ADVISORY COMMITTEE ON CRIMINAL RULES

November 6-7, 2024

AGENDA
Meeting of the Advisory Committee on Criminal Rules
November 6-7, 2024
New York, NY

Page

1. **Opening Business**

A. Chair's Remarks, Welcome New Members, and Administrative Announcements (Oral Report)

B. **ACTION: Review and Approval of Minutes**

- Draft Minutes of the April 2024 Meeting of the Advisory Committee on Criminal Rules 15

C. Report of the Rules Committee Staff

- Draft Minutes of the June 2024 Meeting of the Committee on Rules of Practice and Procedure 38
- September 2024 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States 68
- Chart Tracking Proposed Amendments 90
- Pending Legislation that Would Directly or Effectively Amend the Federal Rules (118th Congress) 97

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

- Reporters' Memorandum (October 9, 2024) 105
- Suggestion 23-CR-F (Coalition of Media Organizations) 111
- Minnesota Supreme Court Orders ADM10-8049 & ADM09-8009 and dissent 128
- Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure, Report and Proposed Amendment 145

3. **Reference to Minors by Pseudonyms (Rule 49.1) (24-CR-A & 24-CR-C) and Redaction of Social Security Numbers (22-CR-B)**

- Reporters' Memorandum (October 9, 2024) 237
- Suggestion 24-CR-A (U.S. Department of Justice) 243
- Suggestion 24-CR-C (American Association for Justice and the National Crime Victim Bar Association 247
- Suggestion 22-CR-B (Senator Ron Wyden) 249
- Memo from Reporters' Privacy Rules Working Group (August 21, 2024) 251

AGENDA
Meeting of the Advisory Committee on Criminal Rules
November 6-7, 2024
New York, NY

Page

4. New Rules Suggestion: Procedures for Revoking or Modifying Pretrial Release (Rule 40) (23-CR-H & 24-CR-D)

- Reporters' Memorandum (October 10, 2024) 261
- Suggestion 23-CR-H (Judge Zachary Bolitho)..264
- Suggestion 24-CR-D (Magistrate Judges Advisory Group) 266

5. New Rules Suggestion: Expanded Use of Videoconferencing (Rule 43) (24-CR-B)

- Reporters' Memorandum (October 13, 2024) 284
- Suggestion 24-CR-B (Judge Brett Ludwig)..292

6. New Rules Suggestion: Contempt Proceedings (Rule 42) (23-CR-C)

- Reporters' Memorandum (October 8, 2024) 298
- Suggestion 23-CR-C (Joshua Carback) 301

7. Report on Attorney Admission

- Memorandum from Judge J. Paul Oetken, Andrew Bradt, and Catherine Struve (August 21, 2024)..385

8. Report on Electronic Filing and Service by Self-Represented Litigants

- Memorandum from Catherine Struve (August 21, 2024)..414

9. Federal Judicial Center Research and Education Report (August 12, 2024) 428

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

- Reporters' Memorandum (October 13, 2024) 438
- Discussion Draft..445
- Redline Discussion Draft 449
- Draft Committee Note..456
- List of Speakers and Schedule 463

11. Next Meeting: April 24, 2025, Washington, D.C.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure (Standing Committee)

Chair	**Reporter**
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	**Reporter**
Honorable Allison H. Eid United States Court of Appeals Denver, CO	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	**Reporter**
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC
	Associate Reporter
	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Civil Rules

Chair

Honorable Robin L. Rosenberg
United States District Court
West Palm Beach, FL

Reporter

Professor Richard L. Marcus
University of California
College of the Law, San Francisco
San Francisco, CA

Associate Reporter

Professor Andrew Bradt
University of California, Berkeley
Berkeley, CA

Advisory Committee on Criminal Rules

Chair

Honorable James C. Dever III
United States District Court
Raleigh, NC

Reporter

Professor Sara Sun Beale
Duke University School of Law
Durham, NC

Associate Reporter

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

Advisory Committee on Evidence Rules

Chair

Honorable Jesse M. Furman
United States District Court
New York, NY

Reporter

Professor Daniel J. Capra
Fordham University School of Law
New York, NY

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke Law School Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Members

Hon. Nicole M. Argentieri Acting Assistant Attorney General (ex officio) United States Department of Justice Washington, DC	Honorable André Birotte Jr. United States District Court Los Angeles, CA
Honorable Jane Boyle United States District Court Dallas, TX	Honorable Timothy Burgess United States District Court Anchorage, AK
Dean Roger A. Fairfax, Jr. Howard University School of Law Washington, DC	Honorable Michael Harvey United States District Court Washington, DC
Marianne Mariano, Esq. Office of the Federal Public Defender Buffalo, NY	Honorable Michael W. Mosman United States District Court Portland, OR
Shazzie Naseem, Esq. Berkowitz Oliver LLP Kansas City, MO	Honorable Jacqueline H. Nguyen United States Court of Appeals Pasadena, CA
Catherine M. Recker, Esq. Welsh & Recker PC Philadelphia, PA	Honorable Carlos A. Samour, Jr. Colorado Supreme Court Denver, CO

Liaison

Honorable Paul J. Barbadoro
(*Standing*)
United States District Court
Concord, NH

Clerk of Court Representative
Angela E. Noble, Esq. Clerk United States District Court Miami, FL

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date		End Date
James C. Dever III Chair	D	North Carolina (Eastern)	Member: Chair:	2022 2022	---- 2025
Nicole Argentieri*	DOJ	Washington, DC		---	Open
Andre Birotte, Jr.	D	California (Central)		2021	2027
Jane Boyle	D	Texas (Northern)		2021	2027
Timothy Burgess	D	Alaska		2021	2026
Roger A. Fairfax, Jr.	ACAD	Washington, DC		2019	2025
Michael Harvey	M	District of Columbia		2023	2026
Marianne Mariano	FPD	New York (Western)		2023	2025
Michael W. Mosman	D	Oregon		2024	2026
Shazzie Naseem	ESQ	Missouri		2024	2027
Jacqueline H. Nguyen	C	Ninth Circuit		2019	2025
Catherine M. Recker	ESQ	Pennsylvania		2018	2025
Carlos A. Samour, Jr.	JUST	Colorado		2024	2027
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee		2007	Open

Principal Staff: H. Thomas Byron III, 202-502-1820

* Ex-officio - Acting Assistant Attorney General, Criminal Division

CRIMINAL RULES SUBCOMMITTEES
(effective October 11, 2024)

Rule 53 Subcommittee Judge Michael Mosman, Chair Judge Timothy Burgess Judge Michael Harvey Ms. Marianne Mariano Ms. Finnuala Tessier (DOJ) Judge James Dever	**Rule 49.1 Subcommittee** Judge Michael Harvey, Chair Judge Andre Birotte Ms. Marianne Mariano Mr. Shazzie Naseem Ms. Finnuala Tessier (DOJ) Judge James Dever
Pro Se Filing Subcommittee Judge Timothy Burgess, Chair Dean Roger Fairfax Judge Michael Harvey Ms. Marianne Mariano Mr. Shazzie Naseem Judge James Dever	**Rule 17 Subpoenas Subcommittee** Judge Jacqueline Nguyen, Chair Judge Jane Boyle Ms. Marianne Mariano Ms. Catherine Recker Ms. Finnuala Tessier (DOJ) Judge James Dever

Updated October 1, 2024

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Dean Troy A. McKenzie *(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. Michael W. Mosman (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

H. Thomas Byron III, Esq.
Chief Counsel
Office of the General Counsel – Rules Committee Staff
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Bridget M. Healy, Esq.
Counsel

S. Scott Myers, Esq.
Counsel

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Carly E. Giffin, Esq.
Research Associate
(Bankruptcy)

Laural L. Hooper, Esq.
Senior Research Associate
(Criminal)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

TAB 1A

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

Attendance and Preliminary Matters

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

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

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

The following persons participated to support the Committee:

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

Opening Business

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

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

Draft

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

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

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

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

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

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

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

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

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

Draft

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

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

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

Rule 17

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Draft

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Draft

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

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

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

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

Draft

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

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

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

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

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

Rule 49

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

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

Rule 53

Draft

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

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

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

be gathered before the Subcommittee would be prepared to begin making any kind of recommendation.

