MEMORANDUM

TO: Hon. James C. Dever III, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael W. Mosman, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 12, 2025

I. INTRODUCTION

The Advisory Committee on Criminal Rules met virtually on November 6, 2025. Draft minutes of the meeting are attached.

This report presents several information items, but no action items. The information items include updates from two subcommittees, the addition of one item to the Advisory Committee's agenda, the removal of another item, and the addition of one set of proposals to related proposals already on the Advisory Committee's study agenda. Finally, the Advisory Committee heard reports on the continuing cross-committee work on attorney admissions and electronic filing by self-represented individuals.

II. SUBCOMMITTEE REPORTS

A. Rule 49.1, Reference to Minors by Pseudonyms (24-CR-A and 24-CR-C); Full Redaction of Social-Security Numbers (22-CR-B)

The Rule 49.1 Subcommittee was charged with responding to suggestions concerning references to minors and social-security numbers in public filings. At the Advisory Committee's fall meeting, the subcommittee presented a discussion draft and solicited feedback on the policy decisions reflected in the draft as well as any concerns about the language in the text and committee note.

1. Reference to Minors by Pseudonyms

As explained in the Department of Justice's suggestion (24-CR-A), Rule 49.1(a)(3), requiring that a filing may include only the initials of a minor, does not ensure the privacy and safety of child victims and child witnesses—especially in crimes involving the sexual exploitation of a child. The Department's prosecutors and victim-witness personnel have pointed out that child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and they assert that child-exploitation offenders sometimes track federal criminal filings and take other measures to uncover the identity of child victims and contact and harass the minors. The American Association for Justice and National Crime Victim Bar Association (24-CR-C) supported the Department's proposal, but they added the suggestion that the advisory committees "consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence." They state, "the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover."

The Advisory Committee expressed support for the proposed revision requiring the use of pseudonyms, rather than initials, to refer to minors in public filings. This practice is already well established among federal prosecutors, and members reported that neither defense attorneys nor the courts have experienced any problems. Moreover, subcommittee members had noted that minor victims are very fearful of being identified, and a change to address this issue would be important. Members also supported adding language to the committee note indicating that gender neutral or other non-identifying terms should be considered where possible.

The subcommittee's proposed language reflects a productive collaboration with the style consultants, who sought to streamline the rule but address concerns about unintended consequences resulting from the changes. Some practitioners who had been asked for comments on earlier versions had interpreted earlier proposed language as requiring them to first include—and then redact—certain information. The discussion draft addressed this concern by the introductory clause "if any of the following types of information appear in the filing, include only … (B) a pseudonym in place of the name of an individual known to be a minor." The draft committee note also emphasized that a filer has the option of omitting any reference to a minor's name rather than replacing it with a pseudonym.

Before the subcommittee presented its draft to the Advisory Committee, the reporter for the Advisory Committee on Appellate Rules asked several questions about the meaning of the draft provision. Does the provision protect anyone who was a minor at the time of the underlying incident involved in the litigation? Does a person who is a minor at any time during the pendency of a case retain this privacy protection for the duration of the case? Or does the protection apply only while the person remains a minor, so that once a person turns 18, absent a motion and order, the rule would permit any subsequent filings to include the person's name?

At its fall meeting, the Advisory Committee had an initial discussion of these issues to provide some guidance for the subcommittee. Members noted that the issue has seldom arisen because of the widespread practice of using protective orders. The Department's representative agreed that this is currently how things work in practice, and she said that the Department's position is that the protections apply to victims and witnesses based on their age when the crime occurred. The representative further noted that 18 U.S.C. § 3509(a)(2)(B) defines "child" to include witnesses to a crime, and § 3509(d) provides the privacy protections for minor witnesses. She said that the Department therefore thought that, at least as applied to victims and witnesses, the protections should extend based on when the event happened that makes the person relevant to the case. The Department did not have a strong view on whether this should happen through protective orders, or local rules that are more specific.

Finally, members expressed no concern about the subcommittee's suggestion that the text of the rule should explicitly mention exhibits and attachments. This was intended to address the finding of the Federal Judicial Center that most of the unredacted material in public filings appears in exhibits and attachments.

2. Complete Redaction of Social-Security Numbers

Senator Ron Wyden (22-CR-B) expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules—permit filings to include the last four digits of social-security numbers.

Although all have agreed that neither the prosecution nor the defense need the last four digits of social-security numbers in public filings in criminal cases, the subcommittee thought it was important to understand whether there was any harm in including this information in public filings. Rules Law Clerk Kyle Brinker provided an excellent research memorandum explaining how this information could be misused by identity thieves and fraudsters.[1] Moreover, a variety of government agencies now consider full redaction to be a best practice.

The subcommittee concluded the case had been made for complete redaction of social-security numbers in Rule 49.1, and the Advisory Committee agreed with this recommendation.

[1] To avoid providing any sort of roadmap for misuse of this information, Mr. Brinker's memorandum has not been included in the public record.

3. Complete Redaction of Other Taxpayer-Identification Numbers

The Advisory Committee also expressed general support for the subcommittee's recommendation that *all* taxpayer-identification numbers be treated like social-security numbers in public filings, i.e., the filer must either omit or completely redact them. The Internal Revenue Service (IRS) recognizes four principal types of taxpayer-identification numbers: Social-Security Numbers (SSN), Individual Taxpayer-Identification Numbers (ITIN), Adoption Taxpayer-Identification Numbers (ATIN), and Employer-Identification Numbers (EIN). All these taxpayer-identification numbers implicate privacy interests. ATINs arise from adoption proceedings, and EINs also implicate privacy interests in at least some cases, such as EINs obtained by families who employ nannies or housekeepers who work in their homes.

Additional research by Mr. Brinker found that there is some risk of misuse of the last four digits of ITINs by fraudsters and identify thieves (though less than that for the last digits of SSNs), but that there was little information available on criminal misuse of ATINs and EINs. The Department of Justice's representative at the November meeting stated that DOJ was aware of no instance of fraud from the use of an ATIN or fraud on an EIN holder. There are many instances where a defendant will use an EIN to commit fraud on the government, but the DOJ had not seen identity theft of someone using an EIN.

Despite the lesser risk of criminal misuse of ATINs and EINs, no member expressed disagreement with the subcommittee's view that in the absence of any need for their inclusion in public filings, Rule 49.1 should prioritize privacy, avoid even the small possibility of criminal misuse of this information, and require full redaction of *all* taxpayer-identification numbers. However, Judge Harvey noted the importance of consistency and uniformity across the various privacy rules, and he stated that the Advisory Committee would need to return to these issues in the spring after hearing the views of other committees.

4. Next Steps

Although Criminal Rules has taken the lead on these suggestions, they implicate the other privacy rules as well. To the extent possible, the current Appellate[2], Bankruptcy, Civil, and Criminal Rules privacy rules are parallel and consistent. Accordingly, the discussion draft was shared with these other committees for discussion at their fall meetings, and the working group of reporters will attempt to develop parallel proposals for consideration at the spring meetings. The distinctive requirements of bankruptcy practice may preclude complete uniformity.

[2] There is no freestanding appellate privacy rule. Rather, Appellate Rule 25(a)(5) provides that in an appeal in a case in which privacy was governed by the bankruptcy, civil, and criminal privacy rules, those rules govern as well on appeal. Thus Criminal Rule 49.1(a) governs in criminal appeals.

B. Rule 40, clarifying procedures after arrest in one district under a warrant issued in another district for violating a condition of release pending trial, sentencing or appeal, or for failing to appear as required by subpoena (24-CR-D & 23-CR-H)

The Magistrate Judge's Advisory Group (MJAG) and Judge Zachary Bolitho have both recommended clarification of Rule 40, which governs arrest for failing to appear in another district or for violating conditions of release set in another district. Judge Harvey provided a report on the work of the Rule 40 Subcommittee, which he chairs.

The subcommittee reached tentative decisions on most of the principal policy issues that concern arrests for violations of conditions of release pending trial, sentencing, or appeal. The subcommittee decided to focus exclusively on Rule 40 (rather than also considering changes in Rule 5, which includes provisions regulating procedures after an initial arrest in a district other than where the defendant was charged).

Members agreed unanimously that Rule 40 should be amended to clearly recognize the right to a provisional detention hearing in the arresting district. This decision agrees with the weight of existing authority, which holds that 18 U.S.C. § 3148(b) does not bar the magistrate judge in the arresting district from releasing the defendant on conditions and allowing the defendant to report in the jurisdiction that issued the warrant.

In his report to the Advisory Committee, Judge Harvey also briefly reviewed a variety of other tentative decisions by the subcommittee, including the following:

- Rule 40 should cite the statutory standard for the release/detention hearing in the arresting district without more detail about the burden of proof or showing required.

- The rule should inform a defendant of the right to consult with counsel if the defendant is already represented, as well as the right to appointment of counsel if the defendant is not presently represented.

- The rule should require the government to produce proof of the warrant and require the judge to find that the defendant is the same person named in the warrant.

- The defendant should be able to consent to appear by videoconferencing.

- The provision in Rule 5(c)(3)(E) requiring the transfer of papers and "any bail" should apply in the Rule 40 context, at least for arrests on violations of pretrial release.

- The rule should include a provision similar to Rule 5(d), which requires a warning at the initial appearance that the defendant has a "right not to make a statement, and that any statement made may be used against the defendant."

- Unlike Rule 5, Rule 40 should not provide for a preliminary hearing, require advice about consular notification, or information about Rule 20.

Advisory Committee members expressed no concerns about these preliminary decisions.

Judge Harvey said the subcommittee would continue its work and draft language to incorporate these decisions. He noted that the subcommittee had not yet considered what changes, if any, to recommend to the language in Rule 40(a) that addresses arrests for "failing to appear as required . . . by a subpoena." The subcommittee initially recommended that witness arrests remain in Rule 40, though more research will be needed to understand the appropriate procedures in such cases.

III. NEW SUGGESTION: RULE 11, ADVICE TO DEFENDANTS (25-CR-N)

Judge Patricia Barksdale suggested (25-CR-N) that the Advisory Committee consider amending Rule 11(b)(1)(M) of the Federal Rules of Criminal Procedure, which requires that before a guilty plea, the judge must determine that the defendant understands "in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a)." Judge Barksdale suggested deleting the language "possible departures under the Sentencing Guidelines," in light of the new amendments to the Sentencing Guidelines. Those amendments, effective November 1, 2025, removed separate consideration of departures when applying the Guidelines, reducing a three-step process to two steps.

Judge Mosman invited discussion of the proposal, and members generally agreed that the Guideline amendments warranted reconsideration of this language in Rule 11, as well as reconsideration of Rule 32(h), which presently prohibits departures on grounds not identified in the presentence report or party submissions, unless prior notice is provided to the parties.

Judge Mosman subsequently appointed a new subcommittee to consider these issues.

IV. ITEM REMOVED FROM THE ADVISORY COMMITTEE'S AGENDA: Rule 15, "Broadcasting" to Individuals and Good-Cause Exceptions (Rule 53) (25-CR-I)

Judge Edmond Chang requested consideration of amendments to Rule 53's blanket prohibition of broadcasting from the courtroom in criminal cases. He suggested two possible amendments:

> (1) a clarification of Rule 53 to make explicit that the "broadcasting" bar covers transmission to single individuals, not just to the general public; and
>
> (2) good-cause exceptions that (a) would permit broadcasting to "crime victim[s]," as defined in 18 U.S.C. § 3771(e)(2), and possibly permit remote participation by victims; and (b) would permit broadcasting to, and remote participation by, third-party custodians at bail hearings.

