ADVISORY COMMITTEE
ON
CRIMINAL RULES

April 18, 2024

AGENDA
Meeting of the Advisory Committee on Criminal Rules
April 18, 2024
Washington, D.C.

Page

1. **Opening Business**

   - Chair's Remarks and Administrative Announcements (Oral Report)

   - **ACTION: Review and Approval of Minutes**

     - Draft Minutes of the October 2023 Meeting of the Advisory Committee on Criminal Rules 14

   - Report of the Rules Committee Staff

     - Draft Minutes of the January 2024 Meeting of the Committee on Rules of Practice and Procedure 38

     - March 2024 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States.....65

     - Chart Tracking Proposed Amendments 74

     - Pending Legislation that Would Directly or Effectively Amend the Federal Rules (118th Congress).....82

2. **Pretrial Subpoena Authority (Rule 17) (22-CR-A)**

   - Reporters' Memorandum (March 26, 2024).....88

3. **Pro Se Access to Electronic Filing (Rule 49) (21-CR-E)** (Oral Report)

4. **Broadcasting of Criminal Proceedings (Rule 53) (23-CR-F)**

   - Reporters' Memorandum (March 25, 2024).....94
   - Suggestion 23-CR-F (Coalition of Media Organizations).....98
   - Rules Law Clerk's Memorandum (February 16, 2024).....115

5. **Redaction of Social Security Numbers (22-CR-B)**

   - Reporters' Privacy Rules Working Group Memorandum (March 19, 2024) 125

AGENDA
Meeting of the Advisory Committee on Criminal Rules
April 18, 2024
Washington, D.C.

Page

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(Standing Committee)

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Advisory Committee on Civil Rules

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	Associate Reporter
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	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

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ADVISORY COMMITTEE ON CRIMINAL RULES

Members	Position	District/Circuit	Start Date	End Date
James C. Dever III Chair	D	North Carolina (Eastern)	Member: 2022 Chair: 2022	---- 2025
Nicole Argentieri*	DOJ	Washington, DC	---	Open
Andre Birotte, Jr.	D	California (Central)	2021	2024
Jane Boyle	D	Texas (Northern)	2021	2024
Timothy Burgess	D	Alaska	2021	2023
Roger A. Fairfax, Jr.	ACAD	Washington, DC	2019	2025
Michael J. Garcia	JUST	New York	2018	2024
Michael Harvey	M	District of Columbia	2023	2026
Marianne Mariano	FPD	New York (Western)	2023	2025
Jacqueline H. Nguyen	C	Ninth Circuit	2019	2025
Catherine M. Recker	ESQ	Pennsylvania	2018	2024
Susan M. Robinson	ESQ	West Virginia	2018	2024
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

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ADVISORY COMMITTEE ON CRIMINAL RULES
SUBCOMMITTEES
(2023–2024)

Pro Se Filing Subcommittee Judge Timothy Burgess, Chair Judge Michael Harvey Marianne Mariano, Esq. Angela Noble, Clerk Rep. Susan Robinson, Esq. Judge James Dever	**Rule 17 Subpoenas Subcommittee** Judge Jacqueline Nguyen, Chair Judge Jane Boyle Marianne Mariano, Esq. Catherine Recker, Esq. Jonathan Wroblewski, Esq. (DOJ) Judge James Dever
Rule 53 Broadcasting Subcommittee Judge Timothy Burgess Judge Michael Harvey Marianne Mariano, Esq. Jonathan Wroblewski, Esq. (DOJ) Judge James Dever	**Unified Bar Admission Joint Subcommittee** Judge J. Paul Oetken, Chair Judge Andre Birotte Judge Michelle M. Harner Judge M. Hannah Lauck David Burman, Esq. Catherine Recker, Esq. Carmelita Shinn, Clerk Rep.

Updated March 21, 2024

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	TBD (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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TAB 1

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 26, 2023
Minneapolis, Minnesota

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on October 26, 2023, in Minneapolis, Minnesota. The following members, liaisons, and reporters were in attendance:

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

The following persons participated to support the Committee:

H. Thomas Byron, Esq., Secretary to the Standing Committee
Allison Bruff, Esq., Counsel, Rules Committee Staff
Zachary Hawari, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center

[1] Mr. Wroblewski represented the Department of Justice.

Opening Business

Judge Dever began the meeting by introducing the University of St. Thomas School of Law Dean Joel Nichols, who welcomed the Committee, made some remarks about the School, and thanked the Committee for allowing students to observe its proceedings.

Judge Dever then introduced and welcomed the new Committee members, Marianne Mariano (who had already begun participating on the Rule 17 Subcommittee) and Magistrate Judge Michael Harvey. Judge Dever noted the members and other participants who were attending remotely and asked all of the participants to introduce themselves. Judge Dever noted that Mr. Wroblewski was representing the Justice Department at the meeting, because new ex officio member Nicole Argentieri, the Acting Assistant Attorney General, had been unable to attend. Nicole Teo, a former Rules Office intern and Elizabeth Shapiro, from the Department of Justice, were introduced as guests.

A motion to approve the minutes of the spring meeting passed unanimously.

Judge Dever asked the Rules staff to present updates on the pending rules and pending legislation. Ms. Bruff noted that the technical amendment to Rule 16, the amendments to Rules 45 and 56 adding Juneteenth National Independence Day to the list of legal holidays, and the new emergency Rule 62 will take effect December 1, absent congressional action (p. 105 of the Agenda Book). Mr. Hawari noted that pending legislation of interest was collected in the Agenda Book beginning on page 112. He mentioned that the Government Surveillance Transparency Act of 2023, introduced last month, would require the Judicial Conference to promulgate rules to put any criminal surveillance order, including search warrants, on a public docket and possibly create a case number and caption for it, with some exceptions.

Rule 17

Judge Dever asked Judge Nguyen to provide an update on the work of the Rule 17 Subcommittee. Noting the Reporters' more detailed memo on the Subcommittee's work beginning on page 127 of the Agenda Book, Judge Nguyen said the Subcommittee has had extensive discussions and input from the Department of Justice, the defense bar, law professors and other experts. The Subcommittee has been persuaded that a case has been made to move forward and engage in a more detailed study and consideration of a possible amendment, but it was still far from discussing specific language. As reported at the last full committee meeting, practices under Rule 17 vary widely from district to district and among judges within the same district, and some clarification of Rule 17 will be very useful. On the key substantive question of whether the *Nixon* standard is too restrictive, the Subcommittee has tentatively concluded that it is. Thus, it is considering possible amendments to expand subpoena authority under Rule 17.

Other key tentative conclusions are that any amendment should include judicial approval before a third party subpoena under Rule 17 is issued, and that subpoenas for personal and confidential information should be treated differently than those seeking nonprotected materials. After pretty extensive discussions, the Subcommittee's tentative conclusion is that the phrase "personal or confidential information" would be appropriate to define protected materials

without going too far in the weeds specifying exactly what they are. The Subcommittee also tentatively concluded that ex parte subpoenas should be allowed upon motion and a showing of good cause.

The Subcommittee met the previous day to discuss additional issues, such as whether information should be disclosed to opposing counsel and whether material should be turned over directly to the party or to the court. Next, it will be deciding what standards to apply to protected material and nonprotected material, and there are other issues to discuss as well before the actual drafting.

Professor Beale noted the Subcommittee had met five times since the spring meeting and although the tentative decision is to try to write a proposed amendment, it wouldn't necessarily be what the New York Bar Committee had recommended. The Subcommittee was moving systematically issue by issue, not presuming that the current rule is right, and not presuming that the Bar proposal is right. It was working to learn what's going on in practice because so much of this is not specified in the rule now, and practice is really working *around* the rule. She reminded the Committee of the earlier October 2022 meeting where practitioners described very different practices, experiences, and opinions, and she emphasized that the Subcommittee was continuing to try to understand the various issues. When the Subcommittee completes its consideration of the last of these issues, it will have to put the whole proposal together to see whether all of its tentative decisions fit together, and then come up with language to capture it all. She commented that the Subcommittee has been persuaded that the rule is very confusing and clarification is absolutely needed, but there are many questions about how to do that without micromanaging the process. She noted that the amendments might not stay in Rule 17 and might end up as two different rules. So there was a lot of work to do, both in finishing the initial review of the issues and reaching tentative conclusions on each, putting those issues together, and then drafting the language of a complete proposal. The Committee could anticipate further discussion at the spring meeting that will get more into substance, but the Subcommittee welcomed comments or questions about the tentative conclusions it has reached so far.

Judge Dever thanked Judge Nguyen for her leadership of the Subcommittee, and the members (Judge Boyle, Ms. Recker, Mr. Wroblewski, and Ms. Mariano) as well as the reporters for their work. He asked for comments.

Mr. Wroblewski described the proposal as "tricky" for a number of reasons. On the one hand there is near unanimity that the rule needs to be clarified. And in some districts, implementing the proposal would be a pretty simple and straightforward process because the use of subpoenas is widespread, there is no judicial oversight of them, and they are routinely ex parte. But in other districts, such as Philadelphia, where there is currently almost no subpoena practice, it would be a much bigger change. He characterized the proposal as a very big deal, and he commented that the Subcommittee's slow, steady, and measured approach was fantastic. He noted that the Subcommittee was considering a change that would overturn controlling Supreme Court precedent, rewrite the law of subpoenas in criminal cases, and likely change pretrial practice—though he noted the Subcommittee did not know yet exactly where it was going. He thought it was also an especially big deal because a few years earlier, in the *Carpenter* decision,

the Supreme Court said for the first time said that subpoena practice implicates the Fourth Amendment. Now, with cloud computing and third parties having control of every last little bit of our lives, he thought the Subcommittee's measured, careful approach was especially important. He hoped that after the Subcommittee came up with a rule, the Committee would road test it before publication with judges, prosecutors, and defense lawyers around the country. That would be a really important step. There is a lot of hard work to come, and he was grateful for the efforts of the reporters, Judge Nguyen, and the other Subcommittee members.

Another member of the Subcommittee thanked Judge Nguyen for keeping the work so organized. The member said the bottom line was we would be creating additional pretrial discovery for the government and the defense, though it was not yet clear whether this would be a little bit more discovery, or a lot more discovery.

Judge Dever commented that the process Mr. Wroblewski described—slow, steady, deliberative, and thoughtful—is a feature and not a bug of the process under the Rules Enabling Act.

Judge Bates asked if the hardest issue was the standard. He noted that the Subcommittee has dealt with a lot of the issues, procedural and otherwise, with respect to the rule. But the *Nixon* standard has created the problem in some districts and nationwide, so is coming up with the standard the ultimate hardest issue? The Subcommittee has identified that it should be a two-part standard, one for the personal and confidential information and one for other information. Had there been discussion yet on trying to come up with the standard and was that really going to be a difficult issue?

Judge Nguyen said the Subcommittee would meet at least twice before the Committee's April meeting and would be tackling that issue first. The answer to that question was going to cause a sea change in the use of Rule 17. So yes, in that sense it would be hard. But before tackling that standard, the Subcommittee thought it was important to first get out of the way some of these other issues about how the subpoena was going to work. Is it going to be by motion? Are ex parte applications allowed? When are in camera reviews appropriate, and how to guide district judges in that? How do you treat personal and confidential information? The Subcommittee wanted to have those questions answered preliminarily to create a framework around which it could come up with an appropriate standard.

Professor Beale said the Subcommittee could not answer the question about the standard without making some preliminary decisions. For example, it was important to decide whether the standard would be bifurcated and whether there was going to be more protection for protected information. There is an interaction between the issues. The category of protected information might need to be larger if the general standard for nonprotected information is very low. The Subcommittee had not yet had that discussion.

Professor King agreed that some of the issues that the Subcommittee had been talking about so far depend to some degree on the standards and vice versa. It is an iterative process, and the hardest part may be fitting them together, and deciding, for example, if what we say about in camera review makes sense, given the scope of "personal or confidential." They are somewhat

tradeoffs, and they balance and affect each other. So she thought coming back and creating a coherent package would probably be tough.

A member said that the issue that seems to be lurking in the background is the pretrial discovery that will be created with this kind of rule change. On the civil side, the member noted, excessive discovery, both in terms of cost and delay, has had a very negative effect on case resolution and jury trials. The criminal side by and large has not had that kind of issue. He thought it would be unfortunate if speedy trial and other considerations were impacted in a negative way by a change in Rule 17.

Noting she was familiar only with criminal practice, Professor Beale asked whether the member could confirm her impression that the problems with civil discovery arise principally from reciprocal demands by the parties for discovery from one another, and not from the parties' efforts to discover material in the hands of third parties. If so, she commented, the parallel in criminal proceedings would be discovery under Rule 16, not discovery from third parties, and the changes being considered here would be different from the most problematic aspects of the dynamic in civil proceedings.

The member agreed, but also noted that the current emphasis in Rule 17 focuses on trial subpoenas, not subpoenas for discovery. The member thought that would be a significant change, and Professor Beale agreed. Another member commented that on the civil side under Rule 45, which covers third party subpoenas, you can get just about anything.

A different member noted the intersection between the developing amendment and the Stored Communications Act (SCA). He said perhaps 70% of the warrants he reviews are under the Stored Communications Act—it's in the cloud, it's Apple, it's Google, it's emails, texts, cell site information. Some of the defense attorneys said they would be interested in some of that. But of course, for most of that information the Stored Communications Act requires a warrant. So how would this subpoena interface with that?

Judge Nguyen replied that nothing in any rule change would affect any statutory protection, and the Committee would have to be certain that the language that it drafts makes that point clearly. Professor Beale agreed and stressed that the rule change would not override any statutory protections for privacy, such as the Stored Communications Act. Judge Nguyen emphasized that any other laws that provide protections right now would not be affected in any way by any rule change.

The member said the SCA defines what you can get by subpoena and when you need a warrant. He didn't think Google would honor a subpoena. There are whole classes of information that the government has access to, and there was a reason that 70% of the warrants are in that area—that's where all the evidence is.

The member said his fundamental question was whether a subpoena under whatever standard the Subcommittee was considering—coming from a third party and not from the government—would satisfy the SCA? Professor Beale said no. The SCA gives different rights to

the government and this would not give third parties rights that they don't already have to override protections of the SCA.

On the question whether this rule would change criminal into civil discovery, another member said there was no chance of that because of all the protections in the rule. The rule could not permit serving the other side with interrogatories or request for production or depositions.

Professor King responded to the member asking about the SCA. One of the things that the Subcommittee talked about is how important it is to (as Mr. Wroblewski noted) road test these ideas on the constituencies that are going to be most concerned about them. So certainly the Subcommittee would solicit even more input from third parties who are likely to hold the kind of information that will be subpoenaed, and seek their reactions and concerns about any potential change. She noted that it had already started that process by talking to an expert on the SCA as well as practitioners from that industry. It would continue to do that. But, she said, the issue was not just the SCA. Similar issues arise under HIPAA and FERPA, as well as state protection privacy laws. All of these statutes have idiosyncratic controls on disclosure, and the rule has to accommodate them. The Subcommittee has no interest at all in changing the legislative policies that have been crafted in all of these jurisdictions in their laws that govern disclosure. The idea is to clarify what information the parties in criminal cases can get from third parties through subpoena before or for trial, and not to change how individual types of information have already been regulated.

A member added that it would not override statutes, but would provide more discovery.

Judge Nguyen agreed it would be an expansion, that is an important point to keep in mind, and it will be significant. She said the Subcommittee was very sensitive to how that intersects with statutes and current protections in place. Although it had researched that area, she thought the idea of road testing it would be really important because the Subcommittee does not necessarily have all the expertise. So input from members and from people who are on the ground would be important to make sure that what the Subcommittee was contemplating and trying to memorialize in draft language would actually work out in that fashion.

Mr. Wroblewski noted that there might be metadata or cell site information that is not governed by the SCA, and constitutional issues that are implicated. That makes drafting the standard really hard: the rule must set out something that will allow the user to recognize that the rule doesn't cover everything, and you must go to these other privacy protection laws, and perhaps consult Fourth Amendment jurisprudence. It was going to be difficult.

A liaison to the Committee said he understood the Rule would not override any federal law, but he emphasized the need to clarify the effect on state privacy protection laws. If the Rule would not allow a party to subpoena information that would otherwise be protected under a state privacy law, he thought that should be made explicit. Because it doesn't necessarily follow that that would be the case (as it would be with respect to the federal law), it should be set forth in the committee note or text to make that limitation clear.

Another member said this all came about because of this letter from the New York bar saying that in this day and age they need more discovery because of the internet, and the situation has changed over 60 years. They convinced us to look into the fact that they likely do need more pretrial information. The Subcommittee did not know how much, but it will be a significant change.

Judge Dever thanked the members for their comments and noted that the discussion illustrates why the Subcommittee is being deliberative and continuing to study these issues. It had received information from Professor Kerr, a former academic member of this Committee, who is an SCA scholar, as well as from attorneys that have represented and advised entities that hold electronic information. And those discussions will continue because the Subcommittee was trying to answer the initial question that the Committee always asks in connection with any proposal that we get: is there a problem? The Committee spends a lot of time exploring that. And then if we think there is a problem, can we address that without creating more problems? We do that by being cognizant of issues like the ones that have been raised in the discussion. That partly explains why the process, compared to some other subcommittees, is taking a little longer because it really is a big issue. Other than the victim amendments, Rule 17 essentially is as it was from the beginning, unlike Rule 45 in the Civil Procedure Rules, which has been changed a number of times since those rules were adopted. He again thanked Judge Nguyen and all the members of the Rule 17 Subcommittee for their continued hard work and invited Committee members to contact the reporters with any other thoughts. He noted that one of the benefits of the Committee's structure is that it has stakeholders with lots of experience and perspectives that all help collectively to get it right with any proposed rule change.

Rule 23

Judge Dever turned the Committee's attention to Rule 23, and the memo at page 134 of the Agenda Book. The Committee received a proposal from the Federal Criminal Procedure Committee of the American College of Trial Lawyers (ACTL) to change Rule 23, which now requires a written request from a defendant for a bench trial, the consent of the United States, and the approval of the court. At its last meeting the Committee decided it would be useful to gather more information on the question whether there is a problem, and both the Department of Justice (DOJ) and the defenders helped gather additional information. Judge Dever said that after introductory comments from the reporters, he would ask for discussion of whether to create a subcommittee to further study this issue, and if so, what the subcommittee would be studying, and how any proposal would interact with Supreme Court precedent.

Professor King noted that the Reporter's memo, at page 134 of the Agenda Book, is quite short and briefly reviews the discussion at the last meeting. That discussion, in the minutes at pages 24–34 of the Agenda Book, focused on whether there is a problem with the current rule and the differences in practices around the country regarding DOJ consent to requests for bench trials. At the end of that discussion, the Committee decided to seek more information about what was going on around the country, and that information is presented in the memo on pages 136–140. A DOJ survey, Mr. Wroblewski reported, revealed that about one fourth of the districts have some sort of policy on the decision whether or not to consent to a bench trial, and that

generally that policy is requiring supervisory approval. But half of the districts have no policy and about one fourth did not respond. Very few of the districts—only eight—indicated there was a backlog as a result of the COVID-19 emergency. One of the reasons given for the proposal was that it would help clear that backlog. But as Mr. Wroblewski said at our last meeting, there are other reasons to work hard on clearing those backlogs if they exist, apart from this proposal. The third question on which he surveyed attorneys around the country was whether there should there be a national policy. The answer, on page 137 of the Agenda Book, was that the reasons for bench trial requests differ significantly and an appropriate national policy is not obvious.

Some of the reasons for bench trial requests and refusals—from the defense perspective—were listed on pages 138–140. Professor King explained that because the respondents were promised that they wouldn't be identified, the information about exactly who was answering this set of questions had been limited to preserve anonymity. But we received fifteen responses from nine federal defenders and six CJA attorneys representing many different districts in many different circuits with a broad spectrum of practice. These ranged from districts where defense attorneys said they have never won a bench trial and would not request them, to districts where the attorneys responded that U.S. attorneys never consent, or that it was not a problem. She observed that there seemed to be no clear pattern to what is going on here.

Noting that this information supplemented the Committee's discussion at the spring meeting, Professor King said it was time to decide whether to continue to pursue this proposal. The proposal itself seeks an amendment that would (see page 162 of the agenda book) add the following section:

> (2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit the defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant's waiver of a jury trial without the government's consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.

She noted the proposal adds a procedural aspect and then states a standard for the court to reject the government's objection.

The questions for the Committee, Professor King said, are very similar to the ones discussed at the prior meeting. Is there a problem with the existing rule that a rule change would modify, and, if so, what should the modification look like? Should it be procedural change? Should there be something different than what is proposed here? Should there be some standard for rejecting a prosecution objection to a bench trial? How will it be reviewed?

Judge Dever expressed his appreciation for the additional information from the Department and from the defenders, and he added some comments regarding the leading case dealing with Rule 23 and its constitutionality. The constitutional challenge in *Singer v. United States* was decided in 1965. The case upheld Rule 23 (little changed since 1946), which requires that the defendant make a request for a bench trial in writing, that the government consent, and that the court approve. The Court in *Singer* added two important points. It acknowledged that the

way the rule was written, the Department of Justice did not have to provide a rationale. The Court stated that because of our confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the government articulate a reason for demanding a jury trial at the time that it refuses to consent. Nor should we assume that the federal prosecutors would demand a jury trial for an ignoble purpose. The second point the Court made (discussed in the memo and seen in some cases particularly during COVID), was that it was not determining whether the trial court could override the government's objection in certain compelling circumstances, if there was an inability to provide a fair trial. That point was raised in the transcript in the New York case (*United States v. Cohen*, 481 F.Supp.3d 122 (E.D.N.Y. 2020)) referenced in the memo and in the proposal. As members thought about whether to establish a subcommittee, he posed a question. Since the Constitution already provides an out to the rule as written in exceptional situations, what is the space between the proposal and what the Supreme Court has said already exists? If we draft a rule that had this procedural reference, he thought it would seem to be suggesting that there is some additional space beyond the need for a fair trial. But it is difficult to figure out what that would be, particularly in light of the backdrop of the jury trial being the gold standard in terms of adjudication, its presence in Article III, Section 2 before even the Sixth Amendment is adopted, and then in the Sixth Amendment itself. He asked for the views of committee members about whether we need to set up a subcommittee to further study it, and if so, what information is lacking.

Professor Beale added that you could view this as a procedural mechanism to allow the defense to raise the *Singer* problem. If they put in writing (e.g., "Here's the problem, this is why having a jury trial would be really bad in this case") then in determining whether to give relief the court can give the government a chance to respond that either there is not a serious problem or to explain how the court could act to ensure the fairness of the trial. *Singer* does say we are not going to assume that the government is doing anything for nefarious reasons, but she did not think the proposal necessarily assumed nefarious conduct. Rather it just gave the government a chance to respond to the defense statement explaining why a bench trial is so critical in the particular case.

Judge Bates responded that the proposal also says that the court must make this decision using the very vague standard "sufficient to overcome." He observed that in most cases both sides are either requesting a bench trial or resisting a bench trial because they think it is more likely that they will win. How, he asked, is the judge going to apply the standard "sufficient to overcome the presumption" when in reality both sides are saying, "Hey, I stand a better chance of winning" with the bench trial or without the bench trial?

Professor Beale responded that the idea is that it might be a good idea to draft an amendment as there is no procedure right now under Rule 23 to raise the kind of issues that *Singer* says are possibly enough to override the government's lack of consent. *Singer* doesn't tell you how that would work.

Judge Dever responded that people are raising these issues because they are being litigated. So lawyers know if you want the court to do something, you file a motion and you cite the Supreme Court case that says "Judge, you can actually look behind this in a compelling

circumstance." A member added that the *Cohen* case is the example of that, where the judge agreed this is the extraordinary case.

A defense member stated that there are cases where defense counsel may not trust a jury to set aside some prejudicial issues that are not necessarily evidence of any guilt but can sway a jury. But, she said, there is another issue involving coercive plea agreements. The defendant may want to go to trial to preserve some legal issues, but not lose acceptance of responsibility. And sometimes the government may withhold acceptance, as a tactic, and perhaps gain two years on a sentence. She said we should allow the judge to make that decision and did not understand why the government can override a judicial decision about that. There may be a need for a procedural mechanism.

Judge Dever noted he had cases in which DOJ consented. But if the prosecutors would not agree to a conditional plea, he had given defendants acceptance of responsibility even after a jury trial where everyone in the courtroom (except the jury) knew the only reason for having the jury trial was to permit a suppression ruling to be appealed. The judge, he said, has ultimate control over acceptance, which is not really tied to a Rule 23(a) issue.

Another member said that the right to a jury trial is constitutional, exceptional circumstances are already in there, and adding this to Rule 23 would just encourage people to think that now we have exceptions. The right to a jury would be very much hampered, and the member was against changing the rule.

Another member wanted to go back to the foundational question of whether there is a problem. It is challenging to measure something that has not occurred, and it is difficult to develop empirical data. Of 94 districts, 25 have a policy of supervisor approval and 52 have no policy. But we don't know what the results are, so it is not clear that we've gained any empirical understanding of what's happening. The additional research added only 15 respondents to the 12 examples set forth in the proposal.

Another member agreed. She said she had been very surprised by the survey results from the defenders because in 28 years of practice, she was aware of only two cases that went to a bench trial. That was because the government had uniformly said it would not consent. And surveying her own CJA panel before this meeting she concluded they were not asking for bench trials. It was hard to measure the problem in districts where there has been a uniform practice of not consenting. She could not measure that in her district, and she doubted it was possible to measure whether there was a problem in the manner that had so far been proposed. She added that defendants do not get acceptance of responsibility. Even if they have a very narrow legal issue that they want to pursue, it has to go before a jury. She said her court had been very busy, had a very small bench, and in effect there was a tax on the clients who tried to pursue that issue.

