ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
October 27, 2022
Phoenix, Arizona

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on October 27, 2022, in Phoenix, Arizona. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr. (via Microsoft Teams)
Judge Michael J. Garcia
Lisa Hay, Esq. (via Microsoft Teams)
Judge Bruce J. McGiverin
Angela E. Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq. (via Microsoft Teams)
Susan M. Robinson, Esq.
Michelle Morales, Esq.
Judge John D. Bates, Chair, Standing Committee
Judge Gary S. Feinerman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine T. Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

H. Thomas Byron III, Esq., Secretary to the Standing Committee
Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Christopher I. Pryby, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
Shelly Cox, Management Analyst, Rules Committee Staff (via Microsoft Teams)
Nicole Y. Teo, Intern, Rules Committee Staff (via Microsoft Teams)

Additional persons attended, at the request of the Committee, to discuss a proposal to amend Rule 17. They are listed on page 15 of these minutes, when they introduced themselves to the Committee.

Opening Business

Judge Dever opened the meeting with administrative announcements, noting it was his first meeting as chair after one year off the Committee. He thanked the staff at the Administrative Office for making all of the arrangements and Judges Bates and Feinerman for attending on behalf of the Standing Committee. Noting that Judge Feinerman had served as a member of the Committee for seven years, Judge Dever said it was terrific that he has returned as our liaison to the Standing Committee.

Ms. Morales attended to represent the Department of Justice, and Judge Dever welcomed her, noting that she had represented the Department at several prior meetings.

Judge Dever noted that several members would be participating via Microsoft Teams: Dean Roger Fairfax, Ms. Hay, Ms. Recker, and Ms. Noble. Professors Struve and Coquillette were also participating on Teams.

Judge Dever also noted that Judge McGiverin had experienced multiple travel delays, but would arrive as soon as he could.

Finally, Judge Dever welcomed and introduced several new members of the Rules Committee Staff Office. Tom Byron is the new Secretary to the Standing Committee and head of the Rules Support Office. Allison Bruff is our new counsel, assigned to both the Civil and Criminal Rules Committees. The new Rules Law Clerk is Chris Pryby, and the new Rules Committee intern is Nicole Teo. Judge Dever concluded by welcoming the members of the public who were viewing the meeting on Microsoft Teams.

After covering some housekeeping details, Judge Dever asked Ms. Bruff to provide an update on the status of the various rules amendments. She directed the Committee's attention to the table beginning on page 216 of the agenda book, which tracked the various proposed amendments, new rules, and official forms. She noted that the proposed amendments to Rule 16 are scheduled to go into effect December 1 of this year absent congressional action, and the status of other rules in process was listed.

Mr. Pryby then gave a brief update on legislation affecting the Criminal Rules. He noted that the most significant pending legislation was the yearly National Defense Authorization Act, page 140 of the agenda book, which typically passes at or near the end of December. It includes a retroactive reduction in sentences for certain cocaine-related crimes, and it provides that court can reduce these sentences without having the defendant present in person, notwithstanding Rule 43. It also provides that notwithstanding Rule 41 the district court in the District of Columbia may issue a warrant for the seizure of certain assets anywhere in the United States, instead of requiring the warrant to be obtained in the district where the assets are located. Although other bills were noted in the chart, Mr. Pryby observed that it was unlikely that they would be passed soon.

Judge Dever then opened the floor to any comments, additions, or corrections moved to consideration to the Minutes from the April 2022, beginning at page 15 of the agenda book.

Professor Beale noted that Ms. Bruff had brought a few typos to the attention of the reporters, who requested permission to make those corrections. A motion was made and seconded to approve the minutes, including the corrections noted by the reporters.

Judge Dever asked Professor Beale to introduce the next agenda item, a report from the Rule 49.1 Subcommittee chaired by Judge Birotte. She explained that the proposal referred to the Subcommittee came from the Committee's former Standing Committee liaison, Judge Jesse Furman. In the *Avenatti* case[1] Judge Furman had occasion to look closely at Rule 49.1 (Privacy Protections for Filings) and particularly the committee note. As a result of his research, Judge Furman concluded that it would be very desirable to amend the committee note, which cannot be done without a change to the text. His proposal to amend the text and add a new note was referred to Judge Birotte's Rule 49.1 Subcommittee.

Judge Birotte explained that the Subcommittee considered several issues. The first question was whether the note was causing a sufficient problem that an amendment to the text was needed to address that problem. If so, then what would an amendment look like? Judge Furman had proposed the addition of an introductory phrase, "Subject to any applicable right of public access." But if the Committee were to amend the rule adopting that language, it would need to consider an issue of consistency with other rules. To assist the Subcommittee, the prior Committee chair, Judge Kethledge, had reached out to the Committee on Court Administration and Case Management (CACM) to determine its view regarding a possible amendment. CACM was amenable to the Committee's consideration of an amendment, but it was not prepared to take a position without getting input from the stakeholders, particularly the defense bar. Coincidentally, at that time an article by a member of the defense bar was published, raising their concerns about and opposition to the proposed amendment.

The Subcommittee, Judge Birotte said, had extensive discussions about whether there should be an amendment, as well as possible language. It also reviewed the case law, and an analysis of how different judges had interpreted Rule 49.1.

Ultimately, Judge Birotte said, the Subcommittee was not convinced that an amendment was warranted. Members thought it was important that the rule currently does not say that the court "shall" seal the forms. Instead, it says that the court "may" order that a filing be made under seal without redaction. That gives the court discretion and flexibility, and the case law demonstrates that is how different judges have interpreted the rule. The Subcommittee agreed with the old saying "if it ain't broke, don't fix it."

Professor Beale added that the Subcommittee also discussed the difference between procedure (which is within the Committee's jurisdiction) and substance (which is not). The question whether these submissions are judicial documents subject to disclosure under the First Amendment or the common law right of access is a matter of substantive law, and accordingly it does not fall within the Committee's authority. The Subcommittee recognized it was important

[1] *United States v. Avenatti*, 550 F.Supp.3d 36 (S.D.N.Y. 2021).

not to take a position on something that isn't within the Committee's proper ambit. On the other hand, Judge Furman thought that the note does exactly that by putting a thumb on the scale. So the Subcommittee tried to determine whether it would be possible to take that thumb off the scale without somehow signaling the Committee's own views on the substantive issue. It concluded that making any change would be read as taking a position. The Subcommittee concluded it was not necessary to make any change because the note is not having a significant effect. Judges are looking at this issue independently, analyzing the substantive issues, not just following the note.

The Subcommittee also considered the harm that might be done by an amendment. The defense bar has read the proposed amendment as taking a position, either signaling that we think these affidavits are judicial documents and there is a right to disclosure, or at least distancing ourselves from the view in the note. The Subcommittee saw no way around that problem, and no compelling need to weigh in on the issue. The Committee, Professor Beale said, generally tries to avoid doing something controversial that would generate widespread opposition. The recently published article suggested that there would be opposition from the defense bar. So in the absence of a clear need to take action, the Subcommittee concluded that the better position was to leave things where they were. Clearly, the *Avenatti* opinion itself demonstrated that the rule did not prevent Judge Furman from reaching what he thought was the correct result. And now his published opinion is available, and it lays out his analysis for the next judge.

Judge Dever asked if the members of the Subcommittee would like to add their views.

A member who stated she agreed that no change should be made added the observation that the committee note does seem to recommend that the affidavits be confidential, whether that is fortunate or unfortunate.

Another Subcommittee member said that she had been very much influenced by the reporters' memorandum that surveyed all of the court decisions, which showed that the courts were considering all of numerous factors and not resting on the language in the rule or the committee note. So there just was not a pressing need to make any changes.

Another member commented that the defense bar feels the financial privacy of indigent defendants should be protected just as it is for those who retain counsel. The Subcommittee recognized that the rules don't ordinarily include an admonition to follow the Constitution or to follow common law, but we were considering an amendment that would say "Subject to any right of public access." That would have been a departure from how the rules ordinarily are written, omitting any reminders to follow the common law or the Constitution. That was a key reason the Subcommittee felt it wasn't a needed amendment.

Professor Beale noted that Professor Coquillette has often reminded the Committee that if we put this in one rule, then every other rule would have to start with "and consistent with the Constitution." Otherwise writing it into one rule could create a negative inference regarding other rules. Professor Coquillette agreed.

Judge Dever then opened the floor for comments or observations from other members of the Committee or others with observations. A member commented that for him the problem of a negative implication was a particularly persuasive point.

Judge Bates said it seemed like a very thoughtful resolution, but he posed a hypothetical question: if Judge Furman were to convince CACM to change the guidance quoted in the committee note to delete the reference to the financial affidavits for assigned counsel, would the Subcommittee feel that would require action by the Committee?

Professor Beale responded that there is no way to eliminate a bad committee note. So the note quoting the prior CACM guidance would remain even if the Committee amended the rule and accompanied it with a new note. On the other hand, if CACM does change its guidance, the new guidance would be promulgated and presumably have its own effect. So the Subcommittee did not think that an amendment—which could not eliminate the old note—would be that important in that scenario.

Professor Coquillette and Professor King said it is possible for West Publishing and LexisNexis to add a footnote stating there had been a change in the rules. That might be an option in the hypothetical situation Judge Bates raised.

The Standing Committee's liaison expressed agreement with what had been said so far. He wished there were an eraser to allow the deletion of the note's reference to financial affidavits. But without such an eraser, he thought any cure would be worse than the disease.

Ms. Morales noted for the record that Department of Justice agreed with the Subcommittee's recommendation.

A motion to adopt the recommendation of the Subcommittee not to move forward with Judge Furman's proposal passed unanimously, and Judge Dever thanked all the members of the Subcommittee, especially the Chair, for their hard work. He stated he would communicate the Committee's decision to Judge Furman.

Judge Dever then directed the Committee's attention to Tab 3, beginning at page 162, which deals with the topic of pro se access to electronic filing. He said Professor King would introduce the topic and then turn it over to Judge Burgess, who chaired the Subcommittee. The other members of the Subcommittee were Judge McGiverin, Ms. Hay, Ms. Robinson, and the clerk representative, Ms. Noble. Finally, Judge Dever noted that the Committee was privileged to have Professor Cathie Struve, who is chairing the working group, available to provide additional information.

Professor King said the item on pro se filing was on the agenda to get the Committee's feedback on topics that had been identified for discussion by all the advisory committees affected by this proposal. Currently Criminal Rule 49 (reprinted at the top of page 169) states that a party not represented by an attorney must file nonelectronically unless allowed to file electronically by the court, by court order, or by local rule. The presumption is that unrepresented parties in

criminal cases must use paper filing. The other advisory committees' rules also deal with filing by unrepresented parties.

In 2021, the Rules Office received a proposal to expand access to electronic filing for unrepresented parties in all proceedings. To facilitate consideration by all of the relevant advisory committees, the Standing Committee established a working group, chaired by Professor Cathie Struve, who was participating in the meetings of each of the relevant committees. Professor King noted that Professor Struve's memo in the agenda book identified several issues, based on the Federal Judicial Center's comprehensive study. Professor King encouraged members to focus on pages 200 to 231, which described what the various district courts had reported was happening in those districts with criminal cases and prisoners. That would be the focus of the Committee's attention.

Professor King then identified three issues for discussion. First, does the current rule, which presumes that unrepresented parties in criminal cases must use paper filing, state the correct default rule, or should the default rule be changed? She noted that the Federal Judicial Center study found that several districts have already allowed unrepresented criminal defendants to use some sort of electronic filing. A few of them had approved the use of CM/ECF by unrepresented criminal defendants. There were not many, she noted, but the existing rule gave them the flexibility to do so. It states that unrepresented parties may file using the court's electronic-filing system "only if allowed by court order or local rule." And that has been permitted in a few districts.

The second issue, Professor King stated, is allowing alternative electronic access in a format such as e-mail or fax. This expanded quite a bit during COVID when there was less access in person to the court and many more districts in the study allowed some sort of electronic filing by prisoners in particular. That was facilitated by scanners provided by the federal court to mostly state institutions. One of the issues that the working group will be discussing is whether we should be encouraging expansion of that type of alternative electronic access outside the CM/ECF system.

Professor King described the final issue, which had surfaced in several different committees, as the requirement that unrepresented parties serve others who are already on CM/ECF in person or by paper non-electronically. If parties are on CM/ECF, they get an electronic notice when the clerk scans in whatever filing is delivered by the unrepresented party to the Clerk's Office. But the duty to serve remains, and is regarded by some as burdensome and duplicative.

Professor King noted that the Subcommittee had discussed these issues, and the memo in the agenda book described its reactions. Now the Subcommittee wanted to get input from the Committee and to hear about members' issues and experiences.

Judge Burgess thanked Professor King for a great summary, noting the variety of practices in different districts. Turning to the first issue, the possibility of changing the default position that requires unrepresented defendants to file in paper, he said the Subcommittee

discussed the burden that would place on the clerk's office if unrepresented parties were allowed to file in CM/ECF or by other electronic means (like email). Some districts have tried this and found it wasn't as hard as they thought it was going to be. But one of the Subcommittee's concerns had been the burden on clerks' offices. He also noted that in his experience, as a practical matter in most criminal cases with pro se defendants, they have standby counsel that can handle the electronic filing. So the number of unrepresented defendants without access to electronic filing is very small. But that did not mean the Subcommittee should not consider whether the default should be changed. However, as drafted the rule does allow the courts to permit pro se defendants who are capable of doing so to file electronically. He summed up the Subcommittee's general consensus: the opportunity is there now without requiring a change in the rule.

As to the third issue, regarding service of process, he acknowledged it is a problem in the sense that the rule requires an unrepresented party to make paper service. But there was some concern that a change would place a burden on the clerk's office and it would raise questions about when something was filed. He hoped to hear more from Professor Struve about the discussions in the other advisory committees as they considered these issues, including the possibility of changing their own default rules.

Overall, the Subcommittee recognized the need going forward to take advantage of electronic filing, but that is already available in most districts if an unrepresented defendant can establish the ability to do it.

Judge Burgess noted that another problem the Subcommittee discussed was the difficulties faced by pro se litigants in custody in facilities that don't have the ability to allow them to file electronically. We have prisoners in state and local facilities that do not have the wherewithal for them to file electronically. The Subcommittee recognized the value of increasing electronic filing, but the general consensus was that we just are not there yet. Judge Burgess and Judge Dever then invited other Subcommittee members to make any additional comments.

A Subcommittee member stated that her initial reaction had been that all litigants should have equal access to electronic filing and we should move towards allowing pro se individuals to utilize the electronic-filing system. But it would not be logistically feasible to move from the current rule that pro se parties cannot file electronically without a judge's permission to requiring them to file electronically. That would be unworkable because persons who are incarcerated don't have access to computers. She noted some of the disadvantages of not being able to file electronically. For example, in many jurisdictions an electronic filing can be submitted until midnight, but pro se filers who must file hard copies must be at the courthouse earlier, by 4:00 o'clock or whenever it closes. And it's easier not having to deal with things like making copies. So she felt that we definitely should work toward increasing access to electronic filing.

The member raised the possibility of seeking a middle ground between the current position of the rule (no access unless approved by the court) and the requirement that all litigants must file electronically (i.e., a rule that it's permissible: unrepresented parties may file electronically if they can demonstrate the ability to do so, without requiring the permission of the

court). She thought that a pro se litigant could establish this capacity in the same manner that attorneys do so now: they must sign up for and take training, and then demonstrate that they know how to use the system and the governing rules. Some jurisdictions, she noted, have local rules requiring attorneys to take a test online to show that they are competent to receive ECF credentials. A member responded wryly that his court sometimes had trouble with attorneys being able to use the electronic filing system correctly.

Another Subcommittee member commented that she had not been able to join the most recent Subcommittee call, but she commented that in her jurisdiction, Oregon, they put scanners in two of the biggest state prisons so that prisoners could scan their materials and electronically file that way. That has worked fairly well. The prisoners don't need an Internet connection, and they don't need CM/ECF filing, but they have a way to create a document that the clerk's office receives. The problem is that it's very expensive. They had been able to include only two prisons in a pilot project, though there are 14 or 15 other prisons. Extending this would require access to the libraries within each prison and access to the scanner for each prisoner. That would be logistically complex, and Oregon had not come up with a method that she could recommend would work for the rules.

The member stated the hope that even if there is no amendment to Rule 49 now, it would be possible to preserve the benefit of the work and analysis done by the Subcommittee and the Federal Judicial Center (FJC). It seems fair for prisoners to have access electronically rather than by the ordinary paper mail method. Since the Subcommittee surveyed the various problems that come up, we apparently still need to have the laboratory of experimentation in all of the district courts. She hoped we could encourage that experimentation.

Judge Burgess responded that the member had largely summed up the Subcommittee's views.

Noting that the Committee's clerk representative had been a critical member of the Subcommittee given her experience as the clerk in the Southern District of Florida, Judge Dever asked her to share her thoughts. She responded that the discussion so far had analyzed the issues very well. She said we want to expand electronic filing, and we all understand the importance of equal justice and having everyone have access. But logistically it is very complicated, particularly in larger districts. Her district has five locations and six different jails, some state and some federal. So logistically, it's expensive and difficult to organize. Changing the default would make it impossible for many courts to comply with the rule. The issue is really logistics, because we all have the same goal. It's just a matter of how do we get there, and how do we do it evenly across the country.

Judge Dever then asked Professor Struve to explain the larger project. She began by thanking the Subcommittee, its chair, and the reporters for their valuable insights. Noting that the working group was convened at Judge Bates's suggestion to consider some proposals with respect to pro se access to CM/ECF, she wanted to clarify where those discussions have been with respect to access to CM/ECF, and foreground the questions with respect to service mentioned earlier. With regard to access to electronic filing, she emphasized that no one was

suggesting that the rules should *require* CM/ECF filing by self-represented litigants. The various proposals would either increase access by making it a presumptive option for self-represented litigants, or in the absence of such a change would address the practice of a minority of districts around the country that flatly forbid the use of CM/ECF by any self-represented litigant. She noted that about 15% of the districts, by the FJC's count, provide that no self-represented litigants can ever access CM/ECF in their own cases. But that is a minority position, as is the position of those other courts that presumptively permit CM/ECF access for pro se litigants. Those positions are the outliers on each side, with the larger middle ground being to allow litigants to seek permission. She also emphasized that in our discussions there had been no momentum in favor of extending CM/ECF access even on a permissive basis to incarcerated self-represented litigants.

