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: May 8, 2026

I. INTRODUCTION

The Advisory Committee on Criminal Rules met in Washington, D.C. on April 29, 2026. Draft minutes of the meeting are attached.

This report presents several action items. The Advisory Committee unanimously recommends final approval of amendments to Rule 17, which governs subpoenas. It also recommends publication for public comment of amendments to Rules 11 (pleas), 32 (sentencing), and 49.1 (privacy). In addition, the Advisory Committee unanimously recommends approval for publication amendments to Rules 49 and 45 concerning access to electronic filing by self-represented litigants. These proposed amendments will be presented in a report by Professor Catherine Struve that incorporates amendments to the Appellate, Bankruptcy, and Civil Rules as well as the Criminal Rules.

Finally, the report presents information items concerning the Advisory Committee's continuing work on Rule 40, and the formation of a new subcommittee to consider proposals to amend Rule 15, which governs depositions.

II. ITEM FOR FINAL APPROVAL

A. Subpoena Authority (Rule 17) (22-CR-A; 24-CR-J; 25-CR-G)

The Advisory Committee unanimously recommends final approval of the amendments to Rule 17 with three changes to the text as published and several revisions to the committee note.

1. The Major Elements of the Published Amendments

The goal of the published amendments is to respond to the wide disparity in the interpretation and application of Rule 17, and particularly to the problems encountered by counsel in some districts where the courts interpret the rule so narrowly that subpoena practice is almost nonexistent. The amendments make incremental changes and set default rules, while also allowing districts and individual judges substantial discretion to adopt local rules or orders refining the procedures. Although minor adjustments were made to other portions of the rule, these are the amendments' most significant changes to the existing rule.

- *Proceedings Other Than Trial*

Some courts had interpreted the existing language in (c)(1), which refers only to "trial," as barring subpoenas for all proceedings other than trial. This interpretation leaves the defense with no mechanism to obtain evidence from third parties for proceedings other than trial, and drastically limits the government's options to do so.[1] To fix this, new (c)(2)(A) expressly authorizes the use of subpoenas at sentencing and suppression hearings (where subpoenas are already used regularly in many districts) as well as detention and revocation hearings, where there is statutory or rule authority for parties to present evidence and the need for third party evidence arises on occasion.

The amendment also provides flexibility to the court to allow the use of subpoenas for other evidentiary hearings in an individual case.

- *Codifying a Somewhat Loosened* Nixon *Standard*

Rather than substituting an entirely different standard for non-grand-jury subpoenas seeking the production of documents or other items, the amendment makes an incremental change, codifying in (c)(2)(B) an interpretation of the *Nixon*[2] standard that is slightly looser than what some courts have demanded. Some courts have required the requesting party to prove with

[1] The government may obtain evidence from third parties for non-trial proceedings with a search warrant, or, under limited circumstances, with a grand jury subpoena.

[2] *United States v. Nixon*, 418 U.S. 683 (1974).

certainty that the information sought by the subpoena would be admitted, thus barring, for example, subpoenas for impeachment evidence until after the other party had presented its witnesses. The Advisory Committee was persuaded these decisions had applied the admissibility requirement in *Nixon*'s interpretation of prior text too rigidly. In other districts, judges have found the "admissibility" requirement of *Nixon* can be satisfied by a showing of likely admissibility, and defense and government practitioners in such districts reported no problems. Retaining some relationship to admissibility narrowed the scope of what can be sought by tying that information to the designated proceeding and further preventing "fishing expeditions."

The Advisory Committee adopted the "likely admissible" language to indicate that somewhat more flexibility is intended. In doing so, it rejected an alternative formulation— "likely to lead to" admissible evidence—that would have nudged the amendments even closer to the standards supported by the City Bar Committee, the National Association of Criminal Defense Lawyers (NACDL), and many of the defense practitioners who spoke with the Advisory Committee. The note also observes that if a court is concerned that some categories of subpoenas—such as those seeking particular types of information, or seeking information for a particular type of proceeding—pose a special risk of noncompliance with these requirements, the court has discretion to require that those subpoenas be authorized by court order upon motion and/or to order that the recipient produce the items to the court instead of directly to the requesting party's counsel.

- *When Motion and Order Required*

New (c)(2)(C) provides a clear rule explaining when a party must obtain the court's permission by motion before serving a subpoena and when the party may serve a subpoena without motion. Courts continue to differ on when a motion is required based in part on the ambiguity of the language in (c)(1), and the *Nixon* Court's interpretation of this provision as requiring court authorization for a subpoena seeking production in advance of trial. In many districts, motions before issuance are not routinely required. Practitioners and judges expressed significant concerns about the burdens that a motion requirement for all or most 17(c) subpoenas would create in their districts, for both counsel and courts.

The added text ensures court supervision when needed most, while providing flexibility to courts to add or continue a motion requirement for particular types of subpoenas or cases. It retains the motion requirement in (c)(3)—the existing provision regulating subpoenas seeking personal or confidential information about a victim—and adds new (c)(4) requiring a motion before a self-represented party may serve a subpoena to produce items. Otherwise, the new provision allows a represented party to serve a subpoena without a motion, unless a motion is required by local rule or court order. The committee note explains that protective orders and other requirements can be adequate to control potential abuse of the subpoena process by the parties, but that individual courts may choose to adopt or continue broader motion requirements by local rule or court order.

- *Proceeding Ex Parte*

New (c)(2)(E) and (F) respond to concerns raised by some courts' decisions that the existing text of the rule mandates disclosure of every motion and subpoena to all parties. The Advisory Committee concluded that both the defense and the government had advanced persuasive reasons for proceeding ex parte under Rule 17(c), and that permitting ex parte motions and production had been working well in many districts.

New (E) provides that upon a showing of good cause a court must permit a party to file ex parte a motion for a subpoena. The proposed amendment uses mandatory language to avoid any possibility that an individual judge, or a district by local rule, could prohibit ex parte motions. New (c)(2)(F) also states that a party has no duty to inform the other parties about a subpoena when no motion is required, absent an order to do so.

- *Place of Production*

New (c)(5) clarifies the circumstances that require a subpoena recipient to produce the designated items to the court rather than to the requesting party. This is yet another issue that has divided courts interpreting the rule's existing text in (c)(1). Some courts read the current rule as requiring recipients of all subpoenas to produce the designated items to the court. Others regularly permit returns directly to the party seeking the items. The revised text again adopts a default rule, mandating returns to the court, unless the court orders otherwise, if the requesting party is self-represented. For other subpoenas, the new text makes returns to a party's counsel discretionary, allowing courts to determine when they wish to receive and review subpoenaed materials before receipt by counsel.

- *Preserving Disclosure Policies in Rule 16*

New (c)(6) resolves another dispute about the meaning of the rule's existing text, which some courts read as requiring that each party have access to any items that a subpoena recipient produces to another party, regardless of whether they would be subject to discovery under Rule 16. By providing that disclosure to an opposing party is required only if the item is discoverable under the rules, the amendment avoids undermining the careful calibration of discovery and disclosure in Rule 16 and other discovery rules.

- *Clarifying Which Provisions Apply to Different Proceedings*

To improve clarity and avoid confusion, the amendments clearly indicate what types of subpoenas are governed by each provision.

  - Subdivision (a) applies to all subpoenas: those to testify and those to produce material, and to grand jury and non-grand-jury subpoenas.
  - Subdivision (b) applies only to subpoenas to testify.
  - Subdivision (c) applies only to subpoenas to produce designated items. Within (c), paragraphs (2) through (6) apply only to non-grand-jury subpoenas.

- Subdivisions (d) and (e) regarding service apply to both subpoenas for testimony and subpoenas to produce designated items.

In sum, the published amendments, endorsed unanimously by all of the judicial, prosecution, and defense members of the Advisory Committee and unanimously approved for publication by the Standing Committee, reflect a series of compromises on major issues:

• Scope of proceedings: NACDL argued subpoenas should be available for any evidentiary hearing, while victims' advocates wanted subpoenas to be limited to trials. The published rule took a middle position, listing certain hearings in (c)(2)(A) and requiring judicial permission for others.

• Evidentiary standard: Defense advocates called for the "relevant and material" standard, but victims' advocates sought retention of the *Nixon* standard or stronger protections. The published standard of "likely to be admissible" was chosen as middle ground.

• Motion and order. An early subcommittee draft required a motion and order for any subpoena seeking personal or confidential information about anyone, but that requirement was strongly opposed by judges and practitioners alike during the November 2024 Advisory Committee meeting. As a compromise, the published amendment added to the motion and order requirement for victim information a motion requirement for all subpoenas sought by self-represented defendants and restrictions for other subpoenas (e.g., the requirement of advance judicial authorization to proceed ex parte).

• Ex parte procedures: Defense advocates strongly supported the availability of ex parte applications to protect trial strategy, work product, and client confidences, while victims' advocates argued ex parte proceedings violate the Crime Victims' Rights Act (CVRA) right to consult with the prosecution and would enable abuse. The published amendment's middle position permitted ex parte applications but allowed a local rule or court order to require disclosure that one party is seeking or has served the subpoena.

• Direct production to counsel: Defense advocates argued judges should not have the option of ordering returns to the court, while victims' advocates strongly opposed direct returns to defense counsel, citing the potential harm to victims. The published amendment provided a default of production to the court for self-represented defendants, and allowed direct production to counsel unless otherwise ordered by the court or by local rule.

2. The Public Comments

The public comments included renewed advocacy for stronger positions on several of these contested issues. The thirteen comments[3] on Rule 17 reveal a division between supporters of

[3] This count includes Professor Garvin's testimony, but not Comment USC-RULES-CR-2025-0003-001 by International Attestations, LLC, which mentions Rule 17 only in a footnote listing all of the published rules and merely states "they are worthy of comment as well." It took no position on Rule 17 and made no other comments or suggestions concerning it.

clarifying and expanding Rule 17 subpoenas, and victims' rights advocates who strongly oppose expansion. Eight commenters—including individuals, defense organizations, the Federal Magistrate Judges Association, and the Judicial Conference Committee on Criminal Law—supported the amendments with varying degrees of enthusiasm and a variety of suggested modifications. Several urge modifications to the proposed amendments that would provide greater access to information in the hands of third parties. Three commenters—Professor Cassell, Professor Garvin, and Volare's representative Ms. Eliason—strongly opposed the changes, based on victims' rights concerns. They urged rejection of the published modifications that would further restrict access to third-party information. Finally, two comments took no position on the amendment as a whole but raised particular questions or issues. A brief summary of each comment appears at the end of this memorandum.

3. The Advisory Committee's Recommendations

The Advisory Committee concluded that the compromises reflected in the published amendments largely struck the right balance between the competing positions and considerations. It declined to revise the fundamental elements of the published amendment, endorsing these features of the published rule:

- the expansion of the scope of proceedings for which subpoenas may be sought including hearings on detention, suppression, sentencing, and revocation and, with the court's permission, other evidentiary hearings,

- the relaxation of the *Nixon* standard, including the evidentiary standard of "likely to be admissible," and

- the explicit authorization of ex parte applications upon a showing of good cause.

The Advisory Committee also reaffirmed its support for allowing direct production of material produced to counsel. However, as noted below, it recommends adding to the text a presumption of production to the court when a subpoena seeks personal or confidential information about a victim.

The discussion below begins with the Advisory Committee's recommended changes to the published text, then its recommended changes to the note, and ends with issues raised by the commenters that the Advisory Committee concluded raised no changes.

a. Recommended changes in the text

The Advisory Committee recommends the following revisions to the published text, none of which in its view require republication.

- **17(a)** – technical correction making explicit that a subpoena can require testimony, production, or both testimony and production

- **17(c)(3)(A)** – clarifying that a motion and order for a subpoena seeking personal or confidential information about a victim from a third party is required when the third party receiving the subpoena is a victim

- **17(c)(5)** – addition of presumptive requirement of return to the court for subpoenas requiring the production of personal and confidential information about a victim

(i) 17(a) (subpoena contents)

Rule 17(a) carries forward the current requirements for the contents of subpoenas, including the proceeding's title and court's seal, etc. The text as published had been revised to clarify that it applies to both subpoenas for producing items as well as those for testimony. However, as NACDL noted in its submitted comments, the published language did not appear to include subpoenas to testify and produce items at the same hearing. USC-RULES-CR-2025-0003-0015 at 2. As published, (a) provides that a subpoena must "require the recipient to attend and testify or produce designated items at a specified time and place."

The Advisory Committee agreed that the text of (a) should be clarified to recognize that subpoenas may require testimony, production, or both. Accordingly, it recommends the following (style-approved) revision of the first sentence of (a):

> A subpoena must state the court's name and the proceeding's title, include the court's seal, and require that the recipient ~~to attend and testify or produce designated items~~ — at a specified time and place—attend and testify, produce designated items, or do both.

No change in the committee note is needed for this correction of the text, since the new language and the published committee note already reflect the current understanding of Rule 17(a), which the Advisory Committee intended to carry forward. For the same reason, republication is not required.

(ii) 17(c)(3)(A) (victim information subpoenas)

Rule 17(c)(3)(A) allows "a non-grand jury subpoena requiring the production of personal or confidential information about a victim to be served on a third party only by court order upon motion."

Professor Cassell argued that there was an error in the 2008 revision of Rule 17(c)(3), limiting the requirement of a motion and order to subpoenas to be served on a third party, and not when service is to be made directly on the victim. Cassell Revised Statement, USC-RULES-CR-2025-0003-0016, at 11-12 (hereinafter Cassell Revised Statement). He argued that the proposed revisions would allow subpoenas to victims for a wide variety of personal or confidential information before trial and that although one might argue that the victim is a "third party" to the case, the rule seems to distinguish between the victim and the third party from whom victim information is being sought. *Id.* The Advisory Committee's research identified two cases which

supported Professor Cassell's concern, concluding that victims are not "third parties" under current Rule 17(c)(3).

Given the confusion on this point, the Advisory Committee approved this clarification in the text:

> (A) *Motion and Order Required.* After a complaint, indictment, or information is filed, a non-grand-jury subpoena requiring the production of personal or confidential information about a victim may be served on a third party, including a victim, only by court order upon motion.

The proposed note explaining this change states (lines 437-444):

> The amendment also responds to a few decisions that had interpreted the rule as applicable only to subpoenas for personal or confidential information served on third parties other than a victim. The amendment adds the words "including a victim" to clarify that the requirement of a motion and court order before a subpoena seeking personal or confidential information about a victim may be served on a third party applies when that third party is a victim.

There was no opposition to clarifying in the text that the term "third-party" includes victims. Victims are not parties in criminal cases. In criminal cases they are generally considered "third-parties" like nonparty media representatives, nonparty subpoena recipients, nonparty asset owners, etc. If the disclosure of a victim's personal and confidential information is so sensitive that it warrants judicial prescreening of a subpoena to allow the judge to reject or narrow the scope of the request and put in place an appropriate protective order to safeguard the information, then judges should exercise the same oversight for *any* such subpoena, whether the recipient is a third party who is not a victim, a victim other than the victim whose information is sought, or the victim whose information is sought.

Because the Advisory Committee viewed the revision as making explicit the intention of the 2008 amendments and resolving an ambiguity that came to light during the public comment period, it did not deem the change to be "substantial," and it concluded additional public input was not needed. Accordingly, it concluded the revision does not require republication.

(iii) 17(c)(5) (place of production)

As published, **Rule 17(c)(5)** stated that "A non-grand-jury subpoena requested by a represented party may require the recipient to produce the designated items to that party's counsel." For subpoenas sought by a self-represented party, however, the amendment provided that the subpoena must require production to the court unless the court orders otherwise. The published committee note explained:

> … [(c)(5)] clarifies when a subpoena must order the recipient to produce designated items to the court, and when it need not do so. Again, the text in former

> (c)(1) stating that the "court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence" produced conflicting decisions on this point. Some courts read the rule as always requiring returns to the court, others that it required returns to the court whenever a subpoena ordered production before trial, and still others that it permitted returns directly to the requesting party unless the court ordered items produced to it. The Committee concluded that judges should have discretion to determine where (and how) production should take place. To the extent the prior text of the rule was leading to unnecessary limits on the discretion of the court to allow returns to the requesting party, it created needless burdens for courts and required revision.
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> Accordingly, subsection (c)(5) sets two defaults, both subject to departure by court order. First, it provides that a subpoena requested by a self-represented party must require the recipient to produce the designated items to the court. Judicial oversight at both the issuance and production stages is added assurance that parties without legal training or ethical responsibilities will not deliberately or unintentionally access inappropriate or non-compliant information that a judge would be able to intercept if the recipient were required to provide the items to the court. The second default in (5) is for all other non-grand-jury subpoenas, namely those sought by represented parties. It provides the subpoena may require the recipient to produce the designated items to that party's counsel, reflecting present practice in many districts. The rule places no restrictions on the court's discretion to vary from these default rules. For example, when a subpoena is likely to produce private or privileged information, it is common practice for courts to order in camera review before disclosure to anyone.

This part of the published amendment generated widely divergent comments. Defense commenters expressed strong support for this provision for the reasons stated in the published committee note, but NACDL claimed that the statement in the committee note at lines 333-337 erroneously limited what it read as a more sweeping change by the text. USC-RULES-CR-2005-0003-0015 at 4 n. 3. The statement in the published Note read: "the court has discretion ... to order that the recipient produce the items to the court instead of directly to the requesting party's counsel (*see* (c)(5))." NACDL argued that "under proposed (c)(5) such judicial discretion applies *only* to subpoenas issued by *pro se* defendants." *Id.* (emphasis added.) The court's discretion, in NACDL's reading of the text, was limited to only subpoenas sought by self-represented defendants, "where greater judicial control is required to compensate for the lack of professional responsibility and judgment that counsel representation ensures." *Id.* Accordingly, NACDL argued, the court has no discretion to restrict the location of production when subpoenas are sought by represented parties.

In contrast, victim advocates expressed strong opposition to any direct production to defense counsel, contending that (c)(5) would strip away another critical safeguard for victims. Professor Cassell stated that direct production would "cut[] the district court out of its statutorily required role of protecting crime victims" as required by 18 U.S.C. § 3771(b)(1). Cassell Revised Statement at 15. Moreover, since the proposed rule permits ex parte motions, prosecutors may also be prevented from discharging their statutory duties to use their "best efforts" to see crime victims are notified of and accorded their rights under the CVRA. Id. at 15-16. Ms. Eliason expressed

alarm that direct production would "make it easier for [victims'] intimate information to be directly accessed by defendants, exacerbating victims' retraumatization, revictimization, and safety risks." Eliason Revised Statement, USC-RULES-CR-2025-0003-0017, at 8 (hereinafter Eliason Revised Statement). She described how the current process of return to the court protects victims:

> … victims typically have at least the chance to seek protective orders from the court with respect to documents produced to defendants. These protective orders often redact portions of the documents to preserve victims' privacy, or tailor the manner in which defendants access the personal information altogether. A staff attorney at Volare who regularly assists victims with redactions describes it as a "time-consuming process." Each subpoena request can entail a series of proposed redactions back and forth between the victim, the defendant, and the court, often requiring specific data sharing platforms like Box that a victim may be unfamiliar with using. …
>
> But the amendments to Rule 17 will enable defendants and defense counsel's access to significantly more sensitive and private information from victims directly—such as reproductive health, mental health, and citizenship records—because Rule 17 will no longer contemplate the court's involvement as both the court's responsibility under the Crime Victims' Rights Act (CVRA) and as a safeguard in ensuring that victims are afforded their rights. Because documents will be delivered directly to defense counsel, the court, victims, and their counsel will not have the opportunity to redact, contest, or remove non-responsive portions of records.

Id. (footnotes omitted). Ms. Eliason emphasized that "[w]ithout review of records turned over to defense, the court is no longer able to strike nonresponsive requests, implement redactions, and create guardrails around defendants' access to sensitive information *before* defense has access to the information. The amended rule alienates judges from their rightful duty to ensure victims are afforded their rights." *Id.* at 9. Moreover, she expressed concern that production without judicial oversight can create the risk of serious harm to victims. For example, without redaction, subpoenaed material might provide information about the times and locations of medical or therapy sessions, creating an opportunity for further crimes against victims. *Id.* at 8-9.

Noting that NACDL's submission identified an ambiguity in the published rule and committee note,[4] the Advisory Committee favored clarifying the rule to remove this ambiguity. It also concluded that the text should clearly state a default requiring production of personal and confidential information about a victim to the court — rather than directly to counsel — unless the

[4] NACDL's interpretation of the rule was not unreasonable—though it is not consistent with the committee note nor, we believe, with the intent of the Advisory Committee. In contrast to the first sentence of (c)(5), which references the court's ability to vary the default rule regarding self-represented defendants, the remainder of (c)(5) states only that "[a] non-grand-jury subpoena requested by a represented party *may require* the recipient to produce the designated items to that party's counsel." (Emphasis added). This language might be read as granting permission to the *party seeking the subpoena* to determine whether to require production directly to counsel. If (c)(5) is read together with (c)(2)(C), which allows subpoenas to be filed without a motion or order unless (c)(3) or (4) or a local order requires them, that interpretation becomes less reasonable, because those provisions recognize the court's discretion to require production to be made to the court to permit in camera review, either by an order in an individual case, or by local rule.

court orders otherwise. The Advisory Committee understood that production to the court in this situation was common practice.

The Advisory Committee approved the following revised text for (c)(5). For clarity, the clean version appears below:

> **(5)** ***Non-Grand-Jury Subpoena--Place to Produce the Designated Items.*** Unless the court orders otherwise, a non-grand-jury subpoena:
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> (A) must require the recipient to produce the designated items to the court if the subpoena:
>
> (i) is requested by a self-represented party; or
>
> (ii) requires the production of personal or confidential information about a victim; and
>
> (B) may require the recipient to produce the designated items to that the requesting party's counsel if the subpoena:
>
> (i) is requested by a represented party; and
>
> (ii) does not require the production of personal or confidential information about a victim.

The changes are shown on lines 111-132 of the redline version. The revision to the committee note approved to accompany this change explains (at lines 455-506):

> **Rule 17(c)(5)** is also new. It clarifies when a subpoena must order the recipient to produce designated items to the court, and when it need not do so. Again, the text in former (c)(1) stating that the "court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence" produced conflicting decisions on this point. Some courts read the rule as always requiring returns to the court, others that it required returns to the court whenever a subpoena ordered production before trial, and still others that it permitted returns directly to the requesting party unless the court ordered items produced to it. The Committee concluded that judges should have discretion to determine where (and how) production should take place. To the extent the prior text of the rule was leading to unnecessary limits on the discretion of the court to allow returns to the requesting party, it created needless burdens for courts and required revision.
>
> Accordingly, subsection (c)(5) sets ~~two~~ three defaults, ~~both~~ each subject to departure by court order.
>
> First, ~~it~~(5)(A)(i) provides that a subpoena requested by a self-represented party must require the recipient to produce the designated items to the court. Judicial oversight at both the issuance and production stages is added assurance that parties without legal training or ethical responsibilities will not deliberately or unintentionally access inappropriate or non-compliant information that a judge would be able to intercept if the recipient were required to provide the items to the court.

The second default in (5) is for ~~all other~~ non-grand-jury subpoenas that require the production of personal or confidential information about a victim ~~namely those sought by represented parties~~. Paragraph (5)(A)(ii) provides that unless the court orders otherwise, such subpoenas must require the recipient of such subpoenas to produce the designated items to the court, not directly to counsel. Production to the court provides an opportunity for the court, before the information produced is disclosed to the requesting party, to review the information produced in camera, require redactions, restrict access, regulate retention, add other protective orders, or take other actions to protect the victim's dignity and privacy.

The third default, in (5)(B), is that unless the court orders otherwise, ~~It provides the~~ a subpoena that is requested by a represented party and that does not require the production of personal or confidential information about a victim may require the recipient to produce the designated items to ~~that~~ the requesting party's counsel~~, reflecting~~. This default reflects present practice in many districts.

The rule places no restrictions on the court's discretion to vary from these default rules. For example, when a subpoena is likely to produce private or privileged information, it is common practice for courts to order in camera review before disclosure to anyone.

The Advisory Committee concluded that the proposed revision would not require republication. It responds to public comments contending that the proposed amendment would have the unintended effect of bypassing a common procedure that has provided substantial protection to victims. The testimony and written comments provided an ample basis for the Advisory Committee to make its decision, and the Advisory Committee saw no need for further public comments. Moreover, the proposed revision received unanimous support from all members of the Advisory Committee, who did not see it as controversial.

b. Recommended changes in the notes

In addition to the note revisions discussed above, the Advisory Committee recommends revisions to the published committee notes to **17(c)(5)**, **17(c)(3)(B)** and **17(c)(2)(B)(ii)**.

(i) 17(c)(5)

An addition to the note on **17(c)(5)** is discussed in the next section, pages 19-22, in connection with comments seeking a change in the text.

(ii) 17(c)(3)(B)

Rule 17(c)(3)(B) requires notice to the victim before an order is entered allowing a subpoena for the victim's personal or confidential information. Current Rule 17(c)(3) requires a court order to subpoena this personal or confidential information, and states that absent "exceptional circumstances" the court must require giving notice to the victim before entering the order. The published amendment did not disturb this language, which was part of the original (c)(3) provision added to Rule 17 in 2008.

Both Ms. Eliason and Professor Cassell emphasized the link between ex parte motions and what they saw as a critical gap in the requirement that victims receive notice when a party seeks a subpoena requiring the production of personal or confidential information about a victim. Cassell Revised Statement at 16-25; Eliason Revised Statement at 11-14. Their principal concern was that the courts will find "exceptional circumstances" and grant ex parte orders for personal or confidential information without giving the victims notice to permit them to move to quash the subpoena or otherwise object. Indeed, in that situation, the victim might be unaware that their confidential information had been provided by a third party.