Professor King mentioned another response in addition to those listed on pages 4–6 of the memo. The Committee received an email from Lisa Hay, a former member of the Committee, who had surveyed her FPD colleagues and reported 14 additional responses. But there was still not a lot of information.

A member asked what prevented the defense from filing a motion to say to the judge, "I'm only trying this legal issue, and it is really only the acceptance of responsibility question I'm concerned with." Was it because judges on that bench are of the view that if the government doesn't consent, you don't get the waiver of jury trial?

A member responded that they do file that motion, but she did not think that would be an exceptional circumstance to overcome the government's lack of consent simply because there's going to be a trial penalty. The defense did make the court aware that they would be willing to have the bench trial, but when they moved for the acceptance points at sentencing, they seldom got them. Some of their judges had awarded acceptance points in that situation, but it was not a uniform practice and was certainly different with different judges. So there was a penalty at the end of it for their clients. Where there is an acceptance issue on a small narrow legal issue, usually there is a fair record made, but the member could not measure it because people did not really approach the government for the bench trial. It was just presumed that they would not consent. She thought that was probably not fair to the government. The member was not sure they are having robust conversations after all these years because of ongoing practice. She believed her district was not isolated in this and had been interested in the results of the survey of her colleagues because it was different than the experience in her district.

Another member noted that in addition to the acceptance issue, there was an issue concerning sentencing appeals. Plea agreements today have very strict statements of facts, on guideline amounts and so forth, and then include complete waivers of appeal unless the court imposes a sentence that is way beyond these guidelines. For example, a client may want to be able to challenge some factual matters that may apply at sentencing and not accept a plea agreement, and may be forced to go to trial in order to preserve those issues. The government's position is "you sign our plea agreement or there is no plea agreement." They will not do exceptions to standard appellate waivers simply because the defendant wants to contest enhancements for vulnerable victims, drug amounts, multiple victims, etc. So in those instances, a client may say "I want to go to trial," and defense counsel may want to try it to a judge because what they really want to challenge are those factors that affect the defendant's sentence and right to appeal. Mr. Wroblewski stated he was very sympathetic to the concern about acceptance of responsibility, but it was not obvious to him how having a bench trial would resolve it. If the defendant is contesting some of the government's facts—whether in a jury trial, or a bench trial, or to the probation officer and the presentence report responses—it was not obvious why that should matter in terms of whether you get the two or three levels of acceptance of responsibility. He characterized that as an acceptance of responsibility problem that belongs in front of the Sentencing Commission.

Mr. Wroblewski said he was not aware of many efforts being made to try to take advantage of the exception that *Singer* allows, so he thought that was not the problem. What might be a problem? A district may have a uniform policy not to do bench trials or have no policy, and the resulting disparity around the country is conceivably some sort of concern. But the answer to that would be to ask the Attorney General to tell each U.S. Attorney's Office to develop a policy and to consider all of the different circumstances. He commented that it was not

obvious that would be the right policy. Article III says all trials shall be by jury, and a prosecutor might say we are just following that, and unless there's a really, really good reason that is within the narrow *Singer* exception, there should be a jury trial. If you seek a uniform policy, he said, you should be careful what you wish for. The policy may be never to consent to a bench trial, as opposed to sometimes, after considering all the circumstances.

A member wanted to know if Mr. Wroblewski was suggesting there should be 94 different policies. Mr. Wroblewski said he was not. But if the problem the Committee saw was that the Department has no uniform policy, then we should have a uniform policy.

Judge Dever said that another way to ask this is whether changing Rule 23 responds to either the absence of a policy of the Attorney General or the absence of language in the guidelines commentary to Section 3E1.1 that clarifies that if a person goes to trial solely to preserve an appellate issue because of the inability to negotiate a conditional plea, the court may award acceptance of responsibility. If there is a trial solely because the defense wants to preserve the issue on a motion to suppress, the defendants do get acceptance of responsibility, at least in his district.

A member asked if the Committee could have the Sentencing Commission look at acceptance of responsibility policies. The member thought this seemed to be an acceptance of responsibility problem more than anything else. Could they do anything with the problem? Mr. Wroblewski responded that the Committee could write and ask the Commission to take it up, and the Commission could certainly take it up. It has amended acceptance of responsibility multiple times for all kinds of reasons. Indeed, there was an amendment going into effect next week. The member commented that where the defendant wants to appeal an issue and is pleading guilty on everything else, the Guidelines could include a statement that encouraged giving acceptance of responsibility.

Another member stated the view that this was not an acceptance of responsibility problem, but rather a lack of uniformity problem. Ninety-four different rules are not going to solve that problem. And it is a rare day that the judge cedes the court's power to the prosecutor in a courtroom so willingly. Having the judge make that decision (the rule change being proposed) would not increase the number of bench trials. The real issue is the lack of uniformity. It is difficult to measure whether that is a problem. The rule gives one party in a courtroom the almost absolute power, save the *Singer* exception, to determine whether there will be a bench or jury trial. And the judge is not the party with this power. The proposed change would not actually result in a terrible increase in bench trials, but it would result in more uniformity.

A member drew attention to the presumption for jury trial resolution, and the presumption against amending rules unless they respond to a substantial problem. He saw this as an amendment in search of a problem, not a solution for one.

Another member reiterated that the Committee did not even know the results in the 25 districts that have a policy or the 52 that do not have a policy. So the Committee still did not have the empirical data that everyone had been searching for. The member argued that a decision should not be made on the basis of an assumption, when the Committee lacked that foundational

understanding. Mr. Wroblewski asked the member to articulate what information she thought was lacking. The member responded. First, in the 25 districts that have a policy to go through the supervisor, what happens when the supervisor reviews them? Are those 25 districts routinely denying the request? What is the result? Second, in the 52 districts that have no policy at all, of the requests that are made, how many are granted?

Mr. Wroblewski noted that the data about the jury trials is from the courts. Judge Dever commented that the ACTL proposal says 11% of the cases tried were bench trials (page 159 of the agenda book). That suggested a lot of U.S. Attorneys consented. There would not have been bench trials if they not consented.

Professor King said that the questions that were presented to the defense attorneys resemble an initial list of questions for prosecutors that she had drafted when we were first thinking about questions that would get more information. That granular kind of survey conceivably could be given to prosecutors to get more detail. "How often do defendants ask? How often do you reject? What are the reasons you reject?" But, she emphasized, the question for the Committee was how that information would make a difference to the issue that it had to resolve. If a survey like that generated responses, what kind of responses would prompt members to say "OK, well, given this, we don't need a subcommittee" or "OK, well, we do need a subcommittee." How is the information pivotal?

The member responded that it was pivotal to understanding whether there is a problem. Eleven percent of trials are bench trials, but the Committee did not know the denominator (i.e., the number of defendants who wish to have a bench trial). The member said this was similar to Rule 17, where the Committee had learned that in many districts defense attorneys do not seek subpoenas because they know they will not be successful. Trying to identify some kind of percentage of success is difficult when the issue might be one of defense attorneys not even asking because they might be in a district where the U.S. Attorney's Office never or rarely consents. The member thought the Committee was trying to measure something that was not happening. There were a number of defense attorneys and defenders who said that it is a problem, and the member credited those statements.

Judge Dever asked the member what space the member envisioned between the proposal and the *Singer* standard, which recognizes that the judge can override DOJ's refusal in a compelling circumstance where a court concluded a defendant could not get a fair trial. What is the space beyond a fair trial that the Committee would be creating, and what problem does that space address in the proposed rule? The member responded that amending the rule would make that space. Judge Dever asked what other problem—beyond not getting a fair trial—would the rule address that the member wants to put in the hands of a judge? The member responded that she could not articulate another problem; the issue was a question of a fair trial and the court is able to identify that.

Another member asked even assuming that the Committee could define what constitutes an improper purpose for a prosecutor to deny a waiver, what was the likelihood of figuring out how often that improper purpose, whatever it may be, was happening? He said he could think of

really terrible reasons that very seldom occur. But if both sides are tribunal shopping, he asked, was that improper? Was it improper for a prosecutor to say, "I just prefer a jury over this judge"? And if that was improper, how could the Committee figure out from DOJ how often that was happening?

Another member was not yet convinced that there was a problem that a subcommittee could study and solve. The defendant already has the ability to file a motion, and the court can reach the exceptional circumstances case. The rest of the cases, the member observed, fall within the strategic category. As a judge, the member said, she wouldn't want to know or be in the position of figuring out whether an attorney thought she was a defense-friendly judge or didn't like her questions. The Committee would presume the government is acting in good faith and the defense is acting in the best interests of the client, and those are strategic calls. The court would do better to stay out of it. And the standard proposed is very amorphous: reasons sufficient to overcome the presumption in favor of the jury trial. The judge must ask the DOJ to justify why it thought a jury would be better. She thought that was very awkward. And it was in some ways very counterintuitive to the trial judge's role of letting each side try its own case and make decisions on how to proceed, including whether strategically it is better to have a jury trial or a bench trial.

Another member said the current requirement of government consent was really not taking that decision out of the hands of the judge. Rather, the rule says before we have a bench trial, both parties have to consent. The rule requires a written request by the defendant. Requiring the government's consent is just another way of saying we do not change the constitutional presumption of jury trial unless both parties consent and the judge approves. The member thought it seemed an eminently fair rule.

A member commented that it is nearly impossible to meet the existing "fair trial" standard for overriding the government's insistence on a jury. Judge Dever observed that was the issue in the EDNY case. But if we amend the rule, Judge Dever asked for someone to articulate what that space would be beyond the fair trial. Is it an abuse of discretion standard? What would be a compelling reason?

The member continued that because the *Singer* exception is such a big hurdle, there are very few requests. When there is a request and the government says no, defense counsel seldom take that much further, because the problems the member had previously mentioned are not related to a fair trial. The defendant has a right to a jury trial. If the defendant wants to waive that, then the question is the community interest, the interest of society. The judge should make that decision and the government should not be able to override that decision. It was difficult to measure how often that was occurring because the Committee did not know how many defendants have abandoned that direction in the face of the government's opposition. The member said that a number of people she contacted did not respond, which might indicate that was not a problem or an issue. Perhaps, she said, some of the reasons defense counsel were seeking bench trials on behalf of their clients were for other policy decisions that we're trying to get around within the government itself. Maybe the problems were driving them toward no trials at all and this bench trial option. She said she was not sure how to solve those issues.

Professor Beale said that in April, two kinds of cases were brought up repeatedly, and they seemed to come up again in those comments from the group of Federal Defenders and CJA lawyers surveyed. One was child pornography cases, where the jury may be very, very offended by what they see and the defense thinks that the jurors won't be thinking about anything else. Another was the very complex case, where the jury may not be able to follow everything. Perhaps the defendant is really at an unusual disadvantage in these kinds of cases and ought to be able to decide that it is not in his or her interest to claim the jury right. And perhaps the government ought to not claim an almost unfair additional advantage, because the problem is jury prejudice or about the limits of what a lay jury can understand, and the government would be getting a little too much leverage there. That's part of what the proposal we received was about: the Sixth Amendment right rather than an Article III preference for the way things have to be. And at that point, we ought to go closer to letting the defendant make that decision. But of course Article III does state that preference, and there is a value to having jury involvement. If the Committee was going to send a subcommittee out to think about this, it ought to have some sense of what happens if an individual U.S. Attorney, or the DOJ as a whole, says "We like Article III and we're not going to consent to a bench trial unless we're convinced that this would be reversed on appeal as a trial that deprives the defendant of due process."

Judge Bates said the conversation had been very interesting and enlightening, and that the Committee must exercise care as to whether a change to Rule 23(a) would really address the acceptance of responsibility or the preservation of factual issues for sentencing problems. He thought these were problems more closely related to the plea process and sentencing. It should also be careful about putting an unworkable burden on the judge to figure out when the two sides are just saying things they don't really want to be said before the judge. The one issue that had been discussed as a reason for a rule amendment that falls somewhat outside of that—though it might not be a sufficient reason for the rule amendment—is the issue of uniformity. If uniformity is something that really is leading to unfairness in the system, perhaps it should be addressed. Whether a rule change or this particular rule change is the way to do that is not clear. Maybe, he said, the way to do it is to try to persuade the Attorney General to insist on some uniformity among the U.S. Attorney's Offices.

Judge Dever asked for each member's view.

All but three members opposed forming a subcommittee. Several noted the difficulty in defining what the problem is with the existing rule. One noted the case-by-case policy in his former district worked well, and another noted his former district's policy was to grant a jury waiver whenever one was requested. Of the three members in favor of a subcommittee to explore an amendment, one suggested the subcommittee could consider a modest change that would at least incorporate *Singer* and change the ultimate decider to the court.

Judge Dever then stated that the proposal would not be pursued further by subcommittee. Later in the meeting, he clarified that the item would be removed from the Committee's agenda.

Responding to comments from several members that the acceptance of responsibility situation is a problem and that the Sentencing Commission should be contacted, Judge Dever

said that he would recommend to the Standing Committee that the Sentencing Commission be made aware of the concern that arose during the Committee's discussion. Specifically, several members suggested clarifying that judges may award acceptance of responsibility after a jury trial held solely to preserve an antecedent issue for appeal when the government would not accept a conditional plea or a bench trial.

Access to Electronic Filing by Self-represented Litigants

After the break, Judge Dever asked Professor Struve to present on the next issue, access to the courts by self-represented litigants, discussed in the Agenda Book beginning on page 185.

Professor Struve, who has been coordinating the efforts of an inter-committee working group, began by thanking some of the participants in the meeting (including Ms. Noble, the Committee's clerk of court liaison, Judge Burgess, and the reporters) for their assistance. Professor Struve explained that the working group was studying (1) the ability of self-represented litigants to access the courts by means of various electronic avenues, including access to CM/ECF for filing, and (2) service of papers by self-represented litigants subsequent to filing. She drew the Committee's agenda to her report in the Agenda Book, and did not attempt to repeat all of that information. She did note that recent developments included finalizing a report on interviews Professor Struve and Dr. Reagan from the Federal Judicial Center (FJC) conducted with personnel from nine districts.

On service by self-represented litigants, Professor Struve said the working group was developing a consensus that the national rules should no longer require self-represented litigants who had access to e-filing to make redundant and burdensome service on persons on CM/ECF, since they would already receive NEFs. Although draft language would not be available until the Committee's spring meeting, Professor Struve said that one option was to bring the other rules (Civil, Bankruptcy, and Appellate) closer to the structure of Criminal Rule 49, which—unlike the other rules—begins with electronic service, which is now the dominant mode of filing.

Regarding self-represented litigants' access to electronic filing, Professor Struve noted that current practices vary greatly, both at different court levels (with appellate allowing the greatest access and bankruptcy the least) and from district to district. She stated that the working group was considering a "minimalist" rule that would not mandate access for self-represented litigants, but would require districts that generally disallow access to make reasonable exceptions. She compared this to the approach taken in Criminal Rule 49(e) from 2011–2018. It required local rules to mandate electronic filing "only if reasonable exceptions are allowed." She said this approach would recognize that districts may be in very different situations with regard to the availability of technology. Professor Struve then invited any comments.

Judge Burgess asked whether the interviews revealed any information related to the concerns that had previously been voiced on the Committee concerning problems with the accuracy of filings by self-represented litigants or burdens on the clerk's office. Professor Struve first noted the potential for some selection bias because the interviews were conducted in districts that had removed the separate service requirement. But the sample did include districts that allowed access and others that allowed access only with permission. In the districts where

they conducted these interviews, there were few concerns about either of these issues. Some respondents did say that it was necessary to train and deploy staff to facilitate electronic filing by self-represented litigants, and to be sure there were adequate staff. On the other hand, allowing self-represented litigants to file electronically reduced burdens on the clerk's office to process and scan paper filings, and eliminated the need for the clerk's office to serve self-represented litigants who were filing electronically, since they would receive electronic filings. As to the accuracy of filings, the representatives who were interviewed did not see that as a major problem, and in one district, the representatives said the self-represented litigants made fewer errors than attorney filers. Professor Struve did note that some of the respondents said that it was important to include the ability to revoke credentials if necessary.

Professor Struve summed up the views of the persons they interviewed, saying that the districts that are allowing electronic filing by self-represented litigants are quite happy with it.

Judge Dever thanked Judge Burgess and Professor Struve for their efforts, and he expressed his appreciation for Ms. Noble's valuable input based not only on her experience in the Southern District of Florida, but also from her contacts throughout the country.

The E-Filing Deadline

Judge Dever asked Professor Beale to explain the recommendation, page 206, that this item be removed from the Committee's agenda.

Professor Beale drew the Committee's attention to the report from Judge Bybee and Professor Struve, Agenda Book page 207, reporting the views of the E-Filing Deadlines Joint Subcommittee. The Joint Subcommittee focused on the developments since Judge (now Chief Judge) Michael Chagares made the initial suggestion that the filing deadlines in the national rules be changed from midnight to an earlier time in the day. The Third Circuit recently adopted a new local rule that makes the presumptive deadline for most electronic filings 5:00 p.m. The new rule had produced strong negative reactions from some members of the bar, and an internal DOJ survey also elicited negative comments. Given these developments, she said, the Joint Subcommittee thought that this was not the time to move ahead with a national rule.

Judge Bates suggested, however, that although it had only been in effect for a few months, the Third Circuit had a sense the new local rule was working well, and there had not been a lot of resistance from the bar. He also pointed out that it would be easier to adopt such a change in the Third Circuit, which falls within a single time zone, than the Ninth Circuit, which spans several time zones.

In response, Professor Beale said the Joint Subcommittee had input from DOJ's internal survey, and it included a member from the Third Circuit. She commented that clearly there was not a ground swell of support for changing the national rules at this time.

Professor Struve provided information concerning the views of the sister rules committees. Bankruptcy, Civil, and Appellate all removed this item from their agendas at their fall meetings.

A Committee member from the Third Circuit who had served on the Joint Subcommittee reported that the bar's response to the new local rule had been "vehemently negative."

The Committee voted unanimously to remove the item from its agenda.

Rule 53

Judge Dever introduced the next item, page 218, a letter to Judge Mauskopf, requesting that the Judicial Conference explicitly authorize the broadcasting of the court proceedings in the cases of *United States v. Donald J. Trump*. Judge Mauskopf forwarded that letter to the Rules Office to be logged as a suggested amendment. Judge Dever said that the reporters' memo concludes that the Committee has no authority to exempt or waive Federal Rule of Criminal Procedure 53, which currently provides that "the court must not permit . . . the broadcasting of judicial proceedings from the courtroom." Moreover, construing the letter as a request to amend Rule 53, the memo concludes that even if the Committee were to move at "warp speed," the change would not take effect for three or more likely four years because of the nature of the rulemaking process. Also, as the reporters' memo noted, there is an excellent discussion of the history of the judiciary's consideration of broadcasting (see footnote 17, page 222).

Professor Beale said she would provide a little more detail following this excellent summary. She commented that the reporters took pains to provide a clear explanation of their conclusion that the Committee lacked the authority to make any exception to allow broadcasting trials of exceptional public interest. The memo laid out the source of the Committee's statutory authority under the Rules Enabling Act (REA). The REA authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the district courts. The REA also requires the Judicial Conference to authorize the appointment of a standing committee on practice, procedure and evidence, and that standing committee authorizes the appointment of additional committees to assist the conference by recommending rules. That, she said, is the authority that allows the appointment of this Committee and the other advisory committees. The Committee has statutory authority to assist the Judicial Conference by recommending rules, but no authority to recommend exceptions to existing rules and the REA.

The Committee's only authority is to recommend rules, not to provide any exceptions to rules, and Rule 53 on its face is extremely clear. As quoted on page 219, it states that "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom" (emphasis added). No one has suggested that any statute would permit the requested broadcasting, and no one has suggested any other rule that might do so. Thus, we have an absolute rule. Our authority is limited to giving advice on and making suggestions on rules, and we have no authority to authorize exceptions to an across-the-board straight rule.

The reporters had also considered the Congressional letter as seeking an amendment to Rule 53 that would allow exceptions for particular cases of public importance. On pages 220–221, the memo discussed the question how quickly the Committee could move and how the process would work. Professor Beale summarized the necessary steps. After the Committee

initially approves a proposed amendment, it recommends the amendment to the Standing Committee. The Standing Committee, if it approves it, sends the proposed amendment out for publication and a period for public comment. After the comment period, the Committee reviews the public comments and decides whether to move ahead with the amendment. If the Committee then approves the amendment, either as published or with changes responsive to the comments, it presents its recommendation to the Standing Committee. At that point, if the Standing Committee approves a proposed amendment (such as a change in Rule 53 to allow the broadcasting of important cases), it then submits the proposed amendment to the Judicial Conference. If the Judicial Conference accepts the Standing Committee's recommendation, it forwards the proposed amendment to the Supreme Court. If the Supreme Court were to agree, under the REA by May 1 of any particular year, the Court would then transmit that recommendation to Congress. Finally, if Congress takes no contrary action by December 1, the amendment becomes law.

As their memo explained, Professor Beale said that even if the Committee were to act at "warp speed," an amendment to Rule 53 could not take effect until December 1, 2026. Moreover, it would probably take longer because the Committee would have to delve into the prior debates and discussion about the merits of broadcasting from the courtroom, as well as new issues, including changes in technology. So even if the Committee were to work as quickly as possible, the reporters had concluded that it would not be possible to amend Rule 53 before the completion of the particular trials that were the focus of the Congressional letter.

Judge Dever advised the Committee of a new proposal to amend Rule 53 from a coalition of media organizations that had not been received in time for consideration at the meeting (it was received after the Agenda Book had been prepared). The media organizations requested that Rule 53 be revised to permit broadcasting of criminal proceedings, or at least that it include an exception for extraordinary cases. He said the very thoughtful letter had been posted on the Committee's website for those who would like to review it now. He drew attention to current online resources on the history of cameras in the courtroom, cited in footnote 17 on page 222, and noted that there had been recent activity within the Judicial Conference in coordination with the Committee on Court Administration and Case Management (CACM) in connection with the broadcasting of civil proceedings.

Judge Dever announced he was appointing a subcommittee, chaired by Judge Conrad, to study the media coalition proposal. The other members would be Judge Burgess, Mr. Wroblewski, and the Committee's two new members, Judge Harvey and Ms. Mariano. Judge Dever thanked them all in advance for their work on this project.

Given the limitations on the Committee's authority (as explained by the reporters) and the fact that he was appointing a Rule 53 Subcommittee, Judge Dever commented that there would not be much for the Committee to discuss until it received a report from the Subcommittee. He asked Judge Bates if he had any comments.

Judge Bates asked whether the analysis just presented would preclude the Committee from drafting a new rule or amendment that would allow broadcasting under some circumstances

(not in a case-specific basis for the Trump case), either in an extraordinary case, in the discretion of the judge, or perhaps with the concurrence of the Judicial Council. He asked for confirmation that the reporters' analysis would not preclude this.

Professor Beale responded that the Committee was not precluded from considering such changes; indeed that was the reason that the reporters had analyzed the nature and time required to adopt such an amendment to Rule 53. She thought that the receipt of the new media consortium proposal—which clearly proposed such a change—was the catalyst for Judge Dever's decision that it was time to appoint a subcommittee.

Judge Dever agreed with Professor Beale's comments, noting that the reporters' memo summarized the authority of the Committee to act. The Committee certainly has the authority to consider the media proposal (as well as the letter of the members of Congress if viewed as alternatively requesting that we consider a potential rule change dealing with extraordinary cases or more generally). The Subcommittee would explore all of those topics. He added that the Committee had not studied the issue of broadcasting for 29 years, and it also raised issues under study by other committees, particularly CACM.

In response to a query from a member, Judge Dever agreed this would not be done at "warp speed." As discussed in connection with Rule 17, deliberative, thoughtful study of issues was a feature and not a bug of the process under the REA, because once a rule is amended, that becomes the law, not merely advice. So in considering whether to amend Rule 53, the Committee would continue to be thoughtful and deliberate. It would begin, as always, with the question whether there was a problem under the current rule, and, if so, what the solution might be.

Judge Conrad (the new Subcommittee chair) asked whether to anticipate parallel reviews by other advisory committees. Judge Bates said that he was aware only of CACM, and that committee would not be looking at a change to Rule 53. CACM is looking at remote proceedings more generally, not specifically in the criminal context but more in the civil context, bankruptcy context, and also with respect to possible changes in terms of public access, which have already been made through the Judicial Conference policy. So there were things going on in this general area but not with respect to the specific question of broadcasting criminal proceedings. Judge Bates also observed that the media request was actually for broadcasting of criminal proceedings, not just criminal trials, and Rule 53 applies to criminal proceedings, not just trials. But again, neither CACM nor any other committee was looking at broadcasting of criminal proceedings.

As a follow up to Judge Bates' point, Judge Dever said that the Subcommittee would be developing an understanding of the historical part, including what this Committee had done, what CACM has done, and what the Judicial Conference has done with regard to broadcasting generally. He anticipated the Subcommittee would receive information from CACM.

A member asked about his recollection of testing of broadcasting judicial proceedings and a pilot program in the Ninth Circuit. Professor Beale responded that the pilot had included only civil proceedings, and it was possible because the Civil Rule, unlike Rule 53, does not forbid broadcasting across the board. That made the pilot program in some districts possible.