She thought that the Subcommittee had made an excellent point: the universe of litigants to whom any such proposal might apply in the criminal rule context is very small. According to one study, perhaps 0.3% of felony defendants in the federal system are self-represented, and among those, not all are incarcerated (though some are). So we have a very small N to think about. And even if you say, under the § 2255 rules, which do permit the application of either the criminal or the civil rules to the § 2255 motion, among those litigants, Professor Struve thought the vast bulk would be incarcerated, though she recognized that custody can extend beyond incarceration for § 2255 purposes. But the relevant point is the N is very, very small as far as the criminal rules are concerned.

So Professor Struve agreed with the Subcommittee that both the benefits and the downsides of the access to e-filing proposal are much less pronounced with respect to the criminal rules. It is more of an issue for the other sets of rules—Civil, Bankruptcy, and Appellate—and she offered to provide an overview of those committees' discussions, with the caveat that the service provision is far different in this respect. The service provision would build on the insight that any paper filings by a self-represented litigant are ultimately scanned and uploaded by the clerk's office into CM/ECF. Because all participants in CM/ECF are going to receive notice of those filings and access to them through CM/ECF in the notice of electronic filing, the question arises whether it's necessary to additionally require that paper copies be served on those parties who are registered in CM/ECF. She emphasized this proposal would not ask that the clerk's office do anything different than what we understand it already does. At present, the clerk's office takes paper filings, scans them, and puts them in CM/ECF. The proposal builds on that, saying once they file in CM/ECF, why do CM/ECF participants in the case need to receive a paper filing as well?

Because this issue concerns service, not filing, the self-represented litigants who might possibly be affected by a rules change would include both incarcerated and non-incarcerated litigants. Assuming that the § 2255 rules are currently deemed to incorporate Criminal Rule 49's approaches, she thought the affected population would include incarcerated people moving under § 2255. And especially as to that population, she asked, why should they use the limited funds in their prison account on stamps to send paper copies to the U.S. Attorney's Office, which will have to check them for anthrax and which already has an electronic copy via CM/ECF? She

suggested that the service question would be the place where the Committee might most profitably direct its attention. That was where she thought a rule change in the Criminal Rules might actually have real world effects.

Next, Professor Struve asked for more information about some points raised on page 165 in the agenda book memorandum. The memorandum mentions that the service proposal could interact with the prison mailbox rule. She expressed confusion about that because the prison mailbox rule, as she understood it, concerns how to tell whether an incarcerated litigant's filing is timely. The proposal to eliminate a requirement of separate paper service—which is what was on the table—did not really relate in any way to the timeliness of the *filing*. It would simply absolve the litigant from separately *serving* the papers they are filing. She asked how the prison mailbox rule related to this service provision. Another question referred to in the memo is determining the date of filing: when delivered to the clerk's office, or when scanned in? She wondered again whether the concern here really is about the date of *filing*, because that would not be affected by the removal of the separate service requirement. The date of filing would still be whatever it would have been without the rule change: when it's delivered to the clerk's office if it's someone not incarcerated, or when delivered to prison officials in compliance with any of any applicable prison mailbox rule. But Professor Struve said flagging the issue of timing had been helpful because it had spurred her to think about how the change would interact with the three-day rule in Rule 45(c). The time period is counted from the date of service, and if there were a change in the service requirement we should think more about how to draft the rule to take account of any possible delays between receipt by the clerk's office of a hard copy and subsequent uploading into CM/ECF. But if there are other ways in which this would interact with the date of filing, she would like to know about them.

Finally, the memo mentioned the potential for increased burdens on the clerk's office. Professor Struve said she was having trouble figuring out what those burdens would be. She found it hard to imagine a Criminal Rules situation in which there could even be a potential problem. Presumably the other litigant in a § 2255 proceeding is the U.S. government, which presumably is always on CM/ECF. Accordingly, the government would receive any filing that the litigant makes in hard copy once it's put into CM/ECF. She recognized that in civil cases there may be other parties who are not CM/ECF participants. The districts that have adopted the proposed approach to service (which included the district in which the Committee was meeting, as well as the Southern District of New York and at least one other district) do not seem to have experienced problems operationalizing it. But in order to be able to ask them whether they have encountered particular problems, it would be very valuable to know exactly what burdens would fall on the clerk's office as a result of a provision that would merely absolve the litigant from serving participants who are on CM/ECF. The proposal, she noted, would still require separate paper service on any litigants who do not participate in CM/ECF.

Professor King thanked Professor Struve and replied quickly to one part of her question on service, pointing out that there are often codefendants in criminal cases who do not receive service through CM/ECF. In thinking about the rules governing service, it is important to keep in

mind that it's not just the government. She agreed with Judge Bates that only unrepresented codefendants would not be on CM/ECF, so the number would not be large.

Judge Dever invited comments from other Subcommittee members and asked the Committee's clerk representative for her perspective. He recalled that in the Subcommittee discussion she had spoken about the logistics of monitoring emails and all the different ways communications come to the clerk's office, and the resource constraints and logistical reality of dealing with them.

The Committee's clerk representative responded that the Subcommittee's discussion of the service issue included not only CM/ECF but also alternative means, such as filings by email. Her district experienced issues during COVID receiving documents via email, not just by pro se filers, but also by the attorneys who sent emails to the box and assumed because they were sent to the email box that they didn't have to serve anyone else. And one of the issues specifically was with sealed documents. When they sent sealed documents, they didn't serve the parties and folks didn't show up for hearings and things of that nature. But that was with regard to email filings, not specifically with regard to CM/ECF. As to service, she agreed that if you file something in CM/ECF you should only have to serve individuals who are not registered for CM/ECF, not all of the people that are already receiving electronic filings. She favored changing that rule if possible. With regard to filing, her concerns focused on registration and getting pro se filers registered for CM/ECF. Professor Struve said she would follow up via email with the clerk representative.

Another member observed that at the outset of a case a litigant might not accurately identify the opposing party, which then puts a burden on the clerk's office to determine who should be served. That had been addressed with regard to civil pleadings in Oregon, which has a standing order that the Attorney General's Office has agreed to accept electronic service from the clerk's office whenever a § 2254 is filed. With that agreement, the clerk's office does serve the Attorney General's office. That might be a model to consider. But their U.S. Attorney's Office has not agreed to accept service of § 2241 petitions. When a § 2241 petition is filed by somebody who says they're being held unconstitutionally by the federal government, the clerk's office can't serve that because the U.S. Attorney's Office is not yet a party. They are not on CM/ECF for that pleading. Usually the party that's the opponent would be the custodian. The warden, usually of the federal prison, would be the opposing party. She thought that was probably one of the burdens on the clerk's office, having to determine how to serve that warden. That was one of the problems with service.

The clerk liaison added a concern about burden shifting where the burden is on the party to file the document and to serve it, not on the clerk's office. She was concerned that there would be claims that the clerk didn't serve the document on the correct party, though ultimately it is really the filer's responsibility to perfect service.

Judge Burgess commented that the Committee might want the Subcommittee to take a harder look at this service issue. He asked for an update on whether the other Committees are contemplating reversing the presumption concerning pro se access to electronic filing. If so, he

wondered whether it would it be a problem to have a different procedure under the Criminal Rules.

Professor Struve said the other three committees had already met, and most of their discussion concerned e-filing rather than service. However, when the service proposal came up, it was always to approbation. Members had made comments such as "that seems like an easy lift" and "that sounds like a good idea." So service seems to be kind of ticking along in the other committees as something to work on as a potential rule amendment.

On the question of access to e-filing, she noted that Mr. Reagan and his colleagues at the FJC have been phenomenal in studying this question. Their study found that for presumptive access to electronic filing for self-represented litigants the level of court makes a huge difference.

In the courts of appeals there is almost an even split between circuits that presumptively permit CM/ECF access for non-incarcerated, self-represented litigants and those that do not. She emphasized this referred only to non-incarcerated litigants. No circuit is presumptively permitting access for incarcerated litigants, though the Ninth Circuit had experiments in some particular facilities. With regard to non-incarcerated pro se litigants, six of the courts of appeals presumptively permit them to file electronically, and six will allow them only with permission in the case. The final court, the Sixth Circuit, has not permitted self-represented parties to file electronically. Professor Struve expressed her personal hope that circuit would reconsider its position. Leaving the Sixth Circuit aside, it is a six-to-six split between presumptive access and access with permission.

In the district courts, in contrast, the majority of districts allow unrepresented parties to file electronically with permission. But in slightly less than 10% of districts, if pro se litigants are not incarcerated, they don't need special permission, though they may need training. And 15% of courts appear to say that pro se litigants can never file electronically.

The bankruptcy courts are furthest along the spectrum because they basically do not allow self-represented litigants to access CM/ECF. But in the Bankruptcy Rules Committee, a majority of the participants were strongly in favor of increasing access. They viewed it as an access to court issue and were not perceiving particular problems. They thought that the arguments advanced against access to CM/ECF were not particularly persuasive, and the clerk of court representative strongly supported the idea that it would alleviate burdens on his office.

Professor Struve said none of the Committees had reached any concrete decisions. She described the Appellate Rules Committee as intrigued, given the fact that the appellate courts are by and large further along in potentially adopting this greater access position. In that Committee, the question might be whether they are going to try to shift the default to presumptive permission, from which a court could opt out in a case. Or would the Committee say the courts of appeal are already moving in that direction, so there's no need for a rule change? In the Civil Rules Committee meeting the views of skeptics on increasing access were quite well represented, although in some instances voiced by participants who are not members of the committee. But

there were also questions raised about whether this is in fact a rules issue. One Civil Rules Committee member suggested CACM should take the lead on email access to e-filing.

In summary, Professor Struve said the discussions spanned a range of degrees of enthusiasm for shifting the default with respect to e-filing. Bankruptcy has been the most enthusiastic, Civil much more doubtful and rather skeptical about whether this is for the Rules Committees at this point, and Appellate considering whether to go their own way or just allow things to evolve.

Mr. Byron, who also attended the other committee meetings, added an additional issue. One of the comments he thought might be worth further inquiry and discussion is whether there's a benefit to providing notice to pro se litigants by electronic means, especially for court orders. This might be less significant for Criminal Rules than for Civil and Bankruptcy. But in Bankruptcy, in particular, he had been struck by the observation that many of the unrepresented litigants in the bankruptcy courts and in civil cases too have no regular fixed addresses. Because they change their address from time to time, mail service is often ineffective at providing notice when the court orders a party to file or appear. Electronic notice could be really beneficial to those parties, and he thought that was an issue to add to the list.

After thanking Professor Struve for her efforts, Judge Bates commented that he agreed that the service issue is one that is right for continued coordinated action. It is more difficult to decide exactly what the next steps should be with respect to the access to CM/ECF issue more generally, but he and Professor Struve would continue talking about that.

Professor King asked for other comments in response to the question about concerns regarding a change in the service requirement. A member asked how a pro se litigant would know who is and is not on CM/ECF if we eliminate paper service for those on CM/ECF. How does that work in practice?

Professor Struve responded that question could be pursued with the districts that have implemented this procedure. These districts have a large docket of self-represented litigants, and there must be an answer. And she emphasized we are only considering service with respect to filings after the initiation of the case, and not service of case-initiating documents like complaints or petitions.

Judge Bates commented that it is a very small group where there is a self-represented criminal defendant and there are other parties in the case that will not see CM/ECF. He had never seen such a case, where there is more than one pro se defendant in the case without standby counsel.

There was agreement that the Committee should learn more about the experience in the districts, including the Southern District of New York and the District of Arizona, where they have already eliminated paper service on parties who are on CM/ECF. Professor Struve commented that the idea of eliminating paper service in this context had been prompted by an early conversation with a person who had been instrumental in bringing this change to the Southern District of New York.

With regard to the general issue of increasing CM/ECF access for self-represented parties, Ms. Morales stated that the Department of Justice supports any measures taken to increase and provide equal access to all our tools. But in looking to expand access to defendants the Committee should also consider the safety concerns that that may raise. She reminded the Committee of the report from the Task Force on protecting cooperators and the risk that any access from prison to these files could potentially cause some harm to the defendant. She put this on the record as the Department's only concern about expanding access.

Judge Nguyen thanked the Subcommittee members for their work, and she endorsed the view that we should be cognizant of the risks and technological challenges but move in the direction of equal access to CM/ECF. But in the meantime, she said, the Subcommittee had discussed some districts that are providing alternative means of electronic access, such as providing portals and allowing filing by email. Though each would carry its own challenges as discussed, she thought from a technological standpoint it would be fairly easy to provide portals where documents can be uploaded. One of the lessons her court had learned during the pandemic was the need to move aggressively to take advantage of technology. During the height of the pandemic, they had to rotate staff coming in just to scan the tremendous volume of filings through the drop boxes. They were thinking about how they could move this to some electronic format that would be safer. She asked whether there would be a means of providing encouragement of these alternative means of electronic submissions.

Mr. Reagan responded that one of the frustrations the FJC researchers had encountered was the ambiguity of the phrase "electronic filing." It can mean filing using CM/ECF, but it can also mean emailing something to the court for filing or using some kind of web portal upload. He also commented that "rules are not always rules." The FJC researchers found that many courts were not enforcing the paper service rule, and there was no incentive to enforce it. The other side wasn't enforcing it because they were already getting service. So there was nobody enforcing the rule. That, he said, was another part of that dynamic: the rule is not being followed because nobody thinks in their particular circumstance that the rule is particularly useful.

Judges Burgess and Dever asked whether there was anything else the Committee wanted the Subcommittee to look at in addition to the service issue. Judge Dever stated that the reporters would follow up with Professor Struve and monitor developments with respect to the other Rules Committees. The Committee will also continue to gather information about what is actually happening on the ground in the districts that are technologically ahead to learn what they are doing, and whether the rule is serving as an impediment, suggesting the need for an amendment.

Professor Beale noted there were references in the FJC report to the additional difficulties that NextGen seems to be posing for pro se parties. She was uncertain where that NextGen process is and how it is being coordinated with what the Committee has been considering. As Judge Nguyen and others said, one of the Committee's overriding goals is access and if there are technical issues concerning software that would scan for malware and so forth. She asked whether NextGen is coming, or is it here? And is there a formal way of bringing these projects together?

Judge Bates responded that CM/ECF is always evolving through NextGen, and it is both here and coming. He characterized it as a process rather than a single thing. He did not think it would be beneficial to wait for something to happen with NextGen, though we should be aware of it, and may be able in some instances to work in coordination with it. Professor Beale expressed the hope that the information that the FJC was collecting in this massive study is somehow being fed back to the people who are working continually on CM/ECF NextGen.

Mr. Reagan said NextGen is mostly here. For the past few years, courts have been transitioning to NextGen first a few at a time and then a very large number, many of them fairly recently. So NextGen is not something in the future, but very much in the present.

Mr. Byron noted, as a matter of terminology, that NextGen CM/ECF is the process that was just completed of transitioning all of the courts to that system. There is, however, an additional conversation, without a specific timeline, to replace CM/ECF with an entirely different platform. He thought that was at least several years away from full adoption and implementation. He thought that in the process of replacing CM/ECF with a different platform, there may be opportunities for the Rules Committees to work with the people at the AO who are working on that process to help ensure that that new products take account of the concerns that we're identifying. But we should not wait for that to be fully developed. There are still things we can do in the rules process in the meantime to address what is possible under what we now live with, which is NextGen CM/ECF (itself subject to constant evolution and tweaking).

The Standing Committee liaison encouraged the Subcommittee also to reach out to the clerk's office in the Northern District of Illinois, particularly as it pertains to CM/ECF electronic filing by pro se litigants, the procedures that clerk's office put in place to prevent malware from being introduced into the CM/ECF system, and how it handles service on CM/ECF users by pro se filers. He thought they had worked things out pretty well and might have some good lessons to impart.

Judge Dever thanked him for that suggestion. Noting this had been a very helpful discussion, he said that the reporters would continue to communicate with Professor Struve, and the Subcommittee would focus on the service issue as Judge Bates had requested, not wait for potential CM/ECF or NextGen solutions, and provide a report at our next Committee meeting.

After a short break, Judge Dever opened the discussion of Rule 17. He introduced himself, noting he is a district judge in the Eastern District of North Carolina and chair of the Committee. After introducing reporters Professors Nancy King and Sara Beale, he asked the other Committee members and participants in the Rule 17 discussion to introduce themselves. Judge Dever noted that Judge McGiverin, a United States Magistrate Judge from the District of Puerto Rico, was experiencing travel issues but would join the Committee as soon as possible.

The Committee members and staff introduced themselves, and the following participants, who attended at the invitation of the Committee, introduced themselves:

Michael Carter, Executive Director, Federal Community Defender's Office, Eastern District of Michigan

Robert (Rob) Cary, Williams & Connolly, Washington, D.C.

Mary Ellen Coleman, Assistant Federal Public Defender and Branch Supervisor for the Federal Public Defender for the Western District of North Carolina, Asheville Division

Donna Elm, Criminal Justice Act panel attorney for appeals and habeas cases for the District of Arizona, the Middle District of Florida, and the Ninth and Eleventh Circuits

James E. (Jim) Felman, Kynes, Markman & Felman, P.A., Tampa

Mike Gill, Criminal Chief, Eastern District of Virginia and chair, Criminal Chiefs Working Group

Angie Halim, criminal-defense trial attorney representing indigent federal criminal defendants, Philadelphia

Ellen Leonida, BraunHagey & Borden, San Francisco

Lisa Miller, Deputy Assistant Attorney General, U.S. Department of Justice's Criminal Division

Dimitra Sampson, Assistant United States Attorney, District of Arizona

Stephen (Steve) Wallin, Criminal Justice Act panel attorney, Phoenix

Judge Dever turned the meeting over to Judge Nguyen, the Rule 17 Subcommittee chair, who expressed appreciation for allocating the Committee's time at the meeting to study the Rule 17 issue. She explained that, in its preliminary review of the proposal to amend Rule 17, the Subcommittee concluded that it did not have a sufficient understanding of how the process worked on the ground and how it varied among districts. So the day's purpose was to gain a greater understanding of the rule's functioning. She thanked the participants for attending to share their experiences and explained how the Committee would proceed. She noted that the Subcommittee had planned several panels and set time frames and issues for each. She asked each participant to speak for six minutes, after which she would invite Subcommittee members to ask a single question before she opened the floor to questions and comments from the whole Committee.

