ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 18, 2024
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 18, 2024, in Washington, D.C. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Nicole M. Argentieri, Esq.[1]
Judge André Birotte Jr.
Dean Roger A. Fairfax, Jr.
Judge G. Michael Harvey
Marianne Mariano, Esq.
Judge Michael W. Mosman
Angela E. Noble, Esq., Clerk of Court Representative
Catherine M. Recker, Esq.
Susan M. Robinson, Esq. (via Microsoft Teams)
Jonathan Wroblewski, Esq.
Judge John D. Bates, Chair, Standing Committee
Judge Paul J. Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

Several Committee members were unable to participate in the meeting. Judge Timothy Burgess and Judge Jane Boyle were in the midst of trials, and Judge Jacqueline Nguyen was ill. Judge Michael Garcia had travel problems.

The following persons participated to support the Committee:

H. Thomas Byron, Esq., Secretary to the Standing Committee
Allison Bruff, Esq., Counsel, Rules Committee Staff
Zachary Hawari, Esq., Law Clerk, Standing Committee
Dr. Timothy Reagan, Federal Judicial Center (via Microsoft Teams)

Opening Business

After the usual short briefing on security, Judge Dever opened the meeting by recognizing and congratulating Professor Sara Beale, Reporter for the Committee since 2005, on her retirement from teaching. She taught her last class yesterday at Duke Law School, after 45 years of excellence in every way. Professor Beale was his professor for criminal procedure

[1] Ms. Argentieri and Mr. Wroblewski represented the Department of Justice.

adjudication (when they were both much younger). She has been an extraordinary teacher and role model for generations of law students at Duke Law School, and Judge Dever joined the Committee in thanking her for everything that she had done for the Committee, and for so many students through the years.

Judge Dever welcomed Judge Michael Mosman, appointed to replace Judge Robert Conrad, who left the Committee to become the Director of the Administrative Office. Judge Mosman has a wide range of experience that will be beneficial to the Committee. He graduated first as valedictorian of Utah State, then from BYU, followed by clerkships with Judge Wilkie on the D.C. Circuit and Justice Powell on the Supreme Court. After some time in private practice in Portland, Judge Mosman served as an Assistant U.S. Attorney for more than a decade before becoming U.S. Attorney, and he was part of the team in the Department of Justice that responded to the events of 9/11. He has been on the District Court bench since 2003 and served on the FISA court with Judge Bates. He will make a terrific contribution to the Committee.

Judge Dever then recognized the three members who were at their last meeting after six years of distinguished service on the Committee, noting that they would have the opportunity to make comments about their service at the end of the meeting.

Judge Dever said Ms. Recker had been an incredible member of the committee in many ways, including her vital work on Rule 17 and her participation in countless meetings on Rule 62. She brought wisdom and intellect to help shape the Rules over the last six years and has been a pleasure to work with. He thanked Ms. Recker for serving with such distinction.

Next, Judge Dever recognized Susan Robinson, also in her sixth year on the Committee. Ms. Robinson had also been instrumental in countless ways, including with Rule 23. He noted that she now handles both civil and criminal work, and has brought this experience—as well as her prior work as an Assistant U.S. Attorney—to the Committee. She has been a terrific member and the Committee will miss having her, though it is grateful for all she has done.

Judge Michael Garcia was also finishing six years on the Committee. Judge Garcia played an important role on many issues, particularly on the Rule 6 Subcommittee, which he chaired with distinction. Judge Garcia, too, brought his various experiences, as the U.S. Attorney, his New York private practice, and now as a judge on the New York Court of Appeals. We are grateful to him for his work.

Judge Dever congratulated Dean Roger Fairfax on his appointment as Dean of the Howard University School of Law. Judge Dever commented that Howard could not have picked a better person as its new leader, and he was glad that Dean Fairfax was staying on the Committee.

Finally, Judge Dever acknowledged those attending remotely, including Professor Dan Coquillette, and he thanked the members of the public who were attending.

The Committee then unanimously approved the minutes from the fall meeting, subject to the correction of any typos that may be discovered between now and the final adoption.

Ms. Allison Bruff from the Rules office provided a brief report, referencing the chart at page 74 in the agenda book, on the status of proposed amendments to Rules. No criminal rules will go into effect December 1, 2024, absent congressional action.

Mr. Hawari, the Rules Law Clerk, reported on pending legislation that would directly or effectively amend the Rules, referencing the charts that began on page 82 of the agenda book. Since the last criminal rules meeting, Senate Bill 3250 (p. 82) had been enacted. It will provide remote access to criminal proceedings for victims of the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.

Mr. Wroblewski informed the Committee that a legislative proposal had been drafted within the Department of Justice that would authorize judges to allow victims to have access to the trial through closed circuit broadcasting more generally, rather than require one-off legislation for each particular case. This preliminary draft had been circulated within the Department, but not approved by the Department or sent to Congress. The Department was hopeful that instead of proceeding with a legislative proposal, the draft could be revised and presented to the Rules Committee. He wanted the Committee to be aware those discussions were happening with Mr. Byron from the Rules Office and Ms. Shapiro from the Department. Mr. Wroblewski emphasized that the draft legislation would allow remote access for victims only to certain proceedings involving sentencing or release of a defendant, and only via closed circuit.

Rule 17

Noting that Subcommittee chair Judge Nguyen was unable to participate because of illness, Judge Dever then recognized Professor Beale to give an update on the activities of the Rule 17 Subcommittee. Professor Beale directed the Committee's attention to the memo beginning on page 88 of the agenda book. She explained that the Subcommittee was seeking feedback, not presenting an action item requiring a Committee decision. She reviewed prior tentative decisions of the Subcommittee that the amended rule should provide

- case-by-case judicial oversight of each subpoena application,
- express authorization of ex parte subpoenas, and
- different standards or levels of protection for personal or confidential information ("protected information") and unprotected information.

Professor Beale noted that participants in the Phoenix meeting had described the need to subpoena various forms of unprotected information, such as recordings from security cameras on the street where a robbery allegedly occurred, or video from a casino of money being counted out to a defendant who wished to demonstrate cash in his possession was not drug proceeds.

Since the 2023 fall meeting, the Subcommittee had met twice and would meet again after the current meeting. It was moving step by step, with a lot of research and deliberation on each point. Among the tentative decisions of the Subcommittee at its most recent meetings was the decision to keep the amendments in Rule 17 instead of creating a new rule. The Reporters had suggested that the subcommittee consider putting the expanded subpoena authority in a new Rule 17.2 or 16.2. That idea provoked a lot of discussion, and the subcommittee unanimously decided

to make any changes within Rule 17, to make it clear that it was revising the Rule into conformity with practices in several districts where it was working well. The Subcommittee did not want to suggest this was an entirely new discovery provision, which might generate unwarranted opposition.

