ADVISORY COMMITTEE
ON
CRIMINAL RULES

October 26, 2023

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Meeting of the Advisory Committee on Criminal Rules
October 26, 2023
Minneapolis, Minnesota

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Advisory Committee on Criminal Rules

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Andre Birotte, Jr.	D	California (Central)	2021	2024
Jane Boyle	D	Texas (Northern)	2021	2024
Timothy Burgess	D	Alaska	2021	2026
Bob Conrad, Jr.	D	North Carolina (Western)	2021	2024
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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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	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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TAB 1

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 20, 2023
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 20, 2023, in Washington, D.C. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess (via Microsoft Teams)
Judge Robert J. Conrad, Jr.
Dean Roger A. Fairfax, Jr.
Lisa Hay, Esq.
Judge Bruce J. McGiverin
Angela E. Noble, Esq., Clerk of Court Representative
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.
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 III, Esq., Secretary to the Standing Committee
Allison Bruff, Esq., Counsel, Rules Committee Staff
Christopher Pryby, Esq., Law Clerk, Standing Committee

Opening Business

Judge Dever opened the meeting with administrative announcements. Judge Burgess was attending remotely from Alaska, and Professor Coquillette was attending remotely from Boston. Judge Garcia was not able to attend. He welcomed Judge Paul Barbadoro from the District of New Hampshire as the new liaison from the Standing Committee. Judge Dever noted Judge Barbadoro's exemplary service as a district judge for more than 30 years and his service in many other capacities in the judiciary, including his current service on the Standing Committee and as our new liaison.

Judge Dever also noted that two members would be ending their terms at this meeting. Judge Bruce McGiverin had served for six years, including admirable service on the Subcommittees for Emergency Rule 62 and Rule 49.1. Despite many travel challenges, Judge McGiverin had made it to all of our committee meetings, and Judge Dever expressed gratitude for his many insights. This would also be the last meeting for Lisa Hay, who would be retiring as the Federal Public Defender in the District of Oregon on June 30, 2023. Judge Dever said Ms. Hay had done valuable work on several subcommittees, including Rule 17, Rule 6, and Pro Se Filing. He thanked her for insights and her willingness and ability to call on an incredible network to gather additional information for the committee.

Finally, Judge Dever thanked the public observers for their interest, and recognized Senior Inspector Richardson for a security announcement.

Turning to the first item on the agenda, Judge Dever asked for comments on the draft minutes or a motion to approve them. The minutes were unanimously approved.

Judge Dever asked for reports from the Rules Staff. Ms. Bruff drew the Committee's attention to the chart in the agenda book detailing the amendments and where they are in the Rules Enabling Act process, beginning on page 111. She stated that several Criminal Rules were currently at the Supreme Court. If they are approved by the Court, they will be transmitted to Congress May 1, and absent contrary action, they will go into effect December 1, 2023. Those included amendments adding Juneteenth National Independence Day to the list of legal holidays, new emergency Rule 62, and the technical amendment to Rule 16.

Standing Committee Law Clerk Chris Pryby called attention to the legislation that would affect the Rules, listed in the agenda book beginning on page 117. He noted that House Joint Resolution 7 relating to the National Emergency for COVID has been signed into law by the President. That will terminate the national emergency and the authority under the CARES Act to hold certain criminal proceedings by video conference or teleconference.

Rule 17 and Pretrial Subpoena Authority

The Committee then turned to the proposal to expand pretrial subpoena authority under Rule 17. Judge Dever asked Professor Beale to begin the discussion. She directed the Committee's attention to the memo on page 124 of the agenda book. All members of the Committee had participated in person or virtually in the Committee's October meeting in Phoenix, where numerous speakers described their experiences—in different districts and in different kinds of cases—with efforts to employ Rule 17 to seek material in the hands of third parties. As described in more detail in the minutes, the Committee heard many defense counsel describe the need for subpoena authority in different kinds of cases and for different types of material that they felt they needed to be able to access in order to properly research possible defenses and lines of investigation. The speakers described very different experiences in different districts and actually different experiences in front of different judges in the same district. For example, one speaker said "the rulings are all over the place." In some districts

judges are reading Rule 17 very narrowly under the Nixon case, but in other districts judges read it much more generously.

Professor Beale said that another issue raised by many speakers in October was the uncertainty about whether defense counsel could seek these materials ex parte, or would have to explain what they were hoping to find and its relevance in a filing available to the prosecution. Again, the speakers in October described uncertainty and inconsistency, with some courts ruling that ex parte filing is not appropriate. In other courts, where counsel could not be certain whether an ex parte application would be approved or not, participants said they were taking a risk in making such an application. And in still other districts, the propriety of ex parte filing was well established. The Northern District of California, for example, has a local rule that makes it very clear you can do this.

Professor Beale noted we also heard different accounts of how broadly or narrowly the Nixon case is applied, and that led to the question whether this issue should be solved by litigation rather than by a rules amendment. As more fully explored in the memo in the agenda book, she explained, the Nixon court was interpreting the current rule, and its decision would not tie the hands of this Committee going forward if it is persuaded that the rule should be broader as a matter of policy.

Turning to the Subcommittee's activities since the October meeting, Professor Beale said that it had held two virtual meetings and had received valuable assistance from several experts who attended these virtual meetings. The Subcommittee spoke to Professor Orin Kerr and Richard Salgado about the Stored Communications Act and other issues relating to materials held online, and to other experts on issues affecting banks and other financial service entities. Additionally, the reporters interviewed other experts concerning the issues that might be raised by subpoenas for school records, medical and hospital records.

Professor Beale noted that no decision had yet been made whether to draft an amendment, but the Subcommittee has been keeping a list of issues (agenda book page 129) that it would need to consider if it were to draft a rule.

Judge Nguyen, the Subcommittee chair, then recapped in a different way, taking what she called a step back. Rule 17 has not been significantly amended since the 1940s. The scope of the initial request that we received was incredibly broad. Rather than delving into the weeds of the proposed language, the Subcommittee began the process with information gathering, an investigative phase, so to speak. That really started in October when we brought in all of the speakers to help us understand what the problem is on the ground. We heard the perspectives of both DOJ and defense counsel. And, as Professor Beale explained, it's very different depending on what district you're in.

At this point, Judge Nguyen said, the Subcommittee was starting to emerge from the information gathering process and would convene again to try to make some initial decisions. Given what it had learned so far—extensive work and very detailed information—the

Subcommittee would discuss whether it was ready to move forward, and if so, what issues it will be taking up. It would be helpful to the Subcommittee to know if there are additional areas of research that Committee members think the Subcommittee should be looking into as it embarks on this next phase.

Judge Dever thanked Judge Nguyen for her leadership as the Subcommittee chair, and opened the floor for suggestions regarding any other areas of information that members thought the Subcommittee should be gathering or other sources it should be consulting that were not identified in the agenda book.

A member who noted she was on the Subcommittee commented that her number one concern was that Rule 17 is very poorly written and is confusing. She noted there is confusion about the proper use of sections (a), (b) and (c) for subpoenas for documents versus for witnesses, and she stressed the need for clarification.

Professor Beale responded that many of the speakers in October referred to the need for clarification and uncertainty about exactly what Rule 17 does say. She thought the Subcommittee was very aware of that concern, and she agreed that any change would need to be clear (and our style consultants require clarity).

A member commented that this is an important rule, and that the Committee had received a wide range of comments. The prosecutors said it is fine the way it is, and it should not be amended. But the defense overwhelmingly thinks it needs to change because defense attorneys need a means to obtain more evidence not just to get ready for trial, but to investigate the case.

Hearing no additional comments, Judge Dever said that the Subcommittee would continue its work and report at the next meeting. He also encouraged any member who had additional thoughts to share them with the Subcommittee.

Access to Electronic Filing by Self-Represented Litigants

The next item was pro se access to electronic filing and Rule 49. Judge Dever noted that Judge Burgess was chairing the Criminal Rules Committee's Subcommittee on this topic, and a working group was coordinating the efforts of all of the Committees. He asked Professor Struve to provide an update on the working group's efforts.

Professor Struve began by thanking all the members of this committee and especially its clerk of court liaison for providing so much food for thought to help identify the questions that will be useful as the working group moves forward. She said that the fall and the January meetings posed questions that need answers if one is to consider moving forward with various possibilities.

The project had been subdivided. One topic was the potential for eliminating the current requirement that a non CM/ECF user who files a paper with the court must serve that paper on all other parties to the case separately and in a traditional method. That requirement of separate service seems redundant, because everyone else who is on CM/ECF is receiving the document

through the notice of electronic filing (NEF). So this part of the project is assessing whether the national rules could and should be amended to eliminate that separate service requirement. Professor Struve and Dr. Reagan from the Federal Judicial Center (FJC) had conducted further research, focusing on some districts that have eliminated that requirement and interviewing court personnel from those districts to see how that has been going. They had spoken to 17 different people from nine districts, including people from seven districts that exempt paper filers from separate service on the CM/ECF participants in their case. They all reported that the process was working well.

Professor Struve said that one of the questions that came up in the discussions was whether all paper filings actually end up in CM/ECF and are accessible. She said the answer is yes, they should be, except for ex parte submissions or things that aren't supposed to be accessible to the other side, and those were not. In essence, it works the same way for the paper filer as it would for the CM/ECF participant. In some districts everyone, including self-represented litigants, has to traditionally serve sealed filings on the other parties because they can't get the link through the NEF. In other districts that is not necessary because there's a way to tell CM/ECF that parties in the case can get access to that document in CM/ECF. In those districts, you don't have to separately serve, and that is true for the self-represented litigants as well.

Professor Struve said that the research so far is very positive on the feasibility of eliminating the separate service requirement, but she and Dr. Reagan had encountered an interesting issue that would arise in cases in which there was more than one self-represented party (which their respondents said was rare). If we eliminate the separate service requirement, it would be eliminated only for CM/ECF participants. So if there are two self-represented litigants in the same case and neither is on CM/ECF, each self-represented litigant would be required to serve the other through a traditional means. But how does the paper filer know which other litigants in their case are not on CM/ECF such that they must traditionally serve them? Professor Struve said they had received various answers to this question. Some parties who are not in CM/ECF are enrolled in an electronic noticing program, and that solves the problem. If a self-represented party is enrolled in the electronic noticing program, they are getting the NEF. The NEF solves the problem, because it tells them who they need to serve in a traditional manner. It will say, for example, the following parties did not receive service via CM/ECF, and you must serve them traditionally. Professor Struve thought that was an excellent idea, and she commented that every district that does that agreed. In those districts and with those litigants who are in the electronic notice program, there is no issue. As to other districts or litigants who are not in the electronic notice program, their respondents reported they were aware of no problems. Although no one reported they had not received a filing, Professor Struve thought this was still an issue to consider. She expressed optimism that rulemaking ingenuity could address it. For example, we could have an information forcing provision in the rule that says explain whether you separately served anyone. She thought that might be a topic for discussion in the working group. Professor

Struve commented that she and Dr. Reagan planned to process the fruits of their discussion in a more formal report, but she thought that would be the most actionable and immediate item.

Professor Struve stated that the seven districts that exempt paper filers from separate service on the CM/ECF participants in their cases were the District of Arizona, the Northern District of Illinois, the Western District of Missouri, the Southern District of New York, the Western District of Pennsylvania, and the Districts of South Carolina and Utah. These districts varied in many respects, but all were happy with exempting paper filers from separate service.

Judge Dever recognized the Committee's clerk of court liaison, who said she had spoken at length with Professor Struve. On the service issue, the liaison thought that was something that we could easily work out. In cases with multiple paper filers, she commented that they serve each other in the traditional way now, and she did not think it would be a big deal if everybody else got served electronically. Although she did not see the service side as raising major issues, she did think that the technicalities of actually allowing pro se filers to use CM/ECF would raise logistical issues that we would need to figure out.

Judge Dever thanked the clerk of court liaison, noting that she was the clerk in the Southern District of Florida, and she also had a network of people in other districts that she has consulted about what's going on in different courts. That is very useful because we have 94 different judicial districts.

Judge Dever then invited Professor Struve to report on other aspects of the project. She said they had been pursuing two other topics. First, in the districts that permit a self-represented litigant to access the CM/ECF, how has that been going and what issues have come up? Five of the districts in which she and Dr. Reagan were pursuing their enquiries allow CM/ECF access to self-represented parties without special permission, and in two more districts the court decides whether to allow the access after the litigant has gone through a process. Their respondents went into some detail about the benefits that they saw from permitting e-access, principally no longer having to deal with the processing of the paper filings by these litigants and all the ways in which that saves them time. This of course also eliminates the need to paper serve court orders on them, which some of the respondents also praised. And they also said it results in an electronic record of what was filed, avoiding later arguments about things like whether Page 10 was missing from the filing. You have a record of that.

Professor Struve and Dr. Reagan also asked respondents about burdens on the clerk's office or the court. Responses ranged from no burden at all, to sometimes we have to do a little more quality control, or in some cases, substantially more quality control (meaning things like the party filed in the wrong event). There is also some training time as well as time spent on the phone troubleshooting problems as they arise. So the burden varies, and the respondents differed in their assessment of the resources they would need in order to address access to CM/ECF. They had a particularly interesting discussion with someone who moved from the Southern District of Florida to the Western District of Pennsylvania and expressed surprise that they were able to give access to CM/ECF. But that respondent also said you would need training resources in order

to accomplish this. That bears on the concern about resources, though it may be shifting court resources from the folks who are opening the paper filings and processing them to the folks who are training. So it seems to be true that a court couldn't just switch immediately from one to the other, but they might find that the resources net out.

From the reports of clerks' offices that are now dealing with this, the question of administrative burden and problems seems to be rather in the eye of the beholder. Each of their respondents basically said it's not a problem, but some of them recalled a few instances when someone had put something in that had to be dealt with. Generally they said someone spotted it and the court restricted access. But if it's a real problem, the court might revoke the privileges.

The interviews did provide answers to some of the questions that had come up in Committee discussion. There were questions whether it is hard to identify a litigant who's not a lawyer but is in CM/ECF, and all of the respondents said no, not at all. They also said they had encountered no problems about self-represented litigants sharing credentials, partly because sharing your credentials in the new system means sharing your PACER account, which is sort of like sharing what you'll have to pay for if someone goes and downloads things. Moreover, most of the districts that they looked at only grant access for a particular case, which reduces the likelihood of a problem with sharing credentials. They were told of one instance where there was a problem with shared credentials, but it was a mother who was a litigant and the son was filing papers. That seemed idiosyncratic and not really a widespread problem.

The respondents said that if one wanted a gating system, CM/ECF has the technical capacity. You can set up a type of event to which only court personnel have access and make that the only kind of event that a self-represented litigant could use. Then the court would have to review the filing and then move it to a non-restricted access status. They said it would be technically feasible, but none of those districts had tried to set up such a restriction. Professor Struve thought that probably reflected their overall viewpoint: they saw no problems with the current situation, and such a restriction would create more work for the clerk's office.

Professor Struve and Dr. Reagan also asked about alternative means of electronic access. You can unbundle the CM/ECF benefits and provide them à la carte, as it were, such as allowing electronic filing by some other means, such as e-mail or upload. Five districts do that and they like it. They say it's very similar in its benefits to allowing access to CM/ECF, and they did not identify many technical problems (though the Southern District of New York was much less strongly favorable about their e-mail filing program). The other thing they found very interesting was that eight of these districts now offer E-noticing. Even if someone is not in the CM/ECF, they can sign up to get electronic notices, which basically is signing up for the NEF. Professor Struve expected the use of E-noticing to spread; four of these districts are actively promoting it to their litigants. The benefits to the clerk's office are obvious: they don't have to send out paper court orders. They praised this to the skies.

Concluding her interim report, Professor Struve reported she was much indebted to Dr. Reagan for his expert guidance as they conducted these interviews. She could attest to the superb

work done by the FJC, especially when it consists of qualitative information obtained via interview. Understanding the effort that goes into that, she felt even more indebted to the FJC researchers.

Professor Beale asked whether Professor Struve and Dr. Reagan had learned anything about the possibility that electronic service might address problems that arise when people move frequently and may not even have a stable home address. She wondered whether their respondents thought shifting to some kind of system where everyone gets electronic notice of filings would improve access to justice. Or did respondents voice only the advantage of not having to mail things out? Might this improve the receipt of critical information so that people don't default?

Professor Struve responded that some of their respondents did volunteer ensuring access among the listed benefits of the various kind of electronic access, and in one district the clerk led with that point, saying it was their job to serve the people who litigate. But generally—perhaps because of the questions in the interview protocols—the respondents were focused on burdens or advantages for the clerk's office. But she thought some did mention e-mail addresses may be more stable over time than physical addresses. She also noted that their questions did not address incarcerated self-represented litigants. Some districts are doing exciting things for them, but it is very institution specific.

Professor Struve commented that in an electronic noticing system the person needs to keep their e-mail address up to date and have the ability to download the documents and store them electronically in an accessible way. She commented that she knew people who can get emails but could not reliably read court documents on their cell phones. Moreover, she and Dr. Reagan found that courts with noticing programs seemed to be taking the opportunity to say people who have signed up for E-noticing are forgoing receipt of paper copies. It is not a belt and suspender system. She expressed concern about the ability of self-represented litigants to store electronic copies of documents and access them reliably, though she noted that issue was not within the working group's remit. The clerks' offices did mention some of these things. For example, sometimes people will say they did not get their one free look. When you get a NEF, you get one free look at the filing, and after that you have to pay if you are accessing the document through PACER. So litigants who are savvy know they need to download filings on their first look and put them in their Dropbox.

In other words, Professor Struve said, the cost to self-represented litigants of getting the benefit of electronic noticing is no one will send them paper anymore.

In response to the question whether self-represented litigants could come to the courthouse to get free access to the filings, Professor Struve responded that she and Dr. Reagan did not ask about that specifically. But on occasion when she suggested maybe not everyone is good at storing documents on their cell phone, some clerks responded that the litigants can come to the courthouse, and there's a kiosk where they can look at filings. Professor Struve thought that might be courthouse specific.

The Committee's clerk of court liaison explained that any litigant has access to come to the courthouse and view the documents for free, but they are charged if they want to print the documents.

Judge Burgess thanked Professor Struve for her report, and asked if any members had thoughts or suggestions about what the Subcommittee on Pro Se Filing should be looking at. The clerk of court liaison raised the question whether this issue called for a federal rule. Should we leave it to each court to determine their needs, or make it a rule that all courts must follow? She commented that her court was in a very big district with many high profile cases. She said the idea of letting any pro se party e-file or just file electronically frightened her. The district has a very high profile. Donald Trump lives there. In some cases members of the public file things that are not necessarily related to the case in any way. They just want to be heard. How do we control that? Do we just let everybody have a password and file as long as they say that they have something to say in the case? Or do we allow the judge to say no, these people don't have anything legitimate to add to the case, and not allow them to file? She was concerned about those kinds of cases, not the average everyday litigant that has a case pending. She said she was afraid of big cases where people come out of the woodwork and just want file things. They also get threats against their judges and against the clerk's staff. If they file in paper, the clerk's office can control it. But if self-represented parties are given access to CM/ECF, they would not have much control.

Judge Burgess asked the clerk of court liaison a follow-up question. Were her concerns about the additional work for staff, or about just clogging the docket in particular cases with unrelated filings? She responded she was concerned about both. Since the clerk's office has the quality control for every document filed in any case, unrelated filings do create more work for staff. But they will also clog up the docket. She asked the judges in the room whether they would want 1000 documents in their cases from members of the public who are not related to the case in any way but have something to say.

Professor Struve responded that sounds like an utter nightmare. But the good news is that would never be allowed in any of the seven or eight districts allowing self-represented litigants with access to electronic filing where she and Dr. Reagan had conducted interviews, because to file you must have a PACER account and be a litigant in a particular case. The clerk's office looks for that match, and only allows access to CM/ECF and filing for parties to the particular case. So at least that piece of it seems to have worked itself out.

The clerk liaison replied that they all want to be "interested parties," and file notices of interested parties. She has thousands of individual citizens who want to be interested parties in these cases and want to be heard.

Judge Burgess said he appreciated these comments, and he thought they warranted a closer look at the concerns about the potential for unrelated filings that could clog the docket in a case and increase the workload of the clerk's office.

Judge Dever thanked Judge Burgess for continuing to chair the Subcommittee, which he said would continue to coordinate with the Professor Struve and the Committee's reporters. He also thanked the clerk of court liaison for raising the question whether there needs to be a rule. He thanked Professor Struve and the FJC, which had provided a great deal of detailed information about what's going on across the districts. Judge Burgess added this thanks to Dr. Reagan.

Unified National District Court Bar Admission

The next agenda item, beginning on page 143 of the agenda book, was Professor Morrison's suggestion of a unified national bar admission. Judge Dever asked Professor Beale to give a summary. She said this was a very lengthy and significant proposal—directed not only to our committee but to other committees—to consider adopting a national rule of bar admission. The submission suggests that that there is now considerable variation district to district, and a significant number of districts impose very high hurdles that individuals have to meet to participate in litigation, including, for example, a high cost for pro hac vice filings. To become a member of the bar in many districts you must pass the state bar exam, which obviously is a significant commitment of time and money.

The proponents note we now have nationwide Federal Rules of Evidence, Civil Procedure, Criminal Procedure, and Bankruptcy Procedure. They contend it is time to eliminate the barriers that affect individual litigants, individual lawyers, and litigation groups. Professor Beale noted that a large number of groups participated in this submission. They have already attempted to get changes in local rules and districts where they would like to participate in litigation and where they felt the barriers were too high. But those efforts on a district by district basis had been unsuccessful. Professor Beale said the question is how to proceed since the proposal was presented to more than one committee.

Judge Bates began by commenting that this was a very interesting and thoughtful proposal spearheaded by Alan Morrison, but joined by several litigation groups and other individuals. He agreed it raised some serious issues, and might warrant serious consideration though it was not without other concerns and problems. He thought it likely there would be some resistance among the courts. It would remove local control over not only bar admission, but also bar discipline. He thought there would be concern about taking the local judges and members of the bar out of the disciplinary process and putting that disciplinary process in a centralized location. The few problem members of the bar may be constrained more if they know that the judges they are appearing before and other lawyers in their community are handling discipline, rather than some centralized location that has no real connection to them.

Judge Bates noted that the proposal would also affect the Civil and Bankruptcy Rules, though it would have less impact on the Appellate Rules because they already to some extent provide for a unified bar. Accordingly, he had decided to form a joint subcommittee with representation from the Criminal, Civil, and Bankruptcy Rules Committees (though he noted Bankruptcy had a lesser interest because it generally adopts the bar provisions of the local

district court). He said the joint subcommittee would gather additional information regarding the current situation and issues, and undertake some data collection, perhaps with the assistance of the FJC. It would take some time, which was appropriate for such a thoughtful submission. Judge Bates commented that Alan Morrison, who spearheaded the proposal, had been a very active participant in the rules process and a very constructive participant in it over the years. Professor Struve had volunteered to work with another reporter to lead the joint subcommittee.

Professor Coquillette provided background information on the Committee's role in disciplining or overseeing attorney admission. When Janet Reno was Attorney General, the Department of Justice proposed a system of federal rules of attorney conduct that would have created a unified federal bar and a unified system of federal disciplinary rules. The Rules Committees held three major conferences on the proposal and drafted a set of federal rules of attorney conduct. At that time, he said, the Department of Justice had some very serious issues with certain State Bar associations. In Oregon, Rule 8.4 blocked Department of Justice supervision of FBI agents and sting operations. The State Bars in several states said that the DOJ could not interview potential witnesses because of Rule 4.2 and the need to have approval of a represented defendant's lawyer. There were, he said, many, many issues. In the end there was a lot of opposition from the State Bars and the ABA. But that was some time ago, and Professor Coquillette said he very strongly agreed with Judge Bates that the time may have come to reexamine this.

A member said if the subcommittee takes this up, she would be interested to learn more about the history and what the ethics rules are in different districts. She was aware of some of the history in Oregon. In the Rigatti case, the Oregon Supreme Court said that undercover operations might violate the state ethics rules depending on whether the lawyers were lying to people as part of those investigations. She thought that was one of the reasons they wanted to make sure lawyers practicing in Oregon followed the Oregon Rules of Ethics. If we had a national admission system, she wondered what state ethics rules might not be applied and what some of those controversies were.

Another member commented that there may be some merit to this proposal, but he questioned how this fell within the proper role of the Criminal Rules Committee. Were the proponents seeking a new Federal Rule of Criminal Procedure that would establish a national bar? Judge Bates responded that those were important questions, and would be part of the new working group's enquiry. He commented that it was not crystal clear that amending the Federal Rules of Civil and Criminal Procedure would be either the proper or the best way to deal with the issues.

Mr. Wroblewski agreed that it would be important to understand the history, and he also agreed with Professor Coquillette that this was a new and different context. He remembered the prior context, and he said the previous DOJ proposal was really about government questioning of represented persons and other related issues. There is now federal law on some of the issues, and

the McDade amendment—a federal statute—obviously bears on it. He thought it would be an interesting project.

Another member asked whether the Committee was talking about a Bar Association that would supplant the state rules, and do away with the state bars? Judge Bates responded that the proposal is for a uniform bar admission, not for a new set of disciplinary rules to supplant state ethics. The member responded that Texas had an elaborate process, and she could not imagine they would ever want to give that up. Professor Beale drew the Committee's attention to the point that the proposal focused only on the federal courts, seeking uniform national admission to practice in Federal District Court. She noted that the situation regarding practice in the appellate courts, as had been noted, is significantly different.

Judge Dever closed the discussion of the proposal with several comments. He thanked the member who had asked whether the proper response to the problems described in this proposal would be a Rule of Criminal Procedure. Judge Dever said the Committee always begins asking whether it has the authority to respond to the problem or issue, and if a new rule is proposed we ask if there should be a rule. If a rule change is proposed, we ask whether there is a significant problem with the rule as written. He said he looked forward to contributing to the work of the new joint subcommittee.

Rule 23 and Jury Trial Waiver Absent Government Consent

The next topic on the agenda was a proposal to amend Rule 23 from the Federal Criminal Procedure Committee (FCPC) of the American College of Trial Lawyers. Judge Dever commented that the provision in Rule 23 regarding bench trials had been largely unchanged since its drafting about 80 years ago, and had been upheld against a constitutional challenge in 1965. He said that the question for the Committee was again whether there was a significant problem with the rule as written that warrants creating a subcommittee to further study this proposal.

Judge Dever then recognized Professor King to introduce the proposal, which began on page 215 of the agenda book. She noted that the FCPC proposed language for a new subsection of Rule 23(a) that would allow the court to approve the defendant's waiver of the jury trial without the government's consent if it finds that the reasons presented by the defendant—with the opportunity for the government to respond—are sufficient to overcome the presumption in favor of jury trials. The FCPC advanced several reasons for the proposed change. First, in a significant number of cases, the government does not consent and that causes a problem for those defendants that want a bench trial instead of a jury trial. They based this assertion on a survey described on pages 215-16 and 247-48. Second, FCPC asserts that bench trials are more efficient than jury trials, and the proposed amendment could assist in reducing the backlog of cases that had been created by the pandemic. Finally, the FCPC stated that roughly one third of the states do not require the prosecution's consent and allow for the defendant to waive a jury with only the judge's consent.

Professor King described the history of this particular provision. The Committee considered a proposal to permit the waiver of a jury in favor of a bench trial without the prosecutor's consent in 1963, and at that time it divided the Committee. She noted that views were mixed, and drew the members' attention to the discussion of that on page 221. More recently, when drafting the emergency rule the Committee considered a proposal to allow a defendant to waive jury trial in favor of bench trial with permission of the judge alone. The full Committee at one point approved a much narrower amendment that would be applicable only during an emergency declaration. That provision, which was approved by the Committee and submitted to Standing Committee (page 217), provided that if the defendant waives a jury trial in writing, that court may conduct a bench trial without government consent if, after providing an opportunity for the parties to be heard, the court finds a bench trial is necessary to avoid violating the defendant's constitutional rights.

Professor King said the Standing Committee sent the proposed amendment back to the Criminal Rules Committee for consideration of several concerns. First, was an amendment necessary? A bench trial would be necessary to avoid violating the defendant's constitutional rights in only a very small number of cases, and judges were already handling those problems. Second, this particular proposal might be controversial enough to potentially derail the package of emergency rules that was going to the Supreme Court on an accelerated timeline. In both the Standing Committee and on this Committee, she said, there had been considerable division among the members on the policy question whether the rules should provide some opportunity for defendants to waive a jury without the prosecution's consent. And at the Subcommittee, the Criminal Rules Committee, and Standing Committee there was some disagreement about how often the government withholds consent. There had been no FJC study, and it was pretty clear that it differed from district to district. In some districts people said that was happening, and in other districts they said this never happens. The government either consents or it's not a problem.

Professor King said the question presented by the new proposal was whether at this point the Committee wanted a subcommittee to study this further. The reporters' memo states the view that this is not a constitutional question. It is a policy question on which the states are divided, with two thirds of them roughly following the federal model of requiring government consent, and the remaining 19 states allowing bench trials without government consent.

Judge Bates returned to the point Judge Dever had made earlier, saying this proposal again raises the basic rules approach of asking a series of questions. First, is there a problem? If so, is a rules amendment the best way to address the problem, and would it fix the problem? And are there any collateral consequences? He commented that whether there was a problem here was a real issue to be examined. He said he had one data point, though admittedly it was on a unique category of cases. He had queried all his colleagues and the clerk's office to get data on the January 6th cases in his district. He learned that to date there had been 44 bench trials, and 15 more were currently scheduled. All of those required the government's consent. He was aware of only one case in which the government did not consent. That was in one of the Oath Keepers sedition conspiracy cases. The judge in that case thought it was proper for the government not to

consent to because the case really should go before a jury. And in one other case the judge declined to have a bench trial because the judge felt that similar kinds of issues really should go before a jury. But, Judge Bates said, except for those two instances, which were pretty unusual, the government had been pretty regularly agreeing to bench trials on the January 6th cases.

And as a follow up to that data point, Judge Dever noted on page 248 the FCPC submission seems to say that in 2020, 13% of the criminal trials in federal court have been bench trials, which by definition means DOJ consented in those. He thought that further confirmed Judge Bates' observational data point.

Judge Bates agreed with Professor King's earlier statement that it does vary from jurisdiction to jurisdiction. He said to his knowledge there were some U.S. Attorney's Offices that generally speaking will not consent to bench trials.

Given that data point, Mr. Wroblewski asked, how do we determine if there is a problem or not? If we ask a subcommittee to look into this and they gather more data, he wondered if we would be in any better position a year from now when we have more data points. We now know 13% of the trials nationwide are bench trials, and we know sometimes it doesn't happen. And there are differences among districts. But how do we know if there's a problem?

Judge Dever commented that what brought every member to the Committee was their life and professional experience, and that was why we were asking them the initial question. We live in a world of limited resources. We do form subcommittees and study proposals, but sometimes we decline to do it. He highlighted Professor King's point that when we looked at this issue most recently, it was in the context of Rule 62 and an emergency already having been declared. Judge Dever noted that one of the FCPC's arguments was that there was a great backlog of cases due to COVID. He wanted to hear whether that was true in the districts other committee members were familiar with, because it was not the case in his own district. He thought Mr. Wroblewski had made a really good point. Part of the discussion at this meeting was on the first principle: is there a problem with the rule that's essentially been written the way it's been written for 80 years, that 31 of 50 states essentially follow, and that survived a constitutional challenge in 1965. As the Supreme Court stated, the Sixth Amendment speaks in terms of the accused. But the jury trial provision in Article 3, Section 2 doesn't limit it to the accused, and this raises the issue of the United States' interest.

Judge Bates agreed it would be necessary for the committees involved with the proposal to see what data might support it. He also observed that one of the bases for the proposal was a claim that there is backlog of cases awaiting jury trials in the federal courts because of the pandemic. That too would have to be assessed. He was not sure it was universally true. It was not true in some districts, including his own, where any backlog was being caused by the unique presence of the January 6th cases, not by the COVID pandemic. Also, because the rule process takes several years, it would not be possible for a rules amendment to address any current backlog from the pandemic. It would be at least four years before a rule could go into effect.

A judicial member of the committee asked if members from the defense bar thought there were certain categories of cases where the defense thought it was beneficial to have a bench trial rather than a jury trial, and the government is disproportionately not consenting in that category of cases. He thought this might be true, for example, in child porn or child enticement cases.

Professor King responded to the question how we know if there is a problem. She said we cannot know just by looking absolute statistics of bench trials, because there is a qualitative aspect. Suppose, she said, we find that there are particular districts or particular set of cases where defense attorneys are concerned that the government should have consented to the waiver but did not do so. Do we then look to see why the government wanted a jury? Do we look to see if consent was granted in other cases? Or whether there a conviction on all counts anyway? What, she asked, is the problem with the government's refusal in the cases where it is refusing consent? And is that something that the rules could deal with as opposed to something else? She thought in these districts it would be very difficult to identify a threshold point at which the judges or the government should be consenting. She commented that it is very, very difficult to look back and identify when that was happening, and she emphasized that this is an adversarial process.

A judicial member said he had a fact-based concern as well as a principled concern regarding the backlog rationale for the proposal. The experience in his district, he said, was completely the opposite from that underlying the FCPC proposal: in his district they were unable to find jury trials. Criminal filings had at one time exceeded civil filings in his district, but now they are a fraction of the civil filings. So in his district, there would be no need to reverse the presumption in favor of jury trials. As to an objection based on principle, he expressed concern about the vanishing of the criminal jury trial, noting studies had found that jury trials are disappearing on the criminal side as fast or faster than on the civil side. He saw adding another way to reduce the number of criminal jury trials as a problem for the justice system, not a benefit. For that reason, he thought requiring both parties to consent to a bench trial was very positive. He would be reluctant to alter that.

Another member commented that this is an adversarial process, and she asked why we would take away the government's right to consent or not consent to a bench trial. That, she thought, would have to be considered if the Committee decides to take up the proposal.

After a 10 minute recess, Judge Dever called the meeting to order and he opened the floor to other committee members for discussion of the question whether they perceived a problem with the rule as written that warrants further study.

A practitioner member stated that she had previously chaired the committee of the American College (the FCPC) that submitted the proposal. When the Criminal Rules Committee was considering emergency Rule 62, she had reached out to the FCPC to ask its members if they had seen a problem with refusals to consent to bench trials. That enquiry was the genesis of the current proposal. She heard, at that time, there absolutely was a problem. Although we have statistics indicating that the government must have consented in 13% of the cases, she pointed

out that we do not know how often the government refused to consent. The open empirical question, she said, looms large and warrants the Committee's involvement because it has the mechanisms to examine whether a problem does exist. That is what it was doing with the Rule 17 Subcommittee, which had been inviting subject matter experts to describe their experiences. She emphasized that the FCPC had continued to pursue this issue after Rule 62 was drafted. The FCPC, she said, includes defense practitioners from all across the country, as well as current and retired U.S. Attorneys and Assistant U.S. Attorneys (though not a sitting Assistant U.S. Attorney). She thought the breadth of the FCPC's membership gave "at least some indication that across the country, practitioners believe that a problem exists."

Professor Beale related those comments to something several speakers said at the Committee's October meeting: in their districts defense counsel did not ask for subpoenas because they knew they would not be successful. For that reason she thought it would not be sufficient to know how many requests have been refused. Rather, the real issue was whether practitioners ask and the government consents in appropriate cases. And of course that would require the Committee to have some idea of what constitutes an appropriate case for a bench trial. She noted that when Judge Bates was describing the January 6th cases, he referred to a case the judge thought "should" go to a jury. She said that if the Committee took up the proposal it would have to think about some very fundamental questions, including what kind of cases should go to juries even if the defendant doesn't want to, and when the government's refusal to consent would be inappropriate. Noting that a prior speaker had emphasized this was an adversarial system, Professor Beale commented that there are not two equal adversaries. Instead, many aspects of the rules treat the defense differently from the government. And the government cannot refuse to allow the defendant to plead guilty or refuse to allow the defendant to incriminate herself. There are many protections for the defendant that the government cannot require a defendant to use. On the other hand, she said, the parties are not permitted to agree to have a private or closed trial, because there is a public interest in having a public trial and the First Amendment requires an open courtroom. So a full examination of the proposal would require consideration of the function of the jury, and whether it is just a right of the defendant. Or does the government have an equal right? And there are also empirical questions. Are there districts, as a prior speaker said, in which the government will never consent? And if that's the case, how many are there? And does the Committee think that's a problem? That would require the Committee to have a normative or policy position. The proposal contends there is a sufficient problem that then we need to investigate the empirics and have our own conclusion about the policies. But it was for the Committee to decide whether there was a big enough problem that it wished to commit the resources of a subcommittee, the reporters, and meeting time. The Committee cannot do everything and must prioritize.

A member said that sounded like an even deeper and broader probe than originally presented in the FCPC proposal. He wanted to understand what problem the proposal was seeking to remedy. What, he asked, is the problem with two party consent given the constitutional presumption of a jury trial? Professor Beale responded that there may not be a

problem. She thought that was the ultimate policy or normative question. She also reminded the Committee that it did not have to adopt or reject the particular proposal. As with Rule 17, the question is whether there is enough of a problem it would be worth looking again at Rule 23. If so, the Committee might substantially revise the proposed amendment or might (as with Rule 6 recently) study it for quite a while and then conclude that it was not prepared to go ahead with an amendment. She asked whether members were persuaded from the proposal or their own experience that this issue warranted a significant expenditure of Committee time.

Focusing on what kind of evidence the Committee needed, another member noted the proposal had attempted to provide evidence of a problem. On pages 215-16, the proposal described an informal survey finding that in at least 12 districts prosecutors rarely or never consent to a bench trial. Thus the Committee had information about at least twelve districts, and it had been told that the process differs district by district: we get bench trials in some places, but not in others. The member thought that was enough of an indication of a problem: procedural unfairness where defendants are being treated differently in different districts across the country based on different prosecutorial decisions—assuming that the Committee did not think the prosecutor needs to have that authority. She noted that there are different charging decisions in different districts, but that was within the role of prosecutorial discretion. This proposal, in contrast, focused on a procedural rule that the Committee had created on how to waive a jury trial. At some point the Committee added the requirement that the defendant has to ask for a bench trial, the prosecutor has to agree, and the court has to approve. But it could revisit the question whether that's the right procedure, and whether the prosecutor's consent should be required. The Committee could also assess whether the Rule is being applied differently across the country. As to the earlier comment about the disappearing jury trial, the member said action by the Sentencing Commission concerning "the trial tax" might be a better way to reinvigorate jury trials.

Judge Bates suggested there might be a middle course between appointing a subcommittee and removing the proposal from the Committee's agenda. In some instances when he had thought it premature for the Civil Rules Committee to appoint a subcommittee, as chair he and the reporters (sometimes working with the FJC representative) worked together to gather additional empirical data that would be useful in deciding whether there was a sufficient problem. So it might be possible to develop more information without appointing a subcommittee.

Mr. Wroblewski said that if there is a problem with a backlog of cases that could be solved by bench trials, we should find out now and respond immediately. He said that during the pandemic many districts were not holding jury trials, and there were significant issues with defendants being able to exercise their constitutional right to have a trial. The Department of Justice pressed all of its U.S. Attorneys to offer every defendant the opportunity to have a bench trial to avoid this particular problem. But the vast majority—almost all defendants—declined the offer. So if there was a current problem that could be solved by the government consenting to bench trials, he thought we should find out right away, so that DOJ could get the word out to the

U.S. Attorneys that you appear to have a backlog, and this is a way to address it now. We do not, he emphasized, need to wait three or four years before an amendment could be adopted.

A member agreed completely, saying no matter how many problems we might find it was still the government's right, and it should be the government's right to waive or not to waive a jury trial. As Mr. Wroblewski said, the Department should get the message out to its prosecutors to waive a jury when there is a significant backlog. The member thought that would be much better than taking away the government's precious right to a jury trial.

Mr. Wroblewski emphasized that although he had not yet had an opportunity to survey his DOJ colleagues, he was fairly confident that they would share his reaction that the proposal was not particularly persuasive, and it was not a very close call. One of the two primary problems identified in the proposal was interference with the defendant's rights because of the unavailability of jurors. But as this Committee and the Standing Committee recognized in considering Rule 62, and as reflected in the case cited in the proposal (United States v. Cohn, page 248), a judge can impose a bench trial over the government's objection when necessary to protect the defendant's constitutional rights. The constitution supersedes any provision of the Federal Rules of Criminal Procedure. No amendment is needed to change that, and the case discussed in the FCPC proposal (Cohn) demonstrates that.

Mr. Wroblewski also stressed that the Constitution has an explicit preference for jury trials. Article III states that "The trial of all crimes, except in the cases of impeachment, shall be by jury." That, he said, is the presumption. The Supreme Court has explained there are exceptions, but that is the presumption. He wondered whether the fact that 13% of cases involve bench trials shows that problem is that there are too many, not too few, jury waivers. He noted there are many very good reasons for the constitutional presumption. We want the community to be involved. There is a big difference between a jury and a judge—who is a government employee. And there is a difference between 12 jurors that must act unanimously and one single judge who decides on his or her own. He urged the Committee to recognize the values embedded in the Constitution and its jury trial provisions. He thought Professor Beale was asking the right questions: when is it appropriate to waive that and give that up? He suggested all members needed to wrestle with that.

In connection with the comment on the jury's constitutional role, Judge Dever observed that under Rule 29(a) the court may grant a motion for a judgment of acquittal at the close of the government's evidence. To the extent there was concern about the need for a bench trial in a certain kind of case because of concerns that the jury may act irrationally if they see certain types of evidence or a technical defense, Rule 29(a) provides another procedural remedy within the jury trial process and the existing rules.

Another member said that anecdotally at least the Committee is aware that in some districts the government does not consent to waiver of a jury trial. She did not know whether that was a problem that a subcommittee could resolve. As Mr. Wroblewski had observed, the issue really is whether the government is entitled not to waive the jury. Thus it might be premature to

appoint a subcommittee to gather additional empirical information, rather than first tackling the broader policy question. She was not sure who the additional empirical information (e.g., whether 10% or 20% of districts did not consent) could help answer the policy question.

The member also asked whether this was something that the Department of Justice could address as a matter of policy. To the extent that there was a district operating outside of the norm the Department expects, she suggested the solution might be for the Department to enact some sort of policy or directive. She and another member used to practice in the same district, and neither could recall a single case where the U.S. Attorney didn't consent if the defense wanted to waive, regardless whether the prosecutors were comfortable with that. The member did not recall whether that was an official office policy, but it was very close to that. So that was a policy matter, and she was doubtful that a subcommittee, rather than the Department, could take care of the problem.

A practitioner member commented that the extraordinary situations of COVID and the January 6th trials (where it was in the interest of the government to move those cases along and may encourage bench trials) were so atypical they might skew the data. She focused on situations that the courts do not see: when defendants request that the prosecution consent to a bench trial, the government says no, and that is the end of it. She returned to the policy question raised earlier: do we want cases like this to be decided by the government or by the court? As Rule 23 now stands, the government is pretty much the sole arbiter of whether a defendant can waive a jury trial except in cases in which the government's refusal would result in a violation of some other constitutional right. In those cases, courts have granted relief. But the courts do not see other cases in which the prosecution refuses a defense request for consent to a bench trial, and there is no extraordinary constitutional favor. In those cases the defense is unlikely to present the issue to the courts, which may be unaware of the scope of the problem. She concluded by restating the question whether as a policy matter the prosecution or the court should decide whether a particular case needs to be public and open in front of 12 jurors.

Another member said he was intrigued by Judge Bates' suggestion that there might be some way to get the data that the Committee might need, but he wondered how we would get data on the cases just described. He thought there might be informal surveys of judges and/or lawyers asking about scenarios where defense may have had a conversation with the prosecution and made a request and the prosecution said no. He wondered whether as a practical matter the Committee could get enough data to decide if this is an issue.

Noting that other members had framed this as an adversarial provision, a member said that conceptually the Sixth Amendment and the Article III provision related to jury trial clearly give the defendant a constitutional right, but there is also a community right. He distinguished this community right from any right of the government. He then raised the question whether the government should be the arbiter of when that community right is vindicated, or whether it should be left to the court. He thought that framing was critical. He also appreciated the challenges with regard to collecting the necessary data. The proposal did include some data. He

thought there might, as Judge Bates had suggested, be a middle ground of ways to gather more evidence, whether it's anecdotal or some sort of survey that would inform whether the proposal was worth pursuing.

Judge Bates acknowledged that collecting the data might be difficult, but he also identified several sources of data the Committee might pursue, perhaps with the assistance of the FJC. The Justice Department could reach out to the U.S. attorneys and units within Main Justice for information regarding requests for bench trials. With the help of the FJC, the Committee could do something similar through the Federal Public Defenders, and it might get some useful information on how often the government refuses defense requests for consent to jury waivers. Though that information might be imperfect, he thought it would be useful.

A member responded that all of the data would really be specific to each district. For example, suppose there is a district in which the prosecutors never agree to jury trials because they think the judges are biased in the sense of being really bent towards the defense. So the prosecutors refuse to consent. Given the different possibilities, the member cautioned it would be necessary to try to understand what is really going on once we gather data.

Professor King posed several questions. If there are reasons that are impermissible for the prosecutor to deny consent, are those same reasons also impermissible for the judge? Or suppose the prosecutor says "I believe in the jury. I think everyone should have a jury trial. I think it's important to the community. So I do not consent to bench trials." If that is acceptable, she thought every prosecutor who wanted to deny consent could just say that. Except for the narrowly written draft emergency rule (limited to cases in which the court found a bench trial was necessary to avoid violating the defendant's constitutional rights) she thought it would be very difficult to determine what sorts of reasons are permissible and what sorts are not for purposes of a rule. Other alternatives might be better, such as the judiciary Benchbook, or DOJ policy. She thought the procedure for deciding could certainly be clarified in the rule, but it would be much more difficult to make the normative decision what reasons are and are not legitimate.

A member suggested that it would be legitimate for the government to refuse consent because the prosecutor thinks the judge would not like the government's case. She asked whether others agreed.

