ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
September 24, 2019
Philadelphia, PA

I. Attendance and preliminary matters

Judge Donald W. Molloy, Chair
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
Judge Michael J. Garcia
James N. Hatten, Esq. (by telephone)
Judge Denise Page Hood
Judge Lewis A. Kaplan
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Bruce McGiverin
Catherine M. Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Consultant, Standing Committee (by telephone)

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Chief Counsel, Rules Committee Staff
Julie Wilson, Esq., Counsel, Rules Committee Staff
Ahmad Al Dajani, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

Judge Molloy called the meeting to order. After thanking the Constitution Center staff for hosting, he recognized Professor Kerr, whose term was ending, and thanked him for his service on the Committee. He also noted his own term was ending and that Judge Ray Kethledge would be taking over in October as Chair.

Turning to the minutes of the last meeting, Judge Molloy asked if there were any changes. Professor Beale stated that the inadvertent omission of a member's name would be

corrected. Judge Molloy asked for clarification of a quote, which was confirmed as accurate. A motion to approve the minutes was unanimously approved.

Ms. Womeldorf reported that Judge Molloy had provided a report of the Criminal Rules Committee's actions at the Standing Committee. She noted that the report to the Judicial Conference also included information about the committee's ongoing work. Regarding new Rule 16.1 and amendments to Rules 5 of the 2254 and 2255 Rules, she said that absent action by Congress, which they do not expect, the amendments should become law in December. The Department of Justice (DOJ) commented that joint training is being conducted with defenders on Rule 16.1.

Ms. Wilson drew attention to the chart in the agenda book showing the pending bills that might affect the Criminal Rules Committee's work, or be of interest to committee members. A bill regarding electronic court records including eliminating costs for PACER had been referred to the Judiciary Committee, and the Rules Committee Staff had been preparing for an upcoming congressional hearing regarding PACER, cameras in the courtroom, and sealed filings. Ms. Womeldorf noted that there was no specific legislation attached to this hearing, except the existing bills on PACER, one to make it free, another to extend it to state courts so they could get their filings on line as well. Judge Fleissig, chair of the Committee on Court Administration and Case Management (the CACM Committee), will address PACER as well as cameras in the courtroom, although the legislative focus on the latter may be the Supreme Court. On the sealing issue, Judge Story will be testifying. The interest appears to be sealing motions in civil cases, not getting into the issues of concern to the Task Force on Protecting Cooperators.

The committee received an update on the Task Force on Protecting Cooperators. Judge St. Eve was meeting with the new Deputy AG to help move the Bureau of Prisons (BOP) along. One problem for the BOP is providing prisoners access to their own sentencing-related material in a secure area with no copies permitted out into the population. Presently, the BOP neither has the space nor the money to create all of these secure areas, so they are exploring with the CACM Committee's staff using kiosks where these materials can be viewed. Mr. Wroblewski reported that most of the many BOP recommendations have been completed or are underway. The big-ticket item was ensuring secure areas for viewing, which they estimated would cost 500 million dollars to build. The BOP would prefer to use electronic kiosks and is investigating that option.

Ms. Womeldorf added that the CACM Committee is working on implementation of the CM/ECF proposal, trying to coordinate with "Next Gen." It is very complicated.

II. Rule 16

Judge Molloy opened the discussion of Rule 16. He noted that this was his eleventh year with the committee, and Rule 16 has been on the agenda for at least eight of those years.

Judge Kethledge, chair of the Rule 16 Subcommittee, reviewed the subcommittee's work on the amendments. At the miniconference we identified two problems: vagueness in what is disclosed and the lack of a clear deadline. At the spring committee meeting (after the

miniconference), there was a consensus that there ought to be some sort of timing requirement. But opinions differed as to whether it should be a numerical standard (*e.g.*, "45 days before trial") or a functional rule (*e.g.*, "reasonably in advance in order to allow adequate preparation for trial"). The committee also agreed that the rule ought to require a complete statement of the expert's opinions, the expert's qualifications, and a list of the expert's testimony for the last four years. And we agreed that the expert should sign the disclosure, but the government did not agree that the expert must prepare it.

The reporters prepared an excellent draft for the subcommittee, which discussed the draft in July and then discussed a revised draft in August. After some further revisions, the subcommittee unanimously approved the proposal that is before the committee now, in the agenda book.

Judge Kethledge summarized the issues the subcommittee had discussed.

Summary. The first issue was what to call this disclosure. The current rule calls it a "summary," but the subcommittee thought we need a break from that word. Some liked the word "report" but to others that suggested a lot of production, binders, and shiny covers. In the end, the subcommittee restructured the sentence to eliminate the word summary and not to try to replace it with another label that might be divisive. Instead, the proposal simply says each party must "disclose" the following information, and lets those substantive requirements speak for themselves. The disclosure must be provided in writing.

Time for disclosure. The subcommittee chose a functional standard: each party should get the information early enough to have adequate time to prepare for trial, which is the core goal of this project. This is not a great issue for a national one-size-fits-all approach. Different districts have very different caseloads and individual cases are different. The person with the most information to decide when the disclosure should be made in a particular case is the district judge in that case. In addition to the functional standard, the subcommittee added the requirement that the district court or a local rule MUST set a deadline. Presumably this will become part of the Rule 16.1 process. The parties will probably talk about it first when they meet and confer, then they will probably go to the court with whatever they worked out. The rule is unequivocal: the court must impose a deadline.

Complete statement. The rule requires "a complete statement" of "all opinions." That is not redundant, because you could have an incomplete statement of all opinions or a complete statement of some.

Signature. The expert must sign the disclosure. This provides a basis for impeachment of the expert should the expert get crosswise with the disclosure; it is less concerned with providing information to prepare for trial. The expert has to "approve" and "sign" the disclosure. But the expert does not have to "prepare" it, which would be very costly for the party presenting the expert. Requiring the expert to approve and sign gives counsel a basis for cross examination if an expert is veering from the scope of disclosure.

Reciprocity. Judge Kethledge said there has been a concern from the defense side that they want to get these disclosures from the government but to some extent they do not want to give them to the government. There has been a sense that the defense should only have to provide reports for experts who would be responsive to an expert for whom the government has made a disclosure. But if the defense has an expert on an altogether different subject as to which the government has not made a disclosure, then they should not have to provide it.

But, Judge Kethledge emphasized, that is not the way discovery works under the current rule, which provides for full reciprocity. If the defense asks for expert reports, the government has to give all their experts' information. And then, if the government asks, the defense has to give over all of their expert reports.

The subcommittee chose not to depart from the current rule. Amending Rule 16 is difficult. Adding an unprecedented change in reciprocity would make the project radically harder. In the absence of a very strong showing of the need to do that now, the subcommittee decided not to pursue any change in reciprocity.

Historical context. There have been several attempts to amend Rule 16 over the past many years. Judge Kethledge urged the committee to be mindful it was walking past a graveyard of failed Rule 16 amendments. Both sides had to make compromises in this process. The defense would have preferred less reciprocity, and wanted the word "report." They did not get those. The government was fine with the status quo, and did not want any changes in Rule 16; however, it was open minded, heard the problems with the current rule, and has tried to find ways to fix them. The government has worked in good faith, very constructively ever since the miniconference. They made compromises. For example, they did not want a "complete statement" of all opinions.

Judge Kethledge concluded that there have been many failed attempts to amend Rule 16, and those failures happen when the committee is divided. Each member of this committee will have to make a choice. The question is not whether this is a perfect rule and whether you got everything you want. The question, in this very difficult area, is whether the proposal is better than the current rule. That is the choice, and he expressed hope that the committee could be united. This would be a significant improvement for discovery in criminal cases. He urged everyone to look at the big picture and ask if the proposal is a net improvement.

Judge Molloy agreed that DOJ has been remarkably open minded in dealing with proposed changes and said he was encouraged.

The reporters led the committee through the proposed amendment section by section, working off the redlined version.

Eliminating the term "summary." Professor Beale explained the subcommittee eliminated the word "summary," which the subcommittee thought had been at least partially responsible for the very cursory information sometimes provided about experts. The specific requirements for the content to be disclosed are listed in the proposed amendment. The current structure of the

rule is not changed, nor is the requirement that the government provide information about any expert testimony the government intends to present during its case-in-chief. It is triggered by a defense request; a parallel provision requires disclosure where the defendant's mental condition is in issue.