Just one year ago, in 2024, the Advisory Committee completed a thorough review of the rule. After considering these issues within a broader framework, it recommended no change to the

rule. In addition, with regard to the specific issue of broadcasting to victims, Congress acted by passing the Lockerbie Victims Access Act, Pub. L. No. 118-37, 138 Stat. 11 (2024).[3]

Although there is no strict rule precluding reconsideration only one year after the Advisory Committee has declined to pursue a similar proposal, the Advisory Committee's resources are limited. Accordingly, the chair announced that he was tabling Judge Chang's proposals at this time.

V. RECEIPT OF ADDITIONAL SUPPORT FOR ITEM ON STUDY AGENDA

At the April meeting, two proposals to amend Rule 15 to allow for pretrial depositions were placed on the Advisory Committee's study agenda. At the November meeting, the Advisory Committee was informed that there was strong support for these proposals within the defense community. The reporters described six more letters that backed the idea of adding depositions to Rule 15. They also noted that an additional eight suggestions supporting the pretrial depositions had come in just before the meeting, after they completed the agenda book. An Advisory Committee member stated that she had received 21 additional letters signed by 59 lawyers from across the country —some from very prominent large law firms, some from boutique law firms, and some from solo practitioners.

Judge Mosman reaffirmed that the issue was on the study agenda for the time being because the Advisory Committee did not currently have the bandwidth to undertake the project. He reiterated that he took this project very seriously and wanted to devote the right effort to it at the right time. Placement on the study agenda will facilitate that. It allows the Advisory Committee to keep hearing from more people, and to seek more information, so that if a subcommittee is established, it will have something to start with instead of starting with a blank slate.

VI. CROSS-COMMITTEE PROJECTS

A. Self-Represented Litigant Access to Electronic Filing

Professor Struve reported on developments in the working group as well as discussions of potential rules in the other advisory committee meetings. Members provided input on issues presented by Professor Struve.

B. Unified Bar Admissions

Professor Struve also provided an oral report on the work of the joint subcommittee.

[3] For a discussion of the Act, and the various safeguards the court imposed to provide for secure victim access, see *United States v. Al-Marimi*, 761 F. Supp. 3d 16 (D.D.C. 2024).

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 6, 2025

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (the "Committee") met by videoconference on November 6, 2025. The following members, liaisons, reporters, and consultants were in attendance:

Judge Michael Mosman, Chair (in-person in Washington, D.C.)
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Thomas M. Durkin
Judge Michael Harvey
Marianne Mariano, Esq.
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Sonja Ralston, Esq.[1]
Justice Carlos Samour
Professor Jenia Turner
Mary Jo White, Esq.
Brandy Lonchena, Esq., Clerk of Court Representative
Judge James C. Dever, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter (in-person in Washington, D.C.)
Professor Nancy J. King, Associate Reporter (in-person in Washington, D.C.)
Professor Catherine T. Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee (in-person in Washington, D.C.)
Sarah Sraders, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff (in-person in Washington, D.C.)
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff (in-person in Washington, D.C.)

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

Opening Business

Judge Mosman opened the meeting and welcomed the attendees. He noted that there were no representatives from the Federal Judicial Center present, as they were unable to attend due to the ongoing government shutdown.

Judge Mosman then briefly introduced the three new members of the Committee. The new academic member, Jenia Turner, is the Amy Abboud Ware Centennial Professor of Criminal Law at Dedman School of Law at Southern Methodist University. Judge Mosman said that Professor Turner's work has had a real-world impact, and her article on transparency in plea bargaining was recently cited by the United States Supreme Court.

Judge Mosman next introduced Mary Jo White, a partner at Debevoise & Plimpton LLP. Judge Mosman stated that Ms. White's focus was on high-stakes criminal defense and pre-enforcement work, among other things. Ms. White was the first female United States Attorney in the Southern District of New York, and possibly the only person to ever have been U.S. Attorney in both the Eastern District and Southern District of New York. She also previously served as chair of the Securities and Exchange Commission.

Next, Judge Mosman introduced the third new member, Judge Thomas Durkin, now a senior judge in Chicago, and a highly experienced trial judge. Judge Mosman said Judge Durkin spent almost 20 years as a partner at Mayer Brown before taking the bench, and had a full career before that as an Assistant U.S. Attorney, including being the First Assistant in the Chicago office.

Judge Mosman then introduced a new Rules Committee staff member, Sarah Sraders, who joined the Rules Office over the summer. Ms. Sraders previously worked as a litigation associate in two law firms in D.C. and was a law clerk to Judge Mark Goldsmith in the Eastern District of Michigan.

Judge Mosman expressed his gratitude to the Rules Committee Staff for their help during the government shutdown. He noted that they were not being paid and recounted an email exchange with Carolyn Dubay before Phase II of the shutdown began. Judge Mosman had expressed his sympathies for how rough the situation must be. Ms. Dubay had hoped that it would be over soon, but said that either way, the Rules Committee Staff had a job to do and it would therefore get done. Judge Mosman described this as the epitome of public service and said that the Committee was thankful for their help.

Judge Mosman then explained how the virtual meeting would proceed. The small group present in Washington, D.C. would turn off the camera and sound in the conference room during breaks. Members who were attending remotely should use the "raise hand" feature on Teams, or raise their hand, if they have something to say. Otherwise, everyone should remain muted. Judge Mosman stated that there was no preference as to whether members' cameras were on when they were not presenting.

Judge Mosman then turned to the draft minutes from the April 2025 Advisory Committee meeting, and called for a motion to approve the minutes. The motion passed unanimously.

Noting that the agenda book included draft minutes from the June 2025 meeting of the Standing Committee and the September 2025 report to the Judicial Conference, Judge Mosman turned to Ms. Dubay for a report on the status of proposed amendments to the Federal Rules. Ms. Dubay directed the Committee's attention to page 134 of the agenda book and noted that there are currently no criminal rules set to be implemented as final rules. The rules that were submitted for final approval to the Judicial Conference were approved. They were transmitted to the Supreme Court on October 16, 2025, and she would deliver them to Congress in April 2026 to become effective next December.

Professor Beale then provided an update on Rule 17, which was published for public comment in August. She gave a brief description of how the process works in general for the benefit of new members and members who have not yet seen a rule work all the way through the process. Rule 17 is now out for public comment, meaning that it has been posted online and has been mailed to various persons who would naturally be interested. The comment period runs until mid-February. The last time that Professor Beale checked, only one comment had been submitted. She cautioned that this does not mean that there will not be a large number of comments, as her experience is that most of the comments come in at the very end of the comment period. The comments can range from very specific comments about the wording of a proposal to more general agreement or disagreement with the purpose of the amendment. The comments would all be considered by the Rule 17 Subcommittee.

Professor Beale also noted the possibility that there would be requests for a hearing. There have not been hearings in recent years, but this is a big enough change that it is possible. The Rule 17 Subcommittee would work through all of the comments received and then present a report to the full Committee at the April 2026 meeting. Professor Beale expressed her hope that the subcommittee would be able to propose that the amendment be approved for presentation to the Standing Committee and ultimately to the Supreme Court and then to Congress. Committee members should therefore expect to see the results of the public comment period at the April meeting, along with a recommendation from the subcommittee.

Judge Mosman noted that prior to becoming Chair of the Committee, he had been serving as liaison to the Evidence Rules Committee, and pointed out that the Status of Proposed Amendments chart in the agenda book contained three fairly significant proposed amendments to the Evidence Rules: Rules 801, 609, and new Rule 707.

Judge Mosman then asked Ms. Sraders to walk through the chart of pending legislation that would directly or effectively amend the federal rules. Ms. Sraders directed the Committee's attention to page 141 of the agenda book, highlighting the Rape Shield Enhancement Act of 2025. The Act would require the Judicial Conference to identify certain amendments to Rule 16 that would narrow the scope of permissible discovery requests to limit inquiries into the records or history of an alleged victim of sexual assault. Ms. Sraders noted that there had been no action taken on the bill since it was introduced, but that the Rules Committee Staff would continue to monitor it.

Rule 49.1

Judge Mosman then asked Judge Harvey for the Rule 49.1 Subcommittee's report. Judge Harvey explained that the subcommittee had been hard at work since the last meeting. It had met several times, resolved the remaining policy issues, and worked with the style consultants on drafting language to amend Rule 49.1, which governs privacy protections in public court filings. The subcommittee had also worked very hard on that proposed draft language amending the rule. Judge Harvey stated that this was his first time drafting language, and he had mistakenly expected it would be fairly simple. It was not simple—the draft language in the agenda book went back and forth with the style consultants several times. Judge Harvey said that the subcommittee was very grateful for their help and for the help of the reporters. He noted the excellent memo found at page 145 of the agenda book. Judge Harvey also thanked Kyle Brinker, the former Law Clerk to the Standing Committee, for his research memos, which had been invaluable to the subcommittee's work.

Judge Harvey directed the Committee to page 153 of the agenda book, where the proposed draft language started. There was a clean and red-lined version, as well as a draft committee note. He asked for the Committee's feedback, noting that despite all the work that had been done, errors could still occur. Judge Harvey pointed out that Ms. Ralston had discovered a word that slipped into the draft language which did not belong there, in subparagraph (a)(2)(C). This portion of the rule governs financial account numbers, which had been outside the scope of the subcommittee enquiry. The draft amended version required no redaction of "the last four digits of an individual's financial account number." Judge Harvey explained that current Rule 49.1(a)(2)(C), refers to financial account numbers, not "an individual's financial account number." Judge Harvey thought that the words "an individual's" should not be included, and the reporters agreed. This language would be removed from the draft.

Judge Harvey then highlighted some of the decisions that the subcommittee had made, which were reflected in this draft. He explained that the subcommittee's work focused on consideration of two substantive changes to Rule 49.1: (1) replacing the use of initials with pseudonyms for minors in public criminal filings; and (2) requiring the complete redaction of social-security numbers (SSNs) and other taxpayer-identification numbers from public filings.

As the subcommittee had previously reported, it had unanimously decided from the outset to require the use of pseudonyms instead of minors' initials in public filings. Both the Department of Justice and the victim advocacy organizations that submitted the proposals triggering this review had emphasized that using initials with respect to minors does not adequately protect their privacy or safety. Use of the minor's initials can allow identification when combined with other information in the record.

Judge Harvey further explained that, as the subcommittee had discovered, the use of pseudonyms was already standard practice for federal prosecutors, and this had not caused a problem for defense counsel or the courts. In a sense, he said, this part of the proposal was simply catching up to what is already occurring. Judge Harvey noted that the proposed draft also made clear that filers may either substitute a pseudonym or simply omit the minor's name entirely from the filing.

Judge Harvey stated that the subcommittee has also recommended language in the committee note encouraging gender-neutral or otherwise non-identifying pseudonyms where feasible. This is the result of a recommendation of one of the victim advocacy groups and is meant to reduce the risk that gendered names or pronouns, when combined with other case facts, could make it easier to identify a minor. Judge Harvey acknowledged that the government's evidence may sometimes not be gender-neutral, making the use of gender-neutral pseudonyms not feasible, which is why this was drafted as a recommendation is in the note rather than a requirement in the text of the rule.

Judge Harvey observed that there were questions raised in the reporters' memo, and he asked for feedback from the full Committee. He first noted that someone (he believed someone from one of the other rules committees) had questioned whether the protection for minors in this rule would extend only to individuals who were minors at the time of the conduct at issue, or only to those who were minors during the pendency of the case. That is, should the protection apply only when the person is a minor, such that once the person turns 18, later filings would revert to using the individual's name unless the court orders otherwise? Judge Harvey noted that this question had been raised after the last subcommittee meeting, so the subcommittee had not discussed it, but was interested in hearing the full Committee's view.