Another member responded to the question how to gather the data. She supported seeking data from the Justice Department and the Federal Defenders. But she emphasized that the Committee already had a statement from the private bar: the statement in the proposal. Lawyers from across the country decided that it was worthy enough of consideration that they put together and submitted this proposal.

A member expressed curiosity about districts that as a matter of course never agree to a bench trial and wanted to know more about that. He could only recall a couple of times where the government did not agree to bench trial when the defense had asked for it. He also stated that

his district was not experiencing any backlog from the pandemic. He thought the January 6th trials were a real exception. He could see where the court in some cases, such as some of these January 6th cases, would really want to have a jury trial as opposed to a bench trial.

The Standing Committee liaison returned to Professor Beale's question whether there are classes of cases where it would be inappropriate for the government to deny a bench trial to a defendant who is seeking one, saying he had been struggling with that question. For him, the presumption of jury trial was so strong presumption that he needed to try to identify what are the kinds of cases where we would be willing to effectively say by rule that the government should not be allowed to object. He had not experienced the problem of the government objecting, but he felt he had powerful tools to ensure a fair jury trial: overseeing the voir dire process, enforcing Evidence Rule 403, and properly instructing the jury. He thought those tools were so powerful that he had great confidence that he could pick a fair jury in almost any kind of case. He thought Professor Beale might have been thinking of cases that involve really ugly brutal facts, or cases that have such extraordinary pretrial publicity that the polarization is horrendous. Although one might think you need the option of a bench trial in those cases, he said he had tried those kinds of cases. He had tried the governor of Puerto Rico when he was running for reelection, and they were able to pick a fair jury. So he did not immediately see that there was a class of cases where by rule we would be willing to effectively tell the government it is not allowed to prevent a bench trial.

A member responded that one example where the defense might want a bench trial is a defendant with prior criminal convictions who wants to testify and believes that the judge could set aside the prejudice that those convictions might show. That defendant might think a jury, even if well instructed, is just going to take those convictions into account. She thought that was an example where the bias that a jury might have is hard to overcome, and a defendant might think they could get a fair trial in front of a judge and want to testify. Regarding the history of Rule 23 that was described in an earlier memo,[1] the member commented that whether the government should have this veto had been addressed several times but not resolved. She thought might be worth investigating that idea again, including consideration of whether there is disparity across the country. She thought the Committee could already say anecdotally there is such disparity, though it might not be able to answer whether the government was objecting for good reasons or not. She asked why the government veto was originally included in Rule 23. She suggested an alternative: if the defense requests a bench trial, they should state their reasons, the government can respond why they oppose, and then the judge would be in a position to represent the community's interest. She acknowledged the constitutional preference for jury trials, but said the judge could enforce that constitutional preference rather than the prosecutor. She thought it was a question of where that power should be. Since the Committee knows the government does not consent in some districts, she did not think it was important to learn more about how many such districts there are. As to the reason Rule 23 was drafted, she appreciated the earlier research

[1] The member was referring to the memo on pp. 220-29 of the agenda book.

memo[2] that indicated there was not much discussion of this issue when the rule originally came up. One commentator said the defendant can waive all these other rights, why not also the jury trial. The 1960s was the last time this was seriously considered, and there was another view. She suggested the key question was why the government, rather than the judge, should have that veto authority.

Judge Dever commented that the research memo the member had referenced did discuss the nine cases that were totally consistent with Singer. In upholding the constitutionality of Rule 23 as written, the Singer Court distinguished exceptional cases where the judge may determine it would not be possible to get a fair jury. There are change of venue provisions, and Judge Dever noted that the previous day had been the horrible anniversary of the bombing in Oklahoma City, and that trial took place in Denver because it was not possible to get a jury in Oklahoma.

A member interjected that she did not read the memo on pages 220-29 of the agenda book as a setting forth a constitutional right of the government to a jury trial.

Mr. Wroblewski said he would be happy to take up any request for research among the U.S. Attorney community to ask them about which districts have what policies and also to consider, at the appropriate time, whether the Department should have some sort of policy. He also noted that Professor King had raised a good question: what is the appropriate standard? When is it appropriate to waive and when is it not appropriate? He thought it was not obvious, and he asked how one could write a policy other than to say you should not reject a request for a bench trial without thinking about it and considering all the totality of all the circumstances. He reiterated that he was happy to gather any information requested, as well as to discuss the possibility of guidance either immediate to address any backlog or longer term to address any other concerns.

Judge Dever thanked Mr. Wroblewski, and said that he thought it would make good sense for Mr. Wroblewski to gather that information as well as information about (1) whether there is a COVID backlog, and (2) data on declining and whether there is a national policy or instruction from the Attorney General, or something U.S. Attorney specific. Judge Dever said the Committee could also try to gather information from the Federal Public Defender community. A member suggested also seeking information from CJA panel attorneys, which she said had a very good organization that could provide additional information, and Judge Dever agreed.

Judge Dever said that was how the Committee would proceed, and in concluding the discussion of this item he echoed an earlier comment about the thoughtful discussion. He noted that one of the key benefits of the Committee's process was hearing from so many different stakeholders and perspectives to get to the right result.

[2] The member was referring to the memo on pp. 220-29 of the agenda book.

Rule 49.1 and Privacy Protections for Social Security Numbers

Professor Beale introduced the next item on the agenda, on page 274 of the agenda book, concerning privacy protections for Social Security numbers under Rule 49.1. Our docket contains a public suggestion that is a portion of a letter from Senator Wyden of Oregon to the Chief Justice. She noted that the treatment in the agenda book was very short because it was a cross-committee suggestion concerning a suite of rules that were all drafted at the same time, after the adoption of the E-Government Act. The parallel rules all have the same language and take the same approach. So any possible change to those to our rule would inevitably require consideration of parallel changes to other rules as well.

Thus the question is how best to move forward and which group has the biggest stake in this? There is agreement that the Bankruptcy Rules Committee has the biggest stake, so they are going to take the lead. Professor Beale asked Mr. Byron to provide an update from the Bankruptcy Rules Committee's meeting and information about what might be coming next. She noted that Criminal Rules would clearly be in the back seat on this, not in the driver's seat, and the car has to go in the same direction for all of these Committees.

Mr. Byron said that the Bankruptcy Rules Committee has begun discussing this question, which is very complicated for them. Many provisions in the Bankruptcy Rules require the last four digits of individual Social Security number or taxpayer ID number, and many reasons have been advanced historically and reiterated in the most recent discussion for why those rules should retain that requirement. He stated that it was not likely that the Bankruptcy Rules Committee would complete its consideration of this question quickly. One of the things discussed in the Bankruptcy Rules meeting a few weeks ago was the fact that the FJC is undertaking a study about compliance with not just the redaction requirement for Social Security numbers, but also the other requirements for redaction in the privacy rules generally. He said there might have been some uncertainty about whether that FJC study would also address the question that the Bankruptcy Rules Committee was considering, which is whether there is a policy reason to change or retain the current requirement in the privacy rule. The discussion in the Bankruptcy Rules Committee might require additional time.

Mr. Byron said that he would discuss with all the chairs and reporters whether it made sense to continue to await resolution by the Bankruptcy Rules Committee or whether instead to go ahead and ask Criminal, Civil, and Appellate Rules to consider on their own whether some change is warranted. It would be premature to say what the outcome of that discussion will be, because we need more information about where Bankruptcy is heading, and how long it would take to resolve those questions. Mr. Byron thought it was unlikely what the Bankruptcy have reached a decision by the fall meeting of this Committee. He also noted it was possible Bankruptcy's problems might be unique. Because they have so many financial records, they might decide to continue to require the last four digits of the Social Security numbers. But it could be that Civil and Criminal—or even just Criminal Rules—might conclude that they do not really need the last four digits of the Social Security number, that it's too much of an

infringement on people's privacy to have that somewhere it can be accessed. But Mr. Byron cautioned that at present it was too preliminary and the decision has been made that Bankruptcy will continue to try to work through this, though there will come a point at which we will have to think about the other rules.

Professor Beale summed up the discussion with the comment that the next steps involving the various committees would be orchestrated by Professor Struve, Judge Bates, and Mr. Byron. At this point, the Committee was not being asked to take any action, and likely the issue would not be on its agenda for the fall meeting.

Removal of Items from the Study Agenda

Judge Dever asked Professor Beale to introduce the next items on the agenda, and she directed the Committee's attention to page 277 of the agenda book, which was the first of two proposals to remove items from the Committee's study agenda. The study agenda allows the Committee to put suggestions to one side to allow additional time before making a determination whether there are sufficient indications of a problem to warrant the substantial commitment of Committee resources for the in-depth study of a possible amendment. In the case of these two items, the reporters recommend that the suggestions be removed from the study agenda, because there has not been a showing of a significant problem that could be remedied by a rules amendment. She stressed that this was merely a recommendation from the reporters, who were inviting comment and consideration by members.

The first of the two study agenda items concerned conditional guilty pleas under Rule 11(a)(2). Professor Beale explained that Judge Susan Graber, who was then a member of the Standing Committee, sent the Committee a very brief e-mail saying here is a recent decision in United States v. Lustig,[3] and there may be room to clarify the rule.

In Lustig, the Court of Appeals concluded that the District Court had erred in denying a motion to suppress. The majority held that that error had was not harmless because it could have affected the defendant's decision to plead guilty. It identified the proper test for conditional plea cases as whether there's a reasonable possibility that the error contributed to the defendant's decision to plead guilty. The court noted that test will necessarily be hard for the government to meet because the record will seldom contain enough information to allow the court to conclude beyond a reasonable doubt that the error did not contribute to the defendant's plea decision. Judge Watford concurred, writing separately to highlight his different view of what Rule 11(a)(2) required. In his view, the statement "A defendant who prevails on appeal may then withdraw the plea" leaves no room for any harmful error analysis as long as the defendant has prevailed on appeal. When the defendant reserves the right to appeal a ruling under Rule 11(a), the only question for the appellate court is whether the ruling in question was in error. Harmless error comes into play only in determining whether the district court's ruling itself could be affirmed.

[3] 830 F.3d 1075 (9th Cir. 2016).

The question for the Committee, Professor Beale said, is whether this demonstrates a problem warranting an amendment. There are only a relatively small number of conditional pleas, and this seems to be a garden variety disagreement between two members of the same court (each of which then cited cases from other circuits). When this suggestion was first presented, the Committee was not sure this was a distinctive and significant problem, so it put it on the study agenda to see whether other courts saw a problem, or whether there were calls for a clarification of the rule. There had been no further indications of support for an amendment. The Lustig opinion did demonstrate a disagreement about the proper interpretation of Rule 11. But it is not the Committee's job to try to identify and resolve every disagreement among courts of appeals about exactly how a rule should be interpreted. The reporters recommended that the Committee not wade into that disagreement, and that it remove this item from its agenda.

Judge Dever opened the floor for discussion. After a brief clarification distinguishing between tabling the suggestion (which had essentially been done while it was on the study agenda) and removing it from the agenda, the Committee unanimously agreed to remove the item from the study agenda.

Professor Beale introduced the next agenda item, on page 278 of the agenda book. A practitioner named Mr. Gleason wrote suggesting an amendment to address cases where the prosecution and the defense both agreed the defendant should be found not guilty by reason of insanity. He stated that in a recent case where he represented the defendant, the government and the defense both agreed the proper outcome was a verdict of not guilty by reason of insanity. But the rules do not allow a plea of not guilty by reason of insanity.

Professor Beale explained that the Insanity Defense Reform Act of 1984 and Rule 11 together create the current landscape. The Act calls for a special verdict if the issue of insanity is properly raised by notice to the government under Rule 12.2. The Act provides that the jury shall be instructed to find—or in the event of a non-jury trial, the court shall find—the defendant guilty, not guilty, or not guilty by reason of insanity. This channels the insanity defense through a verdict in either a bench trial or jury trial, and the Act makes no provision for a plea that the government might agree to, or that the defendant has a right to enter. That raised the question how such cases are being handled now. As the reporters' memo explains, an informal practice has developed in which the parties agree to the relevant facts and they are submitted to the court for a bench trial. There's usually a stipulation of those facts. If there are expert reports from the person who's examined the defendant finding that he or she was insane at the time of the crime and the government is confident that this is correct, there is no reason to dispute it. But there is no provision for a plea that the parties agree to. So the case is submitted to the court on the stipulated facts, and the court enters the special verdict that's provided for under the Act. Professor Beale noted the Act was enacted by Congress after John Hinckley was found not guilty by reason of insanity. The Act reflected a concern about overuse of the insanity defense, and it included the narrower federal definition of insanity. So Congress was seeking to keep insanity cases on track and within some narrow limits. She noted that when the issue was raised at an earlier meeting Mr. Wroblewski told the Committee that the criminal chiefs and others had

described this workaround procedure of a bench trial on stipulated facts. It can be cumbersome; it takes a little longer than just having the parties come in and do a plea. But it is workable. At that meeting, one member commented that the bench trial on stipulated facts avoids a problem where the defendant, because of his mental state, may be unable to appreciate something like his role in the events and thus may not be able to plead knowingly. That member said they could not support a plea proceeding because of potential incapacity on the defendant's part, even though the defendant would be competent to stand trial.

The Committee decided to put the suggestion on its study agenda. The reporters confirmed the use of the procedure. We had an earlier research memo from Mr. Crenny, who tried to identify courts in which this procedure had been used. The agenda book memo, pp. 277-80, which updated Mr. Crenny's research, included lengthy footnotes citing the many courts of appeals that have acknowledged this procedure occurred in particular cases in front of them, and many cases in the district courts.

The question before the Committee was whether to remove the item from its study agenda or move ahead with a proposed amendment. Is there a significant problem that would warrant a change in the rule? Professor Beale said it was the reporters' view that the informal practice was working well enough, and that it would be prudent to remove the item from the study agenda. She said the issue was presented for discussion.

Judge Dever began with the observation that one benefit of the so-called workaround process ensures that the judge gets all those reports and is able to review them before making a decision, and the judge then has the defendant before him in court. He then opened the floor for discussion of the proposal to remove this from the study agenda.

A member agreed that no amendment was needed in light of the workaround procedure, but he had a question about the Committee's process. What happens when an item is removed from the study agenda? Does the person who suggested an amendment receive notification?

Professor Beale responded that over the years there has been an effort to respond, at least to judges who have made a proposal, and certainly to do so in the case of a judge that has been a member of the committee. She was not sure whether that was the case for all public suggestions.

Mr. Byron added that there is a tracking system on the Administrative Office website that includes all suggestions for any of the rules. The tracking system allows any member of the public to see the status of their suggestion or any other suggestion. When an item is removed from a committee's consideration, the website is updated to reflect that action. And, as Professor Beale mentioned, at the chair's discretion there is individual communication for some suggestions.

Judge Dever stated his general view that if someone took the time to write in with the proposal, we ought to let that person know once we make a decision. He also noted how much thought goes into the consideration of each proposal.

A motion was made, seconded, and approved unanimously to remove this item from the study agenda.

Judge Dever advised the Committee that its next meeting would be on October 26, 2023. He anticipated it would be in the Midwest or the East Coast, and he said that members would be notified when the choice of location was final.

Judge Dever reminded the Committee that this was the last meeting for Judge McGiverin and Ms. Hay. He said both had made enormously helpful contributions to the Committee's work, noting also that each had to travel a substantial distance to meetings. He invited them to make parting remarks.

Judge McGiverin said he was grateful for the opportunity to serve on this Committee. He found it inspiring to see the members' strong commitment to getting it right, down to the last comma in the committee notes. It was also inspiring to see members from both the defense bar and from the DOJ (Mr. Wroblewski and others) go beyond mere advocacy to arrive at a more disinterested place to get the rules right. Judge McGiverin said each of the chairs of the Committee while he was a member—Judges Molloy, Kethledge, and Dever—had provided exemplary leadership, and he also praised the work of the reporters, saying that it anchored the Committee's work.

Ms. Hay expressed gratitude for the professionalism and collegiality she had experienced during her three years on the Committee. She said she appreciated that the Committee generally takes a conservative approach, making changes only when needed. But she commented that sometimes the rules have not really kept up with the practice and there is great variation in how courts are interpreting them. She encouraged the Committee to also continue to be creative in its responses. She cited public access to grand jury records and subpoenas under Rule 17(c) as examples where the rules are not being followed. When the rules are not followed, she suggested, it may be a disservice not to clarify or modify them. Ms. Hay stated that she really appreciated the thoughtfulness people have put into the Committee's deliberations, and she thanked Judge Dever, his predecessor Judge Kethledge, and the reporters. We could not do this work, she said, without the research and guidance that they had provided to keep us organized, educated, and on the right track. She too had found her service on the Committee inspiring.

After thanking the staff at the Administrative Office and the reporters for the work that went into the meeting preparations and announcing that lunch was available, Judge Dever adjourned the meeting and wished all participants safe travels home.

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 6, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Washington, D.C., on June 6, 2023. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
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
Professor Daniel J. Capra, Reporter
Professor Liesa L. Richter, Consultant

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, 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; Demetrius Apostolis, Rules Committee Staff Intern; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director, Federal Judicial Center ("FJC"); and Dr. Tim Reagan, Senior Research Associate, FJC.

[*] 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.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed members of the public who were attending in person. He also welcomed new Standing Committee member Judge Paul Barbadoro and bade farewell to two members soon to depart the committee, Robert Giuffra and Judge Carolyn Kuhl. Judge Kuhl and Mr. Giuffra gave brief departing comments, and Judge Bates thanked them for their service.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2023, meeting.**

Judge Bates remarked that a chart tracking the status of rules amendments commenced on page 52 of the agenda book. Mr. Thomas Byron, Secretary of the Standing Committee, noted that the latest set of proposed rule amendments had been transmitted from the Supreme Court to Congress in April.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Catherine Struve reported on this item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Professor Struve recalled that this project had benefited from discussions in the advisory committees, from which important questions arose about the practical logistics of electronic access to the courts. Armed with those questions, she and Dr. Tim Reagan of the FJC held conversations with 17 court personnel in nine districts that had broadened electronic access for self-represented litigants. Professor Struve expressed appreciation for Dr. Reagan's expert guidance concerning these inquiries.

One of their primary areas of inquiry was whether there is any reason to require traditional service by a self-represented litigant on other litigants who already receive notices of electronic filing ("NEFs"). Among the districts whose personnel they interviewed, seven districts exempt self-represented litigants from making such traditional service on CM/ECF participants: the District of Arizona, the Northern District of Illinois, the Western District of Missouri, the Southern District of New York, the Western District of Pennsylvania, the District of South Carolina, and the District of Utah.

In those districts, exempting self-represented litigants from paper service added no burden on the courts' clerk's offices. When self-represented litigants file non-electronically, the clerk's offices already scan those paper filings and upload them to CM/ECF. There are some exceptions to the exemption from making traditional service; notably, filings under seal that are not available to other litigants via CM/ECF must be served on the other litigants by traditional means, but in those circumstances the courts require paper service by anyone making such a sealed filing. That would be true for either a self-represented litigant or a CM/ECF participant.

Professor Struve observed that the exemption from making traditional service exists only when the recipient is receiving NEFs (because they are enrolled either in CM/ECF or in a court-

provided electronic-noticing system). A self-represented litigant who does not receive NEFs will need to be served by traditional means. A filer who is receiving NEFs will learn from the NEF who, if anyone, must be served by traditional means. But if a paper filer is not receiving NEFs, one must ask how that filer will know whether any other litigants in the case are also not receiving NEFs. The universal answer from court personnel was that it just is not an issue.

She thought that this question would likely be an issue only in a vanishingly small number of cases—in part because there would need to be multiple self-represented litigants in the case. She also believes there are ways to craft an exemption from the traditional service requirement to take care of that situation and to ensure that anybody who needs traditional service does get it without burdening non-CM/ECF-filing self-represented litigants with superfluous paper service. She plans to convene a Zoom working-group meeting over the summer to discuss a potential amendment about an exemption from service.

Interviewees were also asked whether and how self-represented litigants obtain access to CM/ECF. About six or seven of the districts covered in the interviews offer some degree of access to CM/ECF for self-represented litigants. At least two of those districts do not require any special permission from the court, and the other districts allow it with court permission. Interviewees from those districts identified a number of benefits from providing that access. It decreased the number of paper filings, saved the court time from scanning documents, avoided the need to have the court serve orders in paper, and averted disputes about what was actually filed and whether a filing had all its pages. There were some reports of burdens as well as notes about the need to make sure there is adequate staffing for technical support and training. There were also some interesting anecdotes about how the courts deal with inappropriate filings. But overall, the report from these districts was positive. As one respondent put it, the benefits outweigh the risks.

Professor Struve further reported that courts are experimenting with increasing electronic access by disaggregating the elements of access via CM/ECF and providing them "à la carte." For example, some courts permit other means of electronic submission through upload or through email, and interviewees from those courts listed a number of benefits from those programs. One prominent benefit was not having to scan paper filings. She noted that many of the respondent districts also provided their own electronic-noticing systems, which benefited the courts because the recipients of NEFs no longer need to receive paper copies of court orders.

Electronic-Filing Deadline

Judge Bates reported on this item.

Judge Michael Chagares, currently the Chief Judge of the Third Circuit, first raised this suggestion some years ago in his capacity as Chair of the Appellate Rules Committee. The suggestion was to change the presumptive electronic-filing deadline set by the time-counting rules to a time earlier than midnight. The objective was to promote a positive work environment for young associates who were working until midnight to get court filings done. A joint subcommittee considered this suggestion, but it did not take any action at the time.

Recently, the Third Circuit adopted a local rule making the filing deadline earlier in the day. The Standing Committee has therefore referred the matter back to the joint subcommittee,

which needs to be recomposed. The joint committee will re-examine the issue and decide whether to propose a rules amendment or perhaps whether it might be better to let the experiment in the Third Circuit run its course for a couple of years to see how things go.

A judge member noted that the Third Circuit's new local rule has elicited an almost entirely negative reaction from members of the bar. A practitioner member argued that this rule change, though well-intentioned, would not make people's lives better. Moving the deadline earlier will simply ruin the night before. Setting the deadline at five o'clock will really wreak havoc for many practitioners. Moreover, even if this deadline is not so bad for appellate lawyers—whose briefing schedule is more predictable and who are not engaged in fact development—it would play out differently in the district courts.

District-Court Bar Admission Rules

Judge Bates reported on this item. Several of the advisory committees received a proposal from Alan Morrison and others on a unified bar-admission rule. The proposal would make admission to one federal district court good for all federal district courts. It would also centralize the disciplinary process that goes along with court admissions.

A joint subcommittee has been formed with representatives from the Advisory Committees on Civil, Criminal, and Bankruptcy Rules to review the proposal over the course of the next year or two. That review may also require some work by the FJC. Professors Struve and Andrew Bradt will be the reporters for the joint subcommittee. Judge Bates thanked them and the members of the joint subcommittee for their work.

An academic member commented that a similar proposal had come up in the past and had a very fraught life. A consultant agreed with the academic member's remarks. A previous proposal had managed to unify all the local and state bar associations in America against it.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Jay Bybee and Professor Edward Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in West Palm Beach, Florida, on March 29, 2023. The advisory committee presented three action items and two information items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 70.

Action Items

Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) and Conforming Changes to Rule 32 (Form of Briefs, Appendices, and Other Papers) and the Appendix of Length Limits. Judge Bybee introduced this item. The advisory committee sought final approval of these proposed amendments, which appeared starting on page 103 of the agenda book.

The advisory committee had received a handful of public comments, which were listed in pages 72–75 of the agenda book. The advisory committee did not recommend any changes in response to those comments.

The proposal consolidates Rule 35 into Rule 40. It does not make any substantive changes to the basis for seeking rehearing from the panel or rehearing en banc. The proposal tries to simplify and clarify the rules, particularly in response to several comments received about the multitude of pro se filings.

A judge member agreed with the rule's statement that rehearing en banc is disfavored. The member asked for additional background on that language. Judge Bybee noted that the language was already in the rule; the proposal did not add it. The judge member observed that some of the public comments had disagreed with that language. Professor Hartnett responded that the advisory committee had been unmoved by those comments because they were at such odds with the usual, uncontroversial practice in the courts of appeals.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 32, 35, and 40 and the Appendix of Length Limits.**

Amendment to Rule 39 (Costs). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 149 of the agenda book.

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court invited the advisory committee to clarify what costs are recoverable on appeal and who has the responsibility for allocating those costs. This proposed amendment does so. It makes a change in nomenclature by clarifying the distinction between "allocating" costs and "taxing" costs. "Allocating" means deciding who is going to pay, and "taxing" means deciding how much is going to be paid. The responsibility for taxing is divided, under the rules, between the district courts and the courts of appeals. The proposed amendment also clarifies the procedure for asking the court of appeals to reconsider the question of allocation.

A question not addressed by the proposed rule is what to do about requiring disclosure of the costs associated with a supersedeas bond, which was the context for *Hotels.com*. In that case, there was a very large bond, whose costs were shifted from one party to the other after the case was over. It was possible that the party that had not sought the bond was going to end up with significant costs that it may not have anticipated.

As the advisory committee considered this rule, it could not come up with a good mechanism within the appellate rules for ensuring that disclosure, so the proposed amendment does not address it. It is fairly rare, but when it does come up, it can be a serious problem, so the advisory committee recommended that the Civil Rules Committee consider whether an amendment to Civil Rule 62 might address disclosure.

An academic member asked whether any thought had been given to whether the change in terminology ("allocating" versus "taxing") might cause confusion. Judge Bybee reported that the advisory committee had carefully considered potential transition costs and had concluded that clarifying the terminology is worthwhile.

A judge member expressed concern that the phrasing "allocated against" (e.g., "if an appeal is dismissed, costs are allocated against the appellant") did not sound right. A style consultant

agreed, saying that the usual expression would be "allocated to." Professor Hartnett responded that "against" is in the existing language (e.g., "costs are taxed against the appellant"), and he explained that the advisory committee wanted to make clear who is on the hook to pay. Allocating something "to" someone might suggest that that person is receiving money rather than having to pay it. Judge Bybee agreed, and he suggested that if the public comments push back against the phrasing, the advisory committee could look for an alternative.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 39 for public comment.**

Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 128 of the agenda book.

Judge Bybee explained that appeals from the bankruptcy court generally go either to the district court or to the bankruptcy appellate panel ("BAP") in those circuits that have established one. But under 28 U.S.C. § 158(d)(2), a party may instead petition for direct review by the court of appeals.

Judge Bybee turned first to the proposed amendment to Rule 6(a), governing direct appeals from a district court exercising original jurisdiction in a bankruptcy matter. He drew attention to an important difference between bankruptcy appeals practice and ordinary civil appeals practice – namely, that the bankruptcy rules set a markedly shorter deadline (14 days instead of 28 days) for certain postjudgment motions that reset the appeal time. The proposed amendment to Rule 6(a) provides fair warning that the bankruptcy rules govern. The proposed committee note also provides a chart setting out relevant Bankruptcy Rules and applicable motion deadlines.

Judge Bybee next highlighted the proposed amendment to Rule 6(c), which governs permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Alluding to the fact that current Rule 6(c)(1) renders most of Rule 5 applicable to such appeals, Judge Bybee stated that Rule 5 did not fit this context very well. Instead, the advisory committee proposes amending Rule 6(c) to address petitions for review in the court of appeals. The changes are fairly extensive. The advisory committee had a subcommittee with specialists in bankruptcy appellate work who have carefully reviewed the proposal.

The representatives of the Bankruptcy Rules Committee said that they supported the proposal.

Professor Struve thought the proposal would helpfully address some real difficulties and complexities. She thanked the Appellate Rules Committee chair and reporter and also their colleagues on the Bankruptcy Rules Committee for their superb work. Judge Bates echoed that sentiment.

Judge Bates asked why the proposed amendments would change "bankruptcy case" to "bankruptcy case or proceeding" and whether that change should be explained in the committee note. Professor Hartnett responded that the advisory committee wanted to ensure that the rule would cover appeals from both bankruptcy cases and adversary proceedings within those cases.

He suggested that the proposed committee note's reference to "clarifying changes" encompassed this feature of the proposed amendments.

Judge Bates then asked whether the phrase "motions under the applicable Federal Rule of Bankruptcy Procedure" in proposed Rule 6(a) should say "Rules" because motions may be made under more than one rule. Professor Hartnett deferred to the style consultants on that, and the change was made.

An academic member asked whether the advisory committee had discussed and decided to endorse the First Circuit's position in *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 83 (1st Cir. 2021) (holding that "the Bankruptcy Rules"—including their shorter postjudgment motion deadlines and the implications of those deadlines for resetting appeal time—"apply to non-core, 'related to' cases adjudicated in federal district courts under section 1334(b)'s 'related to' jurisdiction"). Professor Hartnett responded that, leaving aside whether that case was correctly decided under the current rules, the advisory committee had been informed by bankruptcy specialists that the First Circuit reached the right outcome, so the advisory committee wanted to make that position explicit in the rule going forward.

Professor Hartnett noted one edit: in the committee note to subdivision (b), removing "(D)" in the sentence "Stylistic changes are made to subdivision (b)(2)(D)," on page 90, line 209, of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 6 for public comment with the above-noted changes to the text of subdivision (a) ("Rules") and the committee note to subdivision (b).**

Information Items

Amicus Disclosures. Judge Bybee reported on this item. The advisory committee again sought advice from the Standing Committee. The feedback received at the Standing Committee's January 2023 meeting was helpful. The proposal was still a working draft and not yet ready for the Standing Committee's full consideration.

On behalf of the advisory committee, Judge Bybee posed two questions for the Standing Committee. The first question related to draft Rule 29(b)(4) on page 99 of the agenda book. The draft rule required disclosure of any party, counsel, or combination of parties and counsel who contributed 25% or more of the gross annual revenue of an amicus filer in the prior 12-month period. At the January discussion, the Standing Committee asked whether the advisory committee should use a lookback period of the last 12-month period or the prior calendar year. Contrary to what appeared to be the Standing Committee's sentiments in January, the advisory committee believed that the prior 12-month lookback period works better because, although using the calendar year would be easier, disclosure could also be more easily avoided using a calendar year.

The second question related to draft Rule 29(d), governing disclosure of relationships between *nonparties* and an amicus filer. The advisory committee drafted two alternatives, labeled alpha and beta. Option alpha would require an amicus to disclose a contribution by anyone, including a member of an amicus organization, of over $10,000 that was earmarked for the

preparation of an amicus brief. Option beta would carry forward the existing rule, which requires disclosure of a contribution of earmarked funds but exempts contributions by members of the amicus. The thinking behind option alpha is that option beta makes it too easy to evade disclosure—someone who wants to fund an amicus brief need only become a member of the amicus group. In exchange, the floor for requiring disclosure of a contribution is increased to $10,000 under option alpha. That amount avoids requiring disclosure for a brief crowdfunded by many small contributions.

A practitioner member supported the advisory committee's rationale for the 12-month lookback period. The member also suggested that another option might be to require disclosure of contributions made *either* in the year the brief is filed or the year immediately prior. That way, the amicus could look at annual figures instead of having to create a new lookback window for each brief. Judge Bates asked whether that proposal would make the process of checking and making disclosures overly complicated. Professors Beale and Hartnett raised the question of what the right denominator for calculating the fraction of revenue contributed would be. Professor Bartell suggested using the entire period beginning January 1 of the calendar year before the date of filing.

A judge member preferred option alpha because option beta allowed someone to join an amicus and make a substantial contribution without disclosure being required.

Another judge member wondered whether trade associations keep clear demarcations of funds that are going to amicus work as opposed to general activities and how a donor would know to which of those uses its donations were directed. The member also thought that $10,000 in option alpha was a very high number. The member could understand not wanting to capture small amounts from crowdfunding, but why not a $5,000 or $7,500 floor?

On the first point, Professor Hartnett responded that the subdivision (b)(4) exception hinged more on the phrase "received in the form of investments or in commercial transactions in the ordinary course of business" than on the phrase "unrelated to the amicus curiae's amicus activities." A trade association's members' contributions are not generally thought of as investments or commercial transactions in the ordinary course of business.

As to the second point, the advisory committee had not settled on $10,000—that amount was set forth in brackets, along with $1,000 as another bracketed alternative. Advisory committee members who supported using $10,000 argued that, once the contribution reaches that number, the contributor is very likely to be driving the effort or at least to have a significant hand in it. Instead of funding coming from a broad membership base, it is coming from a small number of people who may not be representative of the entire membership. Some alternatives, such as a percentage of the cost of the brief, were also considered, but they were considered too difficult to implement.

The judge member again indicated a preference for a lower floor, something like $5,000 or $7,500, in case a small number of entities are pooling resources to be a collective driving force behind the brief. The member was also unsure what counted as a commercial transaction in the ordinary course of business. Funds could go into an entity, on a routine basis, to fund all of its activities, including the activities of its general counsel. The member was concerned that there would not be an administrable distinction between money to fund an amicus brief and money to fund the amicus's legal office.

Judge Bates remarked that the goal should be a rule that is clear to those subject to it. If it is unclear what funds do or do not trigger disclosure, the advisory committee should continue to talk about that.

A practitioner member thought that over-regulation of this area would be a big mistake. The committee seemed to be bringing into the realm of amicus briefs concepts that applied instead to lobbying a legislature. The best form of amicus-brief regulation is the discretion of Article III judges to read them or not read them. The advisory committee also ought to talk with at least the big trade associations to see whether the proposed requirements are feasible and how complicated it would be to implement them. And the proposed requirements will hurt smaller organizations.

The member asserted that proposed Rules 29(d) and (e) were a mistake. For example, lawyers who write amicus briefs for big trade associations do so for free or for a discounted amount—say, $5,000, $10,000, or maybe $20,000. They work on these briefs to be able to say that their work influenced a Supreme Court decision.

Judge Bybee asked the member to clarify whether the member was opposed to the beta alternative version of Rule 29(d), which tracked what is already in the current rule. The member responded that it was fine if it was already there, but the member would not try to set dollar or percentage thresholds.

Another practitioner member argued that proposed (b)(4) addressed a real concern—that is, situations in which big players in an amicus control its filings. As to the exception in proposed (b)(4), the member read it to exclude ordinary commercial transactions between the trade association and its members, such as renting space. If that reading is wrong, the member would view that as a problem.

As to (d), the practitioner member thought option alpha was both over- and underinclusive. A big problem with alpha was that it permitted nonmembers to contribute anything below $10,000 without triggering disclosure. The member thought that the concern was about background players who orchestrate large amicus campaigns by donating to many different organizations. The key control existing today (and in option beta) is that the organization can be seen as credibly speaking for its members—if a nonmember makes a contribution, the nonmember has to be disclosed.

The practitioner member said, though, that he is skeptical of tying disclosure requirements to contributions that are earmarked for a particular brief. Large organizations with large budgets will allocate a portion of annual dues to amicus briefs in general; no funds will ever be targeted to a single brief, so no disclosure will need to be made. Smaller groups or groups that do not regularly file amicus briefs probably will not have an allocation for those briefs in their budgets. If a case comes along that is important to them, they will have to "pass the hat" among their members, and they will have to disclose. So the rule's burden then falls disproportionately on different amicus groups. For many companies, disclosure will mean they will not contribute because they will not want to be singled out; and amici will be less willing to file if they will have to make a disclosure because they will believe disclosure will make the brief seem less credible. If the concern is with those who join just before or after contributing, perhaps the rule should expressly target that behavior.

Judge Bybee asked what contribution floor this practitioner member favored for option alpha. The member did not think crowdfunding was such a big issue, so the member suggested perhaps a $10 floor. Amicus briefs are not big profit centers, so they often do not cost that much. If the limit is $7,500, then four contributors who give $7,400 each can provide close to what the brief will cost without triggering disclosure. The contributors need not have anything to do at all with the amici, and that seems to be a problem. This member preferred option beta over option alpha.

A judge member remarked that the underlying concern is the opportunistic arrival of somebody who wants to control or have a voice in a particular case. Although having a set dollar amount might be attractive because it's arguably objective, the member did not know that it would address the concern.

Another judge member stressed the need for clarity, expressed doubt about how to apply a disclosure standard that hinges on the intent behind a contribution, and stated that requiring disclosure of an amicus's membership raises First Amendment issues. This member favored option beta.

Another judge member noted that in the courts of appeals, where amicus briefs are less common, those briefs may be more influential than they are in the Supreme Court. Anecdotally, amici can be very important and influential; this member reads amicus briefs. The member stressed once again that the committee should consider a lower dollar-amount threshold in option alpha. Another important reason to know about who is behind the brief is for recusal reasons—to ensure that a party for whom a judge should not decide cases does not come to the court through a third party instead. Asked for a preference between options alpha and beta, the member preferred option alpha because there needs to be an understanding of who is really driving amicus briefs; the member acknowledged the need for careful drafting of option alpha given, inter alia, potential First Amendment concerns. The member separately reiterated doubts about the meaning of the exception in proposed paragraph (b)(4).

Another judge member agreed that it was not clear what the exception in (b)(4) meant or how it would be calculated. That member also did not think that the courts of appeals were expressing a need for a change to Rule 29. The member has not sensed any problem with amicus briefs. Some members of Congress appear to be concerned about undisclosed backers funding multiple amicus briefs. By contrast, the problem that the member, as a judge, would be worried about is whether an amicus was merely another voice for a party in the case. The portion of the existing rule that would become proposed paragraph (b)(1) is aimed at the latter problem. Subdivision (d) instead tries to get at the concern voiced by the members of Congress. To solve that problem (and this member was not sure it was a problem in the courts of appeals), the existing language may be inadequate because it is limited to those who contribute or pledge money intended to fund the particular brief, as opposed to amicus briefs generally. Someone could set up arrangements so as not to pay for any particular brief; instead, they could just fund several organizations that file amicus briefs in dozens of cases. The member was not sure how best to address the concern voiced by the legislators.

Judge Bybee thanked the Standing Committee for its helpful input on these difficult problems.

Intervention on Appeal. Judge Bybee reported that the advisory committee will consider whether to add a new rule governing intervention on appeal. There currently is no rule, but the issue has come up several times in the courts of appeals. The issue was also recently briefed in the Supreme Court in a case that later became moot.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Rebecca Connelly and Professors Elizabeth Gibson and Laura Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in West Palm Beach, Florida, on March 30, 2023. The advisory committee presented eight action items and four information items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 179.

Action Items

The Restyled Bankruptcy Rules. Judge Connelly introduced this item, and Professor Bartell reported on it. The advisory committee sought final approval of the fully restyled bankruptcy rules, which appeared starting on page 190 of the agenda book.

The restyling project had been an immense effort by the Restyling Subcommittee (chaired by Judge Marcia Krieger), the style consultants, and Rules Committee Staff. The total number of bankruptcy rules exceeded that of all the civil, appellate, criminal, and part of the evidence rules, combined. It was a major project.

Parts VII through IX of the restyled bankruptcy rules were published for public comment in August 2022. There were five sets of comments. The comments and any changes made since publication were shown in the agenda book starting on page 429.

The advisory committee was also asking for approval of Parts I through VI of the restyled rules. The Standing Committee had approved them already over the past two years with the understanding that the rules would return for approval after the entire restyling was completed.

There have been some modifications to the restyled Parts I through VI since those approvals were given. Some of the bankruptcy rules have been substantively amended since then, and the restyled rules now reflect those amendments. The style consultants also did a "top-to-bottom" review of all the rules, making additional stylistic and conforming changes. And the Restyling Committee also made corrections and minor changes.

The advisory committee did not believe that any of these updates to the proposed restyled Parts I through VI were substantive enough to warrant republication for public comment.

Judge Bates commented that the restyling project reflected a monumental collaborative effort by past and present members of the advisory committee, the leadership of the advisory committee and its Restyling Subcommittee, and the reporters and the style consultants on a sometimes-thankless yet important task.

Professor Kimble added that this is the fifth set of restyled rules over 30 years. The rules committees are done with comprehensive restyling, and that is cause for celebration.

Professor Garner noted that this is probably the most ambitious project in law reform and legal drafting that a rulemaking body like the Standing Committee had undertaken in the past 30 years. He noted that the late Judge Robert E. Keeton should be remembered for starting the restyling project in 1991–92. This could be the culmination of his ambition to see simpler, more straightforward rules.

An academic member commented that, as a prior reporter to the Bankruptcy Rules Committee, he participated in a minor restyling of the Part VIII rules. On account of that experience, he had dreaded the prospect of a complete restyling of the rules, and he wanted to congratulate everyone involved with this process. It went more smoothly than anyone could reasonably have hoped, so it really is a cause for celebration.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the restyled bankruptcy rules.**

Amendment to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), Conforming Amendments to Rules 4004, 5009, and 9006, and Abrogation of Form 423. Judge Connelly reported on this item. The advisory committee sought final approval of these proposed amendments, which appeared on pages 687–95 and 703–05 of the agenda book, and the accompanying form abrogation.

Rule 1007 sets deadlines for filing items in bankruptcy court. The change pertains to a requirement for individual debtors in Chapter 7 and Chapter 13 cases. To receive a discharge, a debtor must complete a course in personal financial management. The current Rule 1007 provides a deadline for the debtor to file a statement on an official form (Form 423) that describes the completion of the course. The proposed amendment would instead require that the course provider's certificate of course completion be filed.

Rules 4004, 5009, and 9006 would all need to be changed because they refer to a "statement" of completion, and they would need to refer to a "certificate" of completion. Further, Official Form 423 would be abrogated because it would no longer serve a purpose.

Professor Bartell noted that the provider of the course furnishes the certificate of course completion. Many of the course providers actually file the certificates directly with the court. But if a provider does not, then the debtor would have to file it instead. The advisory committee received no public comments on this set of proposed amendments.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 1007, 4004, 5009, and 9006, and the abrogation of Official Form 423.**

Amendment to Rule 7001 (Types of Adversary Proceedings). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 696 of the agenda book.

Rule 7001 lists the types of proceedings that count as adversary proceedings in a bankruptcy case. The amendment would exclude from the list of adversary proceedings actions

filed by individual debtors to recover tangible personal property under section 542(a) of the Bankruptcy Code.

This amendment responds to a suggestion by Justice Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021). In that case, the Court decided that the automatic stay set by 11 U.S.C. § 362(a)(3) did not prohibit the city's retention of the motor vehicle of a consumer in a Chapter 13 bankruptcy case. Justice Sotomayor noted that a debtor could use a turnover action to recover such property, and opined that if the problem with bringing a turnover action is the delay and cumbersome nature of doing it as an adversary proceeding under Rule 7001, the rules committee could consider amending the bankruptcy rules. *Id.* at 594–95 (Sotomayor, J., concurring).

The amendment was published for comment this past year. The advisory committee received only one comment, which supported the amendment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 7001.**

New Rule 8023.1 (Substitution of Parties). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed new rule, which appeared starting on page 698 of the agenda book.

Rule 8023.1 would govern the substitution of parties when a bankruptcy case is on appeal to a district court or BAP. It had not been addressed previously in the rules. The rule is modeled after Federal Rule of Appellate Procedure 43.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved proposed new Rule 8023.1.**

Amendment to Official Form 410A (Mortgage Proof of Claim Attachment). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 706 of the agenda book.

This proposal amends a provision of the attachment for mortgage proofs of claim. The change would require that the principal amount be itemized separately from interest. Currently the form allows them to be combined on one line item, and the amended form would require separate lines. The advisory committee received one comment on the proposed amended form; it made no change to the proposed amendment after considering that comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410A.**

Amendment to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting on page 709 of the agenda book.

Rule 3002.1 pertains to cases involving individuals who have filed for Chapter 13 bankruptcy. Because of the structure of Chapter 13, mortgage debt is generally not discharged; but Chapter 13 debtors can cure mortgage defaults during the case. Even though a default can be cured, there can be confusion about the accounting of payments during a case and the status of the mortgage claim at the end of the case. That was the impetus behind the rule—to provide more information to the borrower and the lender about the status of mortgage claims in these cases.

Judge Connelly reminded the committee about the proposed amendments to Rule 3002.1 that had been published for comment in 2021. Those proposed amendments would have provided for a mandatory midcase notice issued by the Chapter 13 trustee and would have set a motion procedure for assessing a mortgage's status at the end of a Chapter 13 case. The advisory committee received numerous public comments, and the committee further revised the proposed amendments in response to those comments.

Although the revisions respond to comments submitted during the public-comment process, the advisory committee determined that the changes are significant enough to warrant republication. This is partly because the advisory committee has switched from a mandatory-notice scheme by one party, the Chapter 13 trustee, to optional motion practice throughout the case, by either the debtor or the trustee.

The end-of-case procedure is also changed to address concerns about the consequences for either failing to respond or failing to comply. The consequences are different enough that the committee thought it would benefit from additional public comments and also thought it was important to provide notice of the proposed changes.

Professor Gibson added that the advisory committee's years-long experience with this rule illustrates the value of notice and publication. Two organizations had suggested significant amendments to Rule 3002.1: the National Association of Chapter 13 Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy. Both organizations advocated a midcase assessment of the mortgage's status—the thought being that, if the debtor and the trustee found out then that, according to the creditor, the debtor had fallen behind in mortgage payments, there would be time to cure that before the case was over.

But the comment process revealed a lot of concern with that idea, especially from Chapter 13 trustees. A midcase review may not always be needed; there are other ways to get the information. And different districts handle postfiling mortgage payments differently—the debtor might continue to pay them directly to the mortgagee, or the trustee might make those mortgage payments. In districts with the former procedure, the trustee would not have information about payments made by the debtor. The biggest change is therefore that the midcase review is not mandatory anymore. It can occur at any time during the case, and either the debtor or the trustee can ask for it by motion. The subcommittee feels that these changes have improved the proposed amendments.

A judge member observed that the revised proposal adds a provision for noncompensatory sanctions. When the claim holder does not comply, there were already remedies making the other party whole, including attorney's fees, which would come at a cost to the claim holder. It is not clear why there should also be noncompensatory sanctions. The member also said that, if

something more like punitive sanctions were meant, a notice requirement should be considered, as is usually provided by the rules in such situations.

Judge Connelly said that the proposal for noncompensatory damages was in part a response to *In re Gravel*, 6 F.4th 503 (2d Cir. 2021), which held that current Rule 3002.1 does not authorize punitive sanctions. The new language was intended to clarify that the bankruptcy court could in appropriate circumstances assess noncompensatory damages. Public comment on this provision would be useful.