The Subcommittee also decided to make it clear that the material produced by an ex parte subpoena should be disclosed to the opposing party only as already required by the rules regulating discovery between the parties. Professor Beale said they had heard earlier from practitioners (and later confirmed in case research) that judges had allowed ex parte subpoenas but then ordered that the information that had been produced must be shared with the opposing party. Professor Beale observed that requiring all subpoenaed material to be disclosed automatically to the opposing party really undercut the point of having an ex parte subpoena. Requirements for disclosure to opposing parties are already in Rule 16, 12.2, 12.3, and so forth. Those reflect the right balance. Having an ex parte subpoena should not enlarge the court's authority to require additional disclosure to opposing parties.

A third issue was where returns should go. The rule has not been clear on that. Some courts have concluded, for example, that it's improper to allow the returns to go directly to the party who requested the subpoena. The Subcommittee tentatively decided that the rule should clearly authorize the court to order a witness to produce items directly to the party requesting the subpoena. But it should require returns to the court under two situations: (1) when the subpoena is requested by a party who is not represented, and (2) when the subpoena requests personal or confidential information. Unrepresented individuals don't have the same training or ethical obligations as lawyers, and requiring that a return or personal or confidential information go to the court means that it can exercise some control over what is disclosed.

The Subcommittee also rejected the idea that the rule require notice to the person whose information was being sought. She reminded the Committee that the subpoena authority would potentially reach material that is covered by many different laws, including school records, health records, and records regulated by the Stored Communications Act. The Subcommittee has been clear all along that it is not trying to override those laws, which cover not only what you can get, but also who should get notice. For example, the Stored Communications Act does not provide for notice in certain situations. But Rule 17(c) already requires notice to victims under certain circumstances, and the Subcommittee was not proposing to change that.

The Subcommittee is moving toward deciding the required showing to obtain a subpoena. The language quoted on page 90 of the agenda book had not been approved by the Subcommittee, but it provided a sense of what the Subcommittee has been considering as the standard for obtaining *unprotected* information. It is quite different from *Nixon*, it does not require admissibility, but it must be specific enough that the recipient would understand what they were being asked.

The Subcommittee is also looking at language that would be applicable not only to the trial but to other proceedings, but it had yet to determine what those other proceedings might be.

Parties are entitled to present evidence at a number of proceedings, and they may need a subpoena to get it, or to determine what that evidence would be.

Professor King added thanks to Mr. Hawari, the Rules Law Clerk, and his predecessors who had also been very helpful in providing research to the Subcommittee. She observed that each new step the Subcommittee takes has the potential to raise concerns about prior, tentative decisions because the decisions interact, and that's to be expected. The Subcommittee had yet to address the standard for obtaining subpoenas for personal and confidential information, the type of review that the judge will do in camera, and other procedures. It was taking this step-by-step incrementally. The Subcommittee values any feedback Committee members have to offer.

Judge Bates commented from the judicial perspective, noting that for almost every subpoena request, the judicial officer would have to make three determinations. First, whether the standard is met, whatever the language winds up being to obtain the subpoena. Second, whether good cause has been shown to have the subpoena be ex parte. And third, a determination based on the kind of material sought as to whom the return should be made. Those would be three separate determinations that the judge would have to make for virtually every request.

Professor Beale responded that they would not all be ex parte, but many of them would be.

Professor King noted there would be a fourth determination if the subpoena is one that's returned to the judge for in camera review. Then the judge would have to decide what to disclose and who to disclose it to. She clarified that is a later determination not made at the time the subpoena is sought.

Judge Dever observed that building the standard on the front end helps provide sufficient facts for the judge to be able to evaluate the material if it is returned to the court, so the court understands why the party asked for this, why judicial authority has been allowed to subpoena this. He's had subpoenas seeking personal or confidential material. In that situation, judges reference back to what defense counsel said she was looking for, and then ask whether this is responsive to what the lawyer articulated in the subpoena request, in connection with it being exculpatory or whatever the standard called for. He agreed with Judge Bates's statement of the three process questions that will probably come up almost every time. And then a fourth will be animated by the standard we adopt to even get the subpoena, because once the judge gets the return, the judge will have to compare it to the request to see if it is responsive.

A member noted that there might be an additional determination. He understood the Subcommittee thought that the rule should be silent on whether there should be any notification given to whosever information is being sought, but he thought consideration should be given to acknowledging that the court would have the discretion to order notice. He said that also raises an additional issue: the extent to which the court will have the power to gag, say an internet service provider (ISP) that receives a subpoena and whose policy is to disclose to their customer that they have received a subpoena about the customer's information. When it is truly important to the case and the district judge has made the decision that this has to remain private, is there going to be that power, which is what happens all the time with magistrate judges and warrants?

Magistrate judges in his district routinely get motions not only to seal, but to gag the ISPs, who, since the Snowden case, have policies that they will disclose if there's no gag order.

Professor King said it was important to hear this concern. She said there are several issues like this that come up with subpoenas regularly, that may be controversial among courts, and the Subcommittee will be working through which of those issues to bite off. Is it going to solve this circuit split, and this circuit split, and this other circuit split in the rule? Or are there some things that we don't have to load into a proposed amendment? We had this experience over the years many times, including Rule 12, with several years of being asked, "Do we have to decide that? Can we just say we're not reaching it?" So that may be an issue that ends up in the proposal, but it also may be one of the several issues that are not included, in part to smooth the way through the process. The more controversial things we add, the more difficult it is to get the core changes made. It could be an issue like that, but it's certainly something that the Subcommittee will address.

Mr. Wroblewski offered that the Department likes to use the phrase "delayed notification" rather than "gag." The Subcommittee has talked about this to some extent, and there are provisions in law dealing with when delayed notification is appropriate and when it's not. As the Reporters mentioned, the Subcommittee is not going to try to overrule anything that is already in an existing statute. He asked the member if he thought Rule 17 should be self-contained, meaning that you don't have to flip open your book to somewhere else where it addresses all these kinds of issues that the member is talking about.