The first panelist, Robert Cary, said he practices in Washington, D.C., but handles cases in other districts as well. Mr. Cary said that in his experience courts enforce the *Nixon* three-part test of relevancy, specificity, and admissibility, and he had identified only a handful of reported decisions in federal district courts in New York and the Northern District of California that seemed to depart from the standard. He had found the *Nixon* standard is very hard to meet, so much so that in his last two criminal federal criminal trials, he sought no subpoenas because he did not think in good faith he could meet that standard. For example, in a case in the District of Columbia, he sought to subpoena a company for records concerning its cooperation with the government. This was an important line of inquiry for the defense because the company was

subject to debarment, the government had not debarred it, and the government's chief witness had been able to sell the company for hundreds of millions of dollars. So the defense issued a subpoena. The company moved to quash, and Judge Emmet Sullivan (who has been known to be relatively generous in providing discovery) quashed the subpoena, finding it did not meet the *Nixon* test. Mr. Cary said the defense was unable to identify with specificity precisely what documents it was looking for, much less demonstrate that those documents were admissible. But in the same case, the government issued a trial subpoena for emails from one of the defense witnesses to the witness's employer. The employer, for whatever reason, decided not to move to quash, and the government got all those emails. Mr. Cary characterized this as unfair.

Mr. Cary said it was difficult to provide examples of things that he should have been able to obtain by a subpoena that would have made a difference, because you don't know about what you don't get. But he provided one example from a pro bono drug distribution case he had in the Maryland state courts. A subpoena for phone records provided evidence that defendant was in fact innocent, and the charges were dropped on the first day of trial. But if there had been a motion to quash under *Nixon*, Mr. Cary thought they would have been unable to satisfy the *Nixon* test. His takeaway was that the *Nixon* test is very hard to meet in practice. In most districts, as he reads the law, you have to describe with specificity and demonstrate that that the material sought will be admissible. It's a very hard standard to meet, and clients are aghast and cannot understand why they do not have the same ability as the government has to issue subpoenas. Mr. Cary endorsed the proposal of the New York City Bar Association ("New York Bar"), commenting that that he thought it would go a long way towards not only increasing fairness, but also the perception of fairness.

James Felman, the next speaker, said this is a big issue in white collar cases. In the big fraud cases, we are in a data-driven era. In his current case, for example, the discovery provided by the government was the equivalent of 30% of the Library of Congress, or 3,000 copies of the new Encyclopedia Britannica. This is an enormous amount of information, a "document dump." He called the design of federal criminal litigation trial by one-sided ambush. The government does not necessarily want to obtain the same information that the defense wants. So the defense gets a lot of information, but it is what the government wanted and obtained using a grand jury. But the defense may need different information, and Rule 17(c) is the only way the defense can get what it needs in time to review and use it.

Mr. Felman said his experience was a little different than Mr. Cary's. In many cases the prosecutors did not oppose the sorts of subpoenas that he has asked to be issued, which obviously sought important information. And many times the government concedes the subpoena can issue, though the recipient of the subpoena might move to quash it. That means there are now two rounds of litigation. In round one, the defense has to satisfy the government. And then if they can get through that, in round two, the defense is opposed by the recipient of the subpoena.

Mr. Felman noted that if the government has not agreed to his subpoena, he was probably not going to be successful. He agreed with Mr. Cary that he has to show that he already knows

what he is looking for, and even though he already knows what he is looking for, somehow he cannot prepare for trial without getting it. It's almost an impossible standard to meet. The reality is the defense does not really know with that specificity. It only knows that there is likely to be highly relevant information in the hands of this third party, and they need to get it. So it is almost impossible ever to meet the *Nixon* standard. But most of the time he has not been required to meet the standard, because it would be embarrassing and an obvious due process violation to take the position that the defense cannot get those documents—though sometimes that happens.

And so basically, he said, we are practicing law despite the rule and despite the *Nixon* standard. He described some of the workarounds. Sometimes the clerk's office gives him a blank subpoena, and with the prosecutors' consent, he just fills in the date. We issue the subpoena and it does not even go through the court. When he first started practicing, they would get a trial subpoena, serve it, and sometimes the party would just give us the documents early. But many of the people he is serving are sophisticated, and they will not voluntarily give the defense something early. And he needs pretrial production. He acknowledged that there can be budgetary issues because filing and litigating these motions is expensive. He also expressed concern that in some circumstances, there may be disclosure to the government of a defense theory. Unless he can move ex parte, the government will be able to see what the defense is seeking and then get a copy of the documents when they come in—even if he would not have been required to disclose them to the government under Rule 16. So he urged the Committee to look at this issue, which he characterized as critically important to the modern practice of white collar criminal defense law, saying that practitioners are hobbling along by working around the rule, and it would be much worse if the prosecutors that he worked with were not so professional.

The next speaker was Mr. Wallin, who said that he frequently uses Rule 17 subpoenas before trial in the District of Arizona, he always does so ex parte, and he requests authorization from the judge in advance. He always makes that motion ex parte, and he had never gotten any pushback in various kinds of cases. Mr. Wallin commented on the high quality of the bench in the district, as well as the federal prosecutors.

Mr. Wallin agreed with the previous speakers that the defense needs to obtain material to prepare for trial. He noted that the cases talk about a distinction between discovery and production, which he characterized as semantic, noting that in his motions he always states he is seeking production not discovery. He also reminds the judge that he could also issue a subpoena duces tecum for trial, but that would delay the trial. He surmised that makes a difference to some of the judges.

Mr. Wallin thought that it would have been a real problem if he had the judges that other speakers had described and had to meet those difficult standards. He briefly described a number of cases in which he had been able to subpoena materials. There were many entities in a white collar case, and none were in his client's name—there were nominee family members and so forth. The government had not gotten the bank records from any of these entities, and he needed them for his forensic accountant. In a rape case arising on a reservation, his expert needed the photos of the victim's vaginal and anal areas to determine whether there had been an anal rape.

With the photos he was able to secure a much more favorable plea bargain that did not include sexual assault.

Mr. Wallin urged that Rule 17 be revised to make it clear that, under the judge's supervision, the defense can obtain a subpoena duces tecum as pretrial discovery. Although he thought he was very lucky that the judges in Phoenix seemed to understand that, he emphasized that a revision is really needed.

Judge Nguyen invited questions, first from members of the Subcommittee.

A member asked if subpoenas from retained attorneys and those appointed to represent indigents are treated the same way. She said the public defender in her district said that under 17(a)(1)—which is just about witnesses—retained attorneys can go to the clerk's office and get subpoenas willy nilly. He told her that 17(b) is then primarily for indigents. She did not think that was clear in the rule.

Mr. Cary responded that he believed he could get a trial subpoena simply by going to the clerk's office in any district court in the country without court intervention. But the *Nixon* test is still going to apply if it's a subpoena for documents. But if it's for witnesses, no, but if it's for documents in any way, you have to go through the *Nixon* standard. That was his understanding of law and what his research indicated.

Mr. Felman emphasized the distinction between pretrial and trial subpoenas. He said that, in the case of a subpoena for documents for use at trial, he could go to any clerk's office and get that subpoena with no difficulty. The issue we have been focusing on, in contrast, is a subpoena that would require the third party to provide the documents in advance of trial so that the defense can study them and use them to prepare for trial. He said most courthouses will not issue the defense a subpoena with a blank date. They will only issue a subpoena with the trial date. He can get a pretrial subpoena with an earlier return date only if he has prevailed in litigation and obtained a court order. Now, that's how his courthouse works.

A member asked if 17(a) is solely for witnesses and 17(b) is for both indigent and retained defense counsel, and if both have to satisfy the *Nixon* standards. Mr. Felman responded that Rule 17(a) governs trial subpoenas for everyone. But 17(c) is what you use to get something that's returnable in advance of trial. He thought that was the part of the rule under consideration. But, the member asked, do both (a) and (b) require court intervention?

Another member clarified that 17(a) and (b) are both about trial subpoenas, but they treat indigent defendants differently, because indigent defendants have to name the people they're going to be subpoenaing, whereas those who have retained an attorney can get blank subpoenas at the courthouse. Rule 17(b) in theory requires the defense to name their witnesses and get the court to approve the subpoena, whereas the Committee just heard that if you have a retained counsel under 17(a), you don't have to do that. That seems like a good issue for the Committee to address as well. The member also noted that some defense attorneys get documents by using a witness subpoena under 17(a), and they subpoena the witness to bring the documents. And then the witness might bring the documents earlier.

A member stated that she had always read 17(c) as the only part of the rule that applied to documents, but she thought it was confusing. Some speakers indicated they used 17(a) to get documents. They shouldn't be doing so, but they are. She thought 17(c) was for obtaining documents under court supervision.

Mr. Wallin said that was how he had always read it, and that was the reason he always filed a motion for a Rule 17(c) subpoena in advance to get the authority under Rule 17(c). The first sentence of Rule 17(c)(1) does not refer to court intervention. The second sentence says "The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence." So if you want the items before trial, you have to go to the court, and he had always done that.

Judge Nguyen commented that this was part of the Committee's investigative process, and what the Committee was hearing is that the practices really do vary, including how district judges are interpreting the various provisions. She noted that the next panel would focus on judicial oversight.

Ms. Morales commented that Mr. Wallin's experience was very different from those of Mr. Felman and Mr. Cary. She wanted to understand the source of the difference. Was it a difference between the approaches in different districts, or a difference in the types of cases handled by the speakers, or a combination?

Two speakers responded. Mr. Wallin said he had not done any federal court practice outside the District of Arizona, so he could not say. He assumed it was a matter of the culture. Mr. Cary thought it was a matter of who objects, whether it's the subpoena recipient, who undoubtedly has standing, or sometimes the government. He noted he has not experienced objections, but when you get objections you must meet the *Nixon* standard, which is very tough. A member commented that either way there is court supervision for document subpoenas. Mr. Wallin responded that he dealt with this on the front end, including a judge's order when he issues subpoenas. He thought the court order short circuited any objections, though he thought he had once received a call from the recipient of a subpoena.

Mr. Cary said that until hearing the day's discussion he had thought he did not need judicial authority to get a subpoena and serve it returnable for the first day of trial—though when he got an objection, then the *Nixon* standard would apply. He thought he would need to be more careful going forward.

Another Subcommittee member asked Mr. Cary to provide more detail on the state case in which he had successfully subpoenaed documents that resulted in the case being dropped. Mr. Cary said it was a drug-distribution case where the drugs were dropped off by an undercover Federal Express delivery to a specific address. By subpoenaing telephone records of somebody they suspected might have been involved, the defense was able to establish the drugs were intended for that other suspect. He emphasized that if the telephone company had objected he could not have met the *Nixon* standard for a broad subpoena seeking many phone records.

Another member asked if Mr. Cary or other speakers had a suggestion on what you think would be a better standard. His point was that the *Nixon* standard was too high because it would have required him to know in advance what is in the documents are that you haven't seen yet. In Mr. Cary's case, he thought the phone records would be useful, but he would not have been able to show the court that the records would specifically show that the other suspect was present at the delivery site. So what should the standard for subpoenaing documents from third parties be? The member asked the speakers what standard would allow them to get the documents they needed but still have room for people to object that it's too burdensome.

Mr. Cary responded that the material and relevant standard is a good start, but the burden was another issue he thought was not addressed sufficiently in the New York Bar proposal. He noted that Rule 16 uses the word "material," and he thought it was appropriate for Rule 17 as well.

Mr. Felman stated that he thought there should be no limit on the issuance of pretrial subpoenas. The defense should be able to issue such a subpoena without court involvement. If a recipient thinks it is unduly burdensome, then the recipient would move to quash, and that is where he thought the standard would come in. He noted that he did not seek to subpoena material he did not need and that the process should not be any different than in a civil case. He did not think many civil litigants issue abusive subpoenas, and he saw no reason to believe that criminal litigants would abuse this. So Mr. Felman agreed with the New York Bar proposal, which would eliminate prior judicial approval for the issuance of subpoenas, and, if the recipient thinks it is unduly burdensome and oppressive, they could move to quash.

Judge Nguyen had a follow-up question for Mr. Felman and Mr. Wallin. Although they had described working cooperatively with the U.S. Attorney's Office on the front end, she wanted to know what standards the courts apply when there is an objection from the US Attorney's office or a motion to quash. Is it *Nixon* or something closer to material and relevant?

Mr. Felman responded that if there is an objection, the courts apply the *Nixon* standard, and he is almost certainly going to lose. Mr. Wallin emphasized that he always makes his motions ex parte, and he had never had a judge question that, and never had an objection from the prosecution because they don't know about it. And the judges said fine with that. And he'd never had a motion to quash. That supported Mr. Felman's point that the defense has no interest in abusing the subpoena authority. Mr. Wallin acknowledged that litigants in some civil cases pursue a scorched earth policy, but that just doesn't work for criminal defense lawyers. He thought that some of the concerns and fears that motivated the current design of Rule 17 are just not very persuasive.

Mr. Felman added another point. Sometimes in round one the government doesn't object and the subpoena issues. But he has to file the motion, which articulates the *Nixon* standard, which is then granted. But at the second stage, if the recipient of the subpoena objects that the subpoena is overbroad, burdensome, and does not meet the *Nixon* standard, he will respond that he has already met the standard. But there's some ambiguity at that point because the recipient was not a party to the litigation where he met *Nixon*.

Judge Nguyen then invited questions from members of the Committee who were not on the Subcommittee.

A member asked about the concern that meeting the standard for a subpoena would reveal the theory of the defense. She noted that it requires a great deal of work to obtain judicial approval of a pretrial subpoena, and when you do receive documents they are immediately disclosed to the government. But these may be documents that you don't want to use in your case in chief. You thought they would be relevant and that actually ended up hurting you. So those are decisions that you make early on. She asked the panelists to describe their experiences. Did it reveal the theories of your case? How does it hinder you in order to get documents produced prior to trial to determine whether they are beneficial and helpful? Does it hurt preparation of the defense because subpoenaed documents will be disclosed at the same time to the prosecution?

Mr. Cary began by saying it was his general practice to be "sort of an open book when it comes to discovery." He thought he would not get good discovery from the government unless he disclosed quite a bit of his own defense theories. That is his premise, though he was aware many other defense lawyers did not agree. He noted the contrast with Mr. Wallin, who had described his general practice of using ex parte motions.

Mr. Wallin noted that he generally took the same approach on discovery, but he does file his motions ex parte. And in his motion and proposed order, he includes a statement that the defense must comply with Rule 16 with respect to whatever material is produced in response to the subpoena. He described a case in which his client was in custody and made multiple calls from jail to a defense expert who had evaluated him. Mr. Wallin wanted the jail to provide the calls, so he subpoenaed them, but he did not want to alert prosecutor to the calls. He said that almost by definition, if he is at the point where he thought he needed something to help prepare his case, then he would be revealing defense theory by asking for it and explaining to the judge why it meets the *Nixon* standard. But he noted that typically he did end up disclosing what he got from the subpoena to the government. And, as he said, it might help him get a better plea agreement.

Mr. Felman added that it was very difficult to have a one-size-fits-all answer because it depends on the type of situation at issue. There are times where he wants to get information in the hands of a third party that he thinks might be helpful, but does not think the government knows about and does not want to alert them to. It might or might not be helpful, and he would move for the subpoena ex parte. But most of the time, he was in Mr. Cary's school of thought, and usually talking with the prosecutor. He views a trial as sort of a failure to communicate. He wants the government to see the documents almost as much as he wants to see them himself if he thinks they are helpful to the defense. So usually revealing the defense strategy is not an issue. But it can be. Under the rule, the documents are to be produced at the courthouse, and that means that both parties get a copy. But as a practical matter, it isn't done that way. Usually, arrangements are made that the court will give the defense the response, but the defense has to give it to the government. That's what the rule requires. He noted the asymmetry there. The government gets to investigate and only give us what it wants to, although they do have the

Brady obligation. Ordinarily the defense would only have to hand over what it intends to use in its case in chief. But instead it is gathering new information by subpoena and giving it to the government. On balance, however, he thought it better to get the information even if the government gets it, than be unable to obtain it.

A defense member noted that some people would disagree with Mr. Felman's reading of Rule 17. The requirement that the subpoenaed items be returned at the courthouse doesn't necessarily mean that they also go to the government. The member noted that her own survey of defender offices revealed that in many places, including Oregon, they file everything ex parte, and they would not expect the government to object to the subpoena request because they're not a party to it. Rather, they expect the person who received the subpoena request to do the objecting, and the rule doesn't say that the return should go to the government. The rule says it goes to the court. That gives the court the chance to review it and address any concerns. The court might know, for example, that somebody is objecting and just hasn't gotten their motion onto the docket quickly enough. The member asked if Mr. Felman agreed that just because the subpoenaed material goes to the court that did not necessarily mean it goes to the government.

Mr. Felman said that was absolutely right. This had become routine in his own practice, based on the kinds of subpoenas he was issuing, which the courts were granting with the understanding that both parties are going to get the documents. But he agreed it doesn't have to be that way. And particularly in the ex parte scenario, you would not want it to be that way.

The member then suggested that the Committee look more into the inclusion of the words ex parte in Rule 17(b), which says that the defendant can file an ex parte application to bring their witnesses to court. She suggested that the same reasoning would apply to the defense getting their documents ex parte: the concern about revealing your trial strategy. She noted the speakers had highlighted again different practices around the country. Different courts treat ex parte motions in different ways.