Professor Gibson added that these are cases where the mortgagees are repeat players and that the failure to comply with the rule in multiple cases might create a need for declaratory, injunctive, and punitive relief to address the problem. Another judge member stated, however, that punitive relief seems qualitatively different from declaratory and injunctive relief. Notice should be required before imposing punitive relief, and consideration should be given to the scope and framework for such relief. Judge Connelly responded that the rule reflects the approach taken in Civil Rule 37, and stressed the need for judges to be able to address willful noncompliance with court orders. The judge member suggested the value of seeking comment specifically on whether notice should be required before an award of punitive fines.

On the issue of prior notice, Professor Gibson raised the possibility of prefacing the provision with "if, after notice and a reasonable opportunity to respond," which Rule 11 uses. Although this would not spell out all the procedure, Professor Gibson did not think the rule needed to do so. Professor Struve quoted Rule 3002.1(h)—"If the claim holder fails to provide any information as required by this rule, the court may, after notice and a hearing, do one or more of the following:"—which is followed by paragraph (h)(2). She wondered if this provision addressed the concern with notice.

A judge member thought it did address the notice issue but that it did not explain the need for the punitive sanction. If a mortgage holder was noncompliant, couldn't it end up not only paying attorney fees but also taking a haircut on its claim? Judge Connelly responded that there would not be a haircut on the claim, because the mortgage would survive the discharge. The member rejoined that proposed (h)(1) authorizes precluding the claim holder from presenting information that should have been produced, and argued that this could affect the claim. Judge Connelly responded that the rule would prevent the claim holder from presenting the omitted information as a form of evidence in a contested matter or an adversary proceeding in the bankruptcy case, but that is different from making the debt unenforceable after the case ends. Although the claim holder might not be able to present the evidence in the bankruptcy case the rule would not prevent use of the evidence in state-court foreclosure proceedings.

A judge member stressed that adequate notice would require specific mention of punitive relief if that was under contemplation. "Noncompensatory sanctions," this member suggested, was unduly vague. Judge Bates asked what was contemplated by "noncompensatory sanctions" beyond declaratory and injunctive relief. Professor Gibson and Judge Connelly responded that it would include punitive damages payable to a party.

As to rules that authorize noncompensatory sanctions, Professor Gibson suggested, for example, that under Civil Rule 11 a lawyer could be required to attend continuing legal education.

A practitioner member read the text of Civil Rule 11(c)(4) and pointed out that payments to a party under that rule seemed to be limited to reasonable attorney's fees and other expenses; the potential "penalty" contemplated by that rule is paid to the court. The practitioner member further agreed with previous comments that nobody would read "noncompensatory sanctions" to mean equitable relief. If there is a desire that equitable relief be available, it should be spelled out and, as under Civil Rule 11(c)(2), there should be an opportunity to cure.

An academic member offered background about why courts occasionally need "baseball bats" in these cases. This rule goes back to the mortgage crisis in 2007–08. Many people filed for Chapter 13 bankruptcy in large part to save their homes by curing a default on a mortgage in Chapter 13, while also maintaining their ongoing monthly payments. But it was a huge problem to figure out the exact amount owed on the mortgage, and it was extremely difficult to get mortgagees to give that information in a way that could be processed by trustees, debtors, and the courts. Ongoing compliance was also often an issue because there were not deep-pocketed lawyers on the debtor's side. The Chapter 13 trustee is often, but not always, in the mix, and the court has a huge flow of information that it has to track. The amounts of money in these cases are just not enough, even if clawed back, to get a mortgagee's attention, so a stronger measure is necessary to get that attention.

A judge member questioned whether, if there is no precedent under Rule 11 for imposing punitive damages payable to another party, there were any authority for a bankruptcy court to impose such a sanction. Does that need to be authorized by Congress? Is it implicit in the statute? Such an award, this member suggested, was not a traditional kind of ancillary relief used to enforce court powers, unlike a fine to the court or contempt.

Another judge member suggested that Rule 11 could provide a model for potential language—perhaps "reasonable expenses and attorney's fees caused by the failure, nonmonetary directives, and, in appropriate circumstances, an order to pay a penalty into court." (A practitioner member later made a similar suggestion.)

Judge Bates remarked that there is nothing in the committee note that explains what "noncompensatory sanctions" means or how declaratory or injunctive relief fits into the scheme. After looking at Rule 11, which is much more elaborate in terms of certain requirements than this rule would be, he wondered whether more thought needed to be given to it.

Judge Connelly explained that the proposed amendment responded to the *Gravel* opinion. The idea was to allow the bankruptcy court to award something beyond attorney's fees. The advisory committee did not specify what that would be—the language "noncompensatory sanctions" was meant to be general. Judge Connelly agreed that there should be something in the committee note about that language.

After further discussion, Judge Connelly asked whether, if the language "in appropriate circumstances, noncompensatory sanctions" were removed, the Standing Committee would give approval to publish the rest of the rule. Professor Gibson said she would prefer to go forward without the change to (h)(2) because the rest of this amendment is important. Deferring a vote on the rest of the rule would delay those changes for another year.

Professor Capra remarked that the approval is only for public comment. He further suggested that, in the future, the advisory committee say "award other appropriate relief," period, and then add all the explanation in the committee note. The Standing Committee even has the authority to put the language in brackets and then invite comments on it.

A judge member expressed support for shortening the provision to "award other appropriate relief." Professor Bartell expressed concern that if the "including" clause is removed, an unintended negative inference is created that other appropriate relief no longer includes an award of expenses and attorney's fees. Judge Bates expressed concern about whether this suggestion could increase the likelihood of needing to republish again later.

A practitioner member thought it seemed riskier to take out (h)(2) and not make it an issue if the Standing Committee would still have to discuss it again in six months. Having public comment helps the committees improve the rule. Also, in approving something for publication, the Standing Committee does not necessarily give that same language approval. It is worth seeing what the reaction to it would be. A judge member demurred to that suggestion, arguing that a proposal should not be sent out for comment if the committee knows it could not accept that proposal as drafted.

Professor Hartnett asked whether, if the advisory committee had in mind Civil Rule 37, the rule could cross-reference Bankruptcy Rule 7037. For example, "any of the sanctions permissible under Rule 7037." Professor Gibson responded that some of the sanctions under Rule 37 would not be applicable here; she would be reluctant to have only a general reference to Rule 7037. Professor Hartnett said that he thought "appropriate circumstances" might cover that problem.

Professor Cooper asked whether it would work to publish the rule as proposed and specifically invite comment on the issue. Judge Bates asked what risks would be involved with that approach and whether it would lessen the risk of having to do any republication. Professor Gibson thought it would lessen the likelihood of coming back with another amendment. Judge Bates thought that that approach would give the impression the Standing Committee has approved that language, and he did not have the sense that the Standing Committee is prepared to give approval to that language.

Professor Coquillette noted that, in the past, there has been concern when the Standing Committee permits publication of something that it really would not ultimately approve. The harm is that people might wonder about the rules process. Simply putting something out to attract comment when the committee really will not do it is not a good idea. It is different if there is a real possibility that reading the comments during the comment period could convince the committee to approve the proposal.

Professor Struve agreed with Professor Gibson that, leaving aside (h), the rest of the rule seemed likely to provide significant benefit to a population that is a concern for the whole bankruptcy structure. That benefit has already been delayed past one publication cycle. She also agreed with those who said it would be peculiar to send something out for comment that the Standing Committee could not see a way to approve. She also saw the point about flagging that a piece of the rule may be subject to change in the future; but she was not sure that sending out the proposal currently in the agenda book could avoid the need for republication in the event that the

process ends up putting forward some very different proposal. It might be cleaner, if the Standing Committee agrees that there is a strong normative case for doing so, to publish the rest of the rule without (h).

An academic member remarked that, although the Standing Committee is historically reluctant to change a rule and then immediately afterward publish an additional change, doing so in this case may not pose a serious problem because the sanctions piece is separable. And it would show that the rules process takes seriously concerns about authority, notice, and operation.

Professor Gibson noted that there was relatively little discussion by the advisory committee of (h)(2) as opposed to the rest of this rule. So the advisory committee would likely be satisfied with that outcome.

Judge Bates asked whether a change to the committee note would be needed as well because the note refers to (h)(2). Professor Gibson answered in the affirmative. A judge member asked whether it is typical or permissible to issue a committee note on a provision without amending the provision's text. The judge member wondered if the advisory committee could issue a committee note that "other appropriate relief" should be interpreted broadly to include more than just attorney's fees, instead of adding "noncompensatory sanctions" to the text. Professor Gibson responded that a change to a committee note cannot be made by itself.

A style consultant suggested adding the word "any" before "other appropriate relief" and deleting "and, in appropriate circumstances, noncompensatory sanctions." The committee note would then state that "any" was added to show that the advisory committee did not intend to limit the recovery to reasonable expenses and attorney's fees—a diplomatic way of saying that the amendment was intended to address the Second Circuit's erroneous decision.

Professor Marcus observed that the 2015 committee note to the amendment of Civil Rule 37(e) stated that the amendment rejected certain Second Circuit caselaw.

Judge Bates asked the advisory committee's representatives whether that kind of change would be consistent with what the Bankruptcy Rules Committee decided to do here and whether it would simply ignore the issues raised with respect to what the further relief is, instead letting the courts deal with that. Professor Bartell responded that it would be consistent with the advisory committee's decision and that it would also be consistent with other bankruptcy rules that also call for other appropriate relief upon a violation. Those rules do not say what procedural mechanisms must be adopted to impose that other relief, but that is consistent with how the phrase is treated in other bankruptcy rules. Judge Bates then asked whether there had been discussion of whether punitive damages fell within "other appropriate relief." Professor Bartell said that she had not researched the question, and Judge Connelly said that the advisory committee had not discussed it.

Professor Struve admired the elegance of the proposal to add "any" and a change to the committee note. But she did wonder, if there are instances of "other appropriate relief" sprinkled throughout the bankruptcy rules, whether adding "any" to this one would create an unwanted negative inference. The style consultant responded that the committee note's express statement about why "any" was added would be the reason for the difference. Judge Bates noted that some

judges look at only the text of the rules to determine what they mean, not the committee notes—would that lead to a possible view that they have two different meanings?

A judge member commented that, if the committee note only disapproves of the *In re Gravel* decision, it is not clear what the note actually does. If the note is going to say that certain actions are authorized, the member would want to know what those actions are. Judge Bates agreed that a vague committee note that does not say expressly what the amendment authorizes would lead to divergent comments that the advisory committee would ultimately have to resolve.

A judge member was leery of making any substantive changes or hints right now. Normally in the rules process, this would have been a proposal, and then the Standing Committee would give feedback to the advisory committee. People would have talked about Civil Rules 11 and 37. If there is a Rules Enabling Act obstacle to creating a punitive damage remedy, that would have been discussed. But all of that was skipped because of how this issue, through no one's fault, has arisen. The member would rather hold off six months or a year and then deal with this issue separately rather than today without any preparation.

Another judge member agreed and added that, depending on what the scope of the relief under paragraph (h)(2) is, there may be a need to change the procedural protections. Just changing a word is not going to deal with the problem.

Judge Connelly thanked the Standing Committee for the helpful discussion. The proposed changes to Rule 3002.1 apart from proposed subdivision (h)(2) create a new, necessary, and beneficial mechanism, one in which there has been an interest for a while. Seeking republication of those provisions, excepting those in paragraph (h)(2), is warranted now. Given the comments today, it would be more appropriate to return to the advisory committee for more robust, thorough evaluation of Rule 3002.1(h)(2). It is unclear whether that will result in a proposed amendment at some point. An amendment may even be premature in light of the developing caselaw.

A member moved to approve the proposed amendment, without the proposed changes to paragraph (h)(2), for publication, and another member seconded the motion. Judge Bates opened the floor to further discussion.

Professor Struve asked whether, despite omitting the proposed changes to paragraph (h)(2), the semicolon and word "and" at the end of paragraph (h)(2) would remain. Judge Connelly answered that, yes, the semicolon and "and" would remain.

An academic member encouraged the committee members to read the Second Circuit's *In re Gravel* case, both the majority opinion and the dissent (with which the member agreed). As far as the member knew, that is the first appellate decision with that particular holding. The member also thought the committee members should congratulate themselves because the rules process was working well. The *Gravel* decision was driven in part by *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), which potentially destabilized a bankruptcy court's ability to enter sanctions. It would be appropriate to give greater and deeper thought to *Taggart*'s implications when considering a potential sanctions regime.

After further discussion it was clarified that the committee note would be modified by deleting the third sentence in the last paragraph—"It also expressly states that noncompensatory sanctions may be awarded in appropriate circumstances."

Upon a show of hands, with no members voting in the negative: **The Standing Committee gave approval to republish the proposed amendment to Rule 3002.1 for public comment with the following changes: No amendments to (h)(2) were retained, except for adding a semicolon and the word "and" at the end; and the third sentence in the last paragraph of the committee note was struck.**

Amendment to Rule 8006(g) (Request for Leave to Take a Direct Appeal to a Court of Appeals After Certification). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared on page 728 of the agenda book.

The proposed amendment would amend subdivision (g) so as to dovetail with the proposed amendments to Appellate Rule 6(c) approved for publication for public comment earlier in the meeting.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 8006(g) for public comment.**

Official Forms Related to Rule 3002.1. Judge Connelly reported on this item. The advisory committee sought approval to publish these proposed official forms for public comment. The proposed official forms appeared starting on page 729 of the agenda book.

Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R are the companion official forms to proposed amended Rule 3002.1. None of these forms was affected by the decision (described above) to withdraw the request to publish the Rule 3002.1(h)(2) proposal.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R for public comment.**

Information Items

Suggestion to Require Complete Redaction of Social Security Numbers from Filed Documents. Professor Bartell reported on this item.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal-court filings should be scrubbed of personal information before they are publicly available. Portions of the letter suggested that the rules committees reconsider a proposal to redact entire Social Security numbers from court filings.

The Bankruptcy Code requires that Social Security numbers be included on certain documents either in whole or only partially redacted. *See* §§ 110, 342(c)(1). The advisory

committee cannot change those requirements because they are statutory, but there may be some circumstances where full redaction is possible and appropriate.

But the Advisory Committee has become aware that the Judicial Conference's Committee on Court Administration and Case Management ("CACM") has asked the FJC to design and conduct studies regarding the inclusion of certain sensitive personal information in court filings. Those studies would update the privacy study issued by the FJC in 2015. They would gather information about compliance with privacy rules and the inclusion of unredacted Social Security numbers in court filings. The advisory committee has decided to defer consideration of the suggestion while those new studies are underway.

Suggestion to Adopt a National Rule Addressing Debtors' Electronic Signatures. Professor Gibson reported on this item.

An attorney suggested the adoption of a national rule to allow debtors to sign petitions and schedules electronically without requiring their attorneys to retain the original documents with wet signatures.

But only a year ago, in its Spring 2022 meeting, the advisory committee decided not to take further action on a suggestion by CACM to consider a national rule on electronic signatures of non-CM/ECF users. The advisory committee decided then that a period of experience under local rules addressing e-signatures would help inform any national rule, and it reasoned that e-signature technology would also probably develop and improve in the meantime.

In light of that recent decision, the advisory committee decided to defer further consideration of this suggestion to a later date. Nothing has changed since a year ago. Also, the project on electronic filing by self-represented litigants may also have implications for the e-signature issue.

Suggestions Regarding the Required Course on Personal Financial Management. Professor Gibson reported on this item.

The advisory committee continues to consider suggestions concerning the course on personal financial management discussed earlier.

Professor Bartell's research has shown that, in a single year, thousands of debtors' cases were closed without a discharge because of the debtors' failure to file proof that they have taken this course. Debtors in that situation have to pay to reopen their cases to file the certificates. The Consumer Subcommittee has been considering whether and how the rules might be amended to decrease that number.

One question is whether to change the deadlines for the filing of those forms—now certificates of completion—or perhaps to require simply that they be filed by the point at which the court rules on discharge. There is also a rule that requires the court to remind debtors of this requirement if they haven't filed it within 45 days after the petition. Another question is whether the date for that notice reminder should be changed or whether more than one notice should be given.

Proposed Amendment to Rule 1007(h) to Require Disclosure of Postpetition Assets. Professor Gibson reported on this item.

The advisory committee continues to consider requirements to disclose assets acquired after a petition is filed in an individual Chapter 11 case or in a Chapter 12 or 13 case. In such cases, which may last several years, the Bankruptcy Code specifies that the property acquired by the debtor during that period is property of the estate.

The current rule requires filing a supplemental schedule for only certain postpetition assets obtained within 180 days after filing the petition. Judge Catherine McEwen, a member of the advisory committee, suggested an amendment to cover all postpetition property in individual Chapter 11, Chapter 12, and Chapter 13 cases.

The Consumer Subcommittee thought that one of the problems with such a rule is how to capture what property needs to be disclosed. It would be impossible to report everything that comes into a debtor's ownership over a three-to-five-year period. Should the rule mandate disclosing only certain types of property, such as only property that has a substantial impact on the estate? Also, courts that currently impose a disclosure requirement by local rule do so in different ways, so there is a lack of uniformity.

The Consumer Subcommittee was not sure there was a problem that needed to be solved. The issue was further discussed at the advisory committee meeting. There, Judge McEwen noted that the Eleventh Circuit has strong case law about judicial estoppel when a debtor has not revealed property in the bankruptcy case. Debtors can lose the right to pursue an undisclosed claim, such as a tort action based on a postpetition injury, and creditors can lose the benefit of such claims. By requiring disclosure, that problem could be avoided. So the advisory committee asked the subcommittee to consider the matter further.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robin Rosenberg and Professors Richard Marcus, Andrew Bradt, and Edward Cooper presented the report of the Advisory Committee on Civil Rules, which last met in West Palm Beach, Florida, on March 28, 2023. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 784.

Action Items

Amendment to Rule 12(a) (Time to Serve a Responsive Pleading). Judge Rosenberg reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 826 of the agenda book.

The amendment makes clear that the times to serve a responsive pleading set by Rules 12(a)(2)–(3) are superseded by a federal statute that specifies another time. It came about because some litigants in Freedom of Information Act cases had difficulty obtaining summonses that called for responsive pleadings within the statute's 30-day deadline; without the amendment, it was not clear if a statute prescribing a different time would apply to the United States under this rule.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 12(a).**

Amendments to Rules 16(b)(3) (Scheduling and Management) and 26(f)(3) (Discovery Plan) Related to Privilege Logs. Judge Rosenberg reported on this item. The advisory committee sought approval to publish these proposed amendments for public comment. The proposed amendments appeared starting on pages 828 and 846 of the agenda book.

These amendments deal with the privilege-log problem and address early in the case how the parties will comply with the requirements of Rule 26(b)(5)(A). The goal is to get the parties to address issues pertaining to privilege logs during their Rule 26(f) conference, in order to reduce burdens while still providing sufficient information about documents being withheld and to reduce the number of unexpected problems at the end of discovery.

The proposed amendments were presented for approval for publication at the Standing Committee's January 2023 meeting. There were concerns about the committee notes' length, so the advisory committee took the amendments back for further consideration. The notes are now half as long.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish for public comment the proposed amendments to Rules 16(b)(3) and 26(f)(3).**

New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The advisory committee sought approval to publish for public comment this proposed new rule, which appeared starting on page 831 of the agenda book.

Since 2017, the Multidistrict Litigation ("MDL") Subcommittee and the advisory committee have considered whether to propose a rule to govern MDLs. The MDL Subcommittee has heard many times from attorneys in both the plaintiffs' and defense bars, experienced and first-time transferee judges, and groups including Lawyers for Civil Justice and the American Association for Justice. Judge Rosenberg thanked them for all of the time and meaningful input that they have given the subcommittee. The proposed rule has been well received by all of these groups and was overwhelmingly supported by the transferee judges at the recent transferee-judge conference last fall.

Judge Rosenberg addressed a common question: why is an MDL rule needed? MDLs account for a large portion of the federal docket: 69.8% as of May 2023, up from about 1.3% in 1981. Many judges will be assigned MDLs and will look to the rules for guidance. The Judicial Panel on Multidistrict Litigation is making a concerted effort to expand assignments of MDLs to new judges, and there are more leadership appointments to diverse groups of lawyers. From January 1, 2019, to May 31, 2023, out of 96 new MDLs, 40 went to first-time transferee judges. In 2023 alone, the panel has centralized eight MDLs before eight different judges, six of whom are first-time transferee judges.

The advisory committee and the groups with which it has been working feel it is essential for the court to take an active and informed role early in an MDL proceeding. There are issues that become problematic unless addressed at the outset of the action, particularly in large MDLs.

Transferee judges have also expressed concern that they lack clear, explicit authority for some of the things that they are doing, which most agree are necessary to manage an MDL.

Rule 16 just addresses two-party litigation, and Rule 23 addresses class actions, but we have nothing for MDLs. Managing an MDL is broader than managing a non-MDL proceeding. It is critical for a transferee judge to have a more active management role in an MDL.

The advisory committee used a three-part test to determine whether to go forward with this new rule. First, is there a problem? Yes, there are circumstances in which courts start off on the wrong foot in an MDL and that could cause many problems down the road. Second, is there a rules-based solution? Yes, this proposed rule helps solve the problem by addressing issues early and laying the groundwork for effective case management. Third, would a rules-based solution avoid causing harm? Yes, the advisory committee believes that the proposed rule avoids harm by using the word "should" (with respect to the court's management of MDLs).

Rule 16.1 focuses the court and the parties on the management issues that can effectively move an MDL forward from an early point, yet the rule recognizes that not all MDLs are alike, that no one size fits all. So the rule is drafted to provide both helpful guidance and flexibility in managing the proceeding.

The advisory committee carefully considered the helpful comments of the Standing Committee at its January 2023 meeting, and many of those comments were incorporated into the revised rule.

In subdivision (a), the advisory committee settled on the word "should"—in most but not all MDLs, the court should schedule an initial management conference. The term "should" indicates that reality, while still providing some flexibility. "Should" has been interpreted as a clear directive in many instances and several of the civil rules already use it.

As for subdivision (b), the advisory committee's view is that appointing coordinating counsel helps the court get the case moving. The role of coordinating counsel is limited to the initial conference. The rule provides flexibility both to the court, to determine what issues coordinating counsel should address, and to the parties, to inform the court about the case's status. The advisory committee settled on "may" because an MDL may or may not need coordinating counsel for the initial management conference.

For subdivision (c), the advisory committee chose the first of the two alternatives of the version of Rule 16.1(c) presented at the January 2023 Standing Committee meeting. Most comments preferred this alternative, which lists a cafeteria-style menu of options (reflecting that there is no one-size-fits-all framework for an MDL). It is not a mandatory checklist. Paragraph (c)(1) was modified to say "whether leadership counsel should be appointed" rather than assuming they would be. More specifics were added to the subparagraphs and the committee note to clarify the issues to consider at the initial stages of the MDL. The committee note to paragraph (c)(1)(A) lists factors to consider when selecting leadership counsel. Paragraph (c)(4) was revised in direct response to comments from the Standing Committee about identifying issues, vetting claims, and exchanging information early in the case. Rather than the previous reference to "whether" the parties will exchange information, (c)(4) now refers to "how and when" they will do so. Paragraph

(c)(6) (concerning discovery) was modified to eliminate the word "sequencing" and make it more general. Paragraph (c)(9) is newly added. The court can play a significant role in making sure the settlement process is fair and transparent. Rule 16 already authorizes the court to play some role in the process. In paragraph (c)(12), the advisory committee did not include the word "special" with "master." It recognizes that the court may make decisions and appointments using its inherent authority. The committee note, in its opening paragraph, uses the phrase "just and efficient conduct" in response to a comment from the Standing Committee about directing the parties to adhere to the Rule 1 principles of just, speedy, and inexpensive determinations.

Professor Marcus added that this draft rule is the product of long deliberations, and the advisory committee needs public comment on it. Professor Bradt, as both an outsider and a recent insider to the process of developing the rule, thought it extraordinary how much information and outreach and response from interested parties there has been. He thought it an extensive and admirable process.

A practitioner member expressed continuing concerns about the proposal. The member's primary concern was with the committee note, which the member felt was doing the rulemaking rather than the rule. The member gave several examples of portions of the committee note that caused the member concern. These included examples of sentences that the member felt could be omitted as superfluous or confusing, language in the note indicating that a single management conference might suffice for a given MDL, a sentence discussing individual-class-member discovery in class actions, and language suggesting that the court may have a right to know about the status of settlement negotiations. The most important issue for the member was the standard for selecting leadership counsel. The committee note to subdivision (c)(1)(A), this member argued, should not require each leadership counsel to responsibly and fairly represent *all* plaintiffs, because there can be conflicts among the plaintiffs. Further, the criteria should include the number and value of claims that counsel represents in the MDL; when the leadership counsel include those representing the greatest financial interests, that can help avoid a problem with opt-outs.

Another practitioner member countered that the proposed Rule 16.1 fills an important gap. This member, too, could suggest specific changes, but would resist the temptation to do so because the proposed rule was ready for publication. The newer judges and practitioners who are playing important roles in contemporary MDL practice need such a rule, particularly in the absence of an updated version of the Manual for Complex Litigation. This member felt it was useful for the committee note to mention discovery in class actions, because MDLs often encompass class actions. Judge Bates responded that the other member had raised legitimate questions whether the committee note to a rule on MDLs should address discovery in class actions, and also whether the list of criteria for leadership counsel should include the size and number of claims represented.

A judge member stated that the rule is ready for publication. An effort is ongoing to broaden the MDL bench, and training for new judges is important. Professor Coquillette agreed that the rule was ready for publication and he congratulated the advisory committee, though he also expressed concern that committee notes should not try to fill the role of a treatise. Another judge member praised the rule for setting a conceptual framework and focusing on the basics. This member suggested requesting comment on the compensation of counsel. Taken together, this member said, the rule text and committee note might be read to authorize the use of common benefit funds, and there is debate on whether that mechanism can be used in an MDL. Another

judge member predicted that the rule would be very helpful but also warned that the committee note would be cited more often than the rule, because the note addresses the most nettlesome issues; if the committee wished to deal with those issues, this member suggested, it should do so in rule text. Judge Bates predicted that the committee would receive disparate comments on the notes' best practices advice, and wondered how it would address those contending viewpoints. Another judge member said that the rule was ready for publication, and it would help to protect district judges from being reversed on appeal, but this member voiced some uneasiness about the committee notes.

Judge Bates commented that the rule's title, "Managing Multidistrict Litigation," promises more than the rule delivers. The rule really concerns just the initial management conference.

The practitioner member who had initially raised several concerns asked to change, in the second paragraph of the committee note to paragraph (c)(1), the phrase "responsibly and fairly represent all plaintiffs" to "adequately represent plaintiffs." In the same paragraph, the member also asked to replace "geographical distributions, and backgrounds" with "geographical distributions, backgrounds, and the size of the financial interests of plaintiffs represented by such counsel." The member further suggested, in the second paragraph of the portion of the committee note to paragraph (c)(4), striking the third sentence (concerning discovery in class actions).

A judge member asked whether the practitioner member's suggested term "adequately" was intended to incorporate adequacy as the term is understood in Rule 23(a)(4)? In doing so, a lot of the class-action case law might implicitly be incorporated. The practitioner member responded that he found the terms "responsibly and fairly" problematic because those words do not appear anywhere else and their meaning is unclear. He also objected to addressing the appointment of leadership counsel in the committee note instead of in rule text. Judge Rosenberg confirmed that the advisory committee stayed away from "adequately" because it did not want there to be confusion with Rule 23.

As to the practitioner member's suggestion that the note to (c)(1) should advise the judge when selecting leadership counsel to keep in mind "the size of the financial interests of plaintiffs represented by … counsel," Judge Rosenberg noted that the next sentence, beginning with "Courts have considered the nature of the actions and parties," showed that the nature of the actions is contemplated as a factor, though perhaps it is not clear enough for the point being made about the size of the financial interest. She also did not know how a judge would know the size of the plaintiffs' financial interests. An early census might disclose the *number* of claims represented by someone under consideration for leadership, but would not disclose their size. The practitioner member responded that, in securities cases, it is done all the time for appointing lead counsel at the start of a case. Professor Marcus interjected that securities cases are different. An article by Professor Jill E. Fisch in the *Columbia Law Review* contrasted them with mass torts in particular. And some of the people attending this meeting had previously urged that it was important not to accept numbers as indicative of valid claims, whatever the size of the claims.

The practitioner member responded that, rather than having rules to deal with all of these difficult issues, the committee is burying those issues in the committee note. These topics are contentious, and the financial interest is a factor that a judge could take into account in a products-liability case or in any other MDL. If one lawyer represents $5 billion in claims and another

represents $100 million in claims, and the judge selects as lead counsel the one with $100 million, there will be opt-outs.

Judge Rosenberg still was not clear how a judge would know the financial value. And including language like that could encourage people to simply get lots of claims filed, even nonmeritorious ones, if the word on the street is that, if the judge sees that someone has a lot of dollars and a lot of claims, that person will get leadership. She understood the practitioner member's point and wondered if there were a way to word the committee note to capture it. The language was intended to be comprehensive and to take a lot of factors into account. The closest the committee note got was referring to the nature of the actions—looking at what the applicant for leadership has in the way of actions. Are there a lot of them? Are they high-enough value such that the applicant should be in leadership?

Judge Bates thought this to be a debatable point with merit to each side. There has not yet been a suggestion of language that resolves the debate; public comment may help.

A judge member remarked that mass-tort cases are not the same as securities cases. If a judge goes with the number or value of claims, that will favor those plaintiffs' counsel who have advertiser relationships. In the member's state, in coordinated proceedings in which counsel organize themselves, counsel do not always select as leaders the lawyers with the biggest numbers—they may not be the ones who will make the best presentation on the issues that will decide the case. The member agreed with Judge Rosenberg that relying on claim numbers or value could incentivize putting in massive numbers of cases. Further, a judge may not always know at the beginning who will have the most clients. Sometimes, particularly if there are both a federal and a state MDL, parties wait for the initial rulings to see where they want to file.

Professor Bradt observed that MDLs vary and are fluid. An MDL may be created at different times in a controversy's lifecycle. Sometimes an MDL is created after it is already known who will be involved, and sometimes an MDL is created very early in anticipation of the filing of a lot of future cases. Moreover, one of the things that the rule anticipates is that leadership is also fluid. As the circumstances of the case change, the transferee judge may find it necessary to change the leadership structure. The leadership piece of the rule is capacious in order to account for that.

The practitioner member who had been proposing revisions to the committee note suggested that, if the committee note stopped after paragraph one or paragraph two, the rule would then do what it was intended to do—identify topics for the initial conference. It would be a modest rule, not an attempt to cover the waterfront. But right now, the note is trying to cover the waterfront. Instead, a rule on each one of these topics should be made.

Judge Bates asked the advisory committee's representatives what changes, if any, they would like to adopt before asking the Standing Committee to approve the proposal for publication.

As to the rule's title ("Managing Multidistrict Litigation"), Judge Rosenberg remarked that the advisory committee had gone back and forth. Although the lion's share of the proposed rule is about the initial management, the rule does address later proceedings as well. For example, paragraph (c)(8) speaks of a schedule for additional management conferences with the court. So the advisory committee had stuck with "Managing Multidistrict Litigation" instead of "Initial

Management." A judge member suggested changing the rule's title to simply "Multidistrict Litigation." Rule titles usually do not include gerunds. Judge Rosenberg accepted this suggestion on behalf of the advisory committee.

Professor Marcus responded to a previous remark that there is always more than one management conference. He noted that the rule is not a command to have more than one. Paragraph (c)(8) lets the judge order the lawyers to provide a schedule for further management meetings. Subdivision (d) also advises the judge to be more flexible than under Rule 16 in making revisions to the initial management program. Of the two kinds of issues raised about the rule at today's meeting—smaller wording issues versus more fundamental issues about what should be included in the rule—the wording issues seemed more promising to look at today. Professor Marcus suspected that there would be a long compilation of public comments if the rule were published.

In response to a suggestion by Judge Bates, Judge Rosenberg stated that subdivision (c)'s text would say simply "any matter listed below" rather than "any matter addressed in the list below."

Professor Marcus agreed with Judge Bates that the reference to Rule 16(b) in the fourth paragraph in the committee note on paragraph (c)(1) should instead be a reference to Rule 16.1(b).

Judge Bates had asked whether paragraph (c)(6) should say "to handle discovery efficiently" instead of "to handle it efficiently"; after discussion with the style consultants, the advisory committee representatives decided not to make that change.

Judge Rosenberg agreed with Judge Bates that "Even if the court has not" in the committee note to paragraph (c)(9) should be changed to "Whether or not the court has."

A practitioner member asked if the advisory committee wanted to retain (in the second paragraph of the committee note to paragraph (c)(4)) the sentence about discovery from individual class members. Another practitioner member supported deleting that sentence because it concerned class actions, not MDLs. The practitioner member who had previously expressed support for keeping the sentence suggested that the problem with the sentence was its statement that "it is widely agreed" that such discovery is often inappropriate. There is nothing in Rule 23 law about this, but there is a lot of caselaw. This member suggested that perhaps better language would be, "For example, it may be contended that discovery from individual class members is inappropriate in particular class actions." An academic member questioned why the example should be included in the note. Whether it is accurate or not, it may be better to take it out or find another example. The practitioner member responded that it comes up in hybrid class MDLs in which there are both class actions and individual claims arising from the same product or course of conduct. The example is a way of reminding courts that they may be dealing with different standards, issues, terminology, and decisions based on whether they are dealing with the individual component or the class component of an MDL.

A practitioner member again raised the question whether all leadership counsel must responsibly and fairly represent all plaintiffs. Another practitioner member responded that it might be wiser to say that they will fairly and reasonably represent the plaintiffs or the group of plaintiffs they are appointed to represent. The reason there are diverse leadership groups in MDLs is that

some will represent class plaintiffs, for example, while others will represent a particular type of claim. "All" plaintiffs may be too literal.

Judge Rosenberg agreed that the proposed committee note should be modified to remove the word "all" in the phrase "responsibly and fairly represent all plaintiffs" in the second paragraph of the committee note to paragraph (c)(1). She also agreed that the second paragraph of the committee note to paragraph (c)(4) should be modified to remove the sentence about class-member discovery.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed new Rule 16.1 for public comment with one change to the title of the proposed rule (striking "Managing"), one change to the text of subdivision (c) (replacing "any matter addressed in the list below" with "any matter listed below"), and the following changes to the committee note as printed in the agenda book:**

- In the second paragraph of the note to paragraph (c)(1), "all" was struck from the phrase "responsibly and fairly represent all plaintiffs."

- In the fourth paragraph of the note to paragraph (c)(1), "Rule 16(b)" was changed to "Rule 16.1(b)."

- In the second paragraph of the note to paragraph (c)(4), the third sentence (which concerned class-member discovery and began "For example, it is widely agreed") was struck.

- In the note to paragraph (c)(9), the phrase "Even if the court has not" was changed to "Whether or not the court has."

Information Items

Discovery Subcommittee Projects. Professor Marcus reported on this item. This subcommittee is considering four issues, of which one may not pan out, and the others are in various states of evolution.

One issue is how to serve a subpoena. Rule 45(b)(1) says that service requires "delivering" the subpoena to the witness. Does that mean in-hand? By Twitter? Perhaps there are amendments that could improve the rule. Rules Law Clerk Chris Pryby wrote an excellent memorandum on state practices for serving subpoenas. The subcommittee will consider that new information.

Second, the subcommittee is considering whether to make rules about filings under seal. The agenda book shows how the subcommittee's thinking has evolved. When the subcommittee first learned about an Administrative Office project on sealed filings, the subcommittee thought it should wait for that project to finish; now the subcommittee has been told it should not wait. One question is: what standard should be used? The subcommittee's initial effort provides simply that the standard is not the same as that governing issuance of a protective order for information exchanged through discovery. Another question is: what procedures should be used? The subcommittee identified a wide variety of procedural issues, listed on pages 810–11 of the agenda book, that could be addressed by a uniform national rule. But the scope of what would ultimately

be addressed is uncertain. Professor Marcus asked for input on whether clerk's offices would welcome a national rule on this.

Third, Judge Michael Baylson submitted a proposal concerning discovery abroad under Rule 28 (Persons Before Whom Depositions May Be Taken). This is not a rule that most attorneys often deal with. The subcommittee is beginning to look at this proposal.

Finally, the FJC has completed a thorough study of the mandatory-initial-discovery pilot project. Its findings do not appear to support drastic changes to the rules. The subcommittee will consider whether any changes to the rules are warranted in light of the study.

* * *

After the Civil Rules Committee delivered this information item, it temporarily yielded the floor to the Evidence Rules Committee. The Report of the Civil Rules Committee continued after the conclusion of the Evidence Rules Committee presentation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Patrick Schiltz and Professors Daniel Capra and Liesa Richter presented the report of the Advisory Committee on Evidence Rules, which last met in Washington, D.C., on April 28, 2023. The advisory committee presented five action items and one information item. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 910.

Action Items

New Rule 107 (Illustrative Aids). Judge Schiltz reported on this item. The advisory committee sought final approval of new Rule 107, which appeared starting on page 920 of the agenda book.

Illustrative aids are not themselves evidence. They are instead devices to help the trier of fact understand the evidence. Illustrative aids are used in virtually every trial, but the Federal Rules of Evidence do not address them. Nor do the other rules of practice and procedure. The new rule would fill this gap.

The rule as published would do five things. First, it would define illustrative aids, and it would give judges and litigants a common vocabulary and at least a touchstone in trying to distinguish illustrative aids from admissible evidence.

Second, it would provide a standard for the judge and the parties to apply in deciding whether an illustrative aid may be used: the utility of the aid in assisting comprehension must not be substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. The advisory committee specifically asked commentators to address whether it should be just an "outweighed" standard or a "substantially outweighed" standard.

Third, the new rule as published provided a notice requirement. Before showing the jury an illustrative aid, a litigant would first need to show it to the other side and give the other side a chance to object.

Fourth, the rule bars illustrative aids from going to the jury room unless the parties consent to it or the court makes an exception for good cause.

Finally, the rule would require that, where practicable, illustrative aids be made part of the record so that, if an issue about an illustrative aid comes up on appeal, the appellate court has it in the record.

Professor Capra listed several changes to the proposed rule's committee note made since its publication for public comment but not noted in the agenda book. (These changes are among those listed at the end of this section.) He then discussed the public comments on the proposed new rule. There were many comments and much opposition to the notice requirement. Commenters gave various arguments against the notice requirement, including that it would make litigation more expensive, that it was unnecessary, and that it would steal attorneys' thunder. The advisory committee decided to delete the notice requirement from the proposed rule and instead discuss the issue of notice in the committee note.

Professor Capra also discussed the advisory committee's decision to use the "substantially outweighed" standard. This standard tracks that in Rule 403, and it is geared toward admitting illustrative aids. Based on the public comment, the advisory committee decided that it did not make sense for different tests to apply to evidence and illustrative aids.

Public comment also led the advisory committee to choose the new rule's location within the Federal Rules of Evidence. The rule was published for public comment as Rule 611(d) because Rule 611(a) is frequently used by courts to regulate illustrative aids. But Rule 611, which is in Article Six, is about witnesses, and illustrative aids are not really about witnesses. The new rule fits better in Article One, which is about rules of general applicability. Therefore the proposed rule was designated as new Rule 107.

Last, Professor Capra noted that a new subdivision (d) was added to new Rule 107 to direct courts and litigants to Rule 1006 for summaries of voluminous evidence because there is a lot of confusion in the courts about the difference between summaries and illustrative aids.

A practitioner member observed that he, like other members of the trial bar, had been very concerned about the proposed rule as published. He supported the deletion of the notice requirement and the use of "substantially outweighed" as the standard; he hoped that the latter would encourage the use of illustrative aids. The member stressed that some illustrative aids equate to a written version of the lawyer's actual presentation, such that providing advance notice of the aid would equate to a preview of that presentation. Such disclosures, he argued, would impair truth-seeking and increase the number of objections. So this member had concerns about the seventh paragraph of the committee note (shown on page 923 of the agenda book), which addressed the question of notice in a way that this member thought put too much of a thumb on the scale in favor of advance notice. The member suggested adding the following as the penultimate sentence of the paragraph: "In addition, in some cases, advance disclosure may

improperly preview witness examination or attorney argument or encourage excessive objections." Asked to explain what number of objections would be optimal, the member modified his suggested sentence by deleting "or encourage excessive objections." The member also suggested revising the last sentence of the paragraph to reflect the fact that often the parties will resolve issues concerning advance notice by agreement; Professor Capra expressed reluctance to make that change because the potential for the parties to resolve an issue by agreement exists for many types of disputes.

A judge member suggested cutting the entire paragraph discussing notice. The member thought that the paragraph reflected an increasingly outdated view, and it was heavily leaning in a direction objected to by so many commenters. At the least, this member argued, the sentence beginning with the word "ample" should be replaced with the sentence suggested by the practitioner member.

Another judge member likened issues surrounding the definition of "illustrative aid" to issues prevalent in disputes about summary witnesses. The member suggested refining the definition of illustrative aid so that it cannot be used as a vehicle to bring in extra-record information. Professor Capra thought that such a situation would be prevented by Rule 403: if an aid contained additional evidence not yet in the record, that additional evidence would be evaluated under Rule 403. The practitioner member suggested that the "substantially outweighed" standard would address this problem; a purported aid that contained evidence not in the record would be subject to multiple objections, including that it would create unfair prejudice. Professor Capra noted that the Rule 403 and Rule 107(a) balancing tests would work the same way.

Judge Bates asked what would happen if someone used some type of illustrative aid containing certain terms and added a definition not in evidence—supplying additional information beyond what had been admitted into evidence in the case. Professor Capra thought that Rule 403 would prevent that from happening because of the added information's prejudicial effect.

Judge Schiltz remarked that it is difficult to define illustrative aids to exclude those sorts of situations. The rule gives a negative definition of illustrative aids—that they are not evidence. The rule has to state the idea fairly generally and let trial judges apply it. For instance, the rule cannot say illustrative aids are limited to summaries or compilations because they are much broader than that.

The judge member who had raised the concern about the inclusion of extra-record information again suggested stating explicitly that an illustrative aid cannot include information not already in the record. Professor Capra asked if putting "admissible" on line 4—"understand *admissible* evidence or argument"—would be satisfactory. The judge member responded that, no, someone could help the trier of fact understand admissible evidence by introducing extra-record evidence, as in Judge Bates' earlier illustration. The judge member also thought that whether the aid's utility in assisting comprehension is substantially outweighed by the danger of unfair prejudice is not the correct test for introducing unadmitted evidence through illustrative aids; rather, the presence of that unadmitted evidence should disqualify the aid from being used altogether. But the rule currently does not have anything that prevents that.

The judge member further commented that it might be worth adding a requirement in (b) to tell the jury that illustrative aids are not evidence. Professor Capra responded that it was in the committee note instead because most rules of evidence do not address jury instructions in the text.

A practitioner member commented that it was important to keep in mind that the rule as it now stood encompassed illustrative aids used throughout a trial, including during opening and closing arguments. An illustrative aid during a closing argument will typically include argument; it may for example include headings that characterize evidence a certain way.

Professor Bartell suggested taking the fourth sentence of the first paragraph of the committee note and placing it in the rule text to define "illustrative aid." A judge member expressed support for that suggestion. Professor Capra said that the advisory committee, after repeated consideration, felt that the definition did not work as well in the rule text as in the committee note.

A judge member expressed appreciation for the proposed new rule, and predicted that it would clear up confusion concerning when an exhibit goes back to the jury. The rule does a good job of balancing the interests on that issue. The member also thought that attorneys would generally use common sense to know not to add unadmitted evidence to an illustrative aid. One textual addition that might help reinforce that behavior could be to add the word "the" before the word "evidence" in line 4 of Rule 107(a) as shown on page 920 of the agenda book—"understand *the* evidence or argument." The member further noted that it would probably be necessary to give limiting instructions to ensure that the jury uses illustrative aids properly. Professor Capra accepted the proposed edit of adding the word "the" before "evidence."

Judge Bates wondered if the concern about adding extra-record information evidence could be addressed by adding to the first paragraph of the committee note: "An illustrative aid may not be used to bring in additional information that is not in evidence." Judge Schiltz responded that that would limit argument too much—a lot of argument brings in information not technically in evidence. Judge Bates amended the suggested addition to refer to "additional factual information." Professor Capra reiterated his belief that if there is other evidence offered in the guise of an illustrative aid, it would be analyzed under Rule 403, not 107.

A judge member understood the concern raised about adding unadmitted evidence to an illustrative aid but thought it was not worth worrying about. It is like closing arguments—there is not a rule saying that something not in evidence cannot be mentioned in closing argument, yet any attempt to do so is met with an objection.

An academic member worried about the possibility that confusion about exactly what an illustrative aid is—how it is different, what it captures, what it does not capture, and how it is implemented—would create a flurry of objections and litigation. The answer might be to monitor the caselaw and anecdotal reports so as to learn how the rule is implemented.

Ms. Shapiro commented that the DOJ trial attorneys with whom she had spoken were thrilled to have a rule like this because the courts' treatment of illustrative aids—even their vocabulary—has been inconsistent.

Judge Bates asked whether the last sentence of the third paragraph of the committee note should be revised by adding "or argument" after "evidence" on page 922. Professor Capra accepted this change.

As to the seventh paragraph of the committee note (on page 923), Judge Bates also pointed out that a decision had to be made concerning the suggestions to delete or amend that paragraph's discussion of advance notice. Judge Schiltz recalled that a majority of the advisory committee members had favored a notice requirement; the committee understood the opposition to such a requirement, and had meant to accomplish a compromise by deleting the requirement from the rule text but including the notice discussion in the committee note. He was concerned about changing the committee note too much after achieving that compromise. He thought that adding the sentence about the possible downsides of advance notice and maybe other modest changes would be acceptable, but cutting the paragraph altogether would go too far.

