stating facts was very specific. Judge Nguyen responded that she thought the Committee was inclined to leave the language ("state facts") as is.

Judge Bates said he had two other points that had to do with local rules. The ex parte provision, line 42, said the court may for good cause permit the party to file the motion ex parte. He asked whether that was intended to mean a court cannot have a local rule inconsistent with that allowing such motions for good cause.

Professor King said she thought Judge Bates was asking whether the amendment prevented a district or an individual judge from having a local rule or standing order that said no ex parte motions in my court. She said that it did. The Subcommittee intended to stop the blanket practice of never allowing ex parte motions. She asked if Judge Bates thought it was ambiguous.

Judge Bates said he was raising the question to understand what that language was doing and he had the same type of question for (c)(6) on the redline version. It said a party must disclose to an opposing party an item the party receives from a subpoenaed recipient only if the item is discoverable under the rules. Did that preclude a conflicting court order or local rule?

Professor Beale replied that the proposed amendment was intended to prohibit what the Subcommittee thought were very unwise court orders and practices that were inconsistent with the fact that Rule 16 and the other discovery rules are the standard for when you have to turn things over. Part of that stemmed from the concerns expressed at our various mini conferences from attorneys in districts that had no subpoena practice. They said requiring disclosure to the other party in those courts essentially meant there was no subpoena practice because the lawyers did not know whether they would end up getting inculpatory—rather than exculpatory—information. They could not take that risk. One defense lawyer said she might have to withdraw if she made a motion and then the court required her to turn the subpoenaed material over because she would have done something so inconsistent with her client's interests.

A member followed up on Judge Bates' question about line 42 in subpart (c). The member said that if he were a judge or was in a district that hadn't allowed ex parte subpoenas, he did not think the rule could be read to prohibit him or his district from maintaining a status quo of not allowing ex parte motions. If there were a recalcitrant district or judge that had not

permitted ex parte subpoenas, they would read the language and say that's not what we're going to do. The member did not think the rule would keep them from maintaining the status quo.

Another member asked if the problem would be solved if "may" were changed to "should" or "shall." A third member noted he now understood the problem, and asked if changing from "may" to "must for good cause shown" would that address that concern.

The judge who had stated the view that the current language would not preclude a "recalcitrant" judge from continuing to prohibit ex parte filings thought that it would do so. Judge Bates noted he had been trying to raise the issue without stating a view about what it should be.

Judge Nguyen asked if anyone objected to changing "may" to "must."

Ms. Ralston asked if there was a difference between a party's ex parte filing of a motion and the court's acceptance of it? Could the rule say a party may file the motion with the court, and the court must accept it? Was there a way to express the point that a party has the right to file the thing and the court could not as a blanket policy not consider it? She expressed some concern that changing "may" to "must" somewhat undermines the good cause requirement. It felt like it was giving more control to the party.

Judge Dever commented that the committee note beginning on lines 128, page 136 of the agenda book dealt with this topic. As the Committee did with the *Nixon* standard, he thought it would be easy enough to add a sentence stating that part of what animated the discussion over the last two and a half years was that some courts absolutely prohibited the filing of ex parte motions. If a party tried to file ex parte, the court would say that unless it was served on the other side the court would not consider it. The Subcommittee thought it was important for the parties to have the opportunity to file ex parte motions in some circumstances. Judge Nguyen had touched on one, where the defense lawyer thinks the subpoena will produce exculpatory material, but might also produce something that would be inculpatory. The lawyer would want to file ex parte. He suggested addressing Ms. Ralston's concern with a sentence to make it clear that the purpose of "must" was to make it clear if a party otherwise met the standard, the court must permit the party to file the motion ex parte. The court does not have to grant the motion, but the court cannot return the motion because no ex parte motions are permitted in this court in criminal cases.

Judge Nguyen thought it was a great suggestion to clarify that upon a showing of good cause, the court must allow ex parte application. That was the intent of the Subcommittee. She had not thought about the point Judge Bates had raised, and she noted one could make certain assumptions without realizing that language could be read differently. She asked if there were any objection to changing "may" to "must" and then clarifying that in the committee notes. Hearing no objection, she took that as an informal vote.

Professor Beale said the draft did not include a reference to filing under seal because the practitioners they had asked said they would always file ex parte motions under seal, and no

mention in the text was necessary. Judge Bates asked if it was not needed in the text, why include in the note? The reporters agreed to delete that from the note.

A member said he had previously raised concerns about other laws that would prohibit disclosure of certain information just by through a subpoena. The response at a prior meeting had been that the proposal was not intended to expand what a subpoena could otherwise do. But this was not stated in the text or the note. He recognized that a rule cannot go beyond what the law would otherwise permit. But he noted that examples offered earlier in the day referred to trying to get emails, and it was not clear to him that you could get an e-mail with a subpoena, given the Stored Communications Act. So he asked if the note should say that the rule was not trying to create a super subpoena. Perhaps there was no need to do so, because the law is the law.