Another member asked if the problem is that the *Nixon* standard is too difficult to meet, why the solution would be to change Rule 17. If the objection is to the way the courts are applying *Nixon*, shouldn't the solution come through litigation involving the standard?

Mr. Cary said the *Nixon* standard comes from the government's subpoena for the Watergate tapes, not a defense subpoena for information from a third party. But as he read the cases and encountered the issue on the ground, many trial judges and circuit judges feel bound by the *Nixon* case even though it's not perfectly analogous to third-party subpoenas. He did not know how you can correct the situation unless you can get a case to the Supreme Court. The chances of getting cert granted are only 4%, and it could take decades to get an issue like this before the Court.

Judge Nguyen asked Mr. Cary about Judge Sullivan's decision, and whether he was objecting to Judge Sullivan's decision, or were the courts applying this standard across the board? Mr. Cary responded that in his experience the *Nixon* standard was generally being applied

in the District of Columbia. In addition to Judge Sullivan's ruling in his case, another leading case was Judge Walton's decision in the *Libby* case, which also applied the *Nixon* standard.

Judge Bates commented that most of the district court's docket is not cases that give rise to Rule 17 subpoenas, and Mr. Cary said he had been dissuaded from filing subpoenas in many circumstances because he thought he would be unable to meet the *Nixon* standard. That too reduces the opportunities district judges have to grapple with the issues. He asked exactly what it is about the standard the speakers thought was so difficult to meet. The first part of the *Nixon* standard is the evidentiary and relevant—as opposed to the material and relevant standard articulated a few minutes ago. Is that where the problem lies? Or is it in the other parts of the *Nixon* standard? What causes defense counsel like Mr. Cary to be dissuaded from even seeking the Rule 17 subpoenas, or makes judges decline the Rule 17 subpoena because it doesn't meet the *Nixon* standard?

Mr. Cary said it is the requirement of specificity which Judge Walton ruled, quoting another opinion, doesn't require explicit specificity but does nevertheless require specificity. Judge Bates commented that specificity is not in the *Nixon* opinion, but is a word that the courts have put into the test. Mr. Cary agreed, saying that he views the *Nixon* test as reduced to three things: relevancy (which is not a hard standard to meet), admissibility, and specificity. Specificity, he said, is the hardest gate keeper. The defense may know what type of document it wants, but many people read the *Nixon* standard to require you to describe the documents with super precision. He can rarely do that.

Mr. Felman focused on each element of the four-part test. The documents have to be evidentiary and relevant. Some courts define evidentiary as admissible. He said it was a mystery to him how he could know something was admissible when he had not yet seen it. You must show you cannot otherwise get them without due diligence, and he accepted that he should probably have to ask for them first. And he must show he cannot prepare for trial without them. How, he asked, can he show that without seeing the documents? And he must show it's not a fishing expedition, whatever that means. He said you could describe many of his subpoenas as fishing expeditions because he did not know yet what he didn't know. So the problem is a combination of all of those factors.

Mr. Felman described the case that brought him to the Committee's attention. He was representing a man under indictment for conduct that had been worked on by a number of major law firms. The government was aware of that work but did not issue grand jury subpoenas to those law firms. Accordingly, the discovery from the government to the defense did not include any of the law firms' work. Mr. Felman said he was currently litigating with law firms over their files, relying on Rule 17(c). He described the difficulty of meeting the *Nixon* standard in that context, concluding that each of the elements posed a challenge in that context.

Judge Bates asked whether the courts are rejecting these subpoenas based on all of those things, or was Mr. Felman concerned that they might be rejected? Mr. Felman said he never withheld efforts to seek subpoenas, and he found generally reasonable prosecutors won't stand up in court and tell the judge the defense should not have those files—though that can happen.

But Mr. Felman said he did not think he should be at the mercy of the prosecutor's good graces, but instead should have a rule that entitles him to what he needs. He concluded that when *Nixon* is the reality of how this rule is being applied, he doesn't have much.

Mr. Cary added that a leading case from the Fourth Circuit, *Rand,* was an accounting fraud case, in which the defendant sought accounting records. Mr. Cary thought it was a reasonable request for accounting records that would be admissible as business records, but he noted that the Fourth Circuit rejected that argument under the *Nixon* standard.

Mr. Wallin commented that the meta problem with the *Nixon* standard is that judges are told that Rule 17 subpoenas are not for discovery. That creates the potential for serious problems because realistically to do their job defense attorneys need to do some discovery, whether it's called a Rule 17(c) subpoena or something else. They can say it's production rather than discovery, but the meta problem is that we do not have a rule that says you can use subpoenas duces tecum for discovery.

A member suggested that it might be preferable to place this in Rule 16, and Mr. Wallin agreed. He thought Rule 16 would be a better site to state a specific standard for discovery. The main thing is we have to look at it as a discovery technique and to write the rule so that judges know they are applying a discovery rule. Otherwise there's just too much potential to take away the defense right to prepare for trial.

Mr. Cary provided some context for the language often cited from the Supreme Court's opinion in *Bowman.* He said the defendant was trying to use a subpoena to the government to do an end run around Rule 16 to get material from the government that was not available under Rule 16. In that situation, the Court said Rule 17(c) is not a substitute for discovery. Courts don't recognize that was a case where there was an effort to use Rule 17 to get discovery that was not available under Rule 16.

A member asked about the difference between Mr. Cary's description of his practice and that of the member who had said she always files ex parte. Mr. Cary said that he thought he could make his motions ex parte, though it was not his practice to do so. He generally thought he was more successful "in sunshine."

A member was asked to elaborate on her statement that the rule did not require material subpoenaed by the defense to be provided to the government. The member said that her office interpreted the rules as requiring them to disclose subpoenaed material to the government only when required to do so by Rule 16. For example, the defense might subpoena the guest register at a hotel. If your theory is that your client was there for only one night, and the register shows the client was there for five nights, the defense may not want to use that evidence at trial and also does not want to it over to the government, which can do its own investigation. But if you subpoena the hotel register and find that someone else who is an alternative suspect was there and your client wasn't there, that might not be evidentiary, i.e., not something the defense can introduce into evidence in court, but it might lead to a witness that you bring to court. So she agreed with earlier comments that the evidentiary standard is hard. But on that that question

about disclosing to the government, she thought it was important to not interfere with the defense investigative work and not to give the government everything that the defense looks into. The defense tries to look at all the facts and get a broader context than what the government might have looked at. And if you end up having to do the government's work for them essentially, that would really put a terrible burden on the defense. She characterized this as a pretty important issue, and she urged that the rule be revised to state clearly that the defense is permitted to file ex parte and that the subpoenaed material does not have to be given to the opposing party. Of course, Mr. Cary would still have the option to disclose the material. But she stressed the importance of making it clear that there should be no interference with defense strategy, noting case law supporting that point. The inclusion of ex parte in Rule 17(b) indicates the Committee noted this concern previously, though it was not added to 17(c).

A member asked Mr. Cary and Mr. Felman to respond to questions that arise in internal investigations. The first articulation by a witness of a false statement or the beginning of the inconsistent statements is often made to the outside counsel conducting an internal investigation, a lot of which gets ironed out by the time the witness hits the grand jury. She asked whether either had been successful in subpoenaing the law firm that has done the internal investigation for these interviews or for other material from their internal investigation. She noted counsel's declination pitch or its negotiations with the government may identify someone other than the client who might have been responsible.

Mr. Felman commented that he had generally sought to get documents and information from the time period of the offense and felt he was on thinner ice seeking to essentially get the work product of a law firm that has done such an investigation. But he thought there might be circumstances in which he would try to do that, though he had not done so. He had subpoenaed law firms for their communications with the prosecution but not their internal witness interviews. He noted there is a circuit split over whether or not the firms can maintain a work-product privilege over documents if they have given them to the prosecution. It has been very case-specific litigation. He wanted the Committee to understand that he did not think the explicit authority he was advocating would create a Wild West scenario in which everyone was subpoenaing each other's work product. What he seeks is almost exclusively historical information.

Mr. Cary noted he had experienced a little success subpoenaing an internal investigation but only because there was parallel civil litigation at the same time and the evidence in question was being produced in the civil litigation.

Mr. Wallin said he had not had white collar cases at this level, though he had some experience with work product and attorney client issues.

In the hypothetical about internal investigations, a member asked why this information would not be available in discovery from the government. Wouldn't the government have possession of that information and have to turn it over to the defense if someone came in on a pitch and said somebody else might have done this or has possession of the prior witness statements from internal investigation? The member who provided the hypothetical said that

often the government refrains from asking for those witness interviews so that they don't have to confront this problem. At one level, she said, it is work product. But it's also a witness making a statement, and often their response the first time they're asked about alleged criminal behavior is not completely truthful. So it gets memorialized in some fashion, but it also has substantive value.

Judge Dever said that, in more typical drug and gun cases the defense often argues that it does not have the burden of proof, and if a doorbell camera would have shown something, the government should have gotten that evidence. He asked all the members of the panel whether outside the white collar cases, they had examples of situations in which they were aggressively investigating and trying to use 17(c) subpoenas to do that. And can you give us some examples of that?

Mr. Wallin recalled a case in which he sought the repair records on his client's girlfriend's vehicle. Because his client was not the car's owner, the repair shop refused to produce the records without a subpoena. So he filed a motion for a subpoena that explained what he thought was in the repair records and how they would help his client. The judge issued the subpoena and he got the materials. Mr. Wallin noted that he generally tries to do some investigation his own, and when he runs into a wall he goes to the judge, explains what he found, and why he can't go any further without the subpoena. So far he had not gotten any pushback. He thought was because of the judges in his district.

Judge Dever observed there was also a distinction between someone issuing a subpoena for all the text messages of all the codefendants from the phone company for the last three years versus asking for these specific records. Mr. Wallin asked why he would ask for a lot of material he did not need. He acknowledged wryly that he was paid by the hour on the Criminal Justice Act (CJA) panel but it was not that much. So it was all about what he needed for the defense.

Judge Bates asked if Mr. Wallin had any concern with the examples that he had in mind that if forced to, he would not be able to meet the *Nixon* standard. He thought in his example Mr. Wallin would probably have been able to meet specificity, which has been raised as the greatest concern, and probably admissibility as well. Mr. Wallin responded that sometimes he would, but other times he would not. His problem, as said earlier, was because he had never gotten any pushback he really did not know what would happen if the judge set his motion for a contested hearing. He thought it was important to have done some work that up front so you can explain to the judge why you need this. But he asked again: how is this not serving as a discovery tool? When he gives this information to the judge, he is really making a discovery kind of argument—though under *Nixon* dressing up as production, not discovery. But what he has established shows that it is a discovery request.

Judge Nguyen thanked Mr. Cary, Mr. Felman, and Mr. Wallin for their very informative comments, and then she said it was time to move on to the next panel.

Ms. Coleman opened the next panel, noting that she was an assistant federal public defender in Judge Conrad's district, the Western District of North Carolina. Noting that her

remarks would overlap to some extent with what had already been said, she offered to also provide real world examples. She also thought it was important to set the base level starting point of the ethical obligations of defense attorneys. It is her ethical obligation as a defense attorney to investigate the charges against her client, wholly independent of the government, and to investigate mitigating evidence. She noted her belief that Rule 17 applies to sentencing as well as the guilt innocence phase, and that is wholly independent of a presentence investigation report. These are obligations under licensing boards, from the ABA, from the NLDA, and from precedents regarding what constitutes ineffective assistance of counsel. Moreover, her clients have a constitutional right to compulsory process, and Rule 17 is the mechanism by which they are able to effectuate that Sixth Amendment right. Often her investigation leads to documents and objects that are not in the custody and control of the government. Accordingly she will not get them through Rule 16, and the government may have no *Brady* obligation to provide them. So this is the problem: someone else has this information and Rule 17 is the only way for the defense to get it.

Noting the panel's topic is judicial oversight of these subpoenas, she observed that whether or not the judicial oversight is good or bad is not straightforward. In her district, the problem is inconsistency in whether the judges are going to give you a subpoena. There is an older standing order specific to the federal public defenders, and it is ambiguous as to whether we even need to file a motion requesting these subpoenas. And she has found that it's used quite differently in the Asheville and the Charlotte Divisions. She got the same response from a survey of the local CJA panel attorneys. The requirement of a written motion is unclear and inconsistent. Some judges require it; some judges have gone back and forth multiple times. Because of the inconsistency, she errs on the side of caution and always requests her subpoenas by a motion. But the standards applied in reviewing her motions vary from judge to judge. Some judges take a very broad approach, and like Mr. Wallin she had been very fortunate in the granting of her motions. Some judges take a very strict approach and deny motions, which has in fact produced a chilling effect. Some attorneys whose cases are before particular judges have said they won't bother asking for that subpoena because they know they will not be successful. This removes a very important tool for defense attorneys and places the defendants in those particular courts at a severe disadvantage.

She described the denials. Some simply stated Rule 17 is not for discovery but provided no explanation for why the justification for the subpoena was insufficient. Subpoenas have also been denied because they were seeking documents for sentencing purposes and not for trial. Her office has also had subpoenas denied seeking documents for use in pretrial negotiations. Everyone knows the percentage of cases that actually go to trial in federal court is very small, so plea negotiations are critical as well as sentencing. She emphasized that the majority of clients in federal court will end up in sentencing at some point. Ms. Coleman noted that her office was able to get a renewed motion granted in some of these cases seeking information for sentencing and pretrial negotiations after briefing on the defense role and why it's important for us to get this information. The denials stating simply subpoenas are not for discovery are particularly

problematic, leaving no avenue for recourse. Interlocutory appeal on these issues is not available, and counsel is stuck trying to navigate the case without this piece of information.

Ms. Coleman's other major concern regarding judicial oversight was the need to be able to make motions both ex parte and under seal. If that cannot be done, a particular subpoena request can be very problematic and damaging. For example, in a sexual assault the defense investigation uncovered from its own witness interviews that the alleged victim, instead of immediately reporting the assault or immediately going to a hospital and Medical Center, instead went to a casino and spent considerable time there. Ms. Coleman knew that casino had and retained excellent surveillance video. The videos would show that what happened was inconsistent with the victim's statement. The government had not turned over this information, which wasn't in its control. This evidence, which was critical to their theory of defense, was in the hands of a third party. Disclosing the request for this information would have tipped the hand of what their defense theory was and identified the witnesses they were talking to. So her office very much wanted to file this request for information from the casino ex parte and under seal. The trial ended in an acquittal, and the information obtained by subpoena was very important.

Ms. Coleman noted that there are also situations when she needs to review documentary evidence that contains both inculpatory and exculpatory information about her client. One of the best examples is cell phone records. In many drug cases the government now turns over cell phone records that can have not only the call and text data, but also cell site location information showing where a particular individual lives. She had a serious fentanyl death results case where the government provided cell site location information from the victim's cell phone, but not for the defendant's cell phone. She wanted to obtain her client's own cell phone records, which you cannot typically obtain with only a release from your client. Usually the cell phone companies require a subpoena. Ms. Coleman was concerned that the cell phone records would not show the exculpatory information of where she was at the time of this drug deal, but might also include a host of other inculpatory information regarding previous drug transactions that the government could use for a variety of purposes, including 404(b) at trial. So the defense needed to be able to get this information ex parte and under seal, so as not to tip off the government, which could have done their own investigation and gotten a search warrant. The defense needed to weigh how important the information was to their case, and whether they would need to inculpate their client on other crimes to defend the more serious charge. She offered this as an example for the need to have discretion. She acknowledged that there is case law allowing this, and she has been filing her motions ex parte and under seal. But the rule itself is ambiguous and doesn't provide for this explicitly. She advocated revising and improving it.

As an aside, Ms. Coleman noted that cell phone records can be voluminous, and there are charts and tables. An expert is needed to extrapolate the cell site information. It is not practical to have this information brought to court at the time of trial and reviewed at that time, and it is critical to obtain this information ahead of time.

Finally, Ms. Coleman argued that Rule 17 applies to sentencing. Sentencing is a critical stage of the case, and defense counsel has an obligation to investigate information for it. She

provided two examples of Rule 17 subpoenas that bore on sentencing. In one drug case, $8,000 in cash had been seized from her client at the time of arrest. The Presentence Report converted that to drug weight and increased the sentencing guideline based on the extrapolated drug weight. But her client told Ms. Coleman that he had been at the casino less than 30 minutes before his car was stopped and that he had won the money. A casino video showed him playing Black Jack and winning one $5000 and three $1000 chips. In that case she did not seek the subpoena ex parte. Although the government didn't care about the information, they were not going to seek it. It was up to the defense to establish that this wasn't the proceeds of drug trafficking, but instead money won legally at the casino. The judge granted the subpoena, and the video showed her client at the Black Jack table, turning in the chips, and the money being counted out to him. This resulted in a lower sentence, and there was no other way to obtain the video. Ms. Coleman noted that it took time to go through the casino's videos, and it would not have been feasible to use Rule 17(a) and have someone bring the video to the courthouse at the beginning of the trial.

Ms. Coleman turned next to the use of subpoenas seeking sentencing material going to mitigation based on the defendant's background and personal history, which she noted is relevant to the court's responsibility to make an individualized assessment of each defendant. But it can be very difficult for defense counsel to get information about their clients, who are often in custody and unable to ask the Department of Children's Services or social services for the records of abuse and neglect they suffered. She had used Rule 17 to seek that information and asked the court for a sealed and ex parte subpoena because the records are so private and confidential. Records of a juvenile's psychological assessments may be critical to sentencing arguments about their abuse as a child, but the same information could also be detrimental as far as future dangerousness. So it is important for counsel to make the assessment to determine what is going to be beneficial for their client.

Ms. Coleman closed by stating she agreed that the concerns regarding the misuse of the subpoenas are misplaced. Defense counsel come to this from an ethical place, and there are protections built into this practice against the abuse. The subpoenaed person or entity may move to quash a subpoena, especially if it is overly burdensome, there are constitutional protections against the government seeking to use the rule to gain information about the defendant, and there are reciprocal discovery rules. If the defense intends to use this information, the government will not be sandbagged. If the information would be in her case in chief, she would turn it over to the government. If she intends to use it in sentencing, it will be in a sentencing memorandum. So the government will get that information. Ms. Coleman also noted that Rule 17 already has specific protections built in regarding personal and confidential information. She was interested in the New York Bar's suggestion, which would expand that protection beyond victims and require some type of judicial approval whenever you are seeking information that is personal and confidential. She thought that was where the line should be drawn, because judicial oversight has often been cumbersome. The courts treat her with suspicion, and she often has to explain her role. She characterized the *Nixon* standard as completely ambiguous, and she advocated more clarity in Rule 17.