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

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

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

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

Rule 43

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

Draft

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

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

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

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

Redaction of Social Security Numbers and Other Privacy Issues

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

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

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

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

Draft

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

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

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

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

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

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

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

Draft

Professor Beale referenced page 127 right before the asterisks, identifying a potential issue raised at one point several years ago about 49.1(b)(8) & (9) search warrants and charging documents. There may be something else in 49.1, once we open it up, that we should look at now. But, she commented, we don't want to open the patient more than once if we can avoid it. Accordingly, she asked members to identify any other issues concerns about Rule 49.1 during the meeting or as soon as possible after the meeting. It is helpful to the Committee to make all of the changes to a rule at one time, and bad for those who use the Rules when we do not. When there are multiple amendments within a short period of time, it generates confusion and decreases the input we receive. So if there are any other potential issues, this is the time to put them on the agenda for evaluation.

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

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

Rule 40

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

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

Draft

Judge Harvey recommended that the Committee delay full discussion of the issue raised in the letter until it receives the MJAG comprehensive recommendation. He had seen a draft of it, and it is similar to the request that this Committee considered five years ago from Judge Barksdale. The Committee considered Judge Barksdale's suggestion and decided not to send it to a subcommittee, in part because there was concern that the issues just didn't come up that frequently. Judge Barksdale is working with the MJAG to make it clear that the concerns that she raised are concerns of magistrate judges more broadly. They are making efforts to collect information and data to address the question whether these sorts of situations arise with sufficient frequency to gear up the rules amendment machinery. Judge Barksdale expected to have a proposal including that data in the next few months. MJAG hopes to persuade this Committee that the issues are of concern to many magistrate judges, and the confusion Rule 40 causes comes up with sufficient frequency that it merits our further consideration.

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

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

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

Draft

Unified Bar Admission

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

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

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

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

Draft

Professor Coquillette explained some of the relevant history. When he was reporter, at the urging of the Department of Justice and Deputy Attorney General Jamie Gorelick, the Rules Committees tried to establish uniform rules of attorney conduct in all the federal courts. The idea was that state rules govern when you're in the state court, but in the federal courts there would be uniform standards at least as to key rules of interest to the Department, which practiced in all the states. He characterized the project as the charge of the Light Brigade in Rulemaking. Every local bar association in the country was against the proposal. He also commented that the requirement of retaining local counsel either by rule or by practice at $500.00 is a real financial barrier that the Committee should consider.

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

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

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

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

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

FJC Research Projects

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

Dr. Reagan explained the FJC does empirical research for various Judicial Conference committees, including the Rules Committees, and it had decided to resume reporting to the Rules Committees so that all the members will have a good sense of the FJC's skills and the kinds of

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

products it produces. Dr. Reagan is the liaison to the Standing Committee and Laurel Hooper is the liaison to this Committee from the Research Division. Members of the Research Division attend Rules Committee, subcommittee, and working group meetings so that they can get a good foundation for our research. The FJC's goal is to give the Committee a good information foundation for its policymaking. What it brings to the table is their labor, methodological expertise, and objectivity. They enjoy working for the committees.

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

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

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

Concluding Remarks

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

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

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

Ms. Robinson said it had been an incredible privilege to serve on this Committee and watch the process in which these rules that are so important to the criminal practice of law are developed, implemented, and changed. She called it a unique opportunity. She had enjoyed the ability to share her experience with others who use the rules every day, but seldom get involved the Rules Enabling Act process. Ms. Robinson said she had attempted to spread the word of how practitioners can get involved and have input in the rules process. Noting she could not

Draft

acknowledge everyone in the room, she said she'd been very impressed with the leadership of Judges Kethledge and Dever, as well as the intellect and the work put in by Professor Beale and Professor King. She emphasized the thought and the time and the effort that goes into making these important rules that affect every defendant who might come before a court. It is, she said, so important. She was thankful for the experience.

After thanking everyone again, Judge Dever adjourned the meeting.

Draft

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 4, 2024

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

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge 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

Others who provided support to the Standing Committee, in person or remotely, included 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, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing Committee; Dr. Elizabeth C. Wiggins, Director, Research Division, 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.

Draft

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including the committee members and reporters who were attending remotely. Judge Bates also welcomed members of the public and press who joined as observers.

Judge Bates expressed sorrow at the loss of Judge Gene E.K. Pratter the prior month. She completed a full term on the Civil Rules Committee before joining the Standing Committee and she will be missed.

Professor Catherine Struve honored Judge Pratter's legacy as the quintessential Philadelphia lawyer and judge—incredibly skilled in lawyering and rhetoric—and a role model in the Philadelphia legal community. She began her career in 1975 at Duane Morris LLP where she became the firm's first general counsel and expert on legal ethics. She came to teach ethics and trial advocacy at the University of Pennsylvania Law School and served on its board of overseers. Professor Struve also recalled Judge Pratter's generosity and sense of humor.

Judge D. Brooks Smith noted how shocked he had been to learn of Judge Pratter's untimely passing. He came to know her as a friend and colleague when she became a judge, and he quickly learned of her abilities as a district judge. She also contributed greatly when she sat by designation on the court of appeals. He also remarked on Judge Pratter's wonderful sense of style and humor.

Judge Bates thanked Professor Struve and Judge Brooks and added that Judge Pratter will be remembered as an excellent judge who made countless contributions to justice, the federal judiciary, and the rules process in particular.

As this was Judge Kayatta's last meeting, Judge Bates thanked him for his work and recognized that he had been a wonderful contributor to the efforts of the Standing Committee and the rules process.

Judge Bates welcomed the incoming chairs for the Advisory Committees on Appellate Rules and Evidence Rules. Judge Allison Eid, who is from the Tenth Circuit and a former member of the Appellate Rules Committee, will be succeeding Judge Jay Bybee as chair of the Appellate Rules Committee. Judge Jesse Furman from the Southern District of New York, a former member of the Standing Committee, will be succeeding Judge Patrick Schiltz as chair of the Evidence Rules Committee. Judge Bates recognized the great work that Judge Bybee and Judge Schiltz had performed as chairs of their committees, which have been amazingly productive and done excellent work throughout their tenure.

Judge Bates noted that his term as Chair of the Standing Committee had been extended for another year.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2024, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, reported that the latest set of proposed rule amendments had been approved by the Supreme Court and transmitted to Congress. Those amendments will take effect on December 1, 2024, in the absence of congressional action.

Draft

Judge Bates noted that the Standing Committee's March 2024 report to the Judicial Conference begins on page 54 of the agenda book and the FJC's report on research projects begins on page 64. Dr. Tim Reagan explained that the FJC in January restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include information about the FJC's Education Division.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Struve reported that the working group hopes to bring proposals to the advisory committees in the fall.

Redaction of Social Security Numbers

Mr. Byron provided the report on several privacy issues, including redaction of social-security numbers. A memorandum from the Reporters' Privacy Rules Working Group begins on page 74 of the agenda book and outlines what the working group and Rules Committee Staff have done over the last several months. The advisory committees and their chairs were asked to provide feedback on this memorandum at their spring meetings.

As previously reported, the rules currently require filers to redact all but the last four digits of a social-security number in court filings, and Senator Ron Wyden suggested that the rules committees revisit whether to require complete redaction. A tentative draft of such an amendment appears on page 75 of the agenda book.

That draft is not being proposed as a rule amendment at this time because it makes sense to consider it in conjunction with other privacy rule proposals that have been received in the last year. As described in the memorandum, there are also other potential ambiguities and areas for clarification in the exemption and waiver provisions that may be worth addressing. The working group, with the help of the advisory committee chairs, will continue considering whether to address any of those issues—in addition to the suggestions from Senator Wyden and others—through the fall, and likely spring, meetings.

Joint Subcommittee on Attorney Admission

Professor Struve reported that there was robust discussion of the various options under consideration by the Joint Subcommittee on Attorney Admission at some of the advisory committees' spring meetings. The subcommittee will continue to consider that input as well as the feedback gathered during the Standing Committee's January meeting. The Subcommittee's consideration is also aided by the excellent research from the FJC regarding fees for admission to federal court bars as well as local counsel requirements for practice in federal district courts. Those FJC reports begin on page 78 of the agenda book. The subcommittee will next meet in July.

Draft

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on April 10, 2024, in Denver, Colorado. The Advisory Committee presented four action items – two for final approval and two for publication and public comment – and one information item. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 126.

Action Items

Final Approval of Proposed Amendment to Rule 39 (Costs on Appeal). Judge Bybee reported on this item. The text of the proposed amendment appears on page 184 of the agenda book, and the written report begins on page 127.

The proposed amendment to Rule 39 would address allocating and taxing costs in the courts of appeals and the district courts. "Allocate" refers to which party bears the costs, and "tax" refers to the calculation of the costs. The Advisory Committee received two favorable comments, one comment that was not relevant, and one late-filed comment. Aside from some stylistic changes, the Advisory Committee did not believe changes were needed to the published version.