Professor Beale responded that at the broadest level every rule could say unless otherwise permitted or otherwise prohibited. But the Committees tend not to do that because then there would be a negative implication if such a statement were omitted from other rules. That was a partial explanation. But she also noted that this had been the Subcommittee's focus much earlier, a long time ago, and had been so much a part of its thinking that it was not recognizing that an entirely new audience was coming into it.

Professor King noted this had not been a problem under the existing rule, and she asked whether there was something about the amendments that would suggest that it could become a problem? In other words, was there something in the amendments that suggest that this could be a greater issue?

Ms. Ralston said that the note on line 20 or 21, page 133, clarifying what can be sought, stated data included other information and recognized the parties subpoena electronically stored information, and other intangible items. That opened the question what kinds of electronically stored information. Emails are one of the most common kinds of electronically stored information. And there is another law that governs emails. She did not want to change anything in the rule, but she suggested that a sentence could be added at the end of that paragraph in the note stating some information may not be available by subpoena if otherwise governed by statute or something. It could be added to line 22.

The member who raised the issue responded to Professor King saying he thought prosecutors already knew or should know what you can get with a subpoena under the Stored Communications Act, and when you need a search warrant. That is part of all their investigatory practices. Magistrate judges were dealing with these issues all of the time, and defense attorneys would learn what you can and cannot get with a Supreme Court, if they did not know it already. So he wanted to have the Committee consider whether it was worth putting that marker right in the note.

Professor Beale commented that "data" and "information" were both already in Rule 17, so the proposed amendment would not authorize subpoenas for kinds of things that you could not already get. That led back to the question whether there was a reason for concern. And she thought the member might be suggesting it would be the change in some districts where defense

lawyers haven't really had a realistic opportunity to obtain subpoenas. They might be coming to this new.

A defense member commented that serving a subpoena for ESI is permissible, and it depends on who you are serving the subpoena on. If you're serving the ISP, the person who holds the data, that was governed by the Stored Communications Act. But everybody else has ESI that gets subpoenaed. She thought defense lawyers generally are not going to serve a subpoena on Google, because they could not get anything. And it was virtually impossible to get the tech industry to respond. In her view, it was such a narrow point that it did not merit inclusion in the note.

The member who raised the issue agreed that Google would not respond to a subpoena, and you could probably subpoena records including emails from someone's phone. But it was not as clear to him that you could subpoena emails from an employer if they fell into an RCS or ECS as defined or obscured communications. Were they providing public services in some way? He thought some employers did, and some did not. He said there was a gray zone, and magistrate judges were often trying to figure out whether a new source of electronic data fell within the Stored Communications Act or not.

Judge Nguyen said the Subcommittee did consider that issue and recognized that the rules can't disrupt statutory or other protections. But it did not drill down too much on the question whether we needed to clarify that issue in the committee note. It did hear from a lawyer representing big banks, big data holders. He said they are well aware of the protections, didn't want to run afoul of them, and would move to quash. And the Subcommittee heard from a professor who talked about the Stored Communications Act. So it was aware of that, had discussed it, but really did not think it was necessary to clarify that in the note. She also raised the question whether other notes clarified similar points. Or did everyone operate under the assumption that if there was a statute it could not be trumped by the rules.

Judge Dever said this was certainly not a super subpoena. As Professor Beale said, the general practice was not to add something like "you have to otherwise comply with the law" to the note. It is implicit that there must be compliance with other laws. But if during the public comment we learned that it was generating concerns of this nature, a clarification to the note could be added.

Professor Beale commented that something like that happened when the Committee amended Rule 41 to deal with electronic searches. A significant number of people thought that the amendment—which dealt with venue—was restricting the protections of the Fourth Amendment. So the Committee added a clarifying statement to the committee note, and she thought it had also revised the caption to try to signal more clearly its limited purpose. Similarly, if this amendment were misunderstood as overriding other laws, the Committee could then figure out the best way to clarify it.

Judge Nguyen asked if there were any more comments or concerns, and seeing none she thought that it would be appropriate to take a vote on the rule. It was helpful to have had the straw votes. She suggested a motion with the strikeouts and removal of brackets that had been

the subject of the straw votes. She asked Professor King to walk through and clarify the changes that had been agreed upon, to serve as a basis for a motion.

Professor King began on page 127 of the agenda book. She said the only change, from style, was moving "data" from the place we had added it in line 19. This put the tangible things together and the intangible things together. Professor King read the language: "… produce any item, including any books, papers, documents, data or other information." She noted this was a style change. She noted that there might be other style changes later.

On the next page, Professor King noted a substantive change on the next page, lines 24-26, which dealt with which proceedings were covered, and detention. She noted a hard copy had been distributed, and she also shared it on the screen for those attending remotely.

There were several concerns raised about this. The intent here was to say that you can use a subpoena for at least these enumerated proceedings, and the court has discretion to allow in additional proceedings not enumerated. The concern was that "[u]nless the court permits otherwise" was somewhat ambiguous on that point. The proposed change was dividing this into two sentences. The first sentence declared that a non-grand-jury subpoena was available for trial and hearings on detention, suppression, sentencing and revocation. The second stated that a judge could, in an individual case permit a non-grand-jury subpoena for additional hearings.