Although a recommendation came out of a pilot program to move toward more availability of broadcasting as a national rule, that recommendation was not successful. Professor Beale thought it was at that point—when the proposal to amend the Civil Rules was rejected—that our Committee ended its consideration of a parallel change to the Criminal Rules. Noting that the Subcommittee would review the history thoroughly, Professor Beale suggested that anyone who wanted to know more about that see the online history linked from footnote 17, Agenda Book page 220. She characterized it as very interesting reading that details the actions of different groups, including the Judicial Conference and CACM, and she noted that the Federal Judicial Center had been very involved at different points in time.

Judge Dever said that Mr. Byron, who had been coordinating with CACM on issues relating to civil or bankruptcy proceedings and public access, would continue those efforts and be a resource for the new Subcommittee.

A member asked with respect to the Congressional letter, would the Committee communicate that directly back to the authors of the Congressional letter? Similarly, how would it communicate its decision not to form a subcommittee to consider an amendment to Rule 23, and to remove that item from its agenda?

Professor Beale responded that was up to the chair. Judge Dever stated his view that if someone had taken the time to ask the Committee to consider something, the Committee should write back to them once it had considered the suggestion. If the Committee has decided not to move forward, it communicates that. He noted that occasionally the Committee has received suggestions from judges who raise a variety of issues, and the Committee will seek to determine whether this is more than an isolated one-off example. If it decides to remove the item from its agenda, the chair historically writes the judge or other person who made the suggestion to let them know of the Committee's decision.

Judge Bates commented a communication would be made regarding a decision, particularly where, as here, the suggestion came from Congress and was rather to the Director and not directly to the Committee. In response to a member's concern about the difficulty of explaining the Committee's decision to appoint a subcommittee that would be looking at a proposal to allow broadcasting in the future—but not in the Trump trials which were the focus of the Congressional letter—Judge Bates assured the Committee that the communication would be made with care.

Social Security Numbers

Mr. Byron provided an oral report. He explained that under Professor Struve's leadership last year the Rules Office prepared a statutorily required report to Congress on the adequacy of the privacy rules in all of the rules settings. One of the things that was addressed in that report last year was the redaction requirements for Social Security numbers. Also last year, the committees received a letter from Senator Wyden asking the committees to consider again the question whether the last four digits of Social Security numbers need to be or should be allowed to be included in court filings, or alternatively, whether the full Social Security number should be required to be redacted under the rules.

As that report to Congress laid out, when the original privacy rules were considered and adopted in 2005 and took effect in 2007, the Bankruptcy Rules Committee deemed it important to have those last four digits for identification purposes in a variety of contexts in bankruptcy cases. And the other committees, including the Criminal Rules Committee, as well as Civil and Appellate, determined that the value of uniformity across the rule sets outweighed any concerns that might differ in those contexts from the bankruptcy situation.

That issue was reconsidered following the FJC's study concerning compliance with the redaction requirements in 2015. This Committee, as well as Civil and Appellate, again concluded that the value of uniformity outweighed any particularized privacy concerns in the context of those different rule sets other than Bankruptcy. And the Bankruptcy Rules Committee once again determined that it was important to retain the permissive use of those four last four digits in certain filings.

So now the issue is back to all four committees. Last year, the decision was made to allow the Bankruptcy Rules Committee to consider whether they were still of the view that the last four digits of Social Security numbers served a valuable purpose in some capacity in the bankruptcy context. The Bankruptcy Rules Committee discussed that question in the last two meetings and reached the tentative conclusion that there are at least some situations in bankruptcy cases where that identifying information can be valuable both to the debtor and sometimes to creditors as well. At this point, the Bankruptcy Rules Committee is going to continue to study the issue, but Mr. Byron said it seems unlikely that they would adopt a revision of the Bankruptcy Rule 9037 to require complete redaction of Social Security numbers. And to the extent they make any other changes to redaction requirements in their rules, it would take additional time for study about when and in what situations it is valuable to have that information.

Mr. Byron said that finding teed up for this Committee (as well as Civil and Appellate Rules) the question whether that uniformity goal remains paramount. Or, in light of the passage of time, the continued concerns in this area, and the suggestion from Senator Wyden, should the Committees now consider whether to adopt a requirement that differs from the Bankruptcy Rules and requires redaction of the full Social Security number in filings subject of course to the other provisions and exceptions (of which there are several) in Criminal Rule 49.1?

Mr. Byron described the latest developments, which included a meeting of the reporters for all of the committees that started an initial discussion of what might happen next and the timeline. There would be continued communications among the reporters for the advisory committees, with the assistance of Professor Struve, with the hope that it might be possible to bring a proposal to the committees' spring meetings if there was room on their agendas. He hoped to have some more news on that timeline in advance of the spring committee meetings. In the meantime, he said they would be very interested in any feedback, reactions, or guidance from this Committee about whether it would be valuable either to retain a uniform approach across the rulesets, or at least as between Criminal and Bankruptcy, or whether the privacy concerns that have been raised warrant considering a full redaction requirement or some other provision. He

invited any comments at the meeting and encouraged members to send any further thoughts to him or to the reporters.

Concluding Remarks

Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 18, 2024, and he noted that the work of the subcommittees would continue between the meetings. He also thanked the reporters, and Ms. Cox, Mr. Byron, and the members of the team at the Administrative Office, as well as St. Thomas for hosting the Committee.

Judge Dever then announced that the meeting was adjourned.

TAB 1A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Austin, Texas, on January 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair

Others who provided support to the Standing Committee, in person or remotely, included Judge J. Paul Oetken, Chair of the Joint Subcommittee on Attorney Admission; Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, Professor Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order. He welcomed attendees and members of the public, including those who were attending remotely. He also welcomed new Standing Committee members Justice Edward M. Mansfield and Louis A. Chaiten, Esq. Judge Bates recognized Professor Joseph Kimble for his selection by the Michigan State Bar to receive the Roberts P. Hudson Award for his service to the Bar and legal profession. He also noted that Professors Kimble and Garner deserve a lot of credit for their work on restyling the federal rules.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee approved the minutes of the June 6, 2023, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, noted that the latest set of proposed rule amendments had been submitted to the Supreme Court for review and, if all goes smoothly, will be transmitted to Congress in the spring to take effect on December 1, 2024.

Judge Bates remarked that it is good for the Standing Committee to be aware of the projects underway by the FJC and that a short memorandum regarding that work begins on page 94 of the agenda book. Dr. Reagan explained that the FJC assigns liaisons to various Judicial Conference committees and conducts empirical research for the committees. The FJC's role, he explained, is to contribute methodological expertise and objective research capacity without taking policy positions. Judge Bates thanked the FJC for the continuing support and superb research done on behalf of the Rules Committees.

JOINT COMMITTEE BUSINESS

Joint Subcommittee on Attorney Admission

Judge J. Paul Oetken, chair of the Joint Subcommittee on Attorney Admission and a member of the Bankruptcy Rules Committee, and Professors Struve and Bradt reported on this item. A written report starts on page 101 of the agenda book. The joint subcommittee is considering a proposal from Dean Alan Morrison and others to make admission to the bars of the federal district courts more uniform.

Professor Struve noted the joint subcommittee was in the early stages of its work and thanked its members, who represent the Bankruptcy, Civil, and Criminal Rules Committees. She explained that the Morrison proposal highlights the variation in the criteria for admission to the bars of district courts. It notes that many federal districts require membership in the bar of the state in which the district is located, and in four states this in effect requires that lawyers pass the local state bar exam in order to be admitted to the district court bar. The proponents point out that the admission requirements can be time consuming and expensive and that seeking admission pro hac vice can also be burdensome given varying local counsel requirements and fees. They argue there is no reason for a district court to require in-state bar admission. Their petitions for various restrictive districts to change their local provisions have been unsuccessful.

The proposal contains three options. Option One is to centralize attorney admission and discipline within the Administrative Office of the United States Courts (AO), allowing attorneys in good standing in any state bar to be admitted to practice in any federal district court. Option Two provides that admission in any district court would entitle an attorney to practice in all other districts but would not centralize the process within the AO. Option Three bars district courts from having a local rule that would require in-state bar admission as a condition of admission to practice in the district court.

Professor Struve explained that there have been periodic discussions about attorney admission criteria over the last 90 years. An attorney proposed a nationwide rule for the district courts in 2002, but it did not garner much rulemaking interest or discussion. In the early 2000s, Professor Coquillette examined the adjacent, but separate, topic of centralizing federal rules on attorney conduct, which received a lot of pushback. Professor Coquillette added that the DOJ was the moving party for the unified rules of attorney conduct, but every bar association was against it.

Professor Struve noted that Appellate Rule 46 is one model that already exists in the national rules. It provides for admission to the courts of appeals based on an attorney being of good moral and professional character and being admitted to practice in the United States Supreme Court, a state high court, or another federal court.

The joint subcommittee held its first meeting in October 2023. There was no interest in adopting Option One. There were questions of feasibility and concerns that a centralized office within the AO would lack the local knowledge and contacts required for effective attorney discipline proceedings.

There was some interest in Options Two and Three. In-state admission requirements are particularly burdensome, especially in states that require taking the bar exam for admission. But members were mindful of the local courts' interests in protecting the quality of law practice. Additionally, courts use admission fees for funding important work, and there could be revenue effects. The subcommittee was inclined to consider models with elements of Options Two and Three. There would likely still be separate applications to each district in which one wishes to practice and perhaps fees as well.

The subcommittee also recognized the need to be mindful of rulemaking authority and 28 U.S.C. § 1654, which refers to the rules of courts that permit attorney admission. However, the existence of Appellate Rule 46 suggests rulemaking on attorney admissions has not been foreclosed. Professor Coquillette recalled that some senators had offered to pass legislation giving the Rules Committees power to make rules involving attorney conduct. Going forward, the subcommittee plans to look further into these issues.

Professor Struve also reported that, in response to the agenda book materials, Dean Morrison and others explained that their primary goal is to eliminate barriers that prevent lawyers who are admitted to practice in one district from practicing in another. While not wedded to centralizing admission, they would suggest addressing district variation in how often attorneys must renew their licenses and how much the court charges. They have no interest in removing authority from individual districts to discipline attorneys.

Judge Bates explained that he populated the joint subcommittee with people from jurisdictions with different approaches so there will be a thorough examination through the subcommittee process. There are a lot of issues, and it is a pretty important matter for many courts across the country and for the Bar.

An academic member commented that Option Three has the most promise as there is no good reason today to require in-state bar admission. A practitioner member echoed that Option Three has the best chance of progressing. He acknowledged that there may be something to be served by requiring membership in the local bar but offered three points in support of something like Option Three. First, he noted that in-state bar admission is not a great proxy for experience. For example, he practiced in a particular district for years as an Assistant United States Attorney but was not able to be admitted as a private attorney because he was not barred in that state. Second, the concern around pro hac vice fees can be dwarfed by fees paid to local counsel. Third, reciprocity is not a full solution because defense attorneys must go wherever the case is.

A judge member made the point that spouses of military service members face extraordinary barriers when trying to maintain legal careers while moving around the country every few years. She emphasized the considerable difficulty and cost of admission to state bars and noted that many states already make exceptions to their bar requirements for military spouses. There is also a need to reduce the variable expenses, or possibly make an exception, for military spouses and others who cannot afford these expenses. Option Three should be the bare minimum and would show respect for military service members and their spouses.

Judge Bybee agreed that this project is well worth the effort to study. He noted, however, that diversity cases are an area in which attorneys need to know the state law. The state bar might object to an out-of-state attorney taking a matter from state court directly to federal court. That argument is less compelling for other forms of jurisdiction, but it is not clear how the rules could distinguish between diversity jurisdiction cases as opposed to other or mixed jurisdiction cases.

Professor Struve noted that the subcommittee had not yet considered the issue, but Dean Morrison's proposal attempted to rebut the diversity case argument in his submission.

Another judge member asked what it would cost to initiate Option One at the AO. She also asked about the range of fees across the country for admission pro hac vice, noting that such fees were a substantial source of court income in her district. She suggested that it might be desirable to encourage parity among those fees.

Professor Struve indicated the subcommittee had not conducted its own systematic study yet, but they had been informed that pro hac vice admission fees can reach $500 in some districts.

Another judge member questioned the aptness of the analogy between appellate and district practice given how circumscribed the responsibilities of counsel are on appeal as compared to litigation in the district court. Additionally, he would be cautious about making changes that would make cases less likely to feature repeat players; in his experience, the involvement of attorneys who are known to the court tends to increase the quality of practice.

Another judge member observed that there are many concerns wrapped up in this issue and many ways those concerns could be addressed. Option Three is the most promising. But it is

important to involve state bars in some respect because it is important for district courts and state bars to work together to monitor attorney practice and discipline. Option One is less preferable because it could lead to lower standards. She also noted that it has become more common for attorneys to practice remotely or in another close-proximity jurisdiction. Her district had an issue with attorneys who were living and practicing in the state but applying pro hac vice in every case, seemingly to get around the in-state bar requirement. If the rulemakers were to adopt an approach that mandates reciprocity, it may be that an attorney who lives in a particular jurisdiction for a certain amount of time should be required to be admitted to that bar, possibly with an exception for military spouses.

A practitioner member expressed sympathy for this proposal as someone who spends a great deal of time and money getting admitted pro hac vice in federal courts across the country. But he asked whether districts that require in-state bar admission justify that requirement based on better behavior from repeat, in-state attorneys. He also asked if the subcommittee had looked at whether it would be unauthorized practice of law for an attorney to litigate a lengthy diversity case in federal court without being admitted to that state's bar.

Professor Struve responded that the subcommittee had not yet looked into that issue but that it can.

A judge member noted that these issues are not limited to diversity cases. A federal case often has a federal claim with numerous state law claims under supplemental jurisdiction. There is a concern that, despite soliciting clients within a state, a national practitioner who can only represent clients in federal court might be less familiar with state law that can, at times, afford the plaintiff greater relief than federal law.

Judge Bates thanked the subcommittee for its work so far. He noted that the authority question is particularly important with respect to Option One but is not necessarily eliminated with respect to the other approaches. More examination needs to be done.

Judge Oetken thanked the members of the Standing Committee for their helpful comments.

Service and Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which appears on page 182 of the agenda book, and invited Professor Struve to provide an update.

Professor Struve reported that the pro se electronic filing and service working group is studying two topics: (1) whether to take steps to increase electronic access to the court for self-represented litigants by CM/ECF or otherwise and (2) whether self-represented litigants need to traditionally serve their papers on litigants who will receive a notice of electronic filings anyway. The report in the agenda book summarizes spring 2023 interviews that Professor Struve and Dr. Reagan conducted with officials in district courts. She expressed gratitude to Dr. Reagan and his colleagues for their work.

The working group hopes to develop concrete proposals on both issues for the advisory committees in their spring meetings. One potential proposal discussed in concept at the fall meetings, without eliciting immediate expressions of concern, was a rule that would set a baseline

requirement that districts that disallow CM/ECF access for self-represented litigants would need to make reasonable exceptions to that policy.

Electronic-Filing Deadlines Joint Subcommittee

Professor Struve reported on this topic. In 2019, Judge Michael Chagares proposed a study on whether the national rules on computing time should be amended to set the presumptive deadline for electronic filing earlier than midnight. In 2023, the Third Circuit adopted a local rule moving the filing deadline back in that court of appeals from midnight to 5:00 p.m. The E-Filing Deadlines Joint Subcommittee met in August 2023 and voted unanimously to recommend that no action be taken and that the subcommittee be disbanded. The Advisory Committees endorsed this recommendation at their fall meetings and removed the topic from their agendas.

Judge Bates asked if the Standing Committee had any objection to disbanding the joint subcommittee and putting this issue to rest for the moment. Hearing no objection, Judge Bates disbanded the joint subcommittee and removed the matter from the agenda. The Committee will monitor how things play out in the Third Circuit.

Redaction of Social Security Numbers

Mr. Byron reported that the advisory committee reporters have begun to discuss Senator Ron Wyden's proposal to require complete redaction of Social Security numbers in court filings, instead of the current requirement in the privacy rules of redacting all but the last four digits of those numbers. The reporters' discussions are still in the early stages.

Professor Marcus noted the likelihood that this project, and thus the Standing Committee, will need to confront the question of whether the various sets of rules should continue to take a uniform approach to this topic.

Mr. Byron elaborated that a desire for uniformity was one historical motivation for the current rules. The Bankruptcy Rules Committee had identified the last four digits of a Social Security number as being extremely valuable in bankruptcy cases for creditors and other participants. The other committees essentially deferred to the Bankruptcy Rules Committee on this issue and also required redaction of all but the last four digits. The working group is currently reconsidering whether uniformity is still a predominant concern that should overrule other concerns such as privacy or identity theft. There are also already some variations among the rule sets. One issue is whether the Criminal, Civil, and Appellate Rules Committees want to consider requiring full redaction.

Privacy Report

Judge Bates asked Mr. Byron to report on the status of the 2024 report to Congress.

Mr. Byron explained that the Judiciary has an ongoing statutory obligation to study and report to Congress every two years on the adequacy of the privacy rules. Rules Committee Staff has been working with staff from the Committee on Court Administration and Case Management (CACM) on the privacy report. CACM has requested some FJC research projects that are relevant

to this question, but those projects likely will not be completed in time to fully report their results to Congress this year.

Ideally, a draft report will be ready in time for the Standing Committee to consider and approve at the June meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 19, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 219.

Judge Bybee updated the Standing Committee on two proposals out for public comment. The Advisory Committee has received one comment on the proposed amendment to Rule 39. It has received no comments on the proposed amendment to Rule 6, which involves some very complicated changes dealing with direct appeals in bankruptcy cases. Judge Bybee thanked the Bankruptcy Rules Committee and others who commented on those changes prior to publication. The Advisory Committee will not hold hearings on Rules 6 and 36 due to a lack of requests to testify and expects to seek final approval from the Standing Committee in June 2024.

Information Items

Amicus Disclosures. Judge Bybee and Professor Hartnett reported on this item. The Advisory Committee hopes to have a proposal before the Standing Committee in June 2024.

Professor Hartnett provided background on the proposal. The Advisory Committee reviewed proposed legislation, the AMICUS Act, which would have treated repeat amicus curiae filers like lobbyists, requiring them to register and to disclose contributors who had provided 3% or more of their revenue. That approach was rejected by the Advisory Committee because there is a difference between lobbying and submitting a public amicus brief to which there is an opportunity to respond. On the other hand, sometimes judges care not only about the contents of an amicus's arguments but also who the amicus is.

The Advisory Committee has tried to balance disclosure with free speech and free association rights. The current draft recognizes the distinctions (a) between contributions by a party and by a nonparty and (b) between contributions earmarked for the preparation of a brief and contributions to the organization generally. For example, the 25% threshold for disclosure is meant to avoid discouraging speech and association while recognizing that this level of contribution could give the contributor real influence on the speech. Striking this balance also informed how to set a de minimis threshold amount for disclosure of earmarked contributions by a nonparty.

The Advisory Committee has narrowed down the questions at issue, and Judge Bybee reported on three recent developments.

First, as to the appropriate lookback period for determining contributions by a party, the Advisory Committee had considered whether the proposed rule should use a fiscal year or the 12-

month period preceding the brief's filing. Neither was perfect, but the Advisory Committee has arrived at an elegant solution and would welcome feedback. To determine the threshold contribution amount that would require disclosure, this approach would multiply the amicus's prior fiscal year revenue by 25% and see whether a party had contributed more than that dollar amount within the last 12 months. This effectively combines the two periods into a single, easily calculable figure and closes a potential loophole.

Second, the proposed amendment had incorporated language from the AMICUS Act that would have excluded from disclosure certain amounts received in the "ordinary course of business." But no one was sure what that language meant, and it did not seem essential. To simplify matters, the Advisory Committee has deleted that phrase from the proposed amendment.

Third, the current rule broadly requires disclosure of any contribution earmarked for a particular brief, but it exempts contributions by members of the amicus. That was seen by some as a loophole because it allowed someone to join an amicus at the last minute and avoid disclosure. The Advisory Committee proposed setting a de minimis contribution amount of $1,000 that would not be reportable even when earmarked for the preparation of a brief. This avoids problems arising with a GoFundMe-style amicus brief. For any contribution over $1,000, it must be disclosed unless it comes from someone who has been a member for at least 12 months. Anyone who has been a member for less than 12 months is treated like a nonmember.

Judge Bybee welcomed any input from the Standing Committee.

Judge Bates thanked Judge Bybee, Professor Hartnett, and the Advisory Committee for their work. This important project began with communications from members of Congress to the Supreme Court. The matter was referred to the Standing Committee and then to the Advisory Committee. It has a lot of ramifications and has drawn public and congressional interest.

A judge member agreed that these are elegant solutions and commended the Advisory Committee for its work. Regarding the last sentence of subdivision (d), she recalled the concern expressed about individuals joining an amicus for the purpose of contributing toward a brief. She inquired whether that is a problem, and, if so, whether such individuals would now get around having to disclose that they are funding a brief by creating a new amicus, rather than joining an existing one.

Judge Bybee explained the Advisory Committee's sense that there are people who are willing to form an amicus organization with a name that completely obscures who is behind it. To address this issue, under subdivision (d), while the amicus need not disclose the contributing members if the amicus has existed for fewer than 12 months, it must disclose the date of creation. There is also a new provision in Rule 29(a)(4)(D), requiring a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will be helpful to the court.

A practitioner member commented that, unsurprisingly, there are people that see a case and would like to influence it without filing briefs in their own names, so they form organizations to do so. The disclosure of the date of creation is a check on this. It will flag to the reader that this is

an organization that does not have a long-standing interest or was formed for the purpose of filing an amicus brief if, for example, it was formed after the case was filed.

Another practitioner member added that nothing is perfect, but this solution does address the issue and provides relevant disclosure.

Another judge member also thought that the solution in subdivision (b) was elegant. However, the concern addressed in that subdivision (the relationship between the amicus and a party) was probably not the concern motivating the legislators who submitted the suggestion. It is more of a judicial-looking concern about the adversarial process. He expressed ambivalence on that issue because he was not sure how he would make better, or different, use of amicus briefs if he knew more about who was behind them beyond what they say and who the lawyers are.

Instead, subdivision (d) is directly responsive to the legislators' concerns, and some additions may be needed to guard against engineering to circumvent subdivision (d). For example, if someone funded an organization up front and it does the amicus briefing, would the amicus need to say anyone contributed funds for the brief? The Advisory Committee may want to consider something like submitting or drafting "briefs"—rather than "the brief," that is a particular brief—to capture an organization that is funded generally to file amicus briefs in a certain type of litigation.

A practitioner member wondered whether the $1,000 threshold is too high. It would not require that many like-minded payers each contributing $999 to fund a brief. If the focus is on GoFundMe campaigns, an amount in the $100 range might be more appropriate and make it much more difficult for a group of wealthy people to fund a brief through $999 contributions.

Judge Bates observed that a perfect product is not achievable here. He asked Judge Bybee to address another issue regarding whether to follow the Supreme Court in its recent change to permit amicus briefs without requiring leave of court or consent of the parties.

Judge Bybee explained that the current proposal follows the Supreme Court Rules in not requiring leave of court or consent of the parties. However, the Supreme Court recently issued its own ethics guidelines noting that it has different concerns from lower appellate courts due to the dynamics of disqualification. There is a rule of necessity at the Supreme Court under which the Justices will not regularly recuse due to amici, but that has not been the practice in courts of appeals. Large courts with sophisticated systems for identifying possible conflicts can fairly easily work around an amicus brief if it requires a judge's recusal at the panel stage. But it can be more complicated when the appeal progresses to en banc proceedings where an amicus could strategically file a brief to ensure the disqualification of a judge. The Advisory Committee is still thinking about these issues and would welcome thoughts on whether the rule should revert to the motion requirement to forestall the problem of a strategic en banc amicus filing.

Judge Bates remarked that he hoped that this discussion had been beneficial to the Advisory Committee's continuing efforts and that the Standing Committee would look forward to the next step.

In forma pauperis. Judge Bybee reported that the Advisory Committee has been working diligently and conducting surveys on in forma pauperis status and expected to have a proposal before the Standing Committee in June 2024.

Intervention on appeal. Judge Bybee reported that there is a subcommittee considering intervention on appeal. Although there is not yet a working draft, the subcommittee would appreciate getting a sense of where the Standing Committee stands on this issue. It is a controversial issue that has been studied by the Advisory Committee before, and it came up recently in the Supreme Court.

An academic member thought it would be a worthwhile undertaking to consider what a rule on intervention on appeal might look like. In teaching the relevant cases, he was surprised to learn about the system in the courts of appeals for handling intervention on appeal. They have tried to borrow Civil Rule 24, which itself has ambiguities and difficulties, to fit in the appellate structure. That might be fine because intervention on appeal should not be common. But he would encourage the Advisory Committee to think through this issue, which has come up so frequently in the last few years.

Judge Bybee thanked the Standing Committee for its comments, and Judge Bates thanked Judge Bybee and Professor Hartnett for their report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 14, 2023, in Washington, D.C. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 249.

Judge Connelly reported that the Advisory Committee has been active, engaged, and productive. She thanked the reporters for the terrific job they have done.

Action Items

Proposed amendment to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed). Judge Connelly reported on this item. The text of the proposed amendment appears on page 256 of the agenda book.

Generally, everything a debtor owns becomes part of the bankruptcy estate. Rule 1007 sets a timeline for the debtor to file schedules of the estate's property. It also provides a deadline and mechanism for filing a supplemental schedule for certain types of property interests listed in Bankruptcy Code Section 541(a)(5) that the debtor acquires within 180 days after filing the petition.

However, bankruptcy cases under Chapters 11, 12, and 13 of the Code can take three to five years or longer to resolve, and property the debtor acquires during this period is also property of the estate. The proposal would amend Rule 1007 to account for supplemental schedules to list

those other postpetition property interests that the debtor acquires and that become property of the estate under Bankruptcy Code Section 1115, 1207, or 1306.