Mr. Gill said he had surveyed the criminal chiefs working group to get a feel for how Rule 17 is being applied across the country. In the opinion of the criminal chiefs, judicial oversight and approval are critical, and the case law bears that out. It is very important to have judicial oversight with respect to how these subpoenas are issued. It works very well in connection with the discovery rules. The key is that judges have oversight over what's going on in particular cases. They know what's at stake and what has already been produced in a case. Often when a case is going to trial there has also been briefing. So the judges know what's going on, and they are able to dig down and find out what makes sense for the case. He noted that Rule 17 already gives the judges the authority and flexibility to do the things that they think make sense. For example, do the records need to be produced before trial? Do the parties need to inspect the material beforehand to make sure that they are prepared and neither side is ambushed? With regard to ex parte practice, he said there were several examples in which it had been used effectively to make sure that the defense is able to get the records that they need. He also noted that Rule 17 has another very important function in connection with the Crime Victims' Rights Act (CVRA). If subpoenas are levied with respect to victims, seeking personal and confidential information, a judge needs to be involved to make sure the subpoena is appropriate and that victim has notice unless there are exceptional circumstances.

On the whole, Mr. Gill said, the bottom line is that the system works: judges are engaged and doing what they need to do based on what they know about the case. Prosecutors agree with what the defense lawyers had been saying. If the defense needs to obtain records, counsel needs to be able to go to a court and get them. And in his experience, the judges in the Northern District of Texas and Eastern District of Virginia, and the experience relayed by the criminal chiefs across the country, judges are granting those subpoenas. And the key is parties are able to come forward, based on what they know about the case, that they need certain records. In the case, for example, of the phone records example, he honestly could not think of either a federal judge or prosecutor who would oppose a defense subpoena. Similarly, he couldn't imagine any prosecutor would not want to get to the bottom of that, or would want to stand in front of a judge and say the defense should not be able to obtain those records. He thought it was perfectly fine if the defense wants to use the ex parte process, because the courts are able to get the details they need for the production.

Mr. Gill provided several real world examples. The 2020 Jason Penn case in the District of Colorado was a very complex, ten-defendant bid rigging and price rigging scheme, an excellent example of how judges can drill down. All ten defendants filed requests for subpoenas in specific areas. Judge Brimmer carefully sifted through in that case and parsed those out. He agreed they needed communications related to the bid rigging scheme and talking about the negotiations at issue in this case. But Judge Brimmer denied requests that were overly broad, seeking any and all documents. He was in the best position to make those determinations.

In another white collar case from April 2022, in the Middle District of Florida, in front of Judge Marsha Howard, the defendants moved for subpoenas, and they filed very detailed ex parte submissions. It was litigated before a magistrate judge who very carefully went through, denied some, made some tweaks, and ordered some subpoenas issued. Then the third parties

moved to quash, and the case went back to the magistrate judge. There was more tweaking involved, but ultimately the magistrate judge ordered production on these areas, not production in other areas because they were not specific enough. The parties appealed to Judge Howard, who carefully reviewed the magistrate judge and upheld the magistrate judge's order in a published opinion.

Mr. Gill called another case from the Northern District of Ohio a perfect example of how the process works without the government being involved. In this case, before Judge Sara Lioi, the charges were sex trafficking of children, drug trafficking, and witness tampering. The defense filed four ex parte motions for subpoenas, and the government had no knowledge of the motions. The process worked, and the only reason the government found out is that Judge Lioi entered a very detailed order afterwards in which she stated she carefully reviewed this and was not granting the subpoena. In a footnote, however, she stated she was not going to reveal the reasons for her decision because she didn't want to tip the government off to the defense strategy.

Mr. Gill noted another case from the Eastern District of Virginia, his district, from earlier in 2022, in which the defense filed numerous pretrial requests for subpoenas. Judge Brinkema carefully went through granting some and denying others. Because the case involved an assault on a plane, she granted subpoenas for information about the specific flight attendants and complaints about them. She also said the defense was entitled to information about the rules that apply to the flight attendants, and the responsibilities on this route. But she denied subpoenas seeking information about how the airline tries to solicit customer complaints in general. The case ended in an acquittal, and he thought the defense attorneys would say they had gotten what they needed for that case.

Summing up, Mr. Gill said it is very important to have judicial oversight, and with that oversight the system works well. The judge is kind of like a referee. The judge knows, based on the case, how to handle it, and the rule allows the defense the flexibility they need to reveal information to the court to make determinations about whether subpoenas should issue.

Noting the variety of interesting experiences in other districts, Ms. Halim said that her district—the Eastern District of Pennsylvania, in Philadelphia—absolutely adheres to the *Nixon* standard. There is no mechanism to obtain an enforceable subpoena for documents pretrial absent judicial authority. The defense does have to go to the court to get the approval to even issue a subpoena that would be enforceable and available pretrial. She echoed everything that prior speakers Mr. Cary, Mr. Felman, and Ms. Coleman had said, but she tried not to repeat points already made. Although she had a bit of white collar criminal defense experience, the bulk of her work as a solo practitioner was privately retained or court appointed pursuant to the Criminal Justice Act.

Ms. Halim began by noting workload concerns. A solo practitioner or an assistant federal defender, with a caseload of 35 to 40 federal criminal cases, barely has time to issue a subpoena and follow it up, much less review whatever she obtained from it. The extra step of applying to the court for a court order—and perhaps having to litigate whether or not you're even entitled to

a subpoena—takes critical time that could be put towards other issues in that particular defendant's cases or work on other defendants' cases. She also agreed with Ms. Coleman and other prior speakers that frequently the defense is looking for investigative materials, and most of the time it cannot satisfy the *Nixon* standard. She is unable to satisfy *Nixon* when she is doing follow-up investigations that the government didn't do, and she has to get the materials to know what they say.

And in her district (unlike Mr. Wallin's), Ms. Halim said there was not an across-the-board acceptance of ex parte filings, and it could be a risk to file something ex parte. She stressed how important it is to protect defense work product. She noted that when she might have a shot at satisfying the *Nixon* standard, it's because she had either done her own investigation that has provided useful information or it's part of her defense theory. To get the court order, she would have to spell that out, compromising the defense theory and work product.

As to real world examples, Ms. Halim observed that there is relatively little litigation regarding Rule 17(c) subpoenas in her district because the Third Circuit adheres so closely and strictly to the *Nixon* standard. This definitely produces a chilling effect, and it is discouraging for defendants to gear up for a fight that you're likely to lose. It is not always an option to file ex parte.

Ms. Halim described various forms of evidence the defense may wish to subpoena in non-white-collar cases. Phone records are a big source of information, and often the defense is still investigating when it seeks them and cannot be certain that they will yield evidence that it will admit it trial. But a subpoena might produce evidence the defense will want to introduce, and it's unlikely to get those records without a court order. Another major source of investigative information in her district arises in federal prosecutions that have been adopted from the City of Philadelphia. Often the state prosecution continues against other defendants, and the federal prosecutors obtain limited information very specific to her client. But there may be material that is relevant and potentially exculpatory in the hands of various state agencies, such as the local DA's office, local jails, other local law enforcement agencies, and the Department of Human Services.

In federal prosecutions, Ms. Halim concluded, the defense has to litigate and request permission from the court to investigate its own case. Under the best case scenario, it can be litigated ex parte. But that still takes valuable time, which is a critical factor. Often the defense lacks the time to do that, and is discouraged from filing a motion for a Rule 17(c) subpoena.

Ms. Sampson, an AUSA in the District of Arizona, was the last speaker on this panel. Her work has primarily been prosecuting violent crimes in Indian country, but she also sought information from her colleagues in the district. She had not been aware of how frequently Rule 17 was being used in the district. She thought that showed the system was working because so few of the ex parte applications had come to their attention, and noted her experience was limited to the Rule 17(c) that had been brought to the government's attention. In her district, like many others, the government has an open file policy, and the discovery framework is constantly expanding. From her perspective, Rule 17 subpoenas are just a small part of the discovery

process. She said prosecutors recognize the need to obtain records that are not in its control, and the Rule 17(c) subpoena process is absolutely an appropriate avenue for getting them. In her district and her own experience working violent crimes there had been examples where the prosecutor and defense have worked together very well with requests for records. Perhaps the government was able to assist in obtaining them, so there was no need for a subpoena.

She had also seen examples where the parties agree a subpoena is appropriate even for a confidential and private records—perhaps with a protective order to protect those records in violent crime cases. Often the subpoenas do request information and materials that implicate privacy, but that does not mean they are not discoverable. Often the government is producing those records, in their case in chief or in the discovery process. But when the defense requests records that implicate those concerns, Ms. Sampson said she had also seen their district judges grant them in part and deny them in part after giving the government and the victims a right to object or speak on the issue, which is a requirement of not only the rule but also the CVRA. She thought this is how the rule is intended to work, and that is how she had seen it play out in her district. The only ex parte motions that had been brought to the government's attention sought private and confidential information, which requires the victims to get notice. The government has to be involved and receive notice so that there is an opportunity to be heard. But that did not mean that those subpoenas were denied outright. Most examples Ms. Sampson had seen of subpoenas denied outright or quashed by the district court in Arizona involved defense requests for unrelated, confidential and privileged records where the defense is unable to articulate why they are relevant to the case.

Ms. Sampson said that the government operates on the assumption that defense counsel have good motives and intentions. It recognizes—as earlier speakers had emphasized—that the defense may want information that the government doesn't want and may not understand why the defense wants it. But she thought the rule in its current form, with judicial oversight and gatekeeping, provides safeguards without impeding the defense from getting the records that it needs. She had seen a subpoena narrowed or denied on the basis of the undue burden only once or twice in federal court. She noted that in Indian country, tribal agencies are often subpoenaed in their cases for massive amounts of records, and they either don't know where to get them or they don't have the resources to compile and duplicate those records as part of the discovery process. She had seen courts narrow and perhaps be a little more stringent in applying the standard to avoid putting an undue burden on those agencies. But she had never seen that as the sole basis for denying a defense subpoena for actually relevant and material records.

With regard to the *Nixon* standard, in Ms. Sampson's experience in their district judges have been very thoughtful in their approach to Rule 17(c) subpoenas. She had not seen them deny outright any subpoena strictly citing *Nixon* without additional concerns for privacy and confidentiality or concerns that the subpoena goes beyond some of those standards. Typically, the courts are operating their gatekeeping function by making sure that Rule 17(c) subpoenas aren't being used strictly for what we call fishing expeditions. She recognized there are questions about what that means, again operating under the presumption that most defense attorneys are looking for relevant and useful information and have no ill intent.

With regard to the records being turned over to the court, Ms. Sampson noted that the rule now gives the court discretion to order the records to be disclosed to the parties, and the documents can be returned to the court directly. She had one example from her district where a subpoena was denied because the defense attorney asked for private and confidential information to be turned directly over to him or her. It was not litigated any further, but had it been, she thought some of the subpoena would have been denied anyway because of the nature of the request. So in practice, while the rule is not always strictly followed in some of these regards, at least the court is exercising its gatekeeping function and determining whether the records can appropriately be sought under Rule 17(c). That is why she felt so strongly that judicial oversight is a key and crucial function of the rule—to make sure that subpoenas are being properly requested and utilized, and that the process is not being abused.

Ms. Sampson also provided an example showing the problems that can arise in cases involving pro se defendants. One of her colleagues had provided an example involving a pro se defendant in a human trafficking case who requested all kinds of records to vindicate a certain "mission" on his or her part, rather than actually seeking records that were relevant to the criminal case. The court quashed that subpoena. But without that judicial oversight, she noted, a pro se criminal defendant would have the same access to these subpoenas without the advice of counsel. But a pro se defendant cannot be expected to understand the parameters of the rule that govern when a subpoena is appropriate or not, when to provide notice to the other party, and when to provide notice to victims when they're seeking confidential and privileged information. She noted that was a particular concern for her, given her work on violent crimes in Indian country. She noted that, as Mr. Wallin had explained, the District of Arizona does allow defense counsel to apply ex parte applications for subpoenas. That process seems to be working, and the only time the government hears about it is when there is a request under the rule that requires the government or victims to be notified. The biggest value of that judicial oversight in her cases is protection of victims, protection of witnesses, and potentially protection of law enforcement.

Ms. Sampson noted that amending the rule would implicate the CVRA. Recognizing the dignity and privacy rights of victims, Rule 17(c)(3) was created to make sure that victims would be notified when somebody is requesting private and confidential information about them. The CVRA gives the government the right to assert those rights on behalf of victims. So the rule with that judicial oversight then ensures that the CVRA is also being followed. Many types of records are implicated beyond just health and mental health records. There are all kinds of other private and confidential records, including the social service records that are used regularly in the types of cases she handles. And because of the wide variety of confidential and private records, she thought it was not practical to carve out the requirement of judicial oversight. In her experience working with the tribes, court oversight ensures that the third party recipients of subpoenas have an ability to vindicate their own rights. Recipients are not always savvy corporations that have counsel that can file motions to quash. They may not know how to file a motion to quash and may not know that they do not have to comply under sanctions because the subpoena has a stamp of the United States District Court. So without judicial oversight, the court or opposing counsel would never know that an overreaching subpoena has been filed on a third party because that

third party might not have the wherewithal or the ability, knowledge, or resources to make a motion to quash. And that deprives the court of the ability to supervise the subpoena process and ensure that there's a fair discovery and trial process, which is part of the court's responsibility.

In summary, based on her own experience and the poll she took of her colleagues at the U.S. Attorney's Office, Rule 17 seems to be working in the District of Arizona. The judges seemed to be providing proper and effective oversight over the rule, and she had not personally observed a detriment to either party, though she recognized that colleagues on the defense side might disagree.

Judge Nguyen invited Subcommittee members to question the panel, and Ms. Morales directed a question to Ms. Coleman and Ms. Halim. She noted that Ms. Coleman had described the problem of getting insufficient responses from their judges, whereas Ms. Halim focused on the fact that it's a very time consuming process. She asked each to say more about what they thought was the right role for judicial oversight in this context. What would you want it to look like? Would you want less of it, or would you want it to be more expansive and perhaps have clearer standards or something like that?

Ms. Coleman said she definitely wanted less judicial oversight and clearer standards, characterizing the current situation as very unfair. In some districts judicial oversight is working quite well. But we are a large country with many districts, and she thought that one could find as many examples where Rule 17 is not working as you could where it is. The lack of clarity in the standard is not fair to defendants, who should not be adversely affected by where their charges are brought. She liked the New York Bar's recommendations. She understood and reluctantly agreed that it is important (and already in the rule) that we need to protect personal and confidential information, and that could go through the court. It had been her long standing practice to do that through something like a *Pennsylvania v. Ritchie* motion where you're asking the court to review the confidential information of the victim. But in a mine-run case, she thought the procedure was too burdensome, and the standards are applied inconsistently. It is time consuming to file motions for reconsideration with 15-page explanations of your role as a defense attorney, trying to articulate the application better, especially when you don't know the particular rationale for denying your subpoena. She liked the suggestion that in the mine-run case judicial oversight is not necessary. She liked very much the New York Bar's proposal for Rule 17(i) allowing the court itself to require the parties in a specific case to get court approval for subpoenas. Because there was no requirement for court approval in the mine-run case, the proposed rule would no longer put defense attorneys at a disadvantage because they don't have the same investigative tools as the government. But it would allow specific requirements in cases where there is a potential issue, and force the parties to address why judicial oversight is needed in a particular case.

Ms. Halim said that at a minimum the rule needs to make clear that an ex parte application is not only appropriate, but also necessary to protect defense theory and defense work product. She endorsed Mr. Felman's suggestion that you get to issue your subpoena for documents without the requirement of meeting a standard, and the standard comes in if the

recipient of the subpoena moves to quash, to restrict, or to narrow the subpoena. It should be clear the standard allows the use of subpoenas for seeking discovery and investigative materials, not just evidentiary material as the *Nixon* standard requires.

A member, who noted that she would prefer to practice in Arizona than in her own district, asked the Assistant United States Attorneys who did not experience such a liberal granting of 17(c) subpoenas what their reaction would be to ex parte or under seal as a default. Did they experience litigation over 17(c) subpoenas filed ex parte or under seal?

Mr. Gill responded that in the Eastern District of Virginia and Northern District of Texas, where he practiced he saw it go both ways. He knew several attorneys follow Mr. Cary's approach of transparency where the parties are discussing it, which he thought worked very well. That was the way he handled it. He believed that giving the defense attorney the choice is the way to go. If they want to go ex parte, he was completely in favor of that. He understood that if you are trying to get records, you need to lay it out for the court so the judge can make a good decision. You should not be inhibited and worried the government will see your strategy. That is an excellent idea. He thought it was happening in practice, but it could be important to clarify the rule to make sure some people aren't missing the strategic point. In response to a member's question, Mr. Gill said he thought there should always be court oversight.

A member asked Ms. Sampson, who had mentioned a concern about pro se defendants, whether she thought that the rule should distinguish between pro se and those represented by counsel, rather than the way Rule 17(b) now distinguishes between defendants unable to pay and other defendants. The member noted that many indigent defendants are represented by public defenders who are following the same ethical rules Ms. Coleman spoke about. Did she agree that that would be the right distinction?

Ms. Sampson was not sure she had thought enough about that issue to comment. When she used the example of pro se defendants, it was an example of the potential to run afoul of those rules because of somebody's lack of legal knowledge without judicial oversight. She was really focusing on judicial oversight. Also, pro se defendants are just an example of a small sliver of the population where the process could be abused. It's also entirely possible that well-intentioned defense attorneys ask for records and they don't understand what private and confidential information could be included within those records. That sometimes happens with some of the tribal agency records. Some are more obviously private or confidential in nature, and that is where judicial oversight is so crucial because it does not rely on bad intentions.