The first change was separating it into two sentences, making it clear that the enumerated list is the baseline. The discretion allows expanding to additional proceedings on a case by case basis but not restricting subpoenas for the listed proceedings. The courts must permit subpoenas not just for trials but for sentencing, and the other listed proceedings. That policy decision had been made. Judge Nguyen stated this was an attempt to clear up the ambiguity that Judge Bates pointed out.

A member asked about the choice of available versus permissible. Professor King said she had added the permissible because she thought a concern had also been raised that the text suggested that a subpoena must be available every time you ask for it. She thought the word permissible suggested the need to get permission.

Professor Beale responded that "available" did not suggest that the movant did not have to meet the other requirements of the rule. She was not sure "permissible" did more work, but the reporters had been trying to come up with something that would respond to a member's earlier comment. She suggested that unless they liked "permissible" much better, the Committee should stay with "available." The member who had raised the earlier concern said he preferred "available" as well, especially with the other changes that made it clearer.

When no one spoke in favor of "permissible," Professor King said she was deleting it. As to the division into two sentences, one member said she preferred it, and Judge Nguyen noted it cleared up the issue Judge Bates had raised. When no one objected, she said that would be approved as an addition to the draft.

Professor King turned to the bracket, noting it might not be an issue for the Committee. Her concern had been that Rule 12 of the 2254 Rules said, "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to proceedings." So one basic reason why Rule 17 subpoenas should not be used in 2254 hearings is because the parties could use the Civil Rules of Procedure to get subpoenas. The concern is that by adding the invitation to judges to authorize Rule 17(c) subpoenas in additional or other proceedings it would preempt or conflict with Rule 12 of the 2254 Rules. She did not think that was a necessary reading, but it was a possible one.

A member suggested that the proposed language in the committee note already did the work in a cleaner way because it was more of a narrative. The member thought the suggested bracketed language was a little confusing.

Judge Nguyen suggested striking the bracketed language from the rule itself unless there was objection. There was no objection. And there was no further objection to the new language from the handout, which substituted for lines 24-26 of the redline.

Professor King then turned to the next change on line 31. The straw poll had favored "are or contain information that is likely to be admissible evidence" in the designated proceeding. (She noted style had a preference for "admissible evidence" rather than evidence that would be admissible.)

The next change on page 128 was on line 42, the provision on ex parte motions in (2)(c). It would read "the court must for good cause…."

The next change was page 129, deleting "or prospective witnesses in brackets" from lines 48, 51, 53, 57, and 58, and deleting the sentence in brackets ("Unless otherwise prohibited by law, the court may require giving notice to a prospective witness.")

Next, on page 129, line 64, the brackets around "unless the court orders otherwise" were deleted.

Professor King had no other changes to the text of the rule.

After consultation with the reporters regarding the form of the motion, Judge Nguyen asked if anyone would like to move to send the rule to the Standing Committee with a recommendation that it be published for comment. That motion was moved, seconded, and approved unanimously. There was spontaneous applause.

Judge Nguyen then asked Professor King to take the Committee through the changes in the committee note. The first, on page 133 of the agenda book, was based on a handout distributed at the meeting and displayed online. The first sentence clarified that non-grand-jury subpoenas are permitted to produce items for not only for trial but also for the proceedings where subpoenas are most likely to be needed, and presently used regularly in many districts or for which there is statutory or rule authority for parties to present evidence: detention hearings under the Bail Reform Act, sentencing hearings under Rule 32, pretrial suppression hearings, and revocations.

Professor Beale commented that the Committee had used the word "available" in the text, rather than "permissible," and she suggested using "available" in the note as well. Professor King agreed. There were no other comments on the first sentence.

Professor King returned to the portion of the note that said no other mechanism was available to compel evidence from third parties at these proceedings, even though both parties may need to do so. Some decisions had interpreted the prior text of the rule to bar the use of Rule 17 subpoenas to produce items at any hearing other than grand jury proceedings and trial. This change to the text of the rule expressly authorized the use of a non-grand-jury subpoena to obtain evidence for introduction at the listed hearings. In the draft note, she said, the next sentence had been changed to accommodate the removal of the unless clause. And there was a change taking revocation hearings from those not listed. And, at the bottom was the change about the habeas cases that the Committee had already discussed. Professor King asked if there were any suggestions for changes in this portion of the note.

Judge Bates quoted the language "to produce items in other evidentiary hearings," noting one of the examples was new trial hearings. He had a hard time imagining a new trial hearing. Professor King responded with the example of a new trial hearing for jury misconduct, or other things that happened at trial, where the judge was trying to find the facts of what occurred. Judge Bates asked if this would expand the record.

Judge Dever said Rob Cary from Williams and Connolly had given an example at the Phoenix meeting from the posttrial proceedings in the Elizabeth Holmes case, where after the trial, there had been was some kind of walk back by a person the defense contended was one of the key witnesses against her, and an effort to subpoena information and documents from this person. He thought the judge actually had a hearing on it. Judge Dever thought that the judge had quashed part of the subpoenas. It was a real-life example of trying to use subpoenas to get a large amount of information to support a theory for a new trial. And the judge pared it back, held a hearing, and then denied the new trial motion. That was one of those rare things that might generate a new trial hearing, along with juror misconduct.