Professor Cassell and Ms. Eliason focused on the underlined language in the 2008 Committee Note to Rule 17(c):

> The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2)—or object by other means such as a letter—on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

In their view, it will nearly always be possible for the defense seeking a subpoena for victim information to argue that defense strategy would be prematurely disclosed. Moreover, they urged, that problem is compounded by the last sentence, which permits the court to make that judgment ex parte "without notice to anyone." Cassell Revised Statement at 23-25; Eliason Revised Statement at 11-12. This, they argued, violates the courts' duty under the CVRA to ensure that victims are treated with fairness and with respect for their dignity and privacy. *See* 18 U.S.C. § 3771(a)(8). And notice to the victim of the fact a subpoena is being sought is critical, because it is the necessary predicate to the victim's ability to contest the subpoena or seek its modification.

Responding to this concern, the Advisory Committee agreed to add language to the published committee note accompanying the statutory duty of notice in (c)(3). Specifically, the addition draws attention to the distinction between disclosing a detailed explanation of reasons for requesting an ex parte subpoena, which in some cases may prematurely disclose trial strategy, and notifying the victim that a party is seeking his or her information from a particular subpoena recipient, which would not ordinarily reveal confidential strategy. Becoming aware that a subpoena is being sought is not the same as being handed a roadmap of how a party will use the material. The suggested addition to the published note is shown in red, below:

> **Rule 17(c)(3)** retains the requirement in former (c)(3) of a motion and court order for a subpoena seeking personal and confidential information about a victim, now in subparagraph (A), as well as the requirement of prior notice to a victim absent exceptional circumstances, now in subparagraph (B). Both requirements were added to the Rule in

2008 to implement the Crime Victim's Rights Act and are unchanged, except for the addition of style revisions, including adding the term "non-grand-jury" to (A).

The amendments also add a provision permitting ex parte applications for good cause, but it is important to distinguish that good cause requirement from the "exceptional circumstances" concept in (c)(3). Exceptional circumstances under (c)(3) would include that evidence might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy.[5] It will be uncommon that a notice to a victim will meaningfully implicate the concern about disclosing defense strategy because, unlike subpoena applications under this Rule, a notice merely informs the victim of the request, not the reasons why the subpoena is sought. In contrast, the showing of "good cause" to file a motion ex parte would require an explanation of the reason.

In the Advisory Committee's view, this addition to the note would not require republication. The first step in the republication analysis is whether the change is substantial. The limited role of committee notes supports the conclusion that republication is not required. Committee notes are not permitted to change, restrict, or expand the rule stated in the text. Given the limited role played by committee notes, inclusion of the new language in the committee note—not the text of the rule—provides support for the view that the change is not substantial.

Moreover, the proposed addition to the note is consistent with the language in the 2008 committee note for (c)(3). It carries forward language explaining that both loss of evidence *and* unfair prejudice by premature disclosure of a sensitive defense strategy may constitute exceptional circumstances, while providing an explanation why disclosure to the victim that a subpoena is being sought will seldom result in the latter.

(iii) 17(c)(2)(B)(iii)

Finally, the Advisory Committee recommends a revision in the note accompanying **17(c)(2)(B)(ii)** for clarity. Subparagraph (c)(2)(B) articulates the modified version of the test announced by the Supreme Court in *Nixon*. At lines 326-28 the committee note explains that the published rule included no separate reference to relevance "because it is not likely that information would be admissible unless it was relevant." The Advisory Committee concluded that this sentence was wordy and confusing, and it recommends that it be revised to read "There is no separate reference to "relevance" in **(c)(2)(B)** because information would not be admissible unless it were relevant."

[5] To make the note read more smoothly than the version approved by the Advisory Committee, Judge Mosman suggests the Standing Committee add the words "a showing" to the note. If approved by the Standing Committee, the sentence would read:

> Exceptional circumstances under (c)(3) would include a showing that evidence might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy.

The revised language recognizes that relevance is a foundational requirement for admissibility. This clarification is especially helpful in light of the concerns expressed by some commentators that the "likely to be admissible" standard was a poor fit for proceedings like sentencing and suppression hearings, where the Federal Rules of Evidence do not apply. As members noted at the meeting, even in proceedings where the FRE are not applicable, courts still determine admissibility applying the basic standards of relevance, as well as authenticity, and reliability. Privileges apply as well under FRE 1101(c).

c. Recommendations for no changes

(i) Victim concerns about expanding the scope of the proceedings

Victim advocates expressed strong opposition to authorizing the availability of subpoenas to proceedings other than trial, arguing that this would have a very serious detrimental effect on victims.

Professor Paul Cassell argued that because 95% of cases are currently resolved by pleas, expanding subpoenas to non-trial settings would expand "the possible situations where victims could be subpoenaed by something like 20-fold—i.e., around 2000%." Cassell Revised Statement at 7. He argued, for example, that allowing defense subpoenas for detention hearings in a violent crime case would permit routine subpoenas for all of the victim's medical and psychological records in an effort to undercut the government's arguments regarding the level of danger the defendant presents. *Id.* at 7. He questioned the Advisory Committee's assumption that detention hearings happen so swiftly such subpoenas will be rare. *Id.* He noted that the Advisory Committee's "consensus" on this point reflected only the views of judges, prosecutors, and defense counsel—but not victim advocates. Indeed, Cassell suggests that defense attorneys in a violent crime case would ordinarily move to subpoena the victim's medical and treatment records. He expressed doubt that the other requirements (particularity, reason to believe that the recipient possesses the material sought, and not reasonably available from another source) would be difficult to overcome or provide much of a safeguard. *Id.* at 8-9. Similarly, he argued that at sentencing hearings defense counsel could use subpoenas as the functional equivalent of cross-examining victims by examining their confidential records. He emphasized that victims are not currently subject to cross-examination, so this would be a significant change, greatly increasing the victim's trauma. *Id.* at 9.

In her testimony, Professor Meg Garvin also expressed concern that "all parts of Rule 17 affect victims," and that the combined effect of the amendments would increase the number of subpoenas for victim information, and that the expansion to proceedings other than trial would permit what she called "persistent subpoenas" for this information. Jan. 22, 2026 Tr. of Hr'gs on Prop. Amends. to Rule 17, at 27-28. She stressed that "the lower practical barriers to repeated demands for information are going to expose victims" to trauma, as well as the difficulty of navigating the unfamiliar criminal justice system at an earlier time in the proceedings "where relevance is more up in the air and the rules of evidence are not necessarily in play at all or are in play in a restricted fashion." *Id.* at 28-29. She expressed special concern about fishing expeditions, especially in sexual assault cases. *Id.* at 29. Similarly, Ms. Eliason expressed concern that the

revised standard of admissibility is ill suited to non-trial proceedings in which the Rules of Evidence are not applicable or the applicability of evidentiary rules is "illusory." Eliason Revised Statement at 7. She urged that the "likely to be admissible standard offers "almost no shelter at all" for victims and expressed concern that judges might become more likely to grant subpoenas for efficiency's sake because of the workload generated by the increased number of subpoenas. *Id.*

The Advisory Committee declined to revise Rule 17(c)(2)(A) to restrict the scope of application to trial alone or to edit the list of proceedings where subpoenas are presumptively available. Although the concerns raised by the victim advocates are substantial, subpoenas are already available for some (or all) of these pretrial proceedings as well as others in a significant number of districts, and there has been no indication that the serious consequences Professor Cassell and other victim advocates fear are occurring now in those districts.

In making this decision, the Advisory Committee reconfirmed its understanding that subpoenas are now in use for these purposes in many districts. It reviewed research that identified many districts in which courts have recognized Rule 17 subpoenas proceedings for the proceedings identified Rule 17(c)(2)(A), as well as two circuits recognizing that subpoenas may be permitted for sentencing.[6] It noted that a leading treatise states that Rule 17 subpoenas are not limited to trials and may be issued for purposes including a deposition or a determination of an issue of fact raised by a pretrial motion.[7] A member confirmed that in her district, they are able to subpoena documents and materials for court proceedings other than trial, including detention hearings, suppression hearings, and violation hearings.

Making subpoenas available for these proceedings facilitates the rights provided in other rules. The rules for the pretrial proceedings identified in the proposed amendment already give the defendant a right to present evidence, or assume that the judge will allow the defendant to do so. Rule 17 provides the only avenue for obtaining evidence from third parties for use in those proceedings. Rule 46 requires compliance with the Bail Reform Act, 18 U.S.C. § 3142(f), which provides that at the detention hearing, a person "has the right . . . to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." A defendant may need to testify or introduce evidence at a suppression hearing. The government too may occasionally turn to Rule 17 to obtain evidence from third parties for a pretrial hearing, for example, to rebut a defendant's factual allegation. As for post-trial hearings, Rule 32 does not grant any right to introduce evidence at the sentencing hearing, but Rule 32(i)(2) states that "[T]he court may permit the parties to introduce evidence on the objections," and Rule 32(i)(4)(ii) states the court must "permit the defendant to speak or present any information to mitigate the sentence." At revocation hearings, however, Rule 32.1(b)(2)(C) expressly includes an entitlement of the person to "present evidence[] and question any adverse witness[.]"

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[6] *United States v. Winner*, 641 F.2d 825, 833 (10th Cir. 1981); *United States v. Krane*, 625 F.3d 568, 574 (9th Cir. 2010).

[7] 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 272 (4th ed.) states (footnotes omitted):

> Rule 17 is not limited to subpoenas for the trial. A subpoena may be issued for a preliminary examination, a grand jury investigation, a deposition, for determination of an issue of fact raised by a pre-trial motion, or for post-trial motions.

The victim advocates did not claim that the harms they described are occurring in the districts where such subpoenas are already permitted. When asked specifically at the January 22 hearing about problems in districts in which subpoenas are already permitted in proceedings other than trial, Professor Garvin noted she always sought to limit Rule 17 subpoenas to trials (though she was not always successful), and she acknowledged that when subpoenas were authorized for other hearings, she had been able to litigate issues such as relevance and particularity. Jan. 22, 2026 Tr. of Hr'gs on Prop. Amends. to Rule 17, at 33-35. Professor Cassell and Ms. Eliason did not directly address that issue. Similarly, at the November 2024 Committee meeting in New York, the speakers who opposed the expansion of Rule 17 did not present information or argue that the problems they anticipated were actually occurring in districts with expanded subpoena practice.[8]

The published rule also includes multiple options for a court to respond to any issues it may encounter with subpoenas at non-trial proceedings. It expressly states that a court is free to regulate subpoenas, for example, by requiring a motion and order of the court before service, see Rule17(c)(2)(C), and/or by requiring that items required to be produced by a subpoena, a category of subpoenas, or all subpoenas be returned to the court and not directly to the requesting party, see Rule 17(c)(5). In addition, judges may use protective orders as they wish. In other words, a court can tailor the scope of its oversight to any concerns that may arise from subpoena practice in its individual district. On the use of subpoenas for non-trial proceedings, as well as several other issues, the proposed rule recognizes the need to provide district judges with flexibility and trusts them to exercise it wisely.

Although the victim advocates sought to narrow the scope of the rule to trials, NACDL's comment requested that the rule should be broadened to presumptively permit a subpoena for *any* evidentiary hearing. USC-RULES-CR-2025-0003-0015, at 3-4. The Subcommittee did not find this persuasive. The rule provides the necessary discretion to allow subpoenas for other evidentiary hearings when warranted. The amendment assumes that not only will judges exercise their discretion to provide more oversight should parties misuse subpoenas for proceedings other than trial if needed, it trusts judges to be gatekeepers for the proper use of subpoenas at evidentiary hearings other than those enumerated.

(ii) The revised Nixon standard

Rule 17(c)(2)(B) governs the standard for the contents of subpoenas and includes the Advisory Committee's revision of the strict *Nixon* standard:

> (B) *Required Content and Limitations.* The subpoena must describe each designated item with reasonable particularity and seek only items that:
> (i) are likely to be possessed by the subpoena's recipient;
> (ii) are not reasonably available to the party from another source; and

[8] Deputy Assistant Attorney General Lisa Miller did provide examples of cases in which information disclosed to the defendant by the government during discovery under Rule 16 had been used by the defendant to harm and intimidate third parties, Minutes of Criminal Rules Advisory Committee, November 6-7, 2024, at 32, but those examples did not involve Rule 17 subpoenas.

(iii) are, or contain information that is, likely to be admissible as evidence in the designated proceeding.

Multiple comments urged the Advisory Committee to revise this standard. Defense commentators renewed their support for the more generous "relevant and material" standard, and the victim advocates urged a return to the *Nixon* standard.

The comments from the New York City Bar's White Collar Committee, the New York County Lawyers Association's Federal Courts Committee, NACDL, and individual commenter Morgan Noel all expressed support for the broader standard of "relevant and material." *See* USC-RULES-CR-2025-0003-0013 (New York City Bar Association, White Collar Crime Committee); USC-RULES-CR-2025-0003-0015 (NACDL); USC-RULES-CR-2025-0003-0011 (New York County Lawyers Association (NYCLA) Federal Courts Committee); USC-RULES-CR-2025-0003-0005 (Morgan Noel).

Defense witnesses at both of the Advisory Committee's meetings in Phoenix and New York argued that in many districts the *Nixon* standard was applied so strictly that it was impossible, as a practical matter, to obtain pretrial subpoenas. In contrast, they stated that the more relaxed standards worked well in other districts. Despite their strong opposition to this change, the victim advocates provided no information about increased problems in those districts with more relaxed standards, and similarly the speakers at the New York Advisory Committee meeting in November 2024 who opposed the expansion of Rule 17 did not present information or argue that the problems they anticipated were already occurring in districts with expanded subpoena practice. Indeed, in response to Judge Nguyen's question whether the Department of Justice thought there was a greater risk to victims and witnesses in districts that interpret *Nixon* more permissively compared to districts that have no subpoena practice or interpret *Nixon* very strictly, Deputy Assistant Attorney General Lisa Miller "said that she had not noted a trend," and "Mr. Randall said that he also did not have a sense of current abuses." Minutes of Criminal Rules Advisory Committee, November 6-7, 2024, at 34.

On this point, the only new element in the post-publication statements and testimony by the victim advocates is the argument that this change to the *Nixon* standard would operate in tandem with the other changes discussed, and thus cumulatively have a serious impact on victims. Professor Cassell recognized that "[t]he Advisory Committee appears to have believed the standard was, de facto, the operating rule in some districts[.]" Cassell Revised Statement at 15. But he responded that "the existing rule—and the incorporated *Nixon* standard—was tethered to trials. By specifically expanding the rule to many other proceedings, without the same evidentiary restrictions associated with trial (e.g., detention and sentencing hearings), the proposed rule clearly begins to resemble an anything-goes approach." *Id.* As noted above, the Subcommittee recommends no change in the availability of subpoenas for those proceedings.

The Advisory Committee recommends no changes in 17(c)(2)(B) as published. It concluded that the issues raised in the comments had been carefully considered during the development of the published rule, which reflects a compromise between the competing positions. The districts that already permit the use of subpoenas under a relaxed *Nixon* standard and those

that allow subpoenas for purposes other than trial do not appear to have experienced the serious consequences feared by the victim advocates.

(iii) Subpoenas for personal or confidential information of persons other than victims

The Advisory Committee recommends no change in the text of **Rule 17(c)(2)(C)** as published, but it does recommend an addition to the committee note for 17(c)(5), as noted above. Rule 17(c)(2)(C) provides that—with the exception of subpoenas seeking personal or confidential information about victims and subpoenas sought by self-represented defendants—no motion and order are required before service unless otherwise required by a local rule or court order. During the consideration of the amendment, both defense lawyers and judges expressed serious concerns about the burdens of filing and adjudicating motions for subpoenas, burdens that would increase substantially if motions and orders were required for additional categories of subpoenas. Because this provision mediated the workload of both counsel and the courts and expressly left discretion to require motions for additional subpoenas through local rules or other orders, this provision received strong support in the Advisory Committee.

But one commenter, Mr. Wroblewski, argued that the amendments should be revised to require a motion and court order whenever a subpoena seeks personal or confidential about anyone. USC-RULES-CR-2025-0003-0003. In Court Review Should Be Required Before Our Personal Information is Subpoenaed, a Substack posting submitted as part of his comment, he expressed great concern about one aspect of the proposal: that except for subpoenas seeking personal or confidential information about victims, it generally authorizes prosecutors and defense attorneys to prepare and serve a subpoena "without any motion and thus without any review by a court." He noted that when personal or confidential information about a person other than a victim is sought, the subpoena can be issued without any notice to the person whose information is being sought. He argued this is troubling for two reasons. First, the rule would provide no protection for personal privacy and the "unconstitutional use of subpoenas." And second, the amendment creates an honor system, in which interested parties determine whether a subpoena they seek meets the standards set by the amended rule.

Mr. Wroblewski's argument was policy based (though he added a constitutional dimension discussed below). A version of this argument that all subpoenas seeking personal or confidential information should require a motion and order had been initially persuasive to the subcommittee when it first drafted a possible amendment that provided more judicial oversight of subpoenas and protection for individual privacy interests.[9] But judges and practitioners alike expressed strong views against requiring motions for *all* subpoenas seeking such protected information. At that point, the Advisory Committee understood that a proposal requiring motions and a court order for

[9] The subcommittee's discussion draft, presented at the Advisory Committee's November 2024 meeting in New York, required a motion and order for *all* Rule 17(c) non-grand jury-subpoenas, and heighted procedures for protected information, which it defined to include not only personal or confidential information about a victim, but also "[the type of] information that [may/is likely to be] protected by [a privilege, confidentiality protection, or privacy protection under federal or state law]." *See* Discussion Draft of Rule 17, in Agenda Book for Advisory Committee on Criminal Rules, November 6-7, 2024 at 445-46, lines 21-29. The personal and confidential information Mr. Wroblewski seeks to protect would fall within that definition.

all subpoenas seeking protected information would generate substantial opposition. Accordingly, it moved forward with a compromise proposal that required motions, a court order, and notice for subpoenas seeking personal and confidential information about victims, and it added a requirement of advance judicial authorization to proceed ex parte as well as a motion for all subpoenas sought by self-represented defendants. This compromise received unanimous support in the subcommittee and the full Advisory Committee, and it was approved for publication by the Standing Committee. Thus Mr. Wrobleski's policy arguments were, in effect, rejected before publication as part of the compromises required to obtain full support for the amendments.

Mr. Wroblewski's post-publication submission supported his policy arguments with a constitutional argument based on *Carpenter v. United States*, 585 U.S. 296 (2018), which held that the Fourth Amendment required the government to seek a warrant to obtain cell site location information (CSLI) held by third parties.[10] But *Carpenter* did not hold that subpoenas in general are subject to the Fourth Amendment. To the contrary, the *Carpenter* Court described its decision as "a narrow one," 585 U.S. at 316. It emphasized the "detailed, encyclopedic, and effortlessly compiled" nature of CSLI records, and the prevalence of cellphones, which could accord the government "near perfect surveillance" of an individual's movements. *Id.* at 309, 312. Accordingly, the Court ruled that, under the Fourth Amendment, the government must obtain a search warrant in order to access historical CSLI records. Thus subpoenas seeking CSLI—and perhaps other broad-scope digital information—raise special (and perhaps unique) privacy concerns, and the government may have to seek a warrant based on probable cause.

The Advisory Committee was not persuaded that *Carpenter* required revising the published amendment to mandate a motion and order for any subpoena seeking personal or confidential information about anyone. Few Rule 17 subpoenas will seek information that would be considered as "detailed and encyclopedic" as the CSLI records in that case. And it is unclear whether court's coercive power to enforce a subpoena is sufficient to constitute the state action necessary to bring the Fourth Amendment into play when a subpoena is sought by a criminal defendant. (If it is, that argument would seem to apply equally to parties in civil proceedings, who rely on the court's power to enforce subpoenas, which issue without requiring a motion or judicial review. *See* Fed. R. Civ. P. 45.)

In any event, under the published rule, any constitutional arguments based on *Carpenter* can be raised and adjudicated in particular cases by a motion to quash the subpoena under Rule 17(c)(2) (renumbered as 17(c)(7) in the published amendment). Additionally, a court concerned about potential use of subpoenas seeking personal and confidential information of persons who are not victims can, by local rule or court order, require a motion for any such subpoena, as many courts already do. The rule as published does not discourage or prevent a court

[10] In a passage cited by Mr. Wroblewski, the Court stated that it "has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." 585 U.S. at 317. Mr. Wroblewski contends that *Carpenter* thus established "both that subpoenas implicate the Fourth Amendment—*in some circumstances at least*—and that information held by third parties—*also in some circumstances*—is protected." USC-RULES-CR-2025-0003-0003 (emphasis added.)

from adopting the policy Mr. Wroblewski proposed.

Although the Advisory Committee did not recommend changes to the text, members did express concern about the wider availability of subpoenas seeking personal or confidential information about persons other than victims. Members emphasized that there had been no reported problems in districts where subpoenas are now available without a motion and order, and the published rule provides courts with multiple options to deal with any concerns, including local rules or orders that would require a motion and order in particular kinds of cases, or for subpoenas seeking particular kinds of material or information. On the other hand, the purpose of the amendments is to expand the availability of subpoenas in other districts, where subpoena practice has been limited or virtually nonexistent, and thus practice norms and expectations have not developed.

The Advisory Committee recognized that there were multiple options for providing an opportunity for more judicial oversight other than requiring a motion and order, such as requiring production to the court of all personal or confidential information, requiring the filing of a sealed notice when a subpoena sought personal or confidential information, an idea offered by Ms. Ralston, or adopting some states' practice of allowing the recipient to object in writing without a lawyer. But many members expressed their view that these options had not been adequately investigated or vetted, that it was not possible to predict which procedures would be most effective at protecting privacy, or which would be less burdensome to the courts and the parties, and that probably republication would be necessary if such a change to the text was adopted.

After substantial discussion, the Advisory Committee unanimously agreed that the best resolution of these concerns was to recommend no change in the text of Rule 17(c)(2)(C) and instead adopt a three-pronged approach: (1) adding a short statement to the committee note for (c)(5) about judicial oversight, (2) exploring other avenues to facilitate the development of best practices, and (3) working with the Federal Judicial Center to monitor the implementation of the amendments closely to identify any problems as well as the approaches that prove to be most effective.

First, the Advisory Committee unanimously recommends this addition to the committee note to **Rule 17(c)(5)**:

> And to provide greater judicial oversight—for example, for subpoenas requiring the production of personal or confidential information—the rule permits a court, by local rule or court order, to require the return of such information to chambers before disclosure to the requesting party.

Second, the Advisory Committee will pursue multiple avenues to facilitate best practices. This includes consideration of revisions to AO form 89B (Subpoena to Produce Documents, Information, or Objects in a Criminal Case), working with the Bench Book Committee on revisions addressing the expansion of subpoena authority, and assisting in the prompt development of local rules and orders.

Finally, the Advisory Committee will work with the Federal Judicial Center to develop mechanisms to monitor the practice under the amendments in order to identify any problems that arise and to identify the approaches—such as local rules and orders—that might be recommended as best practices.

(iv) Expanding the scope of the motion and order requirement for victim information

Writing on behalf of the Judicial Conference Committee on Criminal Law, Judge Edmond Chang suggested that **Rule 17(c)(3)(A)** be amended to require a motion and order when a subpoena has a "reasonable possibility" of requiring the production of personal or confidential information about a victim. USC-RULES-CR-2025-0003-0014 at 2. Judge Chang explained that this standard "will capture a broader set of subpoenas and expand victim protections." *Id.* His letter acknowledged that the Advisory Committee was not aware of any significant misapplication of the current language. *Id.* But because the Criminal Law Committee believed it likely that the proposed amendment would increase the number of subpoenas, his letter expressed concern about the risk that the current language would be read narrowly as requiring a motion and order only when the party seeking the subpoena "knows to a *certainty* that the subpoena will result in the production of a victim's personal or confidential information." *Id.* (emphasis in original). That, he wrote, would "inadequately protect[] victim privacy." *Id.*

The Advisory Committee recommends no revision of the published amendment. The suggested change rests on speculation that the current language of the rule will be read very narrowly by persons seeking subpoenas for personal or confidential victim information. The Advisory Committee had no way of assessing the likelihood this would occur. Additionally, the change would probably require publication to gather public comment. Judge Chang's statement the revision would "capture a broader set of subpoenas and expand victim protections" suggested that it may be seen as a significant change.

The Advisory Committee anticipates that its efforts to develop and facilitate best practices and the close monitoring it anticipates will allow it to determine whether any changes of this nature are needed.

(v) Requiring the government to give notice to victims

Writing on behalf of the Judicial Conference Committee on Criminal Law, Judge Edmond Chang suggested another change in **Rule 17(c)(3)(B),** specifying that the *government* must give notice to the victim when a subpoena seeks personal or confidential information about the victim. USC-RULES-CR-2025-0003-0014 at 3. His letter stated that this would "align the text's rule with actual practice." *Id.* Professor Cassell made a similar suggestion, proposing the addition of the following language to (c)(3):

> (C) Service of any subpoena on an unrepresented victim must be facilitated through counsel for the attorney for the government. Service of any subpoena on a represented victim must include notice to the attorney for the government.

Cassell Revised Statement at 36.

The Advisory Committee recommends no change in this provision as published, which retains the same language about notice that currently appears in (c)(3). Our research found that the change would not appear to "align" with practice in all districts. In *United States v. Ray*, 337 F.R.D. 561, 573-74 (S.D.N.Y. 2020), the court held:

> … [I]f the subpoena calls for personal or confidential information of a victim, the Court must require that the party requesting to serve the subpoena have given notice to the victim—and in ample time for the victim to move to quash or modify—before the subpoena is served. It is not sufficient to place the responsibility on the receiving party or just to demand reasonable efforts to provide notice.
> ….
>
> The party requesting authorization for the subpoena to be served also is responsible for ensuring that notice has been provided. That is the process under the Federal Rules of Civil Procedure, where the party serving the subpoena must provide notice. It also places responsibility where that responsibility must logically rest and with the person most interested in discharging that responsibility.

It seems unwise to assume that other districts do not follow the same practice (though of course federal prosecutors and Department of Justice victim/witness coordinators may also provide notice).