A judge member suggested cutting the sentence that was the penultimate sentence of the seventh paragraph as shown on page 923 (the sentence that began "Ample advance notice"). Judge Schiltz agreed to that change. A judge member expressed support for retaining that sentence because it helpfully illustrated different scenarios for the use of illustrative aids; Professor Capra added that the sentence presented a balanced viewpoint. Another practitioner member, though, supported deleting the sentence because it focused on whether requiring advance notice *can* be done rather than whether it *should* be done—the latter being, in this member's view, the more important question. Judge Schiltz agreed that he would rather take out the sentence than possibly lose the support of those concerned about the notice issue.

A judge member questioned the use of the term "infinite variety" in the fourth sentence of the note paragraph concerning advance notice. Professor Garner suggested "wide variety," which Professor Capra accepted.

Professor Capra summarized the amendments to the proposal. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 107 with one change to the proposed rule to add "the" before "evidence" on line 4 on page 920 of the agenda book, and the following changes to the committee note as printed on pages 921–24 of the agenda book:**

- In the first paragraph, fifth line, in the phrase "as that latter term is vague and has been subject," the language "is vague and" was struck.

- In the second paragraph, third line, the word "factfinder" was changed to "trier of fact."

- In the second paragraph, last line, the language "to study it, and to use it to help determine the disputed facts" was changed to "and use it to help determine the disputed facts." The comma preceding this line was also struck.

- In the third paragraph, third line, the word "factfinder" was changed to "trier of fact." In the third paragraph, second-to-last line, the phrase "finder of fact" was changed to "trier of fact," and the phrase "or argument" was added after "understand evidence."

- In the fourth paragraph, second line, the word "information" was changed to "evidence."

- In the seventh paragraph (which commences "Many courts require"), the sentence "That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used," was changed to "That said, there is a wide variety of illustrative aids and a wide variety of circumstances under which they might be used."

- In the seventh paragraph, the sentence beginning "Ample advance notice" was struck and replaced with the sentence: "In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument."

Amendment to Rule 1006 (Summaries to Prove Content). Judge Schiltz reported on this item. The advisory committee sought final approval for an amendment to Rule 1006, which appeared on page 965 of the agenda book.

Rule 1006 allows a summary of voluminous admissible evidence to be admitted into evidence itself. Unlike an illustrative aid, these summaries are evidence and may go to the jury room and be used like any other evidence. The summary may be used in lieu of the voluminous underlying evidence or in addition to some or all of that voluminous underlying evidence.

Courts have had a great deal of difficulty with Rule 1006. Some incorrectly say that a Rule 1006 summary is not evidence; some incorrectly say that a Rule 1006 summary cannot be admitted unless all the underlying voluminous evidence is first admitted; and some incorrectly say that a Rule 1006 summary cannot be admitted if any of the underlying evidence has been admitted.

The proposed amendment would not change the substance of Rule 1006. It would instead clarify the rule in order to reduce the likelihood of errors.

Professor Richter reported that the advisory committee received seven public comments on the proposed amendment. Those comments were largely supportive. There was one note of criticism. A longstanding part of the foundation for a Rule 1006 summary is that the underlying voluminous materials must be admissible in evidence, even though they need not actually be admitted. Courts were not having a problem with that foundational requirement, so the advisory committee did not include it in the version published for public comment. The advisory committee recognized this omission and, at its Fall 2022 meeting, unanimously agreed to add the requirement of admissibility to the rule text. This addition was shown on page 965, line 5. That was the only change to the proposed amendment since the public-comment period.

Judge Bates asked whether, in line 4, the word "offered" should be added, so that the text reads, "The court may admit as evidence a summary, chart, or calculation *offered* to prove . . . ."

Turning to the fourth paragraph of the committee note, a judge member asked whether the verb "meet" in the phrase "meet the evidence" was sufficiently clear. After some discussion among the committee members and the advisory committee's representatives, the advisory committee's representatives agreed to replace the word "meet" with "evaluate."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 1006 with the following changes: in**

the rule text, adding the word "offered" after "calculation" as shown on page 965, line 4, of the agenda book; and in the fourth paragraph of the committee note, replacing the word "meet" with "evaluate."

Amendment to Rule 613(b) (Extrinsic Evidence of a Prior Inconsistent Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 613(b), which appeared on page 952 of the agenda book.

Rule 613(b) addresses the situation in which a witness takes the stand and testifies, and a party wants to impeach that witness by introducing extrinsic evidence—for example, the testimony of another witness, or a document— that the witness made an inconsistent statement in the past. Under the common law, before that party is allowed to bring in that extrinsic evidence to show that the witness made an inconsistent statement in the past, the witness had to be given a chance to explain or deny making the statement. This is called the requirement of prior presentation.

Rule 613(b) took the opposite approach: as long as sometime during the trial the witness had a chance to explain or deny the prior inconsistent statement, the extrinsic evidence could come in. But most judges ignore this rule—Judge Schiltz admitted ignoring it himself—and follow the common law. The common-law rule makes sense because the vast majority of the time, the witness will admit making the inconsistent statement, obviating the need to unnecessarily lengthen the trial by admitting the extrinsic evidence. Further, if the extrinsic evidence is admitted after the witness testifies, then someone has to bring the witness back for the chance to explain or deny it—and the witness may have flown across the country.

The proposed amendment therefore restores the common-law requirement of prior presentation. But it gives the court discretion to waive it—for example, if a party was not aware of the inconsistent statement until the witness finished testifying.

Professor Richter reported that the advisory committee received four public comments on Rule 613(b), all in support of restoring the prior-presentation requirement. The comments noted that it would make for orderly and efficient impeachment and impose no impediment to fairness. The proposal would also align the rule's text with the practice followed in most federal courts. There was no change to the rule text from the version that was published for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 613(b).**

Amendment to Rule 801(d)(2) (An Opposing Party's Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 801(d)(2), which appeared starting on page 956 of the agenda book.

Rule 801(d)(2) provides an exception to the hearsay rule for statements of a party-opponent. Courts are split about how to apply this rule when the party at trial is not the declarant but rather the declarant's successor in interest. For example, suppose the declarant is injured in an accident, makes an out-of-court statement about the incident that caused the declarant's injuries, then dies. If the declarant's estate sues, may the defendant use the deceased declarant's out-of-court statement against the estate? Some courts say yes because the estate just stands in the shoes of the declarant and should be treated the same. Some courts say no because it was technically the

human-being declarant who made the out-of-court statement, not the legal entity (the estate) that is the actual party.

The proposed amendment would adopt the former position: if the statement would be admissible against the declarant as a party, then it's also admissible against the party that stands in the shoes of the declarant. The advisory committee thought that the fairest outcome, and it also eliminates an incentive to use assignments or other devices to manipulate litigation.

Professor Capra reported that there was sparse public comment. Some comments suggested that the term "successor in interest" be used, but that was problematic because the term is used in another evidence rule, where it is applied expansively. Because it is not supposed to be applied expansively here, the committee did not adopt that change.

Judge Bates highlighted the statement in the committee note's last paragraph, that if the declarant makes the statement after the rights or obligations have been transferred, then the statement would not be admissible. He asked whether that was a substantive provision and whether there was an easy way to express it in the rule's text. Professor Capra responded that there was not an easy way to express it in the text, and this issue would arise very rarely. Furthermore, the rationale for attribution would not apply if the interest has already been transferred. The advisory committee decided in two separate votes not to include that issue in the rule text and instead to keep it in the committee note.

Turning back to the proposed rule text on line 29 of page 957 ("If a party's claim, defense, or potential liability is directly derived …"), Professor Hartnett asked whether "directly" was the appropriate term to use. For example, if a right passes through two assignments or successors in interest, would "directly derived" capture that scenario? Professor Capra responded that the term comes from the case law, and "derived" on its own seemed too diffuse.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 801(d)(2).**

Amendment to Rule 804(b)(3) (Statement Against Interest). Judge Schiltz reported on this item. The advisory committee sought final approval of a proposed amendment to Rule 804(b)(3), which appeared starting on page 960 of the agenda book.

Rule 804(b)(3) provides an exception to the hearsay rule for declarations against interest. The proposed amendment addresses a particular application of that rule.

In a criminal case in which the out-of-court statement is a declaration against penal interest—typically, a statement by somebody outside of court that the declarant was the one who actually committed the crime for which the defendant is now on trial—then the proponent of that statement must provide corroborating circumstances that clearly indicate the trustworthiness of the statement.

There's a dispute in the courts about how to decide if such corroborating circumstances exist. Some courts say that the judge may only look at the inherent guarantees of trustworthiness underlying the statement itself, not at any independent evidence (such as security-camera footage

or DNA evidence) that would support or refute the out-of-court confession. But most courts say the judge can look at independent evidence.

The proposed amendment resolves the split. It takes the side of the courts that say that the judges *can* look at independent evidence.

Professor Richter noted that the advisory committee received five public comments on this proposal, all of them in support. But several expressed confusion because, as originally drafted, the proposed rule used the term "corroborating" twice in the same sentence. The distinction was not clear between the finding of "corroborating circumstances" that a court had to make and the corroborating "evidence" that a court could use to make that finding.

The advisory committee modified the text slightly to avoid using the term "corroborating" twice and to clarify the distinction between the finding and the evidence. The revised rule text directs the court to consider "the totality of circumstances under which [the out-of-court statement] was made and any evidence that supports or contradicts it." Conforming changes were made to the committee note. The committee note also explains that a 2019 amendment to the residual hearsay exception (Rule 807) that does the same thing—expanding the evidence a court may use to find trustworthiness under that exception—should be interpreted similarly, even though amended Rules 804(b)(3) and 807 use slightly different wording.

A judge member observed that the criterion in the rule—that the statement tends to expose the declarant to criminal liability—was broader than Judge Schiltz's explanation that the statement exposes the declarant to criminal liability for the crime for which the defendant is being tried; the member asked which was the intended test. Judge Schiltz responded that his explanation was just the most common example, and the rule still reaches all statements exposing the declarant to criminal liability.

Judge Bates asked whether it is correct to say in the committee note that the language used in Rule 807, speaking only of "corroborating" evidence, is consistent with the "evidence that supports or contradicts" language in the proposed amendment to Rule 804. "Supporting or contradicting evidence" includes evidence that is not "corroborating." Professor Capra responded that, because Rule 807's committee note also discusses an absence of evidence, courts applying the post-2019 Rule 807 have considered evidence contradicting the account. Thus, the two rules, though not identical, are consistent. Judge Schiltz noted that the current proposal gets to the same point in a cleaner way. Professor Capra also remarked that the phrase "corroborating circumstances" was not changed because it has been in the rule for 50 years and there is a lot of law about it.

A judge member asked why the proposed rule uses a narrow term like "contradicts" instead of a broader term like "undermines," given that "supports" is a broad statement and the opposing term ought to have similarly broad scope. After some discussion, the advisory committee representatives agreed to replace "contradicts" with "undermines" (in line 27 on page 961 of the agenda book) and to make a corresponding change to the committee note.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 804(b)(3) with the following changes:**

in the text of Rule 804(b)(3)(B), replacing "contradicts" with "undermines," and making the same change in the committee note.

Information Item

Juror Questions. Judge Schiltz reported on this item. The advisory committee proposed an amendment that would have established minimum procedural protections if a court decided to let jurors pose questions for witnesses. The proposed rule was clear that the advisory committee did not take any position on whether that practice should be allowed.

The advisory committee presented this proposal at a previous meeting of the Standing Committee. Some members of the Standing Committee expressed concern that putting safeguards in the rules would encourage the practice.

The matter was returned to the advisory committee for further study. It held a symposium on the topic at its Fall 2022 meeting. The advisory committee then discussed the issue at its Spring 2023 meeting and decided to table the proposal. There was significant opposition to it even within the advisory committee.

Professor Capra noted that the advisory committee has sent its work to the committee updating the Benchbook for U.S. District Court Judges. Judge Schiltz explained that the advisory committee suggested that the proposed procedural safeguards may be appropriate for inclusion in the revision of the Benchbook that is currently being worked on.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (CONTINUED)

Information Items (Continued)

Rule 41(a)(1)(A) (Voluntary Dismissal by the Plaintiff Without a Court Order). Professor Bradt reported on this item.

The question under this rule is: what and when may a plaintiff voluntarily dismiss without a court order and without prejudice? The rule refers to the plaintiff's ability to voluntarily dismiss an "action." What does that word mean? Does it mean the entire case, all claims against all defendants? Or can it mean something less? The circuits are split on whether a plaintiff could dismiss all claims against one defendant in a multidefendant case. There's also a district-court split about whether a plaintiff may voluntarily dismiss even less without a court order, such as an individual claim.

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, is trying to figure out whether and to what extent this is a real-world problem rather than one that courts effectively muddle through. That is, can judges effectively narrow cases, despite the fact that Rule 41(a)(1)(A) speaks only of an "action"? Since the January 2023 Standing Committee meeting, the Rule 41 Subcommittee has conducted outreach with Lawyers for Civil Justice and the American Association for Justice, and it has an upcoming meeting with the National Employment Lawyers Association.

If this is a real problem, the next step would be to ask whether it can be solved by consensus. The subcommittee may need to consider the deeper question of how much flexibility a plaintiff ought to have. And if a plaintiff does have that flexibility, by when must it be exercised? The rule currently says that a plaintiff has until the answer or a motion for summary judgment is filed. But there might be a good reason to move that deadline up to the filing of a Rule 12 motion to dismiss. Further, an amendment to Rule 41 might have downstream effects on other rules designed to facilitate flexibility during litigation, such as Rule 15.

Judge Bates observed that the Eleventh Circuit in Rosell v. VMSB, LLC, 67 F.4th 1141, 1143 (11th Cir. 2023), recently held that an "action" means the whole case and therefore dismissed an appeal for lack of jurisdiction. It seems to be an issue that is live in the courts and could be causing problems for litigants.

Professor Bradt noted that the word "action" also appears in, and the interpretive questions thus extend to, Rule 41(a)(2) (concerning dismissals by court order).

Rule 7.1 (Disclosure Statement). Professor Bradt reported on this item.

The advisory committee has formed a subcommittee to examine Rule 7.1, which requires corporate litigants to disclose certain financial interests. The rule helps inform judges whether they must recuse themselves because of a financial interest in a party or the subject matter. It requires a party to disclose its ownership by a parent corporation. The problem is that the rule may not accurately reflect all of the different kinds of ownership interests that may exist in a party. One topic under discussion is when a "grandparent" corporation owns the parent corporation.

This issue has gotten a great deal of attention from the public and from Congress. At the last advisory-committee meeting, a subcommittee to investigate the issue was appointed, and it will be chaired by Justice Jane Bland of the Texas Supreme Court. The subcommittee will have its first meeting soon. It will initially research the relevant case law and local rules in the federal courts, and it will also look to state courts for insight into how best to resolve the issue.

Professor Beale wondered whether the Administrative Office or some other entity could create a database in which one could query a corporation and find all ownership interests in the corporation, in the corporation's owners, and so on, rather than depending on parties' disclosures. Professor Bradt responded that the subcommittee is going to look at this possibility, but a technological solution may be challenging because of the proliferation of many kinds of corporate structures.

Professor Bradt noted that it might make sense for the subcommittee to work with the Appellate Rules Committee on this issue because many of the questions addressed during the report about amicus disclosures parallel the questions the subcommittee will be addressing in this project.

A practitioner member commented that law firms have to investigate corporate ownership for conflict purposes. Services already exist with this information. The wheel does not necessarily need to be reinvented. Professor Bradt agreed, but also noted that the subcommittee wants to be mindful of whether those services would be sufficiently accessible to parties with fewer resources.

Additional Items. Professor Marcus briefly reported on several additional items.

Rule 23, dealing with class actions, is before the advisory committee again, this time with respect to two different issues. First, in a recent First Circuit opinion, Judge Kayatta addressed the question of incentive awards for class representatives. Because the Supreme Court has so far declined to grant certiorari on this issue, it remains before the advisory committee. Second, the Lawyers for Civil Justice suggested a change to Rule 23(b)(3) on the "superiority" prong to let a court conclude that some nonadjudicative alternative might be superior to a class action.

The advisory committee also continues to look at methods to sensibly handle applications for in forma pauperis ("IFP") status. Perhaps it should even be called something different so that people who are eligible will understand what IFP means.

Finally, three suggestions have been removed from the advisory committee's agenda. The first, suggested in 2016 by Judge Graber and then-Judge Gorsuch, would have amended Rule 38, dealing with jury-trial demands, in response to the declining frequency of civil jury trials. But studies suggest that Rule 38 is not the source of the problem, so an amendment to the rule did not seem the appropriate solution.

Second, Senators Tillis and Leahy wrote to the Chief Justice about a district judge who was extremely active in patent-infringement cases. This judge purportedly held several *Markman* hearings a week, using deputized masters or judicial assistants to assist him with that caseload. The senators did not believe that Rule 53 authorized that kind of use of special masters. But the senators did not suggest that Rule 53 should be changed. Also, the relevant court has revised its assignment of patent-infringement cases in a way that can reduce this problem. This item is therefore no longer on the advisory committee's agenda.

Third, an attorney proposed amending Rule 11 to forbid state bar authorities to impose any discipline on anyone who is accused of misconduct in federal court unless a federal court has already imposed Rule 11 sanctions. Because this proposal misconstrues the function of Rule 11, the advisory committee removed this proposal from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge James Dever and Professors Sara Sun Beale and Nancy King presented the report of the Advisory Committee on Criminal Rules, which last met in Washington, D.C., on April 20, 2023. The advisory committee presented three information items and no action items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 875.

Information Items

Rule 17 and Pretrial Subpoena Authority. Judge Dever reported on this item. Judge Jacqueline Nguyen chairs the Rule 17 Subcommittee. Rule 17, which deals with subpoenas in criminal trials, has not been updated in about 60 years. The New York City Bar Association's White Collar Crime Committee submitted a proposal to amend it.

The advisory committee responded to the proposal by first asking whether there is a problem with how Rule 17 currently works. It began gathering information in its October 2022 meeting, and it has continued that information-gathering by asking how companies that deal with big data respond to subpoenas.

About a third of the states have criminal-subpoena rules that are structured differently than the federal rules. The Rule 17 Subcommittee reported on the topic at the advisory committee's April 2023 meeting.

The advisory committee is considering how to appropriately distinguish procedurally between protected information, such as medical records, personnel records, or privileged information, and other information, such as a video of events occurring outside a store.

Professor Beale added that the subpoena issue is an important question. Defense attorneys have very little means to get information from third parties because Rule 17 has been so narrowly interpreted.

Rule 23 and Jury-Trial Waiver Without Government Consent. Judge Dever reported on this item.

The American College of Trial Lawyers' Federal Criminal Procedure Committee submitted a proposal to amend Rule 23(a) to eliminate the requirement that the government consent to a defendant's request for a bench trial.

Currently, a defendant must waive a jury trial in writing, the government must consent, and the court must also approve the waiver. About a third of the states do not require the prosecution's consent to waive a jury trial. The federal rules have always required it.

The advisory committee has not yet appointed a subcommittee to review the proposal. It has asked the Federal Defenders and Criminal Justice Act lawyers on the advisory committee to gather more information. One premise of the proposal was that there is a backlog of trials because of COVID, but none of the district judges on the advisory committee had had that experience. So the advisory committee wanted to gather more information. That process is ongoing.

The advisory committee is also trying to gather information on what rationales, if any, the DOJ gives for not consenting to a jury trial. Part of what animates the discussion is that, although the Sixth Amendment talks about the accused's right to a jury trial, Article III, Section 2's directive that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" does not mention the defendant. So the United States actually has its own, independent interest in having a jury trial.

Professor Beale predicted that the Rule 23 proposal would generate interesting discussion about whether it is appropriate for parties to be adversarial about demands or waivers of juries or whether there is something different about the jury as an institution that makes it inappropriate for parties to try to demand it or waive it for strategic advantage. There are also apparently differences in the government's practices among the 94 judicial districts. She thought that the advisory committee's attention to the issue might spur the DOJ to change its process on its own.

Judge Bates asked to clarify whether the Rule 23 investigation would only focus on the government's consent to bench trials, not court approval. Professor Beale confirmed that the proposal focused only on government consent.

Professor Marcus remarked that the proposal seems to expand the court's power by letting it decide whether to grant the defendant's request for a bench trial even though the government does not consent.

Judge Dever reiterated that only a minority of the states' practices currently align with the proposal. The federal rule had always required the government's consent, and the Supreme Court has rejected a constitutional challenge to it.

Judge Bates concluded by noting that the DOJ, whose practices vary from district to district, had volunteered to provide information about what they do and have done with respect to requests for bench trials.

Rule 49.1 (Privacy Protections for Filings Made with the Court). As to this item, Judge Dever deferred to Professor Bartell's previous report on Senator Wyden's suggestion concerning privacy protections and court filings.

OTHER COMMITTEE BUSINESS

Information Item

Legislative Update. Judge Bates and Mr. Pryby stated that there was no significant legislative activity to report since the last meeting of the Standing Committee.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to provide input to the Judicial Conference's Executive Committee about the strategic plan for the federal judiciary. Judge Bates requested comment, either then or after the meeting, on the draft report that began on page 1005 of the agenda book.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff and Professor Struve to move forward with the report. Without objection: **The Standing Committee so authorized Judge Bates.**

New Business

No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the committee members for their contributions and patience. The Standing Committee will next convene on January 4, 2024.

Agenda E-19 (Summary)
Rules
September 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-3

2. a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law

   b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

   c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 5-9

3. Approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 12-13

4. Approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 17-19

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

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 June 6, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee (9th Cir.), chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), 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 (E.D.N.C.), chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz (D. Minn.), chair, Professor Daniel J. Capra, Reporter, and Professor Liesa Richter, consultant, 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; Christopher Ian Pryby, 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. An additional update concerned the start of coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees to evaluate a proposal to adopt a unified standard for admission to the bar of federal district and bankruptcy courts. Finally, the Standing Committee approved a brief report regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 32 (Form of Briefs, Appendices, and Other Papers), Rule 35 (En Banc Determination), Rule 40 (Petition for Panel Rehearing), and Appendix of Length Limits

The Advisory Committee completed a comprehensive review of the rules governing panel and en banc rehearing, resulting in proposed amendments transferring the content of Rule 35 to Rule 40, bringing together in one place the relevant provisions dealing with rehearing. The proposed amendments to Rule 40 would clarify the distinct criteria for rehearing en banc

and panel rehearing, and would eliminate redundancy. Rule 32 and the Appendix of Length Limits would be amended to reflect the transfer of the contents of Rule 35 to Rule 40. The proposed amendments were published in August 2022. The Advisory Committee reviewed the public comments and made no changes.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rule 6 (Appeal in a Bankruptcy Case) and Rule 39 (Costs on Appeal) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Appellate Rule 6 would clarify the treatment of appeals in bankruptcy cases. A proposed amendment to Appellate Rule 6(a) would account for the fact that the time limits for certain post-judgment motions that reset the time to take an appeal from a district court to a court of appeals are different when the district court was exercising bankruptcy jurisdiction under 28 U.S.C. § 1334 than when it was exercising original jurisdiction under other statutory grants. The proposed committee note provides a table showing which Bankruptcy Rule governs each relevant type of post-judgment motion and the time allowed under the current version of the applicable Bankruptcy Rule. Proposed amendments to Appellate Rule 6(c) would address direct appeals in bankruptcy cases, which are governed by 28 U.S.C. § 158(d)(2). The Advisory Committee determined that Rule 6(c)'s current reliance on Rule 5 (Appeal by Permission) was misplaced and that there is considerable confusion in applying the Appellate

Rules to direct appeals. For that reason, the proposed amendments to Rule 6(c) would address direct appeals in a largely self-contained way. Finally, the proposed amendments also provide more detailed guidance for litigants about initial procedural steps once authorization is granted for a direct appeal to the court of appeals.

Rule 39 (Costs)

The proposed amendments to Rule 39 would clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals or the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments would codify the holding in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628 (2021)— 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— and would provide a clearer procedure to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments would make Rule 39's structure more parallel by adding a list of the costs taxable in the court of appeals to the current rule, which lists only the costs taxable in the district court.

Information Items

The Advisory Committee met on March 29, 2023. In addition to the proposals noted above, the Advisory Committee discussed several other matters. The Advisory Committee has been considering potential amendments to Rule 29 (Brief of an Amicus Curiae) for several years and considered possible amendments requiring the disclosure by amici curiae of information about contributions by parties and nonparties. In addition, the Advisory Committee completed a draft of amended Form 4 to create a more streamlined and less intrusive form to use when seeking to proceed in forma pauperis. Because the Rules of the Supreme Court require litigants to use the same form, the draft has been provided to the Clerk of the Supreme Court for review.

Finally, the Advisory Committee discussed new suggestions, including a suggestion regarding the redaction of Social Security numbers in court filings, a suggestion for a possible new rule regarding intervention on appeal, a suggestion regarding third-party litigation funding, and a suggestion to follow the Supreme Court's lead in permitting the filing of amicus briefs without requiring the consent of the parties or the permission of the court.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: the proposed Restyled Bankruptcy Rules;[1] proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006; new Rule 8023.1;[2] the abrogation of Official Form 423; and a proposed amendment to Bankruptcy Official Form 410A. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Restyled Rules Parts I–IX (the 1000–9000 series of Bankruptcy Rules)

The Bankruptcy Rules are the fifth and final set of national procedural rules to be restyled. The Restyled Bankruptcy Rules were published for comment over several years in three sets: the 1000–2000 series of rules were published in August 2020, the 3000–6000 series in August 2021, and the final set, the 7000–9000 series, in August 2022. After each publication period, the Advisory Committee on Bankruptcy Rules carefully considered the comments received and made recommendations for final approval based on the same general drafting

[1]The Restyled Bankruptcy Rules are at Appendix B, pages 1-454. They are in side-by-side format with the existing unstyled version of each rule on the left and the proposed restyled version shown on the right. The unstyled left-side versions of the following rules reflect pending rule changes currently on track to take effect December 1, 2023, absent contrary action by Congress: Amended Rules 3011, 8003, 9006, and new Rule 9038.

[2]The proposed substantive changes to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1 are set out separately and begin at Appendix B, page 455. The changes, underlining and strikeout, are shown against the proposed restyled versions of those rules.

guidelines and principles used in restyling the Appellate, Criminal, Civil, and Evidence Rules, as outlined below. The Restyled Bankruptcy Rules as a whole, including the revisions based on public comments and a final, comprehensive review, are now being recommended for final approval.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996), and Bryan A. Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). S*ee also* Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure*, Mich. Bar J., Sept. 2005, at 56 and Mich. Bar J., Oct. 2005, at 52; Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using consistent formatting to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules clearer and make the restyled rules easier to read and understand even when the words are not changed.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words. The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words, as well as redundant "intensifiers"—expressions that attempt to add emphasis but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the

restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers. The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

No Substantive Change. The style changes to the rules are intended to make no changes in substantive meaning. The Advisory Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Advisory Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. One example is "meeting of creditors," a term that is widely used and well understood in bankruptcy practice.

Rules Enacted by Congress. Where Congress has enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 361), and Rule 7004(b) and (h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4118), the Advisory Committee has not restyled the rule.

<u>Amendments to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), related amendments to Rules 4004 (Grant or Denial of Discharge), 5009 (Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied), and 9006 (Computing and Extending Time; Time for Motion Papers), and abrogation of Official Form 423 (Certification About a Financial Management Course)</u>

The amendments to Rule 1007(b)(7) delete the directive to file a statement on Official Form 423 (Certification About a Financial Management Course) and make filing the course certificate itself the exclusive means showing that the debtor has taken a postpetition course in

personal financial management. References in other parts of Rule 1007 and in Rules 4004, 5009, and 9006 to the "statement" required by Rule 1007(b)(7) are changed to refer to a "certificate." Because Official Form 423 is no longer necessary, the Advisory Committee recommends that it be abrogated.

Rule 7001 (Scope of Rules of Part VII)

The amendment to Rule 7001(a) creates an exception for certain turnover proceedings under § 542(a) of the Code. An individual debtor may need an order requiring the prompt return by a third party of tangible personal property—such as an automobile or tools of the trade—in order to produce income to fund a plan or to regain the use of exempt property. As noted by Justice Sonia Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585, 592–95 (2021), the procedures applicable to adversary proceedings can be unnecessarily time-consuming in such a situation. Instead, the proposed amendment allows the debtor to seek turnover of such property by motion under § 542(a), and the procedures of Rule 9014 would apply. [3]

Rule 8023.1 (Substitution of Parties)

New Rule 8023.1 is modeled on Appellate Rule 43. Neither Appellate Rule 43 nor Civil Rule 25 applies to parties in bankruptcy appeals to the district court or bankruptcy appellate panel. This new rule is intended to fill that gap by providing consistent rules (in connection with such appeals) for the substitution of parties upon death or for any other reason.

Official Form 410A (Proof of Claim, Attachment A)

Part 3 of Form 410A is amended to provide for separate itemization of principal due and interest due. Because under Bankruptcy Code § 1322(e) the amount necessary to cure a default

[3]As noted by Justice Sotomayor, "Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days [citation omitted]. One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments." *Fulton*, 141 S. Ct. at 594.

is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages under § 1325(a)(5) to know which portion of the total arrearages is principal and which is interest.

Recommendation: That the Judicial Conference:

a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1 and 8006 and proposed six new Official Forms related to the Rule 3002.1 amendments, Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation with one change, discussed below, to Rule 3002.1.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

In response to suggestions submitted by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy, the Advisory Committee proposed amendments to Rule 3002.1 that were published for comment

in 2021. The proposed amendments—intended to encourage a greater degree of compliance with the rule's provisions—included a new midcase assessment of the mortgage claim's status in order to give the debtor time to cure any postpetition defaults that may have occurred, new provisions concerning the effective date of late payment-change notices, and requirements concerning notice of payment changes for a home equity line of credit ("HELOC"). Additionally, the proposed amendments would have changed the assessment of the status of the mortgage at the end of a chapter 13 case from a notice to a motion procedure that would result in a binding order.

There were 27 comments submitted in response to the proposed amendments. Many of them identified concerns about the midcase review and end-of-case procedures. The comments led the Advisory Committee to recommend several changes to the rule as published. Among those changes, the provision for giving only annual notices of HELOC changes is made optional. The proposed midcase review procedure is also made optional, can be sought at any time during the case, is done by motion rather than by notice, and can be initiated either by the debtor or the trustee, not just the trustee as initially proposed. Changes are also made to the end-of-case procedures in response to the comments, including initiating the process by notice rather than by motion from the case trustee.

In addition to the changes discussed above, the Advisory Committee also recommended changes to current Rule 3002.1(i) (which would become Rule 3002.1(h)) to clarify the scope of relief that a court may grant if a claimholder fails to provide any information required under the rule. Following concerns raised during the Standing Committee meeting, the Advisory Committee chair withdrew one aspect of those proposed changes to allow for further consideration and possible resubmission at a later time.

Because the changes to the originally published amendments are substantial, and further public input would be beneficial, the Advisory Committee sought republication of the new proposed amendments to Rule 3002.1. After the Advisory Committee chair withdrew the portion of the proposed amendments noted in the preceding paragraph concerning current Rule 3002.1(i), the Standing Committee unanimously approved for publication the remainder of the proposed amendments to Rule 3002.1.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

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.

Official Forms Related to Proposed Amendments to Rule 3002.1

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-N (Trustee's Notice of Payments Made),
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made),
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim),
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim)

The proposed amendments to Rule 3002.1 that were published for comment in 2021 called for five Official Forms to implement the proposed procedures. As a result of its recommendation to republish proposed Rule 3002.1, and the substantial changes to the proposed

procedures, the Advisory Committee now seeks publication of six proposed implementing Official Forms.

Information Items

The Advisory Committee met on March 30, 2023. In addition to the recommendations discussed above, the Advisory Committee gave preliminary consideration to a suggestion to require redaction of the entire Social Security number from filings in bankruptcy, a new suggestion to adopt national rules addressing electronic debtor signatures, changes to the timing of clerk notices of a debtor's failure to file the certificate showing completion of a personal financial management course, and a rule amendment that would require the debtor to disclose certain assets obtained after the petition date.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rule 12(a). The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing)

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language could be read to suggest unintended preemption of statutory time directives. While it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. The current rule fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Thus, the current language could be mistakenly interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) are intended to supersede inconsistent statutory provisions, especially because paragraph (1) includes specific language deferring to different periods established by statute.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1)---namely, that a different response time set by statute supersedes the response times set by those rules. After public comment, the Advisory Committee recommended final approval of the rule as published.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b)(3) would provide that the court may address the timing and method of such compliance in its scheduling order. During the January 2023 Standing Committee meeting, members expressed differing views concerning the length of, and level of detail in, the committee notes that would accompany the proposed amendments. The Advisory Committee subsequently reexamined the notes in light of that discussion, and at the June 2023 Standing Committee meeting, the Advisory Committee presented shortened notes to accompany the proposed amendments.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings, which the Civil Rules do not expressly address. After several years of work by its MDL Subcommittee, extensive discussions with interested bar groups, and consideration of multiple drafts, the Advisory Committee unanimously recommended that new Rule 16.1 be published for public comment.

Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after transfer. An initial MDL management conference allows for early attention to matters identified in Rule 16.1(c), which may be of great value to the transferee judge and the parties. Because not all MDL proceedings present the same type of management challenges, there may be some MDL proceedings in which no initial management conference is

needed, so proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b) recognizes that the transferee judge may designate coordinating counsel---before the appointment of leadership counsel—for the initial MDL conference. The court may appoint coordinating counsel to ensure effective and coordinated discussion and to provide an informative report.

Rule 16.1(c) encourages the court to order the parties to submit a report prior to the initial MDL conference. The court may order that the report address, inter alia, any matter under Rules 16.1(c)(1)–(12) or Rule 16. The rule provides a series of prompts for the court to consider, identifying matters that are often important to the management of MDL proceedings, including (1) whether to appoint leadership counsel; (2) previously entered scheduling or other orders; (3) principal factual and legal issues; (4) exchange of information about factual bases for claims and defenses; (5) consolidated pleadings; (6) a discovery plan; (7) pretrial motions; (8) additional management conferences; (9) settlement; (10) new actions in the MDL proceeding; (11) related actions in other courts; and (12) referral of matters to a magistrate judge or master.

Rule 16.1(d) provides for an initial MDL management order, which the court should enter after the initial MDL management conference. The order should address matters the court designates under Rule 16.1(c) and may address other matters in the court's discretion. This order controls the MDL proceedings until modified.

Information Items

The Advisory Committee met on March 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 23 (Class Actions) regarding awards to class representatives in class actions and

the superiority requirement for class certification, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, and Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena. The Advisory Committee also discussed issues related to sealed filings, the standards for in forma pauperis status, and the mandatory initial discovery pilot project.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 20, 2023. The Advisory Committee considered several information items.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17 (Subpoena). On issues related to third-party subpoenas, the Advisory Committee has heard from a number of experienced attorneys, including defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. Through its Rule 17 Subcommittee, the Advisory Committee has collected information from experts regarding the Stored Communications Act and other issues relating to materials held online, as well as issues affecting banks and other financial service entities.

A new proposal from the American College of Trial Lawyers would allow the defendant to waive trial by jury without the government's consent. The Advisory Committee discussed this proposal and its previous consideration of this issue in connection with deliberations over new Criminal Rule 62 (part of the set of proposed rules—currently on track to take effect December 1, 2023, absent contrary action by Congress—that resulted from the CARES Act directive that rules be considered to address future emergencies).

Finally, the Advisory Committee voted to remove two items from its study agenda: a suggestion to clarify Rule 11(a)(2), which governs conditional pleas, and a suggestion to amend Rule 11(a)(1) to provide for a plea of not guilty by reason of insanity.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee's recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the trier of fact in understanding evidence) is sometimes a difficult one to draw, and the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards. The proposed amendment, originally published for public comment as a new subsection of Rule 611, would provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening

and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness's Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest. The Advisory Committee reasoned that admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also

any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

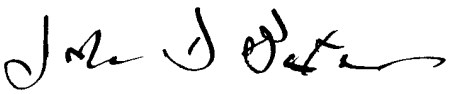
The Advisory Committee on Evidence Rules met on April 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed possible amendments to add a new subdivision to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) to address permitting jurors to submit questions for witnesses. Proposed amendments setting forth the minimum safeguards that should be applied if a trial court decided to allow jurors to submit questions for witnesses were under consideration for some time, but doubts about the practice of allowing jurors to submit questions for witnesses led the Advisory Committee to table any possible proposed amendments. The Advisory Committee referred the issue to the committee

updating the Benchbook for U.S. District Court Judges, and it is being considered for inclusion in the Benchbook.

JUDICIARY STRATEGIC PLANNING

The Standing Committee approved a brief report on the strategic initiatives that the Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler (N.D. Ala.), judiciary planning coordinator.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Robert J. Giuffra, Jr.	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Carolyn B. Kuhl	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

* * * * *

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- 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.	

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- 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
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.	

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REA History:

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- 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:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- 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:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- 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

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, Summary, and Committee Report	Legislative Actions Taken
To designate Indigenous Peoples' Day as a legal public holiday and replace the term "Columbus Day" with the term "Indigenous Peoples' Day", and for other purposes.	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 55 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** Not yet available **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee
National Defense Authorization Act for Fiscal Year 2024	**H.R. 2670** *Sponsor:* Rogers (R-AL) *Cosponsor:* Smith (D-WA) **S. 2226** *Sponsor:* Reed (D-RI)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670eas.pdf https://www.congress.gov/118/bills/s2226/BILLS-118s2226es.pdf **Summary:** Section 9011(a)(2)(B) of H.R. 2670, as amended and passed by the Senate but disagreed to by the House, and of S. 2226, as passed by the Senate, would deem that a "request for disclosure of unidentified anomalous phenomena, technologies of unknown origin, and non-human intelligence materials . . . constitute[s] a showing of particularized need under rule 6 of the Federal Rules of Criminal Procedure."	• 09/20/2023: House appointed conferees and requested a conference to resolve differences • 09/19/2023: House disagreed to the Senate amendment to H.R. 2670 • 07/27/2023: Senate passed S. 2226 with an amendment (86–11); Senate amended H.R. 2670 by striking all after the Enacting Clause and substituting the language of S. 2226, as amended; Senate passed H.R. 2670, as amended, by unanimous consent • 07/26/2023: H.R. 2670 received in Senate • 07/14/2023: H.R. 2670 passed House (219–210) • 07/11/2023: S. 2226 introduced in Senate • 06/21/2023: H.R. 2670 ordered to be reported as amended (58–1). • 04/18/2023: H.R. 2670 introduced in House;

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
				referred to Armed Services Committee
Protecting Our Courts from Foreign Manipulation Act of 2023	**H.R. 5488** *Sponsor:* Johnson (R-LA) *Cosponsors:* Tiffany (R-WI) Van Drew (R-NJ) **S. 2805** *Sponsor:* Kennedy (R-LA) *Cosponsor:* Manchin (D-WV)	CV 26(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5488/BILLS-118hr5488ih.pdf https://www.congress.gov/118/bills/s2805/BILLS-118s2805is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party "foreign person, foreign state, or sovereign wealth fund . . . that has a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise. . . ." Would require disclosure of the source of funding and, by default, a copy of any agreement creating the contingent right. Would prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 09/14/2023: H.R. 5488 introduced in House; referred to Judiciary Committee • S. 2805 introduced in Senate; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 90 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 34 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 rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices' nomination, confirmation, or appointment. Would require expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge.	• 09/05/2023: Placed on Senate Legislative Calendar under General Orders. Calendar No. 199. • 07/20/2023: S. 359 ordered to be reported favorably, with an amendment • 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:**	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			Would require promulgation of Rules to put any criminal surveillance order, including search warrants, on the public docket and/or create a case number and caption. There would be exceptions to address personal information and where the surveillance applicant asks the court to seal the order. Would amend Criminal Rule 41(f)(1)(B) by adding that an inventory shall disclose information about any electronic information.	
Protecting Girls with Turner Syndrome Act of 2023	**H.R. 5167** *Sponsor:* Feenstra (R-IA) *Cosponsors:* Banks (R-IN) Miller (R-IL)	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5167/BILLS-118hr5167ih.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed. Would create a private cause of action and criminal penalties and impose a duty on courts "to expedite to the greatest possible extent" such matters.	• 08/08/2023: H.R. 5167 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 127 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would amend existing rules and direct the Judicial Conference to promulgate additional rules to, for example: • Preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President; and • "[E]nsure the expeditious treatment of" civil actions to enforce congressional subpoenas. Would require the new rules to be transmitted within 6 months of the effective date of the bill.	• 07/27/2023: H.R. 5048 introduced in House; referred to several House Committees–Oversight and Accountability; Judiciary; House Administration; Budget; Transportation and Infrastructure; Rules; Foreign Affairs; Ways and Means; Intelligence
Protect Reporters from Exploitative State Spying (PRESS) Act	**H.R. 4250** *Sponsor:* Kiley (R-CA) *Cosponsors:* 19 bipartisan cosponsors	CV 26–37, 45; BK 7026–37, 9016; CR 16, 17	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4250/BILLS-118hr4250ih.pdf https://www.congress.gov/118/bills/s2074/BILLS-118s2074is.pdf **Summary:** Would require federal entities to obtain	• 07/19/2023: H.R. 4250 ordered reported (23–0) • 06/21/2023: H.R. 4250 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	S. 2074 *Sponsor:* Wyden (D-OR) *Cosponsors:* Lee (R-UT) Durbin (D-IL) Graham (R-SC)		court authorization to compel testimony or certain documents from covered journalists or covered providers; court must find by preponderance of evidence that "there is a reasonable threat of imminent violence unless the testimony or document is provided."	• S. 2074 introduced in Senate; referred to Judiciary Committee
Bring Our Heroes Home Act	**H.R. 3110** *Sponsor:* Pappas (D-NH) *Cosponsors:* Fulcher (R-ID) Houlahan (D-PA) Simpson (R-ID) **S. 2315** *Sponsor:* Crapo (D-ID) *Cosponsors:* 9 bipartisan cosponsors	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3110/BILLS-118hr3110ih.pdf https://www.congress.gov/118/bills/s2315/BILLS-118s2315is.pdf **Summary:** Would deem that a "request for disclosure of [H.R. 3110: Missing Armed Forces Personnel; S. 2315: missing Armed Forces and civilian personnel] materials . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure."	• 07/13/2023: S. 2315 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 05/05/2023: H.R. 3110 introduced in House; referred to Oversight & Accountability Committee
LGBTQ+ Panic Defense Prohibition Act of 2023	**H.R. 4432** *Sponsor:* Pappas (D-NH) *Cosponsor:* Davids (D-KS) **S. 2279** *Sponsor:* Markey (D-MA) *Cosponsors:* 17 Democratic or Democratic-caucusing cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4432/BILLS-118hr4432ih.pdf https://www.congress.gov/118/bills/s2279/BILLS-118s2279is.pdf **Summary:** Would preclude the use of evidence of a "nonviolent sexual advance or perception of belief, even if inaccurate, of the gender, gender identity, or sexual orientation of an individual . . . to excuse or justify the conduct of an individual or mitigate the severity of an offense," except that a court may admit evidence "of prior trauma to the defendant for the purpose of excusing or justifying the conduct of the defendant or mitigating the severity of an offense."	• 07/12/2023: S. 2279 introduced in Senate; referred to Judiciary Committee • 06/30/2023: H.R. 4432 introduced in House; referred to Judiciary Committee
Judicial Ethics and Anti-Corruption Act of 2023	**H.R. 3973** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 40 Democratic cosponsors **S. 1908** *Sponsor:*	CV 26(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3973/BILLS-118hr3973ih.pdf https://www.congress.gov/118/bills/s1908/BILLS-118s1908is.pdf **Summary:** Would prohibit a court from entering an order otherwise authorized under Civil Rule 26(c) to restrict disclosure of information	• 06/09/2023: H.R. 3973 introduced in House; referred to Judiciary, Oversight & Accountability, Rules, Financial Services, Agriculture, and House Administration Committees

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Warren (D-MA) *Cosponsors:* 8 Democratic or Democratic-caucusing cosponsors		obtained through discovery unless the court makes certain findings regarding the protection of public health and safety and the tailoring of the order; would also prevent order from continuing in effect after entry of final judgment unless court makes similar findings.	• 06/08/2023: S. 1908 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)	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3315/BILLS-118hr3315ih.pdf **Summary:** Would extend 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.	• 05/15/2023: Introduced in House; referred to Judiciary Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 14 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 establish Diwali (a/k/a Deepavali) as a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
Strengthening Transparency and Obligations to Protect Children Suffering from Abuse and Mistreatment (STOP CSAM) Act of 2023	**S. 1199** *Sponsor:* Durbin (D-IL) *Cosponsors:* Hawley (R-MO) Cruz (R-TX) Grassley (R-IA) Klobuchar (D-MN)	CR 32(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1199/BILLS-118s1199rs.pdf **Summary:** Would require probation officer, in preparing PSR, to request information from multidisciplinary child-abuse team or other appropriate sources "to determine the impact of the offense on a child victim and any other children who may have been affected by the offense."	• 05/15/2023: Reported favorably with an amendment; placed on Senate Legislative Calendar under General Orders • 04/19/2023: Introduced in Senate; referred to Judiciary Committee
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:*	§ 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 to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j).	• 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

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	19 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors			
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 5 Democratic 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
Federal Extreme Risk Protection Order Act of 2023	**H.R. 3018** *Sponsor:* McBath (D-GA) *Cosponsor:* 95 Democratic cosponsors	CV? CR?	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3018/BILLS-118hr3018ih.pdf **Summary:** Would authorize a new kind of ex parte and permanent injunctive relief, albeit one sounding in criminal law, not civil law. The injunctive relief could also result in property forfeiture. May need new rulemaking to account for this kind of hybrid procedure.	• 04/28/2023: Introduced in House; referred to Judiciary 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
Clean Slate Act of 2023	**H.R. 2930** *Sponsor:* Blunt (D-DE) *Cosponsors:* 7 bipartisan cosponsors	CR 49.1	**Bill Text:** https://www.congress.gov/118/bills/hr2930/BILLS-118hr2930ih.pdf **Summary:** Would mandate sealing of nonviolent federal marijuana offenses 1 year after sentence completed and sealing of federal criminal records relating to judgment of	• 04/27/2023: Introduced in House; referred to Judiciary