Courts have been managing this issue through local rules and administrative orders, and this rule would dispel any concern about whether local courts have the authority to do so. Local management is important because courts have different interpretations about whether a debtor has an ongoing obligation to report postpetition acquisitions other than what is currently required under Rule 1007(h). The Advisory Committee did not want to adopt a particular position on those questions. The proposal also serves to put the debtor and counsel on notice that the court might require the filing of a supplemental schedule.

An academic member commented that this seems like an opportunity to fill a gap in the rules. He recalled researching cases where, for example, a debtor has a valuable cause of action, seeks to pursue it post-bankruptcy, and could be estopped from asserting it later for failure to disclose it. However, given that case law has developed, he questioned whether there is a need for rulemaking. He does not object to publication but is nervous about unintended consequences.

Professor Bartell noted that this proposal does not address judicial estoppel for a cause of action that a debtor had at the time of filing the petition and failed to disclose. It only addresses postpetition assets. It is a weaker version of the original proposal, which would have created a mandatory rule for disclosure. That created problems with how to craft a test for what to disclose. Instead, this proposal empowers local courts to impose a disclosure requirement if they wish to do so.

Professor Gibson added that courts disagree about whether, in the absence of a request by a party, a U.S. trustee, or the court, a debtor in this situation has a continuing duty to reveal postpetition property. It would be helpful for courts that believe there is such a continuing duty to make that fact clear, because failure to satisfy that duty could lead to judicial estoppel.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 1007(h) for public comment.**

Proposed amendment to Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan). Judge Connelly reported on this item. The proposed amendment starts on page 258 of the agenda book.

Rule 3018 governs creditor acceptance or rejection of a Chapter 9 or Chapter 11 plan for reorganization. Although Chapter 9 municipal reorganizations are pretty rare, Chapter 11 reorganizations are very common. (Chapter 11 reorganizations ordinarily involve a business debtor but could involve an individual debtor.) Plan confirmation criteria will be different depending on whether creditors have accepted the plan.

Under Rule 3018, creditors have an opportunity to vote on a plan by indicating acceptance or rejection through a written ballot. The proposal would amend subdivisions (a) and (c) to permit courts to also consider an acceptance—or the change or withdrawal of a rejection—that is made

by a creditor's attorney or authorized agent and is part of the record. That can be done orally at the confirmation hearing or by stipulation.

This proposal addresses two common practices. First, parties are often heavily involved in negotiations leading up to the plan confirmation hearing. This proposal would facilitate effective negotiations by allowing the court to consider acceptances at the confirmation hearing reflecting those negotiations. Second, creditors are not required to vote, and some do not vote at all for a variety of reasons. Most, but not all jurisdictions, do not treat a nonvote as an acceptance. This proposal would reduce the practical difficulties of submitting a written ballot in a four-to-five-week period. While that turn-around time has not proven a challenge for the private sector, it may be a barrier for the government, which is the least likely creditor to vote. Among other reasons not to vote, getting authorization from the Secretary of the Treasury in that timeframe may present an issue for the IRS. This rule would create a potential opportunity for the IRS to participate by authorizing the DOJ to accept a plan.

This proposal is particularly important for small businesses. Subchapter V of Chapter 11 was enacted in 2020 to allow a special fast track for small businesses that cannot typically afford regular Chapter 11 practice. If a subchapter V plan is confirmed as consensual with sufficient acceptances, discharge occurs, the debtor may exit Chapter 11, and the subchapter V trustee's service ends. That means the small business is not burdened with continuing administrative expenses. In contrast, if there are not sufficient acceptances, the debtor does not get an immediate discharge and must remain under the court's purview throughout the plan period. The subchapter V trustee is also the disbursing agent throughout this process. So, there are administrative expenses, and remaining in Chapter 11 for multiple years may have an impact on the business.

Judge Connelly acknowledged that the government expressed concern about this proposal during the Advisory Committee's discussions. The Advisory Committee felt publishing the proposal would provide useful feedback and give the government more time to review it.

Ms. Shapiro explained that the government opposed the proposal in the Advisory Committee because it was concerned that the rule change would pressure the government to accept plans that it lacks the resources to fully review. There was also concern that the change from requiring written acceptances to permitting oral acceptances might result in judges pressuring Assistant United States Attorneys to accept a plan that was not able to go through the process for government review and approval. That said, the government will vote in favor of publication, and it intends to submit a letter to the Advisory Committee setting out its concerns.

A judge member expressed that, while he had no issue with the rule, he wondered whether its structure worked. Current Rule 3018(a)(3) seems to require cause for any change or withdrawal of acceptance or rejection. The proposed additional text in Rule 3018(a)(3)—"The court may also do so as provided in (c)(1)(B)"—appears to permit the court to permit the change or withdrawal of a rejection without cause. It seems the tail has grown much larger than the dog here.

Professor Gibson acknowledged the judge member's point. She noted that courts are already accepting settlements and changes from rejections to acceptances at the confirmation hearing even without the rule explicitly allowing it.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018(a) and (c) for public comment.**

Proposed amendment to Official Form 410S1 (Notice of Mortgage Payment Change). Judge Connelly reported on this item. The proposed revised form starts on page 260 of the agenda book.

Proposed amendments to Rule 3002.1, which require mortgage creditors in a Chapter 13 case to disclose payment changes and other details that occur over the course of the case were published for public comment in 2023. The proposal addresses home equity lines of credit (HELOCs), among other issues. There can be a lot of variation in HELOC payments, and the proposed rule would allow the notice of change to be made either at the time of the change or annually with a reconciliation amount.

One of the public comments to Rule 3002.1 noted a need to update the official form to implement this change. The forms subcommittee determined that Official Form 410S1 should be revised to provide space for an annual HELOC notice at Part 3. If the proposed amendment is published in 2024, the form will be on the same timeline to take effect as proposed Rule 3002.1.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 410S1 for public comment.**

Information Items

Judge Connelly stated that none of the information items mentioned in the Advisory Committee's report required approval or specific feedback at this time. She elaborated on two items.

Reconsideration of proposed Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). At the June 2023 Standing Committee meeting, Judge Connelly requested permission to publish extensive changes to Rule 3002.1, including amendments to the subdivision addressing noncompliance that would authorize the court to enforce the rule by awarding noncompensatory sanctions. There was a robust discussion at the meeting, and, at Judge Connelly's request, Rule 3002.1 was published for comment without the provision on noncompensatory sanctions so that the Advisory Committee could discuss the points raised by the Standing Committee.

The Advisory Committee will defer further discussion of that subdivision for now, pending consideration of the public comments on Rule 3002.1 and further development in the case law.

Remote testimony in contested matters. The Advisory Committee is considering a proposal to address the procedure for a bankruptcy judge to permit remote testimony in contested matters in bankruptcy cases. The proposed amendments were discussed in September, but the Advisory Committee deferred any recommendation so that certain Judicial Conference

committees, particularly CACM, could be informed and have an opportunity to provide input. The Advisory Committee plans to consider the proposal further at its meeting in April, and there will probably be an agenda item on this topic for the Standing Committee's meeting in June.

Professor Marcus observed that Civil Rule 43(a)'s strong presumption in favor of non-remote open-court testimony might in future be altered based in part on experience under the Bankruptcy Rules.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 17, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 288.

Judge Rosenberg updated the Standing Committee on proposals out for public comment. In August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Public comments can be viewed on the regulations.gov website, and a summary of the comments will be provided in the Advisory Committee's spring agenda book. The Advisory Committee is holding three public hearings on these changes. Twenty-four witnesses testified at the first hearing, which was held in person in Washington, D.C., on October 16, 2023. The next two hearings are scheduled for January 16 and February 6, 2024, and will be conducted remotely. So far, there have been 16 written submissions for the January 16 hearing and 32 witnesses scheduled to testify. Another 24 witnesses are currently scheduled for the February hearing.

Information Items

Rule 41 Subcommittee. Judge Rosenberg and Professor Bradt reported on this item.

Judge Cathy Bissoon chairs the subcommittee considering Rule 41(a). There is a circuit split about the meaning of the word "action" in Rule 41(a)(1)(A), which allows the plaintiff to dismiss an action by filing a notice or stipulation of dismissal. Some courts only allow an entire action to be dismissed, not a claim or an action against a particular party. Those courts require an amendment under Rule 15 for dropping anything less than the entire action.

The subcommittee has engaged in outreach to several attorney groups since the last report to the Standing Committee, including Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The subcommittee also sent a letter to federal judges through the Federal Judges Association. There were only eight responses, which were somewhat ambivalent and reflected different interpretations of the rule.

Judge Rosenberg reported that, to date, there have been sketches of possible rule amendments but no concrete proposals. There will be a subcommittee meeting before the April Advisory Committee meeting, and it is possible that the subcommittee may agree upon a proposal

to present to the full committee. An amended rule could clarify how much leeway a plaintiff has to dismiss something less than the entire action and whether that should extend to individual claims. Tangential considerations include the deadline by which a plaintiff can voluntarily dismiss without a stipulation or court order, who must sign a stipulation of dismissal, and which dismissals should be with or without prejudice.

Professor Bradt added that in the subcommittee's extensive outreach, the first question was whether there is a real-world problem for litigants. The answer seems to be yes, particularly in jurisdictions that interpret the rule to allow voluntary dismissal only of the entire action. That often leads to makeshift solutions, serial amendments to complaints, and follow-on motion practice and pleadings. The rough consensus of the members of the subcommittee seems to be that the rule ought to be more flexible than limiting dismissal to the entire action, but the degree of flexibility will be debated at upcoming meetings.

Discovery Subcommittee. Judge Rosenberg and Professor Marcus reported on this item. Chief Judge David Godbey chairs the Discovery Subcommittee. Judge Rosenberg noted that a number of issues were being considered by the subcommittee.

Serving subpoenas. The first issue is service of subpoenas under Rule 45(b)(1), and discussion begins on page 294 of the agenda book. There is some ambiguity on whether service is satisfied by something other than in-hand service. The prior Rules Law Clerk prepared an extensive memorandum on the requirements in state courts. There was no consistent thread to provide guidance, but the subcommittee has concluded that the rule's ambiguity has produced sufficient wasteful litigation activity to warrant an effort to clarify the rule.

The subcommittee's consensus was that requiring in-person service in every instance was not desirable. The proposed sketch at page 295 in the agenda book materials would permit subpoena service by any means of service authorized under Rule 4(d), (e), (f), (h), or (i), or authorized by court order or by local rule if reasonably calculated to give notice.

Professor Marcus noted that this is a work in progress. At the Advisory Committee meeting, the DOJ raised concerns about the inclusion of Rule 4(i), and the Advisory Committee expects to hear more.

Filing under seal. Judge Rosenberg reported that the next issue relates to filing under seal. The Advisory Committee has received a number of submissions urging that the rules explicitly recognize that a protective order under Rule 26(c) invokes a good cause standard, rather than the more demanding standards in the common law and First Amendment context for sealing court files. The subcommittee discussed making an explicit distinction between filing under seal and the issuance of a protective order for materials exchanged through discovery. It has developed a proposed sketch for Rule 26(c)(4) and Rule 5(d)(5), appearing on page 297 of the agenda book, and feedback would be welcome.

The Advisory Committee discussed that making it more difficult to file under seal could prove troublesome in litigation with highly confidential, technical, and competitive information. The attorney members stressed the variation across districts. There were also suggestions to consult with clerks' offices since they are essential to the day-to-day handling of these issues.

Professor Marcus observed that the aspect of the draft proposal that emphasizes that existing Rule 26(c) does itself not authorize filing under seal had been discussed in previous years. He suggested that the Standing Committee's input would be particularly useful on the further sketches presented in the agenda book at pages 300-03 concerning procedures for handling motions to seal. Such procedural questions include (1) whether the motion to seal must be filed openly, (2) whether materials can be filed under a tentative or preliminary seal to meet deadlines, (3) whether the party seeking to file under seal needs to give notice to anyone with a confidentiality interest, (4) what happens if the motion to seal is not granted, (5) when the seal will be removed, (6) whether a member of the public can intervene to seek to unseal sealed materials, and (7) whether a party can retrieve its sealed materials from the court's file after termination of the action (and how such a retrieval would affect the record in the event of an appeal).

A practitioner member commented that this is a complicated topic. While a lot of cases have confidential information, there is a lot of over-designation, and if parties are persistent about sealing, it can come down to how much the other party or the court wants to push back. Certain kinds of cases may also present various First Amendment issues, which should not be defined by rule. The member wondered whether the rule should set a floor while the Committee Note could recognize that First Amendment or other concerns could lead the court to be more aggressive in policing sealing.

A judge member emphasized the great inconsistency in case law as to the difference between protective orders and sealing orders. She also noted that district courts will likely apply a different standard in criminal cases (for example, as to plea and sentencing issues) than they do in civil cases. There is a need for guidance concerning what a court ought to consider when thinking about a sealing order and whether it should be different in civil and criminal cases. She added that it can be a significant technical challenge for the clerk's office when a party requests for only part of a large filing to be sealed.

Alluding to the work (more than a decade previously) of the Standing Committee's Privacy Subcommittee, Professor Marcus recalled that there had been considerable concern over access to information in presentence reports; but this, he observed, is not the Civil Rules Committee's focus. The sketch also was not intended to alter the scope of First Amendment and common law rights to access court documents.

Another judge member commented that the motion should tell the court why the records need to be sealed. It would not be possible to set a hard-and-fast rule governing whether the motion to seal can itself be filed under seal. There should be no taking back of documents once filed on CM/ECF. If a motion is denied, the party can refile it in a manner consistent with what the court ordered. Otherwise, the material should remain inaccessible and effectively under seal but not able to be used in the case. That preserves the record for appeal. Professor Marcus asked if the bracketed language in the sketch that says "unless the court orders otherwise" (page 300, line 409 in the agenda book) would work. The judge member agreed that would make sense and the party can request that it be filed under seal and give a reason why.

Judge Bates observed that this is a very complex, large project for the Advisory Committee and its subcommittee. It is also a fairly difficult area because any rule would have tremendous

effects on the various districts and their local rules. Because of the inconsistency, it would require revision of local rules, as well.

Cross-border discovery. Judge Rosenberg and Professor Marcus reported that consideration of cross-border discovery is in the very early stages. The proposal comes from Judge Michael Baylson, who presented at the Advisory Committee's October meeting. He and Professor Gensler have prepared an article published in *Judicature* entitled "Should the Federal Rules Be Amended to Address Cross-Border Discovery?" They propose that the Advisory Committee should consider how the Civil Rules could better guide judges and attorneys in cases involving foreign discovery. The Sedona Conference submitted a letter in support.

The Advisory Committee recognized that this will be a major undertaking but felt it is worth pursuing. This topic may not be limited to discovery and evidence gathering and could implicate Rule 44.1, regarding proof of foreign law, and service of process. A new subcommittee chaired by Judge Manish Shah has been appointed to undertake this project. The first subcommittee meeting will be in January.

When, in the 1980s, the rulemakers sent to the Supreme Court a proposed amendment dealing with discovery for use in U.S. cases, the United Kingdom objected, the Court returned the proposal to the rulemakers, and no further action was taken. Professor Marcus observed that in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court refused to require first resort to the Hague Convention procedures for foreign discovery and allowed the federal courts to use the Federal Rules as to the parties before the American court. The proposed rule was criticized as following the view of the dissent in *Aerospatiale* rather than the view of the majority. However, things have changed significantly since the 1980s due to the increase in discovery of digital materials. Professor Marcus noted that, more recently, Judge David Campbell successfully used the Hague Convention procedures in a case before him.

Professor Marcus also observed that a separate statute, 28 U.S.C. § 1782, governs U.S. discovery for use in proceedings abroad. The subcommittee will also consider whether to address that topic.

Professor Marcus asked for suggestions about what to do and who might be an expert on this subject.

A judge member recalled listening to Judge Baylson and Judge Lee Rosenthal discussing this topic. Judge Baylson is very knowledgeable and has dedicated a great deal of considerable thought to it.

Ms. Shapiro noted that the DOJ has a great deal of experience with cross-border discovery and mutual legal assistance requests. It was noted that Joshua Gardner will represent the DOJ on the subcommittee.

Rule 7.1 Subcommittee. Judge Rosenberg reported that the subcommittee is considering suggestions from Judge Ralph Erickson and Magistrate Judge Patricia Barksdale, prompted by the concern that the recusal statute potentially covers significantly more situations than the disclosure requirement in Rule 7.1(a). The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, was

created in March 2023 to consider whether a rule amendment is needed to better inform judges of the circumstances that might trigger the statutory duty to recuse.

Currently, Rule 7.1(a) provides for disclosure of any parent corporation of a party and any publicly held corporation owning 10% or more of a party's stock. In contrast, the recusal statute, 28 U.S.C. § 455(b)(4), provides that a judge shall recuse when he knows that he, individually or as a fiduciary, or his spouse or his minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding. The statute defines "financial interest" as ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.

To address this potential gap, Judge Erickson suggested requiring disclosure of grandparent corporations. Magistrate Judge Barksdale proposed requiring that parties check all the judge's publicly available financial disclosures and file a notice of any conflict.

The Advisory Committee has also considered the local rules from the 50 district courts that have rules on this subject, which are catalogued in a memorandum from a former Rules Law Clerk. There are a few options being considered.

The Judicial Conference's Codes of Conduct Committee has indicated that the Advisory Committee's consideration of a potential rule amendment would not conflict with its work. There is also relevant pending legislation, the Judicial Ethics and Anti-Corruption Act of 2023, which would bar a justice or judge from owning any interest in any security, trust, commercial real estate, or privately held company, with exceptions for mutual funds and government (or government-managed) securities.

The subcommittee plans to meet before the full Advisory Committee meeting in April with the goal of presenting a proposed amendment, if any is deemed necessary, at the April meeting.

Professor Bradt explained that the drafting challenge—and where Standing Committee feedback would be helpful—is in figuring out language to sufficiently capture the full range of circumstances in which a judge might be required to recuse without making the disclosure requirement unduly burdensome. One problem with only requiring disclosure of a parent corporation is that there might still be a grandparent company or other related entity giving the judge a financial interest.

There have also been concerns that it would be difficult for a rule to capture the everchanging landscape of financial instruments and business associations. Local rules have taken a wide variety of approaches. Some local rules expand the general categories of entities to be disclosed beyond those in Rule 7.1(a), using words like "affiliation" or "entity." Others require disclosure of defined financial relationships, like an insurer or third-party litigation funder. Another option is to require disclosure of entities owning a percentage of stock smaller than 10%. The 10% ownership threshold in the current rule is thought to serve as a proxy for control. A lower percentage might better capture the financial interest requirement of the recusal statute.

Judge Bates observed that, while there was no feedback from the Standing Committee right now, there is more work to do, and that may engender some feedback in the future.

Random Case Assignment. Judge Rosenberg and Professor Bradt reported on this item. The Advisory Committee decided at the October meeting to accept the random assignment of cases as a project to explore. Attention on this issue has increased due to concerns that in high-profile cases, especially cases seeking nationwide injunctions against executive action, plaintiffs are engaged in a form of forum shopping, particularly in single-judge divisions of district courts.

The Brennan Center for Justice submitted a proposal urging the adoption of a rule to require the randomization of judicial assignment within districts for certain civil cases. Others have also expressed interest in this topic. In July 2023, nineteen United States senators sent a letter to Judge Rosenberg. The following month, the American Bar Association (ABA) adopted a resolution urging federal courts to implement district-wide random case assignment. The House and Senate Judiciary Committees have also held hearings on issues related to nationwide injunctions and forum shopping.

Judge Rosenberg noted that there are questions about whether a national rule can require reallocation of business among divisions of a district court or whether, under 28 U.S.C. § 137, such questions are beyond the scope of rulemaking. Since the October meeting, Professor Bradt has been researching the threshold consideration of whether this is an area for potential rulemaking.

Professor Bradt set out a sequence of relevant questions to consider. First, would a rule on this topic be a general rule of practice and procedure such that it falls within the Rules Enabling Act (REA)'s grant of rulemaking authority? Second, if so, should the supersession clause of the REA be invoked to override the provision in Section 137 giving districts local control over the division of their business? There are also statutory provisions governing the structure of district courts, including divisions, and, for prudential reasons, the Advisory Committee has avoided rulemaking in this area. There are further prudential questions of whether the Advisory Committee ought to act and, if so, what a rule might look like.

In tailoring any potential rule, it would be necessary to define the problem they would be seeking to solve. That is, in which kinds of cases should a rule impose a random case assignment requirement? The Brennan Center submission suggested that a rule should encompass any case in which a party seeks injunctive relief that may have an effect outside the district. The ABA suggested any case in which the United States is a party. Various local rules identify particular subject matters of cases.

Professor Bradt requested feedback from the Standing Committee about whether this is an appropriate subject for rulemaking.

Judge Bates commented that this is obviously an issue of great importance to the Judiciary. These initial issues of authority and prudential considerations of whether this is something that should be addressed through the rules process are very important and need to be thought about at the outset.

A judge member noted that there might be some benefit to working on this issue, even if it turns out not to be within the scope of authority of the Rules Committees. There might be a future legislative proposal on this topic at some point, and it would be nice to have had a committee like

this advance its thinking so that the Judiciary might be able to make suggestions to Congress. A practitioner member agreed. There is a need for objective analysis of what might be done. Although a little out of order, coming up with some ideas of what a solution might be, even if we ultimately do not act, could contribute to informing other actors who might be more able to do something directly. Judge Bates agreed that it can be illuminating to other possible actors that the Rules Committees are looking seriously at an issue and that they have some ideas as to how it can be approached.

Ms. Shapiro noted that the DOJ sent the Advisory Committee a letter in December formally taking the position that rulemaking on this subject is within the grant of authority in the REA. Judge Rosenberg commented that the DOJ's extensive and helpful letter came in after the agenda book materials were put together. Judge Bates agreed the letter was comprehensive and thoroughly addressed the authority question although it did not address the important prudential issues as much.

Professor Hartnett flagged a terminology issue. Although commentators often use the term "nationwide injunction," the problem is not an injunction's geographic scope. An injunction in a patent case barring one party from infringing the other's patent standardly does apply outside the district of the court that entered the injunction. The concern is that the injunction reaches beyond the parties. Using the terminology of "nonparty" injunction is more accurate and reduces the risk of a rule that does not address the real problem.

Another practitioner member echoed Professor Hartnett's observation that it is important to think carefully about the problem the Advisory Committee might target. But "nonparty" does not solve the issue of forum shopping to enjoin the United States.

Professor Hartnett clarified that the problem with injunctions against the United States arises when the injunction is read not only to enjoin the United States with regard to a particular plaintiff, but also with respect to nonparties.

Professor Coquillette commented that the prudential consideration is central. When Congress gets involved by making a rule directly, style and consistency can suffer, so it is a fundamental principle that the Rules Committees should be cautious about issues that Congress is considering.

Demands for Jury Trials in Removed Actions. Judge Rosenberg and Professor Marcus reported on this item. A 2015 suggestion focused on the 2007 restyling project's change in the tense of a verb in Rule 81(c). When this submission was initially presented to the Standing Committee in 2016, two members of the Standing Committee proposed a change to Rule 38 to change the default rule so that parties need not demand a jury trial. Such a change would have obviated the need to consider the underlying Rule 81(c) suggestion. After considerable research by the FJC, the Advisory Committee decided not to propose a change in Rule 38's default rule on jury demands, and that proposal was removed from the Advisory Committee's agenda. The Advisory Committee will consider the Rule 81(c) suggestion again at its April meeting, but the Standing Committee need not spend time on it right now.

Other topics. Judge Rosenberg and Professor Marcus reported on a few issues that the Advisory Committee lacked the capacity and resources to consider presently but that remained on its agenda.

The Advisory Committee has paused consideration on a Civil Rule 62(b) suggestion related to notice of premiums for supersedeas bonds. The proposal comes from the Appellate Rules Committee after it published a proposed change to Appellate Rule 39 in response to a Supreme Court decision. This issue is discussed in the agenda book starting on page 316. Judge Bates observed that the Appellate Rules Committee believes there is a possible need for a change to Civil Rule 62 but that the Civil Rules Committee was not as sure. He invited the advisory committees to continue discussing the subject outside the context of this meeting.

Another information item concerned a proposal about attorney's fee awards for Social Security appeals. Professor Marcus noted that the Supplemental Rules for Social Security cases only went into effect about a year ago. Moreover, one district is considering a local rule on this topic. Further experience could inform any later rulemaking efforts; in the meantime, the Advisory Committee does not recommend action on this proposal.

Professor Marcus directed the Committee's attention to the discussion in the agenda book (starting at page 328) of items to be removed from the Advisory Committee's agenda.

Judge Bates thanked Judge Rosenberg and the reporters for the thoroughness of their report on many important subjects.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on October 26, 2023, in Minneapolis, Minnesota. The Advisory Committee presented three information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 367.

Information Items

Rule 17 and pretrial subpoena authority. Judge Dever reported that Judge Nguyen chairs the subcommittee examining potential changes to Rule 17 concerning subpoenas. There was a conference in October 2022 where the subcommittee gathered information about whether there is a problem with Rule 17, whether there are differences from court to court in the application of Rule 17, and how the *Nixon* standard of relevance, admissibility, and specificity is being applied. It has continued to gather information about this issue from experts and attorneys in industries associated with potentially relevant issues, such as the Stored Communications Act.