The proposal also fails to take account of the situation in which the defense is able to show good cause for an ex parte application for a subpoena seeking personal or confidential information about a victim, and although the court or the requesting party provides notice of the subpoena to the victim, the court orders that it need not be disclosed to the government. The suggestion that the government must give the victim notice assumes that the government itself will always learn of the subpoena request before it is issued. It is possible in some cases that the government would lack this awareness. Thus the Criminal Law Committee's suggestion appears to be in tension with the portion of the amendment authorizing ex parte applications for good cause.

Even if the amendment were modified or interpreted to require that the government always receive the information required for notice—that is, notice that a subpoena seeking the victim's personal and confidential information from X has been requested by the defense—the Criminal Law Committee's recommended change may not be warranted. As noted above, it is not clear that mandating the government always be the one to notify the victim is the universal practice, nor that relieving the court of all responsibility for determining who must notify the victim is the best policy. It may or may not be, but the Advisory Committee did not examine this issue when developing the amendment, nor has it solicited the views of judges, the Department of Justice or the defense bar about the wisdom of this change.

Accordingly, republication for public comment and additional Committee consideration would be desirable if the suggested language were to be added to Rule 17(c)(3)(B). The change to

this key provision in Rule 17 could be substantial, and to date there has been no opportunity for public comment.

(vi) Ex parte subpoenas and gag orders

Professor Cassell argued that the ex parte provisions would facilitate "gag orders" barring the victim from consulting with the prosecutor. Cassell Revised Statement at 26-33. Focusing on subpoenas issued directly to a victim, Professor Cassell explained that for production to be "effectively ex parte, the recipient of the subpoena must be required not to notify the government." *Id.* at 27. He cited an unreported 2016 case from the District of Columbia Superior Court in which the court issued such a gag order, and states that he has been informed by victims' rights organizations that other such cases exist. *Id.* Professor Cassell contended that by preventing victims from conferring with prosecutors such gag orders would violate both the CVRA, 18 U.S.C. § 3771(a)(5), and the First Amendment.

The Advisory Committee recommends no change in Rule 17(c)(2)(E) as published. Authorizing ex parte applications—which are permitted in other contexts—does not provide a basis for a gag order restricting the speech of the recipient. The published amendment makes no change in the existing law concerning gag orders and prior restraints on speech, and it does not modify or affect the CVRA, 18 U.S.C. § 3771(a)(5), which gives victims "[t]he reasonable right to confer with the attorney for the Government in the case." It appears that in federal proceedings the only example of such an order came in the unreported D.C. Superior Court case noted above. (It is unclear whether the other orders reported to Professor Cassell by victim organizations were federal cases.)

(vii) Clarifying the phrase "personal or confidential"

NACDL expressed concern that the term "personal or confidential" has not been defined, leaving the motion and order requirement "open to abuse, to the detriment of defendants' due process rights and the legitimate exercise of the defense function." USC-RULES-CR-2025-0003-0015 at 4. Accordingly, it suggested that the committee note be amended "to clarify that 'personal or confidential,' as used in this provision, is to be narrowly construed." *Id.* NACDL proposed that "[i]t should be made clear, for example, that criminal history information, security camera footage in the hands of a third party, non-content telephone toll and usage records, and bank records of an alleged crime victim, for example, are not 'personal or confidential' within the meaning of this new rule." *Id.* at 4-5.

The Advisory Committee does not recommend this change. It would go far beyond issues the Advisory Committee considered, and it expresses views the subcommittee has not discussed. During the development of the published amendment, the Advisory Committee had concluded not to attempt to define the scope of the term "personal or confidential," noting no reports that the phrase "personal or confidential" had been interpreted improperly by courts since its addition in 2008, or that there had been any "abuse" of the motion and order requirement. In addition, early in the process the Advisory Committee heard testimony that trying to define categories of what is

personal and confidential would require working through a very crowded field of federal, state, and local laws and regulations defining protections for various information.

(viii) Carve-outs to protect victims

The victim advocates contended if the published rule did move forward—despite their strong opposition—then two major carve-outs would be needed to limit the impact on victims. It is not clear where the proposed carve-outs would be located in the rule. The Advisory Committee does not support the proposed revisions.[11]

Professor Cassell and Ms. Eliason both urged that, if revised, Rule 17 should exclude violent crime and all sexual offenses (including trafficking cases), as well as domestic violence and stalking cases. Cassell Revised Statement at 37-38; Eliason Revised Statement at 16-17. They proposed a definition of violent crime for this purpose drawn largely from U.S.S.G. § 4B1.2(a). Cassell Revised Statement at 37-38 (suggesting modifications of § 4B1.2(a) and any comparable state law crimes prosecuted under the Assimilative Crimes Act); Eliason Revised Statement at 16-17 (suggesting in the alternative that the Advisory Committee could use the definition in 18 U.S.C. § 16).

The victim advocates stressed that violent crime cases present special privacy-related concerns, as well as concerns for victim safety, and they do not present the same concerns as the white collar cases that appear to have motivated the Advisory Committee. They contended that it would be consistent with the Advisory Committee's incremental approach to tailor the proposed amendments to cases not arising from violent crimes.

The Advisory Committee did not adopt this proposed limitation, which would be a major departure from the design of the Federal Rules of Criminal Procedure, which apply to all federal criminal offenses, though providing some adjustments rules for petty offenses and misdemeanors. *See* Fed. R. Crim. P. 58.

In the alternative, Ms. Eliason urged that Rule 17 should expressly exclude cases from the District of Columbia "to prevent their application in the DC Court system." Eliason Revised Statement at 17. She described a local law passed in 2022 that requires judges in the D.C. Superior Court to (1) serve the victim with notice of the potential disclosure of confidential information from eight kinds of professionals (including physicians, mental health professionals, and sexual assault counselors/advocates) and (2) give the victim fourteen days to object and provide an explanation for why the disclosure is not in the interest of justice. *Id.* at 12. It also requires the

[11] Professor Cassell also urged the Advisory Committee to consider "promulgating rules (or urging the enactment of statutes) that will assist in the appointment of legal counsel for crime victims who might otherwise be forced to litigate complicated privacy and other issues pro se." Cassell Revised Statement at 38. He included a proposed Rule 44.1 to recognize the court's discretionary authority to appoint counsel for a victim. *Id.* at 39.

Because this suggestion involves the need to promulgate a new rule, the proposal for the appointment of counsel fell outside the proposed amendments to Rule 17.

court to consider the rights of crime victims under the CVRA in determining whether disclosure would be in the interest of justice. *Id.* at 13. Ms. Eliason urged that the amendments to Rule 17 would severely impair victims' ability to protect their rights in the District of Columbia, whose local rules generally mirror the Federal Rules of Criminal Procedure. *Id.* at 15. She explained that the D.C. Code provides that the Federal Rules of Criminal Procedure are the default in the District, and a process must be initiated to reject any amendments to the Federal Rules. *Id.*

It is unclear whether the law adopted in 2022 would remain applicable if the proposed amendments to Rule 17 go into effect. In the hearing, Ms. Eliason suggested that victim advocates would argue it would remain in effect. *See* Jan. 22, 2026 Tr. of Hr'gs on Prop. Amends. to Rule 17 at 18 (stating "[e]ven if Rule 17 in the District Superior Court gets amended to reflect the federal rules, we will have a District law that essentially our argument would be overrides the federal—or, sorry, the District's rule that reflects the federal rule").

The Advisory Committee also declined to add this proposed limitation, which would be a major departure from the design of the Federal Rules of Criminal Procedure, which apply in all districts. Their application to cases in the D.C. Superior Courts is governed by District of Columbia Code § 11-946, which states that "[t]he Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes and adopts rules which modify those Rules."). Thus the D.C. Code itself provides a procedure for reviving or preserving the protections afforded by the law that was adopted in 2022.

(ix) Information that is not subject to subpoena

Rule 17(h)—the last subsection of the Rule—governs information that is not subject to subpoena, and states that Rule 26.2 governs**.**

The New York City Bar Association's White Collar Crime Committee urged consideration of a revision to Rule 17(h) to address what it describes as an error that occurred in the 2002 restyling of the Rule, inadvertently extending the provision which had been based on the Jencks Act, 18 U.S.C. § 3500, and Rule 26.2 to the production of witness statements held by third parties. USC-RULES-CR-2025-0003-0013. NACDL also supported this proposal. USC-RULES-CR-2025-0003-0015 at 5. The Jencks Act and Rule 26.2 address only statements possessed by the government or the defense.

The White Collar Crime Committee noted that the 2002 restyling was not intended to effect any substantive change, but nonetheless courts have taken different positions on the question whether Rule 17(h) now bars subpoenas for witness statements held by third parties, rather than the government or the defense.

The Advisory Committee declined to make the proposed change to the rule as published. This issue was not among those raised by practitioners (and judges) during the Advisory Committee's sessions in Phoenix and New York, was not debated in the subcommittee and full Advisory Committee, and was not included in the package now under consideration. Because the

provision is at least arguably significant and there has been no public input, its inclusion at this point would require republication of the entire amendment.

(x) Requirements for self-represented parties

Rule 17(c)(4) governs subpoenas sought by self-represented parties, requiring them to file a motion, make the showing required in (2)(D), and obtain an order before serving a subpoena. One commentor, Mitchell Berger, questioned why self-represented parties appear to be treated differently under the proposed amended Rule 17. USC-RULES-CR-2025-0003-0012. He argued that requiring pro se parties to file a motion, make the showing, and obtain an order subjects them to a higher standard than represented parties, potentially undermining their Sixth Amendment rights.

The Advisory Committee recommends no change in (c)(4). It reflects a deliberate choice to avoid the potential for abuse by persons who lack legal training and are not bound by the ethical rules that would deter misuse of the court's compulsory authority. Moreover, because subpoenas sought by unrepresented defendants comprise a very small subset, the motion and order requirement in those cases would not add significantly to the courts' burden.

III. ITEMS FOR PUBLICATION

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 Advisory Committee unanimously recommends publication of amendments to Rule 49.1 and an accompanying committee note. The proposed amendment requires:

- the substitution of pseudonyms (rather than initials) for the names of minors, and
- the omission or redaction of all digits of social-security and other taxpayer-identification numbers, including employer-identification numbers.

The proposed text provides:

Rule 49.1. Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, a party or nonparty making an electronic or paper filing with the court, including any exhibit or attachment, must:

(1) omit or completely redact all social-security or other taxpayer-identification numbers, including employer-identification numbers; and

(2) if any of the following types of information appear in the filing, include only:

(A) the year of an individual's birth;

(B) a pseudonym in place of the name of an individual known to be a minor;

(C) the last four digits of a financial-account number; and

(D) the city and state of an individual's home address.

* * * * *

Because the privacy rules are parallel and consistent to the degree possible, a working group convened by Ms. Dubay and including the reporters for the Appellate, Bankruptcy, and Civil Committees has been coordinating the consideration of parallel amendments to be presented at this meeting. The Advisory Committee has been informed that the Civil Rules Committee is recommending amendments to Civil Rule 5.2(a) that parallel the proposed changes in Rule 49.1. Because of the specialized needs in bankruptcy cases, the Bankruptcy Rules Committee is recommending an amendment to Bankruptcy Rule 9037(a) that requires the substitution of pseudonyms rather than initials for minors, but no redaction of social-security and taxpayer-information numbers. Although the Appellate Rules Committee is considering an amendment to add additional protections, there is no need to delay publication of the proposed amendments. Under Federal Rule of Appellate Procedure 25(a)(5), an appeal in a case in which privacy was governed by the bankruptcy, civil, or criminal privacy rules is governed by those rules as well on appeal. Thus, the proposed amendments to Criminal Rule 49.1(a), Bankruptcy Rule 9037(a), and Civil Rule 5.2(a) would govern criminal, bankruptcy, and civil appeals.

1. Reference to Minors by Pseudonyms

As explained in the Department of Justice's suggestion (24-CR-A), Rule 49.1(a)(3)'s current requirement that a filing may include only the initials of a minor does not sufficiently ensure the privacy and safety of child victims and child witnesses, especially in crimes involving the sexual exploitation of a child. The Department explained that child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and 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 the 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's proposed revision requires the use of pseudonyms—rather than initials—to refer to minors in public filings. This practice is already well established among federal prosecutors, and neither defense attorneys nor the courts reported any problems with that practice. Because minor victims are so fearful of being identified, it is important to address this issue in the rules. The proposed amendment does not require the use of gender-neutral pseudonyms, because the evidence required to prove certain offenses would make that impractical. Instead, the

committee note suggests that gender neutral or other non-identifying terms should be considered where possible.

One question that arose during the consideration of the proposed amendment was how the existing rule (and similar privacy provisions in the Rules of Bankruptcy and Civil Procedure) applies to minors who reach the age of eighteen while litigation is still ongoing. Excellent research by Lara Venegas, who was detailed to the Rules Office, found that although the Criminal, Civil, and Bankruptcy Rules do not expressly extend protection to individuals after they have turned eighteen, the courts have used protective orders effectively to provide continued protection. The Advisory Committee concluded that the current practice of using protective orders to extend the protection of minors seems to be working well, and it does not propose a change in the text of the rule.

Federal Rule of Criminal Procedure 49.1(e) itself allows a court, for good cause, to require the redaction of additional information through protective orders, and the commentary states that Rule 49.1 "does not affect the protection available under other rules . . . or under other sources of protective authority." Fed. R. Crim. P. 49.1(e), Advisory Committee Notes. Other sources of protective authority, too, including 18 U.S.C. § 3509(d), support courts' routine extension of protection of the identity of child victims even after they were no longer minors.[12]

Similarly, under the parallel privacy protections of Federal Rule of Civil Procedure 5.2(a)(3), courts have allowed the use of redactions or pseudonyms depending on the nature and circumstances of the case.[13] Courts employ a balancing test to determine if particular circumstances that warrant anonymity outweigh the public's interest in open judicial proceedings. Those circumstances include the nature of the individual, and whether they are a victim, witness, or party to the litigation.[14]

[12] *See, e.g.*, *Doe v. Menefee*, 391 F.3d 147, 151 n.4 (2d Cir. 2004) ("The surnames of all victims who were minors at the time of the events in question have been redacted throughout this litigation in order to protect the victims' privacy."); *United States v. Begay*, 673 F.3d 1038, 1040 n.4 (9th Cir. 2011) (referencing 18 U.S.C. § 3509(d) when noting continued reference by initials because the victims were previously minors).

[13] The Tenth Circuit adopted the standard established by the Eleventh Circuit: "A [party] should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the [party's] identity. The risk that a [party] may suffer some embarrassment is not enough." *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) (quoting *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992)). The Third Circuit recently noted that "minors who reach adulthood during the course of litigation may be able to justify [continued redactions] as a result of their continuing [privacy] interests." *Ricketts v. Titusville Area Sch. Dist.*, 150 F.4th 634, 636 (3d Cir. 2025).

[14] For matters that may fall under analogous civil matters, Federal Rule of Civil Procedure 5.2 may be employed to allow continued anonymous filings because courts "treat plaintiffs who were minors when their claim accrued differently because society has a transcendent interest in safeguarding the physical and psychological well-being of a minor." *Katie M. and A.M. v. Aetna Life Ins. Co*., No. 4:24-cv-00053-AMA-PK, 2025 WL 934458, at *1-2 (D. Utah Mar. 27, 2025) (internal citations omitted); *see also Doe v. USD No. 237 Smith Ctr. Sch. Dist.*, No. 16-cv-2801- JWL-TJJ, 2017 WL 3839416, at *11 (D. Kan. Sep. 1, 2017) (civil suit alleging sexual assault).

Members did express an interest in using publication as an opportunity to solicit public comment on the question whether the rule should be revised explicitly to address the treatment of minors who age out. Ms. Dubay and the reporters agreed to explore this possibility.

2. Complete Redaction of Social-Security and Taxpayer-Identification Numbers

Senator Ron Wyden has 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[15]—permit filings to include "the last four digits of the social-security number and taxpayer-identification number."

a. Social-security numbers

The Advisory Committee unanimously recommends that Rule 49.1 be amended to require the redaction of all digits of any social-security numbers that are included in public pleadings. Neither the prosecution nor the defense needs the last four digits of social-security numbers in public filings, and this information can be misused by identity thieves and fraudsters.[16] Moreover, full redaction is now considered a best practice by a variety of government agencies. The Advisory Committee found this analysis very convincing, and it concluded the case had been made for complete redaction of social-security numbers in Rule 49.1.

Note, however, that the proposed amendment highlights the filer's option to "omit or completely redact all social-security . . . numbers."

b. Other taxpayer-identification numbers

The Advisory Committee also recommends 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. Although this recommendation goes beyond Senator Wyden's original suggestion, the Advisory Committee concluded that the underlying concern for protecting privacy applies to these other forms of taxpayer information as well, and that the amendment should address these privacy concerns comprehensively.

(i) What are taxpayer-identification numbers?

The Internal Revenue Service (IRS) recognizes four principal types of taxpayer identification numbers: Social-Security Numbers (SSN), Individual Taxpayer Identification

[15] Federal Rule of Appellate Procedure 25(a)(5) provides that in an appeal in a case in which privacy was governed by the bankruptcy, civil, or criminal privacy rules, those rules govern as well on appeal. Thus, Criminal Rule 49.1(a) governs in criminal appeals.

[16] Then-Rules Law Clerk Kyle Brinker prepared an excellent research memorandum on this issue. To avoid providing a roadmap for misuse, we have not included it in the Advisory Committee's published reports and agenda books.

Numbers (ITIN), Adoption Taxpayer Identification Numbers (ATIN), and Employer Identification Numbers (EIN).[17]

The most common form of taxpayer-identification number other than an SSN is the ITIN. The IRS requires any individual who is not eligible to get a social-security number to apply for an ITIN under many circumstances, including filing a U.S. federal tax return.[18] As of December 2023, the IRS had issued 26 million ITINs, and there were more than 5.8 million active ITINs.[19] ITINs are now commonly used for a variety of non-tax purposes, including obtaining drivers' licenses and credit cards, and opening bank accounts, and establishing a credit history.[20]

(ii) The history of the privacy rules and taxpayer-identification-numbers

The history of the treatment of taxpayer-identification numbers in Rule 49.1 and the parallel Bankruptcy and Civil Rules indicates that the drafters of the rules intended to require redaction of ITINs, but not EINs, and did not consider ATINs.

Although the Department of Justice initially opposed applying the same privacy redaction rules to social-security and taxpayer identification numbers, the E-Government Subcommittee "determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same."[21] The E-Government Subcommittee

[17] The IRS website also recognizes a Preparer Tax Identification Number (PTIN) as a type of taxpayer identification number. A memo prepared for the Advisory Committee by Former Rules Law Clerk Kyle Brinker also discussed PTINs, noting that these numbers were created to allow tax preparers to shield their own SSNs, and concluding that they do not raise the same privacy issues as ITINs, ATINs, and EINs.

[18] The IRS website states:

> You may need an ITIN if you're a:
>
> - Nonresident alien claiming a tax treaty benefit
> - Nonresident alien filing a U.S. federal tax return
> - Resident alien filing a U.S. federal tax return
> - Dependent or spouse of a U.S. citizen/resident alien
> - Nonresident alien student, professor or researcher filing a U.S. federal tax return or claiming an exception
> - Dependent or spouse of a nonresident alien U.S. visa holder.

IRS, *Individual taxpayer identification number*, https://www.irs.gov/tin/itin/individual-taxpayer-identification-number-itin#what (last visited Apr. 12, 2026).

[19] Treasury Inspector Gen. for Tax Admin., *Administration of the Individual Taxpayer Identification Number Program (Rep. No. 2024-400-012)*, 1 (2023), https://www.oversight.gov/sites/default/files/documents/reports/2023-12/2024400012fr.pdf (last visited Apr. 11, 2026).

[20] *Id.* at 1-2.

[21] Revised Privacy Template, in Agenda Book for Advisory Committee on Criminal Rules, Oct. 30, 2004 at 105 n.3, available at https://www.uscourts.gov/sites/default/files/fr_import/CR2004-10.pdf).

also considered whether EINs should be included as identifiers to be redacted,[22] and it "discussed whether an EIN raised the same privacy risks as social security or tax identification numbers."[23] A Subcommittee member stated that an EIN "did not present the same privacy concerns" because it "was solely used to file taxes."[24] The Subcommittee then agreed and decided not to include EINs in the list of redacted identifiers.[25] A "person's . . . tax identification number" was changed to an "individual's . . . tax identification number" to clarify that corporate tax identification numbers are not subject to the redaction requirement.[26]

(iii) Reasons to require omission or redaction of all taxpayer identification numbers

At its April meeting, the Advisory Committee concluded that Rule 49.1(a) should afford the same protection to ITINs, ATINs, and EINs that it provides to social-security numbers—requiring full redaction in public filings if any of these taxpayer-identification numbers are included. The Advisory Committee was persuaded that inclusion of these numbers in public filings in criminal cases raised some threat to privacy and risk of misuse, and that tolerating these potential harms was not justified by any countervailing need for inclusion.

ITINs and ATINs. What sparse caselaw there is interpreting the phrase "an individual's . . . taxpayer-identification number,"[27] suggests that the existing rule likely already includes ITINs and possibly ATINs. As noted above, the E-Government Subcommittee clearly intended the privacy rules to encompass individual taxpayer identification numbers. Moreover, bankruptcy forms support the view that the parallel privacy rules always intended "individual's . . . taxpayer-identification number" to include ITINs. For example, the Bankruptcy Official Form 21 was amended in 2007 to instruct debtors to state whether the debtor had an "Individual Taxpayer Identification (ITIN) Number(s)," and if so, to provide it.[28] The committee note stated that the amendment instructing debtors to provide their ITINs was made "[i]n light of the new Rule 9037 which limits public disclosure to all but the last four digits of any individual taxpayer-identification number."[29] Several Directors Forms were also changed to require ITIN information "in order to

[22] Minutes of the June 16, 2004 E-Government Subcomm. Meeting, in Agenda Book for Advisory Committee on Criminal Rules, Oct. 30, 2004, at 119, available at https://www.uscourts.gov/sites/default/files/fr_import/CR2004-10.pdf).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Revised Privacy Template, in Agenda Book for Advisory Committee on Criminal Rules, Apr. 4-5, 2005, at 129, available at https://www.uscourts.gov/sites/default/files/fr_import/CR2005-04.pdf).

[27] Only one case was identified as applying the privacy rules to an ITIN; it assumed that Criminal Rule 49.1(a) covers ITINs. *United States v. Valdez-Morales*, No. 3:15-CR-56, 2016 WL 919029, at *4 (E.D. Tenn. Mar. 4, 2016).

[28] Official Form 21: Statement of Social Security Number or Individual Taxpayer Identification Number (ITIN), in Agenda Book for Committee on Rules of Practice and Procedure, June 22-23, 2006, at 794, available at https://www.uscourts.gov/sites/default/files/fr_import/ST2006-06.pdf).

[29] Admin. Off. of the U.S. Cts., *Official Form 21 - Cumulative Committee Note*, https://www.uscourts.gov/sites/default/files/b_021_cn_cum.pdf (last visited Apr. 9, 2025).

comply with" Bankruptcy Rule 9037."[30] Current bankruptcy case policy likewise instructs debtors to redact ITINs in order to comply with Bankruptcy Rule 9037. The bankruptcy case policy provides that, "according to the criteria provided in Fed. R. Bankr. P. 9037," only the last four digits of an ITIN should appear if an individual has an ITIN instead of a social security number.[31]

Like SSNs, ITINs are now frequently employed for a variety of non-tax purposes.[32] Disclosure may thus provide a similar opportunity for misuse by persons with fraudulent or malicious purposes. And although there is little information about how helpful the last four digits of an ITIN would be to those with nefarious purposes, the Advisory Committee's investigation uncovered no reason such numbers were needed in criminal filings.

As a temporary number assigned to a child during adoption to permit the parents to claim tax benefits (such as dependency exemptions and childcare credits), an ATIN appears to pose less risk of harm to privacy than the disclosure of SSNs and ITINs, and is less likely to appear in filings in criminal cases. The Advisory Committee concluded, however, that all taxpayer identification numbers deserved protection and found no reason to exempt ATINs.

EINs. The Advisory Committee considered but was not persuaded by the Department of Justice's preference not to require redaction for EINs, whether personal or corporate, and ATINs. In the Advisory Committee's view, EINs may raise an interest in individual privacy, especially when used by families who employ domestic workers and by sole proprietorships and small businesses. Although a tax-exempt organization or public company must disclose its EIN in public filings,[33] and a company may provide its EIN to employees or to vendors,[34] otherwise EINs are not public, which supports the view that their disclosure raises privacy risks. The IRS will not disclose an EIN unless the EIN holder gives its consent, the party requesting the EIN has a material interest in its disclosure, or the IRS is otherwise required to do so.[35] The IRS also provides for truncated EINs on statements and other documents.[36] Similarly, the U.S. Tax Court's privacy

[30] Memorandum from Jeff Morris, Reporter, to Advisory Comm. on Bankr. Rules, in Agenda Book for Advisory Committee on Bankruptcy Rules, Mar. 29-30, 2007, at 258, available at https://www.uscourts.gov/sites/default/files/fr_import/BK2007-03.pdf).

[31] Vol. 4: Court and Case Management] Guide to Judiciary Policy, ch. 8 § 830.50(b).

[32] "Contrary to its intended use for Federal tax purposes, an ITIN has become widely accepted by third parties outside of the IRS for use as a valid identification number for many nontax purposes." *Administration of the Individual Taxpayer Identification Number Program*, *supra* note 18, at 1.

[33] *See* IRS, *Public Disclosure and Availability of Exempt Organization Returns and Applications: Public Disclosure Overview*, https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organization-returns-and-applications-public-disclosure-overview (last visited Apr. 9, 2026); Secs. and Exch. Comm'n, Off. of Investor Educ. and Advoc., *Investor Bulletin: How To Read a 10-K* (Sept. 2011), https://www.sec.gov/files/reada10k.pdf (last visited Apr. 12, 2026).

[34] *See* IRS, *About Form W-2, Wage and Tax Statement*, https://www.irs.gov/forms-pubs/about-form-w-2 (last visited Apr. 9, 2026); Wolters Kluwer, *Do You Need an EIN or FEIN for Your Business?* (June 29, 2023), https://www.wolterskluwer.com/en/expert-insights/business-ein-your-federal-tax-id-number.