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			acquittal or dismissal. Mandatory sealing rules would have retroactive effect. Would allow certain nonviolent offenders convicted of no more than two felonies to petition for sealing of federal criminal records.	
Women in Criminal Justice Reform Act	**H.R. 2954** *Sponsor:* Kamlager-Dove (D-CA) *Cosponsors:* 9 Democratic & 1 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2954/BILLS-118hr2954ih.pdf **Summary:** Would create a pretrial diversion program for federal criminal cases; may need new rulemaking for criminal procedure (e.g., to allow for withdrawal of guilty plea under diversion program).	• 04/27/2023: Introduced in House; referred to Judiciary, Ways & Means, and Energy & Commerce Committees
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 22 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would create new Fed. Rule of Evidence to exclude "evidence of a defendant's creative or artistic expression, whether original or derivative" as evidence against that defendant (not restricted to criminal cases); would permit it on certain showings by the government by clear and convincing evidence (but not clear what would happen in a civil case if the government is not a party).	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 2782** *Sponsor:* Porter (D-CA) *Cosponsor:* Nadler (D-NY) Cicilline (D-RI) Jayapal (D-WA)	CV 8, 12	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2782/BILLS-118hr2782ih.pdf **Summary:** Would abrogate *Twombly*'s pleading standard, at least in antitrust cases.	• 04/20/2023: Introduced in House; referred to Judiciary Committee
First Step Implementation Act of 2023	**S. 1251** *Sponsor:* Durbin (D-IL) *Cosponsors:* 10 bipartisan cosponsors	AP 4(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1251/BILLS-118s1251is.pdf **Summary:** Would provide that Appellate Rule 4(a) governs the time limit for an appeal of a final order on a motion to modify a term of imprisonment imposed for crimes committed before age 18 .	• 04/20/2023: Introduced in Senate; referred to Judiciary Committee
Securing and Enabling	**H.R. 1059** *Sponsor:*	EV	**Most Recent Bill Text:**	• 04/19/2023: S. 1212 introduced in Senate;

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Commerce Using Remote and Electronic (SECURE) Notarization Act of 2023	Kelly (R-ND) *Cosponsors:* 30 bipartisan cosponsors **S. 1212** *Sponsor:* Cramer (R-ND) *Cosponsor:* 9 bipartisan cosponsors		https://www.congress.gov/118/bills/hr1059/BILLS-118hr1059rfs.pdf https://www.congress.gov/118/bills/s1212/BILLS-118s1212is.pdf **Summary:** Would establish national standards for remote electronic notarization; would make signature and title of notary prima facie or conclusive evidence in determining genuineness or authority to perform notarization.	referred to Judiciary Committee • 02/28/2023: H.R. 1059 received in Senate; referred to Judiciary Committee • 02/27/2023: H.R. 1059 passed House by voice vote • 02/17/2023: H.R. 1059 introduced in House; referred to Judiciary Committee
Online Privacy Act of 2023	**H.R. 2701** *Sponsor:* Eshoo (D-CA) *Cosponsor:* Lofgren (D-CA)	CV 4, CV 23	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2701/BILLS-118hr2701ih.pdf **Summary:** Would permit service of "petition for enforcement" for civil investigative demand under § 401 to be served by mail, and proof of service would be permitted by "verified return" including, if applicable, any "return post office receipt of delivery." Would require a class action to be prosecuted by a nonprofit organization, not an individual, and mandates equal division of total damages among entire class.	• 04/19/2023: Introduced in House; referred to Energy & Commerce, House Administration, Judiciary, and Science, Space & Technology Committees
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Would terminate the national emergency declared March 13, 2020, by President Trump. Ends authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 04/10/2023: Signed into law • 03/29/2023: Passed Senate (68–23) • 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House
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
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:*	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:**	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)		Would permit, after JCUS promulgates guidelines, district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law (e.g., CR 53).	
Everyone can Notice-and-Takedown Distribution of Child Sexual Abuse Material (END CSAM) Act	**S. 823** *Sponsor:* Hawley (R-MO)	CV 4(i)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s823/BILLS-118s823is.pdf **Summary:** Would allow a private person to bring a qui tam civil action against a social-media company that does not disable access to or remove an offending visual depiction within 10 days of notice; complaint must be served on the government under Civil Rule 4(i)	• 03/15/2023: Introduced in Senate; referred to Judiciary Committee
Justice for Kennedy (JFK) Act of 2023	**H.R. 637** *Sponsor:* Schweikert (R-AZ)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr637/BILLS-118hr637ih.pdf **Summary:** Would deem that a "request for disclosure of assassination records . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure."	• 03/07/2023: Introduced in House; referred to Judiciary, Oversight & Accountability, Ways & Means, Foreign Affairs, Armed Services, and Intelligence Committees
Facial Recognition and Biometric Technology Moratorium Act of 2023	**H.R. 1404** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 10 Democratic cosponsors **S. 681** *Sponsor:* Markey (D-MA) *Cosponsors:* Merkley (D-OR) Warrant (D-MA) Sanders (I-VT) Wyden (D-OR)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1404/BILLS-118hr1404ih.pdf https://www.congress.gov/118/bills/s681/BILLS-118s681is.pdf **Summary:** Would bar admission by federal government of information obtained in violation of bill in criminal, civil, administrative, or other investigations or proceedings (except in those alleging a violation of the bill itself).	• 03/07/2023: H.R. 1404 introduced in House; referred to Judiciary and Oversight & Accountability Committees • 03/07/2023: S. 681 introduced in Senate; referred to Judiciary Committee
Asylum and Border Protection Act of 2023	**H.R. 1183** *Sponsor:* Johnson (R-LA)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1183/BILLS-118hr1183ih.pdf **Summary:** Would require "an audio or audio visual recording of interviews of aliens subject to expedited removal" and would require the	• 02/24/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			recording's consideration "as evidence in any further proceedings involving the alien."	
Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* Buck (R-CO)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Would require rulemaking under 28 U.S.C. § 2075 "to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene 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
Write the Laws Act	**S. 329** *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Fourth Amendment Restoration Act	**H.R. 237** *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue. Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information	• 02/07/2023: Referred to subcommittee • 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			acquired about a U.S. citizen during surveillance of non-U.S. citizen.	
Federal Police Camera and Accountability Act	**H.R. 843** *Sponsor:* Norton (D-DC) *Cosponsors:* Beyer (D-VA) Torres (D-NY)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf **Summary:** Among other things, would bar use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; would create evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if recording or retention requirements not followed; and would bar use of federal body-cam footage from use as evidence if taken in violation of act or other law.	• 02/06/2023: Introduced in House; referred to Judiciary Committee
Save Americans from the Fentanyl Emergency (SAFE) Act	**H.R. 568** *Sponsor:* Pappas (D-NH) *Cosponsors:* 18 bipartisan cosponsors	CR 43	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr568/BILLS-118hr568ih.pdf **Summary:** Would permit reduction or vacatur of sentence for certain crimes involving controlled substances that are "removed from designation as a fentanyl-related substance"; would not require defendant to be present at any hearing on whether to vacate or reduce a sentence.	• 02/03/2023: Referred to Health Subcommittee • 01/26/2023: Introduced in House; referred to Energy & Commerce and Judiciary Committees
Limiting Emergency Powers Act of 2023	**H.R. 121** *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 02/01/2023: Referred to subcommittee • 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees
Restoring Judicial Separation of Powers Act	**H.R. 642** *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal	• 01/31/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			agency is a party" and cases "concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure.	
No Vaccine Passports Act	S. 181 *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s181/BILLS-118s181is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure.	• 01/31/2023: Introduced in Senate; referred to Health, Education, Labor & Pensions Committee
No Vaccine Mandates Act of 2023	S. 167 *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s167/BILLS-118s167is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure.	• 01/31/2023: Introduced in Senate; referred to Judiciary Committee
See Something, Say Something Online Act of 2023	S. 147 *Sponsor:* Manchin (D-WV) *Cosponsor:* Cornyn (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s147/BILLS-118s147is.pdf **Summary:** Would prohibit disclosure by providers of interactive computer services of certain orders related to reporting of suspicious transmission activity; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings.	• 01/30/2023: Introduced in Senate; referred to Commerce, Science & Transportation Committee
Protecting Individuals with Down Syndrome Act	H.R. 461 *Sponsor:* Estes (R-KS) *Cosponsors:*	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr461/BILLS-118hr461ih.pdf https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf	• 01/24/2023: H.R. 461 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	19 Republican cosponsors **S. 18** *Sponsor:* Daines (R-MT) *Cosponsors:* 24 Republican cosponsors		**Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed. Would create a private cause of action and criminal penalties and impose a duty on courts "to expedite to the greatest possible extent" such matters.	• 01/23/2023: S. 18 introduced in Senate; referred to Judiciary Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 57 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:* 31 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
ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act	**H.R. 241** *Sponsor:* Calvert (R-CA) *Cosponsors:* Waltz (R-FL) Grothman (R-WI)	CV 16	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr241/BILLS-118hr241ih.pdf **Summary:** Would require JCUS to "under rule 16 of the Federal Rules of Civil Procedure or any other applicable law, in consultation with property owners and representatives of the disability rights community, develop a model program to promote the use of alternative dispute resolution mechanisms, including a stay of discovery during mediation, to resolve claims of architectural barriers to access for public accommodations."	• 01/10/2023: Introduced in House; referred to Judiciary Committee
Injunctive Authority Clarification Act of 2023	**H.R. 89** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/118/bills/hr89/BILLS-118hr89ih.pdf **Summary:** Would prohibit federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty unless the nonparty is represented by a party in a class action.	• 01/09/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Kalief's Law	**H.R. 44** *Sponsor:* Jackson Lee (D-TX)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr44/BILLS-118hr44ih.pdf **Summary:** Would impose strict requirements on the admission of statements by youth during custodial interrogations into evidence in criminal or juvenile-delinquency proceedings against the youth.	• 01/09/2023: Introduced in House; referred to Judiciary Committee

TAB 2

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

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

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

DATE: **September 25, 2023**

This memo describes the tentative decisions reached by the Subcommittee in a series of meetings in April, June, July, and August. On the most fundamental question—whether a sufficient case has been made to move forward with detailed consideration of possible amendment—the Subcommittee has concluded that amendments are warranted both to clarify the rule and to expand the scope of pretrial subpoena authority. In subsequent meetings, it has reached additional conclusions described below regarding several aspects of any potential expanded authority.

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.

A. Pretrial subpoena authority under Rule 17[1] should be expanded

As a policy matter, the Subcommittee is persuaded that it would be beneficial to expand the parties' authority to subpoena material from third parties before trial. As defense speakers at the Committee's October 2022 meeting in Phoenix explained, the *Nixon* standard,[2] as applied in most districts, is too narrow to provide a basis for discovering and obtaining much of the material the defense needs from third parties.[3]

[1] The Subcommittee has deferred discussion on whether the expanded pretrial subpoena authority should remain in Rule 17. It might, for example, be placed in a new rule.

[2] United States v. Nixon, 418 U.S. 683, 700 (1974), requires a party seeking documents through Rule 17(c) to "clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity." The Court also stated that when a party seeks pre-hearing production of documents, it must establish: (4) "that [the documents] are not otherwise procurable reasonably in advance of [the proceeding] by exercise of due diligence"; and (5) "that the party cannot properly prepare for the proceeding without such production and inspection in advance of [the proceeding] and that the failure to obtain such inspection may tend unreasonably to delay the [proceedings]." *Id*. at 699-700.

[3] With the caveat that there is considerable variation from district to district, there was strong support from all of the defense participants for expanding and clarifying Rule 17. Mr. Cary, Mr. Carter, Ms. Elm, Mr. Felman, and Ms. Halim all stated that the *Nixon* standard is too narrow to provide a basis for the discovery of material the defense needs from third parties. See Draft Minutes, October 27, 2022, at 16-17 (Cary), 17-18 (Felman), 42 (Carter), 43-44 (Elm), 32-33 (Halim). Mr. Wallin stated that although he personally had been successful in obtaining discovery, he was unsure whether that would have been the case if he had not been able to file his motions ex parte and there had

The *Nixon* standard requires a party to show that the specific material being sought will be admissible at trial (or other upcoming proceeding). Rigorously applied, it prevents the defense from obtaining material that it has not yet been able to review and cannot access through Rule 16 because the government does not possess it. Without first reviewing such material, the defense cannot verify that it will be admissible. Indeed, in some districts the standard is so strict that it has discouraged counsel from even seeking subpoenas.[4] Defense participants have urged the Committee to facilitate defense counsel's ethical obligation to investigate facts that would provide a basis for a defense. Information that could be essential to the defense, such as information that would be turned over under *Brady* or Rule 16 if possessed by the government, remains off limits because there is no mechanism in the Rules for discovery from third parties in criminal cases.[5] In the Subcommittee's view, some expansion of the authority to obtain access to such material in the hands of third parties is warranted to increase the accuracy and fairness of the process.

Although most federal districts now apply *Nixon* strictly to limit Rule 17 subpoenas, there are precedents for broader access. Statutes and court rules in some states now provide broader subpoena authority, and local rules and practice in some federal districts also allow much greater access to third party subpoenas. Defense participants who practiced in these states and districts reported that these procedures were working well,[6] and the Subcommittee has been studying the relevant local rules and state laws. Some of these approaches provide options for an alternative to the *Nixon* standard. But before beginning the work of drafting a proposed standard other than *Nixon* for obtaining a third party subpoena, the Subcommittee has been resolving some of the other issues that may affect that central task.

B. The rule should require judicial approval before issuance of a third-party subpoena.

First, the Subcommittee concluded that all third party subpoenas should be subject to judicial supervision.[7] The subpoena authority is compulsory process, and judicial oversight is

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been opposition from the prosecution. *Id.* at 27. Ms. Coleman said that although she had generally been successful in her Rule 17 motions (sometimes after refiling them), her colleagues had not been successful. *Id.* at 38.

[4] Mr. Cary, Mr. Carter, Ms. Coleman, Ms. Elm, and Ms. Halim all stated that the *Nixon* standard is so strict that it chills the defense, discouraging counsel from even seeking subpoenas. *Id.* at 16 (Cary), 42, 58 (Carter), 28, 38 (Coleman), 33 (Halim), and 43 (Elm).

[5] Ms. Coleman stressed defense counsel's obligation under the standards of ethics and professional responsibility to investigate the facts that might support the defendant's account and might provide a basis for a defense. *Id.* at 28. Mr. Wallin urged the Committee to clarify the rule to expressly provide for pretrial discovery. *Id.* at 19. Mr. Felman said the policy question for the Committee was whether the Rule should permit the defense to investigate to determine what happened and to seek information that is not in the government's hands and hence not available under Rule 16. Defense participants also emphasized the burdensome cost of trying to meet the *Nixon* standard *Id.* at 32-33 (Halim), 36 (Coleman), 43, 58 (Elm).

[6] Mr. Cary, Mr. Carter, Mr. Felman, and Ms. Leonida all described the vast difference between the *Nixon* standard and the more liberal state discovery procedures in Maryland, Michigan, Florida, and California, and the importance of material discoverable in state cases under those more liberal rules. *Id.* at 17 (Cary), 41-42 (Carter), 55 (Felman), 44-45 (Leonida). Ms. Leonida stressed that the expanded authority in her district and in state practice was valuable and had not caused problems. *Id.* at 44-45.

[7] In contrast, the White Collar Crime Committee recommended that judicial oversight should be required only for subpoenas seeking personal or confidential material.

important to regulate its use in criminal cases. Accordingly, the Subcommittee favors a requirement that the party seeking a subpoena do so by filing a motion.[8]

C. The rule should set a higher standard to obtain a subpoena seeking protected material than it specifies for obtaining a subpoena seeking unprotected material

The Subcommittee has agreed that the rule should distinguish between—and set different standards for—subpoenas seeking materials that are private or protected and those seeking materials not subject to such protections.

The Subcommittee recognized that third party subpoenas might seek documents or items that are private, confidential, privileged, or otherwise protected by law, such as victim information, school disciplinary records, health care and counseling records, correspondence, emails and texts, financial records, business or enforcement strategies, law enforcement personnel files, presentence reports, or adoption records.

States with subpoena standards that are more generous than *Nixon* generally apply a separate, more demanding approach for subpoenas seeking privileged or confidential information ("protected" information). As a practical matter, the Subcommittee agreed that assurance of adequate safeguards for protected information is a prerequisite for any proposal seeking a more relaxed standard for other non-confidential information, such as gas station surveillance video, store receipts, hotel registrations, jail records of cellmates, etc. Experts consulted by the Subcommittee predicted significant public opposition to any proposal that is seen as undermining the protections for stored electronic communications and other forms of protected information. Similarly, there will likely be strong opposition to any proposal that lacks adequate protections for victims.

Accordingly, the Subcommittee agreed it would be appropriate to bifurcate the standards regulating access to third party subpoenas in any proposed amendment.

D. The rule should use the phrase "personal or confidential information" to define which subpoenas would require the higher standard for issuance

The Subcommittee considered two different approaches for defining the category of subpoenas that would require a more demanding showing. One option is to define this category of subpoenas with a description of the general type of information sought by the subpoena. This is the approach in Rule 17(c)(3), which presently specifies certain procedures for subpoenas that seek "personal or confidential information about a victim." A different option would be to require a more demanding showing whenever existing law already regulates disclosure of the information sought by the subpoena. Two states, Maine and Michigan, follow this approach, applying heightened standards to "information or evidence that is protected from disclosure by constitution, statute, or privilege" or "documentary evidence that may be protected from

[8] A few of the local rules use the term "application," rather than "motion." A review of the Criminal Rules as a whole supports the use of the word "motion" to describe any request to the court. In general, once formal proceedings have commenced against an individual defendant, the Rules require the parties to file "motions" rather than "applications." Accordingly, the Subcommittee decided to use the term "motion."

disclosure by a privilege, confidentiality protection, or privacy protection" under state or federal law.[9]

After extensive discussion, including consideration of various terms to delineate general types of information warranting more protection (e.g., private, sensitive, confidential, etc.) under the first approach, and various terms describing legal restrictions on disclosure under the second approach (e.g., law, privilege, statute or rule), the Subcommittee tentatively agreed that a focus on the general type of information sought was best.

In addition, the Subcommittee agreed that the phrase "personal or confidential information" adequately captured the category of information requiring heightened judicial vigilance. The Subcommittee thought that allowing the law applying this phrase to develop on a case-by-case basis would provide helpful flexibility. The phrase is already familiar to courts applying Rule 17(c)(3),[10] and broad enough to include a variety of materials, including, for example, confidential business information.

E. The rule should provide for ex parte subpoenas upon a showing of "good cause"

Another issue raised by many defense speakers at the October Committee meeting was the lack of clear authority in the existing rule to seek subpoenas ex parte. The Subcommittee agreed that the parties should have some ability to file ex parte motions for Rule 17 subpoenas. Providing all of the information required by *Nixon* not only involves premature revelation of defense theories and trial strategy, but also may risk leading the prosecution to inculpatory information. Indeed, at the October Committee meeting, a speaker from the Department of Justice recognized the defense interest in having the ability to file ex parte motions for pretrial subpoenas, and he expressed support for clarifying the Rule 17 to make that clear.[11] Both parties may also have an interest in preventing advance notice that might lead to the destruction of the material being sought.

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[9] Maine's rule provides special procedural protections if a subpoena seeks "documentary evidence that may be protected from disclosure by a privilege, confidentiality protection, or privacy protection under federal law, Maine law (for example …), or the Maine Rules of Evidence." Me. R. Crim. P. 17(d). Mich. Crim. R. 6.201(c)(1) provides special procedural protections for "information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination."

[10] The Committee Note accompanying the addition of (c)(3) states that the phrase, which "may include such things as medical or school records, is left to case development."

[11] Mr. Gill (Criminal Chief in the Eastern District of Virginia and chair of the Criminal Chiefs Working Group) saw no problem with ex parte applications, stating that it "was perfectly fine if the defense wants to use the ex parte process, because courts are able to get the details they need for the production." He also expressed support for amending Rule 17 to make it clear that ex parte applications are permitted, stating

> [h]e believed that giving the defense attorney the choice is the way to go. If they want to go ex parte, he was completely in favor of that. He understood that if you are trying to get records, you need to lay it out for the court so the judge can make a good decision. You should not be inhibited and worried the government will see your strategy. That is an excellent idea. He thought it was happening in practice, but it could be important to clarify the rule to make sure some people aren't missing the strategic point.

Id. at 37.

The Subcommittee favored the familiar phrase "good cause" as the standard for filing a motion ex parte, and it saw no need to define the phrase in the rule. It considered but rejected any additional requirements for a pro se defendant to file an ex parte motion, though it thought that the commentary might note that in applying the "good cause" standard in the case of a pro se defendant, a judge may decide to ask for more information from the government or standby counsel. The Subcommittee also rejected other possible categorical carve outs in which a showing of "good cause" would be insufficient to permit filing a motion ex parte.

The Subcommittee also concluded that the rule need not address sealing. If a motion is filed ex parte, the motion and subpoena will be sealed as a matter of course, and no specific directive on that is needed. The rule should treat both the motion and the subpoena itself as covered by the same request. The Subcommittee considered whether it would be beneficial to address the termination of the sealing, and it decided not to do so. Other rules permitting sealing do not include such a provision, and including such a provision here might generate unnecessary controversy.

F. Issues yet to be discussed

As indicated earlier, the Subcommittee has yet to develop its preferred standards for issuing a third party subpoena – one standard for obtaining a subpoena seeking "personal or confidential information" and a different, less demanding standard for other subpoenas. Also undecided is when, if ever, the subpoena recipient could produce the material sought directly to the party requesting the subpoena, rather than to the court.

The Subcommittee also deferred decision on two issues that arose during the discussion of ex parte subpoenas: (1) whether to require notice of some sort to the person whose information was being sought, as is currently required under (c)(3) when a subpoena seeks personal or confidential information about a victim; and (2) whether the rule should address separately the confidentiality of material *produced* by an ex parte subpoena (that is, what the rule should say about the return of an ex parte subpoena, apart from addressing when the application and subpoena itself can be ex parte).

The Subcommittee has been working on the assumption that the expanded subpoena authority will be available to both the prosecution and the defense, but it has deferred any final decision on that issue as well.

A number of procedural issues may also require attention. For example, the Subcommittee considered but tentatively decided not to include provisions on the timing of an application for subpoena. The current rule allows requests for third party subpoenas before or during trial. To the extent a proposed rule will permit subpoenas for discovery and not limit them to advance production of evidence to be introduced at trial, the timing of requests may be regulated along with other discovery, and the Subcommittee can revisit this issue if needed.

Finally, both participants at the October meeting and Committee members have urged that Rule 17 as a whole should be revised for clarity. The Subcommittee has not yet considered

whether any changes should be made for purposes of clarification, nor has it grappled with which changes, if any, should appear in a new rule separate from existing Rule 17.

TAB 3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 23(a), bench trial without government consent (23-CR-B)

DATE: September 14, 2023

This will be the Committee's second consideration of a proposal from the Federal Criminal Procedure Committee of the American College of Trial Lawyers that would "eliminate the need for governmental consent" and "authorize a court to approve a defendant's waiver of a jury trial based on the court's review of the totality of the circumstances." The proposed amendment, discussed at the Committee's April meeting, would add a subsection to Rule 23 that reads:

> (2) Nonjury trial without government consent. If the government does not consent, the court may permit a 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."

The primary reason advanced for the proposal is the assertion that a bench trial can be in the defendant's best interests, and that the defendant should be able to waive a jury and obtain a bench trial when the court agrees after considering the defendant's reasons and the government's response. The proposed comment accompanying the amendment suggests "a non-exclusive list of reasons for permitting a non-jury trial," would include "concerns about speedy trial, jury bias or prejudice (giving due consideration to the possibility of a change of venue and careful voir dire of the jury panel), or the technical nature of the charges or defenses." The proposal also argues that bench trials are more efficient, saving time and resources. It asserts "federal prosecutors rarely consent to a defendant's request for a bench trial," based on an informal survey of defense attorneys around the country.[1]

I. Committee discussion at spring meeting

At the spring meeting, members focused on whether there was a problem caused by the current rule. The discussion involved two issues (1) the empirical question how often prosecutors refuse bench trials and (2) the policy question whether the rule should permit the prosecutor as well as the judge to block a defendant's access to a bench trial and (if so) when. This discussion

[1] The proposal also argued that the proposed amendment would address a backlog of cases awaiting trial because of courtroom closures due to COVID. Members generally found that argument unpersuasive for several reasons. Some doubted that there was a COVID backlog remaining from the pandemic, but even if so, a rules amendment could not take effect in time to address the problem. Accordingly, we do not discuss it here.

appears at Tab 1 of the Agenda Book in the draft minutes of the April 2023 meeting. We summarize the discussion below.

The Empirical Issue

The Committee first discussed how often the government is refusing to consent to bench trials. A member noted that the proposal included a survey from at least 12 districts finding that prosecutors rarely or never consented to bench trials. On the other hand, the data from the Administrative Office of U.S. Courts (cited in footnote 48 of the proposal) showed 11.6% of criminal trials nationwide are to the bench.

Several members viewed the information on how often prosecutors refuse as incomplete. One member thought courts were unlikely to be aware of the scope of the problem. When defendants request a bench trial and the government says no, the defense may never present the issue to the court.

Mr. Wroblewski informed the Committee that the Department's policy during the pandemic was to agree to a bench trial if a defendant wanted a trial, though the vast majority of defendants declined a bench trial when offered.

Other participants offered examples of districts with very different practices: in some prosecutors almost always consent, in others they never consent. Some members suggested that the inter-district variation results in procedural unfairness.

The Policy Question

The Committee also discussed the underlying policy question that more empirical information would not resolve: whether it is a problem that the prosecutor and not just the judge may veto a defendant's preference for a bench trial, and (if so) in what kinds of cases? Supporting the government's option, several members noted the importance of jury trials. Article III includes an explicit preference for jury trials, and juries involve the unanimous agreement of community members, as opposed to the decision of a single government employee. One member stated that there are too few jury trials already, and he would oppose any change that would reduce them further.

Members also debated whether the right to a jury belongs solely to the defendant. One member stated the government has a right to a jury and should have the authority to decide whether to waive a jury. But another member disagreed, saying caselaw does not establish a constitutional right of the government to a jury trial. A third member responded there is a community right to a jury as well, distinct from any right the government may have, and the question was who should be the arbiter of that community right. The prosecutor's veto over a defendant's jury waiver, suggested yet another, is unnecessary. The judge, not the prosecutor, should be deciding whether a case needs to be in front of twelve jurors, and the judge can enforce the constitutional preference for jury trials.

Members also discussed whether any of the reasons a prosecutor would reject a jury waiver are unacceptable. Must a reason be case-specific? What if a prosecutor never agrees to waivers because she believes a jury trial is the constitutionally preferred process and important to the community? One member said a prosecutor's belief that the judge would not like the government's case is a legitimate reason to oppose a jury waiver. Another thought a bench trial would be appropriate for a defendant who wants to testify and believes a judge will less likely than a jury to be improperly influenced by prior convictions.

Several comments reflected the view that the existing rules adequately respond to potential jury prejudice. One member observed that the current rules authorize the judge to impose a bench trial over the government's objection when necessary to protect the defendant's constitutional rights. Other comments noted that Rule 29 provides a procedural remedy for concerns that a jury might act irrationally, as do the venue change provisions. A different member stated that he did not believe that a rule could define a class of cases where the government must accept a bench trial. Even in cases with really terrible facts and extraordinary polarizing publicity, the rules provide powerful tools to ensure a fair jury trial, including judicial control over voir dire, the introduction of evidence, and jury instructions. A member responded that even if a rule cannot define which reasons are legitimate and which are not, it could specify that the judge is the appropriate decisionmaker and set out a process allowing input from both parties that would help the judge decide.

II. Additional empirical information gathered after the spring meeting

Consideration of the proposal was continued until the fall meeting, to allow the representatives from the Department of Justice, Criminal Justice Act (CJA) attorneys, and Federal Defenders, with help from the reporters and Federal Judicial Center (FJC), to gather more information about current practices. The following information has been provided.

A. Information gathered by the Department of Justice

After the spring meeting, Mr. Wroblewski surveyed U.S. Attorneys on the following questions:

(1) Is there a government policy re: consent to bench trials in each district? If so, what is the policy?

(2) Is there a Covid-19 backlog of cases awaiting trial that might be addressed by government consent?

(3) Should there be a national (rather than district) policy on consent to bench trials?

Of the 77 districts that responded, 25 districts indicated that they have a policy on agreeing to a request for a bench trial, and 52 responded they did not. The 25 districts that reported having such a policy generally require supervisory approval – including, in many offices, from the United States Attorney – before the office will agree to a bench trial request. In

these districts, each request is considered on a case-by-case basis, as the reasons for the requests differ significantly.

On question two, 69 of the 77 responding offices indicated that their district does not have a significant backlog of cases awaiting trial as a result of the Covid-19 emergency. Of the eight districts that are experiencing such a backlog, three reported that there has been consideration within the district of addressing the backlog using bench trials.

On question three, Mr. Wroblewski reported, "we are still considering whether there might be an appropriate national policy on consent to bench trials. The reasons for bench trial requests differ significantly, and an appropriate national policy is not obvious."

B. Information gathered from the defense bar

A set of questions prepared by the reporters, the Rules Office, and the FJC was sent to an AO advisory group which included both CJA attorneys and federal defenders. Fifteen responded – nine federal defenders and six CJA attorneys. Respondents worked in districts of different sizes, spread among the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits. The results are aggregated below, with identifying information removed.

Question 1: In your district, are you aware of cases that have gone to jury trial because when requested by the defense, the U.S. Attorney's office did not consent to a bench trial?

Yes: 8

No: 7

If yes, please estimate the number of cases in the past two years the government denied consent.

1: 2 responses (one also said: "I'm aware of at least 2 in last 5 years, but believe only 1 in [the] last 2 [years]).

2-4: 3 responses

5-10: 3 responses

To your knowledge, were counsel of record made aware of why consent was denied in these specific cases?

Yes in some cases and no in others: 2 responses

Yes, on a routine basis: 2 responses (one also said: "I think Judges push back when they learn that consent [was] withheld.)

No, usually not: 2 responses (one also said: "We presume the government feels their chances of conviction are greater with a jury versus a judge.")

Don't know: 2 responses

Question 2: In your district, are you aware of defense counsel withholding a request for a bench trial because it was assumed that the U.S. Attorney's office would not consent?

Yes: 4

No: 11

If yes, please estimate the number of cases in the past two years in which this occurred.

2-4: 3 responses
5-10: 1 response
Uncertain: 1 response

<u>Question 3</u>: In your district, are you aware of types of cases where the government is more likely to deny consent?

Yes: 3
No: 12 (Responses included these additional comments: "No reported pattern/issue with withholding"; "Government almost always denies consent"; "They won't even do a bench trial solely to allow preservation of a suppression issue, where the defendant is offering to stipulate to the elements of the crime"; "No, but I suspect it's all cases.")

If yes, in which types of cases?

"The government has declined to consent to a bench trial in at least 2 child porn cases that involved technical/legal defenses, presumably because it wanted the materials at issue to be in front of a jury. A judge in the district ruled against the government on drug weight in a distribution case and it's believed that the government would not consent to a bench trial on that issue or with that judge, although there is no formal policy."

"I believe the USAO may be more likely to refuse consent in cases involving child pornography or child sex abuse, because such cases are particularly []."

"Weak cases"

<u>Question 4</u>: In your district, are you aware of any U.S. Attorney's office policy to deny consent to bench trials?

"See previous answer" ["The government has declined to consent * * *."]

"I spoke with the acting US attorney who said there is no formal policy and that he can see scenarios where it would not make sense to consent to a bench trial. However, he could not give an example of a case that he could think of where consent was given. He could cite two recent examples where consent withheld."

"The only bench trials we typically see are trials on stipulated facts."

"Yes. In [ ] the AUSAs deny consent in every case as a matter of policy. My understanding from some of the supervisors is that this is because they don't want to be seen picking and choosing which judges they would want to do a bench trial in front of, when there are some judges they would always say no to."

"Not aware of any specific policy"

<u>Question 5</u>: In your district, is the approach followed by the U.S. Attorney's office consistent and predictable with respect to not consenting to bench trials?

Very consistent: 3 responses
Consistent: 5 responses (responses included these additional comments: "do not seem to typically consent"; "Not aware of any instance where they did not consent"; "Consistent – It is generally consistent, and the USAO will consent in most cases; however there are cases in which the government may believe that it is better to proceed before a jury.")
Neither consistent nor inconsistent: 6 responses

N/A: 1 response

<u>Question 6</u>: What concerns (if any) do you or other defense attorneys in your district have about defendants' requests for bench trials that are denied?

N/A: 4 responses

Not an issue or not aware of any concerns: 2 responses

Comments included the following:

- Defense lawyers may consider bench trials where there's inflammatory evidence and a concern that as a result jurors will not fairly consider the legal issues in the case. In other cases, a bench trial is considered because the government won't do a conditional plea. Another type of case where the defense might consider a bench trial is when only a narrow legal issue is being raised, the facts aren't in serious dispute, and the defendant still wants to seek acceptance under the guidelines or just have a more efficient trial. These are cases where courts should have the ability to consider whether a bench trial would be in the interests of justice and more efficient. I also believe that defense lawyers don't bother with making requests in many cases, believing the government won't consent, particularly where the judge is viewed as defense friendly.
- With a bench trial on limited issues or to preserve an appellate issue, we are often seeking credit for acceptance of responsibility or an equivalent variance. This is less likely if a jury trial is required, simply because the government is insisting on a certain plea agreement or appellate waiver.
- That it is used strategically, largely based on the Judge and is used to force a plea.
- Our concern is the government charging factually weak cases and deciding chances of conviction are higher with juries as opposed to a judge. These are cases that should not have been charged.
- Particularly in cases that involve sensitive subjects (such as child sex offenses) that may be particularly inflammatory to a lay jury, courts and defendant should have the ability to proceed via a bench trial notwithstanding the government's objection.
- Unnecessary use of jury resources and/or unfair pressure to plead for cases with good legal defense but no jury appeal.
- Certain types of cases -- child pornography cases, for example, where the government is seeking a mandatory minimum sentence, or cases where we have a legal challenge to the interstate commerce element -- would be much better tried before a judge and would preserve everyone's resources.
- The government's interest in jury trials should carry less weight than the accused's interests in due process, etc., but the Court that decided this issue did not give the argument much weight. Also, the Sixth Amendment clearly guarantees trial by jury to the accused alone. The Court that has decided this issue determined otherwise.
- Having a bench trial is often best for everyone concerned. Surely underutilized.

Other comments:

- FYI the Judges in my district [are] very conservative. We would prefer jury trials.
- I had a conversation with [US Attorney] this morning regarding the issue of govt consent to jury waived trials. He told me about two cases that he knows of during his tenure where consent withheld… He has no examples where consent given.
- I am not aware of any instance where the government refused to consent to a bench trial. I attached my questionnaire with responses to say the same.
- I sent around a shorter version to the [] and received no relevant responses. I daresay this is likely more of an issue in other jurisdictions because I can't imagine us asking, or the govt refusing, very often in []. In all seriousness, it has always been the general consensus (purely anecdotal) that child sex cases and illegal re-entry generally are bench trials, and I've not seen any issues with the USAO refusing to consent. I have NO info about anyone trying to have one in other types of cases at all, let alone trying and being denied the opportunity by the government's refusal, but as I did put it out to the panel I will keep you posted if any pattern emerges of which I was unaware.
- I only had one response and have manually added the response to the proposed questions.
- In 43 years of practice in federal court, I have had only one bench trial. And that was because the question was purely a legal one, and all I wanted to do was preserve the issue for appeal. And the judge had already made it clear that [] was going to rule against me. Otherwise, the Government always opposes my requests. I would be very much in favor of permitting a defendant to waive a jury trial under the circumstances set forth in the proposed rule change. The key is to write the rule so that a court of appeals can't gut it when the Government begins appealing the grant of a bench trial to a defendant.

Finally, outgoing member Lisa Hay informally surveyed her FPD colleagues and emailed that she had received fourteen responses, which she reported as:

> 5: Govt uniformly opposes bench trials. We would have more if we could. We strongly support the rule change.
> 1: Govt opposes bench trials but we would not request them.
> 2: We would not request them.
> 4: We have bench trials and the govt generally does not oppose.
> 2: We have bench trials when there is a suppression issue that we want to preserve for appeal; whether the government opposes is prosecutor specific.

III. Conclusion

The question for the Committee is whether to recommend to the Chair the appointment of a subcommittee to study the proposal further.

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March 10, 2023

By Electronic Mail

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, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: **Proposed Amendment to Rule 23(a) of the Federal Rules of Criminal Procedure**

Dear Mr. Byron:

This letter is submitted on behalf of the American College of Trial Lawyers, Federal Criminal Procedure Committee, which I currently chair. We write to respectfully request that the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (the "Advisory Committee") consider proposing to the Judicial Conference certain amendments to Federal Rule of Criminal Procedure 23(a). The proposed amended rule is attached to this letter, both with changes tracked, *see* Exhibit A, and as a clean copy, *see* Exhibit B. The basis for the amendment is described in the attached paper published by the ACTL Federal Criminal Procedure Committee, entitled "Rule 23(a) of the Federal Rules of Criminal Procedure Should Be Amended to Eliminate the Requirement that the Government Consent to a Defendant's Waiver of a Jury Trial." *See* Exhibit C (*available at* https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/2023---rule-23(a)-of-the-federal-rules-of-criminal-procedure-should-be-amended.pdf?sfvrsn=48630b5a_2).

The paper recommends amendment of Rule 23(a) to allow a criminal defendant to obtain a non-jury bench trial without the government's consent if the defendant presents reasons sufficient to overcome the presumption in favor of jury trials. The paper explores the constitutional, legal, and practical issues with eliminating government consent, and explains our reasoning behind the specific proposed amendments to Rule 23(a).

Steptoe

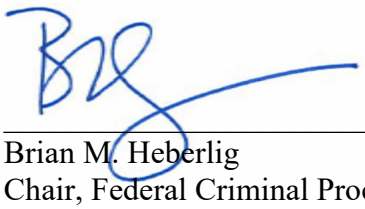
The mission statement of the American College of Trial Lawyers provides:

> The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

The ACTL Federal Criminal Procedure Committee's membership consists of nearly fifty current and former federal prosecutors and defense attorneys from around the United States whose principal area of practice is in federal criminal cases nationwide. The ACTL's Board of Regents recently approved the attached paper for publication.

We appreciate the opportunity to submit the ACTL Federal Criminal Procedure Committee's proposal to you and are available to answer any questions and provide any additional information requested by the Advisory Committee.

Respectfully submitted,



Brian M. Heberlig
Chair, Federal Criminal Procedure Committee
American College of Trial Lawyers

cc: The Honorable James C. Dever III, Chair, Advisory Committee on Criminal Rules
Prof. Sara Sun Beale, Co-Reporter, Advisory Committee on Criminal Rules
Prof. Nancy King, Co-Reporter, Advisory Committee on Criminal Rules

EXHIBIT A

Rule 23. Jury or Nonjury Trial (*WITH CHANGES TRACKED*)

(a) (1) JURY TRIAL. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(~~1~~A) the defendant waives a jury trial in writing;

(~~2~~B) the government consents; and

(~~3~~C) the court approves.

(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit a 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.

COMMENT. The proposed amendment permits a court to let a defendant waive trial by jury without the government's consent. The Supreme Court has suggested that there may be circumstances where the right to a fair trial will overcome the government's objection to a bench trial. *Singer v. United States*, 380 U.S. 24, 37 (1965) ("We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."). Creating a complete list of such circumstances is not possible. However, a non-exclusive list of reasons for permitting a non-jury trial includes concerns about speedy trial, jury bias or prejudice (giving due consideration to the possibility of a change of venue and careful voir dire of the jury panel), or the technical nature of the charges or defenses.

Some courts have permitted non-jury trials because of prejudice. *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968) (barring the government from withdrawing its consent before a second trial); *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976) (multiple defendants in a complex case in which not all evidence would be admissible against all defendants); *United States v. Cohn*, 481 F. Supp. 3d 122 (E.D.N.Y. 2020) (numerous factors, including speedy trial and other issues caused by a mid-Covid pandemic trial). Although the rule recognizes that technical issues may be appropriate for a non-jury trial, the complexity of the subject matter alone is not a basis for overruling the government's demand for trial by jury. *United States v. Simon*, 425 F.2d 796, 799 n.1 (2d Cir. 1969).

Any decision must be weighed against the constitutional preference for trial by jury. *Singer v. United States*, 380 U.S. 24, 36 (1965) ("The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."); *Patton v. United States*, 281 U.S. 276, 312 (1930) ("Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses.").

EXHIBIT B

Rule 23. Jury or Nonjury Trial (*CLEAN*)

(a) (1) JURY TRIAL. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(A) the defendant waives a jury trial in writing;

(B) the government consents; and

(C) the court approves.

(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit a 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.

COMMENT. The proposed amendment permits a court to let a defendant waive trial by jury without the government's consent. The Supreme Court has suggested that there may be circumstances where the right to a fair trial will overcome the government's objection to a bench trial. *Singer v. United States*, 380 U.S. 24, 37 (1965) ("We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."). Creating a complete list of such circumstances is not possible. However, a non-exclusive list of reasons for permitting a non-jury trial includes concerns about speedy trial, jury bias or prejudice (giving due consideration to the possibility of a change of venue and careful voir dire of the jury panel), or the technical nature of the charges or defenses.

Some courts have permitted non-jury trials because of prejudice. *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968) (barring the government from withdrawing its consent before a second trial); *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976) (multiple defendants in a complex case in which not all evidence would be admissible against all defendants); *United States v. Cohn*, 481 F. Supp. 3d 122 (E.D.N.Y. 2020) (numerous factors, including speedy trial and other issues caused by a mid-Covid pandemic trial). Although the rule recognizes that technical issues may be appropriate for a non-jury trial, the complexity of the subject matter alone is not a basis for overruling the government's demand for trial by jury. *United States v. Simon*, 425 F.2d 796, 799 n.1 (2d Cir. 1969).

Any decision must be weighed against the constitutional preference for trial by jury. *Singer v. United States*, 380 U.S. 24, 36 (1965) ("The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."); *Patton v. United States*, 281 U.S. 276, 312 (1930) ("Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses.").

EXHIBIT C

RULE 23(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SHOULD BE AMENDED TO ELIMINATE THE REQUIREMENT THAT THE GOVERNMENT CONSENT TO A DEFENDANT'S WAIVER OF A JURY TRIAL

Federal Criminal Procedure Committee

Approved by the Board of Regents
February 2023

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RULE 23(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SHOULD BE AMENDED TO ELIMINATE THE REQUIREMENT THAT THE GOVERNMENT CONSENT TO A DEFENDANT'S WAIVER OF A JURY TRIAL

I. INTRODUCTION

The backlog of federal criminal cases created by the COVID-19 pandemic exposed the logistical and constitutional issues that arise when the availability of a bench trial is conditioned on the government's consent. Forced to await the empanelment of at least twelve jurors willing to sit in close proximity in a windowless courtroom, defendants have endured prolonged pretrial detentions and systematic burdens on their rights to speedy trials.

This situation triggered discussion in the Federal Criminal Procedure Committee of the American College of Trial Lawyers (the "Committee") about the broader question of whether a defendant should be allowed to waive the right to a jury trial without the consent of the government. The Committee examined the constitutional, legal, and practical issues with eliminating government consent.

The Committee's examination revealed that the requirement in Federal Rule of Criminal Procedure 23(a) that the government consent to a defendant's waiver of a jury trial significantly limits the number of bench trials because the government rarely consents. Moreover, when the government withholds consent, a defendant has little recourse, since judicial review of the prosecutor's decision is unavailable except in rare circumstances involving manifest bad faith.

The government's exercise of its discretion to withhold consent to a bench trial often translates into longer and less efficient trials. Many of the issues that complicate and lengthen jury trials – such as evidentiary objections, limiting instructions, sidebars, shackling, and sequestration – can be managed more easily at a bench trial. As a result, jury trials can be longer and more expensive than bench trials. More efficient bench trials may also be easier to schedule on courts' crowded calendars, thereby reducing delays and minimizing burdens on the right to a speedy trial.

Under the current version of Rule 23(a), the government need not supply a reason for its decision to withhold consent to a bench trial. The traditional justification for this rule is the government's interest in a fair trial. But the defendant shares that interest to an equal or greater degree, and the Supreme Court has expressly recognized that there will be "occasional exceptions" to the default preference for trial by jury in criminal cases.[1] It follows that on the occasions when a defendant seeks a trial before a judge rather than a jury, it is reasonable both to require the government to articulate a basis for its contrary view and to empower trial courts to authorize a bench trial without the government's consent

1 *Patton v. United States*, 281 U.S. 276, 312 (1930).

This white paper describes the Committee's review of the case law interpreting the constitutional right to trial, the history and application of Rule 23(a), the law of the 50 states, and practical experience. While there were divergent views within the Committee, the Committee ultimately determined to recommend amendment of Rule 23(a) to eliminate the need for governmental consent, and to authorize a court to approve a defendant's waiver of a jury trial based on the court's review of the totality of the circumstances.