A practitioner member commented that he liked the terminology, which was in response to prior feedback from the Standing Committee, that is, "allocate" when describing who is being asked to pay and "tax" when describing what should be paid. He offered a tweak to Rule 39(a) on page 184, line 3, to say, "The following rules apply to allocating taxable costs…" Adding "taxable" would introduce both concepts. Judge Bybee agreed that the addition would signal exactly what the rule was doing, and, without objection, the addition was made.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 39.**

Final Approval of Proposed Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee reported on this item. The text of the proposed amendment begins on page 163 of the agenda book, and the written report begins on page 129.

This extensive revision of Rule 6 concerns appeals in bankruptcy cases. First, it addresses resetting the time to appeal as a result of a tolling motion in the district court, making clear that the shorter time period used in the Bankruptcy Rules for such motions applies. Second, it addresses direct appeals to the courts of appeals that bypass review by the district court or bankruptcy appellate panel. The amendments overhaul and clarify the provisions for direct appeal, making the rule largely self-contained. Judge Bybee thanked the Bankruptcy Rules Committee for its substantial assistance. There was only one comment during the comment period, and it supported the amendment.

Judge Bates commented that on page 173, line 184, the rule says that Bankruptcy Rule 8007 "applies" to any stay pending appeal, but elsewhere the rule uses "governs." He asked if there is a reason to say "applies" rather than "governs."

Draft

Professor Hartnett could not think of one but asked if the style consultants or bankruptcy representatives had a preference. Professor Garner commented that consistency is preferable and that "governs" seems to work. Judge Bybee noted that "applies" was used in the stricken language on line 203 and that the committee note on page 182, line 433, uses "governs." The rule and the note should be made consistent regardless of which word is used.

A judge member agreed with using "governs" if Rule 8007 is all-inclusive as to what controls the appeal. If another rule contains requirements for the appeal, however, Rule 8007 would not "govern," only "apply." Judge Connelly and Professor Gibson indicated that Rule 8007 is the only rule relevant to stays pending appeal.

Professor Struve noted that she had suggested the language change to "applies to" at the spring 2023 Advisory Committee meeting but that she did not object to reverting to "governs." Judge Bates called for a vote on the proposal with the minor change from "applies to" to "governs."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 6.**

Publication of Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis (IFP)). Judge Bybee reported on this item. The text of the proposed form appears on page 213 of the agenda book, and the written report begins on page 132.

This proposal is a change to streamline the way in which Appellate Form 4 collects information for purposes of seeking leave to appeal IFP. It does not affect the standard for whether to grant IFP status. The Advisory Committee has been considering this matter since 2019 and gave the courts of appeals, which have adopted various local versions of Form 4, an opportunity to weigh in on the changes.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Form 4 for public comment.**

Publication of Proposed Amendment to Rule 29 (Brief of an Amicus Curiae). Judge Bybee reported on this item. The text of the proposed amendment appears on page 192 of the agenda book, and the written report begins on page 135.

The Advisory Committee has been considering the proposal to amend Rule 29, regarding disclosures in amicus briefs, since 2019. In 2020, the Supreme Court received inquiries from Senator Whitehouse and Representative Johnson, which were referred to the Advisory Committee.

Judge Bybee expressed the Advisory Committee's appreciation for the substantial feedback from the Standing Committee. The Advisory Committee anticipates receiving a lot of public input, which will inform whether the rule strikes the right balance. It has already received some anticipatory comments that have been docketed as additional rules suggestions.

As explained in the written report, the Advisory Committee considered three difficult issues: (1) disclosure requirements concerning the relationship between a party and the amicus,

Draft

including contributions to an amicus that were not earmarked for the preparation of a brief; (2) disclosure requirements concerning the relationship between a nonparty and the amicus; and (3) an exception in the existing rule concerning earmarked contributions by members of an amicus organization.

Judge Bates thanked Judge Bybee and Professor Hartnett for providing an extensive discussion of the rule from various perspectives, including First Amendment considerations.

Much of the Standing Committee's discussion related to concerns about a change that would require leave of the court for non-governmental entities to file an amicus brief during the initial consideration of a case on the merits.

A practitioner member questioned the decision to move away from the Supreme Court's recent rule revision permitting amicus briefs to be filed without leave of the court or the consent of the parties. The Supreme Court's rule presumably reflects the view that the value of helpful amicus briefs outweighs the burden of unhelpful briefs. He wondered if there is actually an overabundance of amicus briefs in the courts of appeals. Even if this rule reduces the number of amicus briefs, there would be more motions for leave to file. He also struggled to see why recusal is an issue for courts of appeals considering that they can strike amicus briefs. If recusal is an issue, rather than limiting the circumstances in which a party can file an amicus brief, perhaps recusal should be addressed directly in the rule (for example, by providing that any amicus brief that would cause recusal of a judge would automatically be stricken) or addressed by the Code of Conduct for United States Judges.

Judge Bates recalled that these concerns were discussed at the Advisory Committee and some unique considerations came up with respect to some appellate courts.

Professor Hartnett remarked that the Supreme Court's rule removes even the very modest filter of consent, so adopting the approach taken in the current Supreme Court rule would require a change from the current Rule 29. One concern expressed at the Advisory Committee was that this completely open rule might result in what are effectively letters to the editor being filed as amicus briefs. However, the recusal issue was a far greater concern to the Advisory Committee. A judge member on the Advisory Committee had explained that the problem is particularly acute during a court's consideration of whether to grant rehearing en banc. When an amicus brief is filed at the en banc stage, no judge is in a position to strike an amicus brief that would require automatic recusal. There is also a recusal problem at the initial panel stage to the extent that the clerk may effectively recuse a judge on the basis of an amicus brief without any judge actually deciding whether the contribution of the amicus brief outweighs the fact that the brief will cause the recusal.

Judge Bybee added that the Advisory Committee's clerk representative was satisfied that this modest change in the rule would not dramatically increase the burden on the clerk's office. He also noted that a prior draft of this proposal followed the Supreme Court's rule and that the requirement of a motion for leave was a recent addition to the proposed amendment.

Multiple members expressed concerns about the increased burden on judges, amici, and parties resulting from a rule that requires a motion for leave to accompany every amicus brief. One judge member noted that motions tend to spawn additional filings—responses, motions for

Draft

extensions of time, and replies. She also pointed out that the motion for leave to file may come before a panel is assigned or publicly disclosed. And she was not sure on what basis, other than recusal, leave to file might be denied. Amicus briefs are a way for people to express their views to the court, which is an important part of the openness of the appellate process. If the parties consented to the amicus brief being filed, she did not know why the court would need to police it.

A practitioner member commented that there was a powerful case made at the Advisory Committee meeting about automatic recusal at the en banc petition stage—at least with respect to the Ninth Circuit—because no panel was assigned to decide whether to permit the amicus brief before the en banc petition vote. His reaction as to the panel stage, however, was similar to the judge member's reaction in that recusal prior to a panel assignment was uncertain, and there would be added costs for motions. Nevertheless, he was persuaded that allowing the public to comment on this proposal would reveal whether there is a problem, and a distinction might be drawn after publication between the panel and en banc stages.

Another practitioner member had a mild negative reaction to the added cost but recognized that the reaction from appellate practitioners—and those who pay for their services—during the public comment process will inform whether this procedure is worth the cost. In practice, she always consents to the filing of an amicus brief, even if it is unfavorable to her position. A judge member agreed that she had advised clients to consent to amicus briefs when she was in private practice.

A judge member remarked that, in her circuit, amicus briefs are often circulated before the vote on the petition for rehearing en banc, and an amicus brief is rejected if it would cause a judge to be recused. That said, her circuit does not have en banc proceedings as often as the Ninth Circuit.

Judge Bates invited Judge Bybee and Professor Hartnett to respond to the concerns expressed by some members of the Standing Committee about eliminating consent at the panel stage.

Professor Hartnett suggested that the proposal be published as-is. The proposal may be changed after the comment period to treat the panel and en banc stages differently, but the current structure of the rule was not amenable to making that change during this meeting. From a process perspective, he also explained that, if there is a substantial concern about the burden that a motion requirement will impose, that will come out during the comment period with the proposal in its current form. But, if the proposal were revised (for example, to retain the option of filings on consent), the Advisory Committee could miss out on that feedback. Judge Bybee added that he does not expect judges to comment on this proposal, and that, by publishing the version of the proposal that accommodates some judges' concerns about the en banc process, the rulemakers can elicit comments from the bar.

A judge member expressed skepticism about publishing the proposal with the motion requirement, considering that the appellate judges on the Standing Committee had expressed opposition. But, if the motion requirement were to remain, it would be practically useful for the judge who is considering the motion to have those disclosures in the motion itself, not only the brief.