Judge Nguyen wanted to clarify whether there had been no instance of a judge who disallowed a defense attorney from utilizing the ex parte and the sealed processes. Mr. Gill said he was not comfortable answering that question. Things could happen with judges in particular cases, and there could be a judge out there who would not allow it. In his communication with the criminal chiefs working group, nothing like that that came up. When courts receive ex parte applications, a lot of times they split them up. The judge looked at issues that he or she believed should be considered independently without the government, and the ones that could be found in

the open court, with the government weighing in, they did that. That was done in the Florida case he described. The judge divided it up and did it both ways.

Ms. Coleman said that she thought the first time she filed a subpoena with a new magistrate, it was denied. She had to refile and explain it better, essentially briefing it. That was part of the problem she and other witnesses had been describing, the time consuming process. And at that point she thought the court had permitted her to proceed ex parte. But she could definitely see the situation where the ex parte and under seal process would not be allowed and was judge dependent.

A member asked for clarification: did the judge disallow it without an analysis? Or did the court announce they denied it, and then you made a motion to reconsider, explaining and trying to shed more light for the judge? Ms. Coleman thought that in that particular situation he denied it under seal and without prejudice, giving her the ability to refile.

Ms. Halim said she had contemplated filing a motion for a 17(c) subpoena and then decided not to because it was too much of a risk that it wouldn't be kept under seal or ex parte. So she has made the decision to forego it completely because the risk exists.

Judge Dever noted that *Rand* is the leading Fourth Circuit case, and it applies *Nixon* and *Bowman Dairy*. He asked Ms. Coleman whether, in all the examples that she gave, she got the information she wanted. She responded that sometimes she had to try more than once, but at the end of the day she got the information. But she had colleagues who were not successful. Judge Dever asked if she thought the problem had been with the specificity standard. She responded it was hard to tell because our denials had often been just a simple statement that Rule 17 is not for discovery. She thought that had really chilled the use of Rule 17, and that she had been invited to participate because she has been more aggressive about using it. But she thought in practice it had really chilled the use because people anticipate being denied.

Judge Dever asked all the panelists to respond to the issue Ms. Sampson raised about pro se defendants with no judicial oversight. Google has an army of lawyers that respond to subpoenas all day, every day. But many people who receive a court order would think they have to bring everything requested to whoever sent it to them.

Mr. Wallin said the subpoena form includes instructions stating the recipient can move to quash if it's too burdensome, and so forth. Ms. Coleman said that the third page of the subpoena tells you how to do that. And in her experience, most agencies that hold personal confidential information like tribal services and DSS have attorneys, and they have had motions to quash from those types of agencies. But it's a different situation when you're dealing more with the mom and pop business.

Judge Dever commented that in his experience it was very common to get ex parte motions under seal from each side. For example, as in the *Pennsylvania v. Ritchie* case the government might say we don't think this is *Giglio* material, but you might disagree with us. Here's our argument. And the judge deals with it. He asked to hear from the judges about their experience with getting motions in criminal cases with respect to subpoenas or discovery issues,

ex parte under seal. He was interested to hear what the judges' experiences are across the districts in thinking about these issues.

A judge from the Northern District of Illinois said the practice there was for the prosecutors and defense counsel to submit an agreed motion, which they call a motion for early return of trial subpoenas. He had never really looked into it, because the motions are always agreed and are always granted. The agreement is that both sides can serve subpoenas for the production of documents, and then they share whatever they get. He had never had an issue. But now looking at Rule 17, it seemed like either a bastardized version of 17(a) or some sort of version of 17(c). But the criminal bar in Chicago is just very cooperative and it's never an issue.

A member commented that the rule did not provide for ex parte applications for documents. Judge Dever responded that was why the discussion was so helpful. The Committee has the text that says what it says, and it is trying to understand what is actually happening in the real world in some subset of the 94 federal judicial districts. So that's a very helpful thing to know.

Judge Bates commented that he did see ex parte motions, and they are routinely granted, including for documents. They are part of the defense investigation and development of their theory of the case. He could not recall a case in which he had required that it not be ex parte. But if he were to deny it, he did not think he would have to disclose that to the government.

Another judge member commented that this was an interesting discussion because it raises broader issues than the text of the rule. The rule is really not saying this is discovery or not discovery. But these are much more philosophical questions than what the text of the rule gives. It is helpful in thinking about what Rule 17 does, and if it doesn't do enough, is something else needed.

Another member added a historical comment connecting the Chicago practice to an earlier practice in the District of Oregon. She said that in the past the Administrative Office had a single form for subpoenas for both trial witnesses and documents. You could use one form for both, so in many districts the practice was to use that trial subpoena and just subpoena documents to an earlier date. In Oregon for many years they essentially used Rule 17(a) and subpoenaed people to come to court with the documents, but gave them the option of not coming in person but just providing the documents. They did that ex parte without the government's involvement. They asked the court to set a court date for these subpoenas to be returned. On that date the person could choose to come and contest the subpoena if they wished to do so with a motion to quash. But if they didn't want to quash, they would just turn over the documents. Then the Administrative Office issued two different forms, one for subpoenaing a witness for trial, and another for documents. She did not remember when that change occurred, but the practice in her district changed, and they now file 17(c) subpoenas for documents.

Although they do not use the trial form anymore in the District of Oregon, the member said they still get the subpoena pretty easily. It's the same process: asking the judge ex parte to subpoena this video or these records. They had been able to obtain telephone records as long as

they had a basis for explaining why they were relevant to the defense case. They only got a motion to quash when seeking confidential information or when they tried to subpoena the police video system at the police station. There was a hearing, but the police, not the government, was their opponent.

The member concluded that she thought there are districts around the country that are exactly like what was being described in Chicago, where the parties use 17(a) trial subpoenas as a way to get documents, and the practice was based on the old forms. Based on what she had heard from different districts, that is not an unusual practice. But most districts didn't really want to talk about it because it is not really clear whether it is permissible. It works really well, and it is a way to get things really quickly without a problem. But it is not clear that it's allowed under the rules anymore.

Judge Dever had a follow-up question for all the defense lawyers as the Committee thought about how Rule 17 is written and then how it is really applied. He noted that he never had a request that included a declaration from the defendant. Rather, it was a representation by counsel, an officer of the court, stating counsel needs this information. The member noted that had been sufficient for him. But he wondered if any of the other defense lawyers had encountered any hindrance or hesitancy to make this representation, if for example judges in their district were saying that what a lawyer says is not evidence, and you need a declaration from your investigator. Or was that not an issue? He invited comments from the panelists as well as the defense members of the Subcommittee.

A member responded that in her district the CJA panel members do not often make a request for production of documents prior to trial. At least one judge's practice in the district is similar to a probable cause type motion. In a case before that judge she had to say she believed that there was evidence that would be relevant and important to her case, explaining her defense theories and how she would use the documents. She had had a form rejected and been told she needed to use the form being used by the Public Defender's Office. In the case she referenced, the court ordered the subpoena, but provided that the documents must be immediately produced to the government. This was ex parte. She was subpoenaing the Department of Motor Vehicles, and she felt the weight of what she was requesting was being evaluated. Like Ms. Coleman, the member's client told her that he had a certain defense, and she had a good faith basis to ask for the subpoenaed material. She did not believe it would be sufficient for an acquittal, but it was actually a document that she had used in the Fourth Circuit on appeal regarding a search warrant issue. So while she did not think it would ultimately prevail, she did think it was a good faith argument. She characterized it as an argument that could change the direction of her client's case, but she also felt that the court was prejudging the value of that evidence before issuing the subpoena. Although ultimately she got the evidence, which was important, there was a burden of having to go through those hoops. She had been in the United States Attorney's Office for many years, and there she could issue a subpoena and get whatever she wanted from whomever she wanted to establish her case. Now, coming to the other side she essentially has to do a search warrant affidavit to get a piece of evidence, even from a state agency such as the DMV. That's very onerous and burdensome on the front end.

Mr. Wallin commented that there might be a sequencing issue. As a CJA attorney, he had had cases in which he knew fairly quickly that he would run over the statutory fee limit and would have to file a budget request. By the time he sought a subpoena, the judge had already seen and approved the request in which he had explained why he would need additional funds, including things he would need to get, review, and have an expert review. Because the judge had already seen and approved his request, he thought it kind of primed the pump.

Mr. Cary said he had never submitted a declaration. But he could not imagine any defense lawyer would have his or her client submit a declaration. Judge Dever agreed there were some self-evident reasons why no defense lawyer would ever want to do that, but said he had concerns if some judges somewhere were actually requiring that. He noted nothing in the rule that suggests that.

Mr. Gill brought up an experience years ago in Texas. He stated his opinion that it is very important for the defense to be able to make these requests ex parte without fear of revealing their strategy. But it is equally important to the government when the defense comes across evidence that they are going to use in the trial that they reveal it to the government. It is in the interest of justice, and ferreting issues out also leads to right decisions when prosecutors know things. Holding things back just creates problems. The case he noted involved the second in charge of Dallas Police Department, who was involved in an arrest. Mr. Gill wondered why the case was going to trial. It was clean and this was an excellent witness. And on cross examination, the defense attorney cross examined the witness about something he had gotten from internal affairs about his involvement and supposedly mishandling evidence. He was shocked. But his witness explained that he had challenged the accusation, and they found that somebody had improperly levied that against him from within the department. It was unfortunate that it came out in front of the jury. It was a very fast verdict for the government. It didn't work, and if it had been revealed beforehand he would have worked it through with the defense attorney. He wanted to get to the bottom of it. He thought that if you are going to use something as evidence, it should be revealed. So it's back to them by both sides. But if it's something that hurts the defense, the defense should not have to reveal it to the government because that would chill their ability to look for evidence. In response to a query about the Texas case, Mr. Gill said this was used for impeachment. He thought that the judge in that case was determined not to let that happen again. It should have come out earlier, and it was crazy when it happened in front of the jury.

Judge Dever announced there would be a 45 minute lunch break.

Following lunch, Judge Nguyen introduced the next set of speakers.

Mr. Carter's comments focused on the contrast between state and federal subpoena practice, the difficulty of meeting the *Nixon* standard for admissibility and specificity, the inability to predict whether the judge would share the request or documents produced with the government, the harm that could cause, and the varied interpretations of the rule by different judges. He said that more experienced judges recognize some of the hurdles that Rule 17 presents to the defense, and they don't follow the rule as rigorously as some of the younger judges. Ex parte requests are rarely denied, and many of the judges will allow the defenders to

subpoena documents to their office without giving the government a chance to review them. Some of the newer judges, however, follow the rule more closely, and that creates what some of the panelists had called a chilling effect that really affects how they investigate their cases.

Mr. Carter stated that when he moved from state practice to the federal defender's office, he had been surprised how difficult it was to get a subpoena. In the Michigan state courts, he said, when investigating a case the defense can subpoena whatever it wishes. For example, if there has been a shooting outside a liquor store where there is a security camera, the defense can issue a subpoena to the liquor store. If the store's owners believe it is overly burdensome, they can file a motion to quash. Similarly, the defense can subpoena documents needed in a child sex or carjacking case.

Mr. Carter explained that Rule 17's relatively strict requirements can hinder investigation. When he has to meet the *Nixon* standard, he said, he prays that the judge will allow him to file ex parte because he will have to disclose some of his trial strategy. The investigation may be seeking information that is not admissible but may lead to something else. But he cannot pass the *Nixon* standard unless he knows "exactly what this camera is going to show or exactly what the phone records will say."

It was a struggle, Mr. Carter said, to investigate a case without having to file an ex parte motion and running the risk of a judge not granting the motion ex parte or unsealing his document and putting it on the public docket. This risk, he said, "discourages creative investigation" and seeking investigative leads that may not fall into Rule 16 but may help build the defense.

Mr. Carter gave an example of judicial oversight that could hurt defendants. His office took one of the *McGirt* cases in Oklahoma. The client had significant mental health issues that could have led to a verdict of not guilty by reason of insanity. The defense needed the client's records from the Child Protective Service Department, which requires a court order and a release. To get those records, they filed a Rule 17(c) motion. The motion was granted, but the court issued an order requiring the defense to turn over to the U.S. Attorney's Office the documents they had not yet reviewed, Although the defense lawyers had no idea what was in that sensitive information, the judge "wouldn't budge." So they called the U.S. Attorney, explained why they asked for the documents ex parte, that they had not yet reviewed them, could not turn them over now, but would provide them if they were going to be used for trial. His office literally begged the U.S. Attorney's Office not to press the matter and require them to provide the documents, and fortunately the prosecutors agreed.

Mr. Carter said it was "somewhat terrifying … that a rule exists that can result in us actually not following or adhering to our ethical duties as defense attorneys. It should not depend on how liberal the judge is in terms of his or her reading of the statute." Although Rule 17 seems pretty straightforward on its face, the way it is interpreted from circuit courts and the district courts is "all over the place." This creates obstacles that prevent defense attorneys from really digging in and investigating cases.

The next speaker, Ms. Elm, argued that Rule 17 adds little benefit while imposing high costs. She explained why there is so little benefit. She said that the rule is made for a very small number of attorneys who are truly abusing subpoenas. She estimated that 15% of lawyers get in trouble at some time, and of those two thirds can get some treatment or help and need not be disbarred. But 5% are bad actors who abuse the system. She estimated that fewer than 1% are defense attorneys who are likely to abuse subpoenas duces tecum. But this rule, she said, was made to control that small group. Other attorneys subpoena only things that are relevant. They do not have time to seek other material. As a CJA lawyer, she is subject to funding caps and has to be watchful to be sure she will be compensated for her work. Moreover, the rule is not likely to stop abuse. Bad actors can just issue trial subpoenas and fake them. She had once had an attorney in her office whom she discovered "was truly abusing this system" and not following Rule 17. After learning the attorney had issued 51 subpoenas duces tecum in a single case, Ms. Elm fired her, went to the chief judge, and got her removed from the CJA panel.

Ms. Elm concluded that if people are not following the current rule they could still escape detection. But there are ways to identify abuses. If an attorney is serving 51 subpoenas for one case, the recipients or the U.S. Attorney could complain. The judge might also notice if the returns for 51 subpoenas are coming in for an immigration case and ask what is going on. Or the judge might notice the subpoenas include no court date.

As to the cost of the rule, Ms. Elm emphasized that "the chilling effect is real." She had been told that other lawyers do not seek Rule 17 subpoenas because it is too difficult and costly. In her experience, an attorney's first Rule 17(c) motion takes 20 hours, which is close to $3,000 of taxpayer money. Subsequent ones now take her three hours, which is $500.00 of taxpayer money. Additionally, there will be a hearing, which adds to the cost. All of this cost is imposed on many people who are not bad actors. She explained that even putting in three hours plus court time and then potentially fighting with the recipient means she will hit her funding cap really early as a CJA lawyer, requiring her to apply to exceed the cap. It requires her to explain things more and raises a worry about voucher cutting. If she did a lot of investigative work, but the subpoenas don't pan out, she worries that the judge may not want to approve funds to compensate her for her work.

Ms. Elm noted another cost is exposing defense work product to the government and to the judge who will be sentencing the client. Getting the judge's approval before issuing the subpoena means the judge learns things about the case that she may later regret revealing, and that too hinders robust defense investigations. That concern was another reason, she said, that she used subpoenas more in state than federal court. She concluded that there are very real worries when she has to obtain her client's records, doesn't admit them at trial, and the judge who will be sentencing the defendant is aware of the situation.

Ms. Elm advocated amending the rule to specify what is required to get a subpoena duces tecum. She favored changing the "tough" *Nixon* standard, and allowing subpoenas for material that "might" or "has some potential of producing relevant admissible evidence." Alternatively, the rule could adopt the phrase in Civil Rule 26: "could lead to discovery of other admissible evidence." She recommended mentioning fishing expeditions in the note, but interpreting them

narrowly. She commented that almost any time she seeks a subpoena duces tecum, it might be called a fishing expedition because she is unable to say exactly what is in a document. But if she already knew what was in the document, she would not need to obtain it.

The second change Ms. Elm recommended was spelling out sanctions, as Rule 16(d) now does. She thought that could be powerful for attorneys. Although it would probably not affect pro se defendants, it would make her think about those standards when issuing a subpoena.

Like other defense practitioners, Ms. Elm pointed out that her experience with subpoenas in federal court was "very uneven." She had practiced in Arizona and the Middle District of Florida. In both districts judges had turned down some subpoenas while granting others that she thought were much closer to fishing.

Regarding judicial oversight, Ms. Elm drew attention to limitations on the defense versus the government's ability to issue subpoenas without judicial oversight. She suggested that the Committee ask the DOJ how many grand jury subpoenas and administrative subpoenas had been issued during a specified time period. She said that in a report to Congress on administrative subpoenas about twenty years ago, the DOJ had reported there were 2,000-3,000 administrative subpoenas on health fraud and about 1,300 on child exploitation. That was just two areas, and nearly 100 agencies have that power. She concluded that "if you look at what they need for investigation, and then how many Rule 17(c) motions you've seen, you will see a vast disparity, and the disparity has to do with everything a person has to go through to try to get it for the defense."

Ms. Leonida said she had been a public defender in California state court, a federal public defender in the Northern District of California, and was now in private practice at BraunHagey & Borden. She began by noting that the rules in California state court are very similar to the proposed amendment the Committee is considering, and she had considerable experience with both. She focused her remarks on three concerns raised by judicial oversight under current Rule 17, particularly in cases with more than one defendant. She also noted that given the recipient's ability to file a motion to quash, her experience with more generous subpoena power in state court did not support claims that reforming Rule 17 would result in "an unfettered fishing expedition."

In cases in which there are two defendants whose interests are obviously at odds with each other, Ms. Leonida expressed concern about the risk that one defendant's ex parte application under Rule 17(c) could provide the judge with prejudicial information about the other defendant, whose counsel would be unaware of it. She related a case where her client's defense was based on a codefendant's coercion and intimidation. She had obtained multiple ex parte subpoenas for information as permitted in the Northern District of California. That necessarily brought in front of the judge information about what a bad actor the codefendant was. In that case, she got reliable information that benefited her client. But if she had been the codefendant's lawyer she would have been justifiably angry that the judge was receiving this ex parte information that would cast her client in a very negative light.