The member responded that it depended on the issue. He received such requests frequently, made entirely by the government to protect its investigation. But the subpoenas under the proposed rule will mostly be used by the defense, because the government has many other ways to get information. So the defense is trying to protect their own theory of the case, trying not to tip the government off as to what it is they're looking at. These subpoenas may lead to potentially inculpatory information, rather than exculpatory information, and he hadn't thought about how that might play into a delayed notification. He thought it was a better question for the district judges, because they will be the ones handling these requests. A rule that has as much as possible in it to guide the judge during a major change like this will be important, especially in those districts such as D.C. where there's not a lot of Rule 17 practice. This is going to be a big change, so there may be some reluctance, and the more you can clarify where those rights exist, it would be helpful.

Judge Bates asked the member if the gagging or delayed disclosure issues arise most frequently where there is a criminal case pending, or most frequently where there is not yet a criminal case pending. Because these subpoenas will generally be where there is a criminal case pending.

The member replied that the issues arise when there is an ongoing investigation, but the government has power to continue to investigate its case, even after an indictment is returned. There are no longer grand jury subpoenas, but there are 2703(d) and search warrants. The government routinely seeks the same sorts of things. And the court looks more closely at those

requests because of the question why the government is still hiding the nature of this investigation when the case is already existing. But it happens.

Another member observed that the protected information that the Subcommittee is looking at is in large part subject to a whole range of protections: some is simply confidential, some is protected but qualified. She asked if the member who just spoke had been suggesting that the rule add something in addition to what the statutory framework already requires.

The member responded that might be more of a question for the defense attorneys who are going to be using the rule. There are certainly categories of information that have various statutory protections. Can you issue a delayed notification order to protect the interests of the defense case? But even for those categories of information for which there is no outstanding statutory protection, defense attorneys may not want anyone to know what they are doing. It might be important to the defense, for example, to preclude the casino from disclosing its receipt of the subpoena. Without making a judgment about whether that should happen, the member could imagine that might be important. And there is no statute that says the court can do it.

Another member said that part of the problem is that there are so many other rules governing the disclosure of information. For example, she will sometimes have to get a subpoena to obtain a client's own records when a release is not sufficient, and a court order is required. Generally, her office obtains the necessary court order by requesting a subpoena. There are some state statutory limitations that provide the right to not have that information disclosed. If defense counsel requests those same records for the *victim,* the same statute would likely require notice to that victim and the government will immediately know that a subpoena has been issued. Even if the request is ex parte, articulating the reason why those records are important to the judge in order to get the subpoena is still important, and it is important to the defense to be able to do that ex parte. But the idea that the government won't know about the subpoena is unlikely. And the idea that a gag order would be issued by a court was hard to imagine where a subpoena seeks the victim's records.

Another example is a subpoena to a law enforcement agency seeking records of a cooperator. Although the member knew of no statutory guidance or rules guidance, there may be ways for the defense to ask the court to issue a gag order to that other law enforcement agency. It would be a pretty uphill argument, and it would have to be fairly specific as to why that would be necessary. Absent that, what is going to happen is that before the defense gets the records, they will hit the desk of her opponent, and then compliance with the subpoena will be fulfilled. She said Rule 17 is a vehicle for gaining access to information, but a lot of other rules are in play. Notice, in particular, is covered by many different federal and state statutes. The one area where others could be more specific is white collar, dealing with huge, voluminous requests through subpoenas. Whether that type of request could ever be under a gag order seems unlikely, but she couldn't say what the notification provisions for bank records, for example, would be. If there's a concern that there should be notification, the district judge can require the requesting party to brief that. But putting it in the rule would complicate the rule's relationship with a lot of other statutory requirements in all of the states and federally.

A member asked to go back to page 90 on the return issue. He noted that as the language characterizing the Subcommittee's tentative conclusion is written, the Rule would authorize the court to direct the return directly to the party requesting, but require return to the court if the information being sought is personal or confidential. Did that second clause mandate that the return would be made to the court in cases whenever the information being sought was personal or confidential? How broad is that characterization "personal or confidential," and from the perspective of whom? He imagined almost all information being sought would be personal or confidential from the perspective of someone.

Professor King responded that the Subcommittee's tentative decision was that the material produced by any subpoena for personal and confidential information goes first to the judge so that the judge can sort through who gets to see it. And that was in part because of the potential breadth of what that category of materials includes. It includes privileged material, closely held material of corporations, medical and therapy records, things like that. The judge would review all of this material first before disclosing it, even to the person who requested it.

Professor King said the scope of that characterization is something the Subcommittee must tackle. It's a tentative decision to bifurcate the standards in that way. There was a debate over how to characterize the two different buckets. "Personal and confidential" appears in Rule 17(c)(3), so it has the advantage of at least some track record available to judges who are applying it. But it may be something that eventually the Subcommittee revisits or describes more fully in some way. In doing so we'd have to be mindful of the existing language in the rule, which has been there for some time.

Judge Bates raised the concern that so much of the material sought with subpoenas would fit into the loose category of personal and confidential that this would be requiring most subpoena returns to be made to the court. That would be a very substantial change and one that the Committee would need to think through quite carefully.

Professor Beale responded that the Subcommittee did discuss what might potentially narrow that. The rule might refer to information that is protected by federal or state statute and other bodies of law that indicate the material has a special, protected quality. The tentative decision — not unanimous — was to stick with the more general category already in the rule. But this does not preclude reconsideration when we see the whole package and think again about things like whether it imposes too much of a burden to put on the courts. When the Subcommittee puts all the pieces together, it will reassess. If it is a broad category and includes things that are not highly, highly, highly sensitive, that may be a much easier decision for the judge to make, seeing no tremendous concern about turning it over.

Mr. Wroblewski said one of the tensions we'd been wrestling with is that if you have a much tighter standard, something much closer to the *Nixon* standard, which is going to limit the information that's coming in, there's obviously less protection and review that has to happen on the back end. But there's also an interest in having the standard at the front end much broader, something more like "material to preparing the defense," which then may require more back-end protections, whether those are protective orders or review by the court. That's one thing the

Subcommittee had been wrestling with — where and when to put those limits, whether it's early on in the standard or later on in the review.

Ms. Argentieri thanked the Committee for having her at the meeting. She first raised a concern about ex parte subpoenas. If the request comes in early in the case, post indictment, and there has been little motion practice, the judge may not be aware of the full scope of the government's case in the absence of highly litigated motions in limine such as Rule 404(b). This puts a burden on the judge to become a document reviewer, where these documents may be voluminous, and to call balls and strikes about what needs to be produced. She asked what the Subcommittee was thinking about that burden and what additional guidance resources would be provided. She commented that in a big white collar case it might overwhelm a chambers and slow down criminal litigation.