[35] *See* 26 U.S.C. § 6103; *Highland Cap. Mgmt., LP v. IRS*, 408 F. Supp. 3d 789, 806 (N.D. Tex. 2019).

[36] 26 C.F.R. § 301.6109-4(a)-(b).

protection rule requires omission or redaction of all "[t]axpayer identification numbers (e.g., Social Security numbers *or employer identification numbers*)" in court filings.[37] The Advisory Committee felt these institutions had a good appreciation of the risks, and that the Tax Court's Rules—which require complete redaction—were a good model.

Moreover, whatever the situation in 2007, when the rule was first promulgated, EINs are now widely used for non-tax purposes, such as opening bank accounts and applying for credit.[38] Given these functions, disclosing a sole proprietorship's EIN raises a risk of fraudulent use. Although the Department reported that it had found no evidence of any problems with fraud or identity theft with any tax numbers other than SSNs and ITINs, the Advisory Committee noted reports from the Government Accountability Office and the Treasury Inspector General for Tax Administration that described the use of stolen EINs to fraudulently obtain tax refunds owed to existing businesses or file false W-2s,[39] and members expressed continuing concern that EINs could be misused. Members also expressed the view that the rules should not facilitate fraud, and they should be proactive, given the rapidly changing forms of fraud being developed using new technologies. And members reiterated the point that even if fraud is not a significant concern, there is an interest in individual privacy, especially in the case of EINs for families and small businesses.

The Advisory Committee favored a simple, uniform rule that treated all Social-Security numbers and all taxpayer-identification numbers the same, requiring their full redaction in all public filings, thus better protecting privacy and reducing the risk of fraud.

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[37] Fed. Tax Ct. R. 27(a)(1) (emphasis added). The explanation accompanying the rule states: "The Judicial Conference privacy policy applies to protect only individual privacy. The Court believes, however, that the same privacy and security interests of corporations, trusts, estates, and other entities as those of individuals should be protected in this Court. Consequently, the Court amends its Rules and petition forms to eliminate the requirement of providing any part of the taxpayer identification number, and to extend the protection to any party or nonparty." Explanation to Fed. Tax Ct. R. 27(a)(1).

[38] *See* IRS*, Employer Identification Number*, https://www.irs.gov/businesses/employer-identification-number#needs (last visited Apr. 12, 2026).

[39] Stolen EINs can be used in at least two distinct forms of tax fraud. Most straightforwardly, a stolen EIN can be used to fraudulently obtain a tax refund owed to an existing business. A 2020 GAO study found that the IRS's computerized filters identified almost 8,000 such cases of confirmed business identity theft, claiming $384 million in fraudulent refunds, from January 2017 to August 2019. GAO, *Identity Theft: IRS Needs to Better Assess the Risks of Refund Fraud on Business-Related Returns (GAO Rep. 20-174)* (Jan. 30, 2020), https://www.gao.gov/products/gao-20-174. The study did not estimate how many fraudulent returns made it past the IRS filtering software. *See id.*

In a more involved form of fraud, a stolen EIN can be used to file false W-2s which report tax withholding that never occurred. The false W-2s are then used to file multiple fraudulent personal returns claiming refunds based on the fictitious withholding. Obviously, this poses a financial harm to the government: in 2013, Treasury Inspector General for Tax Administration (TIGTA) identified 277,624 stolen EINs used on individual tax returns claiming $2.2 billion in fraudulent refunds in TY 2011. Treasury Inspector Gen. for Tax Admin., Off. of Audit, *Stolen and Falsely Obtained Employer Identification Numbers Are Used to Report False Income and Withholding* (Sep. 23, 2013), https://content.govdelivery.com/accounts/USTREASTIGTA/bulletins/984411.

3. Attachments and exhibits

The proposed amendment requires redaction or omission of "an electronic or paper filing, including any exhibit or attachment." The Advisory Committee supports including this phrase because the Federal Judicial Center's research showed that the majority of improperly included social-security numbers appear in attachments or exhibits, not in the main filing. The inclusion in the text would serve as a reminder that counsel must review all exhibits and attachments to ensure compliance with the privacy rule.

The Advisory Committee recognized the concern that the explicit inclusion of this phrase might create a negative implication for other rules. That appears not to be a major consideration for the Criminal Rules. Although the word "filing" appears 50 times in the Criminal Rules, all Criminal Rules other than Rule 49.1 use this word as a verb, not as a noun.[40] When referring to the action of filing, there seems to be little or no chance of confusion arising from this clarification in Rule 49.1.

B. Rule 11, Advice to Defendants (25-CR-N)

Judge Patricia Barksdale wrote suggesting that Rule 11 be amended to address recent amendments to the Federal Sentencing Guidelines.[41] Rule 11(b)(1)(M) now provides:

> **(b) Considering and Accepting a Guilty or Nolo Contendere Plea.**
>
> **(1)** ***Advising and Questioning the Defendant*.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> * * * * *
>
> (M) 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 Advisory Committee unanimously recommends publication of amendments to Rules 11 and 32 that reflect the 2025 amendments to the Sentencing Guidelines.

[40] We read the word "filing" in Rule 56 as a verb, although it could be interpreted as a noun. It reads, "A district court is considered always open for any filing and for issuing returning process, making a motion, or entering an order."

[41] Judge Barksdale submitted her suggestion while the amendment was pending. It went into effect on November 1, 2025.

1. The 2025 Guideline Amendments

The 2025 amendments to the U.S. Sentencing Commission eliminated the term "departure." The amendments deleted language in U.S.S.G. § 1B1.1(b) that formerly required the sentencing court to consider "Parts H and K of Chapter Five, Specific Offender Characteristics and Departures." It also deleted most departures previously provided throughout the *Guidelines Manual* and made other related changes to Chapter 5.

In its summary of the 2025 amendments, the Commission explained the rationale for the changes regarding departures:

> In the years since *Booker*, the frequency of departures has steadily declined with courts relying to a greater extent on variances in a manner consistent with the statutory requirements in section 3553(a). The shift away from departures deepened as a direct result of the holding in *Irizarry v. United States*, 553 U.S. 708 (2008), in which the Court held that the "reasonable notice" requirement in Rule 32(h) of the Federal Rules of Criminal Procedure does not apply to variances.

U.S. Sentencing Comm'n, Amends. to the Sentencing Guidelines, April 30, 2025, at 79. The amendments sought to "better align the guidelines to practices under current sentencing law and to acknowledge the growing shift away from the use of departures." *Id.* at 80. With the exception of the provisions pertaining to substantial assistance under §5K1.1 and to early disposition programs in § 5K3.1, the other departure provisions formerly included in Chapter 5 were eliminated.

Although the 2025 Guidelines retained § 5K1.1, § 5K1.1 no longer uses the term "departure." Rather, it provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, a sentence that is below the otherwise applicable guideline range may be appropriate.

Given the change in the Guidelines, the subcommittee concluded that Rules 11(b)(M) and 32(h) require revision.

2. Rule 11(b)(M)–Revision and Proposed Committee Note

The Advisory Committee recommends that Rule 11(b)(M) be amended to remove the requirement that the court advise the defendant at the plea proceeding of "the court's obligation to … consider . . . possible departures under the Sentencing Guidelines." Its recommendation reflects the revised instructions in U.S.S.G. § 1B1.1(b), which now provides:

> STEP TWO: CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a).—After determining the kinds of sentence and guidelines range pursuant to subsection (a) of

§ 1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants

with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.

After considering various options, the Advisory Committee concluded that the following language best reflects the current two-step sentencing process:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(2) ***Advising and Questioning the Defendant*.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) 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~~ the factors under 18 U.S.C. § 3553(a), including the Sentencing Guidelines; . . .

The proposed committee note explains:

The amendment reflects the 2025 changes to the U.S. Sentencing Guidelines, which (1) deleted most of the provisions in Chapter Five, Part K (Departures), and (2) revised U.S.S.G. § 1B1.1(a) to eliminate the requirement that the court consider departures at step two of a three-step sentencing process. As revised, § 1B1.1 now provides for a two-step process, considering at step one "the kinds of sentence and the guideline range as set forth

in the guidelines," and at step two "other applicable factors in 18 U.S.C. § 3553(a)."

3. Rule 32(h)–Deletion and Proposed Committee Note

Because the Guidelines no longer employ the concept of departures, the Advisory Committee also recommends amending Rule 32 to eliminate paragraph (h), which currently provides:

> **(h) Notice of Possible Departure from Sentencing Guidelines.** Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

To avoid renumbering (relettering) of the remainder of Rule 32, the Advisory Committee recommends that subdivision (h) be reserved. The proposed amendment to Rule 32(h) would provide:

* * * * *

(h) **[Reserved]** ~~**Notice of Possible Departure from Sentencing Guidelines.** Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.~~

* * * * *

The proposed committee note describes the purpose and effect of deleting 32(h).

> The amendment reflects developments in the Supreme Court and the Sentencing Guidelines that eliminated the need for notice regarding departures.

C. Rules 49 and 45, electronic filing by a self-represented party

The Advisory Committee's recommendation that amendments to Rules 49 and 45 be published will be presented by Professor Struve in a comprehensive report.

IV. INFORMATION ITEMS

A. 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 one district for violating conditions of release set in another district.

The Rule 40 Subcommittee presented a discussion draft of an amended rule at the Advisory Committee's April meeting. It plans to solicit additional input from magistrate judges, continue its work on the text, and develop a draft committee note. The subcommittee's work so far has focused on arrests for violations of conditions of release. It has not yet considered what changes, if any, to recommend to the language in Rule 40(a)(i) that addresses arrests for "failing to appear as required . . . by a subpoena," and more research will be needed to understand the appropriate procedures in such cases.

B. Rule 15, depositions for discovery

At its April 2025 meeting, two suggestions for amendments to Rule 15 to authorize pretrial depositions for discovery—25-CR-B (Michael Kelly and Sergio Acosta) and 25-CR-E (Larry Krantz)—were placed on the Advisory Committee's study agenda. At its November 2025 meeting, the Advisory Committee briefly discussed five additional proposals that supported amending Rule 15 to permit depositions or witness interviews.

The Advisory Committee has now received a total of 49 suggestions supporting the amendment of Rule 15 to permit a limited number of pretrial depositions for discovery. The new submissions, like those submitted earlier, were detailed and thoughtful. All expressed support for amending Rule 15, saying that such amendment would promote fairness and efficiency in criminal proceedings. Many of the submissions called attention to the existing imbalance between the government's pretrial access to information and access by the defense, noting the inability of defense counsel to compel witness testimony. The submissions also commonly highlighted the discrepancy between the information available to parties in civil litigation and those in criminal proceedings. Several submissions pointed to state criminal rules that allow for broader discovery that could provide guidance for an amended Rule 15, including Arizona, Florida, Indiana, Missouri, and Nebraska. Like earlier proposals, these submissions often acknowledged concerns about witness security and increased costs but stressed that these could be managed by judicial oversight.

Because it appears that the Rule 17 project is nearing completion, and substantial progress has been made on the other projects on the Advisory Committee's agenda, Judge Mosman announced that he would be forming a new subcommittee to consider these suggestions. The new subcommittee's work will include a study of the submissions, research on the various state laws and rules of procedure that currently provide for depositions in state prosecutions, as well as the scholarship analyzing the need for, and issues raised by, depositions in criminal cases.

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 29, 2026

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (the "Committee") met on April 29, 2026, in Washington, D.C. The following members, liaisons, reporters, and consultants were in attendance:

Judge Michael Mosman, Chair
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
Professor Nancy J. King, Associate Reporter
Professor Edward Hartnett, Reporter, Standing Committee
Professor Catherine T. Struve, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Sarah Sraders, Esq., Counsel, Rules Committee Staff
Dr. Timothy Reagan, Federal Judicial Center (via Microsoft Teams)
Dr. Brittany Ripper, Federal Judicial Center

Opening Business

Judge Mosman opened the meeting and welcomed the attendees.

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

Judge Mosman stated that Judge Nguyen would be leaving the Committee after this meeting, and he expressed his gratitude for all of the hard work that she had done, especially in carrying the Rule 17 project forward. Judge Nguyen said that she had already said goodbye to the Committee once before, since this last year had been her "bonus" year. It had been a pleasure for her to serve on the Committee, first under Judge Kethledge, then Judge Dever, and now Judge Mosman. She thanked the chairs, the committee members, the members of the Rule 17 Subcommittee, and the reporters for all of their hard work and for making the Committee's work such a collaborative process.

Judge Mosman reminded those participants appearing remotely to turn on the "raise hand" feature in Microsoft Teams, or simply raise their hand, to be acknowledged. He also asked members present in the room to raise their hands before speaking. Finally, he noted that the meeting today would need to conclude by 3 p.m.

Judge Mosman then turned to the draft minutes of the November 2025 Committee Meeting and asked whether there were any changes recommended. Professor Beale said that she had been notified of two typographical errors that needed correction. She said that even if a small mistake like that were to be noted later, the reporters were permitted to correct a misspelling. She asked that members let the reporters know of any other typographical errors.

A motion to approve the minutes was made, seconded, and approved unanimously.

Ms. Dubay then provided a report on the progress of proposed amendments to the Federal Rules. She directed the Committee to page 94 of the agenda book, which showed the amendments that would be effective as of December 1, 2026. She noted that the chart listed Appellate Rules 29 and 30, which had been withdrawn. Those would later be resubmitted with the changes voted on by the Appellate Rules Committee two weeks earlier. The other amendments identified on that chart, however, were approved by the Supreme Court and delivered to Congress on April 8, 2026. Barring any action by Congress, those will become effective at the end of this year.

Ms. Sraders provided an update on legislation that would directly or effectively amend the Federal Rules. She directed the committee members to page 99 of the agenda book and drew their attention to the Prohibiting Political Prosecutions Act of 2026. This legislation would add several provisions to Criminal Rules 6, 16, and 48. No action had been taken on this bill since it was introduced, but the Rules staff would continue to monitor it.

Dr. Reagan then provided a report on the work of the Federal Judicial Center (FJC). First, the research on deepfakes and authenticity was complete and had been published in the spring agenda book for the Evidence Rules Committee. Second, the FJC planned to release a documentary video on how two district courts were allowing self-represented litigants to file electronically in civil cases. One district allows them to use CM/ECF, and the other does not. Both allow self-represented litigants to use an online upload portal to submit documents for electronic filing.

Rule 17

Judge Mosman then turned to Judge Nguyen to report on Rule 17. Judge Nguyen said that the Standing Committee had recommended that the amended Rule 17 be published. The subcommittee met and reviewed all testimony and comments received during the publication period. The subcommittee heard from 13 commenters, which included individuals as well as organizations. Eight of these supported the revised rule with some modifications, and three commenters expressed strong opposition, primarily based on concerns about victims' rights. Judge Nguyen explained that the public comments received could be divided into three categories: comments for which the subcommittee believed no change to the proposed rule was warranted; comments for which the subcommittee recommended a change; and comments for which the subcommittee was divided as to how to respond.

Subcommittee recommendation of no changes

Judge Nguyen began with the category of comments for which the subcommittee thought no change was warranted. She turned the Committee's attention to the redline on page 145 of the agenda book. The Committee received strong opposition to subparagraph 17(c)(2)(A), which would expand the availability of subpoenas beyond trial. Professor Cassell, one of the commenters, argued that 95% of criminal cases result in pleas, so expanding the availability of subpoenas beyond trials would dramatically increase the number of subpoenas to victims. There was concern expressed about fishing expeditions, especially in sexual assault cases or cases involving violent crimes.

The subcommittee thought that the concerns expressed were very serious but recommended making no changes to the proposed rule text. Expanding the availability of subpoenas beyond trial was an issue that was extensively discussed and considered both by the subcommittee and the full Committee. The Committee made a deliberate choice to expand subpoena availability beyond trial, for several reasons. One was that the defendant has the right to present evidence in these other proceedings. The expansion was designed to correct inconsistencies across districts: in some districts, defendants are permitted to use subpoenas, but in other districts, the practice is more restrictive. The subcommittee was not aware of any examples of the harms identified by commenters in any of the districts that have liberal subpoena practices. Judge Nguyen reiterated that under the amended rule, courts in every district have full discretion to control the way that subpoenas are handled. Accordingly, the subcommittee unanimously recommended that no changes be made.

The subcommittee also reviewed comments about the relaxation of the *Nixon* standard, in subparagraph (c)(2)(B). Judge Nguyen stated that the defense bar—the National Association of Criminal Defense Lawyers (NACDL) and others—renewed their argument for a more generous "relevant and material" standard. On the other hand, the victims' rights groups advocated strongly for the *Nixon* standard, which is very restrictive. Their primary argument was that relaxing the standard beyond *Nixon*, along with the other proposed changes in the amended rule,

would magnify the harm to victims and decrease district judges' abilities to protect the victims' rights.

The subcommittee again felt that these issues had already been fully explored and considered. Judge Nguyen explained that the standard that was implemented in the proposed rule—"likely to be possessed by the subpoena's recipient," "not reasonable available" elsewhere, and "likely to be admissible"—was a middle ground that drew a balance between the very restrictive *Nixon* standard and the "relevant and material" standard. Relaxing the *Nixon* standard was the thrust of this entire project, and was extensively discussed. Accordingly, the subcommittee members unanimously recommended that no changes be made in response to these comments.

Next, Judge Nguyen turned to the comments received in response to subparagraph (c)(2)(E), on line 61 of the redline. The amendments provided that, for good cause, the court must permit the party to file the motion ex parte. This was an issue that the subcommittee worked very hard on, and the Advisory Committee and Standing Committee approved. The objection to this provision was that it would open the floodgates and undercut the court's ability to safeguard victims' rights. Judge Nguyen stated that Professor Cassell raised one point that the subcommittee had not previously considered, which was that this may somehow facilitate the district court's ability to issue a gag order preventing victims from talking to AUSAs. Judge Nguyen said that the proposed amendments to Rule 17 did not do anything regarding gag orders, so any law regarding gag orders remained the same.

The subcommittee thought that this was, again, something integral to the compromise struck in the amended rule, to allow the defendant to have—upon a showing of good cause—the ability to file an ex parte motion. The subcommittee therefore recommended no change to the proposed rule.

The final comment for which the subcommittee was recommending no change be made concerned paragraph (c)(4), beginning on line 88 of the redline. This provision imposed additional requirements for self-represented parties. One commenter questioned why self-represented parties should be treated differently and argued that this potentially undermined their Sixth Amendment rights. Judge Nguyen explained that these requirements were a deliberate choice made by the subcommittee, acknowledging that self-represented litigants do not have the same ethical obligations or legal training as attorneys, warranting greater judicial supervision. The subcommittee therefore recommended no change to the proposed rule.

Professor Beale stated that prior to the meeting the Committee had received a comment from one of the other reporters suggesting clarification of the committee note. She explained that one of the concerns raised by victims about the expansion of the availability of subpoenas to non-trial proceedings was that the Federal Rules of Evidence do not apply. The published committee note, at line 313 on page 159 of the agenda book, said, "There is no separate reference to 'relevance' in **(c)(2)(B)** because it is not likely that information would be admissible unless it was relevant." Professor Beale noted that this language could be stronger. The suggestion was to say, ". . . because information would not be admissible unless it was relevant." She said that if

the Committee believed that this was correct and less convoluted, then it would deliver a more reassuring point.

Judge Nguyen agreed that this tightened up the language and said the same thing in a clearer and more straightforward way. She believed that this should be fairly non-controversial.

A member noted that this had been a concern of his, an evidentiary standard that may have indirect application and a proceeding where the Federal Rules of Evidence would not apply. He asked how a magistrate judge should prepare for a detention hearing and apply the standard, which talked about the likelihood of admissibility.

Professor Beale said that her understanding based on Committee discussions was that judicial officers apply concepts of relevant, reliability, and authenticity when making these determinations, but do not strictly apply the Federal Rules of Evidence. She stated that it was fairly well-understood that these proceedings were not the "wild west," and judges looked at whether the party was introducing something that was actually relevant to the detention decision, and sufficiently reliable that the judge would want to admit it. The judge would then apply those same standards when thinking about something that a party wanted to subpoena.

Judge Mosman remarked that his experience, which he thought was shared widely, was that even in hearings where the Federal Rules of Evidence do not apply, there was an independent issue of admissibility that was applied, that involves things like relevance, authenticity, and the like. There was still a question to be answered by any magistrate judge: is this admissible? It may not be. The answer is not guaranteed simply because the Federal Rules of Evidence do not apply.

Professor King noted that privileges apply in all proceedings.

A member commented that in the context of detention hearings, seeking the subpoena was almost a higher standard. At a detention hearing, the government and defense lawyers can proffer information as officers of the court. The attorneys simply tell the court what their position is. She noted that although she had yet to uncover a subpoena at a detention hearing with her colleagues, she anticipated that this would occur where the proffers did not align. She thought that getting a subpoena would be relevant to that particular consideration. The member therefore agreed that although the Federal Rules of Evidence would not technically apply, attorneys must always present relevant evidence to the court, at every juncture.

Ms. Ralston stated that the primary feature of the Federal Rules of Evidence that do not apply at these other proceedings is the hearsay rules. The government thought that most other rules apply by principle—things like relevance and authenticity—even if they do not technically apply. Hearsay was the one thing that generally did not apply; for example, at sentencing, the government would introduce a victim witness statement without the victim. For a subpoena for documents, that would be the purpose: to bring in a document instead of a witness.

The member who initially asked the question said that he did not disagree with anything that had been said, and that was how he would have answered his own question. He noted that he was always concerned with relevance, but was almost never concerned with strict hearsay. He was always thinking about reliability, which is what hearsay tried to address. The member said

that the standard here was something that magistrate judges can work with, and that he had received a sufficient answer to his question.

Judge Nguyen asked whether there was a motion to approve the amendments to the committee note, at lines 313-315 on page 159, as Professor Beale had suggested. Ms. Ralston offered a friendly amendment to change "was" to "were." The revised committee note would read, "There is no separate reference to 'relevance' in **(c)(2)(B)** because information would not be admissible unless it were relevant." A motion to accept the committee note language, as amended, was made, seconded, and approved unanimously.

Subcommittee recommendation to change the rule and/or committee note

Judge Nguyen then turned to the comments for which the subcommittee thought that some change was warranted. The first concerned subdivision 17(a), which was clarified to make clear that it applied to both subpoenas for producing items as well as to testimony. However, NACDL noted that this portion of the rule could be construed to preclude testimony and the production of documents at the same hearing. Judge Nguyen said that it was the Committee's intention all along to allow this, but to the extent someone thought that this was somehow precluded or unclear, the subcommittee thought that the language needed to be clarified. It proposed the language on page 145, lines 6 and 7, to correct that.

Professor Beale noted that she did not believe that this change required republication. It was absolutely clear that what the Committee meant all along was not to prevent people from, at one proceeding, being able to be subpoenaed to both present documentary evidence and testify. These proposed amendments only clarified what the Committee thought was already clear. The committee note was still consistent with the proposed change in the text because the committee note was written with this interpretation of the rule in mind. Professor Beale thanked the Style Consultants for their help in ensuring that the new language was clear and efficient.

A motion to approve the amended language in Rule 17(a) was made, seconded, and approved unanimously.

Next, Judge Nguyen turned to another change recommended by the subcommittee, which fell into the same category of things that the Committee had intended, but did not make clear. A commenter had raised the question whether a "third party," as referenced in subparagraph (c)(3)(A), included a victim. The subcommittee thought that a victim was a third party, and so recommended adding language to the rule (in line 79 of the redline) and committee note (in lines 424-431 of the redline) to make this clear.

Judge Nguyen noted that this was also a change for which the subcommittee members thought no republication was needed. Professor Beale elaborated that the analysis for republication asks whether this would be a substantial change, and if so, whether it was one where the Committee would really need to get more input to understand the implications. The subcommittee thought that including a victim as a third party was what the amendment already intended to do. After some research, though, the subcommittee found cases that said that a victim is not a third party. The subcommittee therefore thought that this should be clarified and that this was non-controversial.

A motion to approve the amended language in the rule and committee note was made, seconded, and approved unanimously.

The next item concerned proposed changes to Rule 17(c)(3)(B). Judge Nguyen explained that this rule required notice to the victim before an order is entered allowing a subpoena for the victim's personal or confidential information, unless there are exceptional circumstances. Since 2008, the committee note had defined "exceptional circumstances" to include the risk of revealing defense strategy. Commenters raised an objection that this would be very easy to show, and victims would rarely receive notice. The concern expressed was that this would violate the Crime Victims' Rights Act (CVRA), and that notice to the victim was the only way that would allow the victim to contest the subpoena in any way.

The subcommittee considered this comment and thought that the Committee should, at a minimum, revise the language to the note. Page 162 of the agenda book, lines 409 to 423, showed the draft language that the subcommittee proposed adding to the committee note. Judge Nguyen explained that this paragraph was designed to address the concern raised by the commenters and to draw a distinction between providing notice to the victim and providing a detailed explanation of why a subpoena was needed. Notice was different from the "good cause" showing for ex parte applications. The notice to a victim that their information was being sought would not necessarily reveal a sensitive defense strategy, so that would not qualify as "exceptional circumstances."

Judge Nguyen said that there was also a suggestion that the *government* be required to give notice to the victim in every instance, which aligns with the practice of at least one district. She noted that this does not align with some other districts' practices, and so the subcommittee did not recommend that change.

A member stated that she supported the amendment, but she noted that the amended language did not entirely adopt Professor Cassell's position that the CVRA forbids a lack of notice if it would reveal defense strategy. The amended committee note language recognized that it would be uncommon for merely providing notice to reveal a defense strategy. The member stated that this was why the defense bar could accept the amendment, because the court would ultimately make the determination on whether exceptional circumstances had been met (under the possibility that evidence would be destroyed or that perhaps even the mere notice would impede the defense). She stated that the word "uncommon" in the committee note was important for that reason, but thought that this accurately stated the practice in most districts.