Professor Beale added that these questions are being considered by all of the sister rules committees as well, because the current privacy rules are parallel to the extent possible. There was an ongoing effort to determine whether the Civil, Bankruptcy, and Criminal Rules were on the same page, and whether the Appellate Rules would continue to adopt the other rules by reference or require full redaction. She noted that there has been some discussion in the other committees this fall, and again emphasized that input from the full Committee to guide the Rule 49.1 Subcommittee would be helpful.

Professor Beale went on to say that the subcommittee has staked out a position beyond Senator Wyden's proposal (which only concerned social security numbers) to expand to taxpayer identification numbers, including employer identification numbers. She noted that Professor Marcus, in the Civil Rules Committee, had questioned why the subcommittee had gone beyond what Senator Wyden had proposed. Professor Beale stated that the Rule 49.1 Subcommittee thought that once it started looking at SSNs, it should also consider the closely related issue of taxpayer identification numbers. Once it started thinking about that issue, it considered whether its scope should be limited to just the individual taxpayer identification numbers or whether it should consider employer identification numbers as well. She stated that the subcommittee was looking for input from the Committee on those policy decisions as well as any comments about the specific language.

Professor Beale also echoed Judge Harvey's comment about the issue raised by Professor Hartnett regarding what should happen when an individual ages and is no longer a minor. She commented that it was surprising to her that this issue had not arisen since the privacy rules were originally enacted.

A member responded that the reason this had not previously come up was because there was often a protective order in such cases. It was not uncommon that some of the victims in sex offense cases—particularly victims of child pornography—are adults. She stated that these

individuals are protected with a pseudonym. Although she could not recall seeing such individuals called for a hearing, she was confident that in such cases, their identities would remain protected.

The member said that there may be a different type of offense where a family member is a minor. She said that even when such a person becomes an adult, their identify is usually considered protected information by an order of the court. The defense member said that for her, the issue concerns minors who are not victims, such as defendants who were minors during some portion of the offense. They may be a minor at one point and then an adult at a different point of a conspiracy. Those are not often identities that are protected. The member asked what happens in civil or bankruptcy cases when the minor is not a victim—for example, if a minor saw something happen, and then, by the time the case goes to trial, they are an adult. She observed that witnesses are generally not anonymized, and the public has a right to know who they are as part of the process.

The member suggested that the reason there is no case law on the issue was because there are very active protective orders protecting identities of people who were victimized as minors even once they are adults. This happened organically on a case-by-case basis. The member thought that this approach made more sense than trying to amend the rule, which would broadly affect other types of litigation.

Ms. Ralston agreed that this is currently how things work in practice. The DOJ's position is that for victims and witnesses, the protections apply based on the event in question (when the crime occurred). She further noted that 18 U.S.C. § 3509(a) defines "child" to include witnesses to a crime, and then subsection (d) provides the privacy protections for those people. She said that the DOJ therefore thought that, at least as applied to victims and witnesses, the protections should extend based on when the event happened that makes the person relevant to the case. The DOJ did not have a strong view on whether this happens through protective orders or local rules that are more specific. Ms. Ralston commented that it might be useful to clarify in the committee note that the Committee believes the rule applies to victims and witnesses. She also noted that the practice for juvenile defendants had been to refer to them by their initials, at least in indictments, but deferred to the defense member's experience in this regard as there are very few juvenile defendants in federal court.

Judge Harvey asked whether anyone else had thoughts on this issue. No one responded, and Judge Harvey then highlighted a few other aspects of the subcommittee's recommendation. He noted two other issues. First, the subcommittee thought it was clear that SSNs should be completed redacted or omitted from public filings. As reflected in the memo from Kyle Brinker, there is a vulnerability resulting from including these numbers. This is also consistent with best practices across federal agencies, so the Rule 49.1 Subcommittee felt confident that this was the appropriate position for the Criminal Rules.

The more difficult issue, Judge Harvey stated, is the treatment of taxpayer identification numbers. He explained that there are essentially three different numbers at issue: individual taxpayer identification numbers (ITINs), adoption taxpayer identification numbers (ATINs), and employer identification numbers (EINs). The subcommittee's recommendation is that all of these numbers should be treated like SSNs, and either fully redacted or omitted from public filings.

Judge Harvey noted a difference between what the subcommittee was proposing and what the present rule permits or requires with respect to EINs. In 2004, when this issue was first considered, the e-Government Committee decided to treat individual or personal taxpayer identification numbers different than EINs. At that time, they believed that EINs were only being used for tax purposes. Judge Harvey did not know whether that decision was right or wrong at the time, but stated that Kyle Brinker's research shows that EINs are now used far beyond simply filing taxes. Not unlike SSNs, they are part of applications made by businesses for credit, for loans, or for opening bank accounts. There are also issues with fraud with respect to EINs. The Rule 49.1 Subcommittee therefore believed that if the Committee can come forward with a rule that does not assist fraud, that would be a good thing.

Judge Harvey further stated that EINs can implicate personal privacy. They are used not only by businesses. Individuals who have nannies in their homes must obtain an EIN, and that EIN is nothing more than the business of having a nanny in the home. Judge Harvey found it compelling that the Tax Court requires full redaction of all of these taxpayer identification numbers, and the IRS treats them as confidential.

Judge Harvey emphasized that the subcommittee saw no need for any of these numbers to be disclosed in public criminal filings. Members could not recall any time when that would be necessary. To the extent the number was somehow relevant to a criminal proceeding, a party could file it under seal and file a redacted version publicly. He emphasized that the subcommittee was unwilling to accept even a modest risk of potential abuse of these numbers as a result of their disclosure in public criminal filings.

Judge Harvey did note, however, that this is a change. He also acknowledged that even though the research provided to the subcommittee demonstrated very real vulnerabilities with respect to SSNs, it became harder to see the vulnerabilities as one moved through the various tax identification numbers. ITINs are closest to SSNs in terms of the vulnerabilities, but at the other end of the spectrum are the ATINs, which are temporary. ATINs are required as part of the adoption process, but once the process is completed, that individual receives an SSN. Thus, ATINs are fleeting, and Judge Harvey could not recall any case law that even dealt with these on the criminal side. As for EINs, Judge Harvey noted that there are some requirements for public disclosure of EINS. Some companies must disclose their EINs in various public filings. He acknowledged that one could make the argument that, if the EINs must be publicly disclosed there, why should they not also be disclosed in criminal filings? Judge Harvey asked for the Committee's feedback on this issue.

Judge Mosman said that he suspected there was widespread agreement on some of the subcommittee's more basic assumptions. He asked the Committee whether anyone disagreed with the proposition that the Committee move forward with the suggestion to delete the last four digits of SSNs. No one did.

Judge Mosman then asked whether anyone disagreed with the removal of other forms of taxpayer identification numbers.

Ms. Ralston responded that it might be useful to break these into three pieces. In her view, the ITINs—which were clearly covered by the current rule and were similar to SSNs—

were differently situated from the other two types of numbers. And she thought that had been the subcommittee's view as well.

Judge Harvey agreed that the subcommittee had viewed ITINs as the "easiest" issue to deal with. They are treated the same as SSNs under the current rule, and are used like SSNs. He asked whether anyone objected to the subcommittee's proposal that ITINs should be fully redacted from public criminal filings. No one objected.

Judge Harvey next turned to ATINs, noting that these are the least prevalent, but do relate to an individual. He said they arguably fall under the current rule, which refers to individual taxpayer identification numbers. They do relate to an individual. And although the risk of misuse was not as great as that for ITINs and EINs, it was not zero. He asked whether anyone objected to treating ATINs the same as ITINs and social security numbers; that is, requiring their complete redaction from public criminal filings.

Ms. Ralston responded that there had been many discussions on this issue within the last month at the DOJ. The DOJ learned that no one had seen any fraud involving ATINs because they expire so quickly, and they are only used for tax purposes (to claim the child tax credit and to claim the child as a dependent on tax forms). Nor had the DOJ uncovered any instance of fraud on an EIN holder. There are many instances where a defendant will use an EIN to commit fraud on the government, but the DOJ had not seen identity theft of someone using an EIN.

Judge Harvey asked if the DOJ was taking a position on ATINs. Ms. Ralston responded that in the DOJ's view, consistency with the Civil Rules on this issue was important. If the Civil Rules Committee decided not to require redaction of ATINs, DOJ saw no need for the Criminal Rules to differ, because DOJ had not seen a real identity-theft-type risk related to ATINs. In contrast, for the ITINs, DOJ thought that they should be fully redacted in the Criminal Rules regardless of what the Civil Rules did. DOJ felt the same about the issue regarding the use of pseudonyms for minors.

Ms. Ralston also explained that because of the way certain documents are structured, certain numbers may end up being fully redacted regardless of whether the rule requires it. As an example, if someone is completing a tax form to claim a child as a dependent, the field may say "Social Security Number," and the person writes the ATIN in that field. People would later redact that number because the completed field was labeled "Social Security Number" and the person may not know that this is actually an ATIN that would (hypothetically) not require redaction. The DOJ representative said that the complexity of specifying this in the rule might outweigh the benefit.

Judge Harvey stated that this was a good point, and he emphasized that this was not the last time that the Committee would see this proposal. The other rules committees have also been considering amendments to their own rules, and there may be disagreements between the committees. This might be an area where the desire for uniformity might change some subcommittee members' views about how ATINs or EINs should be treated. Judge Harvey stated that there would be another opportunity to discuss these issues at the spring meeting, with the benefit of input from the other rules committees.

Professor Beale said that the Committee has some input now, as the other committees had some discussion of this issue at their recent fall meetings. Further, the Committee knew that the Bankruptcy Rules Committee has all along taken the position that it will still require the last four digits of SSNs. She said that the question of uniformity is certainly going to be raised.

Judge Dever explained that this issue did come up at the Civil Rules Committee's recent meeting. He asked Ms. Ralston to coordinate with Ms. Shapiro, who had raised concerns about EINs at the Civil Rules Committee meeting. Judge Dever had told Ms. Shapiro and the Civil Rules Committee that this Committee would be discussing this proposal at this meeting.

Judge Dever further stated that the subcommittee's proposal was not saying that the courts cannot have this information. Instead, it is simply not included in a public filing. The Rule 49.1 Subcommittee did not see why this information needed to be made public, and its proposal was consistent with how the Tax Court and IRS treat EINs. Judge Dever questioned what policy reason there would be for the rule to not treat all taxpayer identification numbers, including EINs, the same. Judge Dever asked DOJ to think about what the policy reason is to have EINs publicly disclosed in court filings given the ability of people engaging in sophisticated fraud schemes to use that information to commit fraud.

Professor Struve echoed Judge Dever's comments, and she added that bankruptcy is a "different world" on EINs, because EINs are necessary for purposes of the automatic stay. In fact, there is a bankruptcy form that requires entire EINs. She said that in the Appellate Rules Committee, the current rule picks up whatever rule applied below, but that committee is considering the possibility of adopting a provision that would expand protection beyond what applied below to cover the full redaction requirement for SSNs and taxpayer identification numbers. Professor Struve said that this should not change what the Criminal Rules Committee is doing. The only operative question is whether there is any reticence about the differences with the Bankruptcy Rules Committee, the reasons for which are well-supported.