The subcommittee is now in the drafting process and has a meeting scheduled in February to discuss specific language. There are some basic principles outlined on page 369 of the agenda book. For example, there needs to be judicial supervision of any subpoena issued because it carries the authority of the court. The rule also needs to distinguish between personal or confidential information and other information. There should also be an option for an ex parte process.

Rule 23 and government consent to bench trials. Judge Dever reported on this item. To have a bench trial, Rule 23(a) currently requires a written request from the defendant, the consent of the United States, and the approval of the court. The Federal Criminal Procedure Committee of the American College of Trial Lawyers proposes removing the government from that process when the defendant can provide reasons sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee had questions about the proposal at its April 2023 meeting and gathered information from the DOJ and the defense community. The Advisory Committee discussed the findings at its meeting in October. The proposal initially suggested there might be a backlog of cases due to the pandemic, but that turned out not to be the case. Only eight of the 94 districts said there was something of a backlog. But any rule change would not happen soon enough to address it. The Advisory Committee also learned that there is not a uniform DOJ policy on whether the government consents to a bench trial, and it varies by United States Attorney. In some districts the United States Attorney's Office always prefers a jury trial.

The Advisory Committee also discussed the leading Supreme court case addressing Rule 23, *Singer v. United States*, 380 U.S. 24 (1965), which recognized that the court could order a bench trial over the government's objection where there were compelling reasons associated with a defendant's need to get a fair trial. There were also a couple of cases that arose during the pandemic in which a court invoked the *Singer* language. The Advisory Committee could not find sufficient space between the *Singer* standard and other reasons that would be sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee voted overwhelmingly, but not unanimously, to remove this item from its agenda.

Judge Dever explained that the Advisory Committee also discussed the defense bar's concern that defendants were not receiving an acceptance of responsibility credit when they only went to trial to preserve a suppression issue for appeal. It viewed this as a Sentencing Guidelines issue, rather than an issue with the Federal Rules of Criminal Procedure.

Professor Beale recalled that the Advisory Committee discussed notifying the United States Sentencing Commission about this issue, but there was a question about whether such communication should come from the Criminal Rules Committee or the Standing Committee.

Judge Bates remarked that the mechanism of a communication to the Sentencing Commission could be worked out if the Advisory Committee thought it was a good idea and the Standing Committee agreed. The question was whether the Standing Committee agreed that the Sentencing Commission should be informed that the Advisory Committee thought an issue exists with respect to the acceptance of responsibility credit.

Professor Beale noted that some judges already give an acceptance of responsibility credit in this circumstance, but defense counsel reported that they frequently cannot get the credit. The Advisory Committee does not believe there is a uniform practice. But the Advisory Committee did not conduct an in-depth study on the issue and preferred to ask the Sentencing Commission to examine it.

Judge Dever added that U.S.S.G. § 3E1.1 currently gives the judge discretion. It does not say that a defendant who goes to trial cannot get the credit. But in the Commentary to § 3E1.1, the Application Notes do not include an example for giving the defendant credit after going to trial to preserve an issue for appeal. The Advisory Committee was unsure if the Sentencing Commission could amend the Application Notes to add an explicit example of this.

Judge Bates commented that the Advisory Committee's observation was that it would be a good idea to communicate to the Sentencing Commission that this seems to be an issue that might merit some examination, but not to make any specific recommendation.

A judge member asked for clarification on what would be communicated as a good idea. Is it that, if anyone is going to look at this issue, it should be the Sentencing Commission as opposed to the Rules Committees? She noted that judges have a lot of discretion at sentencing, and it is important to present this as an issue for the Sentencing Commission without taking a position.

Another judge member asked if the proposition was to formally communicate a concern.

Judge Bates asked the Advisory Committee to word the proposition.

Professor Beale stated that concerns were raised at the Advisory Committee's meeting about this issue. The Advisory Committee felt it was not a Criminal Rules issue but wanted to communicate those concerns to the Sentencing Commission. The Advisory Committee would take no position on whether the Sentencing Commission should do something. Rather, it would transmit those concerns, saying that the issue is not properly addressed to the Rules Committees.

Judge Dever commented that the Advisory Committee would be happy to send a letter to the Sentencing Commission but that it did not want to get ahead of the Standing Committee.

Judge Bates thought it was important for the Standing Committee to know whether the concern came from the Advisory Committee or only some of its members.

Professor King responded that the concern was raised by several members of the Advisory Committee. At the end of the discussion, Judge Dever asked the Advisory Committee about sending something to the Sentencing Commission. There was committee-wide agreement that the appropriate place to resolve this concern was at the Sentencing Commission and that it was important enough that the Advisory Committee wanted it to be conveyed. At the end of the meeting, Judge Bates and Judge Dever had a conversation about who should do it.

Judge Bates clarified that the communication, which might come from the Standing Committee or the Advisory Committee, would be a factual recitation—namely, that these concerns were raised but the Advisory Committee felt that they were more appropriately addressed to the Sentencing Commission.

A judge member stated that he does not see the role of the Standing Committee as being a clearinghouse of concerns and suggestions. Usually, the Rules Committees do not refer things along. They tell the suggester when they have come to the wrong place. Consequently, when one of the Rules Committees formally refers something to another governmental body, that referral conveys that the committee has a serious concern that should require more attention than it might

have received otherwise. There might be occasions on which the Rules Committees would make such a referral, but they should only do so after employing the same sort of vetting process that they use when making recommendations on rules. There may be other sides to the issue. For example, he suspected some United States Attorneys might have a different perspective than the defense counsel who had voiced concerns.

In light of the last-mentioned comment, Judge Bates asked Ms. Shapiro whether she had any comments to contribute on behalf of the DOJ. She did not. Professor Struve commented that a DOJ representative at the Advisory Committee meeting had observed that this issue might belong with the Sentencing Commission.

Judge Bates commented that they may be making more out of this issue than was needed. In fairness to the Advisory Committee, it was doing the right thing by checking with the Standing Committee. Judge Bates asked if there were any other concerns with the Advisory Committee sending something to the Sentencing Commission indicating the issue had come up and that the view was that it should be referred to the Sentencing Commission for any further exploration.

The judge member with the prior concern cautioned against creating a precedent of the Advisory Committee referring matters even if it includes a referral statement that the committee was not taking any position. But he acknowledged that the disclaimers would ameliorate the concern that a referral would come with a recommendation.

Judge Bates observed that this was a little different from what typically happens when a Rules Committee, possibly through the Rules Committee Staff, coordinates with another Judicial Conference Committee, often CACM. Communications with the Sentencing Commission regarding potential changes to the Guidelines or commentary are more sensitive and require care. But it is not beyond the capacity of the Advisory Committee to take that into account when drafting a letter to the Sentencing Commission.

Judge Bates asked if there were any other concerns about the Advisory Committee taking that sort of modest communication. Aside from the judge member who spoke earlier, there were no objections.

Rule 53 and broadcasting court proceedings in the cases of United States v. Donald J. Trump. Judge Dever reported on this item. Thirty-eight members of Congress asked the Judicial Conference to authorize the broadcasting of court proceedings in the cases of *United States of America v. Donald J. Trump*. The Advisory Committee discussed the lack of Rules Enabling Act authority to promulgate a rule applying to a single defendant and noted that any rule would become effective, at the absolute earliest, in December 2026, which would likely be after a trial in the relevant cases. A coalition of media organizations later submitted a suggestion on this topic more generally, apart from the specific cases against Donald Trump.

In light of this, the Advisory Committee has formed a subcommittee to study whether to propose amendments to Rule 53. The subcommittee anticipates meeting in March, and the Advisory Committee plans to discuss this issue at its April meeting.

Judge Dever added that, for anyone who wanted to get a history of the issues, the AO has a terrific paper on its website titled *History of Cameras, Broadcasting, and Remote Public Access*

in Courts. Thirty years ago, the Advisory Committee, in a divided vote, recommended that Rule 53 be amended to permit broadcasting consistent with Judicial Conference policy. At the Standing Committee, the chair cast a tie-breaking vote, and the proposal went to the Judicial Conference where it was voted down. Rule 53 has not been substantively amended since it took effect in 1946.

Judge Dever also noted that some cross-committee projects are described in the Criminal Rules Committee's written report in the agenda book. Judge Bates observed that the Criminal Rules Committee was considering some important issues. The Rule 17 issue is a big one, and there is a lot of work yet to be done. There has been a lot going on recently regarding remote proceedings and broadcasting, and it may be the right time to look seriously at Rule 53.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz presented the report of the Advisory Committee on Evidence Rules, which last met on October 27, 2023, in Minneapolis, Minnesota. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 399.

Information Items

Judge Schiltz reported that at the last meeting, the Advisory Committee heard from two panels. The first panel, made up of five law professors, was invited to speak on any changes they would make to the Federal Rules of Evidence. A second panel featured two experts in artificial intelligence who educated the Advisory Committee about AI and its implications for litigation and the Evidence Rules. The focus was on deep fakes and the ability of AI to produce convincing, but fake, evidence that is hard to detect and will present a real problem for federal trials.

Following the presentations, the Advisory Committee discussed the suggestions, and decided to pursue three matters.

The first proposal being considered is a potential amendment to Rule 609, which addresses when prior convictions can be brought up to impeach a witness on the stand. The proposal is that only convictions for crimes indicating actual dishonesty or false statement would be admissible to impeach, and other types of convictions would not be admissible. The argument is that other types of convictions are not especially probative of credibility. There is also a high price to a defendant who wants to testify but is worried about the admission of prior convictions for crimes such as attempted murder or child pornography.

The second proposal is for a new Rule 416 governing the admissibility of evidence that a victim of alleged misconduct—most often sexual misconduct—had previously made false accusations of similar misconduct. This proposal came from one of the professors on the first panel, who noted that there is a great deal of confusion in the case law about how to treat evidence that a victim of an alleged crime had made false accusations of similar alleged crimes.

The third proposal is a possible amendment to the hearsay rule. The committee is considering two options with respect to out-of-court statements made by a witness on the stand who is under oath and subject to cross examination. A broad option could say that no such prior statements made by a testifying witness can be excluded as hearsay—although it could still be

excluded under Rule 403. A narrower version could say that no prior *inconsistent* statement of a testifying witness can be excluded under the hearsay rule. Today, a prior inconsistent statement can be introduced for its truth only if made under oath at a prior proceeding, which is rare.

The Advisory Committee also plans to hold a conference to further its study of AI and machine-based evidence. The issues, including authentication, hearsay, and expert testimony, are incredibly complicated, and AI technology is changing quickly. The committee's initial focus will likely be on issues of authenticity.

Judge Bates observed that the Chief Justice has focused on AI as an important issue for the Judiciary. These are very difficult issues that the Advisory Committee is considering. In some regards, the difficulty lies in understanding the issues. As to Rule 609, any change in that Rule will be controversial. He thanked Judge Schiltz for the report and the committee's continuing efforts on all those matters.

OTHER COMMITTEE BUSINESS

The Rules Law Clerk provided a legislative update. The legislation tracking chart begins on page 416 of the agenda book. Since the agenda book was published in December, the National Guard and Reservists Debt Relief Extension Act of 2023 became law, meaning that Interim Bankruptcy Rule 1007-I will continue to apply for at least another four years.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 4, 2024, in Washington, D.C.

TAB 1B

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, chair, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. (The Advisory Committees had removed the latter suggestion from their agendas, and the Committee approved the disbanding of the joint subcommittee that had been formed to consider it.) Additionally, the Committee received a report from a joint subcommittee (composed of representatives from the Bankruptcy, Civil, and Criminal Rules Committees) concerning a suggestion to adopt nationwide rules governing admission to practice before the U.S. district courts. The Standing Committee also heard a report concerning coordinated efforts by several advisory committees concerning a suggestion to require complete redaction of social security numbers and an update from its Secretary on the 2024 report to Congress on the adequacy of the privacy rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee met on October 19, 2023. The Advisory Committee discussed several issues, including possible amendments to Rule 29 (Brief of An Amicus Curiae) and Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In addition, the Advisory Committee considered suggestions regarding intervention

on appeal and the redaction of social security numbers in court filings. The Advisory Committee removed from its agenda suggestions regarding the record in agency cases and regarding filing deadlines.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan), and Official Form 410S1 (Notice of Mortgage Payment Change) with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed)

The proposed amendment to Subdivision (h) would clarify that a court may require an individual chapter 11 debtor or a chapter 12 or chapter 13 debtor to file a supplemental schedule to report property or income that comes into the estate post-petition under § 1115, 1207, or 1306.

Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed)

Subdivision (c) would be amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance, or a change or withdrawal of a rejection, of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance by written ballot, the amended rule would also authorize a court to permit a creditor or equity security holder to accept a plan (or change or withdraw its rejection of the plan) by means of its attorney's or authorized agent's statement on the record, including by stipulation or by oral representation at the confirmation hearing. A conforming change would be made to subdivision (a)(3) ("Changing or Withdrawing an Acceptance or Rejection").

Official Form 410S1 (Notice of Mortgage Payment Change)

The amended form would provide space for an annual Home Equity Line of Credit notice.

Information Items

The Advisory Committee met on September 14, 2023. In addition to the recommendation discussed above, the Advisory Committee continued its consideration of a suggestion to require redaction of the entire social security number from filings in bankruptcy and gave preliminary consideration to a suggestion for a new rule addressing a court's decision to allow remote testimony in contested matters in bankruptcy cases.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 17, 2023, and considered several information items. The Advisory Committee continued to discuss Rule 41 (Dismissal of Actions), and in particular whether to amend the rule to address caselaw limiting Rule 41(a) dismissals to dismissals of an entire action. It also discussed the work of the discovery subcommittee, which is considering proposals to amend Rule 45 (Subpoena) and to address filing under seal. The Advisory Committee formed a new subcommittee to study cross-border discovery. The Advisory Committee also heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee commenced consideration of suggestions concerning civil case assignment in the district courts.

Other topics discussed by the Advisory Committee include the Bankruptcy Rules Committee's consideration of a suggestion to permit remote testimony in contested matters, a suggestion to amend Rule 62(b) (Stay of Proceedings to Enforce a Judgment), a suggestion to amend Rule 54(d)(2)(B) (Judgment; Costs) with respect to attorney-fee awards in Social Security

cases, and a suggestion to amend Rule 81(c) (Applicability of the Rules in General; Removed Actions) with respect to jury demands in removed cases.

The Advisory Committee also discussed and removed from its agenda suggestions regarding Rule 10 (Form of Pleadings), Rule 11 (Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions), Rule 26(a)(1) (Initial Disclosure), Rule 30(b)(6) (Depositions by Oral Examination), Rule 53 (Masters), and Rule 60(b)(1) (Relief from a Judgment or Order), and a proposed new rule on contempt.

At upcoming hearings, the Civil Rules Committee will hear testimony from many witnesses on the proposed amendments that have been published for public comment—namely, proposed amendments to Rule 16(b)(3) (Pretrial Conferences; Scheduling; Management) and Rule 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation).

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 26, 2023, and considered several information items. The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee will develop a draft of a proposed amendment to clarify the rule and to expand the scope of parties' authority to subpoena material from third parties before trial.

The Committee also considered a recent request from 38 members of Congress to authorize broadcasting of proceedings in the cases of *United States v. Donald J. Trump*. The Committee concluded that it does not have the authority under the Rules Enabling Act to exempt specific cases from Rule 53 (Courtroom Photographing and Broadcasting Prohibited), which

generally prohibits the broadcasting of judicial proceedings from the courtroom in criminal cases. Further, any amendment to Rule 53 to allow exceptions for particular cases—for example, the cases of *United States v. Donald J. Trump*—would not take effect earlier than December 1, 2026, due to the requirements of the rulemaking process set forth by the Rules Enabling Act and Judicial Conference Procedures. The Committee received a later suggestion from a media coalition to amend Rule 53 to permit broadcasting of criminal proceedings. Given the timing of its receipt, the proposal was not discussed by the Committee at its October 2023 meeting, but the chair appointed a subcommittee to consider the proposal going forward.

The Advisory Committee decided to remove from its agenda a proposal submitted by the Federal Criminal Procedure Committee of the American College of Trial Lawyers to amend Rule 23 (Jury or Nonjury Trial) to eliminate the requirement that the government consent to a defendant's waiver of a jury trial. In order for a bench trial to occur, current Rule 23 requires a written waiver by the defendant of the right to trial by jury, the government's consent, and the court's approval. Among a variety of concerns discussed by the Advisory Committee, one relates to a defendant's ability to obtain credit for acceptance of responsibility under U.S.S.G. § 3E1.1(b) after a jury trial held solely to preserve an antecedent issue for appeal when the government has declined to either accept a conditional plea or consent to a bench trial. Though some members of the Advisory Committee voiced support for clarifying that judges may award acceptance of responsibility in these circumstances, members saw this as a Guidelines issue, not a rules issue. The Advisory Committee expressed support for making the United States Sentencing Commission aware of the concerns expressed by some members of the Committee. After discussion, the Standing Committee (over one member's objection) determined that the Advisory Committee chair could convey the members' concerns to the Sentencing Commission.

FEDERAL RULES OF EVIDENCE

Information Items

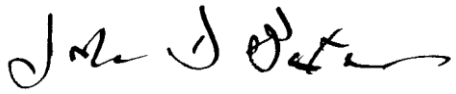
The Advisory Committee on Evidence Rules met on October 27, 2023. In connection with the meeting, the Advisory Committee held a panel discussion with several Evidence scholars on suggestions for changes to the Evidence Rules, followed by a presentation by experts on artificial intelligence and "deep fakes." Following the panel discussion and presentation, the Advisory Committee discussed the potential rule amendments raised by the presenters. In particular, the Advisory Committee decided to consider a possible amendment to delete Rule 609(a)(1), which allows admission of felony convictions not involving dishonesty or false statement, and another possible amendment that would add a new Rule 416 to the Evidence Rules to govern the admissibility of evidence of false accusations. In addition, the Advisory Committee will consider a possible amendment to Rule 801(d)(1) (Definitions That Apply to This Article; Exclusions from Hearsay) to provide for broader admissibility of prior statements of testifying witnesses. The Advisory Committee considered but decided not to pursue a possible amendment to Rule 803(4) (Exceptions to the Rule Against Hearsay) that would have narrowed the hearsay exception for statements made for purposes of medical treatment or diagnosis by excluding from that exception statements made to a doctor for purposes of litigation.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations for discussion topics at the next long-range planning meeting scheduled for March 11, 2024 and future long-range planning meetings of Judicial Conference committee chairs. Recommendations on behalf of the

Committee were communicated to Judge Scott Coogler, the judiciary planning coordinator, by letter dated January 11, 2024.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Edward M. Mansfield	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

TAB 1C

Effective December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." The amendments would put the burden on the claim holder to identify the elements of its claim.	

Effective December 1, 2023

Current Step in REA Process:

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REA History:

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- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within … 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	

Effective December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, designation of coordinating counsel, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

TAB 1D

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
A bill to provide remote access to court proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland	**H.R. 6714** *Sponsor:* Van Drew (R-NJ) *Cosponsors:* Nadler (D-NY) Smith (R-NJ) **S. 3250** *Sponsor:* Cornyn (R-TX) *Cosponsor:* Gillibrand (D-NY)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/plaws/publ37/PLAW-118publ37.pdf **Summary:** Provides remote access to criminal proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland notwithstanding any provision of the Federal Rules of Criminal Procedure or other law or rule to the contrary.	• 1/26/2024: S. 3250 signed by President; became Public Law No. 118-37 • 1/18/2024: House passed S. 3250 • 12/11/2023: H.R. 6714 introduced; referred to Judiciary Committee • 12/11/2023: S. 3250 received in the House and held at the desk • 12/06/2023: S. 3250 passed in the Senate with an amendment by unanimous consent • 12/06/2023: Senate Judiciary Committee discharged by Unanimous Consent • 11/08/2023: S. 3250 introduced in Senate; referred to Judiciary Committee
National Guard and Reservists Debt Relief Extension Act of 2023	**H.R. 3315** *Sponsor:* Cohen (D-TN) *Cosponsors:* Cline (R-VA) Dean (D-PA) Burchett (R-TN) **S. 3328** *Sponsor:* Durbin (D-IL) *Cosponsors:* 8 bipartisan cosponsors	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/plaws/publ24/PLAW-118publ24.pdf **Summary:** Extends the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023.	• 12/19/2023: H.R. 3315 signed by President; became Public Law No 118-24. • 12/14/2023: H.R. 3315 passed Senate without amendment by Unanimous Consent • 12/11/2023: H.R. 3315 passed in the House • 11/29/2023: H.R. 3315 reported by the House Judiciary Committee • 11/15/2023: S. 3328 introduced; referred to Judiciary Committee • 05/15/2023: H.R. 3315 introduced in House; referred to Judiciary Committee

Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 135 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 43 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.	• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders • 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization. Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 158 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena. Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.	• 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees

Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 18 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 20 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 31 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant.	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* 7 Democratic & 2 Republican cosponsors	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.	• 02/14/2023: Introduced in House; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Election Day Holiday Act of 2024	**H.R. 7329** *Sponsor:* Eshoo (D-CA) *Cosponsor:* 21 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf **Summary:** Would make Election Day a federal holiday.	• 02/13/2024: Introduced in House; referred to Oversight & Accountability Committee
Indigenous Peoples' Day Act	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 86 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: Introduced in House; referred to Oversight & Accountability Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 15 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would make Diwali (a/k/a Deepavali) a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee

September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 4 Democratic & 2 Republican cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday.	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday.	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 58 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 115 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee

TAB 2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Subpoenas (Rule 17) (22-CR-A)**

DATE: **March 26, 2024**

The Rule 17 Subcommittee, chaired by Judge Nguyen, has continued its consideration of New York City Bar Association's proposal to expand the parties' subpoena authority under Rule 17. At the Committee's November meeting in Minneapolis, the Subcommittee reported that it had made several tentative decisions:

- Subpoena authority under Rule 17 should be expanded, subject to case-by-case judicial oversight of each subpoena request;
- The rule should set a different standard for obtaining personal or confidential material – referred to below as "protected information" – than the standard for obtaining material that is not personal or confidential – referred to below as "unprotected information"; and
- The rule should provide for ex parte subpoenas upon a showing of "good cause."

This memo provides an update on the Subcommittee's activities since that meeting. The Subcommittee met on December 12, 2023, and February 20, 2024. At these meetings, the Subcommittee discussed the following issues.

Mr. Wroblewski participated in these discussions, but noted that he could not state the Department of Justice's official position at this preliminary point in the development of the Subcommittee's recommendations.

I. The purpose of the proposed amendment and framing

The reporters had suggested the option of placing an amended provision governing subpoenas duces tecum to third parties in a new rule, 16.2 or 17.2, instead of revising or adding material to Rule 17. In its discussion of that suggestion, the Subcommittee unanimously reiterated that its goal was identifying incremental changes that would improve Rule 17, and that any proposed amendment should be located in Rule 17. The goal, members emphasized, is to revise and broaden Rule 17 and to address problematic applications of the *Nixon* standard so that practice under the rule is uniform and workable, and more in line with the practice in districts where the rule functions effectively. Creating a new discovery rule for third parties, as a new Rule 16.2, would send the wrong signal, suggesting a change that is more radical than intended.

II. Procedural issues

The Subcommittee has continued its work on various procedural issues, including (1) whether the rule should address disclosure of the material produced by an ex parte subpoena to the party that did not request the subpoena, (2) whether the returns should be to the court or to party who sought the subpoena, and (3) whether the rule should require notice to the entity or party whose information is sought. It has reached tentative decisions on these issues, noting, however, that these decisions remain under consideration. Like all the Subcommittee's tentative decisions, including those discussed at the Minneapolis meeting, these conclusions will be revisited when the Subcommittee puts all of the pieces together.

A. Disclosure to the opposing party of material returned in response to an ex parte subpoena

Although the practice is not uniform, several courts have required all material subpoenaed by one party to be disclosed to the opposing party, even if the subpoena was granted ex parte. The Subcommittee has concluded that this practice undercuts the utility of allowing ex parte subpoenas. Each party's obligations to disclose information to the opposing party are governed by other provisions, particularly Rule 16, and seeking a subpoena under Rule 17 should not alter those obligations. Accordingly, the Subcommittee has tentatively concluded that the rule should make it clear that the court itself may neither disclose information it receives from an ex parte subpoena to the opponent of the party who sought the information through that subpoena, nor order the party who seeks an ex parte subpoena to disclose the material produced to the other party when it is received.

The Subcommittee also agreed that the Rule should explicitly note that access by parties to information produced in response to a subpoena is regulated by existing disclosure rules (Rules 12.1, 12.2, 12.3, 16, and 16.1(b)). Even if a party can show when requesting the subpoena that the evidence it seeks is admissible, it does not follow that the party will necessarily introduce any of it. But whatever a party does intend to use, that party must disclose to other parties under the discovery rules, at the time required by Rule 16.

B. Returns

A related issue is who should receive the subpoena returns. Rule 17(c)(1) states that the court "*may* direct the witness to produce the designated items in court before trial or before they are to be offered into evidence." (emphasis added). Practices vary from district to district (and sometimes judge to judge). Despite its permissive language, some courts have concluded that Rule 17 requires the court to order returns to the court, rather than the parties.

A majority of the Subcommittee tentatively concluded that the rule should (1) clearly authorize the court to order a witness to produce the items directly to the party requesting the subpoena, but (2) require returns to the court when a subpoena either is requested by a party without representation or seeks material that is personal or confidential. In those instances, the Subcommittee thought that greater judicial oversight is needed before the material produced is disclosed to the party seeking the subpoena.