Judge Bybee's initial reaction was to suspect that recusal issues would be identified by the parties in the motion and that the disclosures would inform the judge about how to weigh the brief. It was also noted that this proposal does not change the current rule with respect to disclosures being contained in the briefs, not motions. The judge member responded that who was contributing money could be relevant on whether to grant leave to file. Also, it has not been an issue because there is not currently a mandatory motion process.

To address disclosures in motions, a practitioner member suggested inserting "motion and" on page 198, line 113, so that the opening of new Rule 29(b) would read "An amicus motion and brief must disclose." Another practitioner member did not think that would capture everything and suggested adding a new Rule 29(a)(3)(C), on the bottom of page 193, to add the disclosures required by Rule 29(b), (c), and (e) to the information accompanying a motion for leave to file. Professor Struve added that Rule 29(a)(4)(A) also requires corporate amici to include a disclosure statement like that required of parties by Rule 26.1. With Judge Bybee's consent, the new subparagraph was added to require those disclosures in a motion for leave.

Regarding the motion requirement issue, a judge member asked about bracketing parts of the proposed rule. A practitioner member suggested bracketing "~~the consent of the parties or~~" on page 193, lines 15–16 and "~~or if the brief states that all parties have consented to its filing~~" on lines 18–19. Judge Bybee agreed with the concept of bracketing that language to call attention to the issue, although he and Professor Hartnett noted that, if that language were restored, it would require some changes later in the rule.

Following further discussion among chairs and reporters during a break, rather than bracketing the language, Professor Hartnett proposed adding language to the report included with the Preliminary Draft, specifically inviting public comment on whether motions should always be required for amicus briefs at the panel stage and whether rehearing should be treated differently. A judge member pointed out that there is language in the proposed committee note, defending the elimination of the consent provision, that would be inconsistent with this solicitation, and Judge Bates suggested that the new report language could refer to the committee note as well as at the rule text. The Standing Committee accepted this proposal.

A few minor changes were made to the proposed rule text and committee note.

First, a judge member questioned why the amicus brief was referred to as being of "considerable help" to the court, on page 192, line 10, whereas it was simply of "help" elsewhere. A practitioner member agreed with omitting "considerable," commenting that no one would want to argue in motions about whether something is of "considerable help" and that it could be an unintentional burden. Professor Hartnett indicated that the phrase was borrowed from the Supreme Court rule, and Judge Bybee indicated no objection to removing "considerable."

Second, Judge Bates asked what is being captured in the phrase "a party, its counsel, or any combination of parties or their counsel" and whether the "or" should be "and." Professor Hartnett indicated they were trying to capture a group of parties, a group of counsel, or a group that includes some counsel and some parties. Professor Struve offered "a party, its counsel, or any combination of parties, their counsel, or both." A practitioner member observed that this provision will cause anxiety, and it is better to be specific even if a little clunky. After further discussion and

Draft

with the style consultants' and Judge Bybee's acquiescence, the Standing Committee approved Professor Struve's suggested language.

Judge Bates also asked whether it was necessary to include the clause "but must disclose the date when the amicus was created" in Rule 29(e) when it is also required in Rule 29(a)(4)(E). Judge Bybee indicated the Advisory Committee felt that the repetition was warranted because it is closing a loophole. However, for consistency, the word "when" was removed from the clause in Rule 29(e).

Conforming changes and minor corrections to citations were also made to the proposed committee note. In addition, on page 206, the parentheses around "(or pledged to contribute)" and "(or pledges)" were removed because, as a judge member noted, pledges to contribute are as relevant as actual contributions.

Several issues were also discussed that did not result in changes to the proposal.

Judge Bates asked about the scope of the term "counsel" regarding the obligations placed on parties or their counsel. Professor Hartnett noted that it was not discussed because it is in the current rule, and no one has raised any concerns about it. Judge Bates asked the practitioner members if they had any concerns, and none were offered.

With respect to the disclosure period in Rule 29(b)(4) for "the prior fiscal year," a judge member asked why the period is not the prior or current fiscal year. Professor Hartnett responded that this provision was a compromise when the Advisory Committee was considering whether to use the calendar year or the 12 months prior to filing the brief. This compromise might leave open some strange situations in which there is a dramatic change in an amicus's revenue, but the provision was designed to make administration of the disclosure requirement as simple as possible. Professor Struve added that the contribution or pledge is captured in the numerator, that is the 12 months before the brief is filed, and that the denominator is set by the prior fiscal year. Plus, the total revenue of the current fiscal year may not be knowable.

A judge member commented that some amicus briefs are filed, not to bring anything new to the court's attention, but to notify the court of their support for a position on a policy issue. He added that it was not apparent to him what additional, useful information will be uncovered by this proposal that is not disclosed under the current rule or that is not obvious from the brief. Judge Bybee responded that the Advisory Committee has been weighing that foundational question, and there were some judges who felt very strongly about having this information. Professor Hartnett added that this is a disclosure requirement, not a filing requirement, and that disclosure also serves to inform the public about who is trying to influence the judiciary.

Finally, a judge member asked if there is urgency to publishing this rule now, given the changes made during the meeting. Professor Hartnett responded that the majority of the changes were stylistic and that the most significant change was to require information provided in the brief to also be provided in the motion. No changes were made to address the most serious concerns about the proposed requirement for a motion for leave. Instead, they will flag that issue in the report. Moreover, the Advisory Committee has already started receiving preemptive comments that have been docketed as rules suggestions, and there is a strong sense from the Advisory

Draft

Committee that it is time to get formal feedback after a very long time considering this issue. Judge Bates agreed that a substantial delay in publication is not warranted given the thoroughness of the examination that has taken place.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 29 for public comment.**

Publication of Proposed Amendments to Rule 32 (Form of Briefs, Appendices, and Other Papers); Appendix of Length Limits. Judge Bybee reported that the proposed amendment to Rule 29 required conforming changes to Rule 32 and the appendix on length limits. The text of the proposed amendments appears on page 210 of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rule 32 and the appendix of length limits for public comment.**

Information Item

Intervention on appeal. Judge Bybee reported that the Advisory Committee continues to consider intervention on appeal, but nothing new is being proposed right now.

Judge Bates thanked Judge Bybee and Professor Hartnett for their report and thanked Judge Bybee, in particular, for his fantastic and concerted work over the years.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on April 11, 2024, in Denver, Colorado. The Advisory Committee presented action items for final approval of two rules and seven official forms, as well as publication of several proposed rule amendments. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 237.

Action Items

Final Approval of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Proposed New Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R. Judge Connelly reported on this item. The text of the proposed amendments begins on page 253 of the agenda book, and the written report begins on page 239.

Rule 3002.1 applies in Chapter 13 cases and addresses notices from mortgage companies concerning postpetition mortgage payments. The proposed amendment to Rule 3002.1 provides for status updates during the case and enhances the notice at the end of the case. The six accompanying forms—which consist of two motions, one notice, and responses to them—provide a uniform mechanism to do this.

Draft

The Standing Committee approved the proposal for publication last year, and the Advisory Committee received a number of helpful, constructive comments. The comments guided the Advisory Committee in making clarifying changes in the proposed rule. The Advisory Committee unanimously approved Rule 3002.1 and the accompanying forms at its spring meeting.

Following a brief style discussion, Judge Bates called for a motion on a vote for final approval for the proposed amendment to Rule 3002.1 and the adoption of the six new official forms as presented in the agenda book. Mr. Byron and Professor Gibson clarified that the effective date for the official forms related to Rule 3002.1, if approved, would be the same as the proposed changes to the rule, December 1, 2025.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rule 3002.1 and new Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R.**

Final Approval of Proposed Amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Judge Connelly reported on this item. The text of the proposed amendment begins on page 291 of the agenda book, and the written report begins on page 241.

The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may request that the court of appeals authorize a direct appeal. The Advisory Committee received only one comment during publication, and it was supportive. This change is related to, and consistent with, Appellate Rule 6(c)(2)(A), which was given final approval during the Appellate Rules Committee's report.

Professor Hartnett noted that this small amendment to Rule 8006 drove virtually all of the revisions to Appellate Rule 6, and he thanked the Bankruptcy Rules Committee for working closely with the Appellate Rules Committee.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 8006(g).**

Final Approval of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The text of the proposed amendment begins on page 327 of the agenda book, and the written report begins on page 245.