Ms. Ralston commented that the defense might seek additional evidence to support a motion for a new trial on the basis of newly discovered evidence, for example, such as the discovery of evidence that might raise a claim of perjured testimony. In one case, there had been an allegation that there were multiple people with the same name and the government had presented a witness who may have been the wrong person, though the prosecutors were unaware. The defense sought evidence like various driver's license records to identify pictures of the various people over time. She said this did not happen frequently, but it was allowed by Rule 33.

A judge commented that she could see many reasons why there would be evidence apart from the record in a motion for new trial. She had seen many of them.

Judge Bates noted that this was just committee note language, but he asked whether it was contemplating that a subpoena would be available just upon a motion for a new trial being filed? Or even before the motion was filed to try to find support for filing a motion? Or when a hearing had been set? The note said it was in connection with an evidentiary hearing.

Professor King responded that the amendment preserved that principle that Rule 17 was not for discovery. The first part of the rule said that the subpoena had to identify the designated proceeding. There must be a proceeding, a hearing, to get a subpoena. Judge Bates asked if that meant you could not get a subpoena until the court had set a hearing. Professor King responded that the Subcommittee had not gotten into the weeds of exactly what had to happen before there was a hearing to designate. Neither the text nor the note stated the court had to docket or schedule a hearing before the parties could use subpoenas. Judge Bates replied this was like Congress saying we'll leave it to the judiciary to figure this out.

Professor King said the Subcommittee was always focused on and thinking proceeding, proceeding, proceeding—not discovery.

Judge Nguyen said that there was a little room there for district judges to slightly vary their practice in terms of how strictly to enforce the identified proceeding. The Subcommittee had left that slight ambiguity there on purpose.

Professor King said the next change in the note was on agenda book page 134, line 75, which should read (c)(1)(B)(iii). Judge Bates had caught that error, and a few other points where the same cross reference error had occurred. Next on line 77, the note would be revised to quote the text which style had slightly revised.

On page 135 of the agenda book, line 110, between the words "court" and "are adequate," "such as protective orders" was inserted with commas on either side.

There were brackets in lines 84-87, and Professor King said they would conform that section to the revised text that had been approved. But two things required decisions: brackets around the word "many" and in the first line "and very." Should these be retained or omitted? The first bracket was in the sentence stating that impeachment evidence should be available to a party by subpoena for use at trial when a party knows that a witness will or is likely to testify. Or should that be "very likely to testify"? Judge Nguyen said "likely" was preferable. She was not sure how much "very" really added. The other bracket was in the statement that the "likely to be admissible standard" was already used by "many" courts or just by "some courts." Professor Beale noted they had not done a count of the courts applying that standard, so it would be preferable to say "some," since they knew that to be correct.

Professor King reviewed the decisions: one line 82, "very" was omitted, line 85, "many" became "some," and on line 87 the brackets were omitted and the language would be conformed to the revised text.

Then on line 110 was the protective order addition previously mentioned, and on line 121 the corrected cross reference was Rule 17(c)(2)(B)(i).

On page 136 of the agenda book, line 123, it should be (2)(B)(ii), and on line 125 there was another section to conform to the revised text.

Next, on line 128, "may" became "must."

A member noted line 125 also mentions relevant to and likely. But that was not part of the final language. The reporters replied that would be conformed to the text.

Line 128, "may" became "must."

Line 129, "and under seal" was deleted.

Two typos were corrected. Line 134 should read "could lead to damage or loss." And on line 145, it should be "to implement" rather than "to implementing."

Judge Bates raised a question about line 141. Rule 17(c)(2)(D) actually referred to local rule or court order. Should we say absent a local rule or court order to do so? The reporters agreed the note should conform to the text. Professor King said she recalled that at some point in the past they had concluded that "order" would include both a local rule and a court order. Professor Beale thought that had been in connection with Rule 16. But both agreed it should be spelled out here, particularly since stating both in some parts of the rule would create a negative implication.

There was agreement to remove the highlighted language, which had been included just to draw the Committee's attention for purposes of the discussion.

One line 146, the bracketed language had been deleted.

Ms. Ralston noted that line 143 refers to subparagraph (A), but the second part of that sentence was now in subparagraph (B). There was agreement to add it at the end of the sentence now in subparagraph (B).

A member returned to the discussion of line 141, where Judge Bates had noted that it was a reference to local rules. He expressed concern that it would not read well if "local rule" were added without rephrasing.

Professor King agreed and said it would be revised to read "unless required by a local rule or court order, a party has no duty to inform when no motion is required."

Since there were no other changes in the proposed note, Judge Nguyen called for a motion to approve the committee note, as amended, for submission to the Standing Committee, with the recommendation that it be published for public comment.

The motion was made, seconded, and approved unanimously. There was a round of applause.

Professor Beale reminded the Committee that there might be additional style changes which would not require Committee approval, but the reporters would inform members if there were any changes suggested that they viewed as possibly substantive. Styles oversight is continuous and part of the Committee process.