Ms. Ralston commented that it was in response to what happened at the Bankruptcy Rules Committee meeting that the Department of Justice was able to discuss the issue more in-depth internally. She had spoken with Ms. Shapiro at length and with DOJ leadership to come to the view that consistency among committees, to the extent possible, is DOJ's higher priority.

Ms. Ralston further stated that the argument against redacting is that there is a presumption of public information. There needs to be a reason to remove these numbers from the record, rather than the presumption being that these numbers are private and there should be a reason to have them publicly filed.

Professor Beale said that this was a very interesting question, whether there is a presumption that private, individual information should be known once there is a criminal or civil filing, particularly if, in the criminal context, neither the prosecution nor defense nor clerks of court could see any reason why this information was useful in a public filing. She said that the question what is the proper starting point presumption, was a great one. She noted that there are no demonstrated incidents of, for example, fraud or identity theft of ATINs. On the other hand, they are the records of individuals, and if there is no need for their inclusion in public filings, it tees up exactly that kind of question. As for employer identification, Professor Beale noted that

the subcommittee heard that issue come up—why, if someone is hiring a nanny or a housecleaner, do they need to have a number that is in public filings? Whose business is that?

Judge Harvey asked whether the reporters needed anything further from the Committee on this issue. Professor Beale answered that they will be able to move forward and will be finding out more information from the other committees. They hope to bring this to the April meeting for final action of a proposal that would then go forward through the amendment process.

Professor Beale flagged one last issue—whether the proposed rule should explicitly mention exhibits and attachments. This language was bracketed in the draft because the reporters thought that it might raise eyebrows, but she gathered that, in the other committees, it did not. Ms. Dubay confirmed that it did not raise eyebrows in the other committees. Professor Beale said that, unless anyone said otherwise, the proposal in April will include this language. She stated that this would address what the FJC found was the most common place that things which are already supposed to be redacted show up. She thought it seemed like a good idea to remind people, in the text of the rule, that the rule covers attachments and exhibits.

Judge Harvey thanked everyone for their consideration and said that this issue would be back before the Committee in the spring.

Rule 40

Judge Mosman then asked Judge Harvey to present the next issue. Judge Harvey told the Committee that the Rule 40 Subcommittee had met several times over the last several months and made substantial progress in clarifying how an amended Rule 40 should address procedures before the magistrate judge in the arresting district when a defendant is arrested on an out-of-district warrant alleging a violation of release conditions pending trial, sentencing, or appeal. The subcommittee has reached a tentative agreement on most of these principal policy issues, and Judge Harvey thanked the reporters and Kyle Brinker for their help.

Judge Harvey stated that the subcommittee did not yet have language to present to the Committee. Instead, the subcommittee wanted to update everyone on the decisions made to date and find out whether there is any feedback from the Committee on these issues.

The first issue, and one that the subcommittee thought was the most important, was whether the defendant should have a provisional detention hearing before the magistrate judge in the arresting district. Judge Harvey explained that at this hearing the defendant can seek release on conditions, for example, that he voluntarily report to the district that issued the warrant. Or, alternatively, the government can obtain the defendant's detention pending the defendant's transfer to the issuing district for further proceedings on the warrant. The Rule 40 Subcommittee unanimously felt that there should be such a hearing. This is what the case law has held, and it is the current practice in the vast majority of district across the country. Judge Harvey noted that there may be a handful of magistrate judges who proceed otherwise, and the subcommittee thought that it would be helpful to clearly state in Rule 40 that there is a right to such a hearing in the arresting district.

Judge Harvey said that the subcommittee had also agreed that the amended rule should cite to the relevant provision of the Bail Reform Act where the detention or release standard can be derived: Section 3142 for cases involving violation of pre-trial release; section 3143(a) for violations of post-conviction, pre-sentence release; and section 3143(b) for release pending appeal.

The second threshold issue was whether the Committee should clarify Rule 5 to the extent that some of the ambiguities in Rule 40 arise from issues with Rule 5. Judge Harvey stated that he was interested in exploring that further, but the subcommittee had decided that for now, it should stay focused on the assignment at hand, clarifying Rule 40.

The subcommittee has come up with a list of procedures, not unlike those in Rule 5 or Rule 32.1, to assist the magistrate judge in the arresting jurisdiction. Judge Harvey explained that those additional procedures would include reminding defendants that they have a right to consult with their existing counsel when Rule 40 issues arise. The defendants have already appeared in the charging jurisdiction and already have an attorney. It is important that they are allowed an opportunity to consult with their existing counsel or, if they are unrepresented, that they have a right to appointed counsel. The subcommittee had also discussed acknowledging the common practice of allowing local public defenders in the arresting district to serve as stand-in or courtesy counsel after consulting with counsel in the charging or issuing district.

Judge Harvey said that the subcommittee also thought it important that the amended rule include a reminder of the defendant's right to remain silent, recognizing that defendants in Rule 40 situations are often appearing in an unfamiliar district and without ready access to their regular counsel. The subcommittee thought that it could not hurt to tell defendants again that they have a right to remain silent.

The subcommittee had also concluded that there is no right to a preliminary hearing in this situation. Case law is consistent on this point. No case has recognized a right to a preliminary hearing with respect to violations of pre-trial, pre-sentence, or post-conviction release. The subcommittee had therefore agreed not to include any notification of a right to a preliminary hearing at the proceeding before the magistrate judge in the arresting district.

The subcommittee did think that it was important that the defendant be allowed an identity hearing. Judge Harvey explained that it is always important to make sure that the correct individual has been detained when they are brought in on a warrant. The defendant is allowed a hearing unless they waive it.

The subcommittee also thought that the government should be required to produce the warrant in the case, consistent with what Rule 5 requires. The subcommittee also favored carrying over the language from Rule 5 that requires the clerk's office in the arresting district to transfer all the papers and any bail to the issuing district. However, the subcommittee had deferred its decision on whether the government should also be required to produce the paperwork underlying the warrant; that is, the actual application filed by pre-trial services that caused the warrant to be issued. The subcommittee wanted to look more closely at what the practice is and ensure that the paperwork is available to pre-trial in the arresting district.

With respect to video conferences, Judge Harvey explained that the subcommittee was not anticipating any change to what is already available in Rule 40. The rule permits video appearances in a Rule 40 proceeding. The defendant may be in jail or some other holding facility and appear before the magistrate judge by video, if the defendant consents. The subcommittee disagreed with the Magistrate Judges Advisory Group's suggestion that Rule 40 should permit video between the defendant and the district that issued the warrant, to hold an initial proceeding on the warrant, the initial detention hearing, or a revocation hearing remotely. Judge Harvey said that this would be a large change in present practice, and there would be many logistical difficulties trying to allow for the charging district to have remote proceedings in the arresting districts for these Rule 40 warrants.

Judge Harvey said that the subcommittee saw no need to restate advice about the circumstances under which the defendant may secure pre-trial release. This is in Rule 5, and the defendant would have already been told that at their initial appearance on the underlying charge in the charging district. The subcommittee saw no reason to repeat this in Rule 40. In any event, the magistrate judge does not need to describe to the defendant the circumstances for pre-trial release, because the hearing in which the defendant will be seeking release happens almost immediately. Similarly, the subcommittee saw no need to repeat advice about consular notification or the possibility of a Rule 20 transfer. This does not fit in with what is happening in the Rule 40 context.

The subcommittee also decided not to address in Rule 40 whether the magistrate judge in the issuing district may modify a detention or release order entered by a magistrate judge in the arresting district. Judge Harvey noted that this was an issue of some confusion in the case law, and that he had encountered this in his own district as well. A defendant who appears in front of Judge Harvey has been detained by a magistrate judge in another district, or has been released on conditions. In both situations, Judge Harvey said that one side or the other is appealing to him to change those conditions or seek the release order or detention order issued by the magistrate judge in the arresting district. There is some confusion as to what a magistrate judge in one district can do to change the order of a magistrate judge in another district. But this issue extends beyond the Rule 40 context. Indeed, it comes up far more often under Rule 5 or Rule 32.1, which deals with warrants arising from a violation of a supervised release. For this reason, the subcommittee concluded it was beyond the scope of what was being considered under Rule 40.

Judge Harvey concluded by saying that this is where things currently stand with respect to Rule 40. The subcommittee still wants to examine whether Rule 40 should also include procedures for what happens when there is a warrant for a pre-trial release violation and the initial proceeding is held in the charging district, because there is no description anywhere in the rules as to what the magistrate judge is supposed to do in that scenario. Rules 5 and 32.1 have provisions for both out-of-district hearings and in-district hearings on warrants, but the subcommittee has not yet decided whether Rule 40 should mirror those provisions. Judge Harvey highlighted one other section of Rule 40 that the subcommittee had not yet addressed: paragraph 40(a)(2), which covers arrests for failure to appear and arrests for failure to appear on a subpoena. This provision has been in the rule for many years, and the subcommittee needs further clarification about how these proceedings may differ. Judge Harvey requested the Committee's feedback with respect to the decisions made so far.

Professor King chimed in to explain the broader picture for members who were new to this project. Rule 5 spells out in some detail what to do at a first appearance on a warrant. Rule 32.1 spells out in some detail what happens when a person is arrested for violating supervised release. But Rule 40 is a very cryptic and unhelpful description of what is supposed to happen when a person is arrested for other types of violations—including pre-trial release—in a different district. It refers to the entire Bail Reform Act, which includes provisions about violation of release pending sentencing and pending appeal, and also includes a provision on material witnesses. Rule 40 also covers failure to appear as required by a subpoena. Professor King explained that the subcommittee thought it would pick the easiest and most frequent issues first—violations of pre-trial release and possibly release pending sentencing and appeal—and put off what to do about warrants for witnesses. At some point, though, the subcommittee will be coming back to the Committee for feedback on that issue. Professor King concluded by saying that it would be very helpful to hear from Committee members, particularly if they disagree with any of the subcommittee's tentative decisions.

A member said that the memo and presentation were very helpful. She noted that the memo says that the subcommittee thought videoconferencing with the judge in the charging district would not work because it does not reflect current practice and because there are serious logistical hurdles. She asked what these logistical hurdles are. In her view, there would be some advantages of having the teleconferencing with the charging district rather than with the arresting district. The member acknowledged that there would have to be counsel in both places for this to work, but she was curious as to what logistical hurdles the subcommittee saw.

Judge Harvey responded that these are essentially warrant returns—there are all different kinds of warrants, and these, warrants for violation of conditions of release, are just one subset of those. Traditionally and across the nation, it is magistrate judges who hear those warrant returns. Judge Harvey explained that there are logistical reasons for this. People are arrested every day and there are prompt presentment concerns with respect to any warrant; someone cannot be housed in jail for days on end. Magistrate judges are set up across the country. There is always a magistrate judge on duty, and one of the primary things that they do is to have initial proceedings on the warrant. This means that district judges do not handle warrants. The whole system is set up to have a duty magistrate judge, a duty AUSA, and a duty public defender; these people deal with all of the new arrests and all of the bench warrant returns on a given day.

Judge Harvey explained that the proposal was that it would be better for the charging district to address and deal with its own warrants, over Zoom. This is not the practice, and Judge Harvey thought it would be difficult to change the system in a way such that the district judge signing the warrant would have to handle these initial proceedings.