Cross references. The reporters noted that there is one correction to the version in the agenda book: the cross reference to romanette (ii) is wrong. The reporters would work with the style consultants to make sure all cross references are correct. In response to a comment by Judge Campbell, the reporters noted that the use of "subparagraph" or "subsection" would be worked out with the style consultants as well.

One rule for all experts. Mr. Wroblewski thanked Judge Kethledge for his leadership. He noted this effort started with concerns about forensic experts. The miniconference revealed that to the extent that there are problems with this rule, it really does not have anything to do with forensic experts. The two major issues that the committee wants to address are timing and completeness. Mostly, the DOJ does not think there is a problem, but it is prepared to do what it can to come to a resolution on those particular issues. The proposal does eliminate the word "summary." In contrast, the civil rule uses the word summary, and it bifurcates discovery between two types of experts. Mr. Wroblewski noted that the proposal does not bifurcate, and instead tries in one rule to cover both. The civil rule talks about experts retained by a party. For them it requires a signed report and it includes variety of additional requirements. But for other experts the civil rule requires only a "summary," and it recognizes that those experts are not under the control of either of the litigants. There are a huge variety of experts brought in on criminal cases by the prosecutor or by defendant. Some are retained, some are not. Some are friendly, some are hostile. We should recognize that we are trying to do something very different than the civil rule.

Professor Beale stated that the rule currently takes this approach in having one rule for all types of experts, and the draft does not change that approach going forward.

Time for disclosure. Moving to lines 21-25, Judge Kethledge noted this was one of the crucial compromises. The defense bar really wanted a set time for disclosure. He recalled Judge Campbell's memorable question at the miniconference: "Where are the judges in these cases where someone receives the disclosure on Friday before a Monday trial, or the night before trial?" As the defense participants explained, there is no relief available to them in these types of situations because disclosures made so close to trial do not violate the text of the current rule.

The subcommittee agreed there was a need for a rule that can be enforced. It tried to draft a rule specifying times for disclosure for both prosecution and defense, but could not come up with something that would fit every case and comply with the Speedy Trial Act. After the government persuaded the subcommittee to adopt a more flexible standard, the subcommittee's goal was to drive home the notion that in each case there has to be a deadline. The court or local rule could set a default, and the parties could always come in and ask for a change. Or the date can be set and adjusted, case by case. That is why the proposal says that the court or a local rule

must set a date. And the rule states the standard for when that date must be set: sufficiently ahead of trial for the party to prepare for trial. This is a functional standard. As the committee note states, it includes taking account of the need for a CJA lawyer to get approval to hire their own expert. The timing will have to be adjusted based on the complexity of the case and the type of expert involved.

Judge Molloy reminded the committee that Judge Campbell had drawn its attention to similar language in the proposed amendment to Rule 404(b).

Judge Campbell said that judges who manage cases are used to doing this all the time in civil cases. He expected that once this rule is in place those judges will start bringing their civil experience into criminal cases when they are setting schedules. Many judges will not only set a deadline for disclosure in a civil case, but they will also say that the disclosure must be full and complete or set a date for supplementation. He asked whether the proposed rule would affect those practices. Does it mean a judge will set an initial disclosure date and then a later supplementation deadline? Or that there is no supplementation, so get the work done now?

Professor King noted there is a provision in the proposed amendment for supplementation to be made in accordance with the continuing duty to disclose under subsection (c). Rule 16(c) now requires supplementation even into trial. So an attempt to cut off the duty to supplement under a court order or local rule would conflict with existing Rule 16(c), as well as the proposed amendment, which incorporates Rule 16(c). Thus, there could be some tension between the new rule and supplementation practices in civil cases.

No defense request to set a time for disclosure. A member asked whether the court's duty to set the time, like the government's duty to disclose, is conditioned upon the defendant's request. Judge Kethledge responded that the rule as written is a mandate: the court must set a time. But perhaps the court could take into account whether the defendant had asked.

Professor Beale asked how often defense attorneys do not ask for disclosure of the government's experts. The member said he had seen it in practice, and usually it is negligence on the part of the defense attorney. Another member reported that in her district the defense always asks. But she had asked colleagues in other districts and was surprised to learn how common it was in other districts not to ask. The member (who said she had been through the 2255 process) could not imagine failing to ask, which opens a defense lawyer up to a lot of risk down the road.

Professor King was not sure that the rule as proposed requires the court to set a date unless there is a duty to disclose. She noted that the use of the word "the" may make the court's duty conditional, because it refers back to (iii), the duty to disclose. Lines 6 -7 begin "at the defendant's request," and then the rest of that follows, "the disclosure" is referring to the disclosure required under (iii).

A member stated her view that the obligation of the parties and the obligations of the court are separate. The court could say, for example, disclose any expert 60 days before trial. Then, as the parties go along, suddenly one decides it needs an expert, and it knows disclosure

must be made sixty days before trial absent an extension from the court. The court can set appropriate dates without knowing exactly which experts will be required. The member also noted that she had started out this process really wanting a stated date, such as forty-five days before trial. But she talked with many defense colleagues, and they decided this flexible standard was a good idea. In many cases, the government has had months or years of preparation, and with reciprocal discovery the defense needs to have that flexibility—not set times—because it may be trying to play catch up. If there were firm deadlines, the defense might be the ones who would be hamstrung. She noted that many of her colleagues eventually came around to this flexible idea.

Method of announcing the deadline: by court, local rule, standing orders, practices. A member questioned the phrasing of the proposed rule. It seems odd to say "court *or* local rule," because a local rule is the court speaking. So it seems odd to distinguish the two. He preferred to refer only to "the court," omitting "or local rule," and then just mention local rules in the committee note. The member also asked if the proposed language would affect existing individual practices, which many judges in his district have adopted.

Professor Beale explained that the language was modeled on Rule 5, which says the judge must set a time, unless the time is set by local rule, and that under Rule 1, "court means a federal judge …" Professor King added that the subcommittee meant to include both district judges and magistrate judges.

A discussion of options for rephrasing this language followed. Judge Campbell suggested it could say "the court, by order or local rule, …" Judge Kethledge preferred the mandatory nature of the existing proposed language, and agreed that if a local rule is something that only the court does, referring to both would be redundant. The reporters noted that the existing phrase conveyed that either the judge could issue an order or there may be a local rule and that the subcommittee thought it would be a good idea for the text to convey the idea that local rules would work. A member noted that there are individual rules of practice that are not quite standing orders, but the parties must comply with them, so that taking out the reference to "local rule" would provide more flexibility. Judge Kethledge added that the note could talk about the different means for the court to do that.

Judge Campbell said that if it is important to flag the idea of local rules then it should be in the text, because so few people read the committee note.

Two other members endorsed the suggestion that the text read "the court must, by order or local rule," one stating it would encompass individual judges' personal standing orders, an order on the judge's webpage, and the other agreeing it is important for people who do not read the committee notes. After Professor Beale noted that Civil Rule 26 has "by order or local rule, the court may also" and that to preserve the mandate, this rule could read "by order or local rule, the court must," a motion was made and seconded to change line 21 on p. 128 and the parallel provision on the defense side to read "By order or local rule, the court must."

Discussing the motion, Judge Kethledge wondered if putting "by order or local rule" as an introductory clause might cause confusion about whether that introductory clause is a condition of the mandate. Placing this phrase between "court" and "must" will be clear: the court must do it every time. But if you begin the sentence with that phrase, someone somewhere is going to think we do not have a local rule that says we have to do that, so we are cool. Although he did not suggest that would be a reasonable reading, he recalled Judge Campbell's advice that we have to write rules for the weaker players.

Professor Beale stated she was not aware that the language has caused problems under the civil rule, but that the style consultants may also have a preference. If it were really a matter of style, their preference would govern. Professor King agreed she liked placing the phrase after "the court" and not in the beginning.

Professor Beale suggested this could be a friendly amendment to the motion, so that the motion would be "the court, by order or local rule, must . . . ." The friendly amendment was accepted, and the motion passed.

Department of Justice concerns. After thanking Judge Kethledge for his leadership, Mr. Goldsmith made some preliminary comments before turning to two issues of concern to the DOJ. He noted there were many leadership changes in the DOJ, and as a result it had been unable to come forward with the type of clear approach and clear recommendations that it wanted to provide. He noted that the DOJ's leadership had been incredibly accommodating. It had been a high wire act, where Mr. Wroblewski participated, but has had to say: "this is not our formal-formal position." Mr. Goldsmith appreciated that in the effort to reach compromise you adjust one thing and new issues arise. But Judge Kethledge had done a masterful job hitting those sweet spots when the DOJ had a different view of where things should end up.