Judge Dever thanked Judge Nguyen, the reporters, the members of the Subcommittee, and finally all Committee members for their work on a project that began when Judge Kethledge appointed Judge Nguyen to chair the subcommittee. The Committee began by trying to discern whether there really was a problem at the meeting in Phoenix two and a half years ago.

Professor Beale suggested that when the rule went out for publication the Committee might write to all the lawyers who had spoken at the Committee's meetings in Phoenix and New York, thanking them for their assistance and asking for their comments. She thought it would be desirable to express the Committee's appreciation to and get further input from people who had put a lot of work into coming to speak to the Committee, as well as those who spoke to the Subcommittee.

Judge Dever said the Committee would proceed very expeditiously through the remainder of the agenda.

Rule 49.1

Judge Harvey reported on the work of the Rule 49.1 Subcommittee. The Subcommitttee was considering two primary issues: the use of pseudonyms when referring to minors in public criminal filings, and full redaction of Social Security numbers, rather than inclusion of the last four digits, which the rule presently permitted. The Subcommittee was in agreement that we should make both changes. It had hoped to have draft language to present at this meeting, but it was unable to do so for several reasons. First, the Subcommittee had been presented with language approved by the style consultants. Members were concerned that the proposed language seemed to suggest a larger or more significant change than required by the proposal. Judge Harvey expressed confidence that the reporters would work with style to address those concerns and develop language that the Subcommittee could bring to the November meeting. The other issue was whether to treat taxpayer identification numbers the same as Social Security numbers in any change. At present, Rule 49.1 treats taxpayer identification numbers the same as Social Security numbers. Taxpayer identification numbers are issued to people who are unable to obtain Social Security numbers, and there are millions of them. They are used in the same way as Social Security numbers, and they raise similar privacy interests. The Subcommittee wanted additional research to determine the harm or risks from the inclusion of the last four digits of these numbers in public filings. Judge Harvey thanked Mr. Brinker for his initial research on the effect of including the last four digits of Social Security numbers, and additional research on taxpayer identification numbers. This research would provide the foundation for the Subcommittee to decide whether or not we should be treating tax identification numbers similar to Social Security numbers, requiring that they be fully redacted from any public filing.

Judge Harvey said he hoped to have a final report and recommendation for the next meeting. Professor Beale said they would also work with the sister committees, who also had an interest in these proposals. The Bankruptcy Committee wanted to retain the last four digits of the Social Security number, but it might be possible to get parallel proposals moving forward from the other committees. They expected to address any concerns about uniformity before bringing a recommendation to the Committee.

Rule 40

Next, Judge Harvey provided a report on the Rule 40 Subcommittee, which was considering proposals from Judge Bolitho and the Magistrate Judges Advisory Group (MJAG). The proposals requested clarification of what procedures are required when a defendant is arrested on an out of state warrant alleging a violation of condition of release pretrial, presentence, or while on appeal, or for failure to appear in an issuing district.

The primary focus of the Subcommittee's first meeting had been whether the magistrate judge in the district of arrest may, should, or could hold a detention or release hearing. Such a hearing would give defendants an opportunity to seek their release on the warrant with the condition that they report to the issuing district. Based on the two suggestions and the research to date, it appeared to be the common practice to permit such a hearing to allow a defendant to seek his release in the jurisdiction of arrest. But a very small number of districts, perhaps only in the Seventh Circuit, did not provide an opportunity for defendants in Rule 40 proceedings to seek their release. That potentially was of concern because it could take the marshal's service up to thirty days to deliver the person to the issuing district where they would have their first opportunity to seek release on the warrant. That was the minority position, which appeared to be based on these courts' reading of Rule 40, especially in relationship to Rule 5. He thought there was an emerging consensus that this issue should be addressed and clarified under Rule 40.

Judge Harvey thanked Mr. Brinker for his great research on these proposals as well. He had provided a research memorandum on past versions of Rule 40, focused at least in part on the availability of a hearing in the arresting jurisdiction. Mr. Brinker had concluded that although the rule had never been explicit in that regard, the availability of a hearing was implicit because the rule had routinely referenced the magistrate judge in the district of arrest setting bail. How, Judge Harvey asked, would you set bail unless you have held a hearing?

The proposals also raised other issues, many of which, in Judge Harvey's view, were not particularly controversial and could be easily corrected by amending Rule 40 to mirror Rule 32.1, which addresses violations of supervised release and includes a nice list of what should occur in the arresting jurisdiction when there is a removal proceeding. Although these would hopefully be less controversial, the Subcommittee had not discussed all of them.

The Subcommittee had identified additional issues to be researched in considering those other issues, and he looked forward to reporting more progress on Rule 40 at the next meeting.

Judge Harvey added that another issue had come up. Dean Fairfax suggested getting input from magistrate judges around the country to help the Subcommittee understand what differences in practices that may exist. He thought that was an excellent suggestion, but the Subcommittee would wait to pursue it until its enquiry was more focused.