Professor Beale addressed the question of the necessity of republication. She stated that the proposed change was in the committee note, not the text. The committee note could not change the meaning of the rule text, or add to or subtract from the text, but it did clarify the intent of the text. She noted that the amended committee note was consistent with the 2008 committee note, but it did draw a distinction with the additional ex parte provisions that were being added to the rule. The subcommittee thought that this was very useful and important to add, and that it did not require republication to do so.

Ms. Ralston responded to the previous member's statement and said that the rule as written would not prevent a court from adopting Professor Cassell's statutory interpretation of

the CVRA. The rule said that *unless* exceptional circumstances apply, the court *must* require giving notice. It did not say that even if exceptional circumstances apply, the court may not require notice. The court may still require notice even if there are exceptional circumstances; it was just not required to do so. The rule left the court with discretion.

A motion to amend the committee note was made, seconded, and approved unanimously.

Judge Nguyen then turned the Committee's attention to comments regarding paragraph (c)(5). The portion of the memo addressing this issue began on page 134 of the agenda book. Paragraph (c)(5) stated that a non-grand jury subpoena requested by a represented party may require the recipient to produce the designated items to the party's counsel. But for subpoenas sought by self-represented parties, the subpoena must require production to the court, unless the court orders otherwise. Judge Nguyen reminded committee members that there were many conflicting practices in various districts as to what the original rule meant. Some courts had read the original Rule 17(c)(5) as always requiring a return to the court. Other courts said that if there was a production ordered before trial, then it had to be returned to the court, but otherwise, it did not. And some courts permitted returns directly to the requesting party unless the court ordered otherwise. So to clarify this, the amended Rule 17(c)(5), as published, set two different defaults. If the subpoena was from a self-represented litigant, then the production was to the court unless it was ordered otherwise. If the subpoena was from a represented party, then the materials were produced directly to counsel.

Judge Nguyen said that NACDL strongly supported this change, but had argued that because of the way that the published rule was written, the district court should have no discretion to order production to the court unless the subpoena was requested by a self-represented litigant. Judge Nguyen did not think that this was the intention of the rule, but thought that it was arguable as to whether NACDL's interpretation was a fair reading or not. Since NACDL read the language this way, the subcommittee thought that the language should be changed. The reporters sought input from the Style Consultants on the proposed changes. The committee note was also revised, throughout lines 442-495.

Judge Nguyen explained that the major change being made was to set a third default: unless the court ordered otherwise, production in response to a subpoena requested by a represented party, that does not require the production of personal or confidential information about a victim, could be made directly to counsel. Personal or confidential information about victims would go to the court.

Professor Beale expressed her appreciation for the assistance from the Style Consultants in drafting this provision. She said that the subcommittee had wished to put the provisions about production of personal or confidential information about victims in the victim provision, thinking that was where people would look for it. The Style Consultants pointed out that the heading of subsection (c)(5) was, "Place to Produce the Designated Items," and readers would follow those headings. It was important for provisions about the place to produce designated items to be in that subsection—not somewhere else, and not in two places. Professor Beale also stressed the importance of avoiding unnecessary cross-references.

Professor King said that the changes in (c)(5)(A) and (B) did two things. First, they clarified that NACDL's reading of the published text was incorrect, and that the court was always in control of where the subpoenas would be returned. There was not a requirement that the production go to defense counsel if the party was represented. Second, and more consequentially, the change would add a category of subpoenas—personal or confidential information about the victim—to those that were presumptively returned to the court unless the court ordered otherwise. This would create a substantial difference, but for a very narrow category of subpoenas. There was unanimity on the subcommittee that this should not require republication.

Professor Beale elaborated that the first change was simply a clarification, to make clear what the Committee intended all along. This did not require republication. The second change came out of expressions of deep concern from the victim advocates that the Committee was changing a well-established and important practice, where the court would referee and protect victims when their personal and material information was sought. There would be an opportunity for redaction or to hold back things that were not relevant; the information would not simply be provided directly to the defendant's counsel. Professor Beale said that the victim advocates were extremely concerned that the Committee was inadvertently changing the established rule in a way that seriously disadvantaged and concerned victims and their advocates. The subcommittee agreed with the view that it was important to have the court as a gatekeeper for this fairly narrow category of subpoenas that sought personal or confidential information about a victim. Professor Beale highlighted that this provision would apply only to personal or confidential information about *victims*, not just anyone. The concerns were well-voiced in the hearings and written testimony, and the subcommittee had had the opportunity to think about the policy implications. If the Committee did not think it needed to hear more information beyond that which came out clearly in the hearings and written testimony, and was able to fully understand the implications of the change, then Professor Beale thought that the change could be presented to the Standing Committee without the need for republication, even if it was a substantial change.

Judge Nguyen added that throughout the subcommittee's work, the key was flexibility, so that the *Nixon* standard could be relaxed for the districts that had no subpoena practice, but would leave alone the practice of districts that had always had a robust subpoena practice. The subcommittee thought that the rule as published already had that built-in flexibility, because the rule began, "Unless the court orders otherwise," and then set out a default that self-represented parties return to the court, but otherwise the return was to counsel. The idea was that in districts where judges wanted to tighten that practice, they could. The change now was that the rule made more explicit that the presumption for personal or confidential information of victims was return to the court, unless the court ordered otherwise.

A member said that he liked the way that paragraph (5)(A) was worded, because it said that unless the court issued an order to the contrary, the court must do what (A) said. But he thought paragraph (5)(B) was strange, because (B) gave the court discretion. It seemed odd to the member to say, "Unless the court orders otherwise, the court may order this." He thought that perhaps the language in paragraph (5) should only be included in subparagraph (A).

Judge Mosman stated that he had originally read the language the same way as the member. However, the rule said, "Unless the *court* ordered otherwise, the *subpoena* may require

the following." The rule did not say that the court had discretion twice. Rather, it addressed what the subpoena could say.

Ms. Ralston said that the "court" was the subject of the introductory clause in (5), but the subject of the next clause was the "subpoena." The verbs that followed in (5)(A) and (B) applied to the "subpoena," not the "court." The opening clause said that the court could always order otherwise. The default rule in subparagraph (A) was that the subpoena must require the recipient to produce these objects to the court. The subpoena must state this. Then subparagraph (B) said that the subpoena "may require the recipient" to produce the items to counsel. It again would be the subpoena that would direct the recipient to produce the items to defense counsel.

Professor Beale noted that this left the option for a party drafting the subpoena. They did not have to draft it this way, but Professor Beale guessed that defense lawyers would want to do so. If they were permitted to do so, they would rather have the production come directly to them. And they were permitted to do so, unless the court ordered otherwise. The court could order otherwise by local rule or by an order in the particular case. The rule was a directive of what must or may be in the text of the subpoena and would instruct the drafter of the subpoena.

Judge Nguyen stressed that that was the difference between the "must" and "may" language. The court could always order otherwise, but there were certain categories for which the subpoena must order production to the court. The permissive provision was for defense counsel.

Judge Mosman stated that the oddness that the member had originally raised would disappear if subparagraph (5)(B) were also mandatory and used the word "must" instead of "may." However, the Committee did not want this section to be mandatory.

A member asked whether someone could clarify what "personal or confidential" meant, because that affected both the motion and order practice and the return. She questioned how lawyers determined whether they should proceed by motion or not.

Judge Nguyen answered that it was a deliberate choice not to define "personal or confidential." That could be defined in many different ways and could be subject to extensive litigation as well. The subcommittee had lengthy discussions on whether to define it, and if so, how, and eventually decided not to do so.

Professor Beale added that this language had been in the Criminal Rules since 2008, when the Rules were revised to incorporate the CVRA. "Personal or confidential" was not defined at that time. It had been working in practice thus far, because there must be a motion and order to subpoena confidential information about a victim. The amended rule carried forward the way that courts and litigants had been applying that language, without getting into a fight about its meaning.

Judge Nguyen noted that even within the same district, or even within the same courtroom, "personal or confidential" could be defined differently. It was a highly fact-specific analysis. Even the same judge might say that something was "personal or confidential," without providing a specific definition, and something else that was close might fall the other way.

Professor Beale added that NACDL had asked that the committee note define "personal or confidential" narrowly, but the subcommittee decided not to choose a definition.

A member said that sometimes non-lawyers were deciding what "personal or confidential" meant, because they were the recipients of the subpoena. This could be a police department or a victim advocacy group. In the member's experience, they were much more protective over the information that they turn over, and so would want to follow any rules that apply to them rather than turn over things they hold in confidence.

Ms. Ralston responded that it would not be up to the police department to decide whether information was "personal or confidential," because that decision was made when the subpoena was written. The subpoena itself would require the return to the court. She stated that she did not know what would happen if a party thought that they were issuing a (5)(B) subpoena, but the recipient thought that it was a (5)(A) subpoena. She added that even though this language had been in the rule for 18 years, and seemed to have been working well, there was not much case law on this. It appeared that this issue was being worked out behind the scenes. Maybe the rule change would make the definition of "personal or confidential" more frequently litigated, because there would be more subpoenas and more opportunities to talk about what it meant. If there was a split in the case law, then the Committee would have the opportunity to come back and clarify the definition. This was something that the rules do often, clarifying between different court interpretations of what the rules mean. Ms. Ralston stated that in November 2024, when the Committee held a hearing, there was an attempt to define the term more explicitly, in reference to state privacy laws and the like. The Committee had determined that that would be unworkable.

A member asked whether subparagraph (5)(B) could say "the subpoena" again, to clarify that the subpoena was the subject of the clause in (B). Professor Beale responded that the Style Consultants would not accept that.

Professor King stated that because this carried over a category that had been in the rule since 2008, the question of what was "personal or confidential" had to come up much earlier than the return of the production. This issue would arise at the front end of the subpoena process. If the drafter of the subpoena erred at the front end, they would be in more trouble than just missing the production. They missed the motion and court order entirely. Thus, this was not just a question of whether "personal or confidential" in this clause was undefined; this was a concept that carried throughout Rule 17 and had done so since 2008.

A member said that although this was a change to the text of the rule, she did not believe that this required republication, for the reasons set forth in the reporters' memorandum. As a member of the subcommittee, she said that there was no question that victims were forefront in the subcommittee's efforts to try to protect their information. When the subcommittee drafted the language that was ultimately published, the thought was that all of the discussion about "personal or confidential" would take place on the front end of the subpoena process, because it would require a motion. She said that the victims were very persuasive at the January hearing that there was still a concern about the return. To the extent the court did not require the return under the published rule, that would be a departure from what the subcommittee intended. For those

reasons, the member did not think that this change required republication. She supported the change.

Professor Beale said again that there was not much case law on personal or confidential information. As Professor Cassell had pointed out, victims do not always have their own lawyers. Even if they did, this issue would arise at a stage of the proceeding where it may not ever give rise to appellate decisions. This was being worked out behind the scenes at the trial level. The rule change accepted that reality and did not try to crystallize that reality into a particular definition. There could come a time when the Criminal Rules would need to define "personal or confidential" information, perhaps as applied to non-victims, where this had not been in place since 2008. But in her opinion, the subcommittee made a wise choice to accept the status quo.

Professor King stated that many of the categories of personal or confidential materials are routine: health records, school records, etc. For a large portion of what would fall under "personal or confidential," there is no question as to whether it fits in that category. Thus, this not only concerned one category of people—victims—it also concerned a relatively small category of information for which there is a question as to whether it is "personal or confidential."

A motion to approve the change to the rule text and committee note was made, seconded, and approved unanimously.

Judge Dever expressed his view that republication was unnecessary for all of the reasons that had been stated thus far. He added that the text and the language of the note, especially lines 470-500, talked about judicial discretion.

A motion to proceed without republication was made, seconded, and approved unanimously.

Subcommittee divided as to recommendation

Judge Nguyen then turned to the final category of responses to comments, those as to which the subcommittee was divided. She directed the Committee's attention to Rule 17(c)(2)(C), on page 147, line 48 of the agenda book. In the published rule, except for subpoenas seeking personal or confidential information about victims, or subpoenas sought by self-represented victims, no motion and order were required before service (unless otherwise ordered by the court). There were thus two categories that required a motion and order: self-represented litigants, and subpoenas seeking personal or confidential information of a victim. One commenter, Jonathan Wroblewski—the former DOJ representative on the Committee—argued that the amendment should be revised to require a motion and order any time a subpoena seeks personal or confidential information about *anyone*, not just a victim. His concerns were, first, that this operates on an honor system. The defense attorney is the one who decides whether the subpoena meets the standards that are articulated in Rule 17. Second, if the person whose personal or confidential information is being sought does not know that a subpoena is issued, how can they object to it? Third, he argued that there was a constitutional dimension to the issue, analogizing to *Carpenter v. United States*, 585 U.S. 296 (2018), which requires the government to seek a warrant for cell-site location information held by third parties. Judge Nguyen noted that this analogy highlights the confidentiality concerns that people have in information they may

want to keep private. She said that the subcommittee spent a fair bit of time going over Mr. Wroblewski's concerns, but was not persuaded that *Carpenter* was a perfect analogy. The Fourth Amendment does not apply in the subpoena context; the concern, and the analogy, is in the privacy interest. Nevertheless, the subcommittee was unanimous in recommending that the Committee not revisit the requirement for a motion and order for all subpoenas seeking personal or confidential information.

Judge Nguyen added, for the benefit of those new to the Committee, that this was the subject of extensive discussion. Initially, the subcommittee was persuaded by that approach: put all personal or confidential information into one category, regardless of whether it was a victim's or non-victim's, and require a motion and order for those subpoenas. There would be another system for other types of subpoenas that did not seek personal or confidential information. That was part of the initial draft that the subcommittee presented at the Criminal Rules Committee's fall 2024 meeting in New York. Judge Nguyen said that this approach was roundly rejected by many, if not all, of the committee members who were not on the subcommittee. The subcommittee therefore thought that, since this had been so extensively considered, it should not retread that same ground. The amended rule reflected a series of compromises to make incremental changes that preserved the flexibility of subpoena practice in some districts and opened up the practice a bit more in other districts.

Professor Beale added that it was not only the committee members who rejected this other approach to the rule; there were a variety of invited speakers at the meeting, from different districts and with different perspectives, and they generally did not like this approach, either. For a practicing lawyer, it was an unnecessary burden and unhelpful; judges also felt that this would be very burdensome. The question for the subcommittee then became how to draw that back and determine when a motion and order should be required. The compromise approach was created because of that very strong and widespread opposition.

Judge Nguyen explained that this strong opposition to motion and order practice for all personal or confidential information was part of what extended the subcommittee's work. She said that part of the opposition was from district judges, who thought that this would dramatically increase their workload, and it was not necessary to go that far.

Judge Nguyen then explained that, although the subcommittee was unanimous that it would not revisit the motion and order practice that was previously rejected by the full committee, the views were divided as to whether it should somehow tip the balance in favor of greater supervision for personal or confidential information of non-victims. Some subcommittee members were strongly opposed to any amendment at all. The view was that this was already fully considered and exhaustively discussed. There were no problems in the districts that had allowed the defense to have this flexibility, and no widespread abuses had been brought to the subcommittee's attention. To the extent that there were any problems, the subcommittee should instead consider adding something to the committee notes or working with the FJC to better educate the bench and bar on best practices.

There were some views expressed that maybe some adjustment should be made to the rule text. Many people, including the reporters, felt that this would require republication of the rule. Ms. Ralston had floated the idea that the rule require the filing of a sealed notice to the

court, so that the court could choose to say that, for this particular subpoena, it wants notice to be given to the person whose information was being sought. Judge Nguyen said that this idea had not been explored yet, so the subcommittee would need to pause, slow down, and gather information and feedback on how this would actually work. She said that another idea was for the default rule to require the return to the court. This would be a significant consideration.

The Committee's choice was now to (1) make no change to the text, but perhaps add something to the note, or (2) really consider whether something new needs to be done, among the options floated at the subcommittee meeting. Judge Nguyen said that there were a few considerations that counseled in favor of Option One. The published rule strove to create a balance between some traditional oversight and the burdens imposed on courts and litigants. Requiring some sort of a default production back to the court puts the rule closer to the motion and order practice that the Committee previously rejected. The other consideration was that this was a substantial change to the rule that would warrant republication. There was momentum behind the change to Rule 17 now; should the Committee take advantage of that momentum and move forward? Judge Nguyen observed that the earliest time that amended Rule 17 would go into effect would be December 2027. The Committee could monitor the situation and determine whether there was a problem in practice. Judge Nguyen said that although she was very concerned about the lack of notice to individuals from whom personal or confidential information was being sought, she did not know whether it would be much of a problem in the real world. Maybe it could be adequately addressed by a particular district imposing local rules. Or maybe it was something that was much more of a concern, that could not be adequately addressed through bench books, best practices, local rules, and the like. She noted also that the rule had built-in flexibility, so some judges could supervise the practice very strictly while others might choose not to. She therefore believed that the Committee could move forward now, and revisit the issue in a year or two if there was a problem.

Judge Nguyen stated that the proposed change to the committee note, lines 495-500, re-emphasized the flexibility and discretion that rests in the hands of the district judges. She concluded by saying that she was in favor of adding to the note.

Judge Mosman said that he was in favor of making no change to the text but revising the note.

A member stated that she was the sole member of the subcommittee who wanted *no* change made, but having been defeated in the subcommittee, she was now arguing in favor of Option One, amending the committee note. She stated that the proposed rule change had been fully vetted multiple times—not just by the subcommittee, but in multiple public hearings. She observed that oftentimes things that are personal or confidential, like medical records, are going to require a motion and order because the recipient wants a court order to accompany the subpoena. The subcommittee had heard testimony that trying to define these categories would be adding to a very crowded field of federal, state, and local laws and regulations defining what is personal or confidential. She thought that what was published provided enough protection. Option One, with or without the bracketed language, would reinforce what was already part of the published rule and would not require republication. That option was consistent with the published draft and with the public work of the Committee.

The member said that at the end of the Committee's fall 2024 meeting in New York, the subcommittee was directed to make an incremental step to loosen the *Nixon* standard, minimize the burden on courts, and allow for the preservation of practices in districts that already had a more robust subpoena practice. This balance was struck in the published version of the rule. But if the Committee were to change the text, she thought that that would require republication. It would be a significant change, and the public had no reason to think that the Committee would be making this type of change to the text. The member reiterated that the Committee's focus must be, what is the problem that we have identified? Notably, both defense attorneys and prosecutors that testified in New York—where there are robust subpoena practices, with no motion required in some districts—identified no issue with their subpoena practices. There was no problem to be fixed. Although the Committee was tweaking a rule that could generate more subpoena practice, the Committee had heard from litigants in districts that already had a significant subpoena practice, and practitioners confirmed that there were no problems.

Another member said that she was one of the two subcommittee members identified in the reporters' memorandum as favoring a change to the text—specifically, return to the court—but she was now persuaded that Option One, clarifying the committee note, was the best choice. She said that the reaction of the judicial members of the subcommittee, that the return to court could be very burdensome on them, was persuasive. She stated, however, that it would be very important to get, as soon as practicable, full comprehensive input on the impact that these changes would have, particularly in those districts that did not currently have robust subpoena practices.

Another member stated that he also favored moving forward with Option One. He was very impressed by how thorough the testimony was at the 2024 New York Committee meeting, observing that the Committee had been able to bring in people from various segments of the criminal justice system. Everyone, by and large, supported the idea that there is trust that exists when an attorney practices in a certain district—between the court, the defense attorneys, and the prosecution. That trust is based on dialogue that occurs back and forth about what is appropriate to do. The member thought that requiring the courts to have greater supervision undermined the trust that exists with respect to what defense attorneys do. He added that as an attorney, regular subpoena practice was very robust, and it took significant time to review the information provided, even for just one case. He said that although he obviously was not a judge, he could not begin to imagine what it would be like for the district courts to receive all that information, take it back into chambers, and make decisions on what to do with it, in addition to everything else that the courts have to handle. Option One relieved the district courts of that potential burden.

Ms. Ralston said that she wanted to clarify a few things. First, if the subpoena, by statute or other law, already required a court order to begin with—for example, for medical records and similar things—then there would not necessarily be a much larger scope of "personal or confidential" things that were not already being examined by the court. It could not be true both that there were not many things that would have to be examined and that this examination would create a huge burden on the courts. The rule retained the discretion for a court—in an individual case, by local rule, or by standing order—to do something different. She said that a rule that said that if there was a motion approved by a court order, then the subpoena production can be

returned to counsel, was a different situation. She thought that the return to court was intended to be a much lower burden than the motion and order requirement generally.

Second, the current rule, Rule 17(c)(1), reads as though the return for *everything* is to be to the court, because it says that the court may allow the parties to inspect the return. If the court allows the parties to inspect the return, the materials must be in the court's possession. Ms. Ralston understood that this was not how this works in practice everywhere, but the local practices exist in the shadow of Rule 17. They are also in the shadow of *Nixon*, which is a tighter standard. Subpoenas are also only available for trial, which is a very small percentage of cases. This proposed rule change is broadening the scope of the proceedings, loosening the *Nixon* standard, and generally dispensing with the motion requirement. All of that would take what is currently a small circle and make it much bigger. To now pare back on the broad scope of this change as published would still be an incremental step in making the small circle slightly bigger.

Ms. Ralston said that the idea that "personal or confidential information" would need to be defined was a red herring. That term has been in the Criminal Rules since 2008, and there was no reason that it would mean something different when applied to non-victims as to victims. If there were litigation about this term, then all the better, because then the Committee could get a definition of what it means.

As for republication, Ms. Ralston said the Committee already considered the motion and order requirement, which people said would be onerous. The return to the court, however, does not *require* the court to do anything. It gives the court the opportunity to do something. This was already required for victims, and the court was not expected in those instances to read every line or every page of the document. She reiterated that this may not come up often enough to impose a substantial burden on the courts, but said that in contrast to the victims, there are situations where there could be subpoenas issued with absolutely no oversight by the court and no check by another party. A motion would not be required, because under Rule 17(c)(2), it was not a pro se party and it was not personal or confidential information of a victim. The attorney does not have to notify the other party that they are serving it, and does not have to notify the subject whose information they are seeking. If the subpoena recipient is a major organization, it might have the resources to resist, but a smaller entity may not have the incentive or the resources to move to quash. In those situations, she said, there deserved to be an additional thumb on the scale to protect people's privacy.

Ms. Ralston further noted that when the government seeks personal information, or information in which someone has a reasonable expectation of privacy, the government has to go to court and convince the judge to issue a warrant. That rule does not apply to defense counsel. But the change that the Committee is making to subpoena practice will not, and cannot, benefit the government. She did not understand why, as a matter of trial practice, this should be asymmetrical. Further, as an individual, she thought that personal information deserved to be protected as least as much from someone who a grand jury has charged with committing a federal crime as it did from the government. She said that it was worth putting a thumb on the scale in favor of privacy in those circumstances where otherwise there would be basically no check on the practice. She agreed with the member who said that criminal practice was built on trust, but said that right now, that trust was built in the shadow of a very limited rule. Everyone operates under an understanding that the rule itself is very restrictive. That is much different

from a situation where the underlying rule is much looser. She observed that defense attorneys have an ethical obligation to do the best for their clients, and have no obligations to the third parties whose privacy might be invaded. Ms. Ralston concluded by saying that although she proposed the idea of requiring sealed notice for the subcommittee's consideration, there was no interest in pursuing that, and she did not think the Committee needed to spend more time on it.

Judge Mosman offered two brief comments. First, he addressed whether the return-to-court requirement would really operate as a useful check. He observed that a recurring theme from commenters was that this would not require the court to do anything. However, if he had personal or confidential information as a return submitted to him, he would view it as a dereliction of his duty to do nothing and simply hand the information over. So, yes, the return to court did require the judge to do something. He further stated that he had reviewed these sorts of materials many times, but it was almost impossible to do any sort of meaningful review, because he did not know the case. The case had not yet gone to trial and may not have even had any hearing. He therefore questioned whether the return-to-court requirement was a meaningful change, rather than a symbolic one.

Second, he agreed that the Committee should monitor how the rule change plays out. He thought that there were two ways to do this. First, the Committee could back off and create a new idea, whether that was sealing, return to court, or something else. This could be implemented years from now. The other way was one the rule allows, which would be to allow 93 districts to develop 93 different subpoena practices over time. Some may require sealing; some may require returns to the court; some may not require anything. Then, two years from now, the Committee can review to see what went well and what went poorly among those districts. It will not have committed to one particular path, but can look at all 93 paths to see which ones best protect non-victims. Judge Mosman agreed that the Committee should care about the privacy interests of non-victims, but did not pretend to know the best way to do that right now. He agreed with adding language to the committee note, which would cement that the courts have discretion.

Professor Beale said that this would be Option One, with a commitment to monitoring subpoena practices as they play out in the different districts. She said that the Committee would talk to the FJC about when it might make sense to begin studying this. She also noted that the Committee could talk to the committee that revises the *Bench Book for United States District Judges* about best practices. This would be an open issue that would need attention going forward.

Judge Nguyen stated that those best practices can sometimes come from districts where there is a robust practice. Those judges create a set of local rules or orders that others follow. Professor Beale added that Jonathan Wroblewski's proposal said that there should be a standard protective order, which could be another part of what the Committee is looking at with this. Monitoring could be the next stage, if the Committee decides to move forward.

A member said that he was torn, because he saw both sides of the issue. He was reluctant to try to make the rule perfect and delay at this late stage. But he also identified with the concerns raised by Ms. Ralston about privacy. He asked what the rationale was for distinguishing between personal or confidential information about victims and personal or confidential

information about other people. He also asked how often personal or confidential information about non-victims comes up in federal court.

Judge Nguyen responded to his first question by saying that the original draft of the amended rule did not distinguish between personal or confidential information for victims and for everyone else. This approach was rejected at the fall 2024 Committee meeting in New York. The subcommittee thought that it was still very important to protect victims' rights, particularly because under the CVRA, victims warrant different treatment. This was the compromise position that was reached.