The court's action setting the deadlines. Mr. Goldsmith said that the DOJ preferred saying the court "should" set a deadline, instead of "must"—though he recognized that ship may have sailed. But he had some concerns with "must" and no qualifiers. He suggested adding something like, "must, absent good cause." At the miniconference, he noted, Judge Campbell—one of the handful of people that have straddled both Criminal and Evidence Rules Committees—suggested that the 404(b) solution was arguably the perfect solution. It was an aha moment. That flexibility helps both prosecution and defense. But one part of 404(b) that is missing from this formulation: "unless the court excuses for good cause the lack of prior notice." He recognized that in the 404(b) context it is the government that would need to establish good cause. Here, it would be the court setting a deadline and the court would not need to give itself a rule on good cause. But a good cause reference is needed because of the one-size-fits-all issue. There are going to be a lot of reactive cases, cases where things are still in play, where maybe there is an arrest, or an indictment, and things are still being formulated, maybe the serology expert is engaged, or perhaps additional forensic works needs to be done, and the concern is that the court may feel compelled to set a time at that point when not every fact is available. This may be forcing deadlines not only for the prosecution but maybe for the defense. The DOJ's

suggestion is to add a qualifier there to signal to the court and to the parties that if there is a legitimate reason to delay setting that time frame, the court should have that option.

Judge Kethledge responded that the proposed rule does not set any deadline for the court to set a deadline. It just says the court must set a deadline. Nor does it say, within some time period of the meet and confer under Rule 16.1 that the court must do this. If the situation is fluid regarding whether there are going to be experts or different experts, there is nothing here that would prevent the court from waiting to set the deadline. But what it does make clear is that the court must set a deadline. So this already has all the flexibility the court would want as to when it may set the deadlines.

Professor Beale agreed. She noted the absence of any language that says for example, ten days after arraignment, the judge must set a date. So if it is clear that the parties are talking under 16.1, and things are fluid, the court can wait to set that deadline until things are clearer. If the deadline is set and it does not work, the court can revise it.

Professor Struve suggested that Rule 45(b) might be of some use here. That is the extension of time provision that provides when an act must or may be done within a specified period. The court on its own may extend the time or may do so on a party's motion. That would provide flexibility.

Professor King responded that there is an even more specific provision that provides that flexibility right in Rule 16. Rule 16(d) says that the court may for good cause restrict or defer discovery or inspection or grant other appropriate relief. This was part of the subcommittee's deliberations about the "must." If there is a need to modify the timetable that has been set, there is an existing mechanism for doing that already in Rule 16. Unlike Rule 404(b), which sets a disclosure time with no overarching instruction about how to change disclosure time, this rule does have that instruction.

Addition to the committee note concerning timing of the court's action setting the deadlines. Mr. Goldsmith noted that there may be an inference that the court must act at a particular time, and he expressed support for adding something to the committee note making it clear that is not the case. Otherwise some district may interpret the new rule as saying this has to happen at the initial appearance, or a certain number of days later.

The committee then discussed what could be done to respond to this concern. Judge Kethledge suggested adding: "this provision leaves the district court discretion as to when the deadlines are entered." Professor King offered that a phrase like that—or "and leaves to the court when to set that deadline"—could be added at the end of the sentence that reads "if that time is not already set by local rule or standing order."

Judge Campbell suggested that even more explanation for judges would be beneficial after the language that says the rule leaves to the court when to set the deadline. The next sentence refers to Rule 16.1, which occurs fourteen days after the arraignment. The parties are going to be coming to the judge within a month of arraignment saying here is our proposed

schedule, and it would be natural under this new rule for the judge to say, OK, I am going to set a deadline for experts. It might be helpful to add language explaining that when the need for experts is unclear the judge may wish to defer, so the judge does not feel compelled to set a deadline thirty days after the arraignment. Judge Campbell also suggested adding to the committee note that the disclosure obligation of the government is dependent upon the defendant's request. This would help avoid judges saying, as a blanket statement, the government shall disclose its experts by such a date, which the parties may view as a command, even if the defendant has not made a request.

Judge Campbell suggested limiting the language to complex cases if the Speedy Trial Act is a concern, noting his experience is that cases never go to trial in seventy days. Most are six or seven months, and the fastest is three or four months. If a case is really in flux, and unclear where it is going, but the party has been arraigned, we should signal to the judge, "You don't have to set a date on experts yet, just because this rule says 'must.' In a complex case you might want to defer that so you'd have a better sense of where that case is going."

Judge Kethledge suggested we might say something like "the court can exercise its discretion as to when to enter the order depending upon the complexity of the case and whether it is clear that the parties are going to have experts." The committee note could recite a few things that might affect when the order will be entered, but also make it clear the court on the timing. Judge Kaplan wanted to add "and to alter them," stating it was worth at least in the committee note alluding to the fact, that once set, the date is not cast forever in granite and can be extended. He noted this was Professor Struve's point, and it is worth an emphasis.

Speaking against adding to the committee note language on modifying times set or deferring setting the times, one member was concerned that if it is this flexible, then the defendant would have to choose between the right to a speedy trial and the right to have a firm date for expert disclosures. If the government believes it is a complex case and it cannot get the expert report prepared and to the defense within 20-25 days, it should ask for a continuance. Because the default is trial, the DOJ should be able to prepare the report in time for the defense to meet it. If the DOJ cannot do so, then the burden should be on it to establish to the court why not. The member argued that adding language that gives the court the discretion to delay necessarily pushes back the time for the defense to prepare. Functionally that will lead to going beyond the speedy trial time frame, when the defendant may actually want to push the government toward trial and be ready when they indict the case.

Another member noted that in his experience every single defendant waives speedy trial, and the judge sets whatever schedule is appropriate. The genius of this effort is that one size does not fit all in this country.

The committee discussed the following possible language to add to the committee note on p. 143, after the sentence ending "or standing order":

and leaves to the court when to enter the order setting the deadline. The court also retains discretion to alter the deadlines to ensure adequate trial preparation under Rule 16 and the Speedy Trial Act.

A member asked if the reference to the Speedy Trial Act was needed. Professor King responded that the reference noted the possibility that the court would grant a continuance under the Speedy Trial Act, after finding it is in the interests of justice.

All but one member agreed the language should be added to the committee note. The dissenting member preferred the rule and the committee note as submitted by the subcommittee, and was concerned that what should be an exception would become a default. Essentially this is saying the court must set a deadline, but then it is saying when the court sets a deadline it is just this fluid state.

The contents of the disclosure; committee note language distinguishing Civil Rule 26. The provision on the contents of the disclosure, Professor Beale explained, was drawn largely from Civil Rule 26. The proposed amendment requires disclosure of a "complete statement" of all the expert opinions the government will present in its case. It retains the language from the existing rule about the bases and reasons for the opinions and qualifications, but adds a requirement for publications over the past ten years, and a list of past cases where the expert provided trial or deposition testimony in the last four years.

Judge Campbell noted that "a complete statement of all opinions" is the same language that is in Rule 26, but in this proposal it is followed by slightly different language that says "that the government will elicit," whereas Rule 26 says "that the witness will express." But if district or appellate judges learn that this amendment arose out of suggestions that the criminal rule be more similar to the civil rule, and they see exactly the same phrase ("a complete statement of all opinions"), they may conclude that it means exactly the same thing in Criminal Rule 16 as it means in Civil Rule 26.

The committee note from the 1993 amendment to Civil Rule 26 says that the witness "must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor." Many trial judges take that to mean that what has to be in the expert report is what the expert is going say on direct examination. Their case management orders say we are going to hold you to that. You cannot go beyond this report on direct. Judge Campbell said that when he is in trial, if a party thinks that what an expert is being asked to say is not in the report they can object, and he turns to the other side and says "show me where it is in the report." If they cannot point it out to him, he sustains the objection. That is how he avoids an endless problem of additional undisclosed opinions. If "a complete statement of all opinions" is read the same way in Rule 16, there will be judges saying that experts on either side cannot give any testimony in federal court that is not in the disclosure that was made to the opposing side. And that may be fine. It would certainly solve the problem of surprise. But he wanted to flag the point that this approach might be brought over from the civil side because of the identical language we are using here. Do the disclosures

control what the witness can say on direct examination? If so, that was fine, he just wanted the committee to be aware that the civil view which grew out of the committee note to Rule 26 may play a role in interpreting this rule. His civil case management order states your expert cannot say anything that is not in that expert report. In fact, in the committee note to Rule 26, the Civil Rules Committee said that part of the intent was to eliminate the need for expert depositions, because you will know everything the expert is going to say from the report. It is intended to be a very comprehensive disclosure on the civil side.