The uniform claim identifier (UCI) is a bankruptcy identifier that was developed to facilitate electronic disbursements in Chapter 13 cases to certain large creditors. Official Form 410, which is the proof of claim form used by any creditor making a claim for payment in a bankruptcy case, currently provides for the creditor's disclosure of the UCI "for electronic payments in Chapter 13 (if you use one)." The proposed amendment would eliminate that restriction, thereby expanding the disclosure of the UCI to any chapter and for nonelectronic disbursements, as well as electronic disbursements. Following publication, the Advisory Committee received one favorable comment.

Mr. Byron and Professor Gibson clarified that, unlike the official forms related to Rule 3002.1, the amendment to Official Form 410, if approved, would take effect in the normal course on December 1, 2024.

Draft

Professor Coquillette asked if this identifier could cause any privacy issues. Judge Connelly responded that use of a UCI may enhance debtor privacy, as it does not require a full account number or Social Security number. It is a unique bankruptcy identifier for creditors that use it to identify the creditor, court, and debtor's claim.

An academic member asked what would happen if someone wanted to use Official Form 410 to file a proof of claim on behalf of someone else, such as a would-be class representative filing on behalf of members of a proposed class under Rule 7023. Judge Connelly commented that this form cannot address all circumstances but that this change would not be affected by who is filing the claim. She added that only parties who represent large institutions would be likely to use an accounting system that would involve a UCI. There are also safeguards in place to address false or duplicative claims.

One additional technical change was made to Official Form 410 to conform it to the restyled Bankruptcy Rules scheduled to go into effect on December 1, 2024: The reference to Bankruptcy Rule 5005(a)(2) in Part 3 of the form was changed to Rule 5005(a)(3).

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

Publication of Proposed Amendment to Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan). Judge Connelly reported on this item. The text of the proposed amendment begins on page 334 of the agenda book, and the written report begins on page 245.

The Standing Committee approved this proposal for publication at its January 2024 meeting. After that meeting, Professor Struve and the Standing Committee's liaison to the Bankruptcy Rules Committee, among others, raised some concerns about the language that had been approved. The Advisory Committee considered those comments and approved some clarifying revisions at its spring meeting. It now seeks approval to publish this revised version for public comment.

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

Publication of Proposed Amendments to Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony). Judge Connelly reported on this item. The text of the proposed amendments begins on page 341 of the agenda book, and the written report begins on page 247.

This proposal relates to the means of taking testimony in bankruptcy cases, and, if approved, would establish different standards for allowing remote testimony in bankruptcy adversary proceedings (separate lawsuits within the bankruptcy case analogous to a civil action in district court) and contested matters (a motion-based procedure that can usually be resolved

Draft

expeditiously by means of a hearing).[1] Under current Rule 9017, Civil Rule 43 applies to "cases under the Code." Civil Rule 43(a), in turn, provides that, at trial, a court may permit testimony by remote means if three criteria are present: (1) good cause, (2) appropriate safeguards, and (3) compelling circumstances. Many bankruptcy courts read Bankruptcy Rules 9014(d) and 9017 together to require that the three-part standard set forth in Civil Rule 43(a) must be met before allowing any remote testimony in a bankruptcy case, whether it is in a contested matter or an adversary proceeding.

This proposal would remove the reference to Civil Rule 43 in Rule 9017, but it would retain Rule 43(a)'s three-part standard for allowing remote testimony in adversary proceedings via a new Rule 7043. A separate amendment would be made to Rule 9014(d) that would incorporate most of the language in Civil Rule 43, but without the requirement to show "compelling circumstances" before a court could allow remote testimony in a contested matter. Good cause—now shortened by restyling to "cause"—and appropriate safeguards would continue to be required for a witness to testify remotely in contested matters.

When this proposal came before Advisory Committee during its fall 2023 meeting, it was pointed out that the Judicial Conference was considering amendments to the broadcast policy based on a recommendation—which has since been adopted—from the Committee on Court Administration and Case Management (CACM). The proposal was delayed so that the Advisory Committee could confer with the CACM Committee. A CACM subcommittee, with input from the Committee on the Administration of the Bankruptcy System, considered this bankruptcy rules proposal and indicated that the proposed amendments and their publication would not violate the new policy or interfere with the CACM Committee's ongoing work.

At the Advisory Committee's spring meeting, there was consensus to seek public comment on the proposal. There was also a question raised about whether this proposal represented a first step with the goal of allowing remote testimony more broadly in bankruptcy cases. Judge Connelly explained that it was not—and is not—the intent of the proposal to herald a broader change, although the Advisory Committee recognizes that adoption of this proposal might lead to future suggestions to adopt the less stringent standard for remote testimony beyond contested matters.

Judge Bates stated that remote proceedings and remote testimony are important issues across the judiciary, not only in the bankruptcy courts. He asked three questions. First, what is the current practice, and is remote testimony being taken already? Second, what are the expected effects of the proposed amendments? Third, what does the standard "for cause and with appropriate safeguards" mean?

As to the first question, Judge Connelly explained that she did not have hard data. Based on conversations with colleagues, she said that remote testimony has been occurring on an ad hoc

[1] Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice or a discovery plan. They occur frequently over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

basis following the pandemic. Her impression was that, although not unheard-of pre-pandemic, it has become more common to allow remote testimony in contested matters in Chapter 11 cases because these cases involve parties across the country or the world and the hearings tend to be more administrative and for the purpose of gathering information. She thought that permitting remote testimony for background information in consumer cases was rare pre-pandemic but that the practice has become more common post-pandemic—although some judges have told her that they feel they can no longer take remote testimony now that the pandemic has subsided.

As to expectations concerning the proposed amendments, Judge Connelly anticipates that remote testimony will become more common in contested matters, particularly consumer matters. She noted, however, that some bankruptcy judges have expressed concern about taking remote testimony and giving increased discretion to those judges is not likely to change their practice.

Judge Connelly said that "cause and appropriate safeguards" under proposed Rule 9014(d) means what "good cause" and "appropriate safeguards" mean under Civil Rule 43, adding that under the restyled Bankruptcy Rules "good cause" is restyled to "cause." Part of the reason for the proposed change, however, was that under most of the published opinions on Civil Rule 43 courts have held that the "compelling circumstances" element in Rule 43 is almost impossible to meet. Many courts have found that distance to the courthouse and financial concerns—two big issues in bankruptcy—are not compelling circumstances that would allow for remote testimony, though they might be enough to find cause to allow remote testimony.

Judge Bates expressed some concern about the prospect that the amendments would make remote testimony more common than it is under the existing rules, and wondered if it might be expected to overtake the general rule requiring in-person testimony. Judge Connelly stated that live testimony would, of course, remain the default under the rules. A party would need to request permission to testify remotely, and a judge would need to find cause.

Professor Marcus mentioned, for context, the Civil Rule 43(a) proposal on page 527 of the agenda book. The Civil Rules Committee has referred that proposal to a subcommittee, in which Judge Kahn is participating on behalf of the Bankruptcy Rules Committee. The practitioners who have proposed the amendment to Civil Rule 43 wish to significantly expand the availability of remote testimony in proceedings under the Civil Rules. While the bankruptcy proposal does not change the standard for adversary proceedings, the Civil Rules Committee would be very interested in seeing any comments on the bankruptcy proposal.

Professor Hartnett asked how often subpoenas are required in contested matters and whether bankruptcy has the same issues as civil with respect to Civil Rule 45 distance requirements. Judge Connelly responded that subpoenas are common in adversary proceedings but less so in contested matters.

A judge member inquired if the Advisory Committee contemplated a judge making a blanket order setting remote testimony as the default for certain categories of matters. He explained that there is a new courthouse that is not yet accessible to the public for security reasons, but the bankruptcy judges were able to move in because most things are done remotely. Judge Connelly responded that the Advisory Committee did not anticipate such blanket orders. If anything, she had heard from colleagues the opposite, that is, that they would generally not approve requests to

testify remotely. There might, however, be circumstances that prevent people from being able to access the courthouse—like security, the pandemic, or weather—and being able to conduct hearings in those circumstances is valuable to the system.

Ms. Shapiro asked why the CACM Committee did not think this would interfere with its work. Mr. Byron and others explained that the CACM Committee separates the ideas of using technology for broadcasting—making the courtroom more accessible to the public—from remote participation, such as allowing witnesses to testify remotely. Because the CACM Committee is focused on broadcasting, this proposal on remote testimony in contested matters is different in kind from, and does not impede, its work. Ms. Shapiro commented that, whether intended or not, some might conflate remote testimony and remote public access because proponents of cameras in the courtroom use a similar good cause and substantial safeguards standard.