A different concern, Ms. Leonida said, was the possibility that disclosure of a defendant's ex parte application to a codefendant could place the defendant in danger. She described a murder case she had when she was with the Federal Defender in the Northern District of California. She submitted more than ten affidavits ex parte in support of Rule 17 subpoenas, and her client cooperated with the government and testified against his codefendant. The codefendant was convicted of murder and sentenced to effectively spend the rest of his life in prison. His new lawyer on appeal sought the affidavits Ms. Leonida had submitted ex parte, and the records produced that had exculpated her client and helped him to be in a position to testify against the codefendant. The Ninth Circuit denied the codefendant access to the affidavits, holding that he had not established that there was anything exculpatory in them. But that situation had raised a number of concerns for her and her whole office. One concern was the chilling effect that people have been talking about—not just the potential that the court might expose your ex parte application to the prosecution or the public, but also the possibility that the court might expose it to a codefendant. That could potentially be very dangerous to a client's safety.

Ms. Leonida's third concern was the possibility that a codefendant's application for a subpoena or the documents produced by a subpoena might contain information that exculpated someone else. There might be exculpatory information about a codefendant in an affidavit that was in the court's possession. As a defense attorney, she has no *Brady* obligation to help a codefendant. But if the court in the course of reviewing ex parte applications under Rule 17 sees something that is exculpatory for a codefendant, there will be a real tension between preserving the strategy and the work product of the defendant applying for the subpoena, but withholding documents that could be exculpatory to another defendant who has no idea that that they exist.

Ms. Leonida concluded by stating that in her years of practicing in California she had not seen unfettered fishing expeditions, and that was the experience of attorneys who practiced in other states as well. If defense attorneys are not forced to apply to the court for subpoenas, the recipients can still move to quash. Notice to victims or the complaining witnesses can prevent abuses on that front, and she thought the proposed amendments were "very workable."

The next speaker, Ms. Miller, said she based her remarks on her experience as a Deputy Assistant Attorney General in the Criminal Division, where she supervised the Fraud and Appellate Sections, her supervisory and line experience in the Fraud Section, her prior experience as an AUSA in Miami, and her discussions with economic crimes chiefs and major crimes chiefs across the country. She focused on the limited purpose of Rule 17—expediting proceedings, not granting discovery—and gave multiple examples to illustrate her position that the risk of delay, harassment, and abuse in the use of Rule 17(c) subpoenas require judicial oversight.

The purpose of the rule was not to provide a means of discovery for criminal cases, Ms. Miller stated, but to expedite the trial by providing a time and place before trial for inspection of subpoenaed materials. In practice, Rule 17 is used not only for trial preparation but to prepare for any hearing—a sentencing, a restitution hearing, even an evidentiary hearing. Because the rule is

for evidentiary and relevant materials, it has to be tethered to some hearing before the court. She emphasized that "Rule 17 is not intended as a general discovery device."

Ms. Miller defended this limited purpose, reflected in the current language of Rule 17, the limits on the rule articulated in *Nixon*, *Bowman Dairy*, and other relevant precedent, as appropriately reflecting the differences in criminal and civil discovery as well as the fact that prosecutors have heavy ethical burdens (not just *Brady*, *Giglio*, and the *Jencks* Act), and must also abide by grand jury secrecy and prove their cases beyond a reasonable doubt. Prosecutors, she said, protect public safety, and they have to protect the integrity of ongoing covert investigations so that targets don't flee or obstruct justice. She said it was important to remember those considerations when evaluating the purpose of Rule 17 as opposed to Rule 16.

Ms. Miller argued that it was not intended that Rule 16 would provide a limited right of discovery and then that Rule 17 would provide broader discovery. Instead, she said, "circuit after circuit has held that *Nixon* does apply to defense subpoenas for third parties because the rule itself doesn't distinguish between the parties, other than 17(b), which is directed at payment of costs for indigent defendants who want to seek process."

She warned that without judicial oversight "a high volume of subpoenas" might be "issued without any standards," with numerous adverse consequences for criminal cases, including delay. Delay could harm not only the government's case, as witness memories become stale, but also the interest of the defendant and the public in a speedy trial. Other harms include the "potential for harassment of corporate and individual victims and witnesses," and the use of discovery by defendants and conspirators "to advance agendas other than defending the criminal case." Ms. Miller related several examples that she said demonstrate these potential dangers, illustrate why judicial oversight is important, and why the standard matters. Some of the examples illustrated potential harms to victims. Ms. Miller also noted that the proposal to change Rule 17 would require litigation and development in practice to define "private and confidential." A system where the onus is on the recipient of the subpoena to litigate will sometimes be hard for victims. For example, a dead victim's family may not have money to litigate, and may not know that they can litigate to quash a subpoena for very sensitive records. So a regime where the onus is on the recipient of the subpoena has to be policed carefully in cases where private, confidential information is being sought.

In other cases, Ms. Miller said, the defense sought information that was not relevant or evidentiary, or information that was protected by privilege or work product. In still other examples, the subpoena was overly burdensome in some respect, threatened an active investigation, or involved an attempt to use criminal subpoenas for discovery in civil cases. She also suggested that the percentage of cases where there are instances of improper materials being sought through Rule 17 subpoenas exceeds 1%. She summarized ten case examples.

(1) *United States v. Ford*. A defendant charged with being a felon in possession of a firearm subpoenaed the Los Angeles Police Department for 40 categories of documents and demanded production of the entire file for an ongoing murder investigation. The defendant seeking the information had previously been a suspect in the murder. The LAPD moved to quash

on grounds that the subpoena violated state law, would be burdensome, and would inhibit the ability of the state to effectively conclude the homicide investigation. Because the defendant in the felon in possession case was affiliated with the suspects in the murder case, granting the subpoena would have disrupted an ongoing homicide investigation. Those materials may very well have been useful to the defense, she said. But the defense was unable to establish that because it was a § 922 possession case, and the firearm in the murder wasn't the firearm in the § 922 case. Ms. Miller said this demonstrated that even when something could be relevant for investigatory purposes for the defense, there are other interests, such as public safety, to consider.

(2) *United States v. Stone*. A retired FBI agent was charged with trying to get money and other benefits from a woman after falsely stating that she was on probation. The defense sent a Rule 17 subpoena directly to the victim without permission and sought personal information such as cell phone records. The victim told the prosecutor about this and then told defense counsel that he intended to file a motion to quash. It was the threat of judicial intervention that caused the defendant to withdraw the subpoena. And if that threat had not been present, the victim would have been affected. That subpoena was also improper because no hearing date in the case had yet been set.

(3) *United States v. Gallo*. This case involved a securities and commodities fraud scheme. A parallel civil case against the defendant, involving a receiver who had been tasked by the SEC with preventing dissipation of assets and recovering fraud proceeds, was stayed pending the criminal case. In the criminal case, the defendant sought to subpoena the receiver and notes of the receiver's interviews with the cooperating witnesses in the criminal case. The court held that information was protected as attorney work product of the receiver and the receiver's team. Ms. Miller characterized this as an attempt by the defendant to use the criminal process to get information relevant to defending the civil case which had been stayed.

(4) *United States v. Javat*. The defendant's scheme was falsely representing to ten victim companies that he intended to purchase certain goods for export. He did this because these companies offered massively discounted rates to buyers who were going to export the goods to, for example, Afghanistan. He could generate a steep profit if he sold the goods domestically. Defense counsel sent Rule 17 subpoenas to the victim companies before trial and before the sentencing and restitution hearings. All were quashed, in part because they were directed at things other than what was at issue in these proceedings, i.e., the defendant's intent. The subpoena sought information from the victim companies about their pricing strategy, all of their buyers, and any prior criminal investigations. The court found the subpoenas were overbroad and improper. Even if the victim companies were not diligent in looking at what was going on in this case, as a matter of law in the Eleventh Circuit the contributory negligence of a defendant could not be a proper defense. So the information sought couldn't have possibly yielded evidence that was "evidentiary."

(5) Defense counsel used Rule 17 to subpoena not only a cooperating witness, but their counsel for "information that would be Rule 16 or Jencks, if it were in the possession of the

government." Counsel argued that it put him in an ethical bind to supply impeachment information about his own client to his adversary, and moreover, the information being sought was privileged (the defense counsel's own notes). After an in camera review, the subpoena was quashed.

(6) In *United States v. Sing* (E.D.N.Y.), another subpoena seeking information from counsel for a cooperating witness was quashed. There the defense counsel even acknowledged in part they were seeking privileged information and withdrew the subpoena.

(7) *United States v. Holmes* (N.D. Cal.) was a recent instance of a Rule 17 subpoena's being used in connection with a hearing on a motion for a new trial based upon what occurred after trial. One of the witnesses at the trial of Elizabeth Holmes was Dr. Rosendorff. After the trial he went to the defendant's home. The hearing was limited in scope to discussing what happened at that visit after the trial. Yet the defense sent a Rule 17 subpoena to Dr. Rosendorff seeking all his communications with the prosecution team, and all of his communications regarding the witness's trial testimony for the prior year, and correspondence with friends and family after the trial about a variety of things. The court quashed the subpoena because it was unrelated to the limited scope of the hearing, which was that one visit to the defendant's house, not an entire year of communications. And since this occurred after trial, impeachment of the witness would not be a proper basis for seeking a new trial.

(8) In *United States v. Coleman* (D. Mass), a kidnapping resulting in death case, the defense sought to subpoena the mental health records of the deceased victim. This was litigated under seal. Over the government's objection, the defense was allowed to obtain these records, and hundreds of pages of private information went directly to the defense. The prosecutors would have preferred that this information go first to the court. Ultimately at trial only a limited portion of those documents were admitted in heavily redacted form, and the prosecutors were able to notify the deceased defendant's family at the time of trial. This case showed other interests at stake: privacy interests in victims' mental health records.

(9) In an example from the Northern District of Illinois, a prosecution for spoofing and wire fraud, the defense subpoenaed the spoofing victims. There were subpoenas to proprietary trading firms and hedge funds seeking what they viewed as very sensitive information, such as their algorithmic trading formulas. Obviously these firms didn't want to provide that information, and they received subpoenas for voluminous records covering a decade. In one of the cases, the defense lawyers worked out a stipulation with the proprietary trading firms and hedge funds, so they were able to submit an affidavit in lieu of complying with the subpoena, which would have been overly burdensome.

(10) In another case, Ms. Miller said, the judge quashed a subpoena that was directed not to the victims, but to the Commodities Futures Trading Commission because it was "seeking deliberative process privileged materials."

To conclude, Ms. Miller quoted the opinion in *United States v. Layfield*, (C.D. Cal. March 2021) on the topic whether the returns from these subpoenas should be shared:

> [T]he defendant's main argument against sharing is simply mistaken. Defendant argues the government got to use the grand jury to acquire numerous documents. It only needs to provide those intended for use at trial or which constitute *Brady* or *Giglio*. Therefore, defendant now should be able to conduct his own investigation and produce those documents that are helpful and ignore those that are perhaps inculpatory.
>
> This entire line of reasoning is unpersuasive. The grand jury is a unique institution with its own powers and its own rules. Once an indictment is returned, the parties are on a more equal playing field. The government cannot now use the grand jury to conduct discovery or plug holes in the investigation.
>
> Furthermore, sharing the documents is a salutary check on the in camera process. Yes, this court either has or will, as the case may be, declined to rubber stamp any requested subpoenas. But inevitably the court either has been or will be sympathetic to requests from the defendant that appear meritorious. But if the defendant knows the documents will be shared, you'll be less likely to make requests that are essentially discovery requests camouflaged as requests for exculpatory trial exhibits.

She said that the judge in *Layfield* noted that early production and document sharing allowed for effective trial preparation. That's the key, she said, especially where voluminous or sensitive records are being sought. It serves the interest of judicial economy and the interest of all the parties to address some of these issues pretrial through sharing information not only under reciprocal discovery and Rule 16, but having protocols perhaps like the practice in the Northern District of Illinois, where the parties agree that there will be some pretrial sharing. This promotes the efficient administration of justice that serves everyone's interest.

Judge Nguyen invited questions from the members of the Rule 17 Subcommittee.

One member objected to the statement that the grand jury cannot be used once indictments are returned, noting that the government uses the grand jury after an indictment is returned if it is investigating other potential charges or bringing a superseding indictment. She asked Ms. Miller if she had any information about how often the government uses Rule 17(c) subpoenas to get information after an indictment has been returned. Also how often does the government use Rule 17(c) subpoenas?

Ms. Miller responded that in reading the *Layfield* opinion she did not mean to suggest that the government never uses the grand jury after indictment. What the judge might have meant is that there is a more equal footing after indictment because the proper purpose of using a grand jury subpoena after indictment is to investigate new conduct or new targets, and it would be an abuse of the grand jury to investigate the pending charges. Presumably there would be new indictments returned based on those grand jury subpoenas post trial or new charges. She noted that an unreported decision from the Northern District of California, *United States v. Pacific Gas and Electric Company*, involved a government request for Rule 17 subpoenas, and the court

modified the magistrate judge's order allowing in part some of the subpoenas, because some of the information sought was for impeachment, which would not be allowed. She said she did not have statistics on how often the government uses Rule 17 subpoenas after indictment, but she acknowledged that it does sometimes, particularly in reactive cases, or cases where the arrest occurs earlier than anticipated. For example, that might occur when prosecutors learn a defendant is about to flee the country and is at the airport. An arrest can be made on information that is not in admissible form. So they might may need the records custodian to certify that these are business records and use a Rule 17 subpoena to get the admissible form of the same evidence for trial.

A member asked Ms. Leonida if she had come across published opinions that addressed something similar to the codefendant issues she described. Ms. Leonida replied she had not. The first situation was just something that bothered her personally because the codefendant's attorney had no idea that that she was filing these applications. As for the case in the Ninth Circuit, she hadn't found much authority. She said one of the things that concerned her was that much of this happens behind the scenes and the codefendant's attorney never knows there is an issue.

Ms. Morales remarked that the defense comments had been pretty unanimous about reducing judicial oversight, and the prosecutors have raised some issues about the different safeguards that need to be in place to ensure that these subpoenas don't ask for records that violate privacy and other concerns. She asked the defense attorney participants what safeguards they proposed or envisioned as possible. Or did they think that there should be nothing and the Committee should just trust the 99%? How did they see it playing out, considering that not every recipient of a subpoena has the resources, knowledge, time, or inclination to move to quash a subpoena that may be improper?

Mr. Wallin responded that in a situation where the victim had been notified under Rule 17, the first thing that victims want to do is call the U.S. Attorney. As a practical matter, that is the first thing that they do. To some extent, that ameliorates problems. He said, however, that he was not per se opposed to judicial oversight. He added that he had not heard much support for maintaining the distinction between discovery versus production, and how judges should have to remember that this is not a discovery tool. He thought the provisions in question should be moved to Rule 16, so it is clear to the judges that third-party subpoenas are a legitimate discovery tool and they should analyze the factors through that lens. He thought Ms. Miller's examples would have ended up the same if there were a Rule 16 discovery type of subpoena, because they all sounded pretty egregious.

Ms. Miller responded that the victim did contact the AUSA in the Texas example. But in other cases, especially in Miami, the victims do not speak English as the first language, or they're otherwise scared because it was a violent crime and they were victimized, or they're just focused on doing their job every day, or they don't quite understand the AO form. So sometimes it is difficult for subpoena recipients to call the AUSA or to go to the court. In one case a victim in a tax fraud case denied at trial that he had met with the government, though he had met with the prosecutors and been told repeatedly that they were government. The prosecutors had to

intervene and remind the witness that they represented the government. She emphasized the importance of making the process accessible for lay people who do not understand the system when they are involved and impacted by crime.

Ms. Elm said she favored judicial oversight at the back end, rather than the front end. She appreciated that not everyone will object to subpoenas, but the Committee cannot address 100% of the problems. In her view, if the rule spelled out the expectations and the possibility of real sanctions, and judicial oversight was available when there were objections or complaints, that would address many of the problems. And, she noted, the Victims' Rights Act requires oversight at the beginning for anything dealing with the victim.

A member asked Ms. Miller two questions: whether she was in favor of judicial oversight across the board under 17(c), and whether she believed that oversight for document subpoenas should always be ex parte. Ms. Miller replied she did favor judicial oversight across the board for documentary evidence. Judicial oversight of documentary evidence, and perhaps even deadlines for exchange of information, serve the same goals as the parties' exchange of exhibit lists. On the second question, she replied that oversight needn't always be ex parte. Recognizing that the government's interests are distinct from those of the victims, some courts allow government standing to challenge Rule 17 subpoenas. Victims may not know, for example, what the charges are and thus what conceivably might be relevant in the case. She gave the hypothetical of a rule that removed any time limitation, allowing a defense attorney, one day after the indictment's returned, to submit a subpoena to return documents five days later. In that system, she thought it would be too hard to go ex parte because the court had just received the case off the wheel, and it might be important to hear from the government, for example, what the case is about.

Ms. Miller acknowledged that, in practice, many lawyers do submit ex parte subpoena requests under Rule 17(c). But the words of the rule say only:

> A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. 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.

She noted that the text doesn't say anything about ex parte, and it doesn't say you must go to the court. But Rule 17(a), which speaks to content, says a subpoena must state the court's name and the title of the proceeding. And she thought that a little bit of judicial oversight was implicit in the fact that it's coming from the AO.

The member followed up, asking whether Ms. Miller liked the rule as it is now, and preferred that it not be "automatically ex parte." Ms. Miller responded that the sound discretion of the district court should govern whether an ex parte application is granted in the context of Rule 17 and other contexts. Committing to the sound discretion of the district court whether any given item should be filed ex parte, she said, allows flexibility based on the facts and the issues.

In response to another question seeking clarification, Ms. Miller said she always preferred judicial oversight.

Judge Nguyen asked for questions from Committee members who were not on the Subcommittee.