II. THE BACKGROUND OF RULE 23(A)

Article III, Section 2 states that the "[t]he trial of all Crimes . . . shall be by jury." Similarly, the Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Consistent with those constitutional commands, Rule 23(a), adopted in 1944, provides: "If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves."[2] The United States Supreme Court, as well as lower federal courts, state courts and commentators, have examined the efficacy of Rule 23 and its state court equivalent throughout the years.[3]

Historically, the modes of trial for criminal defendants have diverged.[4] In America, beginning in the late 17th century, the waiver of a jury trial in favor of a bench trial was prominent in the Massachusetts and Maryland courts.[5] In the 19th century, however, English common-law defendants typically had no choice but trial by jury.[6] There was an option for those defendants who feared the King and wished to pay a fine without overtly admitting guilt; in those instances of "implied confession," the Court decided whether to discharge the defendant after hearing the evidence.[7]

The United States Supreme Court first interpreted the jury trial right in 1898 in *Thompson v. Utah*.[8] Following his conviction in a state district court, the defendant moved for a new trial on the basis that the jury consisted of only eight jurors.[9] The Utah Supreme Court denied his motion for a new trial and affirmed his conviction in part based on its view that the United States Constitution permitted an eight-person jury.[10] Further, the Utah Supreme Court reasoned that the Utah Constitution allowed eight jurors, except in capital cases.[11] On review, the Supreme Court considered whether the Sixth Amendment to the U.S. Constitution required a jury to consist of twelve persons.[12] The Supreme Court held that, although the Sixth Amendment does not specify the number of jurors, a jury must consist "of twelve persons, neither more nor less."[13] In addressing the Utah Constitution, the Supreme Court noted that the provision permitting an eight-person jury deprived the defendant of

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2 Fed. R. Crim. P. 23.
3 *Singer v. United States*, 380 U.S. 24, 26 (1965); *Patton v. United States*, 281 U.S. 276, 286 (1930), *abrogated by Williams v. Fla.*, 399 U.S. 78 (1970).
4 *Singer*, 380 U.S. at 26.
5 *Id.* at 29.
6 *Id.*
7 *Id.*
8 *Thompson v. Utah*, 170 U.S. 343, 344 (1898), *overruled by Collins v. Youngblood*, 497 U.S. 37 (1990), and *abrogated by Williams v. Fla.*, 399 U.S. 78 (1970).
9 *Thompson*, 170 U.S. at 620.
10 *Id.*
11 *Id.* at 621.
12 *Id.* at 622.
13 *Id.*

"a substantial right involved in his liberty" and resulted in a material disadvantage to the defendant.[14] The Supreme Court ultimately determined that an accused did not have the authority to consent to a jury of only eight persons.[15]

In 1930, the United States Supreme Court again examined the composition of a jury in *Patton v. United States*.[16] In *Patton*, the Supreme Court considered whether a defendant could choose to proceed to verdict with only eleven jurors after one of the twelve jurors became severely ill and was unable to complete the trial. Both the government and the defendant agreed to waive the presence of the twelfth juror and to continue the trial with only eleven jurors.[17] However, after the defendant was convicted, he appealed on the grounds that he had no ability to waive his constitutional right to a trial by a twelve-person jury, rendering his waiver unconstitutional.[18] Since a conflict existed among the Federal Circuits in allowing a waiver, the Eighth Circuit certified this question to the Supreme Court.

In *Patton*, the Supreme Court held that a defendant has a constitutional right to waive trial by a twelve-person jury and, in turn, to consent to a trial with fewer than twelve jurors, or to a trial by the court alone with no jury.[19] In other words, the Court concluded that trial by jury is a privilege (waivable right) of the accused and not a jurisdictional requirement. The Court determined that Article III, Section 2 of the Constitution is "meant to confer a right upon the accused which he may forego at his election" and instead, opt for a bench trial with the consent of the government and court.[20] The Court stated that, "to deny his power to do so is to convert a privilege into an imperative requirement."[21] The Court further noted that in preserving the right of trial by jury, the principal intent of the framers of the Constitution was to protect the accused.[22] However, the Court observed that trial by jury also involves interests of the public.[23] For this reason, the Court held that government consent and judicial authorization is required before the accused may choose to waive trial by jury.[24] The Court's holding resulted in what is now Rule 23(a).[25]

In 1965, the United States Supreme Court again considered the issue in *Singer v. United States*, which assessed the constitutionality of Rule 23(a)'s requirement of government consent and court approval before a defendant may waive a jury and obtain a bench trial.[26] At the start of the trial, the defendant expressed his desire to decrease the length of the trial and thus attempted to waive a trial by jury.[27] Although the court was willing to authorize the defendant's waiver, the government refused to consent and the defendant was convicted by a jury.[28] On appeal, the defendant challenged

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14 *Id*. at 623.
15 *Id*. at 624. Six years later in 1904, the United States Supreme Court held that the Constitution did not require that petty offenses be tried by jury at all. *Schick v. United States*, 195 U.S. 65, 70 (1904).
16 *Patton v. United States*, 281 U.S. 276, 286 (1930), *abrogated by Williams v. Fla*., 399 U.S. 78 (1970).
17 *Id*.
18 *Id.* at 287.
19 *Id*. at 290.
20 *Id*. at 298.
21 *Id*.
22 *Id*. at 294.
23 *Id*. at 305.
24 *Id*. at 312.
25 Adam H. Kurland, *Providing A Federal Criminal Defendant with A Unilateral Right to A Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 325 (1993).
26 *Singer*, 380 U.S. at 25.
27 *Id*. at 25.
28 *Id*.

the constitutionality of Rule 23(a) on the grounds that he had a constitutional right to waive a jury trial, "regardless of whether the prosecution and the court are willing to acquiesce in the waiver."[29] The defendant asserted that Article III, Section 2 and the Sixth Amendment were solely designed to protect the accused, and because other constitutional guarantees are waivable without government consent, defendants should be permitted to waive trial by jury and proceed to a bench trial without government consent and approval of the court.[30] The Supreme Court rejected this argument and upheld Rule 23(a) as constitutional.[31]

The Supreme Court in *Singer* held that criminal defendants do not have the constitutional right to choose unilaterally a bench trial without the consent of the government and the court, as required by Rule 23.[32] In so holding, the Court stated that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."[33] However, the Court limited its holding, stating that

> [W]e need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. The petitioner argues that there might arise situations where 'passion, prejudice ... public feeling' or some other factor may render impossible or unlikely an impartial trial by jury.[34]

The *Singer* Court relied on the holding and language in *Patton*. Read together, the cases establish that a defendant has a constitutional right to a jury trial, but no constitutional right to waive unilaterally a jury trial and obtain a bench trial. In upholding Rule 23(a), the Court observed that "the States have adopted a variety of procedures relating to the waiver of jury trials in state criminal cases," suggesting that the Federal Rules of Criminal Procedure could be amended to dictate a different outcome.[35] In other words, only Rule 23(a) of the Federal Rules of Criminal Procedure, not the U.S. Constitution, requires the defendant to obtain the consent of both the government and the court. Notably, the Sixth Amendment to the U.S. Constitution utilizes the word "enjoy," indicating a defendant's right to a jury trial is more of a sacrosanct right, but in appropriate circumstances, can be waived. Amending Rule 23(a) to grant trial courts the authority to approve a defendant's waiver of a jury trial without government consent would, therefore, be constitutionally permissible under the Supreme Court's guidance in *Patton* and *Singer*.

Although the Court in *Patton* and *Singer* noted that the government and the courts were focused on safeguarding the defendant's right to a jury trial, a jury trial might not always be in the defendant's best interest.[36] Rule 23(a) was adopted well before the Supreme Court's decision in *Gideon v. Wainwright,*[37] when a substantial number of defendants were not represented by counsel,

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29 *Id*.
30 *Id*. at 26.
31 *Id*.
32 *Id*.
33 *Id.* at 34.
34 *Id.* at 37-38.
35 *Id.* at 36-37.
36 *See, e.g., Singer*, 380 U.S. at 35.
37 *Gideon v. Wainwright,* 372 U.S. 335 (1963).

and needed protection. Following *Gideon*, the defendant has less of a need for the court's or the government's protection because the defendant has now been supplied his own counsel.[38] If the defendant can plead guilty and thus waive a jury trial if it is in his best interest, he should be permitted to waive a jury for trial, if the defendant similarly concludes that a bench trial is in his best interest. The defendant's choice is much different today for additional reasons. When Rule 23(a) was promulgated, cases were much less complex, media was less of an issue, and dockets were less crowded. Also, while COVID-19 problems may resolve, other unforeseen situations will surely arise.

III. STATE LAWS REGARDING A DEFENDANT'S ABILITY TO OBTAIN A BENCH TRIAL

The Committee surveyed state law to determine whether state criminal procedure is consistent with Fed. R. Crim. P. 23(a) in preventing a defendant from obtaining a bench trial without the consent of the government and approval of the court. A comprehensive summary of state law on this subject is set forth in Appendix A to this article.

In summary, twenty-eight states are essentially aligned with Rule 23, requiring both the prosecution's consent and the court's approval for the waiver of a jury trial.[39] One state is aligned with Rule 23(a) except in capital cases, where the prosecution has no ability to veto the defendant's request for a bench trial and the court's determination is limited to whether the defendant's waiver is voluntary.[40] Two states require the prosecution's consent, but afford the trial court no discretion to deny the waiver of a jury trial if both the prosecution and defendant consent.[41] Eleven states require the court's approval of the waiver of jury trial, but not the prosecution's consent.[42] Eight states grant the defendant a right to waive right to jury trial, subject to the court's finding that the waiver is knowing, intelligent and voluntary, but do not otherwise require the court's approval or the prosecution's consent.[43] In total, thirty-one states require the prosecution to consent to the waiver of a jury trial, while nineteen states do not take the prosecution's perspective into consideration at all.[44]

IV. BENCH TRIAL POLICIES IN U.S. ATTORNEY'S OFFICES

The Committee informally surveyed our colleagues to identify any policies on bench trials in U.S. Attorney's Offices around the country. We were unable to identify any formal policies on bench trials. In at least one district, it appears that the government has never consented to a defendant's bench trial request.[45] In several districts, requests to consent to a bench trial were considered on a case-by-case basis, but rarely resulted in the government consenting to a defendant's request.[46] Fellows from some districts reported that the government periodically agreed to bench trials at the

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38 *Id.*

39 AL, AK, AZ, CA, CO, DE, GA, ID, KS, KY, LA, MI, MS, NV, NW, ND, OK, PA, SC, SD, TN, TX, UT, VT, VA, WV, WI, WY.

40 AR.

41 FL, MT.

42 HI, IL, MD, MA, MN, MO, NE, NY, NC, OR, WA.

43 CT, IL, IN, IA, MD, NH, OH, RI.

44 Notably, while forty-eight states apply the same standard of review to factual findings at trial regardless of whether the conviction results from a bench trial or a jury trial, one state (Rhode Island) appears to require that its appellate court afford more deference to the factual findings of a trial court sitting without a jury, whereas another state (Utah) gives less deference to the factual findings of a trial court sitting without a jury. How the federal courts resolve this issue in a bench trial will be significant if a party requests specific findings of fact under Federal Rule of Criminal Procedure 23(c).

45 A responding Fellow could not recall the government ever consenting to a bench trial in the Northern District of Alabama.

46 Iowa N.D., Iowa S.D., Georgia and North Carolina districts, S.D.N.Y, South Carolina, Kentucky, Tennessee.

defendant's request.[47] Although anecdotal and not comprehensive, the responses we received suggest that federal prosecutors rarely consent to a defendant's request for a bench trial.[48]

V. STATISTICS ON THE BACKLOG OF CRIMINAL CASES IN THE FEDERAL COURT SYSTEM CREATED BY THE COVID-19 PANDEMIC

The COVID-19 pandemic has created a backlog of cases that the courts must address. Statistics from the Administrative Office of Courts illustrate the problem.[49]

Criminal defendants pending

2019	113,987[50]
2020	115,398[51]
2021	126,258[52]

Criminal cases terminated

2019	85,478[53]
2020	71,485[54]
2021	63,725[55]

As of September 30, 2022, there were 122,812 criminal cases pending, representing an increase of approximately 8% over the number of cases pending as of September 30, 2019.[56]

VI. COURT CONDITIONS RELATED TO COVID-19 LEAD THE COURT IN UNITED *STATES v. COHN* TO AUTHORIZE A BENCH TRIAL OVER THE GOVERNMENT'S OBJECTION

In *United States v. Cohn*, a case arising out of a securities fraud prosecution in the Eastern District of New York, District Judge Gary R. Brown granted the defendant's application for a bench trial in the absence of the government's consent in light of the extraordinary and unprecedented circumstances presented by COVID-19.[57] In a thorough and carefully-considered opinion, the court described the unique challenges presented by the pandemic at that time (August 2020, before the availability of vaccines), weighed the competing rights and interests underlying the application, and

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47 N.D. Cal., D. Montana, E.D. Va.

48 Data from the federal judiciary confirms that bench trials are rare in federal criminal cases. In the most recent twelve-month period from September 30, 2021 until September 30, 2022, the Administrative Office of Courts reported the disposition of 1,669 cases by trials in the federal system – 1,475 in a trial by jury and 194 by bench trial. https://www.uscourts.gov/statistics/table/d-4/judicial-business/2022/09/30.

49 The Committee recognizes that the pandemic is not entirely responsible for the increased backlog since most cases are resolved by pleas, not trial, and further, because many defendants do not want a speedy trial.

50 https://www.uscourts.gov/sites/default/files/data_tables/jb_d8_0930.2019.pdf

51 https://www.uscourts.gov/sites/default/files/data_tables/jb_d8_0930.2020.pdf

52 https://www.uscourts.gov/sites/default/files/data_tables/jb_d8_0930.2021.pdf

53 https://www.uscourts.gov/sites/default/files/data_tables/jff_5.4_0930.2019.pdf

54 https://www.uscourts.gov/sites/default/files/data_tables/jb_d9_0930.2020.pdf

55 https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2021.pdf

56 https://www.uscourts.gov/sites/default/files/data_tables/jb_d_0930.2022.pdf

57 481 F. Supp.3d 122 (E.D.N.Y. 2020).

ultimately concluded that the government's objection to a nonjury trial was far outweighed by the defendant's and the public's constitutional and statutory rights. Other case-specific factors supported moving forward with the trial in a reasonable timeframe.

Cohn involved charges of alleged obstruction of justice and unauthorized disclosure of confidential information against a former official of the Securities and Exchange Commission ("SEC"), who was accused of improperly accessing information from the SEC's computer system regarding a pending investigation of the private equity firm he would soon join as its chief compliance officer.[58] The indictment was filed on February 26, 2019 and superseded twice, in October 2019 and in July 2020, to add counts charging a violation of the Computer Fraud and Abuse Act and theft of public property.[59] The court scheduled a jury trial for September 2020. Considering that the Eastern District of New York had not conducted a jury trial since the pandemic began in March 2020, the date was ambitious.

As the prosecution slowly moved forward, Cohn's lawyer raised concerns regarding the need for the defendant to wear a mask during the anticipated trial, in light of his age and health condition, as well as the appearance of the masked defendant before the jury. In light of those concerns and other anticipated complications in conducting a jury trial during the pandemic, the court proposed the parties consider a bench trial.[60] In written submissions in response to the court's proposal, the defendant consented, but the government did not. Notwithstanding the government's objection, the defense filed a motion to proceed with a nonjury trial due to the "extraordinary circumstances presented by the COVID-19 pandemic" and its "desire to have a speedy trial pursuant to [the defendant's] rights under the Sixth Amendment."[61] After considering the parties' competing arguments, the court granted the motion.

In the opinion announcing the decision, Judge Brown stressed that it was the court, not the defendant, that proposed the idea of a bench trial and, therefore, the case did not present a situation in which the defendant was trying to "select his own tribunal."[62] The court recognized an accused's constitutional right to "a speedy and public trial, by an impartial jury," but also noted that "our society has long recognized that bench trials provide a fair and impartial mechanism for adjudication of criminal prosecutions." *Id.* (citations omitted). The court then addressed the Supreme Court's decision in *Singer v. United States*, 380 U.S. 24 (1965), and the central issue it addressed: whether a defendant's waiver of a jury trial can be conditioned upon the consent of the prosecutor and the court, as provided in Federal Rule of Criminal Procedure 23(a). While *Singer* upheld the procedure set forth in Rule 23(a), Judge Brown pointed out the Supreme Court's important caveat that there "might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial," such as "situations where passion, prejudice . . . public feeling or some other factor may render impossible or unlikely an impartial trial by jury.'"[63]

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58 *Id*. at 124.
59 *Id*.
60 *Id*. at 125.
61 *Id*. at 128.
62 *Id*. at 128 (citing *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217 (2d Cir. 1983)).
63 *Cohn*, 481 F. Supp.3d at 129 (citing *Singer*, 380 U.S. at 37-38).

After reviewing the sparse case law on the subject, the *Cohn* court distilled four factors that courts have considered in reviewing the efficacy of a criminal defendant's waiver of a jury trial in the absence of government consent: (1) "whether a governmental objection is made for an improper purpose"; (2) "whether the government's insistence on a jury trial unfairly interferes with the defendant's exercise of a separate constitutional right"; (3) "whether the government's insistence on a jury trial implicates the *public's* right to a speedy trial;" and (4) "whether case-specific factors, such as the nature of the evidence or the predominance of legal issues over factual issues, would render obtaining an impartial jury trial difficult or unworkable."[64]

In considering the first factor, the court recognized that the government is not required to articulate a reason for withholding its consent to a nonjury trial.[65] Having done so in *Cohn*, however, the court rejected the government's explanation for its objection as "simply untrue." Specifically, despite the government's claim that it was unaware of any case in recent memory in which the government consented to a nonjury trial in the Eastern District of New York, the defense identified thirteen Second Circuit cases reported on Westlaw in which the U.S. Attorney in that district consented to bench trials in criminal cases. The court identified two additional examples through its own research.[66] Nonetheless, since the defense had not challenged the prosecutors' motives, the court found the first factor to be neutral.

Judge Brown found the second factor—whether conducting a jury trial would conflict with the exercise of other rights by the defendant—weighed heavily in favor of granting the defendant's jury trial waiver.[67] The court recognized that, pursuant to *Singer*, the defendant's right to a speedy trial was alone insufficient to overrule the government's objection to a bench trial under Rule 23(a).[68] But the defendant's proffered infringement of his right to testify in his own defense was found to be a far greater concern. Judge Brown credited that the defendant would have to remove his mask in order to testify effectively on his own behalf but that requiring the defendant to do so in the early stages of the pandemic would present an unacceptable risk. According to the court, the necessity of masks "effectively pit[ted] this defendant's right to a jury trial against his right to testify at that trial[,] . . .a problem of constitutional dimension."[69] In contrast, a bench trial would provide flexibility for the defendant—such as testifying remotely—without concerns of jury prejudice that could arise from such a procedure.[70]

Likewise, the court found the third factor, the public's right to a speedy trial, weighed in favor of a bench trial. Noting that the Speedy Trial Act was designed "not just to benefit defendants but also to serve the public interest," the court found the public interest to be better served by a bench trial, given that it remained unclear when, and if, a jury trial could commence.[71] While conceding that a bench trial would present some of the same safety risks as a jury trial, the court found "the increased number of individuals involved in jury selection and trial, and the invariably longer amount

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64 *Id*. (citations omitted) (emphasis in original).
65 Because of "confidence in the integrity of the public prosecutor," the government is not required to provide a basis for its Rule 23(a) decision. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217-18 (2d Cir. 1983).
66 *Cohn*, 481 F. Supp.3d at 130-31.
67 *Id*. at 131, 132.
68 *Id*. at 131 (citing *Singer*, 380 U.S. at 38).
69 *Id*.
70 *Id*. at 132.
71 *Id.* at 134.

of time consumed in a jury trial, greatly increase both the disease transmission risk and the space and resources required."[72]

Finally, the court found that other case-specific factors also weighed in favor of a bench trial. The court explained that there were complex legal issues that could "expose a jury to inadmissible and confusing evidence," and the "defendant's health conditions . . . require[d] that he be masked throughout the proceeding, posing some danger of jury prejudice," even if all in the courtroom were required to wear a mask.[73]

After weighing all of these factors, the Court overruled the government's objection and ordered that the case proceed to a nonjury trial, provided that the defendant submit a written jury trial waiver and confirm the waiver in open court.[74] This exercise of the Court's discretion to grant a defendant's request for a bench trial after careful consideration of several competing factors suggests to the Committee a possible template for an amended Rule 23.

VII. RECOMMENDATION

The Committee recommends amendment of Rule 23(a) to remove the automatic veto power of the government without impairing the defendant's constitutional right to a fair trial or the government's interest in the integrity of the judicial process. Specifically, the Committee recommends that the rule be amended as follows:

(a) (1) JURY TRIAL. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(A) the defendant waives a jury trial in writing;

(B) the government consents; and

(C) the court approves.

(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit a 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.[75]

In evaluating possible amendments, the Committee considered recommending an amendment eliminating both the need for government consent and the requirement of court approval. Such an

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72 *Id.*

73 *Id*. at 134-35.

74 *Id*. at 135. There was no trial and no review of the Court's decision in *Cohn* on the defendant's jury trial waiver. That is because, one week after the Court's decision, the defendant pled guilty to one-count Misdemeanor Information and was sentenced to time served.

75 *See* Appendix B for a full draft of the proposed amendment to Rule 23(a), including a proposed comment.

amendment, in the Committee's opinion, has little chance of adoption by the Judicial Conference given the absence of authority for that proposal.[76]

The Committee also considered, but rejected, a potential amendment that would require random selection of a new trial judge where a defendant's request for a bench trial is granted. The Committee concluded that the uncertainty introduced by this requirement would discourage many defendants from requesting bench trials. A further difficulty enforcing such a rule concerns a defendant's potential withdrawal of a jury trial waiver after reassignment to a new judge.

Instead, the Committee recommends removing the need for government consent to a defendant's waiver of a jury trial. The court's approval would still be required, and the court, at its discretion, could require the defendant and the government to submit reasons (*ex parte* if appropriate) supporting their positions. The court would be free to consider a variety of factors, like those set forth by the court in *Cohn*, in deciding whether to grant a bench trial. The court could also *voir dire* the defendant to ensure the defendant freely and knowingly waives the right to a jury trial.

The Committee submits that its proposed amendment to Rule 23(a) would promote both fairness and efficiency, and would ultimately lead more defendants to exercise their constitutional right to trial.

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76 As noted in *United States v. Armbruster*, 2021 WL 2322566 (E.D. Wis. 2021), a case after *Cohn*, "no United States Court of Appeals appears to have approved a defendant's waiver of a jury over the government's objection. Indeed, the circuits that have considered this issue have uniformly upheld the trial court's refusal to grant such waivers without governmental consent." *United States v. United States Dist. Court*, 464 F.3d 1065, 1070 (9th Cir. 2006); *see also United States v. Clark*, 943 F.2d 775, 784 (7th Cir. 1991) (affirming denial of bench trial); *United States v. Alpern*, 564 F.2d 755, 758 (7th Cir. 1977) (same).

State Survey on Jury Trial Waivers

APPENDIX A

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Alabama	In writing or in open court on record AL R RCRP Rule 18.1	Ala.Code 1975 § 15-14-30	No constitutional right for accused to waive trial by jury, Ala.Const. Art. I, § 11, Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979)	Yes, prosecution must consent to waiver (Rule 18)	Court must approve, Rule 18, Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979)	Verdict will stand unless the judge's factual findings are "clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence." Baily v. City v. Ragland, 136 So.3d 498 (Ala. Ct. Crim. App. 2013). A presumption of correctness applies.	An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989). Presumption of correctness applies.	N/A. Same level of deference given to both. Messelt v. State, 351 So.2d 640 (Ala. Ct. Crim. App. 1977) ("[O]n appeal, the judgment of a trial court upon evidence taken ore tenus is to be treated like the verdict of a jury, and will not be disturbed unless plainly contrary to the weight of the evidence.").
Alaska	In writing for felony cases; for misdemeanor cases waiver may be in writing or made on the record in open court AK R RCRP Rule 23	None	No constitutional right for accused to waive trial by jury, AK CONST. Art. I, § 11	Yes, prosecution must consent to waiver (Rule 23)	Court must approve, Rule 23	Substantial Evidence Standard: The substantial evidence test governs appellate review of verdicts in judge-tried cases. Y.J. v. State, 130 P.3d 954 (Alaska 2006). Verdict will stand as long as "evidence exists to support the judge's conclusion." Id.	Substantial Evidence Standard: The "same test that an appellate court applies to jury verdicts" also applies to judge-tried cases. Shayen v. State, 373 P.3d 532 (Alaska 2015).	N/A. Same level of deference given to both. Shayen v. State, 373 P.3d 532 (Alaska 2015) (recognizing that the "same test that an appellate court applies to jury verdicts" also applies to judge-tried cases).
Arizona	In writing or on the record in open court on record; the court must address the defendant personally, inform the defendant of the defendant's right to a jury trial, and determine that the defendant's waiver is knowing, voluntary, and intelligent AZ ST RCRP Rule 18.1	None	AZ CONST Art. 6 § 17: a jury may be wived by the parties in a criminal case with the court's consent	Yes, State must consent to waiver (Rule 18.1)	Court must approve, Rule 23	Substantial Evidence Standard. State v. Natzke, 25 Ariz. App. 520 (1976).	Substantial Evidence Standard. State v. Flowers, 110 Ariz. 566 (1974)	N/A. Same level of deference given to both.
Arkansas	In writing or in open court or through counsel in open court in presence of defendant AR R RCRP Rule 31.2; In fine only misdemeanor case trial may be waived by attorney, corporation by waive through attorney or corporate officer AR R RCRP Rule 31.3	AR ST § 16-89-108 Waivers in certain cases	AR CONST Art. 2, § 7 Jury trials; rights	Yes, except in capital cases	In capital cases, the court must determine that the defendant's waiver is voluntary	Substantial Evidence Standard. Colen v. State, 2022 Ark. App. 148	Substantial Evidence. See Harjo v. State, 2017 Ark. App. 337.	N/A. Same level of deference given to both. Cook v. State, 878 S.W.2d 765 (Ark. App. 1994) (en banc) ("If the decision of the court or jury is supported by substantial evidence, we will affirm.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
California	CA PENAL § 1167 Waiver of jury trial; announcement of findings; form; entry	None	CA CONST Art. 1, § 16 Jury trial; in open court by defendant and defendant's counsel	Yes, "by consent of both parties," See CA CONST Art. 1	"[T]he court retains the right to require a jury trial." People v. Kipnis, 85 Cal. Rptr. 547 (Ca. Ct. App. 1970).	Substantial Evidence Standard: In reviewing a judgment based upon a statement of decision following a bench trial, Court of Appeal applies substantial evidence standard of review to the trial court's findings of fact, and under this deferential standard of review, findings of fact are liberally construed to support the judgment and Court considers evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. Thompson v. Asimos, 6 Cal. App. 5th 970, 212 Cal. Rptr. 3d 158 (2016). We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. People v. Perryman, No. B265183, 2016 WL 7217187, at *5 (Cal. Ct. App. Dec. 12, 2016). A reversal for insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" the trial court's verdict. Id.	Substantial Evidence Standard: To prevail on a sufficiency of the evidence argument on appeal, defendant must present his case to appellate court consistently with the substantial evidence standard of review. People v. Paredes, 61 Cal. App. 5th 858, 276 Cal. Rptr. 3d 165 (2021), review denied (May 26, 2021). To prevail on a sufficiency of the evidence argument on appeal, defendant must set forth in his opening brief all of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade appellate court that evidence cannot reasonably support the jury's verdict. Id.	N/A. Same level of deference given to both.
Colorado	CO ST RCRP Rule 23	CO ST § 16-10-101	No. People v. Dist. Ct. of Colorado's Seventeenth Jud. Dist., 843 P.2d 6, 8 (Colo. 1992).	YES. Prosecution has right to refuse to consent to waiver in all cases in which the accused has the right to request a trial by jury. CO ST § 16-10-101	Where the prosecution objects to defendant's waiver of trial by jury, and the defendant contends that trial by jury would result in a due process violation, the decision as to waiver rests with the trial court. People v. Dist. Ct. of Colorado's Seventeenth Jud. Dist., 843 P.2d 6, 11 (Colo. 1992).	Manifestly Erroneous Standard. Vigil v. Lamm, 190 Colo. 180 (1976).	Manifestly Erroneous standard.	N/A. Same level of deference given to both. People v. Tomaske, 2022 WL 1573059 (Colo. Ct. App. May 19, 2022), reh'g denied (June 2, 2022) ("[S]ufficiency challenges after a bench trial are no different than those after a jury trial.").
Connecticut	None (see statute)	Conn. Gen. Stat. Ann. § 54-82b	Ct. Const. art. 1, § 8	Not specified. CT ST § 54-82b, CT R SUPER CT CR § 42-1.	Court examines totality of the circumstances surrounding the waiver to determine if defendant intentionally relinquished or abandonded defendant's constitutional right to jury. State v. Ells (1995) 667 A.2d 556, 39 Conn.App. 702.	. Same standard applies to both. State v. Weathers, 339 Conn. 187 (Conn. 2021).	Same standard applies to both. State v. Weathers, 339 Conn. 187 (Conn. 2021).	N/A. Same level of deference given to both. State v. Weathers, 260 A.3d 440 (Conn. 2021) (recognizing that in bench trials "the normal rules for appellate review of factual determinations apply and the evidence must be givena construction favorable to the court's verdict").
Delaware	DE R SUPER CT RCRP Rule 23	None. See state rule.	None. See state rule.	YES. DE R SUPER CT RCRP Rule 23	Court must consent to waiver for it to be valid. DE R SUPER CT RCRP Rule 23.	Clear Error Standard: A deferential standard of review is applied to factual findings by a trial judge: those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous. Burrell v. State, 953 A.2d 957 (Del. 2008).	Clear Error Standard. Banther v. State, 823 A.2d 467 (Del. 2003).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Florida	FL ST RCRP Rule 3.260 Waiver of jury trial	None. See state rule.	None. See state rule.	YES. FL ST RCRP Rule 3.260	No. Trial by judge is mandatory when both parties agree. Warren v. State, 632 So.2d 204 (Fla. Dist. Ct. App. 1994).	"Competent Substantial Evidence" Standard: When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence because the trial judge is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses. Harrington v. State, 238 So. 3d 294, 297 (Fla. Dist. Ct. App. 2018).	Same standard applies to both.	N/A. Same level of deference given to both. Siewert v. Casey, 80 So. 3d 1114 (Fla. Dist. Ct. App. 2012) ("It is the role of the finder of fact, whether a jury or a trial judge, to resolve conflicts in the evidence and great deference is afforded the finder of fact.").
Georgia	GA R UNIF SUPER CT Rule 33.8	GA ST § 15-10-61	None. See state rule/statute.	YES. Zigan v. State, 281 Ga. 415, 638 S.E.2d 322 (2006)	Court may deny request. See Zigan, 281 Ga. 416 (2006).	Clearly Erroneous Standard: In bench trials, the findings of the trial court will not be set aside unless clearly erroneous and regard must be given to the trial court's opportunity to assess the credibility of the witnesses. Brown v. State, 351 Ga. App. 808, 808, 833 S.E.2d 302, 303 (2019). When evaluating the sufficiency of evidence, the proper standard for review is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Hayes v. State, 292 Ga. 506, 506, 739 S.E.2d 313, 314 (2013). The clearly erroneous test is the same as the any-evidence rule, and, as a result, the Court of Appeals will not disturb fact findings of a trial court if there is any evidence to sustain them. Serdula v. State, 356 Ga. App. 94, 845 S.E.2d 362 (2020), cert. denied (Apr. 5, 2021)	Same standard applies. Moore v. State, 321 Ga. App. 813, 814, 743 S.E.2d 486, 487 (2013).	N/A. Same level of deference given to both. Moore v. State, 743 S.E.2d 486, 487 (Ga. 2013) ("The trial court sits as the trier of fact; its findings are akin to a jury verdict and will not be disturbed if there is any evidence to support them.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Hawaii	Haw. R. Penal P. 23; Haw. R. Penal P. 5(b)(3)	Haw. Rev. Stat. § 806-61	Haw. Const. art. I, § 14	NO. Only court consent required. Haw. Rev. Stat. § 806-61.	"Although the rule indicates the waiver may be given by written or oral consent, the rule does not relieve the court of its obligation to ensure, through an appropriate oral colloquy in court, that the waiver was knowingly, intelligently, and voluntarily given." State v. Gomez-Lobato, 312 P.3d 897, 901 (Haw. 2013).	Clearly Erroneous Standard: Trial court's findings of fact will not be disturbed unless clearly erroneous. State v. Kwong, 149 Haw. 106, 482 P.3d 1067 (2021). "A finding of fact is clearly erroneous when the record lacks substantial evidence to support the finding or, despite substantial evidence in support of the finding, we are nonetheless left with a definite and firm conviction that a mistake has been made." State v. Park, 495 P.3d 392 (Hawaii Court of Appeals 2021).	The Supreme Court reviews the sufficiency of the evidence under the following standard: evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury, and the test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. State v. Delos Santos, 124 Haw. 130, 238 P.3d 162 (2010).	N/A. Same level of deference given to both. State v. Matavale, 166 P.3d 322, 331 (Haw. 2007) ("Evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury.").
Idaho	I.C.R. 23	Idaho Code § 19-1902	Idaho Const. art. I, § 7	YES. Prosecutor's consent is required.	Level of discretion unclear, but Idaho Supreme Court held that trial court may deny accused's waiver of right to jury trial without violating constitutional rights. State v. Creech, 589 P.2d 114 (Idaho 1979).	Substantial Evidence Standard. State v. Clark, 168 Idaho 503, 506–07, 484 P.3d 187, 190–91 (2021).	Substantial Evidence Standard: The appropriate standard of review on an allegation of insufficiency of evidence "is whether there is substantial and competent evidence to support the jury's verdict. State v. Thomas, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999).	N/A. Same level of deference given to both.
Illinois	IL R 18 CIR Rule 30.13; IL R 22 CIR Rule 10.23	725 Ill. Comp. Stat. 5/103-6	Ill. Const. art. I, § 13	No.	No consent or approval required. Discretion limited to whether waiver is voluntary.	Beyond-a-reasonable-doubt standard of review: "A conviction will not be set aside on appeal unless the evidence is so unreasonable, improbable , or unsatisfactory that there remains a reasonable doubt of the defendant's guilt." People v. Walls, 2022 WL 2035719 (Ill. App.).	Beyond-a-reasonable-doubt standard. People v. Bush, 2022 IL App. (3d) 190283	N/A. Same level of deference given to both. People v. Belk, 326 Ill. App. 3d 290 (2001) (recognizing that the "same standard of review" governing sufficiency challenges applies "regardless of whether the defendant receives a bench or jury trial").
Indiana	Ind. R. Crim. P. 22	Ind. Code § 35-37-1-2	Ind. Const. art. I, § 13	NO. State does not have the right to demand a jury trial over an accused's objection. State v. Bonds, 94 N.E.3d 333, 338-39 (Ind. Ct. App. 2018).	Not specified but but court must determine if waiver is voluntarily, knowingly and intelligently made with sufficient awareness of relevant circumstances surrounding its entry and its consequences.	Substantial Evidence. Scott v. State, 895 N.E.2d 369 (Ind. Ct. App. 2008).	Substantial Evidence Standard.	N/A. Same level of deference given to both.
Iowa			Iowa Const. art. I, § 9	No. Defendant has absolute right to nonjury trial. State v. Henderson, 287 N.W.2d 583 (Iowa 1980).	No consent or approval required. Discretion limited to whether waiver is voluntary.	Substantial Evidence Standard: Trial court's verdict in jury-waived trial is binding on appellate court, and appellate court will uphold it unless the record lacks substantial evidence to support such a finding. State v. Fordyce, 940 N.W.2d 419 (Iowa 2020).	Appellate court reviews a trial court's findings in a jury-waived case as it would a jury verdict. State v. Kemp, 688 N.W.2d 785 (Iowa 2004).	N/A. Same level of deference given to both. State v. Kemp, 688 N.W.2d 785 (Iowa 2004) ("An appellate court reviews a trial court's findings in a jury-waived case as it would a jury verdict.")

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Kansas	N/A	KSA § 22-3403(1)	Kan. Const. pmbl. § 5	Yes. Prosecution consent required. State v. Mullen, 51 Kan.App.2d 514 (2015).	Court's consent is required by statute.	Substantial Evidence Standard	Substantial Evidence Standard	N/A. Same level of deference given to both. State v. Reichenberger, 495 P.2d 919 (1972) (recognizing that in a judge-tried case "the facts found, if supported by substantial competent evidence, must be accorded on appellate review the same weight as if found by a jury").
Kentucky	Ky. RCr. 9.26	K.R.S. § 29A. 270	Ky. Const. art. II § 2	Yes. Commonwealth's consent is required.	Court's consent is required.	Substantial Evidence Standard. Anderson v. Commonwealth, 352 S.W.3d 577 (Ky. 2011)	Same standard applies.	N/A. Same level of deference given to both. Simpson v. Commonwealth, 244 S.W. 65 (1922) (recognizing that upon review of a sufficiency challenge from a bench trial "the same effect should be given to the finding of the facts by the court as is given to the verdict of a properly instructed jury").
Louisiana	La. C. Cr. P. Art. 780, 782	None	La. Const. amd. § 17(A)	Yes, per statute.	Court has some discretion to approve defendant's request for trial by jury, separate and apart from deciding whether or not the waiver was voluntary. See State v. Guy, 16 So. 404 (La. 1894) (finding no abuse of discretion based on trial court's refusal to allow defendant to waive trial by jury, where the court had concurred with the jury in the verdict in a motion for new trial, giving the defendant the benefit of a trial by court as well as by jury).	Manifestly/Clearly Erroneous Standard: Trial judge's factual determination is given great weight and will not be disturbed upon appeal unless clearly erroneous. State v. Colomb, 261 La. 548, 260 So. 2d 619 (1972). Under standard for sufficiency of evidence, the pertinent appellate inquiry regarding the sufficiency of the evidence in judge trials must remain, as it does in jury trials, on the rationality of the result and not on the thought processes of the particular fact finder. State v. Marshall, 2004-3139 (La. 11/29/06), 943 So. 2d 362. The standard of appellate review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).	The appellate standard of review in jury and non-jury trials are the same and the appellate courts are to decide whether the trial court's judgment was manifestly erroneous or clearly wrong. The Court of Appeal's function on appellate review is to determine whether evidence was sufficient for the trial court's factual findings, and whether those findings were clearly wrong. Burkett v. Crescent City Connection Marine Div., 98-1237 (La. App. 4 Cir. 2/10/99), 730 So. 2d 479, 484, writ denied, 99-1416 (La. 9/3/99), 747 So. 2d 543.	N/A. Same level of deference given to both. State v. Marshall, 943 So.2d 362 (La. 2006) (explaining that on appellate review of a sufficiency challenge "the pertinent inquiry in judge trials must remain, as it does in jury trials, on the rationality of the result and not on the thought processes of the particular fact finder").
Maine	Me. R. U. Crim. P. 23	None	M.R.S.A. Const. Art. 1, § 6	No.	Court approval required by rule.	Clearly Erroneous Standard: Factual finding in criminal case in which jury has been waived is only clearly erroneous if there is no competent evidence in record to support it. State v. Bartlett, 661 A.2d 1107 (Me. 1995).	When reviewing challenge to sufficiency of evidence to support verdict in bench trial, standard of review is same as that for jury verdict. State v. Gorman, 648 A.2d 967 (Me. 1994).	N/A. Same level of deference given to both. State v. Gove, 379 A.2d 152 (Me. 1977) (rejecting argument that a different standard of appellate review applied to sufficiency challenge from a bench trial, and holding that the same standard applies in both bench trials and jury trials).

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Maryland	Rule 4-246	MD Crim Proc § 6-101	Md. Const. art. 21	No, per rule.	No consent or approval required. Discretion limited to whether waiver is voluntary.	Clearly Erroneous Standard: When reviewing bench trials, an appellate court will review findings of fact under the "clearly erroneous standard," meaning that a finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion. Scriber v. State, 236 Md. App. 332, 181 A.3d 946 (2018).	Court reviews a challenge to the sufficiency of the evidence in a jury trial by determining whether the evidence, viewed in a light most favorable to the prosecution, supported the conviction and whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Smith v. State, 415 Md. 174, 184, 999 A.2d 986, 991 (2010).	N/A. Same level of deference given to both. Chisum v. State, 132 A.3d 882 (Md. 2016) (holding that "the test of the legal sufficiency of the evidence to support the conviction is the same in a jury trial and in a bench trial").
Massachusetts	Mass. R. Crim. P. 19 (a)	Mass. Gen. Laws ch. 263, § 6	Mass. Const. art. XII	NO. Prosecutor has no say over the decision. See Mass. R. Crim. P. 19 (a); Mass. Gen. Laws ch. 263, § 6; Mass. Const. art. XII.	Court may deny defendant's waiver of trial by jury "for any good and sufficient reason provided that such refusal is given in open court and on the record." See Mass. R. Crim. P. 19 (a); Commonwealth v. Gebo, 188 N.E.3d 80, 90 (Mass. 2022).	Clearly Erroneous Standard: On review of a jury-waived trial, the Supreme Judicial Court generally accepts the trial judge's findings of fact unless they are clearly erroneous. Com. v. Pugh, 462 Mass. 482, 969 N.E.2d 672 (2012). "A finding is 'clearly erroneous' when althoguh there is evidence to support it, the reviewing court of the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id.	Appellate court reviews "the evidence presented at trial, otgether with reasonable inferences drawn therefrom, in the light most favorable to the Commonwealth to determine whether any rational jury could have found each element of the offense beyond a reasonable doubt." Commonwealth v. Morrison,, 150 N.E.3d 826 (Mass. App. 2020).	N/A. Same level of deference given to both.
Michigan	Mich. Ct. R. 6.401	Mich. Code Crim. P. 763.3	Mich. Const. art. I, § 20	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Mich. Code Crim. P. 763.3; People v. Kirby, 487 N.W.2d 404, 406 (Mich. 1992).	Court's approval is required. See Mich. Code Crim. P. 763.3; People v. Kirby, 487 N.W.2d 404, 406 (Mich. 1992).	Clear Error Standard: Trial court's factual findings in a bench trial are reviewed for clear error. People v. Anderson, No. 354860, 2022 WL 981299 (Mich. Ct. App. Mar. 31, 2022). Standard of review for sufficiency of evidence in bench trial is whether trial court clearly erred in its ruling, or viewing evidence in light most favorable to prosecution, whether rational trier of fact could find essential elements of crime were proven beyond reasonable doubt. People v. Gay, 149 Mich. App. 468, 386 N.W.2d 556 (1986).	Same standard applies as in bench trials. People v. Oros, 917 N.W.2d 559, 564 (2018).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Minnesota	Minn. R. Crim. P. 26.01	None (see State Procedural Rule)	Minn. Const. art. I, § 4	NO. Prosecutor has no say over the decision. See State v. Lessley, 779 N.W.2d 825 (Minn. 2010).	Yes. Court's approval is required	Clearly Erroneous Standard: A trial court's findings, as trier of fact in a criminal case, will not be set aside unless clearly erroneous. State v. Wiley, 348 N.W.2d 86 (Minn. Ct. App. 1984), aff'd, 366 N.W.2d 265 (Minn. 1985).	Where defendant waived his right to jury trial in criminal prosecution, trial court's findings will be given the same weight as a jury verdict. State v. Knowlton, 383 N.W.2d 665 (Minn. 1986). Findings of the district court, after waiver of a jury trial by a defendant, are entitled to the same weight on appeal as a jury verdict. State v. Tracy, 667 N.W.2d 141 (Minn. Ct. App. 2003).	N/A. Same level of deference given to both. State v. Holliday, 745 N.W.2d 556 (Minn. 2008) ("'The appellate court reviews criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions.").
Mississippi	Miss. R. Crim. P. 18.1	None (see State Procedural Rule)	Miss. Const. art. 3, § 31	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Miss. R. Crim. P. 18.1.	Court must consent to the waiver before it can be valid. See Miss. R. Crim. P. 18.1	Manifestly Erroneous/ Subtantial Evidence Standard: "For review of the findings of a trial judge sitting without a jury, this Court will reverse 'only where the findings of the trial judge are manifestly erroneous or clearly wrong.'" Amerson v. State, 648 So. 2d 58, 60 (Miss. 1994). Such error does not occur if there is substantial, credible, and reasonable evidence supporting the decision. Briggs v. State, 337 So. 716 (MIss. 2022). There must be substantial evidence showing that the trial judge was manifestly wrong. Solitro v. State, 246 So.3d 941 (Miss. Ct. App. 2018).	Appellate court "will not disturb a verdict when substantial evidence supports it." Bridges v. State, 716 So.2d 614, 617 (Miss. 1998).	N/A. Same level of deference given to both.
Missouri	Mo. R. RCRP Rule 27.01, in felony cases, waiver must be made in open court with the defendant present or present by video and entered on the record	None (other than an ordinance for traffic violations), MO R ORD AND TRAF VIOL Rule 37.61	Mo. Const. Art. 1, § 22a, in every criminal case, any defendant with the assent of the court may waive a jury trial and submit the trial of such case to the Court.	Not by statute, but the court has discretion and must assent in order for the defendant to have a bench trial.	Waiver may only be made "with the assent of the court." Mo. R. RCRP Rule 27.01(B). "There is no absolute right to be tried by court rather than jury." State v. Hornbuckle, 746 S.W.2d 580 (Mo. App. 1988).	The standard of review is the same for a bench trial as it is for a case tried before a jury. "This court's review of a court-tried case is the same as for a case tried by a jury." State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996). The court "view[s] all evidence in the light most favorable to the state and affirm the trial court's judgment if there is substantial evidence to support its findings." State v. Bledsoe, 920 S.W.2d 538 (Mo. App. 1996)	The standard of review is the same for a bench trial as it is for a case tried before a jury. "This court's review of a court-tried case is the same as for a case tried by a jury." State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996). The court "view[s] all evidence in the light most favorable to the state and affirm the trial court's judgment if there is substantial evidence to support its findings." State v. Bledsoe, 920 S.W.2d 538 (Mo. App. 1996)	N/A. Same level of deference given to both. State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996) ("'This court's review of a court-tried case is the same as for a case tried by a jury.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Montana	None	Mont. Code Ann. § 46-16-110. Waiver may be made with the written consent of both parties.	Mont. Const. Art. 2 § 26	Written consent "of the parties" is required for the defendant to waive his/her right to a jury trial. Mont. Code Ann. § 46-16-110. This has been costrued as requiring written consent forom the prosecutor. State ex. Rel. Long v. Justice Court, Lake County, 156 P.3d 5, 8 (Mont. 2007).	Not clear. The statute requires court approval to try case to less jurors than the constitution guarantees, but the following provision allowing waiver by written consent of the parties does not contain similar language requiring court approval. Mont. Code Ann. 46-16-110.	"On appeal, we simply determine if there is substantial evidence to support the defendant's guilt beyond a reasonable doubt." State v. Longacre, 542 P.2d 1221, 1222 (Mont. 1975). "[I] n determining whether there is substantial evidence to support the verdict entered by the trial court, this Court will examine the evidence in the light most favorable to the state." State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979)."	Same standard as bench trial. "Thus, the substantial evidence test applies to appeals both from judge and jury convictions. Therefore, in determining whether there is substantial evidence to support the verdict entered by the trial court, this Court will examine the evidence in the light most favorable to the state." State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979).	N/A. Same level of deference given to both. State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979) ("'Thus, the substantial evidence test applies to appeals both from judge and jury convictions.")
Nebraska	None	There is no statute specific to waiver in criminal cases, except for waiver to as jury trial in cases involving obscenity. See Neb. Stat. Ann. § 28-814. Neb. Stat. Ann. § 25-1126 discusses waiver of jury trials but is not specific to criminal cases. The Nebraska Supreme Court has held that a written waiver of jury trial signed by defense counsel in a criminal case and acquiesed in by defendant is a valid waiver. State v. Klatt, 219 N.W.2d 761 (Neb. 1974).	None	No procesutor consent required. State v. Carpenter, 150 N.W.2d 129 (Neb. 1967)	Consent of court required, but courts should permit waiver "whenever it will promote the fair, reasonable, and efficient administration of justice." State v. Godfrey, 155 N.W.2d 438 (Neb. 1968).	"A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous." State v. Masters, 524 N.W.2d 342, 345 (Neb. 1994). "A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction." State v. Masters, 524 N.W.2d at 345.	"On review, criminal conviction must be sustained if the evidence, viewed and construed most favorably to the state, is sufficient to support the conviction; in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury, which are within the jury's province for disposition." State v. Larsen, 586 N.W. 2d 641, 646-647 (Neb. 1998).	N/A. Same level of deference given to both. State v. Masters, 524 N.W.2d 342, 345 (Neb. 1994) ("A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.")
Nevada	None	Procesutor consent is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1. Defendant can waive a trial by jury if done so in writing with the approval of the court and consent of the prosecutor not less than 30 days before trial except for capital cases, which much be tried by jury.	None	Procesutor consent is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1	Court approval is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1	"[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mitchell v. State, 192 P.3d 721, 727 (Nev. 2008).	"The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution." Morgan v. State, 416 P.3d 212 (Nev. 2018).	N/A. Same level of deference given to both.
New Hampshire	NH R. Crim. Rule 21	NH Rev. Stat. Ann. § 606:7. Defendant may waive the right in writing at the time of a plea or before the jury is impaneled, and file the written waiver with the clerk of court. Court or prosecutorial approval is not required.	None	Consent of the state is not required. NH R. Crim. Rule 21(b).	Court approval is not required. NH Rev. Stat. Ann. § 606:7	" A challenge to the sufficiency of the evidence raises a claim of legal error; therefore, our standard of review is de novo. To prevail upon a challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Vincelette, 214 A.3d 158 (N.H. 2019) (internal citations omitted).	Same as for bench trial. See State v. Morrill, 156 A.3d 1028, 1036 (N.H. 2017).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
New Jersey	N.J. Ct. R. 1:8-1	None	None	No; but notice must be given to the prosecuting attorney who shall have an opportunity to be heard. (Rule 1:8-1(a))	Court must approve waiver. (Rule 1:8-1(a)). A defendant must sign a jury waiver form which advises that (i) a jury is composed of 12 members of the community, (ii) the defendant may participate in the selection of jurors, (iii) all 12 jurors must unanimously vote to convict, and (iv) if a jury trial is waived, a judge a lone will decide guilt or innocence. If signed, the trial judge must engage in a colloquoy to address these four points and the voluntariness of the waiver). See State v. Blann, 217 N.J. 517, 519, 90 A.3d 1253, 1254 (2014) (NJ Supreme Court excercised its supervisory powers to establish these two mandates to ensure full understanding in waiver of jury trial).	Appellate court must have a definite conviction that the trial court went so wide of the mark that a mistake must have been made. State v. $36,560.00 in U.S. Currency, 673 A.2d 810 (N.J. App. Div. 1996).	Appellate court can only disturb jury findings if the jury could not have reasonably used the evidence to reach its verdict. State v. Morgan, 33 A.3d 527 (N.J. App. Div. 2011).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
New Mexico	N.M. R. Crim. P. Dist. Ct. 5-605; NM R MAG CT RCRP Rule 6-602; NM R METRO CT RCRP Rule 7-602	in metropolitan court: NM ST § 34-8A-5	N.M. Const., art. II, § 12.	In metropolitan court and magistrate court, jury trial for misdemeanors or offenses where the potential aggregate penalty includes imprisonment in excess of 6 months can be waived with court and prosecutor consent. NM R METRO CT RCRP Rule 7-602; NM R MAG CT RCRP Rule 6-602. In district court, may waive with court and prosecutor consent. NM R DIST CT RCRP Rule 5-605.	Same	"The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.... In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." State v. Knight, 2019-NMCA-060, ¶ 11, 450 P.3d 462, 465–66 (bench trial).	The standard by which an appellate court reviews a jury verdict for sufficiency of the evidence is well-established. "Evidence is viewed in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." State v. Garcia, 2011–NMSC–003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation marks and citations omitted). We then determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." Id. We have made clear that "[b]ecause an appellate tribunal does not enjoy the same exposure to the evidence and witnesses as the jury at trial, our review for sufficiency of the evidence is deferential to the jury's findings." Id. And we have explicitly said that: New Mexico appellate courts will not invade the jury's province as fact-finder by second-guess[ing] the jury's decision concerning the credibility of witnesses, reweigh[ing] the evidence, or substitut[ing] its judgment for that of the jury. So long as a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction, we will not upset a jury's conclusions. Id. (alterations in original) (internal quotation marks and citations omitted).	N/A. Same level of deference given to both. State v. Quintin C., 451 P.3d 901 (N.M.C.A. 2019) ("In a bench trial, the trial judge takes the place of the jury as the finder of fact, and in this respect, the situation in this appeal is similar to an appeal predicated upon an error in an instruction of law given to a jury." (quotation omitted) (cleaned up)).