A member agreed and offered several additional thoughts. First, it would cause delay to attempt to set up videoconferencing from the charging district. Second, there is no ability to broadcast proceedings. People need to be in a courtroom. The current rules allow for a defendant who consents to participate by video, but the proceeding itself is being held in a courthouse, in a courtroom that is open to the public. Now that the CARES Act has sunsetted, there is no ability under the Criminal Rules to have remote proceedings. Moreover, this particular rule applies to individuals on pre-trial release in several different scenarios. If the person has absconded and is picked up randomly someplace else in the country, they are going to be brought before a judge in

that district where the proceeding will happen. The other type of example is that the person has been residing in this other district—where they work, participate in whatever treatment programs they are in, and are supervised by a probation office. From the member's perspective, it made sense that this appearance is held in that arresting district even though there are some logistical difficulties (for example, the individual's attorney is not going to be present but will instead talk to the lawyer who will be at the hearing). There is an urgency to this first proceeding in the arresting district. The member said that it is valuable to have the hearing to address the conditions of release and whatever incident occurred right there, without the defendant needing to be detained and transported back to the charging district in the first instance. Of course, there will eventually be a proceeding in the charging district, and for that proceeding, it is possible that the defendant could participate by video while everyone else is in the courtroom.

A member asked Judge Harvey if he had experienced situations where counsel in another district appears remotely on behalf of a defendant who has been arrested in his district as the arresting district. In other words, the charging district's counsel appears by video to contest either the arrest or the violation. The member recognized that practicality may require that a local public defender or local counsel step in, but he said that by the time someone is on pretrial release, their counsel has a better sense for who the defendant is and would be better suited to advocate for them than would stand-in counsel.

Judge Harvey responded that he has had multiple cases where stand-in counsel had indicated that they had spoken to counsel, and counsel was comfortable with them moving forward and making certain representations. He could not recall a time when he had permitted counsel to appear remotely or even received a request to delay a hearing so that counsel could appear. The more typical situation is that the federal public defender calls counsel, gets their input, and then makes the arguments and representations with the understanding and agreement of the defendant. Judge Harvey asked whether the other member's experience was different.

A defense member answered that she had, on occasion, had an attorney on the phone in the courtroom, but the federal public defender was always present and handling the representation. Sometimes the attorney will have information that the judge wants to hear directly from them. But usually, the federal public defender has talked to counsel and is able to convey what was told to them by the attorney. The member recalled one instance where the client asked for a delay so that their lawyer could come to the district. The court accommodated that, and there was no question that a defendant can request that. But the person was held in custody.

Judge Harvey said that typically, the defendant wants to have a quick hearing. There is a federal public defender present who knows the magistrate judge, knows the district, and has spoken to the defendant's counsel. So most times defendants want to move forward rather than delay.

A member asked whether there was any discussion of supervised release violations being added to the list. He has had a number of instances where people on supervised release disappear and get arrested—typically in Indiana, because it is very close to Chicago. He assumes that those people went before a magistrate judge in that district. But it is not infrequent that he has people on supervised release lose touch with their probation officer and end up arrested somewhere else.

Judge Harvey responded that Rule 32.1 handles supervised release. Rule 40 addresses only violations of pre-trial release or release pending sentencing or appeal. It used to be that everything was under Rule 40, but at some point, the portion of the rule dealing with supervised release was moved to Rule 32.1. Judge Harvey said that whoever drafted Rule 32.1 did a great job of putting together the list of what the magistrate judge should do when that occurs—when there is a warrant in front of them involving a supervised release violation. Rule 40 does not have that list, so the Rule 40 Subcommittee had been trying to create it. Judge Harvey acknowledged that far more cases arise with respect to supervised release violations than Rule 40 scenarios.

Judge Mosman suggested that the Committee go through the list of things that the subcommittee wants to put into Rule 40 and see whether the Committee agrees or disagrees with each item.

Professor Beale said that these are enumerated on pages 164 to 168 of the agenda book. She said that this was not the last opportunity for someone to speak up about these issues, but asked that Committee members please speak now if they have any thoughts.

A member said that one of the questions in the memo was, why the rule excludes the "adjacent district," which is in Rules 5 and 32.1. She asked whether the subcommittee was planning to include that.

Judge Harvey answered that yes, it was. This was not on the list, but he thought the subcommittee had previously decided that this was something that would be included.

Judge Harvey asked for any other thoughts or concerns, and there were none. Judge Mosman thanked Judge Harvey and the Rule 40 Subcommittee for their work.

Electronic Filing and Service by Self-Represented Litigants

Judge Mosman asked Judge Burgess to address the next issue. He expressed his gratitude for Judge Burgess's sacrifice in attending the meeting from Alaska, noting that he had spoken with Judge Burgess by phone this morning and afterward realized that it was 3:30 a.m. in Anchorage.

Judge Burgess began by thanking the Pro Se Filing Subcommittee and Professor Struve for their work on this project. He said that over the course of the summer, Professor Struve had submitted questions to the subcommittee. The subcommittee met in September and discussed the questions at length. Judge Burgess said that he would like to highlight these questions and the input from the subcommittee, and invite any further suggestions, comments, or questions that Committee members may have.

Judge Burgess said that Professor Struve's memo, on page 170 of the agenda book, broke down the topic into three sections. The first section is the most recent developments. The second section contains the eight questions he referenced. The third section is the rejection of a filing for non-compliance with rules governing electronic filing. He invited Professor Struve to provide a brief highlight of new developments since the last meeting.

Professor Struve thanked Judge Burgess, the subcommittee, Judge Harvey, Ms. Lonchena, and the reporters for all of their work on this project. She explained that there are two basic pieces of the project, one of which concerns service. This was inspired by the practice in the Southern District of New York, which eliminates the requirement of separate paper service of documents, after the initial start of the case, on a litigant that is receiving the notice of case activities through the court's electronic filing system. The second piece is to increase access by presumptively permitting self-represented litigants to file electronically, unless there is an affirmative court provision barring them from doing so, and to provide that a local rule or other local provision that bars them from doing so must include reasonable exceptions, or allow for the use of another electronic method for filing documents and receiving electronic notices in the case. These are reflected in the proposed amendments to Criminal Rule 49(a) and (b), which start on page 219 of the agenda book.

Professor Struve said that this Committee is the latest committee to consider the progress of the project at the fall committee meetings. As of last spring, it was unclear whether the Bankruptcy Rules Committee would participate in this project at all, because they had identified particular concerns, specific to the bankruptcy context, which led them to be skeptical about these changes for the Bankruptcy Rules in particular. Their subcommittee discussed further over the summer, and at the fall meeting, based on the subcommittee's recommendation, the Bankruptcy Rules Committee decided to participate in the project. However, Professor Struve cautioned that this participation was specifically for purposes of publication. The package of proposals for the Standing Committee will include changes for the Bankruptcy Rules as well as for the Criminal, Civil, and Appellate Rules. But the Bankruptcy Rules Committee is keeping open the option to reconsider its participation in light of public comment. Professor Struve also noted that the general idea of limiting this project to only the Criminal, Civil, and Appellate Rules was presented to the Standing Committee last January, and the committee was not fazed by the idea that there could be inconsistency with the Bankruptcy Rules.

The Appellate and Civil Rules Committees also discussed the project at their fall meetings. Professor Struve reported that the Appellate Rules Committee focused on the question raised in part three of her memo, whether to expand the project to encompass a review of the clerk-refusal and local-form rules. The Appellate Rules Committee felt that this was an important topic, but was decidedly against expanding the project to include it. On the other hand, the Civil Rules Committee as a whole did not voice a view on this, but the clerk liaison voiced some interest in seeing whether further work might be done on the topic.

Judge Burgess then turned to the eight questions posed by Professor Struve. The first, on page 174 of the agenda book, was whether to delete item (ii) from proposed Criminal Rule 49(b)(2)(B). This item discusses local provisions for prohibiting access. One comment was that a simpler approach would be to add some additional language to item (iii) and eliminate item (ii). Judge Burgess reported that the subcommittee's conclusion was not to eliminate (ii) to make sure that there are reasonable alternatives for self-represented litigants if a court bars their use of electronic filing, either by local rule or by order of a particular judge in a case. In other words, the court can bar the use of electronic filing, but it must make sure that there are some reasonable alternatives available to self-represented litigants.

Professor Struve agreed, saying that this connects with the second topic that will be addressed. She said that she is very sympathetic to the goal of simplifying the rule. However, she suggested that there is the value that Judge Burgess mentioned to retaining the text of the rule provision in item (ii), so the subcommittee tried to explain in an expanded committee note how items (ii) and (iii) interrelate.

Professor Beale noted that there is obvious overlap between (ii) and (iii), and framed the question as whether to take out of (ii) whatever is distinctive and put it in (iii), or move whatever is in (iii) into (ii). She said she believed Professor Struve's position is that if a court has a local provision prohibiting access, then there are two choices, the reasonable exceptions or another electronic option. Putting this in item (ii) highlights the alternative electronic option and tells the courts, "You have to do something, and here are your two options for doing it." Otherwise, you have reasonable exceptions and conditions and restrictions on access, which all feel very similar.

Professor Struve said that this was exactly right. One of the important things that the subcommittee was trying to do was to work within the existing landscape. Courts increasing access have adopted two distinctive approaches. The first allows self-represented litigants into CM/ECF. The other is to provide a different accommodation, such as a portal to upload documents or accepting filings by email. This second option varies by court and what each court's technology team can support. It was very important to a number of participants in the process that the subcommittee listen to what is working on the ground, and allow clerks' offices as many options as possible to adjust to what the rule is nudging them towards. In Professor Struve's view, this was the added value of spelling that out in (ii). She agreed that items (ii) and (iii) are complementary, because the goal is to rule out complete bars on electronic filing. Either the court must give reasonable access to CM/ECF or it needs to build something else, as many courts are doing.

Judge Burgess highlighted that one of the alternative options was to eliminate (ii) and add language to (iii) that says, "but must not bar access by all self-represented litigants without reasonable exception." This was considered by the subcommittee, but in the end, the consensus was to leave (ii) as-is.

Judge Burgess then turned to the second question posed by Professor Struve's memo, which was whether to use reasonable exceptions or reasonable conditions and restrictions regarding self-represented e-filing access. The view of the subcommittee was to presumptively permit self-represented litigants to file electronically, unless prohibited by local order or local rules, and to provide that local rules or general court orders that bar self-represented litigants from using the court's electronic filing system must include reasonable exceptions or must permit the use of other electronic filing or receiving notice of case activity. He welcomed any questions, comments, or thoughts from Committee members.

Judge Mosman said that his understanding was that the goal was to tell courts that they cannot have a local rule that prohibits access. But the way this is expressed in the rule is that it says, "If you do have a local rule that prohibits access, you have to have reasonable exceptions." Judge Mosman said that this seemed to him as though the Committee is trying to walk through the "back door" instead of the "front door." He asked why the language did not say that courts cannot prohibit reasonable access.

Professor Struve said that if the Committee broadened the language to say that courts cannot bar access by self-represented litigants, then problems may arise with, for example, incarcerated individuals who may not have internet access. The working group and the clerk participants in particular were very concerned about a provision that says courts cannot bar self-represented litigants access (other than as to an individual litigant, which is a different provision). The key point, Professor Struve said, is to flip the presumption and say that courts definitely need to avoid a local provision that generally bars self-represented litigants from access. However, the court can impose conditions, such as saying that litigants cannot be incarcerated, or litigants must take a course before using the electronic filing system.

Professor Struve conceded that the goal of the project is somewhat modest, but said that there are some districts across the country that flatly ban all self-represented litigants from electronic access, without any exceptions. One of the primary goals of this provision is to take that option off the table, but to be maximally flexible as to what those courts must then do to comply with the new rule. The idea is to accommodate whichever method courts feel will work best for them.