Another judge member pointed out that the committee note for Civil Rule 43 has extensive discussion of what constitutes "good cause" and says that "good cause and compelling circumstances" may be established with relative ease if all parties agree that testimony should be presented by remote transmission. She asked if there should be more detail in the bankruptcy rule's note about it. Judge Bates wondered if that supports a cross-reference in the committee note to the explanation in the committee note to Civil Rule 43 about good cause. Judge Connelly responded that a cross-reference to the Rule 43 committee note might make sense, but she explained that unlike in a two-party dispute, it would be difficult in a contested bankruptcy matter to get the consent of every affected party, which technically could include all creditors in the bankruptcy case. So, while there may be consent of all hearing participants, that might not mean the same thing as consent of all parties in a civil case in district court.

Judge Bates later observed that Civil Rule 43 has been viewed as limiting remote proceedings whereas the proposed bankruptcy rule is intended to expand access to remote proceedings. Yet, they share most of the same language, including a reference in the note to Civil Rule 43, and the only change is the removal of the language requiring compelling circumstances.

Professor Bartell responded that both rules permit remote proceedings but only under very limited circumstances. The proposed bankruptcy rule will simply permit it in slightly broader circumstances. Judge Connelly added that, under both rules, the judge still has discretion and there must be cause. Professor Bartell also noted that, in jurisdictions with a large geographic scope, in-person attendance can be a significant burden on parties, whether on the debtor or creditor side. Presumably, jurisdictions with small geographic areas will have fewer situations calling for remote testimony. Judge Bates noted that the vast area explanation also comes up in other contexts like non-random case assignment.

A judge member commented that there will always be some basis for cause—convenience or lesser expense—so, as a practical matter, dropping compelling circumstances means that this decision will be left to the judge's discretion in contested matters. Judge Connelly noted that this could be another reason to cross-reference Civil Rule 43 for the cause standard.

A practitioner member remarked that the big question is whether this is the beginning of a larger creep toward allowing remote participation in proceedings more generally, and another practitioner member wondered if this proposal should be on the same timeline as the recent

Draft

suggestion concerning Civil Rule 43. An academic member pointed out that, while coordination is generally a good idea, the Bankruptcy Rules often adapt to new technology first, and that experience in that arena can inform the other rule sets.

Judge Connelly reiterated that this proposal does not affect Civil Rule 43's application in adversary proceedings; it only affects contested matters and only by removing the need to show compelling circumstances. That is a much more limited change than what is proposed to Civil Rule 43. Delaying the bankruptcy proposal might make things more complicated.

Several committee members felt it would be helpful to add language to the committee note giving a principled reason for why contested matters are being treated differently than adversary proceedings. For example, contested matters occur with routine frequency, often require the attendance of pro se litigants, are shorter, involve more affected parties which makes consent harder to obtain, and often involve testimony where credibility is less of an issue.

Judge Bates remarked that his sense of the Standing Committee's discussion was that it is not necessary to tie the timing of this proposal to that of the proposal concerning Civil Rule 43 but that some additional explanation in the committee note would be useful.

The committee briefly discussed how to incorporate this feedback without delaying publication for another year. A practitioner member asked if this could be handled via email in the coming days, and Judge Bates commented that an email vote is only used if there is some need to resolve the matter promptly. A judge member asked if remote testimony is being permitted around the country. Judge Connelly noted that remote testimony is taking place, although it was hard to tell how often, and there is some urgency in the need to provide clarity. She offered to provide the amendment to the note very promptly. Another judge member remarked that it would be enough for him if the note captured the explanation given during the meeting and that he would like to give the Advisory Committee leadership an opportunity to provide that without derailing the process entirely. Judge Bates emphasized that this would not create a precedent, but, with no opposition from the Standing Committee, he was comfortable with handling this matter by email.

Following the meeting, Judge Connelly and Professors Gibson and Bartell prepared a revised committee note for Rule 9014 that addresses the concerns raised during the Standing Committee meeting, explaining why contested matters are different from adversary proceedings. The Advisory Committee unanimously approved the revised committee note for publication. The revised committee note was circulated to the Standing Committee, which unanimously approved it, and the revised language was included in the agenda book posted on the judiciary's public website.

By email ballot and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 9014 and 9017 and proposed new Rule 7043 for public comment.**

Publication of Proposed Amendments to Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions). The text of the proposed amendments begins on page 331 of the agenda book, and the written report begins on page 248.

Draft

By statute, most individual debtors must complete a course on personal financial management to receive a discharge. Rule 1007 provides the deadline for filing a certificate of course completion, and Rule 9006 provides for altering timelines. The proposal is to eliminate the deadline in Rule 1007 and the cross-reference in Rule 9006. The education requirement is a prerequisite for the discharge, but there is not a particular statutory deadline. But because there is a specific deadline in Rule 1007, some courts have denied a discharge even if the debtor completed the education after the deadline. The Advisory Committee seeks to publish this proposal to address the concern that the rule is making it unnecessarily difficult for debtors to obtain a discharge.

Relatedly, Rule 5009 directs the clerk to perform certain tasks, including sending a reminder notice to debtors who have not filed a certification of completion. This proposal would add a second reminder notice creating a two-tiered system with one notice early in the case when engagement is higher, and a second notice, if the certification of course completion has not been filed, before the case is closed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 1007, 5009, and 9006 for public comment.**

Information Items

In the interest of time, Judge Connelly and the reporters referred the Standing Committee to the written materials, beginning on page 250 of the agenda book, for a report on four information items. The information items pertain to suggestions to remove partially redacted social-security numbers from certain filings, suggestions to allow the use of masters in bankruptcy cases, a description of technical amendments made to certain bankruptcy forms and form instructions to reflect the restyling of the Bankruptcy Rules, and a decision not to go forward with proposed amendments to two forms.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on April 9, 2024, in Denver, Colorado. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 375.

Judge Rosenberg reported that, in August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Three public hearings were held on these changes in October 2023, January 2024, and February 2024, presenting the views of over 80 witnesses. The public comment period ended on February 16, 2024. On April 9, the Advisory Committee voted unanimously to seek final approval from the Standing Committee for both proposals.

Draft

Action Items

Final Approval of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery). Judge Rosenberg reported on this item. The text of the proposed rule amendments begins, respectively, on page 530 and page 550 of the agenda book, and the written report begins on page 379.

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv), the "privilege log" rule amendments, were published for public comment, and there was a lot of feedback from the viewpoints of both discovery "producers" and "requesters." Summaries of the testimony and written comments begin on page 391 of the agenda book. The Discovery Subcommittee recommended no change to the rule text, but it shortened the committee note considerably. The shortened committee note omitted observations about burdens, avoided language favoring either side, and took no position on controversial issues raised during the public comment process. As described in the Advisory Committee's written report, the subcommittee considered several other issues but ultimately did not recommend other changes to the proposal.

Professor Marcus emphasized that the Advisory Committee preferred an adaptable approach. Shortening the committee note was intended to allow judges to consider arguments from both sides without the note giving support to either.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv).**

Final Approval of Proposed New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The text of the proposed new rule begins on page 533 of the agenda book, and the written report begins on page 414.

Judge Rosenberg acknowledged the long, hard work of many people on Rule 16.1, including contributions from Judge Proctor, the current chair of the MDL Subcommittee, and Judge Dow, the prior Chair of the MDL Subcommittee and the Advisory Committee. She also recognized the work of Judge Bates, the Advisory Committee members and reporters, the stylists, and the many organizations and individuals who have offered their feedback during this seven-year process.

The Advisory Committee heard from over 80 witnesses and received over 100 written comments, representing a diverse set of views and perspectives. The MDL transferee judges expressed strong, unanimous support for the proposed Rule 16.1 at the transferee judges conferences in October 2022 and 2023. In addition, the two judges who have been assigned perhaps the most MDLs and the largest MDL wrote letters in support of the version approved for public comment. The MDL Subcommittee and the full Advisory Committee weighed this feedback carefully.

As detailed in the written report, since publication, the proposed rule has been restructured to address both style and substantive feedback. The revised rule now has two lists of prompts to consider, differentiating topics calling for the parties' "initial" views, those topics where court action may be premature before leadership counsel is appointed, if that is to occur, from those

Draft

topics that frequently call for early action by the court. Additionally, the revised proposal omits a provision concerning the appointment of coordinating counsel, which generated negative feedback. Nothing in the revised rule precludes a judge from appointing coordinating or liaison counsel, but the negative public reaction to that provision resulted in its removal from the rule. The rule also highlights the need to decide early whether, and if so how, to appoint leadership counsel. The revised rule also reverses the default such that parties must address the matters listed in the rule unless the court directs otherwise.