Judge Campbell described the evolution of Civil Rule 26. In 1993, the Civil Rules Committee adopted this requirement including the language from the committee note that he previously read, which applied only to retained experts and employees of a party whose job it is to give testimony (essentially in-house experts). Civil Rule 26 did not require anything for other experts. In 2010, the Civil Rules Committee added a second requirement for non-retained experts because there were lots of people giving Rule 702 testimony in civil cases about whom there was never any formal disclosure. There were depositions, but no formal disclosure. We added what is now Rule 26(a)(2)(C), which is not a report from the expert. It is a report from the lawyer and it requires a summary of the opinions and the basis for them. The idea was then you put the other side on notice so that they could depose the people who are going to be giving expert testimony but who are not controlled by a party. You cannot proscribe exactly what they are going to say, but you should still let the other side know what is intended, what you are going to elicit. So there are those two distinct categories. Judge Campbell did not intend to upset this careful balance that has been struck for this criminal rule. But he did think that since we are using the exact language from the first category, the report requirement of a complete statement of the opinions, that courts are going to look to that part of Rule 26 and say aha, this means everything the witness is going to say from the witness stand needs to be in the report. And because we have only one standard in this rule, that will apply to the police officer or the treating physician or whoever gets called, over whom the party does not have control in a criminal case.

Judge Molloy responded that the whole point of amending this rule is to level the playing field. He too followed the practice Judge Campbell described in civil cases. If there is an objection he looks at the report. Even if it is not literally there, if it is fairly there, if fair inferences can be drawn, then he would overrule the objection. If it is not fairly within the disclosure, then he would sustain it.

Judge Kethledge said the rule is saying you have to disclose the opinions you are going to elicit. This will define the scope of direct.

Mr. Wroblewski reminded the committee that the DOJ raised this concern at the earlier stages. The discussion is troubling because it suggests that we were not able to address this. We were concerned number one about the word "report" and again how that could be interpreted in relation to the requirements of Civil Rule 26. We tried to address that by getting rid of the word report and by adding the qualifiers "government's case-in-chief." The other concern goes to the point that we are putting all of these expert witnesses in the same basket. The civil rule says if this is your retained witness, you hired this witness, and you have to have a long report to lay it

all out. The concern we tried to address when getting rid of the word "report" was that there are going to be many experts that are not retained by the government, who may be hostile to the government, or may be hostile to the defense when the defense calls them. We do not know precisely what they are going to say. He understood you want as much disclosure as possible so the other side can prepare. But the idea that the parties are going to control these witnesses, and specify with precision what they are going to say, is not an accurate perspective for all witnesses. For some witnesses, yes. But not all witnesses. So it is a bit troubling.

A member responded by asking how often someone in the DOJ would call a witness who they did not interview. The member could understand the lack of control over a treating physician. But the member thought it would be a pretty rare situation where the prosecutor would say, "we have no idea what this person is going to say but we are hopeful." Hope is not a litigation strategy. He agreed with Judge Campbell. People are going to look at the language that way. But the member emphasized the proposal addresses this with the language exempting a party from getting the expert's signature on the disclosure if the party was unable to do so because the witness was not under the party's control. So the AUSA would say this is the doctor, here is what I am going to examine him about, here is what I anticipate the testimony is going to be.

Mr. Wroblewski said in most cases the DOJ will be able to provide the required disclosure, but there will be cases where not only will we not have an opportunity to interview an expert witness, but the witness may be hostile. Take a white-collar case where the prosecutor is calling an accountant working for the company that is either charged or whose executives have been charged. The accountant might not want to talk to the government at all. And the prosecution might want the accountant/expert to testify not only about the facts and about how they came up with ledger entries, but also about the meaning of the entries in the ledger. Those people may end up as experts. And yes, the DOJ is going to give notice as much as it can about what those experts will say. In the summary that we provide now, we are required to give as much information as we can. It is troubling if the word "complete" is going to be interpreted as the civil rule context. That will be a problem for some experts. Not all, but for some.

Mr. Goldsmith cautioned against a carve out that says retained employees are on one side and non-retained witnesses are on the other. He commented that federal prosecutors do not have the same certainty that they will be able to get some forensic analyst from FBI, DEA, ATF or state and local labs, and pin them down as you could with an employee in a civil case. The discussion has repeatedly referred to the retained employee v. hostile person. That is useful, he said, but only up to a point.

Judge Kethledge then observed that the Civil Rules Committee had their rule, and a committee note that said what it means, and we can have a committee note to the criminal rule that says what we want and what we think it means. We do not have the word "report." There is probably a consensus around the idea that we want the disclosure to provide fair notice to the other party of the opinions. Perhaps we ought to have in our committee note our own statement of what we think it means along those lines.

Judge Campbell agreed that it would be helpful to address this in the committee note, and that the committee might want to say the criminal rule is not intended to incorporate all aspects of the civil rule standard, and note the differences. If this is a disclosure from a lawyer, not a report written by a witness—which is what Civil Rule 26 requires—that may result in less precision. The intent is to give full and fair disclosure of all the opinions that the party intends to elicit, but not necessarily a verbatim transcript of the direct testimony or something to that effect. This would help keep judges from following Rule 26 precedents if they see nothing other than the exact language of Rule 26 in the text of Rule 16.

Judge Kethledge agreed that sounds like a wise approach. We do not want this proposal to become some sort of Trojan horse for making this some sort of de facto Rule 26 when we have made some careful distinctions.

A member suggested revising the text of the amendment to add after "a complete statement of all opinions that the government intends to elicit in its case in chief":

> or, in the event of an expert witness who is not retained or employed by the government, a statement of all opinions the government will attempt to elicit from the witness.

This would essentially carve out those witnesses for whom the government cannot guarantee that the opinions it thinks it is going to get are actually going to be given by the witness.

Another member expressed a preference for the complete statement language as is, and thought many of the concerns are tempered by the language that comes right after—"that the government will elicit"—which distinguishes it from the civil case. If the committee would want to go with what was just said, maybe a way to do that, is to say the government "intends" to elicit, which provides a sense that the government cannot guarantee that this is actually what will be said.

Eight additional members shared their preference for the current language in the text of the proposal. Of these, several thought the committee could clarify this concern in the committee note. Another thought that the new criminal rule will put the civil side of judges on notice that they need to pay attention to where the rule is different. A member noted that you have to get into corporate things, or sometimes medical issues, which are pretty rare, to have a hostile expert. Another member reminded the committee that the government has the grand jury, and could elicit these opinions in the grand jury. Judge Kethledge and Judge Molloy stated they were happy with the current text plus an addition to the committee note indicating the differences with the civil rule.

Note language regarding modification of requirement to disclose list of cases in which an expert testified. Turning to the remaining language in (iii) specifying what must be disclosed, Mr. Goldsmith said that the list of the expert's publications is something that the government should have an obligation to find out and disclose. Regarding the required list of testimony in the previous four years, he was appreciative that the committee note language was changed from "on rare occasions" to "on occasion." He had concerns, however, about the committee note language

concerning what the prosecution has to do in seeking an order modifying discovery. If somebody in a New Jersey state forensic lab is going to testify on narcotics or firearms, and is testifying virtually every week in Essex County, the line prosecutor's ability to get that information and update it accurately is not going to be as simple as it might seem. "On occasion," is not great, but to avoid that obligation the prosecutor has to seek an order. And that, he said, is more than is necessary.

Judge Kethledge responded that there is a strong consensus that this information should be provided. The only way to get you out of the rule is an order. Rule 16(d) already has this escape valve. Most experts themselves actually keep track of their testimony. It is just a list, not a transcript. Opposing counsel has to go off and find the transcripts. You have no obligation to do that. He was skeptical that this would be such a widespread problem that we need to change the default.

Mr. Goldsmith suggested that instead of a separate stand-alone order, perhaps the better procedural mechanism might be that when that the time for disclosure is set, the prosecution has the ability to say, it is calling two people from the local agency and getting all of the cases might be difficult, so that it is part and parcel of the setting of the underlying deadline.

Professor Beale responded that there is no limitation in (d) about when it is done, or that you have to wait or do it as a separate order. If you want to train your people to alert everybody at the beginning, there should not be any problem. And it should be part of what is coming to the judge under Rule 16.1.