C. Notice to the person or entity whose information is sought

As noted in earlier discussions, there are many federal and state laws protecting privacy and limiting the disclosure of certain kinds of information. Familiar examples are the federal and state laws protecting health information and school records, as well as the Stored Communications Act. Many of these laws also include provisions concerning when—and to whom—disclosures must be made (and not made).

Consistent with its view that the rule should not override these other laws, the Subcommittee has tentatively concluded that Rule 17 should not address disclosure of a subpoena to the persons or entities whose information is sought. Rather, any disclosure requirements should continue to be governed by these other laws. However, any amendment would leave in place the language in Rule 17(c)(3) that specifies notice to victims about subpoenas for personal or confidential information.

III. Required showing to obtain a subpoena

As noted earlier, the Subcommittee is seeking to draft different standards for protected and unprotected information. The Subcommittee has focused first on the standard for subpoenas seeking unprotected information, and it has begun discussions of—but not resolved—questions concerning the showing required.

Based on these discussions, the reporters have drafted the following language regarding subpoenas for information that is not personal or confidential, for purposes of the ongoing discussion within the Subcommittee.

The party seeking a subpoena must state facts showing the designated items

(i) are reasonably likely be possessed by the subpoena recipient and
(ii) are, or contain information that is, material to [preparing] the defense or prosecution.

This language has not been approved by the Subcommittee (or reviewed by the style consultants).

IV. Applicability to proceedings other than trial

The Subcommittee has also discussed the question when subpoenas to third parties should be available for proceedings other than trials. Its initial view is that subpoenas should not be limited to trials alone. The Subcommittee noted that subpoenas are often used in other settings to obtain information from third parties, but that an amended rule might draw distinctions among other proceedings. Discussion going forward will focus on how to express the scope of Rule 17(c) subpoenas if not limited to trial.

TAB 3

Item 3 will be an oral report.

TAB 4

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Broadcasting of criminal proceedings (Rule 53) (23-CR-F)**

DATE: **March 25, 2024**

A coalition of media organizations[1] has requested that Rule 53 be revised to permit the broadcasting of criminal proceedings or to at least create an "extraordinary case" exception to the prohibition on broadcasting. Although its submission focused on the importance of broadcasting the "fast-approaching trial in United States v. Donald J. Trump, 23-cr-257-TSC (D.D.C.)," the coalition recognized it might not be possible to revise the rule before that trial. Accordingly, it asked "that every effort be made to change in place for the next trial of such significant public interest and concern."

Judge Dever appointed a subcommittee composed of Judge Conrad (chair), Judge Burgess, Judge Harvey, Ms. Mariano, and Mr. Wroblewski to study the proposal. At the reporters' request, Mr. Hawari provided members with a memo and supporting materials detailing the history of Rule 53, including all prior efforts to amend the rule.

The Subcommittee has held one meeting via Microsoft Teams. Judge Dever led the meeting because Judge Conrad, who had been the chair, was appointed as Director of the Administrative Office of the U.S. Courts. Prior to the meeting, the Subcommittee received briefing materials detailing the legislative history of Rule 53, including all prior efforts to amend the rule.

The focus of the meeting was on identifying the issues of greatest interest and concern, and the topics on which members wished to have more information.

Regarding the issues of concern, several members found one statement from the legislative history especially helpful. In 2000, representing the Judicial Conference, Judge Edward Becker opposed a bill to allow camera coverage of judicial proceedings.[2] At a Senate hearing, he identified several concerns with camera coverage, including the intimidating effect

[1] The media organizations are Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting, Inc., Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company (operator of Court TV), Los Angeles Times Communications LLC, National Association of Broadcasters, National Cable Satellite Corporation d/b/a C-SPAN, National Press Photographers Association, News/Media Alliance, The New York Times Company, POLITICO LLC, Radio Television Digital News Association, Society of Professional Journalists, TEGNA Inc., Univision Networks & Studios, Inc., and WP Company LLC d/b/a The Washington Post.

[2] Prepared Statement of Hon. Edward R. Becker, Hearing before the Senate Subcommittee on Administrative Oversight of the Court (Sept. 6, 2000).

on litigants, witnesses, and jurors; possible interference with the right to a fair trial; the potential for creating potent negotiating tactics in pretrial settlement negotiations; security concerns and heightening threats to judges; privacy concerns for countless people, many of whom are not parties to the case; and making certain court orders, such as orders sequestering witnesses, more difficult to enforce. In addition, he noted that many related technical issues would need to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria. Judge Becker also quoted *Estes v. Texas*, 381 U.S. 532 (1965), regarding the impact of publicity on the quality of witness testimony. Members stressed concerns about the impact on victims and jurors, witness intimidation, and broadly speaking the administration of justice. One member noted that broadcasting could also be dangerous for certain defendants.

The Subcommittee discussed the topics on which they wished to have more information, and they asked reporters to provide information about several topics.

Members expressed great interest in what is happening in the states, including rules and policies now in use, and particularly any studies about the effects of the state procedures allowing broadcasting—especially experience in criminal proceedings. Professor King suggested one source of information on the states could be the National Center for State Courts.

On a related point, Ms. Hooper, who serves on the Rules Committee as the Federal Judicial Center's liaison, stated that the Center had surveyed federal district judges and magistrate judges in 2021 about their experiences with virtual technology, and she offered to send that study to the reporters after the meeting.[3]

A second topic of concern was coordination with other relevant committees, particularly the Committee on Court Administration and Court Management (CACM). In September 2023, CACM recommended – and the Judicial Conference adopted – a policy permitting audio broadcasting of proceedings in civil and bankruptcy cases when testimony is not being taken.[4] Members expressed interest in learning more about the information CACM relied upon, noting that the policy suggested ongoing studies of its impact. Mr. Byron explained that CACM's materials are not public, and said he would try to get clearance to share any CACM materials that went to the Judicial Conference to inform their recommendation. The Subcommittee discussed possible ways of coordinating with CACM, including a possible liaison to the Subcommittee. Judge Dever also noted that the Evidence Rules Committee is beginning a study of deep fakes.

Members discussed the importance of distinguishing remote participation in proceedings by the participants (e.g., the parties and their counsel, witnesses, and victims) from public access. They agreed that any broadening of remote participation (such as that authorized during the pandemic by the CARES Act) may raise different issues than broadening remote public access.

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[3] *See* Carly Giffin & Rebecca N. Eyre, Results of a Survey of U.S. District and Magistrate Judges: Use of Virtual Technology to Hold Court Proceedings (FJC 2022), available at https://www.fjc.gov/content/370037/results-survey-district-magistrate-judges-virtual-technology-court-proceeding.

[4] The Judicial Conference policy is available here: https://www.uscourts.gov/rules-policies/judiciary-policies/cameras-courtroom-policy.

CACM has recognized this distinction, and has expressed no views regarding remote access by the participants. Both issues fall squarely within the Rules Committee's purview because of the existing Rules governing both remote participation and barring broadcasting. Also, criminal cases involve different considerations than civil cases (including the right to counsel and critical need to ensure that counsel has access to the defendant, as well as the Sixth Amendment right to a public trial).

Finally, members emphasized the importance of working collaboratively with other committees and communities (including CACM), and considering all of the issues, and all possibilities, including permitting only audio access, or only delayed access, or only access to certain types of proceedings.

TAB 4A

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October 5, 2023

Via Email and Fedex

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Revising Federal Rule of Criminal Procedure 53

Dear Secretary Byron:

This firm represents a coalition of media organizations[1] who write to request that the Judicial Conference revise Rule 53 of the Criminal Rules of Procedure to permit broadcasting of criminal proceedings or to at least create an "extraordinary case" exception to the prohibition on broadcasting. We make this request now because of the fast-approaching trial in *United States v. Donald J. Trump*, 23-cr-257-TSC (D.D.C.), and respectfully request that the Advisory Committee on Criminal Rules consider including this on the agenda of its upcoming October 26, 2023 meeting in Minneapolis.

We understand that, even at the most expedited pace, rule changes take significant time and that it may not be possible to revise the rule before the unprecedented and historic trial of a former President begins. Nevertheless, we ask that every effort be made to change

[1] The media organizations are Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting, Inc., Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company (operator of Court TV), Los Angeles Times Communications LLC, National Association of Broadcasters, National Cable Satellite Corporation d/b/a C-SPAN, National Press Photographers Association, News/Media Alliance, The New York Times Company, POLITICO LLC, Radio Television Digital News Association, Society of Professional Journalists, TEGNA Inc., Univision Networks & Studios, Inc., and WP Company LLC d/b/a The Washington Post.

the rule as quickly as possible. Indeed, even if the Judicial Conference declines to expedite this request, the case against former President Donald J. Trump shows why the prohibitions of Rule 53 should be reconsidered. We respectfully request, therefore, that the Judicial Conference begin the rule-change process now, regardless how long the process takes, so that a revised rule is in place for the next trial of such significant public interest and concern.

In the case pending in the U.S. District Court for the District of Columbia, former President and current presidential candidate Mr. Trump has been indicted for conspiring to obstruct the certification of the 2020 presidential electoral vote in Congress on January 6, 2021. The jury trial is scheduled for March 4, 2024. This case is of interest to all American voters still struggling to make sense of the 2020 presidential election and its aftermath, and who have an opportunity to vote for or against Mr. Trump should he become his party's nominee in the 2024 presidential election. If Americans do not have confidence that Mr. Trump is being treated fairly by the justice system, there is a very real chance they will reject the verdict (whatever it is) and that their faith in democracy and our institutions will be further diminished. Recent and painful events in our Nation's Capital show that, taken to an extreme, this sort of doubt and cynicism can lead to violence.

Yet currently Rule 53 prohibits all but a few Americans—those who have the resources and wherewithal to travel to the courthouse and wait in line for a limited number of seats—from watching a trial the likes of which the nation has never experienced. At best, Americans will learn about the trial by consuming news reports about it. Of course, those news reports cannot replicate the experience of watching the trial itself, and there is no guarantee that Americans will trust the secondhand reporting they read, watch or hear. At worst, Americans will turn to social media and other unreliable sources, and they will be manipulated by those who seek to spin the events of the day and who have no regard for the truth.

The media coalition has extensive experience livestreaming and broadcasting court proceedings. The overwhelming majority of state courts permit some electronic coverage of criminal and civil court proceedings, certain federal courts permit cameras in the courtroom during civil proceedings, and all federal appellate courts and the U.S. Supreme Court provide audio recordings of hearings online, in both criminal and civil cases, without redistribution limitations. Judges and attorneys who have participated in trials where cameras were present report that, far from causing disruptions, the cameras were hardly noticed, and full video coverage increased the public's confidence in the process.

The media coalition therefore requests that the Judicial Conference revise Rule 53 to permit broadcasting of proceedings in federal court. Alternatively, the coalition requests a revision to Rule 53 that would create an "extraordinary case" exception to the ban on broadcasting so that, at the very least, cases like the one against Mr. Trump can be monitored in real time by the American public. The media coalition stands at the ready to sort out the

logistics of camera coverage with the Judicial Conference (or the trial judge) if the rule is revised.

Several Other Congressional and Judicial Proceedings Were Initiated Against Mr. Trump for His Claims About the 2020 Election; All Have Been or Will Be Televised

On November 3, 2020, Joseph R. Biden, Jr. was elected President of the United States. Then-President Trump, however, refused to concede, "claiming that the election was 'rigged' and characterized by 'tremendous voter fraud and irregularities[.]'"[2] On January 6, 2021, ahead of the Joint Session of Congress to certify the election results, "President Trump took the stage at a rally of his supporters on the Ellipse, just south of the White House."[3] Following Trump's speech, supporters "– including some armed with weapons and wearing full tactical gear – marched to the Capitol and violently broke into the building to try and prevent Congress's certification of the election results."[4] "The events of January 6, 2021 marked the most significant assault on the Capitol since the War of 1812."[5]

On August 1, 2023, the United States government indicted Mr. Trump in the U.S. District Court for the District of Columbia on four counts of criminal conspiracy for "spread[ing] lies that there had been outcome-determinative fraud in the election and that he had actually won" the 2020 presidential election, and having done so "to make his knowingly false claims appear legitimate, create an intense national atmosphere of mistrust and anger, and erode public faith in the administration of the election."[6] Mr. Trump's rhetoric proved to be effective, and many Americans still believe that Biden illegitimately won the 2020 election.[7]

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[2] *Trump v. Thompson*, 20 F.4th 10, 17 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022).

[3] *Id.* at 17-18.

[4] *Id.* at 18.

[5] *Id.* at 18-19.

[6] *See* Indictment, *United States v. Trump*, No. 23-cr-257-TSC (D.D.C. Aug. 1, 2023) (ECF 1) at ¶ 2.

[7] "The poll finds that 3 in 10 Americans (30%) – including two-thirds (68%) of Republicans – believe that Joe Biden only won the presidency because of voter fraud." *Most Say Fundamental Rights Under Threat - Partisan identity determines which specific rights people feel are at risk*, Monmouth Univ. (June 20, 2023), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_US_062023/.

The case in Washington D.C. is just one of many proceedings against Mr. Trump for his speech and conduct leading up to the January 6 riots. First, one week after the riots, the U.S. House of Representatives adopted an Article of Impeachment against Mr. Trump for incitement of insurrection.[8] In February 2021, House Impeachment Managers conducted a five-day trial before the U.S. Senate voted to acquit Mr. Trump.[9] Then, on June 28, 2021, the House created a Select Committee to investigate the "facts, circumstances, and causes relating to" the January 6 attack on the Capitol, and "factors related to such attack."[10] The Final Report of the Select Committee referred Mr. Trump and others for possible prosecution. On August 14, 2023, Mr. Trump and 18 co-defendants were indicted in Georgia state court for allegedly violating Georgia's RICO Act and other charges related to the 2020 election.

Each of these other proceedings against Mr. Trump have been or will be televised, and the public has watched. For Mr. Trump's second impeachment trial, "an average of 11 million viewers watched the opening arguments across MSNBC, CNN, Fox, ABC and CBS."[11] At least 20 million watched the first day of the House Select Committee hearings, and on average, 13 million viewers watched over the following days.[12] Note these numbers

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[8] H.R. Res. 24, 117th Cong. (Jan. 13, 2021), https://www.congress.gov/bill/117th-congress/house-resolution/24.

[9] *See* Nicholas Fandos & Emily Cochrane, *Impeachment Trial: Trump Is Acquitted by the Senate*, N.Y. Times (Feb. 13, 2021), https://www.nytimes.com/live/2021/02/13/us/impeachment-trial. Notably, when the Senate sits for an impeachment trial, it does so as a "High Court." *See Impeachment*, United States Senate, https://www.senate.gov/about/powers-procedures/impeachment/senate-impeachment-role.htm.

[10] H.R. Res. 503, 117th Cong. § 3(1) (2021) at 4-5, https://rules.house.gov/sites/republicans.rules118.house.gov/files/BILLS-117hres503ih.pdf.

[11] Brian Stelter, *How many people are watching the impeachment trial? Here are the numbers…*, CNN (Feb. 12, 2021), https://www.cnn.com/2021/02/11/media/us-senate-impeachment-trial-reliable-sources/index.html.

[12] John Koblin, *At Least 20 Million Watched Jan. 6 Hearing*, N.Y. Times (June 10, 2022), https://www.nytimes.com/2022/06/10/business/media/jan-6-hearing-ratings.html; Rick Porter, *TV Ratings: January 6 Hearings Draw 17.7M in Primetime*, Hollywood Reporter (July 22, 2022), https://www.hollywoodreporter.com/tv/tv-news/tv-ratings-thursday-july-21-2022-1235185046/.

do not include online viewers. And in Georgia, the presiding judge has made all hearings available on the court's YouTube channel and permitted broadcast news media to have "pool" cameras, where groups of news organizations combine their resources and share camera access, in the courtroom. By all accounts, this has gone smoothly, and videos of entire proceedings remain available online.[13]

In sum, the public has become accustomed to watching proceedings against Mr. Trump for his claims about the 2020 election results. The federal trial in Washington D.C. is of at least equal public interest and historical import as these other proceedings, and the public should be able to watch that trial, just as it was able to watch Mr. Trump's impeachment trial, and just as it will be able to watch state court trials of the additional charges brought against Mr. Trump.

Trials Are Already Public Events; Permitting Cameras Simply Transforms the Constitutional Right of Access from a Theoretical Right Into One Citizens Can Actually Exercise

"A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). The First Amendment guarantees this right of access because it "enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). "[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Id.*; *see also Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("[K]nowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known."). Access also serves a therapeutic and "prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980). "Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help' . . . ." *Id.*

In other words, trial participants generally have no expectation of privacy when in court, and transparency serves all interests. Cameras do not present some new threat to privacy or fair trial rights. Our Founders decided long ago that transparency and the orderly administration of justice go hand in hand. As the U.S. Supreme Court recognized seventy-

[13] *E.g., WATCH: Fulton County court holds hearing on 2020 election subversion case*, Wash. Post (Sept. 6, 2023), https://www.youtube.com/watch?v=lqNPqAWhta8; *Georgia Election Interference Court Hearing*, C-SPAN (Sept. 14, 2023), https://www.c-span.org/video/?530445-1/georgia-election-interference-court-hearing.

five years ago, "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage," which long ago came to "distrust . . . secret trials."[14]

The trial of a former President presents serious impediments to physical attendance. Indeed, for Mr. Trump's arraignment on August 11, in addition to the courtroom, the court set aside 100 seats in two separate media rooms for members of the media, as well as a public overflow rooms with 80 additional seats.[15] Yet even if every single courtroom (other than the trial courtroom) in the Elijah Barrett Prettyman U.S. Courthouse were used for overflow seating, only a minute fraction of the 81.3 million people who voted for President Biden—the victims of this alleged conspiracy—would be able to attend and observe the proceedings for themselves. And even if more seats are made available, it is unreasonable to believe that ordinary Americans (who have jobs other than covering trials) can afford to take time off work, find childcare, get themselves to the courthouse, and spend hours—if not days—not only sitting in a courtroom but also waiting in line for a seat. In all likelihood, no more than a few ordinary, non-journalist citizens within the District will be able to attend. Clearly, Americans who live hundreds, or thousands of miles away cannot attend the trial—though they were just as impacted by the allegations at the center of it, and by the outcome of the trial, as any other American.

To that end, Mr. Trump's attorney has repeatedly stated that he wants cameras in the courtroom for the D.D.C. trial:

> "If I appear in court, I'm going to be representing not only the President of the United States, but the sovereign citizens of this country, who deserve to hear the truth. The first thing we would ask for is let's have . . . cameras in the courtroom, so all Americans can see what's happening in our criminal justice system. And I would hope that the Department of Justice would join in that effort so that we take that curtain away and all Americans get to see what's happening."[16]

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[14] *In re Oliver*, 333 U.S. 257, 268 (1948).

[15] *Pub. & Media Advisory*, U.S. Dist. Ct. for the Dist. of Columbia, https://www.dcd.uscourts.gov/sites/dcd/files/Public%20and%20Media%20Advisory%20for%20Friday,%20August%2011,%202023.pdf.

[16] *He did 'absolutely nothing wrong': Trump attorney John Lauro*, Fox News (July 21, 2023), https://www.foxnews.com/video/6331632263112, at 6:05-6:31; *see also* Anders

Many others are also urging that the District Court in Washington D.C. should permit broadcasting of Mr. Trump's proceeding:

- A spokesperson for the Republican-majority House Judiciary Committee told *The Washington Examiner* that they "support cameras in this limited but extraordinary circumstance" of Mr. Trump's trial for alleged attempts to subvert the 2020 election results.[17]

- Jon Sale, who served as an Assistant Special Watergate Prosecutor, recently stated that he used to be against cameras in the courtroom, but in the D.C. case, "I strongly believe this case needs to be televised because the American people need to see the story, so we don't become numb to this."[18]

- Dozens of Democratic lawmakers have also suggested that the Conference permit the trial to be televised, for "[i]f the public is to fully accept the outcome, it will be vitally important for it to witness, as directly as possible, how the trials are conducted, the strength of the evidence adduced and the credibility of witnesses."[19]

- Former Acting U.S. Solicitor General Neal Katyal has advocated for broadcasting the trial, arguing a broadcast "would be less vulnerable to the distortions and

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Hagstrom, *Trump attorney calls for Jan. 6 trial to be televised, accuses prosecutors of hiding trial*, Fox News (Aug. 6, 2023), https://www.foxnews.com/politics/trump-attorney-calls-jan-6-trial-be-televised-accuses-prosecutors-hiding-trial; *Trump lawyer: I personally want cameras in courtroom*, CNN (Aug. 6, 2023), https://www.cnn.com/videos/politics/2023/08/06/sotu-lauro-court-cams.cnn.

[17] Kaelen Deese, *House Judiciary Republicans favor Trump courtroom cameras due to 'extraordinary circumstance'*, Wash. Examiner (Aug. 9, 2023), https://www.washingtonexaminer.com/policy/courts/donald-trump-indicted-jim-jordan-schiff-cameras-courtroom.

[18] *Former Watergate prosecutor 'strongly believes' cameras should be in courtroom*, MSNBC (Aug. 17, 2023), https://www.youtube.com/watch?v=i0Uo5ztMbn8, at 2:21-2:34.

[19] Adam Schiff et al., *Letter to The Hon. Roslynn R. Mauskopf* (Aug. 3, 2023), https://schiff.house.gov/imo/media/doc/trump_trial_transparency_letter.pdf.

> misrepresentations that will inevitably be part of the highly charged, politicized discussion flooding the country as the trial plays out."[20]

Providing citizens with remote video access of the trial would provide many benefits to observers, including "(1) education about the timing and procedural handling of litigation events; (2) acculturation to the tone, tenor, and mechanics of the courtroom; (3) the opportunity to judge the fairness of the court's procedures; and (4) the ability to form impressions about the judge and other courtroom actors."[21]

These interests are all the more acute here, where Mr. Trump is now claiming the criminal proceedings are "election interference" by the prosecutors, and were initiated to derail his 2024 campaign for President.[22] In fact, prosecutors have told the court that Mr. Trump's "relentless public posts marshaling anger and mistrust in the justice system, the Court, and prosecutors have already influenced the public[,]" and have asked the court to enter an order limiting Mr. Trump's extrajudicial statements about the case to prevent prejudicing the jury pool.[23]

In summary, Mr. Trump, as well as lawmakers and attorneys from diverse backgrounds and political perspectives, all acknowledge that political candidates, pundits, and all major news outlets will be providing condensed coverage of the proceedings for those unable to attend in person. The public should not be limited to relying on secondhand

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[20] Neal Katyal, *Opinion - Why the Trump trial should be televised*, Wash. Post (Aug, 3, 2023), https://www.washingtonpost.com/opinions/2023/08/03/trump-trial-tv-broadcast/.

[21] Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom*, 115 Colum. L. Rev. 79 (2015) ("*Singer*"), https://columbialawreview.org/content/judges-on-demand-the-cognitive-case-for-cameras-in-the-courtroom/.

[22] Donald Trump (@realDonaldTrump), Truth Social (Aug. 30, 2023, 3:21 PM) https://truthsocial.com/@realDonaldTrump/posts/110980188106641474; *see also* @realDonaldTrump, Truth Social (Aug. 8, 2023, 9:54 PM) https://truthsocial.com/@realDonaldTrump/posts/110857162338915853 ("The system is Rigged & Corrupt, very much like the Presidential Election of 2020.").

[23] Gov't's Opposed Mot. To Ensure That Extrajudicial Statements Do Not Prejudice These Proceedings, *United States v. Trump*, No. 23-cr-00257-TSC (D.D.C. Sept. 15, 2023) (ECF 57) at 12.

accounts when video technology is readily available for them to observe and form their own conclusions regarding the legitimacy of the proceedings.

Previously Expressed Concerns About Cameras in Courts Were Never Supported by Any Evidence and Have Been Proven Wrong

Times have changed in the decades since Rule 53's ban on cameras was adopted in 1946. In terms of logistics, camera technology has become much less conspicuous. Even as early as 1996, "equipment [wa]s no more distracting in appearance than reporters with notebooks or artists with sketch pads," and the technology has only become more discrete.[24] Now, the media will typically use a single, stationary pool camera, which produces no noise and requires no lighting other than existing courtroom lighting, and can be operated remotely if necessary. Often cameras are mounted near the ceiling and trial participants do not even know they are there (or they soon forget). Microphones affixed to tables can be as small as the erasers found on the ends of pencils.

Cameras and recording devices are also becoming less remarkable because of their ubiquity. Forty-nine states and the District of Columbia either permit journalists to capture proceedings on their own cameras, or authorize courts to provide video or audio webcast proceedings, or both, and all federal appellate courts and the U.S. Supreme Court make audio of arguments *in both civil and criminal cases* available online.[25] In 1990 and in 2011, the Judicial Conference authorized pilot programs permitting electronic media coverage of civil proceedings in federal courts for a certain number of years, and video is still permitted for certain Ninth Circuit arguments and in certain civil proceedings in three districts in the Ninth Circuit.

Common concerns have been that cameras could intimidate witnesses, influence jury deliberations, or that attorneys and judges might play to the cameras. But study after study of state programs has concluded that in-court cameras have not impaired the administration of justice.[26] In 1994, the Federal Judicial Center published a comprehensive study of its first

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[24] *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 582 (S.D.N.Y. 1996).

[25] *Cameras In The Courts – A State-By-State Coverage Guide*, Radio Television Digital News Ass'n, https://courts.rtdna.org/cameras-overview.php.