The Advisory Committee concluded that republication was not required in light of these changes. Under the rules committees' governing procedures, republication is appropriate when an advisory committee makes substantial changes to a rule after publication unless it determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees. The Advisory Committee concluded that the post-publication changes to proposed Rule 16.1 did not rise to the level of substantial changes. Moreover, the changes were discussed regularly throughout the hearings and rulemaking process, and the changes were made in light of the comments the Advisory Committee received.

Professor Marcus emphasized that the public comment period really works and that the rule proposal today is quite similar to the published version albeit rearranged after careful reconsideration. The support of the transferee judges is significant, and the alternative to something like this rule is to leave transferee judges with no indication of the parties' views going into the initial management conference. The Advisory Committee worked for seven years on this proposal, and the original MDL Subcommittee was appointed by Judge Bates when he was chair of the Advisory Committee.

Professor Bradt remarked that the process and outreach to practitioners, academics, and judges had been extraordinary. Although this rule may not include everything that any particular group would have wanted, it achieved consensus.

Professor Cooper added that this rule is discretionary, not a mandate, and is a terrific guide.

Judge Bates congratulated the Advisory Committee's current leadership, members, and predecessors for an outstanding effort in preparing this rule. It is a modest rule considering the initial proposals.

Judge Rosenberg explained that, shortly before the meeting, a judge member of the Standing Committee had suggested clarifying the term "judicial assistance" in the committee note regarding Rule 16.1(b)(3)(E). In response, Judge Rosenberg proposed the following change to the paragraph beginning on page 547, line 386:

> **Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, the court may consider measures to facilitate the resolution of some or all actions before the court ~~it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court~~. ~~Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.~~ In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues,

Draft

> selection of representative bellwether trials, and coordination with state courts may facilitate resolution. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.

Judge Bates pointed out that the paragraph begins with "[w]hether or not the court has appointed leadership counsel" yet this provision is contained in a list that must wait for appointment of leadership counsel. Professor Marcus stated that Judge Bates identified a drafting challenge in that the question of leadership counsel informs a variety of other issues. A judge member suggested striking that introductory phrase, which Judge Rosenberg accepted. This change to the committee note—including the omission of "Whether or not the court has appointed leadership counsel"—was incorporated into the Rule 16.1 proposal.

With respect to proposed Rule 16.1(b)(2)(A)(iv), Judge Bates suggested adding "facilitating" before "resolution." That term reflects the language in proposed Rule 16.1(b)(3)(E) and the language in the committee note explaining that one purpose of item (iv) "is to facilitate resolution of claims." Judge Bates also suggested deleting "some of" in the committee note on page 539, line 140, because this is the only reason given for all of the items. With Judge Rosenberg's agreement and the input from the style consultants, "facilitating" was added to Rule 16.1(b)(2)(A)(iv), and the language in the committee note for Rule 16.1(b)(2) was changed to "court action on a matter ~~some of the matters~~ identified in Rule 16.1(b)(3)."

Judge Bates also commented that whether direct filings will be permitted is a threshold question for the transferee court, but the language in proposed Rule 16.1(b)(2)(D) ("how to manage the direct filing of new actions in the MDL proceedings") seems to presume that there would be direct filings. Judge Rosenberg explained that the current language served to notify the court that there will likely be actions filed directly in the transferee court in addition to those transferred as tagalongs by the Judicial Panel on Multidistrict Litigation (JPML). The use of "manage" in the rule is also intended to encourage parties to think about issues like choice of law and where a directly filed case would be remanded if less than the entire case is resolved in the MDL. Professor Bradt added that there will inevitably be actions filed directly in the transferee court even if there is no direct filing stipulation to waive venue and personal jurisdiction objections. It is the plaintiff's decision where to file in the first instance and the defendant's decision whether to challenge that decision by a Rule 12(b) motion. The current language avoids weighing in on whether a direct filing order pursuant to a defendant's stipulation is necessary, and he worried that it would create confusion if the rule were changed to suggest that the plaintiff could not file first in the MDL forum. Judge Bates said that he would defer to the Advisory Committee's judgment on the direct filing language.

A practitioner member pointed out that the transferee court may be a natural jurisdiction for trial purposes, so there will be direct filings. There could even be direct filings in MDLs involving class actions; she recalled one MDL in which over 400 class actions were filed. MDLs are inherently trans-substantive, and she was impressed by the balance that the Advisory Committee struck to give flexibility. She suggested removing "(g)" from "Rule 23(g)" on page 543, line 256, in response to a concern that she heard from antitrust and securities practitioners. They were concerned that the case management provisions in Rule 16 and 23 might be abrogated by Rule 16.1. Without objection, that change was made to the committee note.

Draft

Another practitioner member asked about the interplay of proposed Rule 16.1(b)(2)(D) and (E) and how to manage plaintiffs who file lawsuits outside the transferee court. Professor Marcus noted that such a case when filed in another federal district court is a tag-along, and it will be transferred to the transferee court unless the JPML chooses not to do so. Professor Bradt remarked that how to deal with tag-along actions is fairly regularized. The rule deals with direct filings because there is a lot of confusion that does not apply to tag-alongs. Another practitioner member added that the JPML has a set of detailed rules regarding tag-alongs, which is likely why it has not been brought up in this rule. Whether to transfer the tag-along case to the transferee district is up to the JPML, not the transferee court; so the issues that would actually come before the transferee court (rather than the JPML) are those in the categories described by (D) and (E).

Another practitioner member worried about the term "authority" in proposed Rule 16.1(b)(2)(A)(iv), referring to leadership counsel's "responsibilities and authority in conducting pretrial activities," and what it might suggest about leadership counsel's ability to bind other attorneys. Striking "and authority" would make it more consistent with the committee note, which speaks of duties and responsibilities, not authority. Professor Marcus responded that to say only "responsibilities" would leave out an important part of the appointment of leadership counsel; as proposed Rule 16.1(b)(2)(A)(vi) recognizes, a corollary to appointing leadership counsel often involves setting limits on activity by nonleadership counsel. Judge Rosenberg noted that one of her prior orders of appointment, which was based on a survey of other judges' orders, defined the "authority, duties, and responsibility" of plaintiffs' leadership.

After a review of all of the changes, Judge Bates called for a motion to approve proposed new Rule 16.1.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 16.1.**

Information Items

Judge Rosenberg reported on the work of the Advisory Committee's subcommittees as well as a few other information items. These items are described in the written report beginning on page 523 of the agenda book.

Rule 41 Subcommittee. The Rule 41 Subcommittee was formed in October 2022 in response to submissions identifying a circuit split on whether Rule 41 permits a unilateral, voluntary dismissal of something less than an entire action. The subcommittee has concluded that the rule should be revised to explicitly increase its flexibility so that parties can dismiss one or more claims from the case. That is consistent with the prevailing district court practice and the policy goal of narrowing the issues in the case. The subcommittee plans to put forth proposed text at the fall Advisory Committee meeting, changing "an action" to "a claim."

Discovery Subcommittee. The Discovery Subcommittee continues to work on two items—the manner of service for subpoenas, and filing under seal—that were reported on at the January Standing Committee meeting.

Rule 7.1 Subcommittee. The Rule 7.1 Subcommittee also hopes to put forward a proposal at the fall Advisory Committee meeting. The subcommittee has been considering whether to

expand the disclosures required of non-governmental organizations. Rule 7.1 disclosures inform judges when making recusal decisions under 28 U.S.C. § 455(b)(4). The Committee on Codes of Conduct recently issued guidance providing that judges should recuse themselves when they have a financial interest in a parent company that controls a party to a case before them. Professor Bradt added that the subcommittee is working on a rule that makes it as easy as possible for judges to implement this guidance.

Cross-Border Discovery Subcommittee. Cross-border discovery is a big issue, and the subcommittee is in an early, information-gathering stage. The subcommittee decided to focus first on handling discovery for use in litigation in the United States and the application of the Hague Convention.

Rule 43/45 Subcommittee. A number of plaintiff-side attorneys have suggested resolving a split in courts about the interaction of (i) Rule 45(c)'s limitations on where a witness must appear under subpoena and (ii) the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena. A new subcommittee has been created to look at this issue.

Professor Marcus noted that there are two subcommittees looking at Rule 45. The Rule 45 aspect of this remote testimony question appears easier to solve compared to the Rule 43 part. It is possible that the Advisory Committee will consider the Rule 45 issues together in a single proposal separate from the Rule 43 remote testimony question.

Random Case Assignment. The reporters continue to research this issue and monitor the effects of new Judicial Conference guidance that encourages random assignment of cases seeking nationwide or statewide injunctive relief. Professor Bradt added that he is researching Rules Enabling Act authority for a rule and what a rule might look like. The subcommittee will focus on monitoring the uptake of the new guidance over the summer.