Professor Beale added that the CVRA itself creates a distinction for victims. Everyone has privacy rights, but victims' privacy rights are elevated. In 2008, the Committee amended Rule 17 and put in, as part of a package of amendments, the requirement for a motion and order and notice to the victim. There was a question as to whether the rules should try to incorporate the statute, and the Committee decided that it should incorporate aspects of it. Rule 17 therefore reflects that notion without denigrating other people's privacy rights.

A member said that she understood the concerns raised by Ms. Ralston, as well as the concerns that this had been studied extensively for three years. She did not want to make the perfect the enemy of the good, and noted that republication would delay the process by another two years. She was personally comfortable with Option One, but liked the idea of having some commitment to study its development and maybe put some best practices in the Bench Book. She said that another option could be to allow the subpoena recipient to object just in writing, without having to hire a lawyer. This would relieve courts of a burden, unless the person seeking the subpoena moves to compel, which usually does not happen. The member noted that Vermont and West Virginia have this option.

Another member said that the testimony in Arizona highlighted issues in districts where there was a complete absence of defense subpoena practices because the court, for example, would not accept an ex parte application, or would require any return to be disclosed immediately to the government. But it was not true that federal practice, broadly speaking, was that subpoenas are only used for trial, that this would be a loosening of the *Nixon* standard everywhere, or that there was no motion practice required. There are districts that already apply a loosened *Nixon* standard, including the member's own district. She had surveyed her colleagues quite extensively, and many districts already routinely allow subpoenas in non-trial proceedings. That would not be new under this rule. And return to the parties differs from district to district and judge to judge. There are already places where return to the parties is common practice. The member stated that she did not make these points to undermine the importance of the topic, which should be studied and will be made part of the Bench Book.

She noted that a member had asked how often victims' personal or confidential information is requested, and said she did not know the answer. In surveying her colleagues, she learned that the type of private information most commonly requested is their client's own information, often from a state or local department of corrections, or a juvenile facility of some sort.

The Committee had heard from many people in the districts where there was already practice in line with the proposed rule. It had also heard from attorneys who could not ethically make an application for a subpoena because they would be required to disclose too much. Nowhere in the spectrum of information that the Committee had gathered had it heard, other than in the victim category, that this was an issue. Option One would address the concerns raised by the Committee and guide the court on what to look for in adopting new practices under the rule, if they indeed change their practice. But the practice would not change in the districts that already have robust subpoena practices. The member thought that the world currently followed many of the things that the rule would now incorporate.

A member noted that the original suggestion came from defense counsel in New York several years ago. She acknowledged that there may still be small issues that needed to be resolved, but this proposed amended rule was a significant improvement over the original rule. She was thrilled with the changes that the Committee had made.

Ms. Ralston asked for more detail on how the Bench Book is amended, and how much control this Committee has over the process. Can the Committee ensure that something is put into the book, or does it simply make a suggestion and hope that someone listens?

Judge Dever said that he would answer her question, but first reminded everyone that if the rule is changed, the AO form for subpoenas would also be changed. The AO form now begins, "Before requesting and serving a subpoena pursuant to Federal Rule of Criminal Procedure 17(c), the party seeking the subpoena is advised to consult the rules of practice of the court in which the criminal proceeding is pending to determine whether any local rules or orders establish requirements in connection with the issuance of such a subpoena." That was the current reality of what attorneys were supposed to do. And based on what the Committee had heard in hearings, this *was* what attorneys actually do. The form goes on to quote the language in Rule 17(c)-(g), including the ability of the receiving party to object.

As to Ms. Ralston's question, Judge Dever said that there was a committee that oversees the Bench Book, and the Criminal Rules Committee could certainly make recommendations. But the more immediate issue, in his mind, was that the language of the subpoena form would be immediately changed to reflect the current text of any change in the rule. It would continue to have the reminder that, if an attorney is going to issue a subpoena, the first thing they need to do is look to see whether there is a local rule or court order that governs this practice. The AO form would immediately change, if the rule changed, to reflect the new text.

Judge Mosman responded to Ms. Ralston by saying that the Committee could not rewrite the Bench Book, but it could make suggestions. It could also request the help of the FJC to study what is happening in various districts. The Committee itself could also monitor this issue, by holding hearings and inviting testimony. He committed to monitoring the situation within this Committee's power as long as he was chair, because this issue was so important.

Professor Beale directed the Committee's attention to footnote 6 on page 124 of the agenda book, which provides the historical example of Judge Raggi, the former chair of this Committee. At the Committee's urging, she requested to sit with the Bench Book Committee; she reported back that the FJC's Bench Book Committee had acted on the Criminal Rules

Committee's suggestion that a discussion of *Brady*/*Giglio* obligations be included in the next edition. A copy of that Bench Book comprehensive section was included in the agenda book for the spring 2013 Criminal Rules Committee meeting. At that meeting, Judge Raggi expressed her gratitude to the Bench Book Committee for allowing her to participate in the discussions. Professor Beale noted that she did not know the current schedule for revisions to the Bench Book, but it seemed like the Committee would be interested in exploring this.

Ms. Ralson asked about the process for amending local rules. Could that process proceed in districts in advance of the amended Rule 17 going into effect, such that a local rule would go into effect on the same date that amended Rule 17 does, or does Rule 57 require some sort of six- or twelve-month lag?

Judge Mosman answered that the local rules could be amended without any delay, so long as any amendment was consistent with the current rules. The courts could also anticipate changes, discuss them in advance of the rule change, and make anticipatory changes to local rules that would be effective immediately upon Rule 17's enactment. Judge Nguyen added that individual judges could amend their own standing rules as well.

A member said that the example with Judge Raggi, about the change to the *Brady* order, happened very quickly. It was anticipated on December 1, and multiple judges in her district put something together quickly. Her district's local rules committee then tried to create a district plan, but while that was happening, the AO sent out very specific language that is now read in every case, consistent with the rule. She said that this process happens very quickly and judges would be ready for this by December 1, because it would be a significant change.

A member said that he was persuaded to go with Option One. He asked whether the Committee intended to include the bracketed language in the committee note.

Judge Nguyen said that she had been planning to propose that the Committee vote on the options with or without the bracketed language, then decide whether it wants to include the bracketed language.

A member said that this was a difficult issue. He agreed with much of what Ms. Ralston had said. He also found Jonathan Wroblewski's article interesting and thought that it raised some real concerns. The member noted that he had said from the beginning that he was concerned about the application of other law to these subpoenas. To what extent does the Constitution or something like the Stored Communications Act apply to these subpoenas? It was unclear in his mind how they may be applicable. He appreciated that there was support for the idea that the Fourth Amendment was not applicable, as set forth in the reporters' memorandum in the agenda book. He said that this did not give him a great deal of comfort. The Stored Communications Act was pointed almost entirely at the government and restricting its ability. That act applies to all data held by third parties. It generally prohibits disclosure of content by internet service providers to anyone, with a few narrow exceptions not applicable here. But as he read the statute, there was no prohibition on providing anything less than content to a private party. There was a gap between what the government could get with a warrant and what an individual may be able to get with a subpoena. Anything less than content, someone could arguably get under the Stored Communications Act. That would include cell site location information, perhaps a tower dump,

and maybe even a geofence. The member noted that issues with respect to privacy in the Fourth Amendment change constantly; geofence warrants were before the Supreme Court this week. He was worried about how this would impact personal privacy and whether the Committee had set the right balance. On balance—especially given that a change at this time would require republication, and that the rule just sets a default and would permit local courts and individual judges to alter these rules with what they think is appropriate in their courtrooms—he would support the moving forward the with amendment without a revision providing oversight for personal or confidential information.

Judge Nguyen then asked whether there was a motion to approve Option One, with the amendment to the note and no change to the text, with or without the bracketed language. A motion was made, seconded, and approved unanimously.

Judge Nguyen then asked whether any committee members had a preference as to whether to include the bracketed language on page 164, lines 495 to 500.

Ms. Ralston said that she liked the bracketed language, but asked that it be introduced by dashes. It would read, "And to provide greater judicial oversight—for example, for subpoenas requiring the production of personal or confidential information—the rule permits a court, by local rule or court order, to require the return of such information to chambers before disclosure to the requesting party."

Professor Beale said that this was a friendly amendment. She noted that after the subcommittee meeting, the reporters asked that members send them potential language. One member had done so. Professor Beale asked if she supported the amendment and the bracketed language, and the member said that she did.

A motion to amend the note with the specific language proposed by Ms. Ralston was made, seconded, and approved.

Judge Mosman asked the Committee to vote on the entire Rule 17 package. He asked for a show of hands, and all members voted in favor.

Judge Nguyen said that the reporters' memorandum in the agenda book addressed the miscellaneous comments on Rule 17, but these did not warrant full discussion from the Committee.

Judge Mosman stated that these amendments to Rule 17 were a great accomplishment and applauded Judge Nguyen for her excellent work on this project over many years.

Rule 49.1

Judge Mosman asked Judge Harvey to present the efforts of the Rule 49.1 Subcommittee. Judge Harvey said that the subcommittee was submitting proposed amendments to Rule 49.1 for approval for publication. In the subcommittee's view, the amendments will strengthen privacy protections for minors and for social-security numbers (SSNs) and other taxpayer-identification numbers in public criminal filings. He directed the Committee's attention to page 215 of the agenda book, where the reporters' memorandum explained in detail the subcommittee's efforts to

date. He thanked Professor Beale and Professor King for the memorandum and for their guidance throughout this process. Judge Harvey said that redline and clean versions of the proposed amendments began on page 225. The language in the proposed rule reflected input from subcommittee members, the reporters, the Rules staff, and the Style Consultants.

At the same time that the Rule 49.1 Subcommittee had been working on the amendments to the criminal rule, the Appellate, Bankruptcy, and Civil Rules Committees had been considering parallel amendments to their privacy rules. Maintaining uniformity across the rules, where appropriate, had been a consideration for all committees. There would be some differences; the Bankruptcy Rules would likely have fewer changes to their privacy rule because of the unique nature of bankruptcy filings.

Judge Harvey summarized the proposed changes to Rule 49.1. First, the proposed amendments responded to the DOJ's March 2024 request to better protect minors' privacy by requiring the use of pseudonyms, rather than minors' initials, in public filings. The subcommittee unanimously agreed that this change was appropriate and uncontroversial. The subcommittee reached that conclusion early in its first meeting several years ago based on a showing that the use of initials for minors in public filings did not adequately protect their identities. The subcommittee also unanimously supported, where feasible, a request from the American Association for Justice and the National Crime Victim Bar Association to encourage the use of gender-neutral pseudonyms in public filings. It concluded that doing so could further protect minors' identities in cases where other information in the record would otherwise make the identification of the minor possible if gendered terms were used. However, since it was not always feasible to require gender-neutral language in criminal cases—for example, where the evidence of the crime was inherently gender-specific—the subcommittee expressed this preference in the committee note rather than in the rule text.

The subcommittee also considered whether the rule should address situations in which a minor reaches the age of majority while the litigation is ongoing. The rule presented did not explicitly address that circumstance. Research conducted by Lara Venegas,[2] however, showed that courts have consistently extended privacy protections to minors who age out, typically through protective orders, which are permitted under Rule 49.1(e). For that reason, because it did not appear that courts were struggling to reach what the subcommittee believed was the right result, the subcommittee concluded that no amendment was necessary at this time. Judge Harvey said that this decision was admittedly influenced by the subcommittee's desire not to further delay publication of other important amendments to the rule that had been under consideration for several years. However, he said that the subcommittee had asked the reporters to explore whether public comment might be solicited on the need for the rule to expressly address the issue of minors aging out.

The second principal assignment of the subcommittee was to consider Senator Wyden's proposal to require full redaction of SSNs rather than permitting disclosure of the last four digits in public filings, as the present rule permits. Based on the very helpful research done by Kyle Brinker, the former Rules Law Clerk, the subcommittee concluded that full redaction of SSNs

[2] Ms. Venegas was detailed from the Defender Services Office in the Administrative Office of the U.S. Courts to assist the Committee during a staffing shortage.

was warranted, for three reasons. First, the subcommittee identified no need to include even partial SSNs in public criminal filings. Second, there was good evidence that even partial disclosure could be misused for identity theft and by fraudsters. Finally, full redaction was widely recognized as the best practice by government agencies who probably understand the risk better than most, including the IRS. Thus, the proposed amendment requires full redaction of SSNs.

Next, the subcommittee considered whether other taxpayer-identification numbers should also be fully redacted. In the present rule, individual taxpayer-identification numbers (ITINs) were treated the same as SSNs in terms of redaction. Judge Harvey explained that were three taxpayer-identification numbers at issue: ITINs, Adoption Taxpayer Identification Numbers (ATINs), and Employer Identification Numbers (EINs). The subcommittee ultimately concluded that all of those numbers should be fully redacted or omitted in public filings. ITINs presented the easiest decision for the subcommittee, which identified no reason to include any part of them in public filings. They raise privacy concerns comparable to SSNs in that they identify individuals, and like SSNs, they are often used for things other than filing taxes—for example, to open bank accounts and apply for credit cards. The subcommittee supported their full redaction. ATINs fell somewhere in the middle. They are temporary and less widely used, so identity theft and fraud risks appear lower. But like ITINs, they identify individuals and therefore raise privacy concerns. The subcommittee saw no reason to include them in public filings. For consistency and uniformity, it recommended treating ATINs the same as SSNs and ITINs.

EINs created the most discussion among the subcommittee. The subcommittee had agreed twice over the past year to propose their full redaction, just like SSNs and ITINs. Judge Harvey highlighted, however, that requiring their full redaction represented a change from the present rule. It was quite clear from the rule's history that when Rule 49.1 was initially promulgated some twenty years ago, the decision was made not to include EINs within the realm of protection. That was the DOJ's position in 2007, and it remained the DOJ's position today. The DOJ's view was that EINs should not fall within the rule's protection, meaning that there should be no redaction requirement for them. This was because there was limited evidence of their misuse, because some EINs were already publicly available from other sources, because requiring the redaction imposes some burdens on litigants, and because of the presumption of public access to court records. The subcommittee was not persuaded on those points, for a number of reasons. It believed that EINs may raise an interest in individual privacy, especially in cases where they were used for families who employ domestic workers, or for sole proprietorships and small businesses. Second, regardless of the situation in 2007, EINs were now widely used beyond tax filings, such as for opening bank accounts or applying for credit. Third, not requiring redaction would create meaningful risks of their misuse by fraudsters. The subcommittee considered government reports documenting significant fraud involving stolen EINs, which caused hundreds of millions or even billions of dollars of fraud on the U.S. Treasury. In the subcommittee's view, the rules should not facilitate fraud, regardless of whether the losses from misused EINs fall on the U.S. Treasury or on private parties. These fraud risks appeared to be increasing. Finally, there was no demonstrated need to include even partial EINs in public criminal filings. The subcommittee voted that the rules should be protective and forward-leaning, and therefore require full redaction of EINs. Notably, this was what the IRS and the Tax Court require.

Finally, Judge Harvey said that the amended rule would apply not only to briefs but also to all attachments and exhibits thereto. The subcommittee had learned that this was where most improper disclosures occur, so it was important to make this explicit in the rule.

Ms. Dubay then provided an update on the work of the Appellate, Bankruptcy, and Civil Rules Committees, which had met the week of April 13 to discuss amendments to their respective privacy rules. The Civil Rules Committee voted to approve for publication and public comment amendments to Civil Rule 5.2, which would include extending full redaction to not only SSNs and ITINs but EINs as well. There were concerns raised at that meeting about whether this was a necessary extension, but the Civil Rules Committee ultimately voted to approve that for publication. It also approved the amendments that would change the requirement of using initials for minors to pseudonyms and the extension to exhibits and attachments. The Bankruptcy Rules Committee had previously specified certain reasons why EINs were useful in the bankruptcy context, and why the last four digits of SSNs were important as well. That committee therefore voted to approve for publication amendments to Bankruptcy Rule 9037 only with respect to the use of pseudonyms for minors. They would make no change to the existing redaction requirements for taxpayer-identification numbers. The Bankruptcy Rules also have a rule that would apply in certain bankruptcy appeals that parallels Appellate Rule 25. There was a slight wrinkle because the last committee to meet on this issue was the Appellate Rules Advisory Committee. At that meeting, the DOJ and practitioners raised an issue with respect to the onerous work that would go into redacting the appendix on appeal, which can be quite voluminous. A decision was therefore made to further study the appellate rule amendment to determine whether there needed to be some carve out with respect to that redaction requirement. The Appellate Rules Committee voted to form a subcommittee to look into those amendments, and it would not be sending their appellate privacy rule to the Standing Committee in June.

Professor Hartnett, Reporter to the Standing Committee, clarified that the Appellate Rules Committee's decision should not affect this Committee at all. The Appellate Rules Committee had been deciding whether to layer additional protection. But the existing Appellate Rule 25(a)(5) incorporated Criminal Rule 49.1. There was therefore no reason for anyone to be concerned about the delay on amending the Appellate Rules.

A member asked whether the rule could be changed stylistically. Instead of saying, "if any of the following types of information appear in the filing, include only . . . the year of an individual's birth," could the rule instead spell out those following types of information?

Professor Beale explained that this decision had been made by the Style Consultants. Substantive rule changes were for the Committee to decide, but if an issue concerned grammar, structure, placement, and did not change the meaning of the rule, the Style Consultants controlled the revision. This particular language was negotiated with the Style Consultants. Judge Harvey added that this sentence was discussed with the Style Consultants three or four times, and the subcommittee was ultimately satisfied with this version of the amended rule.

A motion to approve amended Rule 49.1 and the committee note for publication, as set forth on pages 225-228 of the agenda book, was made, seconded, and approved unanimously.

Ms. Ralston asked whether the Committee could include a request for comment on the particular issue of minors aging out in the rule published for public comment. Professor Beale said that it could, and that the reporters and Rules Committee Staff would discuss how to do so.

Rules 11 and 32

Judge Mosman asked Judge Boyle to present the proposed amendments to Rules 11 and 32. Judge Boyle explained that Rule 11 dealt with guilty pleas and set forth what a judge must do when taking a guilty plea. In subparagraph (b)(1)(M), the rule stated that the court must inform the defendant of, "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)." Rule 32(h) provided, "Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure."

The 2025 amendments to the Sentencing Guidelines made sweeping changes to Section 5K, which dealt with departures. The amendments deleted most of those departure provisions and kept only those provisions under 5K1.1, which dealt with substantial assistance, and 5K3.1, which concerned early disposition programs. Judge Boyle stated that Judge Patricia Barksdale brough this issue to the Committee's attention and said that Rule 11(b)(1)(M) should be amended to address the recent changes to the Guidelines. The subcommittee agreed and thought that Rule 32(h) should be amended as well, since it also mentions departures.

Professor King directed the Committee to pages 241-242 of the agenda book, which showed the redline of proposed changes to Rule 11, and page 243, which showed the proposed elimination of Rule 32(h). She explained that the committee note for Rule 32(h) was short because there was not much to say about it. For Rule 11(b)(1)(M), the rule now says that the court must discuss the factors under 18 U.S.C. § 3553(a), including the Sentencing Guidelines. The subcommittee worked at some length to come up with this particular phrasing. It considered putting the Sentencing Guidelines first and then the statutory factors; leaving the Sentencing Guidelines out; and other formulations. Ultimately, the subcommittee thought that this formulation would convey the appropriate prominence of section 3553(a) as the governing statute, but still remind judges that they must start with the Guidelines. This was faithful to the Guidelines' description of Step 2, which was the subcommittee's guide to accurately describing what the court must do. It begins with the statutory provisions, which is highlighted in the proposed amendment.

Professor King further explained that Rule 32(h) would be eliminated, but it was "reserved." Professor Beale said that the advantage of reserving that subdivision was that it would not require re-lettering or re-numbering the rest of the provisions.

A member observed that the prior version of Rule 11(b)(1)(M) had more specificity—it said to look at the Guidelines, the range, possible departures, and section 3553(a) factors. The amended version would just say to consider section 3553(a) and the Guidelines. Professor Beale confirmed that this was an intentional choice, because Step 2 of the Guidelines analysis involves

not just the range, but also the type of sentence. Listing everything did not seem to the subcommittee to be productive or provide more specificity than just looking at section 3553(a), which lists all of the relevant information.

A member added that the Sentencing Commission was continuing to work on simplifying the Guidelines. Part of the subcommittee's consideration was that by using this broader language, it would incorporate any potential future changes to the Sentencing Guidelines. It would also ensure that 5K1.1 was not lost, which was still relevant even though it was no longer called a departure.

Judge Dever noted that the change to the Sentencing Guidelines would also involve a change to the Bench Book, because that provides the script that many judges use for their guilty pleas. Professor Beale stated that there was a different committee and a different process for revising the Bench Book, but since this Committee planned to speak with the Bench Book Committee about the Rule 17 changes, perhaps the Criminal Rules Committee could mention this as well.

Motions to approve the changes to Rule 11(b)(1)(M) and to approve the changes to Rule 32(h) were made, seconded, and approved unanimously.

Rule 40

Judge Mosman asked Judge Harvey to provide an update on Rule 40. Judge Harvey stated that the Rule 40 Subcommittee was presenting a discussion draft for the Committee's review today. This rule governed arrest of defendants on warrants issued by a district other than the arresting district which arise from violation of release conditions pending trial, sentencing, or appeal. Current Rule 40 does not say much about this, and the subcommittee had proposed significant rewrites to clarify what procedures were required for proceedings in the arresting district. He directed the Committee's attention to page 258 of the agenda book. The subcommittee's intention, with the Committee's permission, was to push out the rule to magistrate judges across the country (for example, the Magistrate Judges Advisory Group (MJAG) and the Federal Magistrate Judges Association (FMJA)) to get feedback on whether the subcommittee was headed in the right direction. Judge Harvey thanked the reporters, the staff, and the subcommittee members for their efforts on the draft.

At a high level, the discussion draft of Rule 40 did a number of things. It specified the core rights and procedures for a Rule 40 hearing in the arresting district, including requiring that a copy of the arrest warrant be produced, that the defendant's identify be established, and that the defendant be advised of the nature of the release violation, the right to remain silent, and the right to counsel. Importantly, with respect to counsel, the draft recognized that the defendant must be given the reasonable opportunity to consult with existing counsel. This was unique to the Rule 40 context, because counsel may have already been appointed for the defendant during initial proceedings in the case in the issuing district. The draft rule therefore reminded the magistrate judge and the litigants of the need for consultation and required reasonable opportunity for the defendant to consult with his or her attorney. The draft also recognized and permitted the use of stand-in counsel in the arresting district, which is often what happens in Rule 40 proceedings. The duty assistant federal public defender would speak to the defendant's

counsel in the issuing district, and then stand in for them in the Rule 40 proceeding in the arresting district, so that the proceeding could go forward without undue delay. The draft rule acknowledged and expressly permitted that practice.

Perhaps most importantly, the draft made clear that a defendant had a right to seek his release in the arresting district before being transferred to the issuing district, and that it was the magistrate judge in the arresting district who would make that decision. The draft also cross-referenced sections of the Bail Reform Act, where the detention or release standards could be found. The standard varies depending on whether the defendant's violation occurred while on pretrial release or post-conviction release, so the draft rule provided guidance on where to find those standards in the Bail Reform Act. This was one of the things that MJAG requested that the new rule accomplish, to assist magistrate judges.

Judge Harvey said that the draft did not require a preliminary hearing on the warrant, which was consistent with the case law. It also omitted certain Rule 5 advisements that did not fit well in the Rule 40 context—for example, there was no requirement to advise the defendant of his or her rights under Rule 20 or of counselor notification. Both of those make sense at the start of a case, and are included in Rule 5, but do not apply in a Rule 40 proceeding, which comes later or even near the end of a prosecution when the defendant is awaiting sentencing or appeal.

The other provisions—allowing for first appearance in the neighboring district if it can occur promptly and requiring transfer of the defendant to the issuing district if detained; for the clerk's office to provide the paperwork; and permitting video teleconferencing with the defendant's consent—were all drawn from either Rule 5 or present Rule 40 without substantial change.

A member asked what the biggest change was that this draft accomplished. Judge Harvey responded that it made clear that the defendant had a right to a hearing and that it would be the magistrate judge in the arresting district who would make that determination. There were some cases that had expressed confusion about this, and Judge Harvey thought that the confusion largely arose from Rule 5. But the new Rule 40 would make clear that this is a decision that needed to be made, and that the magistrate judge in the arresting district had the power to release someone regardless of what the warrant said. The warrant did not control the magistrate judge in the jurisdiction of arrest. It was also helpful to make clear where the standard comes from, and ensure that magistrate judges understand that it is more difficult for a defendant to obtain release when they are on release pending sentencing or pending appeal. The Bail Reform Act says that the standard gets increasingly difficult. Without the reminder, a magistrate judge might reflexively apply the normal factors under 18 U.S.C. § 3142. Those are appropriate if the individual was on pretrial release and was before a magistrate judge for violating those release conditions. He noted that Rule 32.1, which outlines the proceedings with respect to violations of supervised release, refers to the Bail Reform Act. The MJAG requested that this rule provide similarly, and Judge Harvey thought that this would assist magistrate judges.

Professor King stated that based on empirical data from multiple districts provided by the FMJA, somewhere between 6 and 40 percent of arrests for pretrial violations are out of district. That was the context in which the subcommittee was asked to investigate and clarify the rule. However, Rule 40 covers other things, including violations of release pending sentencing and

violations for failure to appear when ordered by subpoena as a witness. The subcommittee chose to set those less common things aside and focus on the pretrial context to start. The draft it presented to the committee encompassed release pre-sentencing and pending appeal as well, because there was so much overlap that it was easy enough to put those things together in one product. The witness aspect would be somewhat different and would require different kinds of procedures. The subcommittee had not yet tackled that issue.

Professor King said that the existing version of the rule could be quite unclear, so that was what the subcommittee was trying to fix. She had heard of a magistrate judge who was new to the bench and asked a more experienced judge how to handle Rule 40 arrests, and the experienced judge told the new judge to ignore the text of the rule, because it was unhelpful. This is not what the Committee wants; it wants a rule that tells judges clearly what to do.