A second concern, Ms. Argentieri continued, is not having the government be a part of this. Having been on the defense side for years she totally understood there might be cases where the defense doesn't want to reveal strategy, and perhaps the government shouldn't have a place at the table because you're trying to figure out if you might be developing additional inculpatory evidence. On the other hand, not having the government at the table to provide that other perspective also limits the information the court is getting when making important decisions.

In addition, Ms. Argentieri remarked, if the standard for a subpoena becomes information that is material to the defense or prosecution, if the government receives such information it would have to provide it to the defense. When she was on the defense side, they never made Rule 16 productions. Usually the defense did not make Rule 16 productions until the witness was on the stand. She asked if the Subcommittee was thinking about giving additional guidance about what eventually must be produced to the prosecution. Otherwise it could potentially be kind of a litigation by sandbag.

Based on what the Committee heard in Phoenix at the October 2022 meeting, Judge Dever said, at least in the districts that allow ex parte subpoenas, counsel seek them for material they think will be helpful to the defense case, but they don't really know. They may get material that is both helpful and harmful, and they have to decide what to use at trial. Rule 16 covers their disclosure obligations for trial. He thought the Subcommittee views Rule 16 as covering what you have to disclose and when you have to disclose it. In contrast, Rule 17 was about getting access to the information, recognizing that you think it is going to be helpful, but you may get material that is somewhat helpful and somewhat harmful. Then your obligation is to look to Rule 16.

Professor Beale explained the Subcommittee thinks other parts of the Rules deal with what you have to disclose if you get something ex parte. You might get this information in many different ways. You can get it earlier in a grand jury subpoena, or somebody could volunteer it and bring it in. The government doesn't have to disclose it unless required to do so by Rules 16, 12.2, 12.3 or its *Brady* obligations. (Of course, the defense has no *Brady* obligations.) But the ability to get this information does not mean that you have to turn it over. It is only if some other body of law says you have to turn it over. The Subcommittee understood that those other bodies

of law reflect policy choices about fairness and transparency, but also the ability to build your own case and keep trial strategy secret. The Subcommittee is not seeking to override any of those policy choices. It is trying to allow parties to get access to information, but not to determine if and when they should have to hand it over to an opposing party.

Professor King responded to Ms. Argentieri's first question, whether this could overwhelm the judge with document reviews. She said that the Subcommittee is very aware of that concern, which Judge Bates raised as well. One of the things that the Subcommittee had considered all along, and that it would continue to consider, is how any burden will differ from what exists now. If judges now must run through all of those issues under the *Nixon* standard, is it going to be different from that in terms of burden, and if so how? Also, we have and will continue to look at jurisdictions that have systems that are like the ones we are considering, to see what the burdens are there and how they're handled by the judges in those districts. We will definitely pay attention to those as we go forward.

Another member stated her view that the Subcommittee has done an excellent job framing out some of these initial issues. First, she emphasized the recognition of the chilling effect that any automatic disclosure of the documents would have if a defendant were required to immediately turn over all of the records obtained by a subpoena. The member said it is critical that the rule enable a defendant to conduct his own investigation and defend himself. Requiring automatic disclosure would undermine that process. Second, she noted that getting away from *Nixon*'s admissibility requirement is critical here, as the Subcommittee had recognized. Third, the reporters mentioned that the Subcommittee is considering not only trial but other proceedings where subpoenas could be used. If there are proceedings to challenge evidence (perhaps even in detention, although it might take too long to get documents that might be helpful initially for that), those could be important proceedings. On sentencing, to make mitigation arguments it is very helpful, for example, to be able to obtain her client's educational and medical records that the client no longer has the ability to obtain. Subpoenas are critical, important, and helpful for those proceedings.

The member also addressed delayed notification. In a case where a state agency is a purported victim, if the defense is subpoenaing records from that agency, it expects the agency to share the subpoenas with government. The government gets a little information from the subpoena, but the member stressed that it was important that the government not get the supporting motion, which described to the court why the defense needed the subpoenaed documents, how they were going to be used, or why they were important in the case.

The member raised the question who can challenge these subpoenas. Is it only the third party or does the government have standing? Can the government, independent of the agency itself, challenge the subpoena and file a motion to quash? It might be important to address that with this rule. When she has litigated these issues, the court has said the government really does not have standing, but then it turns to the other party and gets very mushy. There may be instances where the third party would not challenge the subpoena, would not feel that it had reason to, but the government might jump in for whatever their reasons and motivations are. It might be important to address that. Overall, the member said, this was a terrific start.

Another member noted that the Committee had learned that there are vast differences in practice, and her experiences had been very different from Ms. Argentieri's. For example, in her district she can ask for an ex parte subpoena. If the judge wants to hear from the government, the judge will say "We can disclose your request, or you can withdraw it." She had never had a judge give the subpoenaed material to the government without giving the defense an opportunity to withdraw the request. The member also noted that the courts in her district were quite adept at making sure that they had all the necessary information, particularly if it is not the eve of trial, when perhaps the court is more aware of the case and can put more context into the request.

The member commented that Rule 16 has some teeth in her district because the defense can get subpoenas, either ex parte or otherwise. The judge knows very well when she got the information. If she did not provide reciprocal discovery required by Rule 16, there would be a motion to preclude the evidence, which would be granted. The Subcommittee was focusing on whether the court should be able to require all material subpoenaed ex parte to be turned over. Because as others have noted the defense requests information without necessarily knowing the fine details, and it could receive something it ultimately decides not to introduce. But even if the defense decides not to use the material obtained by subpoena, it aids the defense preparation to know what was there. If something is provided that we intend to use, judges will absolutely expect that that the defense to comply with its disclosure obligations under Rule 16. She thought that was what the Subcommittee was trying to resolve, and this discussion highlights in many ways why that will be difficult.

Judge Dever commented on the point Ms. Argentieri and Judge Bates had raised. One of the things that the Committee heard in Phoenix and that the Subcommittee is considering is whether the front-end standard should include some kind of diligence regarding alternative sources. One important point is the difference between the white collar practitioner and the CJA defense lawyer. The Criminal Justice Act (CJA) defense lawyers from districts where they can obtain subpoenas were uniform in saying they have no interest in getting a terabyte of data from someone. They say, "I wouldn't have time to review it anyway." If they were defending a Hobbs Act robbery case or something, their subpoena requests would be very targeted.