Judge Mosman said that it seemed as though the Committee was saying that the court needs to have reasonable exceptions, but after reading item (iii) and the committee note, the reader learns that "reasonable exceptions" means "reasonable access." Why does the rule not just say then that the court must provide reasonable access?

Professor Struve said that this was a superb line of questioning. Her view was that the Committee wants to preserve some degree of articulation of the different ways that this reasonable access can happen. By breaking it out into (ii) and (iii), the rule sets out the baseline principle that the court must either include reasonable exceptions to the bar or allow alternative methods. Then, in item (iii), the rule says that you can impose reasonable conditions and restrictions, and those are the mirror image of reasonable access. She added that another reason to break the rule out in this way was because it gives clerk representatives something to point to when a self-represented litigant says, "Why did you put this limit on my access?" The clerks can say, "Well, because it's a reasonable condition or restriction on the access." Nonetheless, Professor Struve said that the working group was open to ways of redrafting that would preserve all of those concepts.

A member said that as the subcommittee was discussing the issue in September, there had recently been some nationwide ECF concerns. He thought there was probably concern amongst the judiciary and clerks that unfettered, unrestricted access to the electronic court filing system would open it up to potential abuse. Having the limitation in place as the standard, then finding exceptions to it, would still allow reasonable access with some barrier to entry. Courts can find a way to provide self-represented litigants with access beyond that. The member said that the second issue discussed by the subcommittee was that self-represented litigants would not have the benefit of an attorney to advise them against filing documents of a certain nature. Allowing the court to set what reasonable access would be would prevent potential unintended abuse of the ECF system—for example, if someone wants to file a proffer that someone gave, and they are not familiar with the rules of redaction or the sensitivity of the documents that they would be filing. That might put other defendants and other parties at risk.

The member said that he had not thought of the issue in the way that Judge Mosman had framed it, but he thought that what Judge Mosman said made sense. He wanted to offer up some of the subcommittee's thoughts to provide context behind the discussions that were not necessarily reflected in the agenda book materials.

Judge Burgess then offered two follow-up thoughts. First, the subcommittee did discuss the idea that some courts may never provide any reasonable access because they do not want self-represented litigants filing. That was a concern. Second, the approach seemed to Judge Burgess to be an incremental approach. The Committee could start with this, and see if down the road, Judge Mosman's suggestion could be adopted.

The clerk representative explained that from the clerk's perspective, part of the approach to keeping both (ii) and (iii) was a practical approach for self-represented litigants to (ii)—prohibiting access and providing an alternative method. Some courts may not want litigants filing directly into ECF, but may create a portal, where documents can be filed into the portal first then filed in ECF by the clerk's office. She also said that much of the drafting was done to make it easier for self-represented litigants to understand. An incremental approach between (ii) and (iii), as well as some of the wording in the committee note and the extra wording used elsewhere in the rule, were all designed to be easier for self-represented litigants to understand. It also gave the clerk's office something to point to if self-represented litigants had questions about the court's approach.

Professor King said that she had been an advocate of eliminating item (ii) and adding more words in item (iii). But if the consensus was that, for the reasons mentioned, the Committee should spell everything out, she thought that it might make more sense to make the language in item (ii) part of item (iii). This would tell courts that they can set reasonable conditions and restrictions, then provide an example of what is not reasonable and what courts must do if they have this kind of a restriction. Professor King's view was that the rule may be easier to understand if, instead of first saying, "If courts prohibit access, here is what they must do," and then saying that a court may set reasonable conditions, the rule says this in the reverse order. That is, state the general rule first, then the specific application, which is what the Style book recommends. Because (ii) is a specific application of the general rule in (iii), the Committee should swap the order of these two, or put one inside the other.

A member asked whether the language in item (iii) stating that a court may set reasonable conditions meant not only by local rule, but also on a case-by-case basis. Judge Burgess answered that this was referring to an order of a judge. The member thanked him, saying she just wanted to clarify this because (ii) is just referring to local rules.

Professor Struve agreed with that and thanked Professor King for her drafting suggestion. Professor Struve expressed a concern, however, that item (ii) is not an example or an implementation of (iii). She did not think that allowing self-represented litigants to file in another electronic portal or file by email is a reasonable condition or restriction on access to the e-filing system itself. Rather, it is an alternative system if courts want to bar self-represented litigants from the CM/ECF system entirely. Professor Struve agreed that these provisions were implementing similar concepts, but did not think that item (ii) was a subset of a condition on access to the CM/ECF filing system unless one were to say that it is reasonable to bar self-

represented litigants entirely because the court is giving them a different option. This argument did not seem intuitive to her.

Judge Mosman stated that the concerns he had about "back door" exceptions would be eliminated by switching the order of (ii) and (iii), because the rule would talk about the "front door" first, then the "back door."

Judge Mosman announced that the Committee would be taking a lunch break and would reconvene in thirty minutes.

After the lunch break, Judge Burgess announced that he had learned that Professor Struve was recently the recipient of the Harvey Levin Award for Teaching Excellence at the University of Pennsylvania. This award is given by the graduating class of the law school. Judge Mosman congratulated Professor Struve. She thanked him for his comments and said the award illustrated how very kind her students were.

Judge Mosman asked whether anyone had additional comments. Ms. Ralston said that she understood that item (i) states what the party should do. Because items (ii) and (iii) state what the court should do, she asked whether the working group had considered putting the provisions about the court first. This would not be switching the order of (ii) and (iii), but rather putting any provisions addressing what the court must do first, then stating that the party must, or may, or can use the system that has been established in item (i).

Professor Struve responded that Ms. Ralston was correct that item (i) talks about what the party can do, and (ii) and (iii) talk about what the court can do. Items (ii) and (iii) apply only if the court decides to do something. She explained that the initial provision is the default rule that would operate if a court did not say anything about electronic filing. Although (i) is phrased in terms of what the party may do, this will force the court to do something. It follows logically from that that if the court decides to do the thing referenced in item (i)—that is, adopt a "court order or local rule [that] prohibits the party from doing so"—then items (ii) and (iii) come into play.

Professor Struve further stated that the working group was hoping to bring these proposals back to the Committee in the spring for potential publication approval. She expressed an eagerness to work further on items (ii) and (iii) given the guidance received by the Committee today. She understood that the Committee wished to meld (ii) and (iii) together. It would say that the court must provide reasonable access to the court's electronic filing system. Then, as a specific application of that, completely barring access would not be reasonable access unless it provided an alternative means of electronic access, like a portal or filing by email. Professor Struve cautioned that this would mean that the text of the rule itself would tell fifteen or so district courts that completely bar access and do not provide alternative means of electronic submission that they are being unreasonable. The current text of the proposed draft does not say whether that would be reasonable or unreasonable. It simply says that the court needs to provide reasonable access or permit the use of another method.

Judge Burgess asked whether anyone else had comments, questions, or suggestions on this topic. No one did. Judge Burgess then turned to the next question proposed by Professor

Struve's memo, which was whether to retain the caveat regarding learning of non-receipt. In other words, if a filer learns that the recipient has not received a document or a filing, then it is deemed not filed. The subcommittee felt that this language should be retained. There were no comments, questions, or suggestions in response to this question.

Judge Burgess then turned to the next question proposed by Professor Struve's memo, which was whether to use the provision addressing service of papers that are not filed. He noted that this could be useful guidance to self-represented litigants, but said that the subcommittee had suggested seeking input from district clerks. No one from the Committee voiced any comments, questions, or suggestions, so Judge Burgess stated that the subcommittee would seek input from clerks on this issue.

Next, Judge Burgess turned to question five, which was whether to use "notice of case activity" rather than "notice of filing." The subcommittee's recommendation was to use "notice of case activity," and no Committee member voiced concerns or questions about that approach.

Judge Burgess turned to the next question—whether to use the term "unrepresented" or "self-represented" litigant. The subcommittee had preferred the term "self-represented," but was aware of complications this term could cause due to the use of "unrepresented" in existing rules. He asked whether Judge Dever had any concerns about an inconsistency with these terms. Judge Dever said that he did not. No Committee member voiced concerns or questions about using "self-represented."

The next question was whether to use the term "person" or "party" in the new rule. Judge Burgess said that the subcommittee had decided to use "party" to avoid any suggestion that a person who is not a participant in the case can file simply because they are a "person."

A member asked whether the rule could refer to a "party or nonparty," as Rule 49.1 does. She explained that she was thinking of potentially self-represented nonparties who might file a motion to quash a subpoena.

Professor Struve responded that the consensus from the clerks was that it was very important to say "party. Otherwise, the rule could allow someone entirely uninvolved in a case to say that the rule allows them to use the CM/ECF system. This becomes an issue now because the proposed rule flips the default presumption to say that this person can have electronic access unless the court bars it. Professor Struve opined that Rule 49.1(a) was different because there, the goal is to protect the information of people whether they are a party or not.

Professor Struve noted that a victim with rights under the Crime Victims' Rights Act (CVRA) may wish to participate in the proceeding. The proposed amendment would leave that person in the same position that they are in now. If the local district court wants to give them electronic access, it can, but the rule would not force the court to do so. Professor Struve asked the Committee members how often someone who is asserting rights under the CVRA does so themselves, as opposed to having the U.S. Attorney speaking for them.

Ms. Ralston said that this is an area where the DOJ feels strongly that using "party" would be particularly useful, for several reasons. First, the DOJ wants to continue to make clear that there is no rule of intervention in criminal cases. Second, the DOJ cares very deeply about

the Rule 49.1 privacy protections and other protected information, such as cooperators' identities. The DOJ feels very comfortable that attorneys are following all of the necessary rules and are not filing anything on the public docket that should not be made public. However, self-represented litigants may inadvertently file something that should not be public. Clerks are not necessarily reviewing all documents for compliances with the applicable rules, but when filings are served on the government, that allows the DOJ the opportunity to make whatever motion is appropriate to deal with that. Finally, the DOJ's experience has been that statements or information pertaining to victims is almost always filed by the attorney for the government and is properly redacted or sealed. When a victim is acting on their own—perhaps because there is a dispute about whether they are a victim—those people are represented. Ms. Ralston said that the practitioners surveyed had never seen a situation where a self-represented victim or would-be victim was filing, so she did not think that this was an issue. As for people hoping to quash a subpoena, or forfeiture claimants, the status quo deals appropriately with this small number of filers.

Ms. Ralston also pointed out that the title of proposed subparagraph (b)(2)(A) refers to a "person" represented by counsel in the title, but the text refers to a "party." She suggested that this could be clearer. She said that this also presents another question about whether the rules should be different for someone who is represented by counsel, if the concerns about misuse of the system do not apply to attorneys. If a media organization seeking a release of documents, or someone seeking to quash a subpoena, is represented by counsel, perhaps they should be able to file their motion electronically, because the lawyer is subject to all of the rules that lawyers are subject to. The DOJ does not have a position on what the outcome of that discussion should be, but thinks that it is different when people are represented by attorneys.

Judge Mosman added that in his experience, more than ninety percent of motions to quash subpoenas are filed by corporations.

A member agreed, saying that motions to quash were filed almost exclusively by corporations represented by large law firms.

Professor Struve thanked Ms. Ralston for pointing out the disjuncture between represented "person" and "party," and said that she would make sure that those accord. She pointed out that the current language in that provision, in what would become subparagraph (b)(2)(A), is taken from the existing rule. The existing rule says that a party represented by an attorney must file electronically. Therefore, the subcommittee will carry forward the existing rule unless the Committee says that it would like to do something different with respect to represented parties.