Judge Harvey clarified that the draft covered almost the entirety of Rule 40, with failure to appear as required by subpoena as the sole exception. The subcommittee would look at that next and determine how best to address that—whether it needed to be in the rule and if so, whether the procedures should be any different.

Ms. Ralston said that the DOJ felt strongly that Rule 40 should address material witnesses and subpoena no-shows. She also asked whether it would be possible to get feedback from the Probation Officers Advisory Group at the same time as the subcommittee was getting feedback from magistrate judges. She had heard several times from U.S. attorneys that the probation and pretrial office in the arresting district typically does not have any information to provide for these hearings, which leaves everyone a bit at sea about what appropriate conditions or modifications should be made. This seems to be a record-sharing issue. But it may be useful to get their feedback.

Judge Harvey agreed. He noted that he had met with the clerk's office and with pretrial services in D.C., and they had not expressed confusion about the paperwork that they were supposed to provide or the process for doing so. He nonetheless thought broader feedback would be helpful. Judge Harvey noted that on page 262, line 72, the draft rule read, "Once the person is transferred or released, the clerk must promptly transmit the papers and any bail to the clerk in the district where the warrant was issued." He said that the subcommittee had discussed what this meant and thought that there was not much confusion about it among courtroom deputies and pretrial services. This language came directly from Rule 5.

Ms. Ralston explained that the confusion she had heard about was not about what happens after the proceeding, but instead what needed to happen before the proceeding, particularly to ensure that pretrial services would be able to provide information that would inform the release or detention decision. Judge Harvey thanked her for clarifying and said that this was a great point.

Judge Dever stated that, because these defendants are being processed under Rule 40, they necessarily had been arrested and released in their original districts. When they were arrested somewhere else, there must have been a pretrial services report created, which could be transmitted to the magistrate judge in the arresting district. The report would have the

defendant's criminal history, family issues, and anything that allowed them to be released in the first place.

Judge Harvey said that there was not always a warrant application. The best example was a bench warrant—someone is supposed to appear in court, and does not, so a judge issues a bench warrant because this was a violation of the defendant's condition of release. If that defendant appeared before a magistrate judge in a district two states away, there would not be any application for that judge to review. Or, if pretrial services calls a magistrate judge and says that a defendant removed his location device, the magistrate judge may just issue a bench warrant. But he agreed with Judge Dever that in a situation where a warrant was issued because someone was violating some other conditions of release, pretrial services would have prepared a report, and it would have been on that basis that the court issued a warrant.

A member pointed to Suggestion 23-CR-H from Judge Zachary Bolitho, which concerned the authority of the magistrate judge in the arresting district to conduct a detention hearing and the standard applied at any such hearing. She asked for Judge Harvey's view. Judge Harvey noted that in Judge Bolitho's case, as described in his suggestion, there was a question about whether a detention hearing should be held at all. He thought that yes, there certainly must be a detention hearing. This was not a change to Rule 40; this was a clarification. The existing rule says that the arresting judge "may modify any previous release or detention order issued in another district." The magistrate judge in the arresting district should make a detention determination regardless of what the judge in the issuing district had determined.

The member asked whether there was any difference in the standard that applied to the detention hearings. Judge Harvey answered that there was a difference, and it depended on the type of violation. The standards in section 3142 apply to violations of pretrial release. If someone had violated a condition of pre-sentence release, or release on appeal, the standard was more difficult to meet, because the defendant was closer to judgment.

A member agreed with Ms. Ralston that it was a good idea to solicit feedback from pretrial services. She asked whether the Committee could find out a bit more information from them about how these cases typically arise. If someone absconded from her district and was picked up somewhere else, that district would have no connection to her client. That district would need to contact the pretrial officer in her district and get the report. But many times, someone will be released and live in a different district. They will be supervised by that district's pretrial office, who will have a lot of information. And, for example, there may be a few positive drug tests, such that the judge in the member's district would want the issue addressed and issue a warrant or a summons. This was why the right to a hearing in the arresting district was important, so that the defendant could address whether conditions could be changed to allow them to remain on release. The member added that a third type of situation could occur if, following the positive drug tests, the judge in the member's district required the defendant to appear in that district. This would not implicate Rule 40. The member thought that getting perspective from pretrial services would be helpful, especially if they could provide information about the circumstances in which these Rule 40 proceedings regularly take place.

Another member said that she read the draft rule to say that the arrestee must be taken to a court in the district of arrest unless the arrestee could be brought back to the home district that

same day. What if, for example, a defendant was charged in the Central District of California and then arrested in Las Vegas? This was a six- to eight-hour drive, depending on traffic. She thought that there was some flexibility for the magistrate judge to tell the defendant to start the drive—even if he would not make it that same day. It did not sound to her as though this flexibility existed under the draft rule, because if a defendant could not get to the home district that same day, then the magistrate judge in the arresting district must hold a brand new detention hearing. She was interested to see how magistrate judges felt about what is potentially a lot of extra work for a defendant who was not under that district's supervision, when they could very easily get the defendant to court the next day.

Judge Harvey responded that this language came from Rule 5. He reiterated that these were a relatively small portion of out-of-district warrants that magistrate judges must address. The vast majority arise under Rule 5, when an arrest warrant is issued for a complaint or indictment, and the defendant is arrested in a different state. The second most common category is for violations of supervised release. Those are more common than a Rule 40 scenario because there are many people out on supervised release. Judge Harvey said that this had been how Rule 5 treated the issue—he was not saying that this was the right way to do so, but simply that this was a longstanding practice.

The member said that she saw the Rule 5 context as slightly different than a Rule 40 arrest. She noted that she had had an experience many years ago where a defendant was arrested in another district and she was told that the defendant would appear in her district the following day. She thought that the rules therefore accounted for this flexibility. She did not have a view as to whether it was acceptable to remove that flexibility if magistrate judges thought that was the better course.

Judge Harvey said that the subcommittee would certainly get input from magistrate judges. He observed that it could often take several days for the U.S. Marshals to transfer a defendant to another district, and the defendant might be detained for far less time if they were simply brought before the magistrate judge in the arresting district. On the other hand, in cases involving bordering districts, it may help to provide a bit more flexibility in the rule. He said that the subcommittee would continue to look at this issue.

Judge Harvey asked whether there were any further questions from the committee members, and there were not. He stated that the subcommittee would reach out to magistrate judges, clerk's office representatives, and pretrial representatives for informal feedback on the draft rule.

Rules 49 and 45

Judge Mosman turned to Judge Burgess and Professor Struve to present the proposed changes to Rules 49 and 45. Judge Burgess directed the Committee to Professor Struve's memorandum on page 281 of the agenda book and explained that the subcommittee had been focused on proposed amendments to Rule 49 relating to self-represented litigants. He also thanked the subcommittee members, Professor Struve, and the reporters for their hard work throughout this process.

Judge Burgess stated that the first proposed change was to make the filing provisions clear for self-represented litigants. Rule 49(a)(3) would now read, "For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service is complete as of the notice's date." The subcommittee wanted to ensure that self-represented litigants were not penalized if they submitted something to the clerk's office but it was not posted until a later date.

The next proposed change was to Rule 49(b)(2)(B). This subparagraph previously used a four-part structure, as seen in the fall 2025 agenda book. The subcommittee received some suggestions to shorten it, and in March, came up with the language of what was now a two-part structure. This version was simpler and cleaner; it now read, "A court may set and enforce reasonable conditions and restrictions on self-represented parties' access to the court's electronic filing system (including by denying or revoking access for particular self-represented parties if they misuse the system). But the court may not prohibit all self-represented parties from using the court system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method . . . ." The subcommittee wanted to ensure that courts would not prohibit any access at all by self-represented litigants.

Finally, the subcommittee proposed three additional changes. First, for the provision on service of sealed filings in Rule 49(a)(3)(B), the subcommittee retained the provision for local control, and added a court order as an option. The provision would now read, "A court may provide by order or local rule that if a paper is filed under seal, it must be served by other means." Next, in Rule 49(a)(5), the subcommittee decided to delete the provisions that addressed service of papers not filed, since it did not think those were necessary. Lastly, there was a recommendation to replace "person" with "party." There was a concern that "person" could lead self-represented litigants to think that they could file something in a case that they have no relation to. Changing "person" to "party" would resolve that potential problem. Judge Burgess then turned to Professor Struve to provide additional comments.

Professor Struve thanked Judge Burgess; the subcommittee; Dr. Lonchena, Dr. Reagan, and their colleagues at the FJC; the Style Consultants; and the reporters, Professor Beale and Professor King, for their work on this project. She drew the Committee's attention to the portion of the committee note concerning Rule 49(b)(2), which was on page 311, lines 253 to 258. This sentence discussed what would constitute reasonable exceptions if a court decided to have a provision that barred self-represented litigants from accessing the court's electronic filing system. It said, for example, local provisions that require self-represented parties who seek to use the court's electronic filing system to obtain permission from the judge to whom the case is assigned would count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice. This sentence addressed what would constitute compliance with the new flipped default presumption concerning access to the court's e-filing system.

Rule 49(b)(2)(B)(i) said that presumptively, self-represented parties can use the court's e-filing system unless a court order or local rule prohibits them. Then, in (B)(ii), the rule said that the court may set and enforce reasonable conditions and restrictions on that access, including by denying or revoking access for a particular party. "But the court may not prohibit all self-represented parties from using the system unless that prohibition includes reasonable exceptions

or the court permits the use of another electronic method" for filing and receiving electronic notices.

The committee note language honed in on the question of what would count as "reasonable exceptions," and said that it would qualify for a court to say that it would require each self-represented litigant who wanted to use the court's e-filing system to get permission from the court, so long as the permission was not unreasonably withheld in practice. Professor Struve noted that there was significant attention focused on this language from the Appellate, Bankruptcy, and Civil Rules Committees, which met two weeks ago. There were two schools of thought about this. One view was that this was an important piece of the committee note because there were many courts that currently say that if self-represented litigants want to use the e-filing system, they must get the court's permission. There was value to validating that practice. The committees had heard from clerk representatives that an important way to run the system is to require a self-represented litigant who wants access to go and ask for permission. That allows for some gatekeeping and a dialogue with, most often, the clerk's office. The other view, expressed in the Civil and Appellate Rules Committee meetings, was that this language risked undercutting the change to a default principle of access for self-represented litigants that the committees have worked so hard to present. The committee note language could be read as validating a court's decision to have a permission-only system that operates in a mode of standardless discretion for the court. This could make it quite difficult for a self-represented litigant who believes that they reasonably should qualify for electronic access to challenge the court's denial or practice of denials of that permission.

Professor Struve stated that, after a good deal of discussion, the Civil Rules Committee ultimately voted to proceed with this committee note language, even though some members expressed doubts. The Bankruptcy Rules Committee voted to proceed as well. However, the Appellate Rules Committee came up with different language, which appears on page 330 of the agenda book. This language would begin similarly to the existing language, but would then say that local provisions requiring permission would count as including reasonable exceptions, "so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court." Professor Struve explained that this was a reference to the language a few paragraphs earlier in the committee note. The thought was that this language would validate the practices of courts that wish to have a permission-based system, but would do so in a way that would avoid blessing standardless, discretionary systems that could never be challenged in practice by a self-represented litigant who was denied access. She added that the proposed new language on page 330 of the agenda book would also change the requirement that self-represented litigants seek "permission from the judge to whom the case is assigned" to say that they must obtain "the court's permission." This was because the subcommittee had heard from clerk representatives that it was often the clerk's office, not the judge, who played this role in practice. Professor Struve invited the Committee's feedback on the changes.

Professor King stated that the proposed text said that "a court may set and enforce reasonable conditions and restrictions on self-represented parties' access to the court's electronic system," which the committee note suggested could mean, for example, only to self-represented litigants who are not incarcerated, who satisfactorily complete required training, and who comply with other reasonable conditions on access. Did this mean that the court *must* set them, rather

than *may* set them? If compliance with the conditions and restrictions was a condition of having a policy of permission, then these conditions and restrictions must be in place.

Professor Struve agreed that conceptually, that was true. However, the way that it generally worked in practice was that the clerk's office would tell a self-represented litigant the court's requirements for electronic access, such as completing a training module. The idea was that the note would push courts towards creating policies—if a court wanted to have its policy be that self-represented litigants need to request permission, then it needed to have some idea of the bases on which it would withhold permission. She added that because the rule was now flipping the default presumption to allow electronic access to self-represented litigants, courts *would* need to do something to create a policy. A court could adopt a rule that says, "No self-represented litigants may ever use the system, but they can use our alternative method of using an upload portal and court-based electronic notice." Thus, the courts would need to create something, and the implication in the note was that the court cannot create a policy that said that it might let self-represented litigants file electronically, but it would not disclose the standards it would use to make that determination.

Judge Burgess said that it made him nervous to look at brand new language for the first time in a committee meeting. He also stated that he liked the concept of a judge to whom the case was assigned making a decision as to electronic filing, rather than the court, as the new language stated. Lastly, he asked whether the rule sets needed to be consistent with one another.

Judge Dever stated that at the Appellate Rules Committee meeting, the clerk representative was very helpful. He told the committee that he and his staff would be the ones getting calls from self-represented litigants, and the clerks' offices want something in the rule language that they can point to when having these discussions. The clerk's office can tell the self-represented litigant that they do not need to call the judge's chambers; the clerk's office represents the court and can tell the self-represented litigant what to do. The clerk representative for the Appellate Rules Committee said that otherwise, a self-represented litigant might say, "Well, the committee note says 'judge.' So that means that I get to talk to the judge." The representative thought that changing the language to refer to the court would result in fewer difficulties for the clerks' offices. As to the question about consistency, Judge Dever said that while the rules committees strive for consistency, the Bankruptcy Rules are often set apart, for various reasons.

Professor Struve added that the proposed change to refer to the "court's" permission still left the court perfectly free to have it be the individual judge who makes the determination, because the judge is the court. It simply broadened it to permit the practices of courts that want the clerk to handle it instead. She said that this particular feature of the rule really should mean the same thing across the rule sets, and the Standing Committee will want to make this uniform. If the Criminal Rules Committee felt differently from the Appellate Rules Committee, then it should let the Standing Committee know its reasons for taking a different approach, so that the Standing Committee could pick one or the other.

Professor Hartnett said that for the other three rules committees, the question was framed as, "Do you want this sentence at all?" The Civil and Bankruptcy Rules Committees decided that they did. The Appellate Rules Committee was troubled but thought that it had come up with

compromise language that would meet both concerns—so rather than eliminating the sentence entirely, or having it as originally drafted, there was a way that would get both sides' support.

A member asked whether the Civil Rules Committee had considered the language proposed by the Appellate Rules Committee, and Professor Struve responded that it had not, because the Appellate Rules Committee was the last of those three committees to meet. Judge Harvey said that he shared Judge Burgess's concern with the new language and wanted to give it further thought. The issue here was whether judges were going to be unfair and deny access to self-represented litigants across the board. He thought that this was unlikely to occur, and to the extent that it did, the fact that the committee note says that the permission should not be unreasonably withheld would enable interested stakeholders, both within the courthouse and outside, to take whatever action they want to, even informally, when it becomes clear that a judge is doing so. He thought that the existing language was sufficient and important.

Judge Burgess said that he understood the reasons the member gave for preferring the language that had been discussed by the subcommittee. However, Judge Burgess said that he liked the idea of referring to the court's permission rather than the judge's permission. The member responded that he had no objection to that and thought saying "the court's permission" made sense. He objected only to the last newly proposed line.

The clerk representative said that she agreed with Judge Dever. In her court, the presumptive approach was that self-represented litigants could e-file with permission so long as they met certain criteria. The issue never went before a judge. On the other hand, the decision to revoke the permissions typically does come from a judge. She supported the change from "judge" to "court" because it allowed each district the flexibility to handle the situation as it saw fit.

Judge Burgess asked whether the Committee could vote first on the proposed modifications to Rule 49, then vote on the language in the Committee Note. Professor Struve first directed the Committee's attention to page 303, line 14, of the agenda book, which contained bracketed language in paragraph (a)(3). She explained that this language would simply add "by a notice of case activity" to the rule, and that the other three committees had already voted to include this language in their respective rule sets. She asked that the Committee decide whether to include this language in its rule.

A motion to remove the brackets in Rule 49(a)(3) was made, seconded, and approved unanimously.

Judge Burgess asked whether the committee members favored making the suggested changes to the text of Rule 49, and all member agreed.

Judge Burgess then turned to the new language proposed for the committee note. He stated that he shared some of the concerns expressed earlier by another member, but also thought that the new language would have some advantages. It would create consistency across the rules, and was a step in the right direction, although it may not have individual accountability.

Professor Struve said that on the question of individual accountability, she understood that one concern with the proposed language from the Appellate Rules Committee was that it

would foreclose individual denials of electronic access on the basis that a particular litigant was not viewed as an appropriate person to be on the system. She did not think that this concern was warranted because the note language refers to the reasonable conditions and restrictions set by the court. In the text of the rule, in item (b)(2)(B)(ii), there is a parenthetical that says, "including by denying or revoking access for a particular self-represented party." The language therefore could not be read to foreclose the court from saying that a particular litigant would cause trouble and should be restricted from electronic filing, because the text of the rule absolutely permits that as a reasonable condition or restriction.

A member said that when she initially read the agenda book, she questioned whether the phrase "so long as such permission is not unreasonably withheld in practice" was necessary, because the way the amendment was structured was that the court could set reasonable restrictions and conditions on access. The presumption should be that the court and court staff would act reasonably. She preferred the newer language, because it referred back to the standards set by the court. She agreed that the language should be changed to refer to "court" rather than the "judge," and said that if the Committee wanted to include the last phrase, she preferred the newer version over the version originally in the memorandum.

The member made a motion to amend the committee note with the language suggested by the Appellate Rules Committee, as shown in the last full paragraph on page 330 of the agenda book. Judge Dever added that the clerk representatives had consistently said that they would prefer to deal with electronics than paper, and this project was designed with that in mind.

The motion was seconded and approved by all but one of the committee members.

Professor Struve said that there was one more issue in the committee note that needed the Committee's attention. On page 311, line 219, the Committee had an option to say that a "district" or a "court" wished to restrict self-represented parties' access to electronic filing. The Civil Rules Committee decided to use "district."

A motion to use "district" was made, seconded, and approved unanimously.

A motion to recommend amended Rules 45, 49, and the committee notes for publication for public comment was made, seconded, and approved unanimously.

Rule 15

Judge Mosman stated that many comments had come in on Rule 15, which were discussed in the agenda book. The Committee would not be discussing this issue today, but Judge Mosman had created a new Rule 15 Subcommittee, which would be chaired by Judge Burgess.

Attorney Admission

Judge Mosman turned to Judge Birotte to present this item. Judge Birotte said that this project stemmed from a 2023 recommendation from Dean Alan Morrison to have a unified bar admission for all federal courts. The subcommittee created to address this issue consisted of members from the Bankruptcy, Civil, and Criminal Rules Committees. Dean Morrison had raised two primary issues. District courts' admission requirements vary across the country, which can

cause some challenges for lawyers who practice in numerous federal courts. Additionally, with the increase in multi-district litigation, the suggestion was to make it easier to obtain access to courts across the country.

The subcommittee thoroughly examined this issue, considering various proposals and examining Appellate Rule 46. However, there were concerns among the subcommittee members about quality control across the different districts and the ability to discipline attorneys or to have access to information about whether lawyers had previously been disciplined. There were also concerns about revenue impacts on certain districts. Additionally, Professor Struve contacted some state bar counsel to get their input. They questioned whether it would be considered unauthorized practice of law in some jurisdictions if someone were allowed to practice in the district court, but the state would not permit this. Overall, there was a recognition that reducing the barriers to practice—especially for military spouses or people who travel in different districts—was important. But that was outweighed by the concerns regarding accountability, control, and culture across different districts. Ultimately, the subcommittee felt that there was not sufficient widespread concern to justify a national rulemaking proposal.

Accordingly, the subcommittee will recommend to the Standing Committee that the attorney admission project be terminated, and that the subcommittee be disbanded.

Closing Comments

Judge Mosman announced that Judge Harvey had agreed to renew his term on the Committee. Judge Burgess had also agreed to a one-year extension of his term.

The next Committee meeting will be held in Boston, in the federal courthouse, in October.

Judge Mosman adjourned the meeting.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 17. Subpoena

(a) ~~Content~~In General. A subpoena must state the court's name and the proceeding's title ~~of the proceeding~~, include the court's seal ~~of the court~~, and ~~command~~ require that the ~~witness~~ recipient ~~to attend and testify~~ ~~—~~at ~~the~~ a specified time and place ~~—~~ attend and testify, produce designated items, or do both ~~the subpoena specifies~~. The clerk must issue a blank subpoena—signed and sealed—to the ~~party~~ requesting ~~it, and that~~ party, who must fill in the blanks before the subpoena is served.

(b) Subpoena to Testify—Defendant Unable to Pay Costs and Witness Fees. Upon a defendant's ex parte application, the court must order that a

[1] New material is underlined in red; matter to be omitted is lined through.

subpoena be issued for a named witness if the defendant shows ~~an inability to pay the witness's fees and~~ the necessity of the witness's presence for an adequate defense~~. If the court orders a subpoena to be issued, the~~ and an inability to pay the witness's fees. The process costs and witness fees will then be paid ~~in the same manner~~ as ~~those paid~~ they are for witnesses ~~the~~ responding to government subpoenas.

(c) ~~Producing Documents and~~ Subpoena to Produce Data, Objects, or Other Items.

(1) ***In General—Items Obtainable.*** A subpoena may ~~order~~ require the ~~witness~~ recipient to produce any ~~books, papers, documents,~~ item, including any data or information or any book, paper, document, or other ~~objects the subpoena designates~~ object~~. The court may direct the witness to produce the designated items in court before trial or before they are~~

~~to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.~~

(2) ~~***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.~~ ***Non-Grand-Jury Subpoena—When Available; Required Content and Limitations; Issuance; Disclosure.***

(A) *When Available.* A non-grand-jury subpoena is available for a trial; for a hearing on detention, suppression, sentencing, or revocation; or—with the court's permission in an individual case—for any additional evidentiary hearing.

(B) *Required Content and Limitations.* The subpoena must describe each designated item with reasonable particularity and seek only items that:

(i) are likely to be possessed by the subpoena's recipient;

(ii) are not reasonably available to the party from another source; and

(iii) are, or contain information that is, likely to be admissible as evidence in the designated proceeding.

(C) *Motion and Order Not Ordinarily Required.* A motion and order are not required before service of a non-grand-jury subpoena unless (3) or (4),

a local rule, or a court order requires them.

(D) *Necessary Showing In a Required Motion.* The movant must:

(i) describe each designated item with reasonable particularity; and

(ii) state facts showing that each item satisfies (2)(B) (i)-(iii).

(E) *Ex-Parte Motion.* The court must, for good cause, permit the party to file the motion ex parte.

(F) *Disclosure When No Motion Is Required.* When no motion is required, a party need not disclose to any other party that it is seeking or has served the subpoena, unless a local

rule or court order provides otherwise.

(3) ***Non-Grand-Jury Subpoena for Personal or Confidential Information About a Victim.***

(A) *Motion and Order Required.* After a complaint, indictment, or information is filed, a non-grand-jury subpoena requiring the production of personal or confidential information about a victim may be served on a third party, including a victim, only by court order upon motion.

(B) *Notice to a Victim.* ~~Before entering the order and u~~Unless there are exceptional circumstances, the court must, before entering the order, require giving notice to the victim so that the victim can move to quash or

modify the subpoena or otherwise object.

(4) ***Subpoena by a Self-Represented Party.*** A subpoena is available to a self-represented party only after the party:

(A) files a motion;

(B) makes the showing described in (2)(D); and

(C) obtains an order.

(5) ***Non-Grand-Jury Subpoena—Place to Produce the Designated Items.*** Unless the court orders otherwise, a non-grand-jury subpoena:

(A) must require the recipient to produce the designated items to the court if the subpoena:

(i) is requested by a self-represented party; or

(ii) requires the production of personal or confidential information about a victim; and

(B) may require the recipient to produce the designated items to the requesting party's counsel if the subpoena:

(i) is requested by a represented party; and

(ii) does not require the production of personal or confidential information about a victim.

(6) *Disclosing to Other Parties the Items Received.* A party must disclose to an opposing party an item the party receives from a subpoena's recipient only if the item is discoverable.

(7) ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. A party responding to a motion to quash a non-grand-jury subpoena must make the showing described in (2)(D).

(d) Service. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy ~~of the subpoena~~ to the witness or to the subpoena's recipient and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. But t~~T~~he server need not tender the attendance fee or mileage allowance ~~when~~ if the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service.

(1) ***In the United States***. A subpoena requiring a witness to attend a hearing or trial—or requiring a recipient to produce designated items—may be served at any place within the United States.

(2) ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.

(f) ~~Issuing~~ Subpoena for a Deposition ~~Subpoena~~.

(1) ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) ***Place.*** After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the

witness to appear anywhere the court designates.

(g) Contempt Order for Disobeying a Subpoena. The court (other than a magistrate judge) may hold in contempt a witness or subpoena recipient who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. ~~A~~ Under 28 U.S.C. § 636(e), a magistrate judge may hold in contempt a witness or subpoena recipient who, without adequate excuse, disobeys a subpoena issued by that magistrate judge ~~as provided in 28 U.S.C. § 636(e)~~.

(h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

Committee Note

The amendments to Rule 17 respond to gaps and ambiguities in its text that have contributed to conflicting interpretations in the courts and difficulties in application. The changes include revisions that clarify the procedures for

subpoenas to produce data, objects, or other items and the availability of such subpoenas for proceedings other than trial, as well as revisions that delineate which provisions apply to certain types of subpoenas. The amendments also include stylistic revisions to text and headings.

Rule 17(a). In addition to stylistic changes, the text in (a)(1) has been revised to clarify that it applies to subpoenas for producing items as well as those for testimony.

Rule 17(b) formerly headed "Defendant Unable to Pay," has been retitled to clarify that it applies only to subpoenas for testimony. Changes to the text are stylistic only.