And in terms of judicial review of an overwhelming amount of documents, Judge Dever said, when we move to the white collar bucket, we underestimate the capacity of companies that have big data to send their lawyers in to initially try to negotiate with the lawyer, saying "We're not going to produce, we're going to litigate this unless you tell us more narrowly what it is exactly you want." That's a back-end safeguard, and it's legitimate. Is a terabyte of data going to come into a chambers? One of the safeguards against that is the capacity of a third party who gets a subpoena to itself say, "Who is the defense lawyer that sought this? I'm calling that defense lawyer," and saying, "We will move to quash this because it's unreasonable and oppressive to us, unless we can negotiate a narrowing of what it is exactly that you're looking for." So we have some safeguard that we can hopefully build in on the front end explaining what it is you're trying to get, and then we also have some safeguards later. You see that in civil cases all the time of when a third party gets a subpoena.

A member emphasized that defense counsel doesn't want a terabyte of data. That whole process of narrowing is definitely something that we would be interested in. Just because it's a white collar case and there is an extraordinary amount of data, it doesn't mean we want it all.

A member said the word "designated" items in the standard can do a lot of work. To what extent do you need to particularize what those items are to narrow it? It is important to address all of these issues with respect to the volume that's going to be returned and the potential burden on the district judge. Part of this as you think about the standard is some sort of particularization, to the extent that the defense can. Another issue is, at least for ISPs, they don't do a lot in terms of culling in response to government requests. They don't have the manpower or the interest to do it. Apple recently said that they will not even date restrict the data that's coming in, and that has become an issue because typically there's some restriction to the date in responses to subpoenas or to search warrants. But it is easier for them to produce everything, and then the FBI has an army of agents and analysts who are going through all of this data to try to figure out what can be seized and used as part of the investigation. That will be a challenge for a district judge.

A member drew attention to the difference between government search warrants and defense subpoenas. Defense attorneys are limited by the Stored Communications Act. Since they cannot obtain the content of stored communications, isn't the burden on the ISP very limited?

The other member agreed that the defense cannot obtain content, but it can get subscriber information with the IP information, which can be over time and not be related to the particular time that's at issue in the case. The extent to which ISPs will be willing to cull information is an issue, even in response to a subpoena. It was not clear to the member what ISPs would do. To the extent the information you can subpoena is considered personal and confidential, that may go to the district judge. Then how does the judge figure out this data file, which the FBI knows how to deal with?

The reporters and Judge Dever thanked the members for their helpful comments.

Rule 49

Judge Dever moved to access to electronic filing and Rule 49 with a report from Professor Struve. She explained the working group does not have a draft for the Committee this spring, but will be convening in the coming months over the summer. It is indebted to Ms. Noble and everyone else, including the reporters, for their wise input on the project. The group will work over the summer on the proposals both on electronic access for filing purposes and also modifying the service requirement in cases where a self-represented litigant is receiving a notice of electronic filing through CM/ECF.

Professor Beale added that this is another example of attempts to bite off parts of what was a much broader proposal that could not possibly go forward as submitted. There is a sense that there are some smaller pieces that would be feasible for this Committee and other committees to implement, and the task is to target and identify some specific provisions that could be useful.

Rule 53

After thanking Professor Struve, Judge Dever moved to the next item on the agenda: Rule 53 (page 94 of the agenda book), the broadcasting of criminal proceedings. He noted that before his appointment to head the Administrative Office, Judge Conrad had chaired the Rule 53 Subcommittee, and Judge Mosman is joining that Subcommittee. Judge Dever stated the agenda book included the Reporters' memorandum and the proposal from the media coalition organization, page 98. Mr. Hawari's excellent memo, beginning on page 115, explains the history of Rule 53, which has been largely unchanged since its adoption. In 1992 there was a proposal to add a clause at the end of the current rule providing "except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States." That proposal would have allowed the Judicial Conference to promulgate guidelines allowing broadcasting in specified circumstances. A nonunanimous Criminal Rules Committee recommended the proposal to the Standing Committee, where the chair broke a tie and sent the proposed amendment to the Judicial Conference. The Judicial Conference rejected the proposal.

Judge Dever said the Subcommittee's first meeting had been very productive. The coalition's letter said that some parts of criminal proceedings may be televised in 49 states, and the Subcommittee hopes to learn more about what is going on in the States. CACM has had a significant role on issues concerning broadcasting, and it just promulgated a revised policy. The Subcommittee hopes to learn more about CACM's views and its research. Judge Dever also expressed his gratitude to Mr. Hawari for the great historical memo, and he noted that the Subcommittee was in the process of gathering more information.

Professor Beale offered comments she thought might be useful not only for the group in the room, but for members of the public and the proponents of this proposal. The Committee is not writing on a clean slate. This is a proposal to change a rule to allow greater broadcasting. Similar proposals have been considered multiple times, and the rule has not been amended. The Subcommittee feels that it has to understand the original reasons for banning broadcasting, and the reasons for retaining that rule. It also needs to understand the received wisdom underlying the rule. But it is also very important to understand the current environment. Technology and other things have changed, so we are trying to understand the foundations of this rule and then enlarge our understanding of what's going on in the other jurisdictions, and what the FJC and other groups that are studying this are finding, before there would be any possibility that we could make a recommendation going forward. And we are not the only actors here. For example, the Committee on Court Administration and Court Management (CACM) has a lot of responsibility in this area, and it has recently made changes that reflect its own policy judgments and the information it has gathered. The Subcommittee hoped to work in tandem with CACM. But coordination will raise some issues. CACM has its own responsibilities. It is not a public committee that reports generally or has open meetings like this. It operates on a different schedule. So trying to figure out exactly how that will work is also part of what we're doing along with, as Judge Dever said, trying to understand what's going on in the states. Fortunately, we don't have to be the only researchers in this area. The National Center for State Courts and others gather this information, and other groups have published their own accounts of what

different states and courts within particular states are doing. But quite a lot of information must be gathered before the Subcommittee would be prepared to begin making any kind of recommendation.

Judge Dever referenced the Reporters' memo at page 94, and invited the members to comment if there is anything else that would be helpful to consider.

Professor Beale added that it was important to keep in mind the difference between the participants and the general public, and that whatever the rules provide for participation by the various parties, witnesses, and victims could be potentially quite different from remote access or broadcasting to the public at large. The Committee and Subcommittee need to remain sensitive to that difference. Obviously concerns about the privacy of jurors, witnesses, and so forth are things that must be kept in mind.

Professor Coquillette concurred in the praise for Mr. Hawari's outstanding historical memo. As someone who's lived through one iteration of this, he thought that focusing on that history would be one of the most useful things that the Committee and Subcommittee could do. He identified several lessons from that experience. First, he acknowledged the challenges of working with CACM. They have a different philosophy, they are not a sunshine committee, they operate differently, and they have a big, big stake in this. Secondly, there are some powerful lobbies involved here that are very influential. The committees do not normally look over their shoulder at Congress, but this is one where we might need to do so. Finally, the Judicial Conference did something unprecedented in rejecting a recommendation from the Standing Committee in 1994. It was a split vote. So taking time to build a consensus is an excellent idea because there are so many moving parts.