[26] *See, e.g., In re Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 768, 775 (Fla. 1979) (finding that, after a one-year experiment, concern that cameras in the courtroom would negatively affect lawyers, judges, witnesses or jurors was "unsupported by any evidence."). *See also* N.Y. State Comm. to Review Audio Visual Coverage of Ct. Proceedings, *An Open Courtroom: Cameras in N.Y. Cts. 1995-1997 (*Apr. 4, 1997); *Report of the Comm. on Audio-Visual Coverage of Ct. Proceedings* (May 1994); Ernest H. Short & Assocs., *Evaluation of Cal.'s Experiment with Extended Media Coverage of Cts.* (Sept.

pilot program, which reported that "[j]udges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice," and most "believe electronic media presence has minimal or no detrimental effects on jurors or witnesses."[27] Judge's attitudes about electronic media coverage "were initially neutral and became more favorable after experience under the pilot program."[28] Similarly, the 2011 pilot program proved to be "an extraordinary resource for federal adjudication, providing a modern window into the courthouse for busy lawyers, anxious litigants, and a curious public."[29] According to a Federal Judicial Center study, nearly three-fourths of judges and attorneys who participated in a video-recorded proceeding during this pilot program stated that they were in favor of video recording proceedings, and nearly two-thirds of judges polled, including those who participated and those who did not, said they would allow video recordings if the Judiciary permitted them.[30]

The biggest and most extensive camera experiment was during the COVID-19 national emergency, when state and federal courts were forced to adjust to social distancing, stay-at-home orders, and remote access. All courts had to switch to video or teleconferencing to function.[31] Minnesota in particular had two pandemic-induced camera experiences with high-profile criminal trials of intense public interest: first Derek Chauvin's trial for the murder of George Floyd, and then Kimberly Potter's trial for the manslaughter of Daunte Wright. Both were livestreamed, gavel-to-gavel, due to pandemic restrictions that severely limited the number of spectators allowed to attend the trials in person. And the livestreaming of both received praise from many, even most, quarters, including some unexpected ones:

1981), *Report of the Chief Admin. Judge to the Legislature, the Governor, and the Chief Judge of the State of N.Y. on the Effect of Audio-Visual Coverage on the Conduct of Jud. Proceedings* (Mar. 1989).

[27] Fed. Jud. Ctr., *Elec. Media Coverage of Fed. Civil Proceedings* at 7 (1994).

[28] *Id.*

[29] *Singer*, https://columbialawreview.org/content/judges-on-demand-the-cognitive-case-for-cameras-in-the-courtroom/.

[30] Fed. Jud. Ctr., *Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project* (2016).

[31] *Jud. Authorizes Video/Audio Access During COVID-19 Pandemic* (Mar. 31, 2020), https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic.

- Attorney General Keith Ellison, whose office opposed camera coverage of the Chauvin trial and filed an unsuccessful motion asking the court to reconsider its decision to allow such coverage, said in an interview after trial concluded: "It worked out better than I thought. I'll say, hey, I can be wrong and I guess I was a little bit." In the same interview, prosecution team member Steve Schleicher compared the cameras to "shopping at Target. You didn't really notice. You just go in and you do your thing." Prosecution team member Jerry Blackwell, now a federal judge for the U.S. District Court for the District of Minnesota, agreed. "When you're in the courtroom there's no cognizance or awareness or thought …of who's watching," he said.[32]

- Mary Moriarty, the Public Defender in Hennepin County, Minnesota, for more than thirty-one years and now the Hennepin County Attorney, tweeted, "I was against cameras in the courtroom at the beginning of this trial, but I may have to move off that position because this trial exposed so much of what happens the public has no way of knowing."[33]

- The Chief Judge of the U.S. District Court for the District of Minnesota Patrick J. Schiltz told the *Star Tribune* that when he learned the Chauvin trial would be livestreamed, "I thought that was a huge mistake but by the time he was done I admitted I was wrong." Judge Schiltz explained his change of heart this way: "It really helped people see what a criminal trial looked like"; they were able to see how "careful" such trials are often managed while also observing the more monotonous, technical moments of a trial.[34]

- Perhaps most notably, the judge who oversaw the Chauvin trial—The Honorable Peter A. Cahill—explained in a written comment to the Minnesota Advisory Committee on Rules of Criminal Procedure that although he had previously "opposed the use of cameras in the courtroom in criminal cases," his "recent experience in *State v. Chauvin* has changed my opinion such that I now believe cameras in the courtroom can be helpful in promoting trust and confidence in the

[32] Paul Blume (@PaulBlume_FOX9), Twitter (Apr. 26, 2021, 4:47 PM), https://twitter.com/PaulBlume_FOX9/status/1386784094911008768 at :01-:05, 2:09-2:16.

[33] *See* Mary Moriarty (@MaryMoriarty), Twitter (Apr. 21, 2021, 8:18 PM), https://twitter.com/MaryMoriarty/status/1385025113867702273.

[34] Stephen Montemayor, *New chief federal Judge Patrick Schiltz sees caseloads, security as Minnesota court's top issues*, Star Tribune (July 11, 2022), https://www.startribune.com/new-chief-federal-judge-patrick-schiltz-sees-caseloads-security-as-minnesota-courts-top-issues/600189351.

judicial process and are sometimes necessary to safeguard both the defendant's right to a public trial and the public's right of access to criminal trials."[35]

- And although she was less vocal than Judge Cahill in advocating for a rule change, The Honorable Regina Chu, who oversaw the Potter trial, told the *Star Tribune* that both the Potter and Chauvin trials proved to her that cameras can be present in the courtroom without being disruptive. "I forgot they were even there . . . ."[36]

In the wake of the success of these televised trials, the Minnesota Supreme Court issued an order amending the general rules of practice for state district courts in order to provide judges broad discretion to allow video coverage at most criminal trials.[37] Following the COVID-19 videoconferencing experiment, Colorado similarly passed legislation to provide remote public access to criminal court proceedings with limited exemptions.[38] Colorado Judge William Bain, who led committee recommending the rules change, commented "I think it's been revolutionary, what we've done not only for the benefit of the parties and attorneys, but the public is much more easily seeing a whole lot more of what we do than they did three years ago, when the only way to see what was going on in court was to come to the courtroom."[39]

This has also been the experience of other countries. In his recent annual address to the Commonwealth's judges and magistrates, Lord Chief Justice Burnett of Maldon, the

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[35] Letter from Hon. Peter A. Cahill to Advisory Comm. On Rules of Crim. Proc. re: Cameras in the courtroom (Jan. 28, 2022), *see* https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12951-TKL/KLT-EmmyParsonsDeclaration.pdf at Ex. A.

[36] Paul Walsh, *As retirement looms, Judge Regina Chu reflects on a long career, impact of Kimberly Potter trial*, Star Tribune (Apr. 1, 2022), https://www.startribune.com/regina-chu-judge-who-presided-over-kimberly-potter-trial-is-retiring/600161338/.

[37] Order Promulgating Amendments to the Gen. Rules of Practice for the Dist. Cts., *In re Rules of Crim. Proc.*, No. ADM10-8049 (Minn. Mar. 15, 2023).

[38] H.R. 23-1182, 74th Gen. Assemb., Reg. Sess. (Colo. June 7, 2023), https://leg.colorado.gov/sites/default/files/2023a_1182_signed.pdf.

[39] Jeffrey A. Roberts, *Legislation or a new judicial branch policy could make livestreaming of court proceedings more commonplace in Colo.*, Colo. Freedom of Info. Coalition (Feb. 6, 2023), https://coloradofoic.org/legislation-or-a-new-judicial-branch-policy-could-make-livestreaming-of-court-proceedings-more-commonplace-in-colorado/.

highest sitting jurist in England and Wales, titled his speech "Open Justice Today." He spoke of the positive outcomes of broadcasting proceedings during the COVID emergency, and commented that "[i]n the context particularly of controversial constitutional challenges, the contemporaneous broadcasting of proceedings has been seen to enhance public understanding, support the legitimacy of the decision made by the court and the willingness of the public and politicians to accept the outcome."[40]

Any Concerns About the Integrity of Mr. Trump's D.D.C. Trial Would Not Be Intensified by Cameras; Rather Those Concerns Would Be Alleviated

Allowing cameras at Mr. Trump's trial will not increase the publicity it receives. Mr. Trump's attorney already is regularly appearing on national news syndicates to present his client's case, and the case is already a presidential campaign talking point. Without doubt, the public and media will be closely watching the D.D.C. trial, regardless whether cameras are present. If the trial is not televised, secondhand extrajudicial interviews and summaries will be the only information that the public receives. Cameras simply ensure that Americans can see what transpires for themselves.

In a similarly high-profile context, Judge Cahill took this into account when addressing objections by Chauvin's co-defendants to broadcasting of their trial, after Chauvin was convicted:

> As the notoriety of these cases is neither enhanced nor diminished by livestreaming, the defense arguments fail. The joint trial of these defendants, as was the case with the trial of their co-defendant Derek Chauvin, can be expected to receive ubiquitous media coverage given the vast public interest whether or not the joint trial is livestreamed. That is simply the nature of highly publicized trials in which the public and media have an intense interest.[41]

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[40] Speech by the Lord Chief Justice: Commonwealth Judges & Magistrates Conf. 2023 (Sept. 10, 2023), https://www.judiciary.uk/speech-by-the-lord-chief-justice-commonwealth-judges-and-magistrates-conference-2023/. The Lord Chief Justice, noting that sentencings have been broadcast in England and Wales since July 2022, observed that the "innovation has been a success, and successful beyond our expectations." *Id.* He added, "When people have the whole picture they are less likely to criticise unfairly. It has become clear that the availability of [sentencings] to commentators and journalists has improved the quality of reporting. If I may say so, it has also helped enhance understanding . . . amongst politicians and policy makers." *Id.*

[41] Order Denying Mot. to Reconsider Nov. 4 Order Allowing Audio & Video Coverage of Trial, *State v. Thao et. al*, Nos. 27-CR-20-12949, 27-CR-20-12951, 27-CR-20-12953 (Minn.

Mr. Trump's lawyer has already stated the former President believes televising the trial will make it *more* fair to him. And it is certainly more fair to the American public to provide audiovisual access to the criminal trial of the man they elected as President (and may elect again). Some 155 million people voted in the 2020 election, but unless audiovisual recording and telecasting of the proceedings is allowed, only a few dozen people will be able to watch the proceedings.

Beyond the often-raised argument that cameras somehow increase publicity and jeopardize a defendants' fair trial rights, opponents of cameras in courts argue that cameras may dissuade witnesses from participating or impact the attorneys' or the jurors' abilities to fulfill their respective duties. Those concerns have not been borne out by evidence, and they certainly have no merit with regard to the trial of Mr. Trump.

Witnesses are already subject to public scrutiny. The witnesses will be named, their pictures will be published, and their testimony will be picked apart. This will happen regardless whether cameras are in the room. The witnesses should know this from firsthand experience, as the trial of Mr. Trump is not likely to be their first time testifying. Many witnesses in the case against the former President will likely have already had to testify in video depositions during the January 6 Committee's investigation, or live at the January 6 Committee hearings, and video of their testimony is available online.[42] And, within hours of the indictment coming down in the D.D.C. case, almost all of the unnamed "co-conspirators" mentioned had been identified—and all are well-known because of the congressional proceedings and Georgia case concerning election interference claims.[43]

Likewise, any potential juror almost certainly will be familiar with the highly publicized nature of this case. Questions they are asked during *voir dire* will be reported.

4th Jud. Dist. Jan. 11, 2022) at 4, https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12951-TKL/Order.pdf.

[42] *See* Select Jan. 6th Comm. Final Report & Supporting Materials Collection, https://www.govinfo.gov/collection/january-6th-committee-final-report.

[43] *E.g.,* Holly Bailey et al., *Here are the Trump co-conspirators described in the DOJ indictment*, Wash. Post (Aug. 1, 2023), https://www.washingtonpost.com/national-security/2023/08/01/doj-trump-indictment-trump-coconspirators/; Anders Hagstrom, *Who are the 6 co-conspirators named in Trump's Jan. 6 indictment? Here's what we know*, Fox News (Aug. 2, 2023), https://www.foxnews.com/politics/who-6-co-conspirators-named-trumps-jan-6-indictment-heres-what-we-know.

Even their names may ultimately be released to the public after trial. The judge can address any risk that cameras will impact their deliberations by addressing the issue during *voir dire*, and by giving explicit instructions throughout the trial and before the jury retires to deliberate. Additionally, the media coalition will not film or photograph the jury if so instructed. The media regularly televise proceedings in courtrooms where rules prohibit taking photos or video of the jury and the media abide by these rules.

The attorneys and judge will likewise be fully aware their conduct will be closely watched by the public and media. And more than that, attorneys and judges who have participated in filmed trials state the cameras did not affect their ability to do their jobs.[44] As for the concern that certain trial participants may be motivated to "play to the camera," the more logical view is that cameras, given the public scrutiny they facilitate, cause trial participants to be on their best behavior, not their worst.

Without cameras, "sound bites" from out-of-court interviews will be played, perhaps juxtaposed against photographs of participants. Citizens will judge the proceedings with whatever information made available to them, however truncated, salacious, biased, or inaccurate. For millions of citizens with a democratic interest in the trial, a *per se* rule that closes the courthouse door to all but the few dozen people who manage to secure a spot on a court bench fails to vindicate their access rights.

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"People in an open society do not demand infallibility from their institutions," the Supreme Court has explained, "*but it is difficult for them to accept what they are prohibited from observing." Richmond Newspapers*, 448 U.S. at 572 (emphasis added). Cameras are an important part of transparency and access. And, increasingly, previously hypothesized risks attendant to cameras in the courtroom are being proven wrong, not by legal arguments, but by the experience of courts that are permitting cameras in courtrooms all around this country every day.

Decades ago, the Court recognized that a "responsible press has always been regarded as the handmaiden of effective judicial administration, *especially in the criminal field*." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (emphasis added). Because few citizens have time to attend criminal trials, the First Amendment empowers the media to act as their surrogates and "bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). As Justice Stewart (joined by a plurality of Justices) observed nearly fifty years ago, "The Constitution requires sensitivity to [the press's] role [as a surrogate], and to the special needs

[44] *Supra* at 10-12.

of the press in performing [that role] effectively," including by using "cameras and sound equipment" to convey "sights and sounds to those who cannot personally visit the place." *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring in judgment); *see also id.* at 39 n.36 (Stevens, J., dissenting) (noting that permitting the press's use of audio/visual equipment "redound[s] to the benefit of the public interested in obtaining information" about the government). The best way to do this is to allow the media to use the best technology at its disposal. That's not a notepad and paper. It's not a typewriter or even a laptop. It's a camera.

We all share an equal stake in the historic trial of our former President. Without cameras in the courtroom, the public will not have equal opportunity to assess the process and the result.

Very truly yours,

Charles D. Tobin

Leita Walker

TAB 4B

MEMORANDUM

To: Sara Beale and Nancy King, Reporters

From: Zachary Hawari, Rules Law Clerk

Re: History of Criminal Rule 53

Date: February 16, 2024[1]

This memorandum summarizes the historical consideration of Criminal Rule 53 by the Rules Committees. This history traces the origin of Rule 53 in the 1940s through its reconsideration in the 1990s and ends with a request for clarification in 2014. It also touches on other judiciary activities regarding cameras in the courtroom.

Historical records reveal the first discussions of Rule 53, the earliest drafts of what became Rule 53, public comments from the 1940s, and materials from reconsiderations in the 1960s.

I. Origin of Rule 53

In the early 1940s, the Criminal Rules Advisory Committee discussed preliminary drafts of the Criminal Rules. These discussions, summarized below, can be found in the stenographer minutes.[2]

In May 1942, despite admitting that he did not think it would get very far, John Waite, a member of the Advisory Committee, introduced what would become Rule 53.[3] According to the stenographer minutes, the initial proposal, styled as Rule 26(a), provided: "Conduct of Trial. The taking of photographs in the court room or in chambers while judicial proceedings are being held therein shall not be permitted, nor shall any radio broadcasting of such proceedings or parts thereof be permitted."

The Advisory Committee members viewed the taking of photographs and broadcasting from the courtroom as improper, leading to distractions in the courtroom. But some saw it as an issue for state courts and questioned the need for such a rule in federal court. One member commented, "It seems to me you might as well have a rule that there shall be no boisterous conduct in the court room. It is not the sort of subject that should be treated of in rules of procedure." Another member, G. Aaron Youngquist, added, "While I agree with your aim, I think it is an admonition among all courts as they have been doing, but I do not think it comes quite within the scope of our job here, because it is not known in the federal courts."

[1] Updated March 27, 2024.
[2] May 1942 Criminal minutes (Part III) at 477-480; February 1943 Criminal minutes (Part III) at 605-19. These excerpts are included in Appendix Part I.
[3] May 1942 Criminal minutes (Part III) at 478.

A month later, this comment was included in a preliminary draft of the Criminal Rules:

> The problem of this sort of publicity in federal courts has not yet become serious and may never become so. In state courts, however, there have been grave abuses and the preclusion of photographic and broadcasting activities has been advocated by bar associations and has been put into effect by local rules of court.[4]

Somewhat revised, the proposal was brought back up at the May 1943 meeting, now providing:

> **Rule 23-2. Regulation of conduct in the court room.** The taking of photographs in the court room during the progress of judicial proceedings, radio broadcasting of the judicial proceedings, or any other activity which is designed for the purposes of publicity and which is derogatory of the dignity of the judicial proceedings or may interfere with the accurate settlement of issues shall not be permitted by the court.

The Advisory Committee discussed the proposed rule at length—sometimes off the record.[5] At the start, the Advisory Committee's Chair suggested removing "which is derogatory of the dignity of the judicial proceedings or may interfere with the accurate settlement of issues."

One member clarified that the presence of reporters, who have a right to be in the courtroom, was not the issue. Rather, the problem was the practice of distracting the jury, for example, with a messenger running in and out of the courtroom, ferrying messages from the reporter to the outside.

A member asked whether radio broadcasting included a news commentator summarizing the trial from a studio. Another said that was not broadcasting. Someone else commented that, if the reporters can get away with it, they record the proceeding on a wax record and rebroadcast it, which would be a violation of the rule.

Some members expressed concerns about publicity but wondered if the matter should be left to the "common sense" and "fitness" of the judges. Again, there was a question about whether this was really a matter of procedure. Mr. Youngquist commented that "the connection which this provision would have with procedure, and procedure is what we are dealing with, is so tenuous, well, I am unable to perceive it." To him, procedure means "what is done by" the prosecution, defense, and jury. "[B]ut here we are talking about what is to be done by what you might call strangers to the court. They do not affect the procedure, as such, in any event. I think, too, that

[4] Appendix Part II.
[5] February 1943 Criminal minutes (Part III) at 605-19.

we might much better leave matters of that sort to the conference of the senior circuit judges and the various judicial conferences in the circuits or districts of the States."

One member pointed out that the American Bar Association's Code of Ethics already declared this conduct was unethical. Others mentioned that some local courts already prohibited the taking of photographs, and others commented that they refused to permit photographs even during recess.

Ultimately, the Advisory Committee voted 9-7 to remove the publicity provision and referred the rule to the Committee on Style. Later, "from the court room" was added after "radio broadcasting of judicial proceedings."[6]

The final version of Rule 53 went into effect in 1946 and provided:

> **Rule 53. Regulation of Conduct in the Court Room.** The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

II. Intermittent Interest in the 1960s and 1970s

In May 1966, the Advisory Committee briefly discussed Rule 53.[7] The Judicial Conference had issued a memorandum to the judges, and the reporter thought Rule 53 was not consistent with what the Conference had told the judges to do. However, the Advisory Committee did not feel the difference created a problem and decided to discontinue any further study.[8]

In July 1969, there was a short discussion on Rule 53, although the minutes do not specify the issues discussed; the Advisory Committee decided to further consider this rule at the next meeting.[9] Not long after, the Advisory Committee's reporter, Professor Frank Remington, prepared a memorandum stating that he "had the impression that it was the consensus of the committee that this issue creates more public controversy than it warrants."[10] Although he felt the draft was more descriptive of the actual policy, he agreed with the Committee's conclusion and did not resubmit the proposed amendment.

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[6] June 1944 Criminal report at 57. This suggestion was made at the May 1943 meeting, but it was seemingly left to the Committee on Style to decide whether the change was needed. February 1943 Criminal minutes (Part III) at 619. The rule number was also moved around from 49, 52, and 56 before settling at 53.

[7] May 1966 Criminal minutes at 22.

[8] The minutes did not explain what the difference was.

[9] July 1969 Criminal minutes at 14.

[10] The Remington memorandum, dated August 29, 1969, is provided in the attached historical materials.

The Advisory Committee did not formally reconsider Rule 53 again until 1992.

In 1972, however, the Judicial Conference of the United States adopted a prohibition against "broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto."[11] The prohibition, which was contained in the Code of Conduct for United States Judges, applied to criminal and civil cases.

III. Proposed Pilot Program in the 1990s

The Chief Justice appointed an Ad Hoc Committee on Cameras in the Courtroom in 1988 to review recommendations from Judicial Conference Committees on the introduction of cameras in the courtroom.[12] In 1990, the Judicial Conference adopted the Ad Hoc Committee's report and recommendation to (i) strike the ban on cameras in Canon 3A(7) of the Code of Conduct for United States Judges, (ii) add a policy to the Guide to the Judiciary for cameras in the courtroom, (iii) authorize a three-year experiment with broadcasting in civil cases, and (iv) assign oversight of this pilot program to the Committee on Court Administration and Case Management (CACM). In recommending a pilot program for civil proceedings only, the report noted the prohibition in Criminal Rule 53.[13]

In 1992, a coalition of news organizations proposed amending Rule 53 by adding "except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States" to the end of the rule.[14] They offered this proposal so that the Judicial Conference could decide whether to establish a pilot program for cameras in criminal trials.[15] A February 1993 memorandum from now-Judge Timothy B. Dyk and Barbara McDowell clarified that the coalition did not seek an amendment to the rule that would itself authorize cameras in the courtroom, but rather an amendment to "transfer jurisdiction" over the issue from the Rules Committees to the Judicial Conference.[16]

The Advisory Committee considered this proposal in April 1993.[17] In the absence of any reported "horror stories" coming from the pilot program for civil trials, one member spoke in favor of amending Rule 53 to allow broadcasting in criminal cases. She indicated that in her experience cameras in the courtroom tended to keep everyone honest; the media tends not to come into the courtroom because they can watch the proceedings from another location. It also serves as an asset to the

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[11] History of Cameras, Broadcasting, and Remote Public Access in Courts | United States Courts (uscourts.gov). *See also* Appendix Part II at 23-25 (excerpt from 1963 article on Judicial Canon 35).
[12] Spring 1993 Criminal agenda book at 266-76; History of Cameras, Broadcasting, and Remote Public Access in Courts | United States Courts (uscourts.gov).
[13] Spring 1993 Criminal agenda book at 274, n.3.
[14] Spring 1993 Criminal agenda book at 243-48.
[15] Fall 1992 Criminal minutes at 9.
[16] Spring 1993 Criminal agenda book at 248-66.
[17] Spring 1993 Criminal minutes at 12-13.

administration of justice. It was also observed that the proposal defers to the Judicial Conference to set the appropriate guidelines. Another member moved to delete the word "radio" from Rule 53.

The Standing Committee unanimously approved publication of the proposed Rule 53 amendment for public comment.[18]

In April 1994, immediately before the spring meeting, the Advisory Committee held a hearing on proposed amendments, including Rule 53.[19] There were three written comments, and two witnesses testified.[20]

One magistrate judge strongly opposed cameras in the courthouse based on 18 years of experience as a state and federal trial judge, as well as the collected views of several individuals and organizations in Oregon.[21] Steven Brill from American Lawyer Media offered to testify about their experience with Court TV, which covered 36 federal civil cases as part of the federal judiciary's pilot program.[22] Ed Cooper commented on a potential distinction between Judicial Conference "standards" and "guidelines" and noted that the Subcommittee on Style might be interested in the question whether uniform language should be adopted.[23]

At the spring 1994 meeting, the Advisory Committee discussed the proposed amendment to Rule 53 at length, voted to approve the amendment as published by a vote of 9-1, and appointed a subcommittee to start drafting suggested guidelines.[24] The following points were made at the meeting:

- There were concerns "about simply deferring to the Judicial Conference to promulgate guidelines for implementing the rule."
- The Chair of the Standing Committee noted that CACM was very interested in the proposal and its potential implications for federal criminal trials. There would need to be coordination between "between a number of entities and committees."
- The Criminal Rules Committee's report would transmit its strong interest in remaining "actively involved in promulgating standards or guidelines."

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[18] June 1993 Standing minutes at 19.
[19] Spring 1994 Criminal agenda book at 8. That hearing was recorded by C-Span and is available here.
[20] May 1994 Criminal Gap report at 220.
[21] Spring 1994 Criminal agenda book at 87-90.
[22] Spring 1994 Criminal agenda book at 92-93.
[23] Spring 1994 Criminal agenda book at 94.
[24] Spring 1994 Criminal minutes at 5-6. *See also* May 1994 Criminal report to the Standing Committee at 205-07. One member later said that he had consented to the amendment to allow the Conference to have a say, even though he remained opposed to cameras in the courtroom.

- The Criminal Rules Committee Chair, Judge Jensen, noted that the Judicial Conference had extended the civil pilot program until the end of 1994, but, unless Rule 53 was amended in some way, there is no authority for a similar pilot program for criminal cases. Another member questioned the need for a pilot program.

- A member expressed concern, noting that in his experience, there were "tremendous problems with broadcasting trials." A defense-side member disagreed. A proposal to change the amendment to require consent of both the government and defendant for broadcasting failed by a vote of 2-8.