Rule 17(c), covering subpoenas to produce data, objects, or other items, has been revised to address multiple issues with the prior language that had contributed to conflicting interpretations in the courts. Formerly it had three subsections, now it has seven. The changes are intended to promote clarity about what the Rule requires, while safeguarding the discretion of courts to tailor subpoena practice to the circumstances of a district or case. The section's heading —"Subpoena to Produce Information, Objects, or Other Items"—has been revised to more accurately describe the amended language in (c)(1).

Rule 17(c)(1) continues to describe what a subpoena may obtain, but it has been revised to refer to "items" that include not only data, but also any "information" or objects. This recognizes that parties use subpoenas to obtain electronically stored information and other intangible items in addition to "data," "documents" or other objects.

Perceived ambiguities in the language of the last two sentences of former (c)(1) contributed to several conflicts in

case law, including when a subpoena may be sought ex parte, and the rules for production and disclosure. The revised rule replaces these two sentences with separate provisions containing explicit direction about each of these issues.

Rule 17(c)(2) is new. The language formerly in (c)(2) about motions to quash is now (c)(7). **Subparagraph (2)(A)** clarifies that non-grand-jury subpoenas are available to produce items for trial as well as proceedings where subpoenas are most likely to be needed, presently used regularly in many districts, or for which there is statutory or rule authority for parties to present evidence: detention hearings under the Bail Reform Act, sentencing hearings under Rule 32, pre-trial suppression hearings, and revocations. There is no other mechanism available to compel evidence from third parties at these proceedings, even though both parties may need to do so. Some decisions have interpreted the prior text of the Rule to bar the use of Rule 17 subpoenas to produce items at any hearing other than grand jury proceedings and trial. This change to the Rule's text expressly authorizes the use of a non-grand-jury subpoena to obtain evidence for introduction at the listed hearings.

The ending clause explicitly recognizes the discretion of the court in an individual case to permit a Rule 17 subpoena to produce items in other evidentiary hearings not listed in the Rule in which a party may be allowed to present witnesses or evidence. Examples include preliminary hearings and new trial hearings. The present use of Rule 17 subpoenas for items in such proceedings is not as common, in part because of the difficulties, costs, and delays that may arise when subpoena practice is imported into these less formal or more expedited proceedings.

Rule 17's provisions are not applicable to hearings under § 2254, where a court may apply subpoena provisions in the Federal Rules of Civil Procedure. *See* Rule 12 of the Rules Governing § 2254 Proceedings. Rule 12 of the Rules Governing § 2255 Proceedings allows application of either the Civil or Criminal Rules in § 2255 proceedings.

Subparagraph (c)(2)(B), along with the requirements in **(c)(2)(D),** articulates a modified version of the test announced by the Supreme Court in *Nixon v. United States,* 418 U.S. 683 (1974), which interpreted the previous text of Rule 17. Applying *Nixon,* all but a handful of lower courts have read Rule 17 as limiting non-grand-jury subpoenas to produce documents or other items to those that met specificity, relevance, and admissibility requirements. Many courts added one or more of the additional following criteria: that the items sought were not otherwise obtainable by due diligence, that advance inspection was needed to properly prepare and avoid delay, and that the subpoena was not a "fishing expedition."

The Committee agreed that the basic character of Rule 17 subpoenas as seeking evidence for a particular proceeding should remain unchanged, and that the rule should continue to prohibit the use of subpoenas for general discovery from third parties. But it also determined that the admissibility requirement, as well as other aspects of the prevailing interpretation of the prior language, was being applied inconsistently, resulting in harmful uncertainty and unnecessarily restricted access to evidence needed from third parties for trial and other proceedings.

The new text now codifies a modified version of the *Nixon* standard intended to provide an adequate and more predictable opportunity for both the prosecution and defense to obtain from third parties the evidence they need for the

proceeding designated in the subpoena. The new text imposes upon a party the duty to ensure that every subpoena to produce items meets this standard, including those obtained and served without motion.

As to specificity and the prevention of "fishing expeditions," **(c)(2)(B)** first requires that the subpoena "describe each designated item with reasonable particularity." This requirement serves at least two functions. First, it informs the recipient what is being requested so that the recipient can decide how to comply and whether to file a motion to quash. Second, it prevents parties from using such subpoenas for discovery and "fishing expeditions," which can create unacceptable burdens for recipients, courts, and those individuals and entities whose information the recipient is ordered to produce. The requirements in **(c)(2)(B)(i)** and **(ii)** advance this same goal by limiting the subpoena to items "likely to be possessed by the subpoena's recipient," and "not reasonably available to the party from another source."

The text of **(c)(2)(B)(iii)** requires that each item either be, or contain information that is, "likely to be admissible as evidence in the designated proceeding." In using "*likely* to be admissible," the Committee deliberately rejected stricter formulations applied by some courts. In some circumstances, it will be impossible to be certain *before* a proceeding begins that a precisely identified item will be admissible. Such circumstances include when an item's admissibility depends on whether the opposing party first presents other evidence. For example, impeachment evidence should be available to a party by subpoena for use at trial when a party knows that a witness will or is likely to testify. That evidence should not be unavailable simply because admissibility cannot be determined definitively until after the witness has actually testified. The "likely to be

admissible" standard is already used by some courts applying Rule 17 and more accurately describes the appropriate inquiry. There is no separate reference to "relevance" in **(c)(2)(B)** because information would not be admissible unless it were relevant.

If a court is concerned that without judicial oversight some categories of subpoenas—such as those seeking particular types of information, or seeking information for a particular type of proceeding—pose a special risk of noncompliance with the requirements in (c)(2)(B), the court has discretion to require that those subpoenas be authorized by court order upon motion (*see* (c)(2)(C)) and/or to order that the recipient produce the items to the court instead of directly to the requesting party's counsel (*see* (c)(5)).

The provisions in **Subparagraphs (c)(2)(C)-(F)** resolve several disputed issues about obtaining subpoenas to produce items that arose under the prior language of the Rule**.**

Rule 17(c)(2)(C) defines when a motion and court order are required before a party may serve a non-grand-jury subpoena to produce items. Courts have disagreed about if or when the former language in (c)(1)—which stated "the court may direct the witness to produce the designated items in court before trial or before they are offered in evidence"—required a court to first approve a subpoena under 17(c). The resulting practice has differed greatly from court to court (and in some cases judge to judge), with some courts requiring motions for every subpoena to produce items, others permitting parties to obtain and serve such subpoenas without judicial involvement (unless the subpoena sought victim information under (c)(3)), and still others insisting on prior approval in certain circumstances but not others.

The Committee concluded that mandating a motion and court order for every subpoena to produce items—or for every subpoena that seeks production before trial, as some courts had interpreted the former language in (a)—places unnecessary burdens on courts and parties alike and is contrary to existing practice in many districts. Other requirements stated in the Rule or otherwise available to the court, such as protective orders, are adequate to control potential abuse of the subpoena process by the parties. Districts that have required, under the prior language of the rule, a motion and court order whenever a subpoena seeks production prior to trial may continue that practice by local rule or court order. That level of judicial oversight before service, however, is no longer required by the revised text of the Rule.

The amended rule clearly specifies the circumstances that will always require prior court approval via motion, and it preserves the discretion of judges to require motions in other situations. It provides that a motion and order are not required before service of a non-grand-jury subpoena to produce items "unless (3) or (4), a local rule, or a court order requires them."

Rule 17(c)(2)(D). When a motion is required for a non-grand-jury subpoena, new (c)(2)(D) states exactly what a party must do in the motion to prove that the proposed subpoena does indeed comply with (c)(2)(B)'s requirements. Rule 17(c)**(**2)(D)(i) requires the party to demonstrate to the court that the subpoena describes each designated item with reasonable particularity. And (2)(D)(ii) requires the party to "state facts," showing each item is "likely to be possessed by the subpoena's recipient," "not reasonably available to the party from another source," and "likely to be admissible as evidence in the designated proceeding." Requiring a factual

basis is intended to prevent the use of Rule 17 subpoenas based upon unsubstantiated guesses or mere speculation.

Rule 17(c)(2)(E) ensures that a court must, for good cause, allow a party to file a motion for a subpoena to produce items ex parte. Whether a party may seek a subpoena ex parte has been another contested question under the prior language of Rule 17(c). Although some courts have read the Rule to preclude ex parte subpoena practice, most allow it, some by local rule. Proceeding ex parte is important when disclosure to another party of what the subpoena requests, the identity of the recipient, or the explanation why the subpoena complies with (c)(2)(B) could lead to damage to or loss of the items that the party is attempting to obtain, or divulge trial strategy, witness lists, or attorney work-product. Without the ex parte option, defense counsel may face the impossible choice of either not seeking a subpoena and violating the ethical duty to prepare a plausible defense, or seeking the subpoena and disclosing their trial strategy, work-product, and other confidential information to the government and co-defendants (who may have adverse interests).

Rule 17(c)(2)(F) clarifies that unless required by a local rule or court order, a party has no duty to inform the other parties about a subpoena when no motion is required.

Rule 17(c)(3) retains the requirement in former (c)(3) of a motion and court order for a subpoena seeking personal and confidential information about a victim, now in subparagraph (A), as well as the requirement of prior notice to a victim absent exceptional circumstances, now in subparagraph (B). Both requirements were added to the Rule in 2008 to implement the Crime Victim's Rights Act and are unchanged, except for the addition of style revisions, including adding the term "non-grand-jury" to (A).

The amendments also add a provision permitting ex parte applications for good cause, but it is important to distinguish that good cause requirement from the "exceptional circumstances" concept in (c)(3). Exceptional circumstances under (c)(3) would include [a showing] that evidence might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. It will be uncommon that a notice to a victim will meaningfully implicate the concern about disclosing defense strategy because, unlike subpoena applications under this Rule, a notice merely informs the victim of the request, not the reasons why the subpoena is sought. In contrast, the showing of "good cause" to file a motion ex parte would require an explanation of the reason.

The amendment also responds to a few decisions that had interpreted the rule as applicable only to subpoenas for personal or confidential information served on third parties other than a victim. The amendment adds the words "including a victim" to clarify that the requirement of a motion and court order before a subpoena seeking personal or confidential information about a victim may be served on a third party applies when that third party is a victim.

Rule 17(c)(4). This new provision extends the motion requirement to a subpoena requested by a self-represented party. Two reasons underlie this decision. First, self-represented parties are not bound by ethical rules that deter an attorney's misuse of the court's compulsory authority, raising the risk that the subpoena would not comply with (c)(2)(B). Second, requiring judicial oversight of this very small subset of subpoenas would not significantly add to the courts' burden, even in districts where there is relatively little motion practice under Rule 17.

Rule 17(c)(5) is also new. It clarifies when a subpoena must order the recipient to produce designated items to the court, and when it need not do so. Again, the text in former (c)(1) stating that the "court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence" produced conflicting decisions on this point. Some courts read the rule as always requiring returns to the court, others that it required returns to the court whenever a subpoena ordered production before trial, and still others that it permitted returns directly to the requesting party unless the court ordered items produced to it. The Committee concluded that judges should have discretion to determine where (and how) production should take place. To the extent the prior text of the rule was leading to unnecessary limits on the discretion of the court to allow returns to the requesting party, it created needless burdens for courts and required revision.

Accordingly, subsection (c)(5) sets three defaults, each subject to departure by court order.

First, (5)(A)(i) provides that a subpoena requested by a self-represented party must require the recipient to produce the designated items to the court. Judicial oversight at both the issuance and production stages is added assurance that parties without legal training or ethical responsibilities will not deliberately or unintentionally access inappropriate or non-compliant information that a judge would be able to intercept if the recipient were required to provide the items to the court.

The second default in (5) is for non-grand-jury subpoenas that require the production of personal or confidential information about a victim. Paragraph (5)(A)(ii) provides that unless the court orders otherwise, such subpoenas must require the recipient of such subpoenas to produce the designated items to the court, not directly to counsel. Production to the court provides an opportunity for the court, before the information produced is disclosed to the requesting party, to review the information produced in camera, require redactions, restrict access, regulate retention, add other protective orders, or take other actions to protect the victim's dignity and privacy.

The third default, in (5)(B), is that unless the court orders otherwise, a subpoena that is requested by a represented party and that does not require the production of personal or confidential information about a victim may require the recipient to produce the designated items to the requesting party's counsel. This default reflects present practice in many districts.

The rule places no restrictions on the court's discretion to vary from these default rules. For example, when a subpoena is likely to produce private or privileged information, it is common practice for courts to order in camera review before disclosure to anyone. And to provide greater judicial oversight—for example, for subpoenas requiring the production of personal or confidential information—the rule permits a court, by local rule or court order, to require the return of such information to chambers before disclosure to the requesting party.

New **Rule 17(c)(6)** states, "A party must disclose to an opposing party an item the party receives from a subpoena's recipient only if the item is discoverable under these rules." This provision resolves another dispute about

the meaning of the Rule's prior text, which some courts read as requiring that each party have access to any item that a subpoena recipient produces to another party. That position undermines the careful calibration of discovery and disclosure in Rule 16 and other discovery rules. For example, even if every item produced by a subpoena is admissible, it does not follow that the requesting party will decide to use all of those items in its "case-in-chief at trial." And a defense subpoena may produce inculpatory evidence the government did not know about, as well as evidence the defense hopes to use at the designated proceeding. The new text recognizes that disclosure of information and other items between parties, including information and items the party may obtain by subpoena, is regulated by the Constitution, Rule 16, and other discovery rules. Rule 17 does not modify that carefully developed law.

Rule 17(c)(7) contains the text about motions to quash previously in (c)(2). A second sentence has been added clarifying that the showing described in new (c)(2)(D) must be made by the party responding to a motion to quash a non-grand-jury subpoena to produce items.

The second sentence of **Rule 17(d)** now includes the words "or to the subpoena's recipient" after "witness" to clarify that it applies to both subpoenas for testimony and subpoenas to produce items. The last sentence has been restyled, adding "But" at the beginning and replacing "when" with "if."

Rule 17(e)(1) contains an addition similar to that in (d) to clarify its application to subpoenas to produce items as well as subpoenas for testimony.

The heading of **Rule 17(f)** has been restyled.

Rule 17(g) includes three changes: (1) the heading has been revised to better describe its content; (2) "or subpoena recipient" has been added to clarify its application to both subpoenas for testimony and subpoenas to produce items; and (3) the reference to 28 U.S.C. § 636 has been restyled.

Changes Made After Publication and Comment

The language of (a) was revised to clearly state that a subpoena may order both testimony and the production of items. The words "including a victim" were added to the text of (c)(3)(A) to clarify that the requirements in (c)(3) for non-grand-jury subpoenas seeking personal or confidential information about a victim apply when the third party receiving the subpoena is a victim.

The language of new (c)(5), regulating the place to produce designated items, was revised both to make clear that under the amended rule the court continues to control that location for all subpoenas and to provide that, unless the court orders otherwise, personal and confidential information about a victim must be produced to the court rather than directly to counsel.

In addition to explanations for the changes above, three revisions were made to the committee note. First, language was added to the end of the portion of the note accompanying (c)(5)—the provision addressing when a motion and order are required before a party may serve a non-grand-jury subpoena to produce items. The added language explains that the rule permits a court to require, by local rule or court order, the return of personal or confidential information to chambers before disclosure to the requesting party. Second, language was added to the

portion of the note accompanying (c)(3)(B) explaining the difference between the showing of good cause required for an ex parte motion and the "exceptional circumstances" exception from notice in (c)(3). Finally, a sentence in the note accompanying (c)(2)(B) discussing relevance was revised for clarity.

Summary of Public Comment

USC-RULES-CR-2025-0003-0003 (Jonathan Wroblewski). Mr. Wroblewski supports the provisions that update the rule to define the proceedings to which it would apply, when production must be made to the court or may be made to counsel, and when subpoenaed material must be disclosed to the opposing party. He also supports the proposed relaxation of the *Nixon* standard as "modest and reasonable." But he urges two important changes: (1) requiring a motion, notice to the party whose information is being sought, and court review for all subpoenas seeking private or confidential information from third parties, and (2) providing a default protective order for such information when a subpoena is approved by the court. He argues that the constitution requires the protection of everyone's personal or confidential information—not just information about victims—and that judicial scrutiny of motions seeking such information is necessary to promote consistent applications and ensure that subpoenas meet the standards in 17(c).

USC-RULES-CR-2025-0003-0005 (Morgan Noel). Mr. Noel generally supports the proposed changes, which improve clarity and now make it clear that subpoenas are available for non-trial proceedings. However, he prefers the NYC Bar Committee's "relevant and material" standard, rather than "likely to be admissible."

USC-RULES-CR-2025-0003-0006 (Joseph Zaki). Mr. Zaki supports the rule's objective but proposes committee note clarifications regarding digital evidence, such as the ability to designate integrity artifacts, objective identifiers for reasonable particularity, and protective structuring for sensitive information.

USC-RULES-CR-2025-0003-0008 (Federal Magistrate Judges Association—FMJA). The FMJA "enthusiastically endorsed" the amendments because they "will provide much needed clarity and lead to consistency across districts."

USC-RULES-CR-2025-0003-0009 (Anonymous). This commenter raises several questions and concerns, including the meaning of "when available" in (c)(2)(A), the potential that the "likely to be admissible" standard might be read to reach material when there is only "a slight chance it could be admissible," the need for court orders to apply for credibility determinations, the meaning of "good cause" under 17(c)(2)(E), and the potential that ex parte subpoenas could be abused.

USC-RULES-CR-2025-0003-0010 (International Attestations, LLC). The International Attestation submission focuses on the proposed Civil Rules, but footnote 1 of the submission noted in passing that "the other proposed rules changes," including Criminal Rule 17, "are worthy of comment as well." However, International Attestations took no position on Rule 17 and made no suggestions.

USC-RULES-CR-2025-0003-0011 (New York County Lawyers Association—NYCLA—Federal Courts Committee). The NYCLA commends the effort to modernize Rule 17 but argues that the proposed changes do not go far enough. While endorsing the clarification that

Rule 17(c) applies to sentencing, suppression, detention, and revocation hearings, and supporting the replacement of *Nixon*'s specificity requirement with "reasonable particularity," the Committee argues the proposed "likely to be admissible" standard will continue to create inconsistent applications. NYCLA advocates for the NYC Bar's "relevant and material" standard instead. It notes that Rule 17(c) subpoenas are a criminal defendant's only vehicle to compel production from third parties—in contrast to prosecutors who have grand jury subpoenas and search warrants—making broader access essential to defendants' constitutional rights to compulsory process and a meaningful opportunity to present a complete defense.

USC-RULES-CR-2025-0003-0012 (Mitchell Berger). Mr. Berger questions why self-represented parties appear to be treated differently under the proposed amended Rule 17. He argues that requiring pro se parties to file a motion, make the showing described in (c)(2)(D), and obtain an order (per proposed Rule 17(c)(2)(I)(i)) subjects them to a higher standard than represented parties, potentially undermining their Sixth Amendment rights.

USC-RULES-CR-2025-0003-0013 (New York City Bar Association, White Collar Crime Committee). NYCBA's White Collar Crime Committee believes the amendments "will promote clarity, uniformity, fairness, and, ultimately greater trust in our criminal justice system." The amendments "represent a substantial step in the right direction towards much-needed reform." Though the Committee fully supports the proposed amendments, it suggests a revision to 17(c) and an amendment to 17(h). Relaxing the stringent *Nixon* standard imposed by certain courts is a significant step, but it does not go far enough. The published "likely to be admissible" standard may still lead to differing interpretations. The Committee urges

adoption of its original "relevant and material" standard. The Committee also proposes amending Rule 17(h) to clarify that witness statements can be obtained from third parties by subpoena, resolving a circuit split on this issue. It states that the proposed rule's safeguards (requiring motions for personal or confidential victim information, judicial gatekeeping, and notice requirements) adequately protect victims while preserving defendants' constitutional rights.

USC-RULES-CR-2025-0003-0014 (Judicial Conference Committee on Criminal Law). Writing on behalf of the Committee, Judge Edmond Chang agrees amendments are needed to clarify Rule 17 because the existing guidance is "ambiguous and incomplete, and it has produced conflicting interpretations that afflict multiple aspects of subpoena practice." He offers two suggestions intended to avoid potential confusion and ensure effective application. (1) Revise Rule 17(c)(3)(A) to require a motion and order when a subpoena has a "reasonable possibility" of requiring the production of personal or confidential information about a victim. This would counter the risk the parties might interpret the rule as requiring notice only when they are certain such material would be produced. (2) Revise Rule 17(c)(3)(B) to specify that the court must require the government to give notice to a victim whose personal or confidential information is being sought. This would align the rule with the current practice.

USC-RULES-CR-2025-0003-0015 (National Association of Criminal Defense Lawyers—NACDL). Although its preferred approach would have made ex parte subpoenas available to the defense for investigative purposes as soon as charges had been filed, NACDL characterizes the published draft as a "significant improvement" and supports it subject to several suggested changes. NACDL

strongly supports the relaxation of the *Nixon* standard and the explicit authorization of returns to counsel's office. It supports the expansion to four kinds of evidentiary hearings other than trial, but objects to limiting subpoenas to only those proceedings. NACDL suggests several modifications: (1) clarifying the relationship between (a) and (c); (2) disallowing overrides of numerous provisions by local rules and orders; (3) clarifying the meaning of "personal or confidential," which should be narrowly construed; (4) correcting the statement in the note to (c)(5) that the court has discretion to require production to the court rather than to counsel; and (5) clarifying Rule 17(h) "does not extend Jencks Act-type limitations to otherwise-permissible subpoenas to third parties."

USC-RULES-CR-2025-0003-0016 (Prof. Paul G. Cassell). Professor Cassell provided a revised version of his written statement following the January 22, 2026, public hearing. Professor Cassell argues the proposed amendments represent a dramatic and unjustified expansion that will harm crime victims while providing minimal benefit to defendants. His central arguments are: (1) most crime victims (over 85%) lack legal counsel and cannot effectively litigate subpoena challenges; (2) expanding subpoenas from trials to detention, suppression, sentencing, and revocation hearings would represent approximately a 20-fold increase in proceedings where information about victims could be subpoenaed; (3) the lowered "likely to be admissible" standard would provide no protection at detention and sentencing hearings where evidence rules do not apply; (4) the proposal carries over a drafting error in the present rule, which does not require a motion and order to subpoena personal or confidential information about a victim directly from the victim; (5) direct production to defense counsel would bypass judicial review, which is required by the Crime Victims' Rights Act (CVRA); (6)

allowing ex parte motions to avoid disclosure of "trial strategy" would violate victims' CVRA rights to confer with prosecutors; and (7) the proposed ex parte procedures would facilitate gag orders on victims in violation of both the CVRA and the First Amendment. Professor Cassell proposes specific remedies including carve-outs for violent crimes, sexual offenses, and domestic violence cases, and a new Rule 44.1 confirming the authority of courts to appoint counsel to assist crime victims in exercising their rights.

USC-RULES-CR-2025-0003-0017 (Volare). Volare, a Washington D.C. nonprofit providing free legal services to crime survivors, strongly opposes the Rule 17 amendments based on their experience representing victims. Kristin Eliason, Esq., submitted revised testimony following the January 22, 2026, public hearing. Volare's central concerns are: (1) less than 1% of DC crime victims receive legal representation, leaving them unable to effectively challenge subpoenas; (2) the proposed "likely to be admissible" standard will dramatically increase the number of scenarios where subpoenas may be issued, (3) the amendments authorize subpoenas for additional non-trial proceedings, exponentially expanding the settings in which victims' personal or confidential information may be sought, and in many of these proceedings the Rules of Evidence do not apply, (4) the new rule's provision for direct production to defense counsel bypasses the judicial review that currently protects victims; (5) allowing ex parte motions to avoid prematurely disclosing "trial strategy" will lead to the proliferation of secret proceedings of which victims will have no notice; (6) the changes will operate "in tandem" to create untenable circumstances for victims; (7) the proposed changes would impair victims' ability to protect their rights in the District of Columbia, which currently has more protective procedures. If the proposed amendments move forward, Volare proposes carve-outs for violent

crimes and explicit exclusion of the District of Columbia from the rule changes given the unique impact on their local court system. The submission includes testimony from "Jane," a crime victim who chose not to report her assault specifically because she feared the invasive discovery process.

Testimony of Meg Garvin (Executive Director, National Crime Victim Law Institute; Professor of Law Lewis & Clark). Professor Clark testified in opposition to the proposed amendments, stating that they would undermine the rights provided by the Crime Victims' Rights Act, which guarantees victims' rights to be treated with fairness and respect for their dignity and privacy, and places an affirmative duty on the courts to "ensure that victims are afforded their rights." Victims will be affected by all parts of the amendments, which will increase the number of subpoenas seeking their information, potentially allow that information to go directly to defendants, and lower the practical barriers to repeated demands for information that will expose victims to trauma earlier in the proceedings, while applying a lower standard than *Nixon*. She stressed the emotional, financial, and psychological toll on victims, particularly the potential for repeated subpoenas and disputes.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 11. Pleas

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(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's

[1] New material is underlined in red; matter to be omitted is lined through.

obligation to ~~calculate the applicable sentencing guideline range and to~~ consider ~~that range, possible departures under the Sentencing Guidelines, and other sentencing~~ the factors under 18 U.S.C. § 3553(a), including the Sentencing Guidelines;

* * * * *

Committee Note

The amendment reflects the 2025 changes to the U.S. Sentencing Guidelines, which (1) deleted most of the provisions in Chapter Five, Part K (Departures), and (2) revised U.S.S.G. § 1B1.1(a) to eliminate the requirement that the court consider departures at step two of a three-step sentencing process. As revised, § 1B1.1 now provides for a two-step process, considering at step one "the kinds of sentence and the guideline range as set forth in the guidelines," and at step two "other applicable factors in 18 U.S.C. § 3553(a)."

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 32. Sentencing and Judgment

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(h) **[Reserved]** ~~**Notice of Possible Departure from Sentencing Guidelines.** Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.~~

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Committee Note

The amendment reflects developments in the Supreme Court and the Sentencing Guidelines that eliminated the need for notice regarding departures.

[1] New material is underlined in red; matter to be omitted is lined through.