Professor King said that she had been reading criminal cases involving applications for writs, which are often filed by third parties, people who are not parties. She is also aware that nonparties like media representatives and subpoena recipients file in criminal cases. She has seen individuals filing motions to quash, and she assumed that these people are represented. She acknowledged that everyone has said that it is rare that nonparties want to file things, and if they do, they are almost always represented by counsel. If they are not represented, the status quo addresses how they file. Professor King asked, however, whether anything in the amended rule

speaks to what a self-represented nonparty has to do. How should a self-represented nonparty know what to do?

Professor Struve answered that they will not know what to do based on the rule. The Committee could add language that says that a self-represented nonparty must file non-electronically, unless allowed to file electronically by court order or local rule. If the national rule does not say this, these people would need to look at their court's local provisions or call the clerk's office.

Professor King said that her concern is that by staying silent on this issue, the rule would be interpreted to bar self-represented nonparties from electronic filing entirely. Perhaps that is what the Committee would like the rule to say.

Professor Struve said that the rule would simply not address the issue, and the Committee could put in the committee note that the rule does not speak to this topic. But if the Committee feels that by saying nothing, this would remove the court's ability to designate at a local level how it would like to receive filings by self-represented nonparties, the Committee could put this into the text of the rule.

Judge Burgess asked whether Judge Mosman would like the subcommittee to take a look at this issue, in addition to the work it would be doing with items (ii) and (iii). Judge Mosman said that he would.

Judge Burgess then turned to the next question posed by Professor Struve's memo, which was whether to use explicit wording as it pertains to self-represented litigants. The subcommittee felt that there was value in doing so, as this makes it easier for self-represented litigants to understand the rule. No one expressed any comments, questions, or concerns with this approach.

Judge Burgess then turned to the last question in the memo, which was whether to exclude the prison mailbox rules from the scope of the project. The subcommittee had decided to do so. No one expressed any questions, comments, or concerns about this approach.

Judge Burgess said that the final issue he wanted to discuss was raised in section three of Professor Struve's memo. He asked her to give a brief summary of the issue for the Committee.

Professor Struve explained that Professor Hartnett had raised this issue over the summer. His question was, given that the project currently encompasses a change to the architecture of how self-represented litigants will be allowed to file, does that implicate, to some extent, the question of what happens when they do it incorrectly? There are two existing rules that speak to (or could be read to speak to) that question. Rule 49(b)(5) is an example of what Professor Struve calls the "clerk refusal" rules. It says that the clerk must not refuse to file a paper just because it is not in the form prescribed by these rules or a local rule or practice. There are cognates of this in the other Federal Rules. The other (potentially) implicated rule is Rule 57(a)(2), which says that a local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement. This was adopted in 1995 along with other cognate provisions in the other sets of rules.

Professor Struve said that there are three different kinds of scenarios where these rules may come into play. First, someone may try to file using a method that the court does not permit, under circumstances where the result is that the filing never enters the physical building of the court or the court's electronic system. There is a circuit split between the Second, Sixth, Seventh, and Ninth Circuits, which have applied these rules to protect a filer who uses the non-permitted method, and the D.C. Circuit, which has held to the contrary. Second, someone may file using a permitted method, but submits the filing in a non-permitted format. There is some limited case law on this scenario. Third, someone may be allowed to use CM/ECF but does not do it successfully. They may manage to file something, but it contains technical errors. In the Second, Sixth, and Seventh Circuits, this is accepted despite the technical errors. However, there are cases where someone files a notice of appeal, proceeds to the payment screen, but does not progress to the final screen for CM/ECF submission. Three circuits have said that this person did not validly submit the notice of appeal.

Professor Struve said that the basic point was that these rules have been invoked by people who run into problems in their interactions with electronic filing systems, and the circuits disagree as to what the rules say about that. In an ideal world, where the committees had unlimited time and scope for this particular project, it could be very interesting and beneficial to expand the project to encompass the question of whether these rules are the right fit for the circumstances of misadventures in electronic filing (and if not, where there is a better way to do it).

Professor Struve recounted that a participant in one of the prior committee's discussions suggested creating a rule that is modeled on the U.S. Supreme Court's rule, which says that if there is a problem with a filing, the clerk's office will inform the filer and provide a grace period to fix the problem. If the filer fixes it, it is deemed filed as of the date of the original attempt. This proposal was discussed at the Appellate Rules Committee meeting, and there was resistance to trying to create a provision like this for use in the lower courts. The committee's view was that this practice may work for the U.S. Supreme Court, but the complications that could ensure in the lower courts would be considerable. Additionally, this facet of the project, while meritorious and worthy, would expand beyond the scope of what the project was trying to do with self-represented litigants. Professor Struve conceded that this was correct, because once one changes the architecture of how the rules deal with the failures of filing, it affects not only self-represented litigants but also everyone else. Her foray into the case law amply illustrated that lawyers and their assistants have challenges with compliance with all of these systems as well.

Professor Struve reported that the Appellate Rules Committee firmly decided not to expand its version of the self-represented litigant project to encompass this topic. As for the Civil Rules Committee, it did not reach a view on this, but its very wise and experienced clerk representative said that this was an intriguing idea and he would like to work on drafting something. The Bankruptcy Rules Committee was not presented with this question because it was at the antecedent step of deciding whether it wanted to participate in this project at all.

Judge Mosman said that he did not think the project should be expanded to include the clerk refusal issue. The project was already a significant advance, and he did not want this additional issue to slow down that effort.

Judge Burgess confirmed that the subcommittee would look into two issues: the interplay between items (ii) and (iii), and the party/nonparty issue. The subcommittee will report back at the April meeting.

Attorney Admissions

Judge Mosman asked Professor Struve to present the next issue on the agenda.

Professor Struve noted, for new members, that there are materials in the agenda book for the Standing Committee's January 2025 meeting that encapsulate where this project has been so far. This is a project for which Professor Struve and Professor Andrew Bradt are co-reporters. There is an inter-committee subcommittee, on which Judge Birotte is a member and Ms. Recker previously served as a member.

Professor Struve explained that this project originated in the observation by Dean Alan Morrison and others that the district courts take varying approaches to attorney admission, with the more restrictive districts requiring that an applicant for admission to the district court bar be admitted to practice in the courts of the state in which the relevant district courts sits. There are four such states that have no reciprocity with other states, such that a lawyer wishing to be admitted to practice in a district court in those states has to take the state bar exam in order to gain admission to the district court. This prompted their initial submission in 2023, which prompted the formation by Judge Bates of the subcommittee. Dean Morrison had three different proposals, but consideration in the project has narrowed them to two. The first is a national rule that would provide that admission to any federal district court entitles a lawyer to practice before any other federal district court. The other is a national rule that would bar district courts from requiring, as a condition of admission to that district court's bar, that the applicant reside in or be a member of the bar of the state in which the district court is located.

Professor Struve reported that the subcommittee has been in information-gathering mode. It has looked at the practice in the courts of appeals, where Appellate Rule 46 takes a relatively permissive approach to the question. The subcommittee has also been exploring the link between these topics and requirements that lawyers practicing before a district court associate with local counsel. It has also thought about ways in which this might link to questions of unauthorized practice of law. The subcommittee is now gathering information concerning the practices of districts that take varying approaches to this topic.

Judge Mosman asked whether there was any input on this subject, and there was none. He noted that he thinks he may be the only district judge in the country who has been reversed by the court of appeals for denying someone admission to the district court bar.

Rule 15

Judge Mosman noted that there are now three categories of new suggestions, and asked Professor Beale to explain the first category.

Professor Beale explained that, as continuing members may remember, two suggestions to amend Rule 15 to provide for a limited number of depositions under some circumstances were placed on the study agenda at the last meeting. The memo on page 271 of the agenda book

describes six more letters supporting the idea of adding depositions to Rule 15. The Rules Committee Staff also informed her that an additional eight suggestions supporting the same idea came in over the last seven days. Professor Beale said that she would only be describing those which arrived in time for inclusion in the agenda book. She would not describe the first two, which kicked off this process, and would not try to speed-read the most recent letters. She said that she was aware of them, however, and they will be digested moving forward.

Professor Beale highlighted some elements of particular new proposals that might be of special interest. In general, the proposals supported the initial Kelly Acosta proposal. They discussed the need for depositions in order to even the playing field, to provide very important and useful information to improve the fairness of the criminal justice process. Several of them drew on a state practice permitting depositions.

Suggestion 25-CR-H, from John Cline, like the others, has a general description of the need for depositions and many of the same themes as in the first two suggestions. In Professor Beale's view, what was particularly new and noteworthy about Mr. Cline's suggestion was his emphasis on New Mexico's current procedural rules. New Mexico provides for something called a "statement," which is an unsworn interview often taken very informally. There is typically no court reporter and no procedural fanfare. Someone turns on their phone; it is very inexpensive and efficient. New Mexico also has formal depositions by either agreement of the parties or by order of the court upon a showing that it is necessary to prevent injustices. The New Mexico Rules provide for protective orders as needed. Mr. Cline described his very positive experiences with the New Mexico rules.

Suggestion 25-CR-J is from John F. Murphy, the Executive Director of the Federal Defender Program in the Northern District of Illinois. Professor Beale said that Mr. Murphy set the stage by talking about the recurring problems that arise under the current rules, where the defense simply does not have the necessary information. He said that it was like flying blindly, and he also described the many reasons why voluntary interviews with witnesses are unsuccessful from the defense point of view. He argued that limited pre-trial depositions with court supervision would address those problems, allowing defense counsel to be able to make informed decisions. He highlighted several features of the Kelly Acosta proposal that he considered to be critically important. First, except for exceptional cases, it is limited to five depositions. Mr. Murphy thought that that number would minimize costs and necessarily require the defense to focus on the most important witnesses necessary to be able to advise their clients and make decisions about whether to plead guilty. He also stressed the proposal's safeguards to protect witnesses and promote judicial efficiency, including the requirement of the defense motion and a judicial finding that the depositions would be in the interest of justice. He drew attention to the success of depositions in other states, and he noted that Florida's depositions were found by a blue-ribbon study committee to be a necessary and valuable part of the criminal justice system to ensure fairness and equal administration of justice.

Suggestion 25-CR-K is from David Oscar Marks. Professor Beale said that he wrote in strong support of amending the rule as a matter of basic fairness. He talked about a tilt in favor of the government and the need to make life-altering decisions. He focused on the Florida depositions that Mr. Murphy said were affirmed by a blue ribbon committee, and noted that the depositions in Florida make the process more fair and efficient. They shorten trials and lead to

appropriate resolutions without trials, because parties are not blind-sided. Mr. Marks also asserted that Florida has ample tools to address concerns about witness safety or intimidation.

Next, Professor Beale described Suggestion 25-CR-L, submitted by Jonathan Blunt. This suggestion described his experiences in Indiana, one of the several states that now allow pretrial depositions in criminal cases. Noting he had been an AUSA and now a defense lawyer, he described the positive effects of pretrial depositions, the search for truth, and practical advantages for the prosecution. Professor Beale highlighted one distinctive aspect of Mr. Blunt's letter, which is that the defendant obtains valuable face-to-face confrontation and gives the defendant a sense that they had a fair opportunity to evaluate all of the evidence. This reminded Professor Beale of the research by Tom Tyler and others that people accept the results in the criminal justice process much better if they feel they have been treated fairly. Mr. Blunt asked the Committee to think about that element. He also said that he and his colleagues were unaware of any abuse or misuse of the Indiana process.