Mr. Goldsmith suggested language to add to the committee note: "which may be part of the initial discussion of the court when the initial date is set." Judge Campbell offered alternative language, which Mr. Goldsmith accepted: "the party who wishes to call the expert may raise the issue at any scheduling conference or seek an order modifying expert discovery under Rule 16(d)." After some discussion of substituting "and" for "or," so that the default of establishing good cause under (d) is not modified, Judge Campbell suggested the following language: "In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying an order of discovery under Rule 16(d)."

A member asked whether instead of one statement about the discretion to delay the time, and another about this exception, it would be preferable to have just one reference to 16(d). With a single reference, everyone would know they can resort to 16(d) whether it be at the scheduling conference or a later motion if warranted, if you cannot get a list of prior testimony for a witness. There may be other parts of, for example, the signature, where you want to raise something under 16(d). Just one reference to 16(d) would be simpler.

Professor Beale noted that whether you want multiple references to Rule 16(d) depends upon how much you want to customize. If you really care about the list of prior testimony and you want to make sure you have made clear what is going to happen, talking specifically about when that can be raised allows anybody who has questions about it to find that right there. There is some utility in specifying this. The reporters noted that providing for modification of this

particular requirement regarding previous testimony was important for the government's buy-in. Some prosecutors may oppose the rule because they say we cannot do this, and the answer was to make it clear: you can apply for relief under 16(d). Judge Campbell's suggested language shows it can be done in an efficient way, and prosecutors can be trained on that and everybody will know what is going on. When the rule is published, we do not want more people objecting that it is not going to work because they have forgotten about Rule 16(d).

A motion to approve lines 26-39, on pages 128-129 was made and seconded, and passed by voice vote unanimously.

Exception to signature requirement when opinion and bases already disclosed in prior report signed by the expert. Regarding the signature requirement, lines 40-44, Professor Beale noted that the government asked for the language allowing an exception to the disclosure requirement for information previously provided. The parallel provision in (b) benefits the defense. Information provided in reports required under subsection F need not be repeated.

Professor King noted that Professor Struve had raised the concern that without additional language in the text, the defense may lack notice that there is something in a prior report that belongs within this list. Professor King directed the committee's attention to language to insert at the end of line 42 that she and Professor Beale had cleared with the style consultants in order to address this concern. The style consultants' preferred version was replacing the words "need not be" with "that information may be referred to, rather than repeated" in the expert disclosure. So that the text would read: "that information may be referred to rather than repeated in the expert witness disclosure." Professor Beale explained that a case may involve many experts and many reports, and the party may not recognize that there is another report that this expert prepared. There is no reason not to have a reference to incorporating. And the same thing will be in the defense disclosure rule requiring a defendant to cross reference.

Judge Kethledge agreed it was a good point, but suggested that "may be incorporated by reference" was better phrasing. Professor King responded that the "referred to" language was the style consultants' preference.

Mr. Wroblewski said that the language in the agenda book was added at DOJ's request in large part because of forensic science analysts who are required to prepare a report and also the supporting documentation for the bases for the opinions. The DOJ's concern was that the way they want to speak is through a formal report, which is reviewed as part of a regulated system. If this new language requires something in addition to disclosing that report, if they have to prepare something else and sign it too, they have serious questions. This new text suggests something else has to be provided, but we do not know what that is. We provide the report. In addition, our prosecutors write out a summary. We are going to call this expert and he will testify to these opinions. But now we are asking the forensic scientists to sign this new disclosure too.

Judge Kethledge responded that the lawyer is making the disclosure. You have already provided a report about an opinion under subsection F. But if you do not mention in your disclosure under G that the reason for not providing disclosure on one or more experts is that it

has already been provided in this document under subsection F, the defendants might not know it is in the other document. All that is required is just a reference, such as one of these:

"We are also going to have the opinions in this report" or "in this section of this report."

"The opinions I'll offer are the ones specified in the report dated whatever."

Professor Beale suggested it could also say "all my opinions are in the Section F report."

Mr. Goldsmith said that it is perfectly fair to add language that information in an F report need not be repeated in the witness disclosure if it is referred to in the disclosure. It puts the opposing party on notice, and it will occur fairly often. But he suggested that some reference to the signature section should be added, or conversely from the signature section to this, so that the information need not be repeated, nor must the expert sign the disclosure as referenced in the subsequent paragraph. Otherwise, the uninitiated will say, when I refer to this, I have to sign it. Mr. Goldsmith commented that he did not believe the DOJ would have the ability to convince the FBI, DEA, ATF, and state and local lab experts to sign even that—something that simple—without the requisite levels of review. And if all we are doing is stating that the report we previously turned over under subsection F contains all the opinions, under those circumstances the disclosure need not be signed by the expert.

When some members said they did not understand the problem, Mr. Goldsmith explained that they needed some language in that paragraph or the signature paragraph that says if you are taking the "see my F report" option, then that suffices for the obligation of the witness to sign the disclosure under G.

Judge Kethledge and Professor Beale asked Mr. Goldsmith to restate and clarify his position. He said if the witness has already signed an F report that itself contains all the opinions, then the witness need not sign this disclosure. If there were both opinions in an F report and new opinions, he was not suggesting the need for a signature section that carves out what to sign. And it was not necessary for the expert to sign the list of publications and prior testimony, which could all come from the prosecutor and not from the expert. It would be hard to get chemists to sign something saying this is how many times I have testified.

Mr. Goldsmith confirmed that the DOJ was "OK" with the language "may be referred to rather than repeated," so long as this concern about the signature was addressed in the signature section.

A motion to add the language "may be referred to rather than repeated" was made, seconded, and unanimously passed by voice vote.

Expert signature if information is referred to rather than repeated. The committee then turned to the DOJ's request for a way to frame the language so that if it is all in the signed F report, it obviates the need for the expert's signature. Mr. Goldsmith said there was no need for the expert to sign what is essentially non substantive information. The prosecutor will state: here are the publications, the cases in which the expert testified, and the opinions to be offered are on

pages 61-89 of my disclosure dated March 15. The expert's signature on this filing is unnecessary. You do not need the cross examination on this and it is adding a step which is going to be time consuming. If the amendment goes out for comment, he thought we would receive some pretty vociferous opposition from entities over which the DOJ has relatively little control.

Judge Kethledge suggested a second paragraph, parallel to the preceding paragraph, such as "the witness need not sign the disclosure for opinions as to which the expert has already signed a report previously disclosed under Section F." Mr. Goldsmith agreed that would be responsive to his concern.

Judge Campbell summed up the suggestion: the expert must sign the disclosure unless the government states in the disclosure that it could not obtain the signature through reasonable efforts, or the opinion contained in the disclosure was contained in a subparagraph F report signed by the witness.

Professor King noted that what was in the F report could be the opinions, could be the bases and reasons, could be part of those, or could be something else. It is only the information that is already in the F report that need not be repeated in the disclosure. To say that you do not have to sign the disclosure at all if only some of the information required was referred to and not repeated goes too far. Can we specify those elements in (iii) that must be in the F report for the signature exception to apply?

Mr. Goldsmith responded that the real meat is the opinions and bases in the previously provided and signed lab report. Judge Campbell suggested adding the word "all": "The witness must approve and sign the disclosure, unless the government states in the disclosure that it could not obtain the witnesses signature through reasonable efforts, or all of the opinions contained in or referred to in the disclosure were set forth in a subparagraph F report signed by the witness." Mr. Goldsmith thought that the word "all" eliminates the problem where some of it is in F and some is not.

Professor Beale suggested the language should be both opinions and bases and reasons, so that the only things that do not have to be signed are the publications, list of prior testimony, and qualifications. Judge Kethledge agreed that the expert's signature on those items would not seem to be very important for impeachment purposes. That approach sounds reasonable if this would otherwise get into compliance with an ethical code briar patch, to have them sign as to anything new in the disclosure and they have already signed as to their opinions. In response to a member's question, he said that the change still required the government to provide the publications and list of testimony, but the signature of the prosecutor, an officer of the court, as opposed to the witness, would be sufficient.

Requiring disclosure of the reason a party could not obtain witness's signature. Judge Molloy also proposed a change to the last sentence of the signature provision: "unless the government states in the disclosure *the reason* that it could not obtain the witnesses signature," as opposed to, "I didn't have time." A member said she agreed, and that the reason the

government could not obtain a witness signature is sometimes an important piece of information for cross examination.

When Professor Beale asked if the phrase "reasonable efforts" gets at the same thing, the member stated they were different. The member would not cross-examine a witness who was in labor and delivery and could not sign, but would cross the witness who cursed and emphatically refused to cooperate. That is an important piece of information that we need to know.