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
New York	NY CRIM PRO § 320.10	None	NY CONST Art. 1, § 2	No.	Consent of court. NY CONST Art. 1, § 2	Although the defendant was convicted after a nonjury trial, the appropriate standard for evaluating his weight of the evidence argument is the same, regardless of whether the fact-finder was a judge or jury. People v. Zephyrin, 52 A.D.3d 543, 543, 860 N.Y.S.2d 149, 150 (2008). Thus, we must first determine, based upon the credible evidence, whether a different result would have been unreasonable, and if it would not have been, then we must " 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " Id.	In assessing whether a verdict is supported by the weight of the evidence, we must first determine whether, based upon all of the credible evidence, a different finding would have been unreasonable; if not, we must then "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" to determine whether the jury gave "the evidence the weight it should be accorded" People v. Wilder, 200 A.D.3d 1303, 158 N.Y.S.3d 422, 424 (2021). However, we also accord "[g]reat deference" to the jury's credibility determinations, given that the jurors have the "opportunity to view the witnesses, hear the testimony and observe demeanor" Id.	N/A. Same level of deference given to both. People v. O'Neill, 169 A.D.3d 1515 (N.Y. Supr. Ct. 2019) ("In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference.").
North Carolina		NC ST § 15A-1201	None	Opportunity to object. NC ST § 15A-1201	Consent of trial judge required; hearing required in open court for judicial consent; judge must address defendant personally to determine if defendant fully understands waiver, and determine if state objects to waiver. NC ST § 15A-1201	"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also Sisk v. Transylvania Cmty. Hosp., Inc., 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).	"There was sufficient evidence, in law, to support the finding of the jury, and when this is the case and it is claimed that the jury have given a verdict against the weight of all the evidence, the only remedy is an application to the trial judge to set aside the verdict for that reason." Pender v. North State Life Ins. Co., 163 N.C. 98, 101, 79 S.E. 293, 294 (1913). "We cannot interfere with the jury in finding facts upon evidence sufficient to warrant their verdict." West v. Atlantic Coast Line R.R. Co., 174 N.C. 125, 130, 93 S.E. 479, 481 (1917).	N/A. Same level of deference given to both. State v. Pavkovic, 833 S.E.2d 383 (N.C. App. 2019) ("When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
North Dakota	ND R RCRP Rule 23	ND ST 29-16-02	None	Consent of prosecutor. ND ST 29-16-02	Consent of court. ND RCRP Rule 23	"In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses." State v. Rufus, 2015 ND 212, ¶ 6, 868 N.W.2d 534, 538	Same standard applies.	N/A. Same level of deference given to both. State v. Rufus, 868 N.W.2d 534, 538 (N.D. 2015) ("[S]tandard of review for a criminal trial before the district court without a jury is the same as a trial with a jury.").
Ohio	Ohio Crim. R. 23(a)	R.C. 2945.17; R.C. 2945.05.	Ohio Const. art. I, § 10	No.	None. "[T]he trial court cannot reject a defendant's waiver of the right to a jury trial." State v. Van Sickle, 629 N.E.2d 39, 44 (Ohio App. 1993).	Same standard as jury trial, but in a bench trial there is a rebuttable presumption that that the court considered the relevant evidence. State v. Pepin-McCaffrey, 929 N.E.2d 476 (Ohio App. 2010).	"When reviewing sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in a light most favorbale to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Rucker, 113 N.E.3d 81, 91-92 (Ohio App. 2018) (quotation omitted).	N/A. Same level of deference given to both. State v. Webb, 1991 WL 253811, at *3 (Ohio Ct. App. Nov. 15, 1991) ("The same standard applies if the criminal conviction is the result of a bench trial, rather than a trial to a jury." (citing State v. Swiger, 214 N.E.2d 417 (Ohio 1966))).
Oklahoma	None	None	Okla. Const. art. II, §§ 19, 20	Yes. "[A] defendant cannot waive a jury trial without the consent of both the State and the trial court." Hinsley v. State, 280 P.3d 354, 356 (Okla. Ct. Crim. App. 2012).	Yes. The trial court must consent to the waiver.	"[W]here a jury is waived, and the case tried to the court, his findings, as to the guilt of the defendant, will not be reversed where there is any competent evidence in the record, together with reasonable inferences and deductions, to be drawn therefrom supporting the court's findings." Kinder v. State, 438 P.2d 302, 303 (Okla. Ct. Crim. App. 1968).	"[W]hether the evidence, taken in the light most favorable to the prosecution, permits any rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt." Thompson v. State, 429 P.3d 690, 694 (Okla. Ct. Cirim. App. 2018).	N/A. Same level of deference given to both. Martin v. State, 547 P.2d 396 (O.C.C.A. 1976) ("Where a jury is waived and the case is tried before the court, the weight and credibility of the evidence as determined by the court is the same as if determined by the jury and will be given the same force and effect.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Oregon	None (criminal procedural rules are statute-based only)	O.R.S. § 136.001	Or. Const. art. I, § 11	No. Oregon Supreme Court held that the statute granting prosecution right to veto defendant's waiver of jury trial was unconstitutional under Oregon Constitution.	Court has discretion to allow defendant to waive a jury trial, though not controlling, must consider the prosecutior's expressed preference for or against defendant's waiver	""This court reviews questions of the sufficiency of the evidence . . .by examining the evidence in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential element of the crime beyond a reasonable doubt. . . . This court's decision is not whether we believe that defendant is guilty beyond a reasonable doubt, but whether the evidence is sufficient for the jury to so find." State v. Moore, 927 P.2d 1073, 1094 (Or. 1996) (quoting State v. Cunningham, 880 P.2d 431 (Or. 1994)).	Same standard as bench trial	N/A. Same level of deference given to both. State v. Lammers, 562 P.2d 1223 (Ore. App. 1977) ("'The court's findings on factual matters are as binding as a jury verdict.").
Pennsylvania	Pa. R. Crim. P. 620	None (42 Pa.C.S. 5104 held unconstitutional)	Pa. Const. art. 1, § 6	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver)	Court's approval is reuqired. Commonwealth v. Giaccio, 457 A.2d 875 (Pa. Super. 1983).	"[W]hether, when viewed in a light most favorable to the verdict winner, the evidence at trial and all reasonable inferences therefrom are sufficient for the trier of fact to find that each element of the crimes charged is established beyond a reasonable doubt." Commonwealth v. Akhmedov, 216 A.3d 307, 322 (Pa. Super. 2019).	Same standard as bench trial. Commonwealth v. Lee, 956 A.2d 1024 (Pa. Super. 2008).	N/A. Same level of deference given to both. Commonwealth v. Lee, 956 A.2d 1024 (Pa. Super. 2008) (recognizing that the same "standard of deference" applies in bench trials and jury trials).
Rhode Island	R.I. Super. R. Crim. P. 23	Gen. Laws § 12-17-3.	R.I. Const. art. 1, §§ 10, 15	No.	No consent or approval required. Discretion limited to whether waiver is voluntary.	Same standard as jury trial with this additional qualification: The "appellate court will uphold the findings of a trial justice presiding over a criminal bench trial unless it can be shown that he overlooked or misconceived relevant and material evidence or was otherwise clearly wrong." State v. Berroa, 6 A.3d 1095, 1100 (R.I. 2010).	Whether, "viewing the light most favorable to the prosecution, no reasonable jury could have rendered [the guilty verdict]." State v. Gaffney, 63 A.2d 888, 893 (R.I. 2013).	Bench trial. State v. Gianquitti, 22 A.3d 1161, 1165 ("[F]actual findings of a trial justice sitting without a jury are granted an extremely deferential standard of review.")
South Carolina	SCRCrimP 14	S.C. Code Ann. § 22-2-150 (Applies to Magistrates only) S.C. Code Ann. § 14-25-125 (Applies to Municipal Courts only)	S.C. Const. art. I, § 14	Prosecution has veto power over defendant's ability to waive (i.e., A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.)	Yes. The trial court must consent to the waiver.	Clear Error Standard. State v. Black, 400 S.C. 10 (2012).	Same as bench trial.	N/A. Same level of deference given to both.
South Dakota	S.D. Codified Laws § 23A-18-1	S.D. Codified Laws § 23A	S.D. Const. art. VI, § 6 and § 7	Prosecution has veto power over defendant's ability to waive. (i.e., "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing or orally on the record with the approval of the court and the consent of the prosecuting attoney.")	Yes. The trial court must approve the waiver.	Clear Error: "Findings made pursuant to rule granting a criminal court authority to find facts specially in a case tried without a jury are not to be set aside unless clearly erroneous." State v. Catch the Bear, 352 N.W.2d 640 (S.D. 1984).	Same standard as bench trial.	N/A. Same level of deference given to both. State v. Nekolite, 851 N.W.2d 914 (S.D. 2014) ("A general finding of guilt by a judge [in a nonjury trial] may be analogized to a verdict of 'guilty' returned by a jury.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Tennessee	Tenn. R. Crim. P. 23	Tenn. Code Ann. § 27-3-131 (Appeals in Misdemeanor cases) Tenn. Code Ann. § 39-13-205 (1st degree murder; jury trial; waiver) Tenn. Code Ann. § 39-13-204 (1st degree murder; sentencing factors) Tenn. Code Ann. § 40-1-109 (Misdemeanor cases in general session courts) Tenn. Code Ann. § 40-20-105 (Guilty pleas; waiver of jury trial) Tenn. Code Ann. § 40-35-203 (Imposition of sentence)	Tenn. Const. art. I, § 6 and § 9	Prosecution has veto power over defendant's ability to waive (i.e., A defendant may waive his right to a jury trial at any time before a jury is sworn. A waiver of jury trial must be: (A) in writing; (b) have the consent of the district attorney general; and (C) have the approval of the court.)	Yes. The trial court must approve the waiver.	Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the ssential elements of the crime beyond a reasonable doubt." State v. Van De Gejuchte, No. M201701173CCAR3CD, 2018 WL 5883972 (Tenn. Crim. App. Nov. 9, 2018)	Same standard as bench trial	N/A. Same level of deference given to both. State v. Hatchett, 560 S.W.2d 627 (Tenn. 1978) ("In a case tried without a jury, the verdict of the trial judge is entitled to the same weight on appeal as a jury verdict.").
Texas	Tex. Code Crim. Proc. Ann. art. 1.13 (Unwaivable in capital felony cases unless attorney representing the state informs court/defendant that it will not seek the death penalty) Tex. Code Crim. Proc. Ann. art. 45.025 (Bench trial)	None	Tex. Const. art. I, § 10 and § 15	Prosecution has veto power over defendant's ability to waive (i.e., A defendant's waiver of a jury is conditioned on the consent and apporval of the attorney representing the State. The consent and approval of the prosecutor must be in writing, signed by the prosecutor, and filed in the court of records before the defendant enters his or her pleas.)	Court has discretion to allow defendant to waive a jury trial subject to the prosecution's veto power (i.e., The consent and approval by the court shall be entered of record on the minutes of the court.).	"We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. Evidence is legally insufficient when the only proper verdict is acquittal. We give deference to the jury's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. We review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency." Infante v. State, 404 S.W.3d 656, 660 (Tex. App. 2012)	Same standard as bench trial	N/A. Same level of deference given to both. A.T.S. v. State, 694 S.W.2d 252 (Tex. Ct. App. 1985) ("Findings of fact entered in a case tried to the court are of the same force and dignity as a jury's verdict upon special issues.")
Utah	Utah R. Crim. P. 17	Utah Code Ann. § 76-3-207 (Capital felony-Sentencing proceeding)	Utah Const. art. I, § 10 and § 12	Prosecution has veto power over defendant's ability to waive (i.e., "All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution. All other cases shall be tried without a jury UNLESS the defendant makes written demand at least 14 dyas prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.")	Court has discretion to allow defendant to waive a jury trial subject to the prosecution's veto power.	Clear Error. State v. Finalayson, 362 P.3d 926 (Utah Ct. App. 2014). "When reviewing a bench trial for sufficiency of the evidence, our review is less deferential, and we sustain the district court's judgment unless it is against the clear weight of the evidence, or if we otherwise reach a definite and firm conviction that a mistake has been made." State v. Washington, 2021 UT App 114, ¶ 8, 501 P.3d 1160, 1163, cert. denied, 509 P.3d 198 (Utah 2022)	"When reviewing a jury verdict on an insufficiency of the evidence argument, we view the evidence and all inferences drawn therefrom in a light most favorable to the verdict. And we will reverse the verdict only when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, we find that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. So long as some evidence and reasonable inferences support the jury's findings, we will not disturb them." State v. Quintana, 2019 UT App 139, ¶ 16, 448 P.3d 742, 744–45	Jury Trials. State v. Walker, 743 P.2d 191 (Utah 1987) (holding that different standards of review apply to sufficiency challenges arising from bench trials versus jury trials); State v. Goodman, 763 P.2d 786 (Utah 1988) (recognizing that the standard of review for sufficiency challenges resulting from bench trials is "less deferential").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Vermont	Vt. R. Crim. P. 23	None (see State Procedural Rule)	Vt. Const. Ch. 1, art. 10	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Vt. R. Crim. P. 23.	Court must consent to the waiver before it can be valid. State v. Ibey, 352 A.2d 691, 692 (Vt. 1976).	Clear Error. State v. Amdsen, 194 Vt. 128 (2013). "[W]hether the evidence, viewed in the light most favorable to the state and excluding modifying evidence, fairly and reasonably supports a finding beyond a reasonable doubt." State v. Amsden, 75 A.3d 612, 616 (Vt. 2013) (citations omitted).	Same standard applies. State v. Brochu, 949 A.2d 1035 (Vt. 2008)	N/A. Same level of deference given to both.
Virginia	Va. Sup. Ct. Rules, R. 3A:13	Va. Code. Ann. § 19.2-257;258	Va. Const. art. I, § 8	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - Pope v. Commonwealth, 360 S.E.2d 352, 358 (Va. 1987)	Court must consent to the waiver before it can be valid. Pope v. Commonwealth, 360 S.E.2d 352, 358 (Va. 1987)	"When a defendant is convicted by a circuit court sitting without a jury, the circuit court's judgment is entitled to the same weight as a jury verdict and will not be distributed on appeal unless it is plainly wrong or without evidence to support it." Caldwell v. Commonwealth, 298 Va. 517 (Va. 2020).	Same standard as bench trial.	N/A. Same level of deference given to both. Caldwell v. Commonwealth, 298 Va. 517 (Va. 2020) ("When a defendant is convicted by a circuit court sitting without a jury, the circuit court's judgment is entitled to the same weight as a jury verdict and will not be distributed on appeal unless it is plainly wrong or without evidence to support it.")
Washington	Wash. St. Super. Ct. Cr. CrR 6.1	Wash. Rev. Code § 10.01.060	Wash. Const. art. I, § 21	NO. Prosecutor has no say over the decision. See Wash St. Super. Ct. Cr. CrR 6.1; see Wash. Rev. Code § 10.01.060; see Wash Const. art. I, §§ 21, 22.	Court must consent to the waiver before it can be valid. State v. Wicke, 591 P.2d 452, 455 (Wash. 1979).	"Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." State v. Yallup, 416 P.3d 1250 (Wash. App. 2018).	Substantial evidence standard. State v. Green, 616 P.2d 628 (Wash. 1980).	N/A. Same level of deference given to both.
West Virginia	W. Va. R. Crim. P. 23(a)	W. Va. Code § 50-5-8	W. Va. Const. art. III, § 14	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - State v. Redden, 487 S.E.2d 318, 327 (W. Va. 1997)	Court must approve waiver before it can be valid. State v. Redden, 487 S.E.2d 318, 327 (W. Va. 1997)	Clear Error. State v. J.S., 233 W.Va. 198 (2014). "[W]hether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." State v. White, 722 S.E.2d 566, 576 (W. Va. 2011).	Same standard applies.	N/A. Same level of deference given to both.
Wisconsin	None (see statute)	Wis. Stat. Ann. § 972.02	Wis. Const. art. I, § 7	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - State v. Denson, 799 N.W.2d 831, 846 (Wis. 2011).	Court must approve waiver before it can be valid. State v. Denson, 799 N.W.2d 831, 846 (Wis. 2011).	"[W]hether, after viewing the evidence presented in the light most faborable to the prosecution, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. LaCount, 750 N.W.2d 780, 788 (Wis. 2008) (quoting State v. DeLain, 695 N.W.2d 484, 488 (Wis. 2005)).	Same standard applies.	N/A. Same level of deference given to both. State v. Bowden, 288 N.W.2d 139 (Wis. 1980) ("This court, like all appellate courts, accords substantial deference to the trier of fact in a criminal trial. Whether trial is before a jury or to the court, the question on appeals is not whether the reviewing court is convinced of the defendant's guilt beyond a reasonable doubt, but whether it is possible for the trier of fact, acting reasonably, to have been so convinced.")

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Wyoming	Wyo. R. Crim. P. 23.	None (see State Procedural Rule)	Wyo. Const. art. I, § 9	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - Taylor v. State, 612 P.2d 851, 854 (Wyo. 1980).	Court must approve waiver before it can be valid. Taylor v. State, 612 P.2d 851, 854 (Wyo. 1980).	"[W]hether, after viewing the evidence in the light most favorable to the prosecuion, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Willis v. State, 46 P.3d 890, 894 (Wyo. 2002).	Same standard as bench trial	N/A. Same level of deference given to both. Mathewson v. State, 431 P.3d 1121 (Wyo. 2018) (In reviewing a claim that the evidence was not sufficient to support a guilty verdict after a bench trial, we apply the same standards as for reviewing a verdict after a jury trial.").

Rule 23(a) Amendment Draft

APPENDIX B

(a) (1) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(A the defendant waives a jury trial in writing;

(B) the government consents; and

(C) the court approves.

(2) Nonjury Trial Without Government Consent. If the government does not consent, the court may permit a 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.

COMMENT. The proposed amendment permits a court to let a defendant waive trial by jury without the government's consent. The Supreme Court has suggested that there may be circumstances where the right to a fair trial will overcome the government's objection to a bench trial. *Singer v. United States*, 380 U.S. 24, 37 (1965) ("We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."). Creating a complete list of such circumstances is not possible. However, a non-exclusive list of reasons for permitting a non-jury trial includes concerns about speedy trial, jury bias or prejudice (giving due consideration to the possibility of a change of venue and careful voir dire of the jury panel), or the technical nature of the charges or defenses.

Some courts have permitted non-jury trials because of prejudice. *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968) (barring the government from withdrawing its consent before a second trial); *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976) (multiple defendants in a complex case in which not all evidence would be admissible against all defendants); *United States v. Cohn*, 481 F. Supp. 3d 122 (E.D.N.Y. 2020) (numerous factors, including speedy trial and other issues caused by a mid-Covid pandemic trial). Although the rule recognizes that technical issues may be appropriate for a non-jury trial, the complexity of the subject matter alone is not a basis for overruling the government's demand for trial by jury. *United States v. Simon*, 425 F.2d 796, 799 n.1 (2d Cir. 1969).

Any decision must be weighed against the constitutional preference for trial by jury. *Singer v. United States*, 380 U.S. 24, 36 (1965) ("The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."); *Patton v. United States*, 281 U.S. 276, 312 (1930) ("Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses.").

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TAB 4

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

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

RE: **Project on self-represented litigants' filing and service**

DATE: **September 18, 2023**

The attached memoranda from Professor Struve describe (1) the continued work of the self-represented litigant e-filing and e-service working group, and (2) the interviews Professor Struve and Dr. Reagan conducted.

This is presented as an information item.

MEMORANDUM

DATE: September 18, 2023

TO: Advisory Committees on Appellate, Civil, and Criminal Rules[1]

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

As you know, a working group that was convened to consider filing methods open to self-represented litigants has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive a notice of electronic filing (NEF) through CM/ECF or a court-based electronic-noticing program.

In spring 2023, Tim Reagan and I conducted additional interviews of court personnel on these topics, and I enclose a report that summarizes findings from those interviews. This memo provides a very brief update concerning the working group's summer 2023 discussions on both the filing and the service topics.

The service topic concerns whether to repeal the current rules' apparent requirement that non-CM/ECF users serve CM/ECF users separately from the NEF generated after a filing is scanned and uploaded into CM/ECF. The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their post-case-initiation filings[2] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even those that are CM/ECF users. In the advisory committees' discussions of this topic during the past year, participants were receptive to the possibility of amending the service rules to eliminate the requirement of paper service on those receiving

1 The Bankruptcy Rules Committee, of course, is also a part of the project discussed in this memo, but as of this writing that Committee has already met. It received an oral report along the same lines expressed in this memo.

2 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). As noted, the discussion here focuses on filings subsequent to the initiation of a case.

NEFs. At the working group's most recent (September 2023) meeting, participants expressed support for that idea, but also suggested a number of possible drafting changes to the then-extant sketch of a possible amendment. That redrafting is yet to be done, so I am not including here a sketch of a possible amendment. We intend to develop that proposal in the coming months.

On the filing topic, last year's round of advisory-committee discussions disclosed both some support for adopting a rule that would broaden self-represented litigants' access to CM/ECF and also a fair amount of opposition to adopting a rule that would require broad access for self-represented litigants to CM/ECF. In the light of those discussions, at its September 2023 meeting the working group considered the possibility of proposing a rule that would merely disallow districts from adopting blanket bans entirely denying all CM/ECF access to all self-represented litigants. Such a rule might say that even if a district generally disallows CM/ECF access for self-represented litigants it must make reasonable exceptions to that policy. That idea, like the service idea, has not yet taken shape in draft form. At the fall advisory committee meetings, I welcome the opportunity to gather input on whether such a rule could be drafted in such a way as to address the concerns expressed by participants in the process who are most wary of a broad right of CM/ECF access.

Encl.

MEMORANDUM

DATE: September 18, 2023

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Update concerning spring 2023 district-court interviews

During March 2023, Tim Reagan and I interviewed 17 district-court employees[1] who hale from nine districts.[2] This memo summarizes some of the themes that emerge from the interviews.

We are indebted to the 17 interviewees, who took time from their extremely busy schedules to share their courts' experiences with us. And I am also indebted to Tim, who guided my research and provided me with the entrée that enabled us to talk with the court staff with whom we spoke – many of whom he or his colleagues had interviewed in the course of last year's research. His and his colleagues' study provided the foundation for this further research, and Tim's expert presence on our video meetings and phone calls was invaluable. Tim also generously allowed me to choose the focus of this round of follow-up interviews.

I chose to focus this round specifically on personnel in districts where – we believed – the district has adopted the approach of exempting litigants from separate service on CM/ECF participants. But once we had the opportunity to talk with court personnel from a given district, of course we took the opportunity to ask them about the other two topics (CM/ECF access, and alternative modes of electronic access) as well. And in some instances, we also had the opportunity to inquire about special programs that the district had adopted concerning incarcerated litigants.[3] To make the inquiry manageable, I restricted our scope to district courts

1 In some instances, more than one person joined the interview: we spoke with two people in the District of Arizona, two in the District of Columbia, five in the District of Kansas, two in the Western District of Pennsylvania, and two in the District of South Carolina.

2 The districts in question were: D. Ariz.; D.D.C.; N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; W.D.Pa.; D.S.C.; and D. Utah.

We also interviewed a Pro Se Law Clerk from another district, but that interview turned out to be brief because she explained that her district does not actually engage in any of the service or filing practices on which we wanted to focus.

3 Those inquiries are omitted from this memo, in part because we did not have time to pursue them in all interviews.

(not bankruptcy or appellate courts) and focused our questions on the practice in civil cases (not criminal cases). This memo first sketches some findings concerning the service issue, and then turns to CM/ECF and alternative electronic access.

I. Exempting litigants from separate service on CM/ECF participants

We confirmed through our interviews that the following districts have exempted paper filers from traditionally serving papers[4] on litigants who are on CM/ECF:

- The District of Arizona
- The Northern District of Illinois
- The Western District of Missouri
- The Southern District of New York
- The Western District of Pennsylvania
- The District of South Carolina
- The District of Utah

For short, I'll refer to these districts as the "service-exemption" districts. Notably, these districts vary in how explicitly their published materials tell self-represented litigants about the exemption; only one of these districts is very explicit and consistent on this point.[5]

Once we confirmed that a district was indeed a service-exemption district, we asked the personnel from that district the questions noted in Part I.B of my March 3, 2023 memo.

Those personnel reported no problems with the implementation of the service-exemption policy. We specifically asked about burdens on the clerk's office, and no one could think of any.[6] One interviewee stated that the lawyers representing other parties in the case don't want paper copies of filings anyway.[7]

As to the question, how do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still

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4 As discussed previously, we are focusing here on Civil Rule 5 service (that is, for papers subsequent to the complaint), not on Civil Rule 4 service.

5 The Southern District of New York is explicit: "Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service." S.D.N.Y. ECF Rules & Instructions 9.2; see also id. Rules 9.1, 19.1, & 19.2; Role of the Pro Se Intake Unit, https://www.nysd.uscourts.gov/prose/role-of-the-prose-intake-unit.

6 Interviewees who responded to the burdens question and said no included: D. Ariz.; N.D. Ill. (no effect on the clerk's office because "We don't monitor how service is done."); W.D. Mo. (might even save clerk's office "a little smidge" of work because they need not deal with later filing of a certificate of service); W.D. Pa.; S.D.N.Y.; D.S.C.

7 D. Ariz.

required), responses varied. It was noted that this particular question would only arise in a case where multiple parties are not on CM/ECF – which some of our interviewees noted would be unusual.[8] Also, even in such a case, the question would arise only if the person making the paper filing was not enrolled in an electronic-noticing program (because such a program would generate a NEF when the paper filing was entered in CM/ECF, and the NEF would state if any other party to the case required traditional service).[9] One interviewee said they thought that this information might be included in a notice that the court sends to self-represented parties early in the case.[10] A number of interviewees observed that a useful way to discern who needs traditional service is to look at the docket; if it shows no email address for a self-represented litigant, that is a tip-off that the person is not receiving electronic noticing.[11] Interviewees from another district stated that the issue might be addressed in a court order early in the case.[12] Interviewees from two districts said that the issue simply had not arisen.[13]

In at least three of the relevant five or six districts,[14] the service exemption encompassed both service on CM/ECF participants and service on participants in a court-run electronic-noticing program,[15] but one interviewee surmised that the program in their district encompassed only service on CM/ECF participants and not service on participants in the court-run electronic-noticing program[16] and, upon reviewing my notes, I am not sure that I posed this question to the interviewee from one other district.[17]

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8 N.D. Ill. (interviewee stated this would be very rare, but might arise in a lawsuit involving spouses, or a lawsuit in which two individuals are jointly suing the police); W.D. Mo. (interviewee could not think of a case involving more than one self-represented party); D.S.C. (interviewee stated that "theoretically that could happen, but as a practical matter it hasn't been a concern").

9 S.D.N.Y.

10 D. Ariz.

11 D. Ariz.

12 W.D. Mo.; D.S.C.

13 W.D. Pa. (clerk's office assumes that litigants comply with their service requirements); D. Utah.

14 If my memory serves, the District of South Carolina does not offer electronic noticing.

In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish. If a self-represented litigant signs up to use CM/ECF but is making paper filings, that litigant need not be traditionally served.

15 D. Ariz.; S.D.N.Y. ECF Rules & Instructions 9.1 (the service exemption encompasses service on "all Filing and Receiving Users who are listed as recipients of notice by electronic mail"); id. 2.2(b) ("A pro se party who is not incarcerated may consent to be a Receiving User (one who receives notices of court filings by e-mail instead of by regular mail, but who cannot file electronically)."); D. Utah.

16 N.D. Ill.

17 W.D. Mo.

Our interviewees confirmed that when a litigant makes a filing in paper, that filing will always be scanned by the clerk's office and placed into CM/ECF.[18] (Interviewees noted a few exceptions, such as documents submitted by a person who is under a filing restriction,[19] documents submitted by a litigant whose case had been closed for several years,[20] documents submitted for in camera review, documents that have no discernible connection to any litigation,[21] correspondence to the judge that should not be filed in the case.[22]) A number of interviewees reported that their office sets a goal for the maximum time interval between the court's receipt of a paper filing and the time when that filing has been scanned and is entered into CM/ECF;[23] the goals ranged from 12 business hours[24] to one business day[25] or two business days.[26]

In some districts, a filing that is made under seal would need to be traditionally served on the other participants in the case, because in those districts that filing would not be available to the parties in the case via CM/ECF.[27] But that's true of filings made under seal by attorneys via CM/ECF, just as it would be true of paper filings made under seal by a self-represented litigants; in either event, the filer would be directed to serve the filing on the other parties by traditional

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18 D. Ariz. (implicit in answer to related question); D.S.C.; D. Utah.

19 D.S.C.

20 D. Utah (interviewee stated that depending on the filing, they would check with chambers before docketing such a submission).

21 S.D.N.Y. (the stated example was a document "talking about [the litigant's] meatloaf recipe"; the clerk's office would consult the judge before docketing such an item).

22 W.D. Pa. (judge might determine that certain correspondence should not be filed, e.g., a letter from a criminal defendant discussing their lawyer's performance in ways that implicate attorney-client privilege); S.D.N.Y. (letter threatening the judge).

23 I did not note a specific goal stated by the interviewees from the W.D. Pa., but they stated that the usual turnaround time from opening to scanning to docketing is generally from 4 to 6 business hours.

24 N.D. Ill. (this is the goal, but it is hard to meet on the Tuesday after a Monday holiday).

25 W.D. Mo. (interviewee stated that the informal deadline is 24 hours not counting weekends, but "99.5 percent" of paper filings are docketed the day that the court receives them); D.S.C.; D. Utah (goal is to enter paper documents within 24 hours, excluding holidays and weekends).

See also D.D.C. (for filings in an existing case; listed here as a "see also" because D.D.C. apparently does not exempt paper filers from serving those who get NEFs).

26 D. Ariz. (goal is same day or next day; in context I think "business day" was implicit); S.D.N.Y. (48 hours – not counting weekends – from stamping the document received to docketing on CM/ECF).

27 E.g., D. Ariz.; N.D. Ill. (local provision points out that the NEF for a sealed filing does not count as service); W.D. Mo. CM/ECF Admin. Manual at 8; W.D. Pa.; D. Utah ECF Admin. Procedural Manual 21, 28-29.

means.[28] In other districts, it is possible to set the restrictions for the CM/ECF filing so that the document is viewable both by the court and the other parties.[29]

It appeared that some but not all of the districts had thought about how to treat the calculation of time periods measured from service when the service is effected through CM/ECF but the filing was filed other than through CM/ECF. An interviewee in one district reported that this issue does not come up, but thought that a sensible way to approach this question is to count the date of entry in the CM/ECF docket (i.e., the date of the NEF) as the date of service.[30] An interviewee in another district stated that the issue has not arisen in their experience, perhaps because the clerk's office tends to get paper filings up onto CM/ECF pretty quickly.[31] An interviewee in a third district also reported that the issue has not come up, probably because briefing schedules are typically set by the judge.[32] An interviewee in another district treats the date of entry into CM/ECF (that is, the date of the NEF) as the relevant starting point for response periods that run from service.[33] Two districts apparently treat the date the court receives the filing (not the date of entry into CM/ECF) as the relevant starting point for response periods that run from service, and do not accord the responding party three extra days for the response.[34]

II. Access to CM/ECF for self-represented litigants

When interviewing personnel from districts that provide CM/ECF access to non-incarcerated self-represented litigants (either across the board or by permission), we asked a number of questions about how that is working. Since this suite of questions concerned experience with CM/ECF access for self-represented litigants, we posed these questions only to those from districts that provide that access to some degree.[35] Among the districts encompassed

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28 D. Ariz. ("attorneys are often worse" than self-represented litigants about separately serving sealed documents on the other parties); N.D. Ill ("attorneys get into trouble on this"); W.D. Mo. (noting that the other party would know of the filing's existence based on the NEF, so they would know to follow up with the filer if the document were not separately served on them as required by the local provision).

29 S.D.N.Y. ECF Rules & Instructions 6.9 ("The filing party has the ability to designate which case participants will have access by selecting the appropriate Viewing Level for the document from the list below."); D.S.C.

30 N.D. Ill.; see also S.D.N.Y. (interviewee stated that the date of entry stated on the NEF would be considered to be the date of service).

31 W.D. Mo.; see also supra note 25 regarding typical time interval in W.D. Mo. between receipt of paper filing and entry in CM/ECF.

32 W.D. Pa.

33 D.S.C.

34 D. Ariz.; D. Utah.

35 The D.S.C. does not permit any self-represented litigants to use CM/ECF. An interviewee

in our interviews, the districts that provide access to all self-represented litigants (at the litigant's option) without the need for special permission are:

- District of Kansas (where an interviewee reports that "one or two percent of our [CM/ECF] filers are pro se users").

- Western District of Missouri (where an interviewee estimates that there are about 20 to 25 self-represented litigants currently using CM/ECF).[36]

- Western District of Pennsylvania (where an interviewee estimates that there are "maybe a couple of dozen" self-represented litigants using CM/ECF at any given time).[37]

The districts that provide access to self-represented litigants with court permission are:

- District of Arizona[38] (where an interviewee reports that CM/ECF participation by self-represented litigants is "not rare").

- District of the District of Columbia (where an interviewee reports "a lot of pro se filers on CM/ECF").

- Northern District of Illinois.

- Southern District of New York (where the interviewee reports that it is unusual for a self-represented litigant to use CM/ECF; those who do are usually pro se attorneys).

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from that district volunteered that she would oppose any rule amendment that required a district to allow such litigants to access CM/ECF. I responded that the proposals currently under consideration would, at most, foreclose a district from having a blanket ban on CM/ECF access [see Suggestion No. 20-CV-EE (John Hawkinson)]. The interviewee stated that a blanket ban is necessary in her district because the court wishes to treat all pro se litigants uniformly.

36 The district initially provided access based on permission from the judge (starting in about 2009), but five years ago it changed its approach and the clerk's office grants access "on a routine basis."

37 See W.D. Pa. ECF Policies & Procedures at 2-3: "A person who is a party to an action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. If during the course of the action the person retains an attorney who appears on the person's behalf, the attorney must advise the clerk to terminate the person's filing privileges as a Filing User upon the attorney's appearance.
When registering, an individual must certify that ECF training has been completed, and then requests a CM/ECF account for the Western District of Pennsylvania through PACER. Once the request is processed by the clerk, the Filing User will receive notification that the request was approved."

38 See D. Ariz. Pro Se Handbook at 15-16.

Uniformly, the interviewees reported that there was no difficulty in keeping track of self-represented litigants on CM/ECF.[39] You will recall that this question arose in committee discussions because self-represented litigants, unlike lawyers, do not have attorney ID numbers. Interviewees in two districts stated that their court wouldn't keep track of attorneys on CM/ECF via their attorney ID numbers.[40] Several interviewees noted that each CM/ECF registrant (whether or not they are a lawyer) has a "PRID" number[41] – which is a unique personal identifier – though one of those interviewees observed that their court hardly ever uses the PRID, because they can usually just look up a self-represented litigant using their name.[42] One interviewee noted that the CM/ECF system will have an email address on file for the litigant.[43]

Interviewees from a number of districts reported that their staff do quality control on all CM/ECF filings, whether made by self-represented litigants or by attorneys.[44] Two interviewees mentioned that the filings made on behalf of attorneys are often made – in actuality – by paralegals;[45] one of these interviewees reported that mistakes occur about equally frequently by attorneys and by self-represented litigants,[46] and the other reported that their office finds far more errors by lawyers, especially by attorneys who usually practice in state court.[47] One interviewee reported that, in the course of their quality control, they will correct a wrong event choice (or the like) whether made by an attorney or by a self-represented litigant.[48] Interviewees from three districts reported that they might need to do more review for quality control and make corrections more frequently for self-represented litigants.[49] An interviewee from another district

39 D. Ariz.; D.D.C.; W.D. Mo.; W.D. Pa.; S.D.N.Y.
40 D.D.C. (attorney bar numbers are not listed in the docket); N.D. Ill. (interviewee noted that staff are not going to call up a state bar to verify attorney's bar ID number).
41 D.D.C.; W.D.Mo.; S.D.N.Y.; see also D. Kan. (interviewee stated that pro se litigants have personal ID numbers that will show in the system).
42 D.D.C.; see also D. Kan. (interviewee noted that NextGen suggests matches for a person's name, which helps with "matching" a person if they have filed more than one case in the district; "at any given moment, we have ten to 15 electronic filers that we are relatively familiar with, and they tend to be repeat litigants").
43 D. Ariz.
44 D.D.C.; N.D. Ill.; D. Kan.; S.D.N.Y.
45 N.D. Ill. (estimating that nine out of ten attorneys have a paralegal do the filing).
46 D.D.C.
47 N.D. Ill.
48 D.D.C. Compare S.D.N.Y. (court flags the error for the litigant to correct, and the litigant can call the help desk for further explanation).
49 D. Ariz. (but this interviewee also noted that a lot of self-represented litigants "actually do a pretty good job," and that "attorneys are terrible at [choosing the right events when filing], too"); D. Kan. (interviewee noted that some self-represented litigants "are better than some paralegals, because we are in better communication with them," while other self-represented litigants are

reported that problems with the format of PDFs are more frequent in attorney filings than self-represented litigants' filings,[50] and an interviewee from a third district reported that attorneys use the wrong event more often than self-represented litigants do.[51] An interviewee from another district reported that their office does quality control by checking for legibility and use of the right event, and does correct errors, but stated that "if anything" the only "appreciable burden" is the time spent on the phone with the self-represented litigants who are getting used to the system.[52]

Among the seven relevant districts, one requires training for both attorneys and self-represented users of CM/ECF,[53] while (probably) two require training only for the self-represented users[54] and three do not require training for either group.[55] One district requires that the self-represented litigant certify completion of the training as part of their application for permission to use CM/ECF.[56] Training and/or information varied among the districts that provide it, with written training materials being the most common but with some districts providing video training modules[57] and one district providing a particularly helpful step-by-step

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much less functional; "overall we spend a little more time on quality control with the pro se's, but not a lot more"); W.D. Pa. (there might be additional quality control that needs to be done and quality-control messages that need to go out a little more frequently – for example, if the litigant selects the wrong event or fails to separate documents – but some of the self-represented litigants are just as good as the attorney filers).

50 D.D.C. (attorneys sometimes file fillable PDF forms without first "printing" them to PDF; self-represented litigants are less likely to do this because they are more likely to file PDFs created by scanning).

51 N.D. Ill.

52 W.D. Mo.

53 N.D. Ill.

54 S.D.N.Y. is in this category. See S.D.N.Y. Motion for Permission for Electronic Case Filing. D.D.C. appears to also fall in this category, see D.D.C. Local Civil Rules 5.4(b)(1) (no mention of training requirement for lawyers) & (2) (self-represented applicant to use CM/ECF must certify "that he or she either has successfully completed the entire Clerk's Office on-line tutorial or has been permitted to file electronically in other federal courts").

55 D. Ariz.; D. Kan. (training is "offered and encouraged" but not required; self-represented litigants must have a conversation with an Administrative Specialist at the court before they receive CM/ECF credentials); W.D. Mo.

In the Western District of Pennsylvania, the ECF Policies & Procedures state that when registering for CM/ECF one "must certify that ECF training has been completed," but our interviewees stated that training resources were offered but not required.

56 D.D.C. (see D.D.C. Local Civil Rule 5.4(b)(2)).

57 D. Kan. (one civil-case video module accessible at https://www.ksd.uscourts.gov/cmecf); S.D.N.Y. (selected videos at https://nysd.uscourts.gov/programs/ecf-training).