Suggestion 25-CR-M came from a group of lawyers at Hecker Fink. Trish Anderson was the first signatory, but 16 other partners at this law firm also signed the letter. It struck Professor Beale as unusual that they all put their own names on the letter. She stated that the letter was distinctive in describing a particular representation in a parallel civil and criminal securities fraud case in the Southern District of New York. Because the defendant had not yet been extradited, the civil case went forward first. The criminal prosecutors had not yet been able to obtain the defendant's presence, so full civil discovery was completed. The letter describes how different that discovery was from what would have been available under Rule 16, even though what the defendant was facing in the criminal case was a more serious potential sanction, incarceration. The letter described the importance of the information that they received and how beneficial that was to the correct and proper advice they were able to give in resolution of the criminal case. Hecker Fink then added its view that this is not just important in civil fraud cases, which may be very complex and include a great deal of information. Depositions would be at least equally as important in drug, gun, and immigration prosecutions. Moreover, in those cases, witnesses are often law enforcement agents and officers for whom concerns that might arise about witness intimidation or threats to witnesses are actually not likely to be significant.

Professor Beale turned to the last letter, 25-CR-O, from Lawrence S. Mosberg. He also wrote in support of the Kelly Acosta proposal. He was speaking from his position not only as co-chair of the White Collar Investigations section of his law firm, but also as a director of a fellowship in public interest and constitutional law. Like the other letters do, he wrote about the need to level the playing field and described the importance, for example, of being able to shed light on possible *Brady* violations. He urged that post-COVID, practitioners have the experience and technology to take and defend depositions, many of which could, should, and would take place remotely. He said that depositions would be especially helpful at this time, when an increasing number of cases involve witnesses from around the world who may be unable to travel to the United States.

A defense member stated that she had not had a chance to survey her colleagues on this topic at the spring meeting, but had done so since that time. She stated that she had also been in touch with Mr. Kelly and Mr. Acosta, whom she believed had joined the meeting. In addition to the letters referenced by Professor Beale, the member stated that she had 21 letters signed by 59

lawyers—some from very prominent large law firms, some from boutique law firms, and some from solo practitioners, from all across the country. Three federal defenders submitted letters in support, in addition to the letter from Mr. Murphy in the agenda book. The defense member represented that the federal defender community as a whole would support moving forward with the proposal to amend Rule 15. If now is not the time, she hoped that in the spring, the Committee would consider forming a subcommittee. She thought that there are many issues worth vetting in this proposal.

Anecdotally, the member shared that she has talked to a handful of relatively new defenders who previously worked in states that allow depositions. In New York, they do not, so when she hires someone new, the biggest surprise to them is sentencing. Her colleagues who had depositions in state court express surprise at the limitation here in federal court. The member also echoed the important ideals of such an amendment, which include leveling the playing field and ensuring that *Brady* is secure. She said that her colleagues have stressed to her that this resolves cases, because the parties are in a room, talking about the case, talking to a particular witness, and suddenly things start to move. The defense member emphasized that the defender community strongly supports moving forward with Rule 15 amendments.

Judge Harvey asked for an explanation of what it means when a suggestion is put off for study.

Judge Mosman said that he would answer that question and also let the Committee know what he, as chair, intended to do. He had had a chance to read the new submissions, and they are also in the same vein of what Professor Beale had already described. He stated that several of them hit an issue that is not hit quite as hard in the earlier submissions, which is that this is a resolution to *Brady* problems. Taken altogether, Judge Mosman thought that these submissions raised a very serious and important issue. He said that he had spoken with two of the newest Committee members, and they had both expressed an interest in that project.

A new member asked what the process was, because—to state the obvious—this would be a sea change. It is intended to be a sea change. She expressed no doubt of the thoroughness of this Committee and the work it does, but noted that the Committee would want very robust comment from the prosecutorial community as well, particularly in states that have such a rule already, and from DOJ. She asked how the process would work, because this is a heavy-duty issue, to say the least.

Judge Mosman agreed that this is an important issue. He said that this is also what he would call a "gigantic" issue, because it would require a hard look at the experience in the various states, and they are not uniform. They have very significant differences in their approaches. It raises, in Judge Mosman's mind, questions about what impact it will have on speedy trial protections. Judge Mosman thought it would be important to get at the nature of the problem the Committee is trying to solve here. Are these proposals trying to solve a *Brady* problem? Is the Committee doing this because, as the defense member suggested, it helps resolve cases better? There are many reasons. Of those reasons, which ones do depositions solve and which ones do they not solve?

Judge Mosman said that this is a very big project, and in his view as chair, the Committee is in the middle of some other very big projects. The Committee has Rule 17, that is nowhere near the finish line yet, although it is on the right path. He noted that Professor Beale had previously used the metaphor of an anaconda swallowing an antelope to describe where the Committee is right now. He said he wanted to wait to let that process work itself out. Judge Mosman did not think that the Committee had the bandwidth, right now, to undertake this project. He stated, candidly, that he thought this project would happen. Judge Mosman reiterated that he took this project very seriously and that he wanted to devote the right effort to it at the right time. He therefore placed it on the study agenda, which allows the Committee to do several things. First, it allows the Committee to keep hearing from more people, so, for example, the defense member's most recent submissions would be added. The Committee would read them. It would also do other things to gain more information, so that if and when the day came that the Committee established a subcommittee, they would have something to start with instead of starting with a blank slate.

Rule 53

For the next agenda item, Professor Beale directed the Committee to page 306 of the agenda book. She explained that Judge Edmond Chang has asked the Committee to consider two different possible amendments to Rule 53, which is a blanket prohibition on broadcasting from the courtroom. The first would make explicit that the "broadcasting" bar, as that term is used in Rule 53, would cover transmission to single individuals, not just to the general public. His second suggestion is to consider good-cause exceptions that would do one or possibly two things: (1) create a good-cause exception that would permit broadcasting to "victims," as defined in the CVRA, and possibly remote participation by victims; and (2) create a good-cause exception permitting broadcasting to, and remote participation by, third-party custodians at bail hearings.

Professor Beale explained, as background, that in 2024, the Rule 53 Subcommittee did a thorough review of the rule and considered multiple suggestions for changes to the rule to allow some broader availability of broadcasting. In the fall of 2024, the Committee accepted the subcommittee's recommendation that there be no change to Rule 53. Subsequently, in addition to the Chang proposal, Congress recently passed the Lockerbie Victims Access Act, providing for remote access under very limited circumstances for the victims. The agenda book provides the decision in *Al-Marimi*, in the District Court for the District of Columbia, where the court looked at what it would need to do to provide this access to victims, and came up with a long list of requirements and procedures.

Professor Beale said that the question is whether to make any change in what has been done with Rule 53.

Judge Mosman said that there is not a hard-and-fast written rule that if the Committee takes a hard look at a rule, it will not take another hard look one year later. However, he noted that it is "pretty close" to an unwritten rule that the Committee does not do that. Judge Mosman noted that Judge Chang's suggestion is much narrower in scope that what the Committee looked at previously, and said that he would not be opposed to undertaking a much narrower look at Rule 53 at some future point. But he was unwilling to devote resources right now, in the middle of a busy

time for the Committee, to a rule that the Committee just looked at a very short time ago. Judge Mosman tabled this suggestion as well.

Rule 11

The Committee next turned to Professor King to discuss the Rule 11 suggestion. This proposal came from Judge Patricia Barksdale, who suggested deleting language from Rule 11(b)(1)(M). As the Committee knows, Rule 11(b)(1) includes all of the advice that a judge must give a defendant who is pleading guilty or *nolo contendere*. The language at issue here is the advice that, "in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." The proposal is to take out the language "possible departures under the Sentencing Guidelines," because the Sentencing Commission has eliminated the departures in the Guidelines in the wake of *Booker*.

The question for the Committee was what to do with this proposal. Professor King noted that this issue is possibly simple enough that no subcommittee would be needed. If there is a consensus that the right thing to do is to eliminate those five words from Rule 11(b)(1)(M), then she and Professor Beale could draft an amended rule and prepare a memo for the spring meeting. At that point, the Committee would vote on the proposal. Professor King asked whether the Committee members thought this issue was that simple, or if there was something more to look at.

Judge Mosman said that, from a sentencing judge's perspective, the Committee was talking about what a judge is obligated to tell a defendant under Rule 11 in order to get a plea. Judges are obligated to tell defendants about possible departures under the Guidelines as part of what was a three-step analysis. There are still departures, but there is no longer three-step analysis. Now it is just two steps. So the proposal would be that judges no longer tell defendants at Rule 11 colloquy about possible departures under the Sentencing Guidelines since that is no longer a formalized step in sentencing someone. It would eliminate that language from Rule 11.

Ms. Ralston thought this was a good suggestion, as DOJ had pointed out to the Sentencing Commission in its letter over the summer, saying that it might consider suggesting this change to the Criminal Rules Committee. The Sentencing Commission declined. But the representative stated that DOJ thought that it might be useful to have a subcommittee meet, even if just once, to discuss this issue. She thought that this would be a little more complicated than just deleting a couple of words, because the substantial assistance provision remains in the Guidelines and is not part of the Guidelines range. She did not know whether that needed to be dealt with. Although it is not part of the statute nor part of the Guidelines range, it is still relevant. She also said that Rule 32(h) should also be considered, because it contains a similar reference to notice about departures that the Supreme Court struck down fifteen years ago. In her view, if the Committee is going to change Rule 11, it should also consider amending Rule 32(h). It may be useful to have some people on the Committee talk about this issue a little more in depth once or twice.

A member said that she had been thinking along the same lines, but not that a subcommittee is necessarily needed (although she expressed her willingness to participate in

one). She stated that the first line, which referred to properly calculating the Guidelines range, should encompass everything that is in the Guidelines now. She suggested that that make its way into the committee note, that it is in the three-step process, but the fact is there is still the 5(k)(1) departure, which is part of that Guideline calculation. She thought it would be pretty easy to address this. She had not looked at the other provision, but agreed that it had been struck by the Supreme Court. If the language was there, though, she stated that this is definitely not the law.

Judge Mosman said that he takes these suggestions seriously. He would do one of two things: either he would create a subcommittee, or he would ask the DOJ representative and the defense member to talk with Professor King about the issue.

Closing Comments

Judge Mosman noted that there is no report from the FJC, as they were unable to attend the meeting. Professor Beale nonetheless noted that there is a written report in the agenda book.

Judge Dever expressed his gratitude for Professor Struve, saying that she is not only an award-winning teacher, but has also done extraordinary work in the Rules process since 2006. She first worked as a reporter to the Appellate Rules Committee for almost a decade, then was an associate reporter to the Standing Committee, and has been the reporter to the Standing Committee since 2019. Because of a whole host of commitments, Professor Struve will cease being the reporter in mid-February of 2006, although she will still be a consultant to the Standing Committee. Judge Dever said that everyone present has been the beneficiaries of her extraordinary scholarship, disposition, and effort on behalf of the Rules process, in addition to her many other obligations that she had. Judge Dever said that Professor Edward Hartnett, who is currently the reporter for the Appellate Rules Committee, will become the reporter to the Standing Committee, and Professor Steven Sachs at Harvard Law School will become the reporter for the Appellate Rules Committee in mid-February.

Judge Dever wished to publicly thank Professor Struve for her extraordinary work on behalf of the Rules process, which thankfully will continue in just a slightly different capacity. Judge Mosman echoed these comments.

Professor Struve thanked Judge Dever and Judge Mosman for their comments. She also thanked the Committee, saying that it has been a pleasure and a privilege to learned from everyone (particularly Professor Beale and Professor King, as her long-time reporter colleagues).

Judge Mosman informed the Committee that the next meting will take place on April 29, 2026, in Washington, D.C. He thanked everyone for their very helpful participation and adjourned the meeting.