On the need for more input, Professor Beale commented that one difference between the discussion of this issue and many others that had come before the Committee was that so much of this was squarely and almost exclusively in the bailiwick of the magistrate judges. Naturally, Judge Harvey did not want to be the only one who really could provide that sort of input. The

Subcommittee discussed various ways to get more input, and one possibility would be to plug into meetings scheduled for other purposes, such as the regular semiannual meetings of magistrate judges. She said they would definitely seek to supplement the input and reactions that the Committee was getting so that it would not miss something where it could get more help. For example, the Committee might want input on particular language or a set of particular questions.

Electronic Filing by Self-Represented Litigants

Judge Dever thanked Judge Harvey for chairing the two subcommittees, and turned next to two reports from Professor Struve, one on the electronic filing and service by self-represented litigants, which begins at page 157, and an oral report on the attorney admission proposal.

Judge Burgess, chair of the Subcommittee on pro se filing, began the discussion of this issue, thanking Professor Struve for an outstanding memo about possible rule changes to allow self-represented litigants to utilize the electronic filing system. A major goal of the project was to update the rules to reflect the primacy of service by electronic means in a modern court system. The suggested updates focused on two goals: (1) expanding availability of electronic filing for self-represented litigants except for case opening documents, and (2) updating requirements of service of documents filed by self-represented litigants, eliminating the need for paper service of filings that court staff had already uploaded electronically. The updates also proposed expanding the availability of electronic modes by which self-represented individuals can file documents with the court system.

Judge Burgess noted that Dr. Reagan had just published a Federal Judicial Center report describing the results of a survey of all district courts, which found that nearly two thirds of districts permitted self-represented litigants to file electronically. Indeed, one district required it unless you opted out. A number of districts required the court's permission. So although the approaches varied, many districts, if not most, offered the opportunity for self-represented litigants to seek permission to file electronically.

Judge Burgess said that this issue was very different in the criminal context than in the bankruptcy, civil, and appellate contexts. Because most criminal litigants who were self-represented would be incarcerated, it was difficult (if not a complete bar in many places) for incarcerated self-represented individuals to file electronically. One way around that was to appoint standby counsel, which then allowed use of the electronic case filing system. Judge Burgess then turned the discussion over to Professor Struve.

Professor Struve thanked Judge Burgess for the Subcommittee's work on this, and she thanked Ms. Lonchena who had also been tremendously helpful. Professor Struve said the project was proceeding in tandem with the other advisory committees. She reported that the Bankruptcy Rules Committee had decided at its spring meeting that it wanted to be included in the project, though they would still have some bankruptcy specific concerns. It was forming a subcommittee that would work over the summer in the hopes of solving their concerns and being in the project.

Professor Struve said they were hoping to work over the summer to be able present to this Committee and its counterparts at the fall meetings with proposals along the lines Judge Burgess had suggested. She recognized, as Judge Burgess had mentioned, that the population of self-represented litigants who could be affected by this in the core criminal process was vanishingly small. But the proposal would also affect the Section 2255 proceedings. Even there, as Judge Burgess mentioned, self-represented litigants were not likely to be getting into the CM/ECF system from their institution unless there was some prison library program making that possible. But it still would be very valuable for those litigants to have the relief from having to make paper service and pay for that from their prison account. That is where this project would probably have most of its effect in the settings governed by the Committee's sets of rules.

She asked for feedback going forward and said she expected to be working with Judge Burgess's Subcommittee over the summer if time permitted.

Professor King commented that it might be helpful for the people who had not been involved in that discussion to be aware that the draft rule for the criminal cases switched the presumption. She invited them to compare pages 170 and 173 of the agenda book. It was this particular change that generated the most conversation. The rule currently says a party not represented by an attorney may use electronic filing only if allowed by court order or local rule. The proposed change would be that a self-represented person may use the court's electronic filing system unless the court order or local rule prohibited the person. She asked if anyone had feedback on that, noting that everyone seemed okay with the proposal on service.

A member identified two reasons for permitting participation: the dignity of being a participant in a court proceeding and the efficiency of being able to do so. His final thought was although there were only a small number of self-represented defendants who were not incarcerated and could use electronic filing, since we did not know what would happen in the future, we might want to flip the burden, to encourage this. And then hopefully, as things moved forward, incarcerated defendants would be more able to use electronic case filing system—whether by sending it to the clerk's office by fax or by a court portal that can accept filings.

Judge Dever thanked Professor Struve for her report and continued work on that project.

Formatting of Pleadings, Incorporation of Local Rules, and Creation of a New Set of Common Rules

Next, Judge Dever asked Professor Beale to discuss the suggestions beginning on page 192 of the agenda book from Sai. Professor Beale said Sai had made four separate proposals, which were described briefly in that memo. She said that now the Appellate, Civil, and Bankruptcy Committees had removed these items from their agenda. She said she would briefly describe each, but she noted that the deck was stacked against the proposals because the other committees had already looked at them and decided not to move forward.

The first proposal was to prohibit putting names in pleadings in capitals and require correct diacritics. Sai provided a very thoughtful discussion of how many problems all capitals

and improper use of diacritics might create. It might be culturally insensitive. It might cause mistakes and create confusion between individuals.