Another member suggested "makes a showing that it could not obtain," instead of stating the reason. Judge Kethledge responded that implied you have to go to the court as opposed to reciting in the disclosure.

In response to a question, Mr. Goldsmith said the DOJ had no problem with adding the reason that it could not obtain the signature.

A motion to approve the following language was made, seconded, and passed unanimously:

> The witness must approve and sign the disclosure, unless the government states in the disclosure the reason that it could not obtain the witness's signature through reasonable efforts, or all of the opinions and the bases and reasons for those opinions required to be disclosed under iii, were set forth in a subparagraph F report, and that report was signed by the witness.

When a party intends to use an expert but cannot identify the specific individual. A member raised a concern that in a many cases, such as a gun case, the government makes a disclosure that it plans to call an expert to testify that DNA is rarely found on a gun, and the reasons why, and so forth, but at the time of that disclosure they do not actually know who that expert will be, i.e., which of the ATF examiners will be available. With Rule 16(d), in those circumstances a disclosure close to trial may be enough for the defense to meet the government evidence. But, the member said, it is a practical concern.

Mr. Wroblewski noted that is one of the DOJ's concerns with the timing provisions. There are many different kinds of cases, not just firearms, but say fingerprint analysis, where you do not know which analyst is going to come, so you cannot get a signature until quite late in the process. You know there is an analyst who is going to come, but you do not know which one, so you cannot get the prior testimony and that may come late. That was one of the concerns we were trying to deal with when discussing the timing provision. If we say we are going to have this kind of witness and this is the disclosure we can make at this point, it was not clear whether that will be allowed by district court.

A member suggested that the "reasonable efforts" and the reason for the lack of a signature are adequate to cover that problem. Judge Kethledge agreed, noting that the defense would say, OK, once you have that person, have them sign. But Judge Campbell pointed out that it is not just the signature. You cannot give a list of prior publications until you know who the witness is either. Mr. Goldsmith wondered if there is some elegant way to address a disclosure

for a generic expert but not the specific person. Judge Kethledge suggested it could be another foreseeable circumstance that the committee note could cite as a basis for the court exercising discretion or granting relief 16(b) later than in other similar cases, although he thought that generally the court and the parties are going to work this out.

A member suggested adding to the language about the time to provide disclosure, the phrase "or times." Judge Kethledge responded that that would change the default, which is this must be one shot. The member said that the judge can say you have got to do everything but the publications or whatever for the generic expert by November 1, and as to that you have to do it later. Judge Kethledge said this may be the tail wagging the dog.

The reporters suggested that the supplemental and correcting provision the committee has yet to discuss might address this.

Judge Campbell reminded the committee that it need not come out with the final version of this rule today, because the Standing Committee typically approves in June what is going to be published in August. So a tentative view could be worked through by the subcommittee again before the spring meeting. A member asked what would happen if the Standing Committee decides not to approve publication in June. Will it not be published? Judge Campbell did not think that would happen because there will be a pretty thorough report to the Standing Committee in January of everything that has happened here, including the current draft. And the Standing Committee will be able to provide thorough feedback at that time before the committee's spring meeting. We typically do not have a problem in the June meeting approving things for publication if the Standing Committee has had a previous chance to look at it in January.

After a lunch break, the committee returned to the proposed amendments to Rule 16, starting with lines 48-51 on p. 129 of the agenda book.

Supplementing and correcting. Professor King explained that initially the subcommittee considered a much more detailed paragraph for supplementing and correcting that was styled more closely to the one in the civil rule. But there was support for something much simpler that would cross reference Rule 16(c), which already creates a duty to supplement this disclosure as well as other disclosures that are ordered or are already in the rule. The subcommittee thought a cross reference to 16(c) would be an easier way to deal with concerns such as when it will be a different agent that testifies, or a different doctor. The subcommittee included this language "or correction," because 16(c) discusses only additional material. The proposed amendment lists in the contents a complete statement of all opinions, and one party might decide not to call a particular witness or not to present certain evidence, and that correction should be provided to the other party, and is under Civil Rule 26. The subcommittee thought that was important to retain it because correction is different than supplementation with additional material. Professor Beale added that if the disclosure says the expert is going to say X, and now it is actually Y, that is a pretty important correction. The subcommittee thought it was important to drive that home.

Professor King also noted that the reasoning behind the "for the defendant" language in the brackets is that Rule 16(c) provides that the duty to supplement may be met by disclosure to the other party or the court. The subcommittee felt it would be important to make sure that the supplement or correction go directly to the opposite party, and one way to do that would be to add "for the defendant," but there was no decision on this language from the subcommittee. Professor Beale added that supplemental disclosures only to the court do not appear to be a problem with Rule 16(c) right now. Prosecutors are not just giving things to the court and not to the defendant. Everybody understands the supplementation would go to the other party so maybe we do not need that.

Mr. Wroblewski stated the DOJ supports this provision. Judge Kethledge said he did not believe the rule needs to say "for the defendant." (G)(i) now says the government must disclose to the defendant, and that is the disclosure we are talking about; it says "the."

A motion to approve the supplementation provision, taking out "for the defendant," was made, seconded, and approved unanimously.

Defendant's disclosures. Professor Beale explained that the provisions in (b) regarding the defendant's disclosures were parallel to the provisions in (a) regarding the government's disclosures, so that all of the changes made to the government's obligations would be made to these. Professor King reiterated those text changes:

- Line 20 would read "court, by order or local rule, must set a time."
- Line 39, p. 133 would read "that information may be referred to rather than repeated."
- Line 39, after the signature, would read "The witness must approve and sign the disclosure, unless the defendant states in the disclosure the reason that it could not obtain the witness's signature through reasonable efforts, or all of the opinions and the bases and reasons for those opinions required to be disclosed under iii, were set forth in a subparagraph F report, and that report was signed by the witness."
- And on line 39, the defendants' report should be subparagraph (c) so that would change, not paragraph F.

The reporters noted they would work with the style consultants to implement these changes.

Change "defense" to "defendant." The only objection was from a member who proposed changing "defense" to defendant. Another member agreed, and there was no objection to changing defense to defendant.

Reciprocity. Judge Campbell asked if some might object, even though the current rule requires reciprocal discovery, but see this amendment as going farther, requiring defense to provide details of defense strategy, crossing a line and violating due process rights.

Judge Molloy said this was an issue that was brought up at our miniconference, and was something he put in his notes as a possible addition to the language of Rule 16(b)(1)(c). But in light of Judge Kethledge's comments, he thought this was probably going to be fleshed out in litigation.

A member said she had been struggling with precisely the point just raised. She appreciated the balance between the procedural right of access to the report, the constitutional right to remain silent, and the judicial case management function that is going on here. Her concern is that by requiring the defense to produce a written document as the proposed rules states, we may be going too far. She could envision a situation in which the defense produces a report that the government then meets through supplementation, which has begun to erode the constitutional rights of the defendant. For the sake of mirror obligations, we are losing track of the fact that there are disproportionate obligations on the part of the parties. It is not like the civil case. The government has the burden. This much detail for a mirror obligation is going too far.

Judge Molloy asked if the concern is answered by the option of not asking for disclosure. As a practical matter, it is only when you request discovery under Rule 16 that you have the reciprocal obligations. The member responded that was not an option. Without asking, it is possible the defense would not get anything. The defense must ask. Another member said there are times when the member chose not to ask. And there still is a certain amount that has to be turned over. In principle, level playing fields and level obligations make a judicial process work better. But we do not have a level field here. The resources go to the government. They far out resource the defense. The right not to give out information is one of the few things that we might be able to use to counterbalance the resources and timeframe that so much favors the prosecution.