One member commented that she had always felt categorically opposed to cameras in the courtroom, but she had been very intrigued with Ballard Spahr's letter and its the description of the experience with the George Floyd related trials. She was really surprised and thought that accumulating information broader than the Ballard Spahr letter about that experience might be helpful. Judge Dever agreed.

Rule 43

Judge Dever reported on a different but related issue. The Committee received a letter from Judge Ludwig in the Eastern District of Wisconsin, who asked the Committee to revisit Rule 43 and the defendant's presence requirement in connection with Rule 11 proceedings. The Committee did not receive the proposal in time to include it in the agenda book. The Rule 53 issue is that broadcasting could allow many people to see what is going on in the courtroom. That is distinct from the Rule 43 proposal, he emphasized, which concerns the use of technology to lawyers and parties to *participate* in a proceeding. The use of technology to allow remote participation in judicial proceedings is different than the use of technology by observers. He expected that the reporters would prepare a memo for the Committee's November meeting that will describe the history of the consideration of this type of proposal for remote participation in criminal proceedings. Obviously, there was a big exception made in the CARES Act with respect to Rule 11 and with respect to sentencing proceedings. That exception has expired. As he

understood the proposal, it says, "We found that experience [under the CARES Act] to be good. We think you ought, as a Committee ought to revisit that issue."

Judge Dever said the Committee last considered this Rule 43 issue when Judge Kethledge was the chair. At that time, the Committee had no desire to change the rule (and it had considered the issue before). Judge Dever noted that he found it very helpful to understand the history of a rule. He expressed his appreciation for the historical memos prepared by the reporters and lawyers (like Mr. Hawari) in the AO that help us before we even think about changing anything. The reporters would prepare a memo for the November meeting, and the Committee will discuss whether to set up a subcommittee to study that issue in the suggestion letter.

Professor Beale said the reporters would try to summarize the history in their memo for the November meeting.

****The meeting was recessed at this point when remote access dropped building wide, and resumed when internet access was restored.****

Redaction of Social Security Numbers and Other Privacy Issues

Judge Dever moved to page 125 in the agenda book with the redaction of Social Security numbers and a privacy rules working group update from Mr. Byron.

Mr. Byron said that the memo on page 125 updates everyone on the work of the reporters' privacy rules working group. As explained there, Senator Wyden has suggested that we amend the privacy rules—not just the Criminal Rule 49.1, but the others as well—to require complete redaction of Social Security numbers, not permitting (as we have for the last nearly 20 years) retention of the last four digits. That suggestion prompted discussion among the reporters and the Rules staff about whether there are other issues that warrant consideration as amendments to the privacy rules. We have now received some specific suggestions, including a recent one from DOJ proposing the use of pseudonyms rather than initials for known minors.

Because there are some related issues that they thought were worth considering in terms of the specifics of the Rules amendments—some cutting across the privacy rules in different rule sets, and some specific to particular rule sets such as the Bankruptcy or Criminal Rules— the working group had tentatively recommended that the suggestion from Senator Wyden be considered in the context of a larger review.

The materials on page 126 sketch what a complete Social Security number redaction amendment might look like if it were undertaken in isolation. Professor Struve noted that the working group was not asking that the Committee consider or vote on that particular idea or sketch of an amendment. Instead, it was asking for broader feedback about whether it is a good idea to pursue Social Security number redaction in isolation, or instead consider a broader review of the privacy rules as a whole. Relatedly, if we were to undertake a broader review of the privacy rules, what other issues should we look at?

Mr. Byron also asked for feedback and suggestions about the best way to undertake the next steps here. Would it make sense to continue the efforts of the reporters working group,

working with the Rules Committee staff? Should one advisory committee take the lead on any cross cutting issues across the rule sets and the privacy rules to the extent that they have common language, common approaches? Or should this Committee and others ask the Standing Committee to appoint a joint subcommittee as sometimes seems appropriate? He noted that the next agenda item for this Committee was a recommendation from DOJ about pseudonyms for minors. He understood that Judge Dever was creating a new subcommittee, chaired by Judge Harvey, to consider the pseudonym proposal and other issues that may arise from the working group.

Judge Dever confirmed that was the plan, and asked Mr. Wroblewski to explain the specific DOJ proposal regarding referring to minors by pseudonyms before opening discussion to include any other issues on the privacy rule.

Mr. Wroblewski drew the Committee's attention to the Department's letter at page 132 of the agenda book, which presented an issue raised by Child Exploitation prosecutors within DOJ. The current practice under Rule 49.1(a)(3) is to use initials to mask the identity of minors in various court documents. As the letter explains, there are serious concerns that is not effective to protect minors, and it would be a better practice to use pseudonyms.

Professor King asked Mr. Wroblewski for the current DOJ policy regarding protecting the privacy of adult sexual assault victims. He did not know but he offered to find out. He noted that in his own experience those names are in the public record. Three other judges agreed that that was the practice in their districts.

Turning to the new subcommittee, Judge Dever commented that if members thought it would be useful, its charge could be broadened. The subcommittee would be chaired by Judge Harvey, and its members would be Judge Birotte, Ms. Mariano, Mr. Wroblewski, Dean Fairfax, and Ms. Noble. He noted Ms. Noble's participation would be particularly useful because many of the issues come up in the clerk's office. He asked for comments on whether there were any other parts of the rules that that we needed to look at.

Mr. Byron commented that given the appointment of the subcommittee, it was possible that the other advisory committees (with the blessing of the Standing Committee) might want Criminal Rules to take the lead on some of these questions, especially to the extent they were motivated in part by concerns not unique to the Criminal Rules. He thought it might make sense in terms of efficiency and resources for Criminal Rules to take the lead if the new subcommittee has the time and attention to consider some of these broader cross-cutting issues as well. He noted that he was open to the Committee's feedback about what would work best.

Judge Dever said the initial charge for Judge Harvey and the Subcommittee was to look specifically at the DOJ proposal, but then to broaden that out to the extent that there are Social Security number references in the rules.