But the current Federal Rules of Criminal Procedure did not get into any of these details, though they do say that indictments must be written. Professor Beale said it would be really quite a remarkable change to get into specifying the use of diacritics and capitals. As to the concern about the impact on sovereign citizen slash organized pseudo legal commercial type litigants, she said that the reporters were aware of no special criminal-related concerns from them.

The second proposal would move similar provisions from each set of local rules that govern the subjects to a single set of national rules, so that litigants could look in one place.

The third proposal was aimed at topics addressed in the Civil Rules, the Criminal Rules, and the Bankruptcy Rules. It proposed they be moved to a single set of common federal rules.

Professor Beale commented that the second and third proposals would be enormous projects. Adopting that structure initially might have been a good idea. But at this point, the other committees had all concluded it would be too big a lift for not enough benefit.

Finally, there was a proposal to standardize page equivalents for words and lines, but it appeared to relate only to certain sets of rules that did not include the Criminal Rules.

The question was whether the Committee should, like its counterparts, remove these suggestions from our agenda, or whether there was some enthusiasm for one or more of these proposals.

Hearing no discussion, Judge Dever said he would entertain a motion to remove it from the agenda. The motion to remove the suggestions from the Committee's agenda was moved, seconded, and removal from the agenda was approved unanimously.

Rule 15

Judge Dever recognized Professor Beale to give a report on the suggestions from Michael Kelly and Sergio Acosta, as well as Larry Krantz, who proposed amending Rule 15 to provide the defense with pretrial depositions for discovery. She noted that these two independent proposals were based on the same idea: there ought to be much more availability of depositions in criminal cases. The Kelly and Acosta proposal described in some detail their own experience in a particular case. In that case, they had demonstrated the need for and the value of depositions, but it was only because of a quirk in the particular case that the court authorized them to take depositions. Mr. Krantz came in from a different angle, describing a fairly common hypothetical fraud case and comparing the process depending on whether it was a civil or criminal proceeding. In a civil case, depositions would be available, and the client would be able to develop the evidence to support a defense. But in a criminal case, there would be no depositions, and the defendant would not be able to develop the defense. He argued a person whose liberty is at issue should have at least the same ability to defend himself as if it were just his money.

Both proposals sought at least a limited expansion of the ability to take a pretrial depositions. Kelly and Acosta explicitly sought only defense depositions, arguing that the government has many other means to collect information, including grand jury subpoenas. In exceptional cases, the proposal would permit the court to allow more than five depositions.

Professor Beale noted that the particulars were less important than the general proposal to consider expanding pretrial depositions. She noted that in the case of Rule 17, what the Committee had just adopted was not very close to what the New York bar first brought to the Committee. The question for both proposals was whether the Committee thought there might be a problem, did the Committee think an amendment could address it, and third—from the reporters' point of view—did the Committee have the bandwidth to pursue this now. Should we appoint a subcommittee now? Or would it perhaps be best to continue work on our other large projects and maybe put this off to one side with the ability to come back to it? She asked if Judge Dever might want to speak to that sequencing/scheduling issue.

Judge Dever said that in the past the Committee had placed some proposals on a study agenda to gather information before it made a decision whether to form a subcommittee. Based on the current committee work, he recommended placing these proposals on the study agenda. He noted that a number of states, though less than a majority, permitted depositions, some as a matter of right, and some with court approval, and that Judge Barbadoro had experience with that in New Hampshire.

A member asked what the study agenda was, and noted she had been intrigued to learn that thirteen states already do this. Professor Beale responded that the study agenda put proposals on hold while gathering information but not actively pursuing them, not appointing a subcommittee with a chair, and not setting meetings and deadlines. It would be a slower process, gathering some information while moving ahead with the Committee's other current projects. She observed that you can only do so much at one time, so this project might move more slowly while other projects already on the agenda were being actively pursued. Judge Dever agreed and thought there was time to learn more about the state practice, and once the Committee had more bandwidth to decide where to go with these thoughtful proposals. He noted that the Committee did have the ability to do additional research, and its existing subcommittees had benefitted greatly from Mr. Brinker's research.

Judge Dever asked whether anyone was opposed to placing the Rule 15 suggestions on the study agenda. Hearing no objections, he announced they would be placed on the study agenda.

Federal Judicial Center Report

Next, Judge Dever recognized Dr. Beth Wiggins, Director of the Research Division of the Federal Judicial Center (FJC). She drew the Committee's attention to the memo in the agenda book prepared by Dr. Tim Reagan and others. Its purpose was just to provide flavor of the kind of work the FJC was doing for other rules committees or other judicial conference committees and groups based on the research front, but also some of the educational activities related to the Committee's work. The report that Judge Burgess had described was a recent example. To get

more information about the experiences in various courts of allowing self-represented litigants to e-file, the FJC was preparing a court-to-court program on that issue. As part of that project, Dr. Reagan did an analysis of the local rules addressing the same issues.

Dr. Wiggins invited the Committee to let the FJC know if it wanted it to develop information that could inform its discussions. The FJC does a variety of different kinds of research, ranging from an analysis of local rules to quantitative types of studies, including surveying work.