A member commented that he was not really troubled by this concern. We have a notice of alibi defense under Rule 12.1. If the defendant does not want to present an alibi, then he does not have to say a word. But if he wants to go down that path, he has an obligation of fair process to cough it up and give the prosecution an opportunity to challenge it. The same argument could be made that if a defendant wants to call an expert witness, leveling the playing field would be served by having the defendant not have to qualify the person as an expert, not having to follow *Daubert*, just leave it to whatever the government can do on cross. There are some obligations in other words that are inherent in the process of a fair trial, and it seemed to the member this is one of them. This member also related that some time ago it was the established rule in British defense bar that the defendant did not have to get on the stand, did not have to disclose anything whatsoever about the defense. There was a great deal of pressure from the defense side to expand the obligations of the Crown to make disclosure in criminal cases. The way a committee worked this out in the UK was a proposal that said the defendant may serve a comprehensive statement of the defense before trial. If the defendant does so, the government must reveal everything that it will use to prove the prosecution's case and anything that could possibly undermine the prosecution's case or assist the defendant. One of the fiercest critics of that proposal, who saw it as the end of criminal defense rights in the UK, now a judge, has said he now realizes that this reform ultimately worked to the profound benefit of the defendants. This kind of reciprocal disclosure will have a similar effect. Defendants will get a lot more out of it than they put into it. We believe in the government having the burden of proof beyond a reasonable doubt and a fair trial, but the proposition that anytime you ask a question of a defendant—they have no obligation

to answer anything goes a whole lot farther than the Fifth Amendment, and is a counterproductive argument in the fullness of history.

Professor Beale pointed out that the current rule already requires reciprocity. It does say now that the summary must describe the witness's opinion, and the bases and reasons and the witness's qualification. The amendment takes it further, depending upon on how the summary disclosures have been.

Another member said she had a similar concern about the constitutionality of requiring the defendant to affirmatively disclose the expert report. You do not have turn over the impressions of counsel. Expert reports slide into that a little bit but there can be a balance struck. On the whole the member thought that it would be more beneficial to the defense to have this rule than not have it.

Professor King addressed the member with concerns, asking why the member felt this rule differs and crosses the line. First, the member had referred to the level of detail and also to the duty to supplement. What in this rule changes that situation? Second, the proposed language limits defense disclosure to a complete statement of all witness opinions the defense will elicit on direct. The government's obligation is limited to opinions the government will elicit in its case-in-chief. Professor King said she had been concerned about whether the defendant's disclosure should be limited by a direct examination condition or by a case-in-chief condition, or by no condition. The current rule has no condition, but the defense equivalent of the F report, the B report, is conditioned on the case-in-chief. So what, Professor King asked, did the member think about the description of the defense obligation?

The member responded that she wanted to consider sequencing. She did not see anything relevant in the materials, and was not sure how that can be addressed. Will they both disclose at the same time, and then the government will supplement based on the defense disclosure, and be able to use the defense disclosure to augment and refine its case against the defendant? She was trying to envision, as a practical matter, how this will work. She noted that for the defense it is hard to know until the government rests exactly what the case-in-chief will be. The government may not meet its burden, and the defense will not want to present an expert. So how can the defense determine what it must disclose under the proposed rule?

The reporters noted that the current Rule 16(b)(1)(C) provides that the defendant must provide a written summary of the expert testimony "the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial." This already requires a prediction about the evidence the defendant will need to present, made before the government has presented its case-in-chief. So how is the problem different under the proposed amendment than when you have to give a summary under the current rule? Is the concern that the court does not order simultaneous disclosure?

Professor Struve observed that the defendant's obligations are only triggered when the defense requests and the government complies. So would not that imply that the government first complies and then the defendant discloses? The reporters, who noted that few discovery disputes

make it into reported decisions, could suggest only one possible scenario in which the defense might not get disclosures but would have to disclose itself. If the defense requests expert disclosure, and the government responds that it will not put on any expert evidence, some court might conclude that the government had complied with its discovery obligation and the defendant would be required to make "reciprocal" disclosure of expert testimony. But the reporters had not seen such a case and were not sure how courts would rule.

The reporters noted that except for requiring the disclosures to be more complete there were no changes in the rule. The proposal does not change the sequencing. The defendant need not disclose until the government complies. That is not changing. *See* line 15, p. 131. They assumed that means that a district judge would not order simultaneous disclosure.

Mr. Wroblewski said the framework of the rule as it stands right now is that once the defendant requests, then there is reciprocity. He understood why some of his defense colleagues were troubled that this is the framework. But he did not think that we should look at the reciprocity framework in just this particular context. We ought to follow the basic framework of the rule if we make changes to the expert witness rules.

Defendant's case-in-chief. A member noted the difference in the language between intent to use on direct examination and case-in-chief. Was that intended?

Professor King said the existing rule requires pretrial disclosure if the defendant intends to use under FRE 702, 705 "as evidence at trial." The government's disclosure duty is limited to opinions it will elicit from the witnesses "in its case-in-chief." In response to some concerns at the miniconference, it made sense to put a limit on the obligation of the defense and make it fully parallel. So the proposed language refers to "direct examination" and does not require the defendant to provide information about evidence it would use on cross examination.

In response to a member's question whether there a practical difference between direct examination and case-in-chief, Professor Beale first suggested that it was not clear the defense had a "case-in-chief." But Professor King responded that the term "case-in-chief" is currently used to refer to the defense obligation in Rule 16(b)(1)(B)(ii).

Another member commented if the defendant testifies and the government has a rebuttal case, where its expert testifies, and then the defendant's expert comes back in a surrebuttal, as the proposal is now written, the defendant would be required to disclose—in advance—the opinions elicited on direct examination in surrebuttal. That may not be feasible.

Professor Beale suggested "case-in-chief" is better on line 28 on page 132. She thought it would be best to pick the right phrase and have it in both lines 13 and 28. The scope of the preamble should be the same as the scope of the obligation, and it would also parallel lines 11 and 12 of government side.

Judge Kethledge supported using "case-in-chief." There seemed to be general agreement with this solution.

Committee note regarding of scope of the defendant's obligation. Professor King asked if there should be something in the committee note explaining that to make the disclosures parallel, the amended rule would limit the defense disclosure further than the existing rule by including the condition that the expert be intended for use in the defendant's case-in-chief. Judge Campbell thought that would be beneficial because otherwise this clear change in the rule might be lost.

Professor Beale said it would be useful to go back to restyling to determine if it reflects some reason the defense obligation would be broader than the government's in the existing rule.

Mr. Goldsmith asked if anyone thought the lack of parallelism now results in broader defense disclosures. Probably not, so to the extent that they are being made parallel, is not necessarily to constrict existing practice, but it will help ensure that the rule going forward reflects existing practice. Professor Beale agreed.

Judge Molloy suggested that the reporters have all that input and will incorporate it into the next revision of the text and the committee note.

Noting the likelihood that the defense obligation will be challenged in court, Judge Campbell asked whether the committee note should explain why the committee believes it is appropriate. Professor Beale responded that there is a Supreme Court case on point, *Williams v. Florida.* It holds there is no Fifth Amendment problem with asking a defendant to reveal before trial what he intends to put into evidence at trial, because it just speeds up what he was going to have to do at trial. We could put that into the committee note but it is baked into Rule16. That is why it is all reciprocal and constitutional. And that is why some states like Florida can go even farther. Defense witnesses can be deposed under Florida law. Under the Constitution, discovery obligations by the defense can go farther if the government reciprocates.

A member agreed the proposed rule would be challenged but suggested that as a practical matter at the Rule 16.1 conference the defendant will generally say "we haven't decided" about expert witnesses. That is the reality that the member sees in requests for funds for a consulting expert. The defense wants to consult with the expert before they decide whether to call him. That expert may give them an opinion they do not want to use. They have a consultation and they may decide not to call that witness. Or in other cases, they have a consultation and then that consulting expert becomes a testifying expert. This is a defense protective reality. Almost every defense lawyer is going to hire a consulting expert, see what that expert's opinion is, and only then or later in the process decide whether to use an expert witness. If there is not a good witness, they will not have one. The defense has the ability to do that and the government would never know about it.

Professor Beale commented that this uncertainty may occur less frequently for the government, because it is further along in its case preparation at the time of discovery. So it is more likely to know whether it will call an expert (although they may only know it will be one of the ATF experts).

Vote on text for defense disclosures. Judge Kethledge noted that the committee had already approved the language for the government's disclosure and suggested a vote on the provisions regarding the defendant's disclosure.

The language for (b)(1)(C) as amended (with changes to parallel the changes made to the government's disclosure provision, substituting defendant for defense, and substituting case-in-chief for direct examination) was moved, seconded, and approved. Professor Beale complimented the committee, noting the discussion had improved the proposal.

Next steps. Judge Kethledge sketched out the next steps. The committee had approved the text as revised, but still needs to do more work on the committee note language. The committee report for the Standing Committee meeting in January will include the text of the amendments and revised committee note language. The committee may need to consider changes in the text at its spring meeting based on feedback from the Standing Committee.

Judge Campbell requested that the reporters provide a version that redlines the committee note language that changes, and Professor Beale agreed. Judge Furman, the member liaison from the Standing Committee, agreed that it would be helpful to have a working version of the committee note in January.