Professor Beale referenced page 127 right before the asterisks, identifying a potential issue raised at one point several years ago about 49.1(b)(8) & (9) search warrants and charging documents. There may be something else in 49.1, once we open it up, that we should look at

now. But, she commented, we don't want to open the patient more than once if we can avoid it. Accordingly, she asked members to identify any other issues concerns about Rule 49.1 during the meeting or as soon as possible after the meeting. It is helpful to the Committee to make all of the changes to a rule at one time, and bad for those who use the Rules when we do not. When there are multiple amendments within a short period of time, it generates confusion and decreases the input we receive. So if there are any other potential issues, this is the time to put them on the agenda for evaluation.

Professor Beale observed that there are some style conventions in the Rule (such as "social-security") that we would not be able to change, and if the advisory committees go in lockstep we might not get exactly everything we want. But for the parallel provisions, we would be able to give our input, and if we took the lead we might even set the agenda. But she thought there was a good chance that these rules will continue to be uniform across all the provisions and issues that are shared.

Mr. Byron added that the uniformity concern has been paramount since the beginning, and driven in part by statutory concerns as outlined in the memo. But it has also been driven by concerns that many of these issues arise in many types of proceedings. DOJ's suggestion to use pseudonyms rather than initials to identify minors is a good example. Although it was aimed principally at Criminal Rule 49.1 and criminal victims and witnesses, the same provision appears in the Civil and Bankruptcy Rules, and it applies in the Appellate Rules too. So whatever this Committee recommends on that question will need to be considered by the other Advisory Committees.

Rule 40

Hearing no additional comments, Judge Dever moved to the proposal to amend Rule 40, and the Reporters' memo at page 136 arising from a proposal received from Magistrate Judge Bolitho in the Northern District of Florida. The memo outlines the issue that Judge Bolitho identified as a perceived ambiguity in the rule, its relationship with the Bail Reform Act, and how he resolved it. In preparation for this meeting, Judge Harvey had gathered additional information to help the Committee decide whether it sees this as a significant problem.

Judge Harvey said he had reached out to some colleagues on his court, to individuals in his judges' class, to a representative for the Magistrate Judge's Advisory Group (MJAG), and the Rules Committee of the Federal Magistrate Judges Association. Generally, everyone who responded had views on Rule 40. They were universal in the view that the rule is confusing and difficult to apply. They each have different issues with what they think needs to be addressed, not necessarily the issue raised by Judge Bolitho. As for that issue, he learned the MJAG is going to be submitting in the next few months a more comprehensive request regarding amendments to Rule 40, which would encompass the issue raised by Judge Bolitho, as well as additional issues.

Judge Harvey recommended that the Committee delay full discussion of the issue raised in the letter until it receives the MJAG comprehensive recommendation. He had seen a draft of it, and it is similar to the request that this Committee considered five years ago from Judge Barksdale. The Committee considered Judge Barksdale's suggestion and decided not to send it to

a subcommittee, in part because there was concern that the issues just didn't come up that frequently. Judge Barksdale is working with the MJAG to make it clear that the concerns that she raised are concerns of magistrate judges more broadly. They are making efforts to collect information and data to address the question whether these sorts of situations arise with sufficient frequency to gear up the rules amendment machinery. Judge Barksdale expected to have a proposal including that data in the next few months. MJAG hopes to persuade this Committee that the issues are of concern to many magistrate judges, and the confusion Rule 40 causes comes up with sufficient frequency that it merits our further consideration.

Judge Dever and Professor Beale thanked Judge Harvey for the additional work that he had done. He contacted many people and asked his law clerk for additional research, resulting in a nice packet of material. Professor Beale expressed her gratitude in this case and in the many other cases in which Committee members have done a tremendous service developing information. For example, Ms. Recker had identified and recruited several specialists in different areas to talk to the Rule 17 Subcommittee.

Professor Beale explained that the fact that the Committee has received a similar proposal before does not necessarily determine what we should do when it receives a new proposal. We are always trying to decide if a rules suggestion is just a one off. If one judge says, "I didn't know quite what to do on this issue," and we cannot determine whether anybody else has had the same problem, that is not a good enough reason to gear up the rulemaking process. But if things continue to bubble around and we see more cases, even if the issue is being correctly resolved, we may wish to reconsider taking an issue up. The magistrate judges with whom Judge Harvey was in contact generally agreed Judge Bolitho had resolved the issue correctly, but they also said that the Rule is not clear and that figuring out the proper procedure and standard was more difficult than it should be. If many courts must resolve those issues, that might be sufficient to warrant taking the issues up, even though the courts are muddling along to the correct answers. We will have more information at the November meeting and perhaps more sponsors other than one or two judges who think that we that we ought to do something. There is respect for every judge that sends in a suggestion. But the Committee does not have the resources to gear up the rules process to revise every rule that could be tweaked to be a little clearer.

Judge Dever concluded that we anticipate a proposal from the MJAG, which will incorporate part of what Judge Bolitho has said. We will also have a Reporter's memo addressing the history. We will want to understand whether we have already addressed either the same issue, or something slightly different, and whether there is a bigger problem than we thought. We will also consider the details any proposal submitted by MJAG. Hearing no disagreement with Judge Harvey's suggestion, Judge Dever said the Committee would follow his advice. Judge Dever wrapped up discussion of this issue with renewed thanks to Judge Harvey for his terrific work on the last minute request for more information.

Unified Bar Admission

Judge Dever then recognized Professor Struve to provide an oral report on the proposal for unified bar admission.

Professor Struve explained that she was speaking as one of two reporters (along with Professor Andrew Bradt) to the Standing Committee's Unified Bar Joint Subcommittee that is calling itself the Attorney Admissions Joint Subcommittee. The Joint Subcommittee is chaired by Judge Oetken, and it includes Judge Birotte and Ms. Recker from the Criminal Rules Committee as well as members from the Bankruptcy and Civil Rules Committees. The Joint Subcommittee is in the information-gathering stage. The proposal that touched off the formation of the Joint Subcommittee grew out of the view that the variations in the bar admission requirements among the 94 federal districts were both burdensome and not justified. For example, several districts require an applicant to be admitted to the bar of the state where the court is located. This poses a particular barrier to entry for those who seeking admission to a District Court bar in California, Florida, and Delaware, because those states do not allow experienced practitioners to waive into the state bar. Instead, they must take the state's bar exam. This is very time consuming and expensive for lawyers with a national practice who are seeking to practice in a districts around the country. Although pro hoc vice admission is an option, the availability of pro hoc vice admission varies across the districts, and it can be expensive, with fees as high as $500.00. The original proposal suggested creating a national federal District Court bar, but the Joint Subcommittee lacked enthusiasm for this and the other ambitious suggestions, and the proposal garnered no support when it was reported to the Standing Committee in January.