Attorney Admissions

The Committee turned next to Professor Struve, who began with a brief introduction to the attorney admissions project. It arose from a suggestion to the various advisory committees by Alan Morrison and others, pointing out that among the 94 district courts, there are variations in attorney admission standards. Some districts are quite restrictive in their requirements. The Standing Committee formed a subcommittee, and Professor Struve expressed gratitude for the input Criminal Rules members Ms. Recker and Judge Birotte had provided on that subcommittee. The Subcommittee's research was ongoing, exploring possible national rulemaking responses that could address the more restrictive practices, which in the more restrictive districts required that an attorney be admitted to the state that encompassed the district to which they were seeking admission. That included districts in California, Delaware, and Florida, where that required taking the state bar exam. The Subcommittee has been conducting research on various facets of this, including how Appellate Rule 46 works out in the courts of appeals. It would be conducting outreach to a number of selected district judges to learn more about how things play out under these different approaches. She would have more information at the fall meeting. Judge Dever thanked Professor Struve for her report and her work on that project.

Closing Comments and Recognition of Outgoing Members

Judge Dever noted the last item on the agenda, drawing the Committee's attention to the next meeting on November 6, 2025, at a place to be determined. He thanked the outgoing members, Dean Fairfax, Judge Nguyen, and Ms. Recker, and invited them to make any final remarks.

Dean Fairfax said membership on the Committee had been an honor and a privilege. He expressed gratitude to Chief Justice Roberts for his initial appointment and reappointment, and to Judge Dever and Judge Kethledge for their leadership. The Rules Committee staff have been phenomenal, and he thanked the reporters for their hard work and their example. He said his journey to the Committee began when he clerked for a federal District Judge and a Circuit Judge, and particularly when he was a "baby prosecutor" in the Public Integrity Section at the Justice Department. He spent a lot of time in the grand jury, got very familiar with Rules 6 and 7. In the Eastern District of Virginia with its rocket docket he gained familiarity with many of the other Rules of Criminal Procedure. After working as a line prosecutor, and a stint in private practice,

he became a law professor. For his first article, he did archival research on the promulgation of the original Federal Rules of Criminal Procedure and learned all about this committee process, which was modeled on the Federal Rules of Civil Procedure, which had been adopted just a few years earlier. In his scholarship and teaching he had fallen in love with the Federal Rules of Criminal Procedure and the process for promulgating, studying, and revising them. Serving on the Committee had been a dream come true for him. He said he would miss everyone, and he said they all had an open invitation to the Howard University School of Law. He would love to host a mini conference or even a symposium on the eightieth anniversary of the federal Rules of Criminal Procedure in 2026. Dean Fairfax reiterated how grateful he was for everyone's hard work day in and day out. He said that anyone who was disillusioned about whether there was serious, sober, committed work being done in the public interest need look no further than this Committee.

Judge Dever told a brief story to illustrate Dean Fairfax's dedication. He had participated in one meeting via telephone while attending his daughter's final collegiate track meet. He was in the bleachers, the ultimate multitasker.

Judge Nguyen, noting she felt that the Committee had already heard enough from her for one day, said how thoroughly she had enjoyed her service on the Committee. She thanked everyone, saying it had been quite an education. She added extra thanks to the reporters and Judge Dever for their leadership and the benefit of their wisdom.

Ms. Recker said this was her second farewell speech, and she promised it would be her last one. She expressed gratitude for the six years she spent as a rules romanette member where she had the great fortune and honor to work on Rules 6, 62, and Rule 16 expert discovery. She said Rule 62 was something she would never forget. She was grateful for Judge Dever's and Judge Nguyen's leadership. She also thanked the reporters and expressed appreciation that they always took the time to listen. She was especially grateful for her bonus year. She thought Rule 17(c) exemplified the best of the rules committee process. The Committee drew on lived experience and developed a proposal making incremental changes. Judging by the day's consensus approving the rule unanimously, she thought everyone had a lot to be thankful for and proud of. All of the work would lend credibility, which was more important now than ever before.

Judge Dever again recognized and thanked Judge Bates for his work as Chair of the Standing Committee and his life of public service, noting he had modeled what being a true citizen is. Judge Dever thanked everyone, noting it was the last Criminal Rules meeting he would attend as chair. He reminded the Committee that the work would continue, and he looked forward to being on calls with everyone serving on a subcommittee as work continued over the summer. He expressed his gratitude to all of the former chairs: Judges Raggi, Molloy, and Kethledge on Criminal Rules, and Judges Sutton, Campbell, and Bates on the Standing Committee. He thanked the reporters. He said it had been a privilege to work with everyone for the last ten years, and said like a piece of tape stuck to your shoe he would see everyone at the next meeting but in a different chair.

Professor Beale presented Judge Dever with a card that everyone had signed and said that later he would receive a certificate. She noted everybody around the table wanted some way individually to thank you, and she initiated an enthusiastic round of applause.

Judge Dever congratulated everyone on Rule 17, thanked Judge Nguyen, and adjourned the meeting.