In June 1994, the Standing Committee voted 7-6, with the Chair breaking the tie, to send the proposed amendment to Rule 53 to the Judicial Conference for approval.[25] Some participants expressed strong opposition to cameras in the courtroom as a matter of policy, asserting that they adversely influence courtroom behavior. They questioned the accuracy and depth of studies showing that cameras did not affect courtroom behavior. Another member, however, had extensive and favorable experience with cameras in state courts.

It was also noted that CACM had recently met and decided to depart to some unspecified degree from the recommendations of the Federal Judicial Center regarding the civil pilot program. One member recommended deferring the proposed amendment pending the final results of that study. Others thought that the Judicial Conference should be allowed to experiment in criminal cases, if it so chose, like it did with civil cases.

The Chair of the Criminal Law Committee—who would attend the Judicial Conference's upcoming meeting[26]—wrote to the Criminal Rules Committee during the summer of 1994.[27] Judge Jensen's acknowledgement letter, dated August 10, 1994, noted the Criminal Law Committee Chair was correct that a Criminal Rules subcommittee was "preparing a draft of rules on this subject," which would be provided to the Judicial Conference. A copy could also be sent to the Criminal Law Committee and CACM, which had worked on this issue in civil cases and would have an interest in criminal cases.

The Subcommittee on Guidelines for Cameras in the Courtroom submitted its report to the Advisory Committee on September 1, 1994.[28] The report contained proposed guidelines for a pilot program on photographing, recording, and

[25] June 1994 Standing minutes at 17-18.
[26] September 1994 Judicial Conference Report at 3.
[27] While the original letter has proven difficult to source, Judge Jensen's letter in response was included in the October agenda book. Fall 1994 Criminal agenda book at 80.
[28] Fall 1994 Criminal agenda book at 70.

broadcasting of criminal cases.[29] As with the civil case pilot program, the cost and burden of providing logistical support for media coverage would be on the "news gathering or reporting organization," which also needed to request media coverage. Any party or witness could object to the coverage.[30] Local courts and presiding judicial officers would have wide discretion to refuse requests or place additional restrictions or bans on broadcasting. Moreover, the guidelines specifically limited coverage "to arraignment, the entry of a guilty plea (including the trial court's compliance with Rule 11), the trial and the sentencing hearing." It further limited coverage in a variety of ways, including prohibiting coverage related to jurors, certain categories of witnesses (at least absent measures to protect their identities), and "unnecessary focus" on spectators and the defendant when not testifying. The subcommittee also recommended promulgating a rule defining whether a broadcasting order is final for purposes of appellate jurisdiction.

Later that month, the Judicial Conference disapproved the proposed amendment to Rule 53.[31] The Conference also considered the FJC's report on the civil pilot program and a report and recommendation from CACM related to broadcasting in civil proceedings in trial and appellate courts.[32] "A majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and the Conference declined to approve [CACM]'s recommendation to expand camera coverage in civil proceedings."

Shortly after, Steven Brill sent a letter expressing his surprise and disagreement with the decision and his hope that the Judicial Conference would reconsider.[33]

At the Advisory Committee's meeting in October 1994, it was noted that the issue of cameras in the courtroom was "dead" at that point and further discussion would not be fruitful.[34]

IV. Style Changes and Legislative Proposals in the 2000s

In 2002, Rule 53's ban on "radio broadcasting" was shorted to "broadcasting" as part of the general restyling efforts. The Advisory Committee agreed that the word "radio" could be deleted without changing the scope of the rule.[35] As explained in the

[29] Fall 1994 Criminal agenda book at 71-78. The Department of Justice had not yet taken a position on the merits of cameras in the courtroom, preferring to wait on a full examination of the civil pilot program.
[30] While the subcommittee chose not to provide a precise procedure for requesting and objecting media coverage, it provided an alternative section with what such procedures might be.
[31] September 1994 Judicial Conference Report at 67.
[32] September 1994 Judicial Conference Report at 46-47. *See also* Electronic Media Coverage of Federal Civil Proceedings, FJC (1994).
[33] Fall 1994 Criminal agenda book at 103-04.
[34] Fall 1994 Criminal minutes at 7.
[35] January 2000 Criminal minutes at 9.

Committee Note, doing so "accords with judicial interpretation applying the current rule to other forms of broadcasting and functionally equivalent means." The restyled rule also recognized that other rules might permit broadcasting for limited purposes like video teleconferencing.

The rule provides today:

> **Rule 53. Courtroom Photographing and Broadcasting Prohibited.** Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Over the years, there have been various proposals in Congress that would effectively amend Rule 53 to require or permit broadcasting of trials.[36]

For example, in 2000, Judge Becker opposed one such bill on behalf of the Judicial Conference.[37] At a Senate hearing, he identified several concerns with camera coverage, including the intimidating effect on litigants, witnesses, and jurors; possible interference with the right to a fair trial; the potential for creating potent negotiating tactics in pretrial settlement negotiations; security concerns and heightening threats to judges; privacy concerns for countless people, many of whom are not parties to the case; and making certain court orders, such as orders sequestering witnesses, more difficult to enforce. In addition, many related technical issues would need to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria. Judge Becker also quoted *Estes v. Texas*, 381 U.S. 532 (1965), regarding the impact of publicity on the quality of witness testimony.[38]

Since 2000, the Judiciary has opposed similar bills. For example, in June 2021, ahead of a markup session on the Sunshine in the Courtroom Act of 2021, the Director of the Administrative Office sent a letter to the Senate Committee on the Judiciary, highlighting the Judicial Conference's concerns with cameras in the courtroom as well as the value of the deliberative process afforded by the Rules Enabling Act.[39]

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[36] *See e.g.*, Sunshine in the Courtroom Act, H.R.1280, 105th Congress; Cameras in the Courtroom Act, S.807, 117th Congress. Some version of a Sunshine in the Courtroom Act has been reintroduced every Congress since 2005.

[37] Prepared Statement of Hon. Edward R. Becker, Hearing before the Senate Subcommittee on Administrative Oversight of the Court (Sept. 6, 2000).

[38] *See also Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (discussing *Estes* and issues related to broadcasting of court proceedings).

[39] June 23, 2021, Letter from Judge Mauskopf & Attachments.

V. The 2014 Proposal to Clarify Tweets

Rule 53 briefly came up again with respect to microblog posts on the social networking service formerly known as Twitter. In 2009, a magistrate judge found that the prohibition on "broadcasting" contained in Rule 53 includes a prohibition on "tweeting."[40] In 2013, the Criminal Law Committee Chair asked the Advisory Committee to consider clarifying whether Rule 53 applies to contemporaneous reporting, such as tweeting.[41]

The issue was referred to a Rule 53 subcommittee with an initial question of whether to recommend that the Advisory Committee undertake a full review of Rule 53 at that time.[42] A March 2014 memorandum explained that at least two federal judges had permitted reporters to use Twitter to report on federal criminal trials from the courtroom and that state courts were split on this issue.[43] The memorandum also noted that, at the time, tweets were limited to 140 characters but that might not always be the case. The subcommittee unanimously concluded that an amendment would be premature, emphasizing the discretion judges currently have to deal with various forms of technology.

The Advisory Committee discussed this issue at its spring 2014 meeting.[44] The subcommittee expressed its view that there was not enough information to consider revising Rule 53 to take account of new technologies and that it would be better to wait for more experience to develop. The Advisory Committee Chair also did not favor an amendment that would tell judges how to run their courtrooms unless there was a need for a one-size-fits-all rule. Some concerns were raised about making sure jurors do not read about a case, which is also an issue with traditional media. One member noted the need to coordinate with CACM if the Advisory Committee took up the issue. However, that was not necessary because the Advisory Committee unanimously decided not to pursue an amendment.

Aside from the emergency measures taken in light of the COVID-19 pandemic, the new Criminal Rule 62, and the current Rule 53 proposal—all of which are outside the scope of this memorandum—the Criminal Rules Committee has not addressed Rule 53 since 2014.

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[40] *See United States v. Shelnutt*, No. 4:09–CR–14, 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009).
[41] Spring 2014 Criminal agenda book at 281.
[42] Spring 2014 Criminal agenda book at 271.
[43] Spring 2014 Criminal agenda book at 274-75.
[44] Spring 2014 Criminal minutes at 21-22.

TAB 5

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

Re: Update on Review of Privacy Rules

Date: March 19, 2024

I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (4~~3~~) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

III. Other Privacy Rule Issues

A. The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

B. The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

C. Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

* * * *

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

TAB 6

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

Re: Reference to minors by pseudonyms (Rule 49.1) (24-CR-A)

DATE: March 25, 2024

The Department of Justice has proposed amending Rule 49.1 of the Federal Rules of Criminal Procedure to require that the parties refer to minors by pseudonyms in all publicly available court filings.

Rule 49.1(a)(3) currently requires that minors be referred to only by their initials, but as explained in the letter from Acting Assistant Attorney General Nicole M. Argentieri, "[i]t has become clear in recent years … that referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—is insufficient to ensure the child's privacy and safety."

Because this proposal concerns language that is included not only in the Rules of Criminal Procedure, but also in the parallel provisions of the other privacy rules, it has also been logged as a suggestion for the Bankruptcy, Civil, and Appellate Rules.

The Reporters' Privacy Rules Working Group discussed the proposal briefly. That group is coordinating the response to Senator Wyden's proposal to amend the privacy rules to require full redaction of all social-security numbers in public filings. The Working Group agreed it would be desirable to propose only one amendment encompassing any changes in this portion of Rule 49.1 and the parallel privacy rules. The Working Group hopes to bring a proposal regarding social-security numbers and any other changes to the privacy rules to the spring meetings in 2025.

Judge Dever is appointing a subcommittee, chaired by Judge Harvey, to consider this suggestion and other issues arising from the Reporters' Working Group.

TAB 6A

U.S. Department of Justice

Criminal Division

Acting Assistant Attorney General *Washington, DC 20530*

March 7, 2024

The Honorable James C. Dever III
Chair, Advisory Committee on Criminal Rules
United States Courthouse
310 New Bern Ave.
Raleigh, NC 27601

The Department of Justice (the Department) proposes an amendment to Rule 49.1 of the Federal Rules of Criminal Procedure to require that in all publicly available court filings, the parties refer to minors by pseudonyms.

1. Federal Rule of Criminal Procedure 49.1, titled "Privacy Protection for Filings Made with the Court," provides in relevant part that "[u]nless the court orders otherwise," court filings "that contain[] … the name of an individual known to be a minor … may include only … the minor's initials." Fed. R. Crim. P. 49.1(a)(3). It has become clear in recent years, however, that referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—is insufficient to ensure the child's privacy and safety. Project Safe Childhood prosecutors and victim witness personnel, for example, know that child-exploitation offenders sometimes track federal criminal filings and take other measures in an effort to uncover the identity of child victims and contact and harass—and thereby further victimize—the minors. And this is to say nothing of the increased shame, embarrassment, and fear that a child victim or witness may face if their identity as a victim or witness were to become publicly known.

In 2022, the Department of Justice issued The Attorney General Guidelines for Victim and Witness Assistance (the AG Guidelines). As most relevant here, the AG Guidelines state that "Department personnel should scrupulously protect children's privacy in accordance with 18 U.S.C. § 3509(d), the AG Guidelines, and other Department policies." 2022 AG Guidelines, Article III.L.1.d. Although the prior version of the Guidelines had permitted use of initials or an alias to identify children,[1] the 2022 AG Guidelines direct that

[1] The 2011 Attorney General Guidelines for Victim and Witness Assistance provided that "[a] child's name or other identifying information (other than *initials or an alias*) should not be

"[a] child's name or other identifying information (*other than a pseudonym*) should not be reflected in court documents or other public records unless otherwise required by law." 2022 AG Guidelines, Article III.L.1.d. (emphasis added). The 2022 AG Guidelines also caution that "Department personnel should be aware that information in multiple sources can be put together to trace the identity of victims or witnesses." *Id.* at Art. II.D.1.

Federal courts have referred to minors by pseudonyms. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 439 (2014) (noting that the child victim "goes by the pseudonym 'Amy' for this litigation"); *United States v. Viarrial*, 730 F. App'x 694, 695 n.1 (10th Cir. 2018) (unpublished) ("To protect the privacy of those involved, this opinion refers to Mr. Viarrial's child victims and his former partner with the pseudonyms [*e.g.*, Jane Doe] used in the indictment, jury instructions, and verdict form."); *Brodit v. Cambra*, 350 F.3d 985, 995 n.1 (9th Cir. 2003) (Berzon, J., dissenting) ("The charging documents and much of the trial transcript refer to the child in this case by the pseudonym 'Jane Doe.' Accordingly, I will also use this pseudonym."); *Collmorgen v. Lumpkin*, 2023 WL 6388551, at *5 (S.D. Tex. 2023) ("To protect the child victim's privacy, the [state] appellate court used pseudonyms to refer to him and his family members. This Court will do the same—referring to the child victim as Maxwell and referring to the State's rebuttal witness as Kaitlyn."); *Doe v. Avon Old Farms School, Inc.*, 2023 WL 2742330, at *1 n.1 (D. Conn. 2023) ("I refer to the … daughters with the 'Jane Doe' pseudonym throughout this opinion—as the parties do in their filings—because the girls are minors and this case includes sexual harassment and assault allegations."); *United States v. Stivers*, 2020 WL 2804074, at *1 n.1 (S.D. Ind. 2020) ("'Vicky' is a pseudonym for the actual minor victim depicted in the series, which the Court will adopt to refer to the victim in this Order. All of the references to 'Vicky' in this Order and in the other criminal cases discussed herein refer to the same person."). These cases support the Department's policy and practice as well as the Department's recommendation to amend Rule 49.1.

Finally, amending Rule 49.1(a)(3) to change "the minor's initials" to "a pseudonym" will not prejudice criminal defendants. To the extent that a defendant has the right to know the actual identity (*e.g.*, name) of a minor, that right can be protected through sealed filings that identify the child while making sure that publicly available filings use only the pseudonym. *See generally* 18 U.S.C. § 3509(d)(2); *see also* 2022 AG Guidelines, Art. II.D.1. In addition, and where appropriate, a party can seek a protective order to help ensure that information that should not be released publicly is in fact not released publicly. *See* 18 U.S.C. § 3509(d)(3); Fed. R. Crim. P. 49.1(e); 2022 AG Guidelines, Art. II.D.1.

2. For the reasons set forth above, the Department proposes to amend Rule 49.1(a) as follows (stricken text in red; proposed new text in blue):

> **(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number,

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reflected in court documents or other public records unless otherwise required by law." 2011 AG Guidelines, Article III.L.1.d (emphasis added).

taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) ~~the minor's initials~~ in reference to a minor, a pseudonym;

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

(5) the city and state of the home address.

* * *

We appreciate your assistance with this proposal, and we look forward to working with the Committee on this issue.

Sincerely,

NICOLE ARGENTIERI
Digitally signed by NICOLE ARGENTIERI
Date: 2024.03.07 10:41:35 -05'00'

Nicole M. Argentieri
Acting Assistant Attorney General

TAB 7

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 40 (23-CR-H)

DATE: March 26, 2024

Magistrate Judge Zachary Bolitho has written describing a case in which a defendant from outside his district was arrested there on a warrant for violating her pre-sentencing release. At the initial appearance, which Judge Bolitho held there in the district of arrest, the government moved for detention pending the defendant's release revocation hearing in the charging district under 18 U.S.C. § 3148, and the defendant requested a detention hearing in front of Judge Bolitho. The government argued that Judge Bolitho lacked the authority to conduct a detention hearing, because Rule 40 says nothing about a detention hearing in the district of arrest, and 18 U.S.C. § 3148 speaks only of a revocation hearing before a judge in the charging district. Judge Bolitho rejected that argument, for the reasons stated in his suggestion, and he ruled that the appropriate standard was that set forth in Rule 46(c) and 18 U.S.C. § 3143(a).

Judge Bolitho says that it would be helpful if Rule 40 could address the two questions he faced:

> (1) Does a defendant who has been arrested on a petition to revoke pre-trial or pre-sentencing release from another district have the right to a detention hearing in the district of arrest; and
>
> (2) If so, what is the standard that applies in the detention hearing?

This item is on the agenda for an initial discussion of the question whether the Committee wants to put this proposal on its agenda for in depth consideration.

TAB 7A

Hon. Zachary Bolitho (23-CR-H)

Released on November 27, 2023
Category: Suggestions
Committee: Criminal
Rules Status: Pending consideration
Rule or Form: Rule 40

A defendant from outside my district was arrested here on a warrant for violating her pre-sentencing release. I conducted her initial appearance under Fed. R. Crim. P. 40. At the initial appearance, the government moved for detention pending the defendant's release revocation hearing in the charging district under 18 U.S.C. 3148. The defendant requested a detention hearing in front of me. The government argued that I lacked the authority to conduct a detention hearing. The AUSA argued that Rule 40 says nothing about a detention hearing in the district of arrest and that 18 U.S.C. 3148 speaks only of a revocation hearing before a judge in the charging district. I rejected the AUSA's argument and found that the right to a detention hearing in the district of arrest was implicit in Rule 40(c), which permits a judge in the district of arrest to "modify any previous release or detention order issued in another district." I determined that it would be inconsistent with the Bail Reform Act for me to modify a release order and require detention without providing the defendant with a hearing on the issue. There are a few decisions from other magistrate judges that have reached the same conclusion. That led to the next issue, which was what standard to apply at the detention hearing. Neither the Bail Reform Act nor the Federal Rules provide a standard. My research revealed that magistrate judges have applied various standards. Because the defendant was awaiting sentencing, I determined the appropriate standard was that set forth in Rule 46(c) and 18 U.S.C. 3143(a). I felt that made the most sense under the circumstances, but I can't point to anything in the Federal Rules or the Bail Reform Act to confirm that I made the right call.

It would be very helpful to magistrate judges if Rule 40 could be amended to address the two questions I faced—(1) Does a defendant who has been arrested on a petition to revoke pre-trial or pre-sentencing release from another district have the right to a detention hearing in the district of arrest?; and (2) If so, what is the standard that applies in the detention hearing?

TAB 8

Item 8 will be an oral report.

TAB 9

Federal Judicial Center

Date: March 6, 2024

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan
Federal Judicial Center Research Division

Re: Federal Judicial Center Research Projects

This memorandum summarizes current and recently completed Federal Judicial Center research relevant to the Federal Rules of Practice and Procedure. Center researchers attend committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides.

Current Research for Rules Committees

Complex Criminal Litigation Website

As suggested by the Criminal Rules Committee, the Center is developing as one of its special-topics websites (curated content) a collection of resources on complex criminal litigation.

Attorney Admissions

The Center is conducting research for the Standing Rules Committee's subcommittee on admissions to the district courts' bars.

Completed Research for Rules Committees

Default and Default Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

Mandatory Initial Discovery Pilot (MIDP)—Final Report

At the request of the Civil Rules Committee, the Center studied a pilot program in two districts, in which initial disclosures required by the Federal Rules of Civil Procedure were supplemented with broader disclosure requirements (www.fjc.gov/content/376773/mandatory-initial-discovery-

pilot-final-report). Among other findings, pilot cases had shorter disposition times than nonpilot cases, controlling for case type, district, and the effects of the Covid-19 pandemic.

Jury-Trial Demands in Terminated Civil Cases, Fiscal Years 2010–2019

Prepared for the Civil Rules Committee, this study observed that jury-trial demands were recorded in half of the federal courts' civil cases, but only 0.7% of civil cases were resolved by jury trials (www.fjc.gov/content/373277/jury-trial-demands-terminated-civil-cases-fiscal-years-2010-2019).

Federal Rule of Civil Procedure 42(a) Consolidation, Appellate Finality, and Hall v. Hall

Prepared for the Appellate Rules and Civil Rules Advisory Committees, this study examined potential issues arising from the Supreme Court's 2018 decision in *Hall v. Hall* that a case that has been consolidated with other cases may become appealable before other cases in the consolidation (www.fjc.gov/content/373279/federal-rule-civil-procedure-42a-consolidation-appellate-finality-and-hall-v-hall). The research did not observe widespread losses of appeal rights following the decision in *Hall*.

Federal Courts' Electronic Filing by Pro Se Litigants

In light of interest in whether self-represented litigants should be provided expanded electronic filing opportunities, the Center interviewed a modified random sample of seventy-eight clerks of court or members of their staffs in late 2021 and early 2022, including courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants).

Electronic filing avoids the burden of visiting a courthouse or the delay inherent in regular mail. One option for electronic filing is use of the court's CM/ECF (case management, electronic case filing) system, which is how attorneys typically file now. Another option is email or its equivalent, such as an electronic drop box. Courts vary according to whether they generally permit or forbid these methods and whether they allow for exceptions to their general rules. Some courts have arrangements with some prisons (typically state prisons) for electronic submissions by prisoners.

Some courts do not require paper service by paper filers on parties already receiving electronic service.

Electronic Filing Times in Federal Courts

In light of a proposal to require electronic filing to be completed by the close of business on the day that the filing is due, the Center catalogued the times all docket entries were made in 2018 for all federal courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/365889/electronic-filing-times-federal-courts). About nine in ten attorney filings were made before 6:00 p.m.

A survey of attorneys' practices and preferences was piloted but discontinued because of the Covid-19 pandemic. Preliminary pilot data suggested that most attorneys working for large firms preferred a filing deadline earlier than midnight, and most other attorneys preferred a midnight deadline.

Electronic Filing in State Courts

The Center surveyed electronic filing rules for thirty states selected to equally represent each of the federal circuits (www.fjc.gov/content/373599/electronic-filing-state-courts).

Current Research for Other Judicial Conference Committees

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center has conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences during the pandemic providing remote public access to proceedings with witness testimony.

Case Weights for Bankruptcy Courts

Data collection has begun for the Center's updated research on case weights for bankruptcy courts. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships in bankruptcy courts. The research was requested by the Committee on Administration of the Bankruptcy System.

Completed Research for Other Judicial Conference Committees

Evaluation of the Interim Recommendations from the Cardone Report

In 2023, the Center completed for the Defender Services Committee and the Executive Committee an assessment of the implementation of thirty-five recommendations for how the courts manage their responsibilities under the Criminal Justice Act, which specifies how the courts provide financially needy criminal defendants with legal representation (www.fjc.gov/content/380873/evaluation-interim-recommendations-cardone-report). The

recommendations were provided in 2017 by the Cardone Committee, named after its chair, Western District of Texas Judge Kathleen Cardone.

Court Orders Issued During the COVID-19 Pandemic on Criminal Justice Act Interim Voucher Payments

This report—prepared as part of the Center's research on recommendations in the 2017 Cardone report—summarizes federal court orders issued during the coronavirus pandemic regarding interim payments to Criminal Justice Act panel attorneys (www.fjc.gov/content/376241/court-orders-issued-during-covid-19-pandemic-criminal-justice-act-interim-voucher).

Federal-State Court Cooperation: Surveys of U.S. District and U.S. Court of Appeals Chief Judges and State and Territorial Chief Justices and Court Administrators

Prepared for the Committee on Federal-State Jurisdiction, this report updates the findings of a 2016 survey of U.S. chief district judges regarding their past, current, and future plans for cooperation with the state courts, as well as their use of state-federal judicial councils as a forum for communication between the courts (www.fjc.gov/content/378684/federal-state-court-cooperation-surveys-us-district-and-us-court-appeals-chief-judges).

Other Current Research

Manual for Complex Litigation

The Center is preparing a fifth edition of its Manual for Complex Litigation (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

Other Completed Research

Special-Topic Website: Science Resources

The Center maintains a website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Topics include fingerprint identification, neuroscience, the opioid crisis, DNA technologies, and water and the law.

Emergency Election Litigation: From Bush v. Gore to Covid-19

The Center prepared 513 case studies of how the federal courts have managed emergency election litigation from 2000 through 2020; the case studies include 717 individual emergency cases (www.fjc.gov/content/382726/emergency-election-litigation-federal-courts-bush-v-gore-covid-19). Individual case studies are also posted separately on the Center's website (www.fjc.gov/content/case-studies).

Jurisdictions with a High Number of Civil Jury Trials

Congress directed the Center to study factors related to high numbers of civil jury trials in some jurisdictions (www.fjc.gov/content/376750/jurisdictions-high-number-civil-jury-trials). The ten districts with the highest rates of civil jury trials were all small to medium in size. Civil trial rates ranged from 0.29% to 2.75%; the rates for a large majority of districts (82%) were between 0.5% and 1.5%.

COVID-19 and the U.S. District Courts: An Empirical Investigation

This examination of district-court case processing during the coronavirus pandemic showed an overall slowing of case processing but an overall reduction in backlogs (www.fjc.gov/content/374523/covid-19-district-courts-empirical-investigation). For some courts, however, their backlogs increased.

Resolving Unsettled Questions of State Law: A Pocket Guide for Federal Judges

The Center prepared a short guide to what federal judges might consider when applying unsettled questions of state law (www.fjc.gov/content/373468/resolving-unsettled-questions-state-law-pocket-guide-federal-judges).

National Security Case Studies: Special Case-Management Challenges

The Center published its seventh edition of *National Security Case Studies: Special Case-Management Challenges* in 2022 (www.fjc.gov/content/372882/national-security-case-studies-special-case-management-challenges-seventh-edition). The cases studied include terrorism prosecutions, espionage prosecutions, and other criminal and civil cases. Challenges include handling classified information and other security concerns.

Results of a Survey of U.S. District and Magistrate Judges: Use of Virtual Technology to Hold Court Proceedings

The Center surveyed federal district and magistrate judges about the use of virtual technology before and after the onset of the coronavirus pandemic (www.fjc.gov/content/370037/results-survey-district-magistrate-judges-virtual-technology-court-proceeding).