III. 18-CR-D, time for ruling on habeas motions

Judge Molloy drew the committee's attention to the letter receive from Judge Fleissig, the chair of the CACM Committee, responding to the committee's transmittal of 18-CR-D. The committee had written to the CACM Committee, noting that the current exemption of habeas cases from the list of motions that must be reported as pending might be contributing to delays in cases under 2254 and 2255. Judge Fleissig wrote to say that the CACM Committee had studied the issue and concluded that the current approach was appropriate given the unique issues associated with Section 2254 petitions and Section 2255 motions. Professor Beale commented that although it was discouraging that there would be no change in the reporting of pending cases—since that had seemed to be a promising approach to reducing delays—the CACM Committee had identified another possible option. Judge Fleissig stated that the CACM Committee has asked its case management subcommittee to look into other steps that might address the problem of long delays, including additional staffing.

IV. 19-CR-A, calculation of IFP and CJA status

Professor Beale introduced the first proposal from Sai, which was addressed to the Civil, Criminal, and Appellate Rules Committees, and seeks changes in the process of determining IFP (in forma pauperis) status. In a footnote, Sai states that IFP includes CJA status in criminal cases. Professor Beale described the issues raised by Sai's proposal, including the question whether the rules committees had jurisdiction under the Rules Enabling Act. She emphasized that Sai was incorrect in equating IFP status with CJA status, which is governed by a different statute, and has a different process and different standards than IFP status. Professor Beale acknowledged Ms. Elm's assistance in helping the reporters explain these differences in their agenda book memo.

The committee has been asked to advise the Standing Committee on how this suggestion should be handled. Is this something that should be taken up by individual committees, or by a subcommittee drawn from all of the affected committees? Because CJA status is so different from the IFP status that is the focus of the suggestion, the reporters recommended that the Criminal Rules Committee not take a major role if other committees pursue it. But the Criminal Rules Committee does have an interest in IFP status for filings under 18 U.S.C. § 2254. Although those proceedings are technically civil they fall under the jurisdiction of the Criminal Rules Committee. So if the other committees want to look at changes on IFP status, the reporters thought the Criminal Rules Committee would want to have some input.

In response to Judge Molloy's enquiry, no member expressed an interest in pursuing the proposal at this time.

V. 19-CR-B, court calculation and notice of all deadlines

Professor Beale described briefly the second rules suggestion from Sai, which went not only to the Criminal Rules Committee, but also to the Appellate, Bankruptcy, and Civil Rules Committees. The purpose of the discussion was to get members' views on the merits of the suggestion and whether it should be pursued in a cross-committee inquiry. She explained that the proposal sought to require that courts give immediate notice to all filers of (1) the applicable date and time (including time zone) for future events, (2) whether and how the time could be modified, and (3) whether the event was optional or required. The notices would be cumulative, continuously updated, and user friendly, not requiring users to look up applicable rules or do calculations. Sai also proposed that the rule specify that filers could rely on the court's computed times. Although such information would be helpful to filers, Professor Beale noted it would put a significant burden on the clerks' offices. Also, the proposal that filers be able to rely on the calculations raised special issues. For example, what if the calculation of a jurisdictional time was in error? The question is whether the proposal should be studied, and if so whether it should be handled cross committee.

A judicial member commented that in her court the notices generated by the clerk's office state the date and time of filing, which allows a calculation of when 30 days (or another applicable period) will run. And the rule tells you the time calculation. Her clerk might say, tell them to read the rule. Why should the court have to do more? Professor Beale responded that Sai was particularly concerned for pro se filers who do not have law degrees and may not know how to look up the rules governing time for pleadings and responses. In Sai's view, these people need more help, which should come from the courts.

Another member commented that determining time limits is difficult, even for lawyers, and much more so for pro se parties. In some cases, pro se parties rush to file a response immediately—which is less complete and well drafted than it otherwise might be—because they are unable to determine when they must file. The member wanted to know whether the clerks' offices have software applications that they use to determine the applicable time limits. If the courts have and are using such applications, why not use them for this purpose?

A judicial member said that his district was trying to provide as much information as possible, and parties receive a notice from the clerks' office of filings that includes the date any opposition is due. But if the clerk's office has made an error because the judge shortened the time, in his court the judge's order trumps the clerk's notice. So at least in his district, the clerk's office has been helpful. The member also noted that in his own orders he tries, as much as possible, to include dates certain in order to make the notice as clear as possible.

Another judicial member noted that pro se cases make up one third of the docket in his district. There are pro se staff members in the clerks' office, and the district has a handbook that provides helpful guidance to pro se filers. The member expressed sympathy for the plight of pro se filers in a system that is very complex. But the member emphasized that the clerk's office in his district was already "running as fast as they can." They are dealing with fewer personnel and smaller budgets and can no longer even guarantee that an order docketed today will be filed even by the next day. CM/ECF has a limited capacity to provide some of the information being sought, but only if the clerk's office has the time and personnel to generate that information—which they do not in the member's district. He called the suggestion a "huge ask," and said it was "not practical."

Another member agreed it was not practical, absent some mechanism like a software application mentioned earlier by a member. The member also drew attention to the risk to parties who would rely on such a calculation. He reminded the committee that the Supreme Court had held that a habeas petitioner was jurisdictionally out of time even though he had relied on the district court's erroneous statement of when his filing was due. So, at least under some circumstances, parties cannot rely on the calculations by the clerk's office or even the district court.

In response to Professor Beale's comment that there had been at least some interest in automation if it could be done easily, a judicial member raised another concern. He noted that many documents entered in the docket are mischaracterized. If a machine read those designations, it might calculate the wrong date.

Ms. Womeldorf noted the suggestion by one of the judicial members that he sought, when possible, to specify a date certain in his own orders. That might be a useful suggestion as a best practice. Another member noted, however, that these dates could be affected by later events. If the court has specified dates certain, then they must all be adjusted. That is not the case if one specifies that an action must be taken within a certain period before or after a given event.

VI. 19-CR-C, E-filing Deadline Joint Subcommittee

Professor Beale drew the committee's attention to the final item in the agenda book: information about an E-filing Deadline Joint Subcommittee study, chaired by Judge Michael Chagares. The subcommittee is considering a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone. The subcommittee's membership is comprised

of members of all of the rules committees. The committee's reporters and Ms. Recker, a member of the committee, are representing the Criminal Rules Committee.

The subcommittee is just beginning its work. It was on the committee's agenda to provide notice that the study is underway, and to solicit advice on any information that the subcommittee should gather and consider. The subcommittee will consider the impact on both counsel and the courts. Professor Beale noted Judge Molloy's comment about the impact late filings have on the courts. When a case is on his docket for the next morning, he may review the filings that evening. But he cannot do so if the filing comes in just before midnight.

Mr. Wroblewski asked whether the subcommittee had a member from the DOJ, noting that it would provide an important perspective. Judge Campbell and Ms. Womeldorf expressed interest in being sure that the DOJ's views were represented going forward.

Another member noted it would be nice from a practicing lawyer's standpoint to be able to finish earlier, and that counsel will take all of the time they are allowed. But the member noted different issues arise in mass litigation than criminal cases.

A member questioned how the new timing requirement would work, and Professor Struve stated that the system would still accept later filings, but they would not be timely unless submitted by whatever earlier time might be selected. The member responded this would likely result in motions to accept the late filings nunc pro tunc.

VII. Acknowledgement of members whose terms were ending

Judge Molloy invited Professor Kerr to make remarks since this was his last meeting. Professor Kerr said it had been a wonderful six years, a great personal and professional experience. He thanked the reporters and the staff for their efforts.

Judge Molloy thanked Professor Kerr for his service and Judge Campbell for his input and guidance. He also expressed this gratitude to Ms. Womeldorf, Ms. Wilson, and Ms. Cox for their efforts, noting that the staff's hard work always resulted in meetings going smoothly. He noted that Mr. Wroblewski had served even longer than he had, called him a tremendous asset, and offered Mr. Wroblewski kudos and thanks.

Finally, Judge Molloy expressed gratitude for eleven years of friendship and education on the committee, and he warmly thanked the reporters for their work, presenting them with thoughtful mementoes of their service.

Judge Kethledge summed up the thoughts of all those present, thanking Judge Molloy for his service, and especially his leadership. He called Judge Molloy an exemplary leader and steward who created and enhanced a spirit of good will, and had a great record of accomplishment.

The meeting was adjourned.