The Joint Subcommittee is considering some possible pared-back proposals. One might be a national rule that would prohibit district courts from having local rules that require admission to the bar of that state as a condition of admission to the district court. This option was presented to other rules committees at their spring meetings. Some judges on the Civil Rules Committee expressed strong views that this would be a bad idea. Five members of the Standing Committee, who agreed that there is an issue here that should be addressed, offered some additional important questions for us to look into. One member pointed out, for instance, that military spouses who are lawyers need to practice in various districts as they move around the country, and they find these fees and other impediments to be particularly burdensome. So, Professor Struve commented, there is support for continuing, but also a recognition that there are federalism issues at play, as well as issues about the quality of practice before the District Court, about protecting clients and ensuring that the district courts have the tools they need in order to maintain disciplinary standards. The Joint Subcommittee has been discussing how districts handle the question of discipline of those admitted to practice before their court.

Professor Struve said that one current rule – Appellate Rule 46 – is arguably analogous, though practice in the courts of appeals is considerably simpler than practice before the district courts. Rule 46 is much more permissive and open to admission of those from other jurisdictions. The Joint Subcommittee would investigate further the experience in the circuits, with the help of Ms. Dwyer, the Ninth Circuit clerk, and Dr. Reagan from the FJC.

Professor Coquillette explained some of the relevant history. When he was reporter, at the urging of the Department of Justice and Deputy Attorney General Jamie Gorelick, the Rules Committees tried to establish uniform rules of attorney conduct in all the federal courts. The idea was that state rules govern when you're in the state court, but in the federal courts there would be

uniform standards at least as to key rules of interest to the Department, which practiced in all the states. He characterized the project as the charge of the Light Brigade in Rulemaking. Every local bar association in the country was against the proposal. He also commented that the requirement of retaining local counsel either by rule or by practice at $500.00 is a real financial barrier that the Committee should consider.

Judge Dever thanked Professors Struve and Coquillette, commenting that this was important history and the Committee was fortunate to have Professor Coquillette's wisdom on the history of that project and also on professional responsibility questions more generally.

Professor Struve added that even as to the more modest proposals, there is a question about whether they fit comfortably within the rulemaking authority under the Rules Enabling Act. Mr. Hawari had assisted with research on 28 U.S.C. § 1654, which says in all courts of the United States, the parties may plead and conduct their own cases personally or by counsel as by the rules as such courts, respectively, are permitted to manage and conduct causes therein. And so we're pondering the question of that statute and its relation to the question of local control over attorney admission.

Mr. Wroblewski asked Professor Struve how the U.S. Supreme Court handles disbarments. They allow anybody who is a member of any bar for three years to be a member of the Supreme Court bar. Does the Supreme Court have rules about disbarring or dealing with attorneys who have discipline problems?

Professor Struve responded that's a great thing to look at. These analogies to the other levels of courts are very useful. Her other comment on the question of rulemaking authority was to note that Appellate Rule 46 had been adopted.

Professor Coquillette recommended a leading case *In re Ruffalo*,[2] which held that if the lawyer involved is also a member of the federal bar, the federal judge is not required to follow the discipline of the state court. In *Ruffalo*, the trial judge did not do so, and his ruling was upheld by the Supreme Court. Federal judges have their own authority and control over bar discipline.

FJC Research Projects

Judge Dever turned to the FJC research project report at page 142 of the agenda book and recognized Dr. Tim Reagan.

Dr. Reagan explained the FJC does empirical research for various Judicial Conference committees, including the Rules Committees, and it had decided to resume reporting to the Rules Committees so that all the members will have a good sense of the FJC's skills and the kinds of products it produces. Dr. Reagan is the liaison to the Standing Committee and Laurel Hooper is the liaison to this Committee from the Research Division. Members of the Research Division attend Rules Committee, subcommittee, and working group meetings so that they can get a good foundation for our research. The FJC's goal is to give the Committee a good information

[2] In re Ruffalo, 390 U.S. 544 (1968).

foundation for its policymaking. What it brings to the table is their labor, methodological expertise, and objectivity. They enjoy working for the committees.

Professor Beale asked for more information about the complex criminal litigation website. Dr. Reagan responded that several years ago the FJC started developing curated websites on special topics, sometimes called special topic websites. A website on complex criminal litigation is in development. Ms. Hooper was working on that, and she regretted not being able to attend the meeting. He agreed to provide more information as the website develops.

Professor King asked if there has been any progress on determining whether the results of the remote public access to court proceedings research for CACM can be shared with the Rule 53 Subcommittee. Dr. Reagan said he would look into that.

Hearing no other questions for Dr. Reagan, Judge Dever thanked him for his report and for all the work that he and the FJC staff do on behalf of the committees as part of the rule making process.

Concluding Remarks

Judge Dever announced the next meeting would be November 7, 2024, at a place to be determined (which will not be Washington, D.C.). He thanked Mr. Byron, Ms. Bruff, Ms. Cox, Ms. Johnson, and the entire team at the AO for all of their great work in getting the meeting organized and supporting it. He recognized that takes a lot of work.

Since it was the last time they would all be together as a group, he thanked Ms. Recker and Ms. Robinson (noting Judge Garcia had been unable to attend this, his last meeting), and asked if either of them wanted to say anything.

Ms. Recker noted she had been coming to Rules Committee meetings for ten years, first as an observer and then the last six as a member. She said it had been an incredible experience, and she had learned a great deal. She had seen the benefits of the rulemaking process play out in her own practice, especially with respect to Rule 16 as it relates to experts. In her personal experience, the rule change immeasurably improved the quality of evidence presented at trial. As for Rule 62, she hoped never to encounter that rule again, because it would mean a national catastrophe. Work on that rule had been a defining experience for her during the pandemic, and she was very grateful for having had the opportunity to serve.

Ms. Robinson said it had been an incredible privilege to serve on this Committee and watch the process in which these rules that are so important to the criminal practice of law are developed, implemented, and changed. She called it a unique opportunity. She had enjoyed the ability to share her experience with others who use the rules every day, but seldom get involved the Rules Enabling Act process. Ms. Robinson said she had attempted to spread the word of how practitioners can get involved and have input in the rules process. Noting she could not acknowledge everyone in the room, she said she'd been very impressed with the leadership of Judges Kethledge and Dever, as well as the intellect and the work put in by Professor Beale and Professor King. She emphasized the thought and the time and the effort that goes into making

these important rules that affect every defendant who might come before a court. It is, she said, so important. She was thankful for the experience.

After thanking everyone again, Judge Dever adjourned the meeting.