I do not count the Western District of Missouri's video on case-opening procedures because self-represented litigants are not permitted to open cases via CM/ECF.

interactive automated training.[58]

Interviewees reported favorably on their court's experience with CM/ECF access for self-represented litigants.[59] The most commonly noted benefit (to the court)[60] of CM/ECF access for self-represented litigants was the decrease in the volume of paper filings.[61] A number of our interviewees pointed to a huge savings in court time – that is, opening mail, sorting it, scanning it, and uploading the electronic version to the docket.[62] Some also like not having to handle tangible papers that might be hard to scan, fragmentary, or odorous.[63] Because CM/ECF access also includes electronic noticing via the NEF, interviewees also strongly praised the saving in court time spent on sending notice of court orders – printing, mailing, and re-sending the mailings that are returned by the Post Office – and also the savings on mailing costs.[64] A number of interviewees also praised the benefits of the electronic record, which averts disputes with the litigant concerning what the litigant filed and when[65] and what orders the court sent out and when.

The interviewees had a range of views about the burdens on the clerk's office occasioned by self-represented litigants' access to CM/ECF.[66] One interviewee noted that sometimes a self-represented litigant might complain that they had a problem with their "one free look" at a filing via the NEF.[67] An interviewee from another district reported no extra burdens occasioned

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58 This is the D.D.C. See https://media.dcd.uscourts.gov/ecf2d/ . They acquired these training modules from another court. The District of Kansas website describes a similar training system, but when I clicked the link to access it, https://ecf-test.ksd.uscourts.gov/, I received an error message. Similarly, I could not get the Western District of Pennsylvania's training module, available via https://www.pawd.uscourts.gov/cm-ecf-training , to work for me.
59 N.D. Ill. ("The benefits outweigh the risks").
60 It is notable that a number of our interviewees also expressed the importance of striving for equality of court access for self-represented litigants. See D.D.C. (noting convenience to litigants of ability to file after hours).
61 N.D. Ill.; W.D. Pa.
62 D. Ariz. (not having to scan the paper documents); D.D.C. (same); W.D. Mo. (same; interviewee noted that due to the combined effect of CM/ECF access and EDSS access, court staff time on processing and scanning paper filings was about 30 minutes per day, down from a couple of hours per day).
63 D. Ariz.
64 D. Ariz. (printing court orders, time and cost of mailing them); S.D.N.Y. (mailing costs).
65 D.D.C. (clerk's office need not worry whether it correctly scanned all the pages of a filing); N.D. Ill. (electronic filing avoids the risk that an unethical filer might say that a paper filing scanned by the court differed from the original document).
66 See above for discussions of whether there was an increased need for quality control for self-represented CM/ECF users' filings.
67 D. Ariz.

by self-represented litigants' CM/ECF access.[68] Interviewees from another district noted that they will check whether a litigant is subject to a filing restriction, and that occasionally the court has removed the CM/ECF privileges of a problem filer (with the problematic filings in such cases typically being problematic because of their volume, that is, too many filings); but these interviewees reported (respectively) no "undue stress on the system" and that "overall [the access] is probably helpful".[69]

On the question of inappropriate filings, the overall view was that these could present problems whether filed in paper or electronically, and that either way the burden on the court was manageable.[70] One interviewee observed that self-represented litigant CM/ECF privileges did open the possibility that an inappropriate filing would be viewable on CM/ECF until court staff had a chance to review it; on the other hand, this interviewee observed that the staff in their district – when scanning in a paper filing – check only the caption, case number, and signature, but not every page of the document.[71] This interviewee could only think of one self-represented litigant, in the course of a decade, who filed an inappropriate item in CM/ECF; staff spotted the filing (a document containing inappropriate images) while auditing and immediately restricted access to it, and revoked the petitioner's CM/ECF privileges.[72] In another district, the interviewees could not think of an instance of inappropriate language or images filed via CM/ECF, though they could think of one involving a paper filer.[73] And in a third district, the interviewee noted that court personnel will simply restrict access to a problematic filing when necessary, and that even those filings tend to be made in good faith (e.g., pictures relating to a surgery or an injury);[74] this interviewee could think of only one self-represented litigant who made "scandalous" filings, and observed that the court promptly handled that situation by order.[75] In another district, the interviewee did note that services such as Lexis and Westlaw

68 N.D. Ill.
69 D. Kan.
70 D. Ariz. ("The vast majority of litigants are trying to get their case heard and are not filing a bunch of inflammatory stuff and clerk's offices are good at reacting quickly if something should be sealed and it hasn't been a burden to do that."); W.D. Mo ("litigants aren't attaching deliberately scandalous material, just sensitive information about themselves"); W.D. Pa. (generally the pro se filer who is technically savvy enough to use CM/ECF is not among the pro se litigants who are submitting problematic materials); S.D.N.Y. ("I would rather have frivolous electronic filings than frivolous paper filings.").
71 N.D. Ill.
72 N.D. Ill. The interviewee also noted an instance where a self-represented litigant's filing in a state (not federal) court contained the home addresses of judicial personnel.
73 D. Kan. (noting a litigant who brought the court "boxes full of porn").
74 W.D. Mo. (interviewee noted options of restricting access to parties only or court only).
75 W.D. Mo. ("that was a bit of an ordeal when it was happening, but the judge acted quickly, and there was no public interest in the documents"; the court set up immediate notifications to chambers when this litigant made a filing, so that the court could quickly review them and decide whether to restrict electronic access).

scan the court's electronic dockets constantly and will download new filings right away.[76] Multiple interviewees observed that rescinding CM/ECF privileges is always an option.[77]

None of the districts in question uses a "gating" system (that is, holding self-represented litigants' court filings for clerk's office review after a document is filed in CM/ECF and before it is made viewable by people other than court personnel). A number of our interviewees noted that it would be possible to configure CM/ECF so that it worked this way (for example, by creating a separate user group for self-represented litigants and then only giving that user group access to events that would be restricted to court viewing only).[78] But two interviewees observed that their district hadn't felt the need to adopt such a practice.[79] One interviewee observed that it would take valuable clerk's office time to engage in such a review.[80] And another interviewee suggested that the relevant court of appeals would look askance at the constitutionality of restricting (even temporarily) who could view a litigant's filings.[81]

We asked about inappropriate sharing of CM/ECF credentials, and among our interviewees, only one cited an example involving a self-represented litigant – specifically, a case in which a mother was the listed plaintiff in a case but her son would use her PACER account to file documents.[82] But the interviewee who provided that example also stated that they "had not seen a huge problem," and that the "majority of mistakes concerning sharing of credentials come from law firms."[83] A number of interviewees observed that, because access to NextGen CM/ECF entails linking the person's PACER account with the particular case, sharing credentials would mean sharing the PACER login – and there is a built-in disincentive to share the PACER login because that would enable the other person to run up PACER bills on the person's PACER account.[84] Also, a number of these districts restrict a self-represented litigant's CM/ECF access to only those cases in which the self-represented litigant is a party,[85]

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76 S.D.N.Y.

77 D. Ariz.; D.D.C. (interviewee noted that in a few instances the court had rescinded access); N.D. Ill. (interviewee noted that the court had revoked an attorney's CM/ECF privileges too); D. Kan.; W.D. Pa.

78 D.D.C.; D.Kan.; S.D.N.Y.

79 D. Ariz. (interviewee noted that court could simply rescind CM/ECF access if necessary); D. Kan. (same).

80 D. Kan.

81 N.D. Ill.

82 D. Kan.

83 D. Kan. See also S.D.N.Y. (interviewee noted that a lot of lawyers share their credentials, and asked why credential sharing would be a bigger deal when done by a pro se litigant).

84 D.D.C.; W.D. Mo.

85 D. Ariz.; D.D.C. (access is granted on a per-case basis); D. Kan. (interviewee stated that "you have to be associated with the case, and there is a mechanism within the profile for that case, where we have to turn on their e filing privileges"); W.D. Mo.; W.D. Pa.; S.D.N.Y.

which by definition limits the incentive to share the credentials with some other person for reasons unrelated to the litigant's case.

All but one of these districts require the self-represented litigant to initiate their case by other means; so CM/ECF access for self-represented litigants in these districts occurs only once the case has gotten started.[86] (By contrast, in some of these districts lawyers can initiate a case via CM/ECF, while in others even lawyers cannot do so.) In one district, new cases can be initiated electronically in a "shell case," and then the clerk's office moves the case over in a real case docket; and this process is available to self-represented litigants who are registered in CM/ECF; but only a handful of self-represented litigants have used this method.[87]

We also asked these interviewees what resources a court would find necessary or useful if it were to permit or expand CM/ECF access for self-represented litigants. Here are their suggestions:

- Learn from your peers in other courts.[88]
- Use a pilot program, take things one step at a time, and see how a new program goes.[89]
- Involve your pro se law clerks in drafting your CM/ECF rules and procedures.[90]
- Plan how you will rescind CM/ECF access if necessary.[91]

By contrast, our interviewee from the Northern District of Illinois asserted that it is not technically possible to limit access to just one case. I now think that what he may have meant is that if you grant a litigant access to CM/ECF for one of their cases, and they have multiple cases in the district, the grant of access operates across all of their cases. We certainly did hear from other districts that it was possible to limit access such that the self-represented litigant could not file in cases to which they are not a party.

86 D. Ariz. (interviewee noted that, for IFP cases, this effectively means no CM/ECF filing access until after the case has survived the initial IFP case review); D.D.C. (interviewee noted that "case initiating filings are the most likely to be problematic"); N.D. Ill. (interviewee noted that this helps the court to know who a litigant is); D. Kan. (see https://www.ksd.uscourts.gov/filing-without-attorney/faq); W.D. Mo. CM/ECF Admin. Manual at 17; S.D.N.Y. ECF Rules & Instructions 14.2.

87 See W.D. Pa. CM/ECF Version 6.2 Attorney User Guide at 19.

88 D.D.C. (interviewee advocated use of listserves that have been set up by someone in EDNY – such as a listserve for ECF coordinators – and observed that these listserves have searchable archives); N.D. Ill. (suggestions included convening a seminar at which courts that don't yet allow self-represented litigants to use CM/ECF can learn peer-to-peer (chief judge to chief judge, clerk to clerk) how it works in the districts that have been doing it for a while); W.D. Mo. (interviewee suggested consulting personnel in districts that are similar in size or within the same circuit).

89 D.D.C.

90 S.D.N.Y.

91 N.D. Ill.

- Build a very simple menu in CM/ECF for the pro se filers, with only a few simple events, so as to limit the options that they will see when they use the system.[92]
- Put together a training on CM/ECF (which the court should already have done for their attorney filers).[93]
- Have good instructional documentation online. [94]
- Make sure that your help-desk staff can explain how the system works, especially how to select the right event when filing.[95]
- Make clear to the would-be self-represented CM/ECF filer that the court will not provide remedial technical support such as teaching them how to make PDFs or how to troubleshoot their wi-fi connectivity.[96]
- In one district, the interviewees were equivocal as to whether staffing would be a consideration.[97] In another district,[98] interviewees emphasized the need for proper staffing – both having someone on staff who knows how to configure the system for use by self-represented litigants and having adequate personnel to do quality control.

III. Alternative (non-CM/ECF) modes of electronic access

A number of these districts provide alternative methods of access for self-represented litigants – both for filing their own papers and for receiving others' filings in the case. As to those districts, we had a set of questions for the interviewees. The districts (in our interview set) that provide alternative electronic filing access[99] are:

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92 S.D.N.Y.
93 N.D. Ill.
94 D. Kan.
95 D. Kan.
96 S.D.N.Y.
97 D. Kan. (one interviewee first advised, "make sure you have the manpower to handle what might be a huge influx," but then stated that self-represented access to CM/ECF "does not seem like that big of a deal"; a second interviewee noted that their district had not seen a flood of self-represented litigants on CM/ECF and predicted that a court won't necessarily have to increase its staffing but instead should just make sure its existing staff are trained and prepared).
98 W.D. Pa.
99 I am omitting the D.D.C. from this list, because although the court accepted email filings in civil cases during COVID, it no longer does so (though it is still accepting email filings in criminal cases).

For similar reasons, I am omitting the District of South Carolina. The D.S.C. permitted pro se email submissions during COVID, but ended that program in June 2021. The interviewee from the D.S.C. explained that few litigants were using it, and those who were using it made some frivolous filings, so this mode of access was being used "improperly or not much."

I am also omitting the Western District of Pennsylvania, which allows certain sealed filings to be submitted by email, but does not otherwise allow alternative means of electronic submission.

- Northern District of Illinois (upload via Box.com; court previously had a temporary email address for pro se filings)
- District of Kansas (email)
- Western District of Missouri (upload) (interviewee estimates that around 50 self-represented litigants are using the EDSS system, up from half that number the previous year)[100]
- Southern District of New York (email, including to start a new case)
- District of Utah (email; interviewee stated that probably 70 percent of non-incarcerated self-represented litigants are filing by email)

The districts (in the interview set) that provide an electronic noticing program[101] are:

- District of Arizona
- District of the District of Columbia
- Northern District of Illinois
- District of Kansas (an interviewee reported that this is "more popular than electronic filing")
- Western District of Missouri (only if the litigant signs up for EDSS)
- Southern District of New York
- District of Utah

The interviewees from districts that permit email or portal submissions did not report any significant difficulties with virus scanning,[102] file size,[103] or other technical problems.

As noted above in the section concerning CM/ECF access, the key benefit of electronic

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100 https://www.mow.uscourts.gov/content/electronic-document-submission-system .

101 In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish.

102 A D.D.C. interviewee expressed confidence in the fact that the court's IT department keeps their virus protections up to date.

A District of Kansas interviewee noted that court personnel will send any questionable-looking file to their IT department for review, but also noted that they knew of no malicious submissions; "the biggest problem is that they'll scan in something you can barely read."

A Western District of Missouri interviewee reported that the court's IT department set up the court's security system, which the interviewee presumes addresses any virus issues.

The Southern District of New York interviewee stated that, nationwide, the AO has provided all districts with a version of Outlook that blocks attachments that appear malicious.

The District of Utah interviewee stated that viruses have not been a concern.

103 D. Kan. (people will usually file multiple attachments rather than trying to consolidate all of them into one big file); W.D. Mo.

submission methods, from the clerk's office perspective,[104] is the avoidance of the need to handle paper filings.[105] Some interviewees also noted the benefit of an electronic trail concerning what was filed and when.[106] And one interviewee noted that unlike paper filings scanned by the court, some electronic submissions are native PDF files that are text searchable.[107]

Our interviewees did not note many difficulties or burdens associated with their programs. An interviewee in one district reported that occasionally a litigant will email the court a complaint without including contact info besides their email.[108] In another district, the interviewee noted one problematic litigant with seven cases before the court who was abusive in interactions with court staff, but that situation was handled by the judge and was "a rarity" because most EDSS users "file on time and properly and do well."[109] The interviewee in another district stated that there is "a love/hate relationship" with the court's email filing program: on one hand, some email submissions are crazy and abusive, but on the other hand, abuse can be submitted via paper as well, and with email submissions, the court avoids the need to deal with paper filings.[110] In another district the interviewee noted that the main challenges were making sure that a litigant submitted the required form to register for email filing[111] and that litigants sometimes make improperly formatted or too-frequent submissions; but this interviewee reported that most self-represented email filers do well, and that it is faster to deal with electronic submissions than paper submissions.

In districts that provide an alternative electronic submission method (email or portal), we asked whether such filings qualified for the same time-computation treatment as CM/ECF filings – that is, would a filing submitted at 11:30 pm on Tuesday be counted as filed on Tuesday? The

104 As with CM/ECF, so too here, some personnel also noted benefits to the litigant. E.g., W.D. Mo. (interviewee stated that access to the EDSS system gives litigant greater control over their case).
105 N.D. Ill. (avoidance of need to scan paper filing, audit scanned e-copy, retain paper copy for a period of time); D. Kan. (avoidance of need to scan paper filing); W.D. Mo. (same).
106 N.D. Ill. (contrasting this with the disputes that can arise with respect to what a litigant filed via a physical drop box).
107 S.D.N.Y.
108 D. Kan. (interviewee added, "but that's a handful of noncompliant people," and overall the email filing program saves the court a "tremendous" amount of effort).
109 W.D. Mo.
110 S.D.N.Y. This interviewee stated uncertainty as to whether the court would continue its email submission program.
111 D. Utah. Some litigants submit by email without first filling out the form, which sets out the ground rules for the program, see D. Utah Email Filing & Electronic Notification Form for Unrepresented Parties.

answer in all five districts is yes.[112]

In the districts that provide an electronic noticing program, the electronic noticing programs all work the same basic way: The system is set to generate an email notice of electronic filing (NEF) to those litigants who are enrolled in the electronic noticing program just as it generates a NEF to those litigants who are on CM/ECF. So the electronic noticing works similarly for its enrollees as for CM/ECF participants: the email notice includes a link to the underlying filing (whether it be a litigant's filing or a court order)[113] and the person gets "one free look" by which to view and download the document (after that one free look, any applicable PACER fees would be incurred by subsequent "looks").

Our interviewees noted a few minor issues with their court's electronic noticing system: the need to alert litigants to its limitations,[114] the occasional user who messes up their "one free look,"[115] the occasional typo in an email address or change in email address.[116] They tended to stress the benefit to the court of avoiding the need to mail court orders[117] as well as having an electronic record of what the litigant received.[118] A number of interviewees observed that their court encourages self-represented litigants to sign up for electronic noticing.[119]

In at least one instance, we also obtained details on how electronic noticing works for

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112 N.D. Ill.; D. Kan.; W.D. Mo. (answer provided by W.D. Mo. EDSS Admin Procedure III.B); S.D.N.Y.; D. Utah Local Civil Rule 5-1(b)(1)(A)(iv).

113 N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; D. Utah.

An interviewee from D.D.C. pointed out an exception to this: the documents cannot be accessed electronically in Social Security or immigration cases. (This may be specific to the way in which the email noticing program is set up. Compare Civil Rule 5.2(c)(1) (presumptively allowing "remote electronic access to any part of the case file" for "the parties and their attorneys" in Social Security and immigration cases).

114 A D.D.C. interviewee stressed the need to make sure that litigants understand the lack of electronic access to documents in Social Security and immigration cases.

115 D.D.C. (interviewee noted that the court will generate a new NEF for the person so long as it's not always the same person having this difficulty). Compare D. Kan. (interviewee noted that this issue arises much more frequently with attorneys than with self-represented litigants).

116 N.D. Ill. (interviewee noted that this problem arises "more frequently with attorneys" than with self-represented litigants); D. Utah (interviewee noted the need to keep the email addresses up to date and monitor for bouncebacks).

117 D. Kan. (interviewee noted that for many self-represented litigants, their email address may be more stable over time than their physical address); S.D.N.Y. (between CM/ECF access and electronic noticing program, court is avoiding the need to mail out about 3,000 orders per week); D. Utah (savings on printing and postage and trips to the mail drop).

118 D. Utah.

119 D. Ariz.; D.D.C. (courtroom deputies boosted awareness of the program by sending flyers to self-represented litigants); N.D. Ill.; D. Kan.

incarcerated litigants.[120] In the interests of brevity, I am omitting from this memo that and other details specific to incarcerated litigants, but that will be useful information for future work on that topic.

120 D. Ariz.

TAB 5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: E-Filing Deadlines (19-CR-C)

DATE: September 15, 2023

The E-Filing Deadlines Joint Subcommittee was appointed to consider now-Chief Judge Michael Chagares' proposal that the national time-counting rules (including Criminal Rule 45) be amended to set a presumptive electronic-filing deadline earlier than midnight.

As explained in the memorandum from Judge Bybee and Professor Struve, the subcommittee has voted unanimously to recommend to the Standing Committee that no action be taken on the suggestions—including 19-CR-C—and that the subcommittee be disbanded.

We recommend that this suggestion be removed from the Committee's agenda.

MEMORANDUM

DATE: August 24, 2023

TO: Judge John D. Bates
Standing Committee on Rules of Practice and Procedure
Reporters and Advisory Committee Chairs

CC: H. Thomas Byron III

FROM: Judge Jay S. Bybee
Catherine T. Struve

RE: E-Filing Deadlines Joint Subcommittee

We write on behalf of the E-Filing Deadlines Joint Subcommittee to summarize the Subcommittee's recommendations concerning Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U. Those docket numbers refer to a 2019 proposal by now-Chief Judge Michael Chagares that the national time-counting rules[1] be amended to set a presumptive electronic-filing deadline earlier than midnight.[2]

---

1 Civil Rule 6(a)(4) is representative of the operative portions of the national time-counting rules. It provides in relevant part:

> (a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time….
>
> > (4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:
> >
> > > (A) for electronic filing, at midnight in the court's time zone; and
> > >
> > > (B) for filing by other means, when the clerk's office is scheduled to close.

Bankruptcy Rule 9006(a)(4) and Criminal Rule 45(a)(4) are materially similar. Appellate Rule 26(a)(4) is slightly more complicated (in part because it addresses electronic filings in both the district court and the court of appeals) but, like the other three rules, it sets a presumptive deadline of midnight for electronic filings.

2 Chief Judge Chagares summarized his proposal thus:

The subcommittee requested information from the Federal Judicial Center ("FJC") about actual filing patterns by time of day. The FJC released two studies in 2022 – one concerning e-filing in federal court,[3] and another concerning e-filing in state courts.[4] The study of federal-court filings included a survey component, but that survey was truncated due to challenges arising from the pandemic.[5] The study also included a quantitative analysis of more than 47 million docket entries made in 2018 in the federal bankruptcy courts, district courts, and courts of appeals. That analysis enabled the researchers to reach this estimate: "About four out of five attorney filings in all three types of courts were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before 8:00, about one in six was made after 5:00, and about one in ten was made after 6:00."[6]

This year, the Third Circuit adopted (effective July 1, 2023) a new local rule that moves the presumptive deadline for most electronic filings in that court of appeals from midnight to 5:00 p.m.[7] The Standing Committee asked the subcommittee to update its consideration of the

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> I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

The full proposal is enclosed.

3 See Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingDeadlineStudy.pdf .

4 See Marie Leary & Jana Laks, Electronic Filing Deadlines in State Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingStateCourts.pdf .

5 See Reagan et al., supra note 3, at 1 ("We planned to ask a random sample of judges and attorneys about their practices and preferences, but we brought the survey to a close during its pilot phase because of the still-present COVID-19 pandemic.").

6 See id. at 4.

7 Third Circuit Local Appellate Rule 26.1 provides:

> 26.1 Deadline for Filing
>
> (a) Unless a different time is set by a statute, local rule, or court order:
>
> (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
>
> (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and

2019 proposal in the light of that development.

The subcommittee met by Zoom on August 21, 2023. All members participated, as did the Rules Committee Secretary and reporters from all four of the relevant advisory committees. Subcommittee members gave consideration to the Third Circuit's stated reasons for its new local rule, and also to reported comments concerning that local rule. It was noted that the local rule proposal had evoked strong negative reactions from the bar. An internal DOJ survey of attorneys concerning the idea of moving the presumptive e-filing deadline earlier than midnight had also elicited negative comments about that idea. A subcommittee member reported a similar reaction from members of a law firm.

After careful discussion, the subcommittee voted unanimously to recommend that no action be taken on Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U, and that the subcommittee be disbanded.[8]

Encls.

> (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.
>
> (b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.
>
> (c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
>
> > (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
> >
> > (2) a party is providing paper copies of previously filed electronic briefs and appendices.
>
> (d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

The Third Circuit's Public Notice dated May 2, 2023 is enclosed.

8 It was noted that the Appellate Rules Committee currently has before it a suggestion from Howard Bashman, Esq., proposing various possible responses by the Appellate Rules Committee to the Third Circuit's local rule. See Suggestion 23-AP-F. The Appellate Rules Committee, however, has not yet discussed that proposal, which remains for future consideration by that advisory committee.

19-AP-E
19-BK-H
19-CR-C
19-CV-U

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
>
> (A) for electronic filing, at midnight in the court's time zone; and
>
> (B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at: https://courts.delaware.gov/forms/download.aspx?id=105958. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by 'holding' briefs for filing until midnight themselves as a response, even when their brief was done." Delaware Bar Report 33-34.[1]

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline "will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day." Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association's Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline "has provided a healthier work-life balance" and that the order "has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country."). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court's time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court's time zone>. Another

[1] The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing "does not promote the submission of carefully considered and edited filings," id. at 32, and that quality "is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable," id. at 39-40.

approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk's office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.

Public Notice – May 2, 2023

The United States Court of Appeals for the Third Circuit has adopted amendments to its Local Appellate Rules (L.A.R.), creating a new L.A.R. 26.1 and modifying L.A.R. Misc. 113.3(c). The amended rules create a uniform 5:00 p.m. E.T. deadline for filings (electronic and otherwise) and will become effective on July 1, 2023. The Clerk's Office will apply the 5:00 p.m. E.T. deadline to deadlines set on or after July 1, 2023, and also observe a grace period until December 31, 2023, for papers mistakenly filed after 5:00 p.m. E.T. The amendments are below.

By way of background, Federal Rules of Appellate Procedure 25(a) and 26(a) create two general presumptive filing deadlines, with electronically filed documents due at midnight and documents filed otherwise (such as paper filings) due when the Clerk's Office closes. The hours of the Clerk's Office in the Court of Appeals for the Third Circuit are 8:30 a.m. to 5:00 p.m. E.T.

Rule 26(a)(4) also authorizes courts to establish their own deadlines by court order or local rule. The Court consulted its Lawyers Advisory Committee, which studied and approved the proposed rule changes. The Court then determined that it would solicit comments from the public about the proposed new local rule and conforming amendment. A Public Notice encouraging comments was issued on January 17, 2023. The period for public comment closed on March 3, 2023.

The Court received wide variety of comments from a diverse group of entities and people, including senior attorneys, junior attorneys, pro se litigants, professors, paralegals, and legal assistants. "The Court is grateful for all of the comments received and they were quite helpful in our decision-making. As a matter of fact, several modifications to the proposed rules were made because of suggestions made in the comments, such as excepting filings initiating cases in the Court, like petitions for review," stated Chief Judge Michael A. Chagares. Further, the Court took notice of the successes of the United States District Court for the District of Delaware and state courts of Delaware, which relied principally on work/life balance and quality of life concerns in similarly modifying their filing deadlines years ago. Other courts have also rolled back their deadlines.

Reasons supporting the Court's adoption of the amendments include, in no particular order:

- permitting the Court's Helpdesk personnel to assist electronic filers with technical and other issues when needed during regular business hours and permitting other Clerk's Office personnel to extend current deadlines (the average non-extended filing period is thirty days) in response to a party's motion or for up to fourteen days by telephone, during regular business hours. In addition, the amendments permit judges to read and consider filings at an earlier hour.

- insofar as over half of the Court's litigants are pro se, many of whom cannot or will not use the Court's CM/ECF system (and attorneys must use the system), the rule largely equalizes the filing deadlines for pro se litigants and attorneys.

- consistent with the collegiality and fairness the Court encourages, the rule ends the practice by some of unnecessary late-night filings intended to deprive opponents from hours that could be used to consider and formulate responses to such filings. Further, the rule obviates the need by opposing counsel to check whether opposing papers were filed throughout the night. About one-quarter of the Court's filings are currently received after business hours.

- alleviating confusion by equalizing the filing deadlines for electronically filed and non-electronically filed documents in most cases.

While the new rule sets a 5:00 p.m. E.T. deadline for filing, parties reserve the autonomy to prepare their papers whenever they choose, and as Chief Judge Chagares notes, "the virtual courthouse remains open twenty-four hours a day for electronic filing."

The Clerk's Office will proactively advise and remind parties of the new deadline in, for instance, scheduling orders.

L.A.R. 26.0 COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

(a) Unless a different time is set by a statute, local rule, or court order:
  (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
  (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and
  (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

(b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.

(c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:

(1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or

(2) a party is providing paper copies of previously filed electronic briefs and appendices.

(d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as "midnight in the time zone of the circuit clerk's principal office" for electronic filing and "when the Clerk's office is scheduled to close" for other means of transmission of documents to the clerk's office. This rule applies "[u]nless a different time is set by statute, local rule, or court order." L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

….

(c) Except as stated in L.A.R. 26.1, ~~F~~filing must be completed by ~~midnight on the last day Eastern Time~~ 5:00 p.m. Eastern Time on the last day to be considered timely ~~filed that day~~.

….

Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

TAB 6

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

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

RE: **Rule 53 proposal to authorize broadcasting in the federal trials of former President Donald Trump (23-CR-E)**

DATE: **September 14, 2023**

In a letter dated August 3, 2023, 38 members of Congress wrote to Judge Roslynn Mauskopf, the Director of the Administrative Office of the U.S. Courts and Secretary to the Judicial Conference, requesting that the Conference "explicitly authorize the broadcasting of court proceedings in the cases of United States of America v. Donald J. Trump." Judge Mauskopf responded to the members of Congress that she was forwarding their letter to our Committee. The letter was placed on the court's website as a suggestion to the Rules Committee and is included after this memo in the agenda book. It states:

> It is imperative the Conference ensures timely access to accurate and reliable information surrounding these cases and all of their proceedings, given the extraordinary national importance to our democratic institutions and the need for transparency.
>
> As the policymaking body for the federal courts, the Judicial Conference has historically supported increased transparency and public access to the courts' activities. Given the historic nature of the charges brought forth in these cases, it is hard to imagine a more powerful circumstance for televised proceedings. If 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.
>
> We urge the conference to take additional steps, including live broadcasting, to ensure the facts of this case are brought forward, unfiltered, to the public.

In this initial consideration of the proposal, the question for the Committee is, as always, whether to pursue it further. To aid the Committee, we provide in this memo information about the feasibility of doing what the proposal asks, and do not address the merits of the proposal itself. We conclude that under the Rules Enabling Act, the Committee has no authority to exempt or waive the current rule that bars broadcasting criminal proceedings, and any action this

Committee could recommend in response to the proposal could not take effect within the timeframe requested.

I. Rule 53 prohibits the broadcasting of any federal criminal proceedings

Although the Representatives' letter makes no specific reference to it, we understand that they seek an exemption or waiver from Rule 53, which provides:

> **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.

Because no current statute or rule permits the broadcasting of criminal proceedings, Rule 53 prohibits the broadcasting of the proceedings in all federal criminal proceedings, including the Trump prosecutions.

II. The Rules Enabling Act authorizes only the promulgation and amendment of Rules of Procedure

Both this Committee and the Standing Committee derive their authority from the Rules Enabling Act (REA).[1] The REA authorizes the Supreme Court "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts."[2] It also requires the Judicial Conference to authorize the appointment of a Standing Committee on practice, procedure, and evidence,[3] and authorizes the appointment of additional "committees to assist the Conference by recommending rules."[4] Our Committee was appointed pursuant to this authority. The REA states that the "standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice."[5]

Notably, the REA, which is the exclusive source of authority for this Committee and the Standing Committee, provides no mechanism for waiving or exempting individual cases from the general rules of practice and procedure for cases in district courts. Thus, neither this Committee nor the Standing Committee would be able to "explicitly authorize the broadcasting of court proceedings" in an ongoing case.

[1] 28 U.S.C. §§ 2072-2077.
[2] 28 U.S.C. § 2072(a).
[3] 28 U.S.C. § 2073(b).
[4] 28 U.S.C. § 2073(a)(2).
[5] 28 U.S.C. § 2073(b).

III. No amendment to Rule 53 could take effect in time to apply to an ongoing case

It is possible to interpret the proposal as seeking an amendment to Rule 53 rather than an exemption. However, no amendment promulgated in compliance with the REA could achieve what the proposers seek because it could not take effect in time to apply to an ongoing case.

A. The statutorily mandated period between submission of a rule change by the Supreme Court to Congress and the effective date of that change

The REA permits new or amended rules to go into effect no earlier than December 1 of each year if they have been submitted to Congress by the Supreme Court no later than May 1 of that year and no contrary Congressional action has been taken.[6] For rules amendments scheduled to take effect on December 1, 2023, the statutory deadline to submit amendments to Congress (May 1, 2023) has long passed. Further, even if the Supreme Court could approve a rule change and submit it to Congress by May 1, 2024, the REA provides no mechanism for that amendment to apply to proceedings that take place before December 1, 2024. Moreover, as discussed below, multiple additional steps are required by statute and Judicial Conference procedures[7] to ensure notice to the public and opportunity for public comment on proposed rules. Those additional steps would not permit the Advisory Committee to propose a rule change that could take effect as soon as 2024.[8] These steps would push the earliest effective date of any amendment to December 2026.

B. Time needed for required steps preceding Supreme Court consideration of a rule change

The REA and Judicial Conference procedures set out specific steps that must be taken before Supreme Court consideration of a rule change. These steps ensure careful, informed, and transparent consideration of each proposed change. They include:

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[6] 28 U.S.C. § 2074(a).

[7] Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees (as codified in Guide to Judiciary Policy, Vol. 1, § 440), avail: guide-vol01-ch04-sec440_procedures_for_rules_cmtes_1.pdf (uscourts.gov) (hereinafter *Judicial Conference Procedures*). *See also* 28 U.S.C. § 2073(a)(1) ("The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.").

[8] Judicial Conference procedures contemplate an expedited timeline but emphasize the need for appropriate notice to the public and an opportunity for public comment on proposed amendments to the rules. *See Judicial Conference Procedures* § 440.20.40(d). Those expedited procedures would not provide sufficient time for this Advisory Committee, as well as the Standing Committee, Judicial Conference, and Supreme Court, to review and approve any amendment by May 2024 so that it could become effective by December 2024.

- a recommendation by the Criminal Rules Advisory Committee for publication of each proposed amendment for public notice and comment[9]
- Standing Committee approval of this recommendation for publication[10]
- publication and a public comment period of 6 months[11]
- Advisory Committee review of the public comments[12]
- Advisory Committee final approval of an amendment and submission to the Standing Committee[13]
- Standing Committee approval and submission to the Judicial Conference[14] and
- Judicial Conference approval before submission to the Supreme Court.[15]

Pursuant to Judicial Conference procedures, the Advisory Committee considers each proposed request at least twice, once before sending any recommendation to the Standing Committee, and once after the public comment period. The Standing Committee, too, considers the proposal at least twice, once before approving it for publication, and again after the Advisory Committee has made a recommendation incorporating public comment, before approving the recommendation to the Judicial Conference.

Following these procedures, if this Committee were to develop a proposed amendment to Rule 53, it could be submitted—at the earliest—to the Standing Committee at its June 2024 meeting.[16] The Standing Committee could then approve—at the earliest—publication for public comment in the summer of 2024. The comment period would ordinarily last six months, ending in time for the Advisory Committee to review the recommendation anew at its spring 2025 meeting. After review of the public comments, this Committee could—at the earliest—submit a final recommendation to the Standing Committee at its meeting in June 2025. The Standing Committee then could—at the earliest—forward a proposed change to the Judicial Conference for consideration in September of 2025. If the Judicial Conference received a proposed amendment and approved it at its September 2025 meeting, that recommendation would be transmitted to the Supreme Court. Under the mandated period described above, if the Supreme Court approved the rule and submitted it to Congress by May 1, 2026, the amendment could go into effect on December 1, 2026.

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[9] 28 U.S.C. § 2073(b); *Judicial Conference Procedures* § 440.20.30. The REA mandates that all meetings of the Advisory Committee and the Standing Committee must be held after the publication of notice sufficiently in advance to permit public attendance. 28 U.S.C. § 2073(c)(2).
[10] *Judicial Conference Procedures* § 440.20.40(a).
[11] *Judicial Conference Procedures* § 440.20.40.
[12] *Judicial Conference Procedures* § 440.20.50(b).
[13] *Judicial Conference Procedures* § 440.20.50(c).
[14] 28 U.S.C. § 2073(b); *Judicial Conference Procedures* § 440.30.20.
[15] 28 U.S.C. § 2073(a)(2).
[16] Since the proposal includes no draft language, it would be necessary for the Committee to draft a proposed amendment and committee note. We do not think those tasks could be completed in time for submission to the January 2024 Standing Committee meeting. Moreover, even if an amendment could be drafted and submitted for that meeting, it could not be published for public comment before the summer of 2024.

Indeed, this roughly three-year time frame from first consideration by the Advisory Committee until transmittal from the Supreme Court to Congress would be unusually accelerated as compared to most amendments, because it assumes both that the Advisory Committee could approve without further study the text of an amendment after just one meeting, and that the Standing Committee could approve that change for publication when it is first considered, without further changes or study. Such precipitous action seems unlikely for any proposal on the topic of broadcasting criminal proceedings. Prior suggestions regarding broadcasting have generated considerable controversy.[17] A more realistic appraisal would peg the time it would take for consideration of a proposal on Rule 53 closer to at least four years.

In sum, compliance with the REA would delay the effective date of any amendment beyond the timeframe requested by this proposal.

[17] For a history of the consideration of cameras in the courtroom, see https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts (describing, inter alia, a proposal to amend Rule 53 that was not accepted by the Judicial Conference). Most recently, this month, the Judicial Conference allowed for the first time live audio only access for a limited class of *civil* proceedings, https://www.uscourts.gov/news/2023/09/12/judicial-conference-revises-policy-expand-remote-audio-access-over-its-pre-covid. For a recent review of these issues, see SARAH ECKMAN ET AL., CONG. RSCH. SERV., IN12220, BROADCASTING FEDERAL CRIMINAL PROCEEDINGS, (2023), https://crsreports.congress.gov/product/pdf/IN/IN12220.

APPENDIX

Rules Enabling Act

§ 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

§ 2073. Rules of procedure and evidence; method of prescribing

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this

title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 or 2075 of this title.

§ 2074. Rules of procedure and evidence; submission to Congress; effective date

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

§ 2077. Publication of rules; advisory committees

(a) The rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published. Each court of appeals shall print or cause to be

printed necessary copies of the rules. The Judicial Conference shall prescribe the fees for sales of copies under section 1913 of this title, but the Judicial Conference may provide for free distribution of copies to members of the bar of each court and to other interested persons.

(b) Each court, except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court and, in the case of an advisory committee appointed by a court of appeals, of the rules of the judicial council of the circuit. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5.

Judicial Conference Procedures:

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rule Changes

(a) Meetings

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the Federal Register and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Preparing Draft Changes

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) Considering Draft Changes

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 Publication and Public Hearings

(a) Publication

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the Federal Register and on the judiciary's rulemaking website. The Secretary must:

1. notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and
2. provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) Public Comment Period

A public comment period on the proposed change must extend for at least six months after notice is published in the Federal Register, unless a shorter period is approved under paragraph (d) of this section.

(c) Hearings

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the Federal Register and on the judiciary's rulemaking website. The hearings must be transcribed. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) Expedited Procedures

The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) Advisory Committee Review; Republication

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for

an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) Submission to the Standing Committee

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

1. be accompanied by a separate report of the comments received;
2. explain the changes made after the original publication; and
3. include an explanation of competing considerations examined by the advisory committee.

Congress of the United States

Washington, DC 20515

23-CR-E

August 3, 2023

The Honorable Roslynn R. Mauskopf
Judicial Conference Secretary
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Judge Mauskopf:

We are writing to request the Judicial Conference explicitly authorize the broadcasting of court proceedings in the cases of United States of America v. Donald J. Trump. It is imperative the Conference ensures timely access to accurate and reliable information surrounding these cases and all of their proceedings, given the extraordinary national importance to our democratic institutions and the need for transparency.

As the policymaking body for the federal courts, the Judicial Conference has historically supported increased transparency and public access to the courts' activities. Given the historic nature of the charges brought forth in these cases, it is hard to imagine a more powerful circumstance for televised proceedings. If 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.

We urge the conference to take additional steps, including live broadcasting, to ensure the facts of this case are brought forward, unfiltered, to the public.

Sincerely,

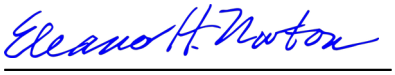
Adam B. Schiff
Member of Congress

Henry C. "Hank" Johnson, Jr.
Member of Congress

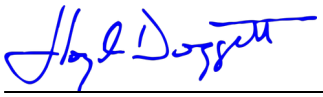
Bennie G. Thompson
Member of Congress

Gerald E. Connolly
Member of Congress

Jasmine Crockett
Member of Congress

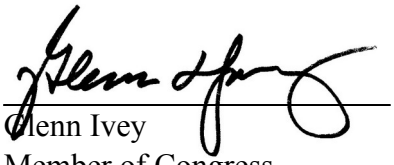


Eleanor Holmes Norton
Member of Congress

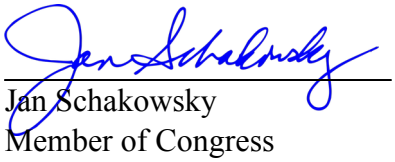


Lloyd Doggett
Member of Congress

Steve Cohen
Member of Congress



Glenn Ivey
Member of Congress



Jan Schakowsky
Member of Congress

Debbie Dingell
Member of Congress

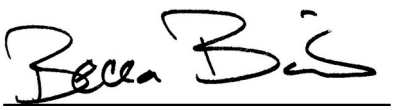
Dan Goldman
Member of Congress

Dwight Evans
Member of Congress

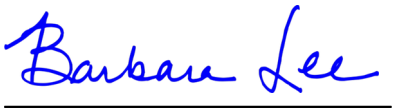
Nikema Williams
Member of Congress

Tony Cárdenas
Member of Congress

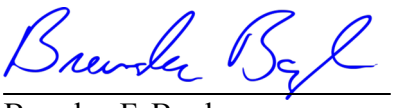
Earl Blumenauer
Member of Congress



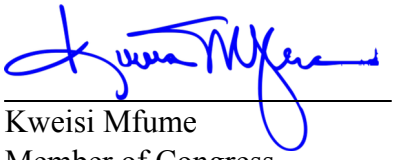
Becca Balint
Member of Congress



Barbara Lee
Member of Congress



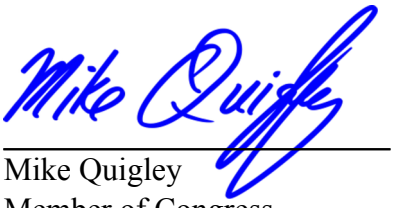
Brendan F. Boyle
Member of Congress



Kweisi Mfume
Member of Congress

Jamie Raskin
Member of Congress

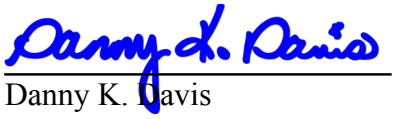
Mark DeSaulnier
Member of Congress



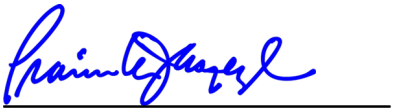
Mike Quigley
Member of Congress

Brad Sherman
Member of Congress

Dina Titus
Member of Congress



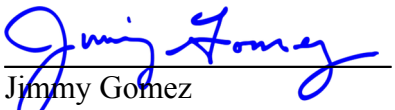
Danny K. Davis
Member of Congress



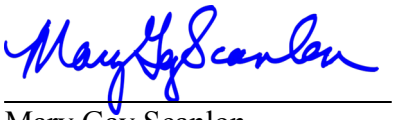
Pramila Jayapal
Member of Congress

Troy Carter
Member of Congress

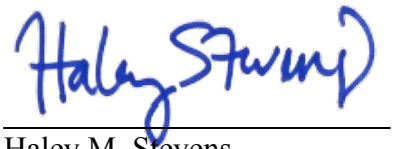
Zoe Lofgren
Member of Congress



Jimmy Gomez
Member of Congress



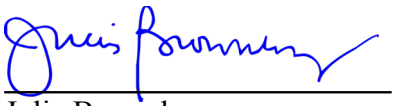
Mary Gay Scanlon
Member of Congress



Haley M. Stevens
Member of Congress

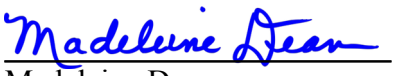
Mark Takano
Member of Congress

Greg Stanton
Member of Congress

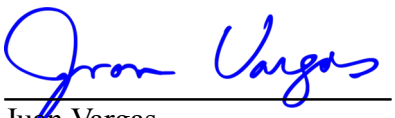


Julia Brownley
Member of Congress

Sheila Jackson Lee
Member of Congress



Madeleine Dean
Member of Congress



Juan Vargas
Member of Congress

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

August 15, 2023

Members of Congress
United States House of Representatives
Washington, DC 20515

Dear Members of Congress:

I write in response to your letter of August 3, 2023, inquiring about broadcasting of court proceedings in certain criminal cases. The issue of photographing and broadcasting in criminal cases is governed by Rule 53 of the Federal Rules of Criminal Procedure, which applies to all criminal proceedings in United States district courts. Rule 53 provides: "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."

I am forwarding your letter to the Judicial Conference's Advisory Committee on Criminal Rules, which considers proposed amendments to the Federal Rules of Criminal Procedure. Your letter will be docketed and posted publicly on the Judiciary's website, and will be considered by the Advisory Committee pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2072-2074.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact us through the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,

Roslyn R. Mauskopf

Roslynn R. Mauskopf
Secretary

Letter sent to:

Honorable Adam B. Schiff
Honorable Bennie G. Thompson
Honorable Jasmine Crockett
Honorable Lloyd Doggett
Honorable Glenn Ivey
Honorable Debbie Dingell
Honorable Dwight Evans
Honorable Tony Cárdenas
Honorable Becca Balint
Honorable Brendan F. Boyle
Honorable Jamie Raskin
Honorable Mike Quigley
Honorable Dina Titus
Honorable Pramila Jayapal
Honorable Zoe Lofgren
Honorable Mary Gay Scanlon
Honorable Mark Takano
Honorable Julia Brownley
Honorable Madeleine Dean
Honorable Henry C. "Hank" Johnson, Jr.
Honorable Gerald E. Connolly
Honorable Eleanor Holmes Norton
Honorable Steve Cohen
Honorable Jan Schakowsky
Honorable Dan Goldman
Honorable Nikema Williams
Honorable Earl Blumenauer
Honorable Barbara Lee
Honorable Kweisi Mfume
Honorable Mark DeSaulnier
Honorable Brad Sherman
Honorable Danny K. Davis
Honorable Troy Carter
Honorable Jimmy Gomez
Honorable Haley M. Stevens
Honorable Greg Stanton
Honorable Sheila Jackson Lee
Honorable Juan Vargas

TAB 7

Item 7 will be an oral report.