A member raised a question triggered by Ms. Elm's description of her experience of trying to get Rule 17 subpoenas as a practicing CJA panel attorney representing indigent defendants. The proposal from the New York Bar included a hypothetical with a much different situation, where an apparently very well-heeled defendant and defense counsel with huge resources wanted sophisticated financial information to give to their financial forensic expert and consultant. The member asked whether defendants and attorneys with significantly fewer resources have different experiences and challenges getting these subpoenas. And, if so, is there something baked into Rule 17 as we have it now that exacerbates that situation? Is there something in the proposal that would help alleviate that situation?

Ms. Elm replied that well-heeled defendants represented by major law firms tended to do better than she has done representing small drug dealers. That may have been because of resources, or political ties, or more respect. But when she had gone in on 17(c) and explained it well, she said she had almost always been well treated by judges. As a CJA attorney, she tries to winnow down her requests because it will cost her a lot of time to get five subpoenas duces tecum on five different things that she might really need for her defense. Now doing habeas work, looking at ineffective assistance of counsel issues, she asks what subpoenas did they not issue that now, in habeas, they might be able to find out could have helped? And why did they not issue or try and get those subpoenas? She acknowledged that if you have the resources, you can do more. You can hire investigators to do all kinds of things. She is much more limited with a small drug client, and she did not think that Rule 17 speaks to that issue.

Mr. Carter added that he'd worked in both white collar and indigent defense, and often the relationship with a white collar client is completely different than the relationship a public defender or CJA lawyer has with their client. Usually the white collar client has selected the attorney, and they inherently trust the attorney, who comes with a great reputation. But public defenders are not quote unquote "paid" lawyers, as his clients always remind him. What that means is his client does not trust him and may not be as forthright as the white collar client. So when he asks his client if he should get the video surveillance camera outside of the liquor store where there was a shooting, he does not know whether to trust the client's response knowing that the client does not trust him. That puts him in a very difficult position. Perhaps he can file under Rule 17, but he cannot definitively state why he needs the video because he does not know if his client is telling the truth. That's baked into the indigent defense relationship.

Second, Mr. Carter agreed with other speakers about the importance of the time component. A lawyer who works at a silk stocking law firm and represents Exxon, which is his major client, can devote a lot of time to a case. For a big white collar indictment the lawyer would have the help of 100 partners and associates. But as a public defender, he has a big RICO case, a street gang, and 35 of these cases. It is difficult for him to sit down, draft motion after

motion, and think about trying to meet the *Nixon* standard each time. It stalls the process, but judges resist adjournments. A simple gun case may not be that simple in terms of the investigation. But a district court judge might think this is just a felon in possession case, so why are you asking for all these subpoenas. Judicial oversight sometimes creates this tension, and defense attorneys feel time pressure from the judges. They feel the judge will be angry if they file another Rule 17(c), when they should really do so. All of this, he said, is baked in when you're talking about indigent defense.

A member commented that the distinction between discovery and production kept coming back as an inflection point. The member appreciated the way that Ms. Leonida and Mr. Carter grounded their views on the ethical obligations of defense attorneys to conduct investigations. The duty to investigate was at the heart of *Strickland*, the case that erected the framework for ineffective assistance of counsel. The member commented that there seemed to be some common ground, perhaps around safeguards, protection of victims, and ensuring some ex parte procedure.

Judge Bates asked Ms. Leonida about the examples of situations with codefendants. Was she suggesting that some rule change was needed to address that? For at least one of those examples, he said, it seemed she might be arguing for less judicial oversight, so that the judge would not be aware of certain things. Did she think there is a rule change that would be needed to address those types of codefendant problems?

Ms. Leonida replied reduced judicial oversight would solve the problems that she had encountered in codefendant cases without resulting in fishing expeditions or jeopardizing victims or the pursuit of justice in any way. In both situations, she said, the issue was the judge getting secret information about a defendant through the Rule 17 application process. Codefendants frequently have secrets from each other. It is not a problem if one defense attorney knows something that another defense attorney wished they knew. But it does become a problem when the court has that information, putting the court in a bind in terms of which defendant's interests get priority. It is one defendant's right to exculpatory information versus another defendant's right to pursue their defense. And it is even more dangerous where a judge of necessity has a lot of information that's negative about a defendant when they are presiding over that defendant's trial, and perhaps even more significantly sentencing that defendant—and defendant's lawyer doesn't even know there is information that they need to contest or address in any way. She commented that it is not possible to unring a bell, once something is in front of anyone, even a judge.

Ms. Leonida thought that all of Ms. Miller's examples had included the word "quash." So they seemed to be situations where a subpoena was issued under the current regime, presumably approved by a judicial officer. She noted even without judicial oversight at the front end, the courts are involved. The proposed amendment requires notice to victims, and there is always built-in judicial oversight.

Judge Bates posed a second question for the prosecutors, Ms. Miller and Ms. Sampson. He said that they had raised many examples of why judicial oversight is good and necessary, and

some indication that it is desirable to have judicial discretion whether to make it ex parte. He asked whether they thought the rule as written creates any problem that needs to be fixed. Or does it allow the kind of judicial oversight and discretion they thought advisable?

Ms. Miller responded first to the question that had been directed to Ms. Leonida. She admitted she had focused on examples where there had been motions to quash, but one of them was a threatened motion to quash. She said that she thought that if the proposal were adopted, it would reduce the ability to quash improper subpoenas before records have been provided. There are some instances where parties don't know they can quash or they just start providing records because it's close to the due date. She thought that would be an issue if the Committee changed the system.

On Judge Bates's question, Ms. Miller thought the language of the rule could be sharpened. It could expressly require that there be a scheduled hearing before the court, including sentencing, restitution, trial, and so forth. But she did not think there was a problem that needed to be fixed, because the courts are currently providing appropriate case-by-case oversight. Although there are examples where sometimes a court's paying more attention or less attention, and there is district by district variation, that happens across all of the rules of criminal procedure. The variation in Rule 17 practice is similar to the variation that occurs in practice across criminal issues. She thought the variation in the Rule 17 subpoena context is not so different or much greater than the variation in, for example, the use of Rule 35s versus 5K motions in some districts. The key, she said, is the involvement of judges who know the facts and the law and can appropriately weigh in.

Another member asked Ms. Miller about her comment that in some instances early on in case judges can't know enough about the case to make decisions, which is why the Justice Department should be involved. Ms. Miller responded that her comments on this point had referred to the situation if the rule were amended. If the rule were amended to sever the link between subpoenas and scheduled hearings, and people want extremely early returns, which she thought the defense might under the new proposal, then it would be difficult given the court's limited information.

But what if a defense lawyer needs a subpoena before they even get the Rule 16 discovery? Is that reasonable? Ms. Miller said this might pose an issue in terms of managing the court's docket, but that the judges would be more knowledgeable about that. She thought as a practical matter it could be difficult to weigh these things extremely early in the case.

Judge Dever asked whether tying the Rule 17(c) request to a hearing was somewhat artificial. A defense lawyer could always say there is an upcoming initial appearance, a detention hearing, or an arraignment, and counsel needs to advise whether to plead guilty or not guilty, and that is why counsel needs this information. Mr. Wallin noted that in his district they set a trial at the arraignment, and he just sets the date of return at the first trial date. If the date later gets pushes back, that's not his problem.

Judge Dever said he would like to hear from both prosecutors and defense attorneys to get a better sense of the practice. He said that under 16(b) if a defense investigator finds inculpatory information the defendant has no obligation to turn that over. The text of the rule covers that. And yet some speakers mentioned the subpoena return is being made to the court. He noted Ms. Coleman's example where defense counsel is not sure what they will get. It might be a mix of inculpatory and exculpatory. He also asked for more information on the practice experience of those in districts where these orders are being issued. Were judges telling the defense they will only get a subpoena if the U.S. Attorney gets the information too, even when the judges realize the defense doesn't know what will be in there? Some of it might be evidence that will be introduced in the government's case in chief.

Mr. Felman responded that he had not yet had a case where he was trying to get something from a third party that he felt he needed to hide from the government. But other speakers at the meeting had given examples where that was definitely the case. So there is no one-size-fits-all scenario. There must be opportunities to go ex parte. He had come away from the day's discussion thinking that many thorny technical questions could come up. But the big one is the philosophical question: "do you want me to find out what happened or not? Or is this about limiting discovery?" That, he said, is the question the Committee has to answer. We are having a debate about whether discovery should be limited, whether defendants should basically get what the government gives them, and nothing more unless it can make a pretty compelling case on targeted matters.

Mr. Felman said he also practices criminal law in state court where he can subpoena anybody anytime. When he has gathered all the documents, he takes a deposition of each of the state's witnesses. And when he has seen the evidence the government will use at trial, he explains to his client why they need to plead guilty. He had never had a problem getting depositions in criminal cases for 30 years, and we have several places in this country where people issue subpoenas freely. Some of them are indigent, some pro se. He was sure some subpoenas get quashed. He invited the Committee to envision the reaction of civil practitioners hearing a proposal to remove their subpoena authority because some subpoenas had been quashed. He thought they would say that of course some would be quashed. He thought there was no basis to believe that if you let the defense issue subpoenas it would abuse them.

Mr. Felman returned to the foundational question. Do you want the defense to be able to learn what happened in this digital age where the evidence is not necessarily stagnant, it's not small, it's not who shot who at the 7-11? These are mountains of papers and files and digital records and emails that are not necessarily the ones the government wants the defense to get. The government is not going to seek them out. So if he cannot get them under Rule 17(c), he never will. What the Committee is really challenged by, he said, is the philosophical question of whether discovery should be limited to what the government wants to give the defense, or whether the defense should be allowed to go out and discover what happened. He urged the Committee to bend toward justice, to bend toward letting the defense find out, and let the truth shine.

A member noted that on Judge Dever's question, Mr. Carter, for example, had given the example of subpoenaing his client's health records in the *McGirt* case, and the judge ordering the records to be turned over to the prosecution. We heard some other examples as well where the defense wants to file ex parte, believing that would be possible, but then that was not the case. She thought the common ground the Committee had heard was that the rule isn't clear, and how your subpoena will be treated really depends on the judge. She thought that is a pretty significant problem, and that the Committee should fix the rule. She noted Mr. Gill said he thought a defense attorney should be able to file ex parte whenever they want to do so. But the lack of clarity described by many speakers does have a chilling effect, and it is something the Committee should try to clarify. The Northern District of California has a standing order where their court has said they are ex parte. So perhaps some courts have taken the extra step to actually write something into a rule. But Rule 17 doesn't say anything, and the member thought the Committee should at least correct that uncertainty.

The member also commented that Judge Dever had raised a good question about whether it makes sense to retain the words "hearing" or "trial" in the rule. This rule predated Rule 16, and it was not intended for discovery. We could update Rule 17 to show that you can use it for some discovery, taking out the idea that it's for a hearing and modifying the language to show it allows the defense to get discovery. But the Committee needs to agree on the standard, whether there is judicial oversight, and when judicial oversight would take place. She had been unaware that so many states don't seem to have judicial oversight at the front end, and she suggested the Committee look into that. She said it is a problem if defendants are being treated differently depending on where they live or what judge has the case. Everyone would benefit from making it clear, to show the ex parte nature of that defense investigation, and that the defense doesn't have to turn it over.

Ms. Elm added she'd had a few instances where the judge granted her motion but added she must give it to the government. In those instances, where it goes wrong, she has an ethical obligation to move to withdraw because she just harmed her client. That adds another issue.

A member asked Ms. Miller in the situations where subpoenas were withdrawn under threat of being quashed, had there been judicial approval before they were issued and served? Ms. Miller replied she would have to review the cases and supply that information to the Committee.

Ms. Miller also responded to Judge Dever's questions, noting that in a case before Judge Matsumoto in the Eastern District of New York the defense filed 35 ex parte subpoenas with the court and sought four years of records. The subpoenas originally were made out for the return to the defense. But the court ultimately ordered that the materials be turned over. She said she would follow up with the details. She noted that in *Layfield*, the case she had quoted from earlier, the court discussed why sharing the returns is beneficial for the system. So there have been instances where courts order sharing. She thought the best arguments for sharing are those given by Mr. Gill. i.e., not to invade defense strategy, but to ensure that the truth comes to light and the parties efficiently share large volumes of information, especially in white collar cases. If, for

example, the defense seeks voluminous records before arraignment to assess how to plead in a white collar case involving ten years of conduct, that could postpone the arraignment for a year and a half. So there are practical reasons why there have to be some limits. It gets to question posed by others: what should discovery be for criminal defendants? She thought it should be a different than the civil system because of the different purposes of the criminal justice system.

A member asked Ms. Miller whether she could review the cases she had described to answer some questions. Had the judges been aware of the subpoenas and had they approved them under the *Nixon* standard before the motions to quash were filed? And for those situations where judicial approval was not obtained before issuance, did the judge at the quashing stage ask why this was not brought to the court beforehand? Ms. Miller said she would review the cases, and she added that in the example from the Northern District of Texas where the former FBI agent was committing fraud there had been no advance court approval of that improper subpoena. Professor Beale asked Ms. Miller to send any additional material to Shelly Cox and copy the reporters.

Judge Nguyen invited the morning's panelists to make short additional comments in the time remaining.

Mr. Cary said he seldom used ex parte applications but had found six reported cases where ex parte applications were held to be improper. He would provide those to the Committee. He also agreed this is a philosophical question. The big question arises from the *Nixon* case, which he noted was decided in a completely different context. But now he must tell his clients he cannot satisfy the *Nixon* test even though he believes in good faith that there's information out there that would be helpful to the client, who in theory has a right to compulsory process.

Mr. Cary also responded to the question whether we should let the courts decide this thorough litigation rather than amending Rule 17. He said it would be necessary to get the Supreme Court to take a case presenting this issue if this Committee is unable to deal with what he called the basic issue: "Is the defense going to get what we defense lawyers think we need." He added that to the extent there is a concern about abuse, he agreed with Ms. Elm about sanctions and would not object to including a sanction mechanism for abuse. For personal and confidential information, he noted that the New York Bar proposal expands the protection of the Crime Victims' Rights Act, requiring advance court approval for subpoenas for personal confidential information from both victims and people other than victims. He thought that was a good balance.

Mr. Cary's final comment concerned cost and funding. He observed that we are in a data-driven world, and evidence is in data. It could often cost money to get it. In most of his white collar cases his client will gladly pay if he has to go to some company and search their computers. But Mr. Wallin's clients may not be able to pay. Our system needs to come to grips with the question how we are going to pay for it. He thought cost shifting, which was not addressed by the New York Bar, would be appropriate. He understood there may be an issue with getting funding. But if defense counsel has a good faith belief, on a good basis, that

evidence exists that would be helpful or reveal the truth, we need to find the money to allow the defense to get it.

Ms. Coleman said there is a problem with the rule. The rule regarding judicial oversight needs to be fixed, and we have to address the standard. She brought the focus back to her client: a person, a defendant with constitutional rights, including rights to compulsory process. Like a doctor, she wanted first to do no harm to her client. That is the importance of the ex parte process. She did not agree that subpoenaed materials must be shared, unless that was required by the rules governing reciprocal discovery. There must be, she argued, some capacity for her to investigate her case—as she is ethically obligated to do—and not harm her client.

Ms. Sampson said she had trouble thinking of a time when she had actually received disclosure from a defense 17(c) subpoena, though we all know that occurs. Unless we're actually going to trial and the records are going to be used in Arizona, they don't have that issue. So, in the District of Arizona, she thought they might be "in the position of what doesn't seem to be broken, doesn't need to be fixed, because it's actually working." She said the government doesn't want to keep the defense from seeking information or seeking the truth, because they are obligated to find the truth. That is absolutely something that that they want to do. But she did not know how you could have a system where the judiciary does not get an opportunity to ensure that the process of trial and discovery are going well. She knew of no other way. She said that judicial oversight is the key. She said we could talk about expanding the standard, but she thought it was not being strictly applied in her district.

Mr. Carter said indigent defense is about human beings, not two corporations fighting it out, or a big corporation being charged for some sort of fraud. These are real human beings facing a lot of time. In many state cases the unrestricted use of subpoenas had really changed the course of the litigation, whether it be getting a client to see the light and accept a good plea, or finding exculpatory evidence leading to the dismissal of the case or a not guilty verdict. The rule as written really does chill litigation. Many things are left in the dark because, as a defense attorney, you don't want to run the risk of disclosing information that can end up harming your client. Mr. Carter strongly encouraged the Committee to adopt the amendments proposed by the New York Bar.

Ms. Elm reiterated that we are really talking about trying to control a very small number of bad actors and having a very significant impact on the defense. She advocated a cost benefit analysis weighing the significant negative impacts: a rule that chills defense advocacy, imposing a difficult and expensive process, but can affect only a small number of bad actors. We should presume, she argued, that most defense attorneys are not acting inappropriately, and not impose these hardships on the good practitioners, many of whom are doing their work pro bono or for $158.00 an hour, serving the court and protecting constitutional rights of thousands of people. But the rule as written creates hardships, including realistic possibilities of denial and exposing inculpatory material. Exposing that material to the judge, even if it's not revealed to the prosecution, can affect sentencing. That is something we should to try to avoid, because it creates "a fundamental procedural due process sort of problem." The procedural burden imposed on the

defense is much more onerous and difficult than that faced by the prosecution. She agreed with the speakers who had said the issue was about allowing the defense to try to get the truth.

Ms. Miller said it was important to consider cost not just with respect to Rule 17, but also with regard to other rules. With a large volume of subpoena returns it is important to consider who will review them. She also expressed concern about federal public defenders lacking the resources to review those materials and keep up with the caseload. Would it really help defendants if it is too burdensome, given the volume of materials? That was something to consider with all of the rules, and she suggested advocating for more funds in Congress.

Judge Nguyen thanked the speakers for the robust and informative discussion. She said the Subcommittee would continue to gather information from various stakeholders, and she requested that the speakers email any additional information they think would be helpful to Shelly Cox and copy the reporters.

Judge Dever thanked everyone and stated the next meeting would be in Washington, D.C., on April 20, 2023.