Use of the Word "Master" in the Rules. The American Bar Association proposed removing the word "master" from the rules, particularly Rule 53, and substituting "court-appointed neutral." The Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) supports the proposal. The Advisory Committee would appreciate the views of the Standing Committee on whether the word "master" should be discarded in the rules and, if so, what term should replace it. The term "master" appears in at least six other rules, the Supreme Court's rules, and at least one statute. Judges also use the term in making appointments to assist in the conduct of litigation even without relying on Rule 53.

Professor Marcus sought guidance, particularly from judges. The term "master" has been used in Anglo-American jurisprudence for a very long time, but it has also been used in a very harmful way in contexts mostly unrelated to judicial proceedings. Anecdotally, from the two judges he asked, he heard opposite views about whether a change is needed.

Hearing nothing, Judge Bates noted that the Standing Committee members could reach out to Professor Marcus after the meeting and commented that the Standing Committee would look forward to the Advisory Committee's views.

Draft

Demands for Jury Trials in Removed Actions. The Advisory Committee has not yet decided how to address the verb-tense change made during the restyling of Rule 81(c)(3)(A) and the potential issues that it may be causing in removed actions.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever presented the report of the Advisory Committee on Criminal Rules, which last met on April 18, 2024, in Washington, D.C. The Advisory Committee presented four information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 573.

Information Items

Rule 17 and pretrial subpoena authority. The Rule 17 Subcommittee, chaired by Judge Nguyen, has been considering how information is gathered from third parties in criminal cases and has determined that there is a need to clarify the rule. The subcommittee has conducted a survey and gathered information showing that there is great disparity in actual practice regarding how Rule 17 has been interpreted by courts. The subcommittee has been working to draft language for the Advisory Committee to review and possibly to road test.

Rule 53 and broadcasting criminal proceedings. The Rule 53 Subcommittee is considering a suggestion from a consortium of media groups proposing to amend Rule 53 to give courts discretion to televise trials. The Rules Law Clerk has prepared a memorandum on the history of Rule 53, and the subcommittee is now in the process of gathering information about actual practice. Judge Michael Mosman, who joined the Advisory Committee to replace Judge Conrad after he was appointed Director of the Administrative Office of the U.S. Courts, will serve as a member of the Rule 53 Subcommittee.

The subcommittee is also coordinating with the CACM Committee. As Judge Dever commented during the discussion on remote testimony in contested bankruptcy matters, the CACM Committee draws a distinction between using technology to bring witnesses into court and using technology to expand the courtroom.

Rule 49.1 and references to minors by pseudonyms. The Advisory Committee recently received a suggestion from the Department of Justice to amend Rule 49.1 to protect the privacy of minors by using pseudonyms, instead of initials as is currently required. Judge Dever announced a new Privacy Subcommittee, headed by Judge Harvey, to consider this proposal as well as other issues under Rule 49.1, including the redaction of social-security numbers.

Ambiguities and gaps in Rule 40. Magistrate Judge Bolitho submitted a proposal to clarify Rule 40 as it applies when a defendant from outside the district is arrested for violating conditions of release. The Magistrate Judges Advisory Group recently submitted a comprehensive request concerning additional amendments to Rule 40 that would address several issues of concern, including the situation raised by Judge Bolitho. Judge Dever anticipates creating a new subcommittee.

Draft

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on April 19, 2024, in Washington, D.C. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 96.

Action Item

Publication of Proposed Amendment to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Judge Schiltz reported on this item. The text of the proposed amendment appears on page 102 of the agenda book, and the written report begins on page 97.

This proposal is related to a witness's prior inconsistent statements, which are introduced early and often at trials. In theory, under the current Rule, prior inconsistent statements can be used only to assess the credibility of a witness—not for the substance of the statement—unless the statement was made under oath at a formal proceeding. As a practical matter, prior inconsistent statements are likely being used by jurors for substantive purposes, and the proposed amendment would allow admissible prior inconsistent statements to be used for both credibility and substance.

Aside from prosecutors using grand jury testimony, prior inconsistent statements are rarely made under oath at a formal proceeding. Judges give instructions like the following: "You heard Joe testify that the light was red. You also heard that, a few months ago, Joe told his sister that the light was green. You may use Joe's statement to his sister in deciding whether Joe was being truthful in saying the light was red, but you may not use Joe's statement to his sister in deciding whether the light was red." But many trial judges believe jurors do not understand or follow such instructions, and attorneys often do not ask for these instructions.

As a matter of hearsay law, a prior inconsistent statement cannot be admitted unless the person who made it is on the stand, under oath, and subject to cross-examination; this proposal would not change that standard and would not result in jurors hearing anything new. Rather, the proposal would bring the rule into alignment with practice and spare judges from giving jury instructions that are likely not being followed. It would further bring the treatment of prior *inconsistent* statements into alignment with prior *consistent* statements, which may be considered for both purposes (substance and credibility). This would restore the rule to the version proposed by the original Advisory Committee before Congress, in enacting the Evidence Rules, changed Rule 801's approach to prior inconsistent statements. Additionally, about half of the states have more lenient treatment than the federal rules, and around 15 states allow the use of prior inconsistent statements for any purpose.

One of the practitioner members commented that the proposal was elegant, but the deletion of the limiting language in Rule 801(d)(1)(A) would raise questions about new types of evidence coming in as substantive evidence. For example, in a criminal case, witnesses are commonly confronted with prior statements memorialized in federal agent notes such as the FBI form FD-302. But those federal agent notes are not a transcript and would not themselves be admissible. He wondered whether the rule would encompass prior statements that cannot be easily verified; what if the witness states that they cannot recall what they previously told the agent? He suggested

Draft

adding "is otherwise admissible under these rules" in the rule or clarifying it in the committee note. Another practitioner member suggested that the committee note could provide a more fulsome cross-reference to the other rules to expressly clarify that the statement would need to be otherwise admissible.

Professor Capra explained that proving a prior inconsistent statement is done with extrinsic evidence under Rule 613(b), and the statement will be admitted as substantive proof only if there is admissible evidence. Judge Schiltz noted that this is not an affirmative rule of admissibility. The proposal simply lifts the hearsay bar as is already done with prior consistent statements. Judge Schiltz and Professor Capra pointed out that judges could still monitor the use of statements through Rule 403, and authenticity rules also still apply. Nevertheless, they agreed that a new paragraph could be added to the committee note to clarify this issue, and there was some discussion about whether to make that change now or after publication.

A judge member asked why we would only make this clarification (referring to otherwise admissible evidence) as to inconsistent statements and not to consistent statements. Professor Capra agreed that was a good point. The rules do not say that the evidence must be admissible every time there is an exception to the hearsay rule. The judge member asked if there had been issues with the change to consistent statements, and Professor Capra indicated there had not. The judge member stated that she would not limit any change to inconsistent statements, and Professor Capra worried about negative inferences for every other hearsay exception. Another judge member echoed this concern.

The first practitioner member commented that it would be sufficient to address this in the committee note. He reiterated that the note's statement that "[t]he rule is one of admissibility, not sufficiency" implies something that the Advisory Committee did not mean to imply. Professor Capra proposed removing that sentence from the note. The previous judge member indicated that would be acceptable, and that sentence in the note was deleted without opposition.

The practitioner member also suggested deleting the word "timing" on line 79 because Rule 613(b) is not just a matter of timing, and Professor Capra agreed. A conforming change was made in line 79 to make "requirement" plural. For consistency, Judge Bates also suggested adding "prior" before "inconsistent statement" in line 31, which Judge Schiltz agreed was a good idea.

Another judge member thought there was a convincing argument that this proposal will not make a practical difference in most cases. However, this change would make a substantive difference in cases where the out-of-court statement is the only piece of evidence to fill a hole in the sufficiency of the evidence.

Judge Schiltz agreed that it is theoretically possible for a case to be decided on only a prior inconsistent statement, but he found it difficult to produce real-life examples of that happening. Professor Capra added that, as state practice shows, this rule change will make a difference in some cases. He also noted that, when Congress was initially considering Rule 801, a senator objected to the third subparagraph of Rule 801(d)(1) on the ground that a prior identification, not made under oath, should not serve as the sole basis of conviction. Congress, however, revised its thinking because, like an excited utterance, this is a form of hearsay exception, and hearsay exceptions can

Draft

be sufficient evidence. The Evidence Rules address admissibility, not sufficiency, of evidence; concerns about sufficiency of evidence are beyond the purview of those rules.

Another judge member offered a hypothetical where five witnesses said that the light was green, and one witness gave an out-of-court hearsay statement that the light was red but recanted at trial, saying he was mistaken and could not recall. That case would now go to a jury. Judge Schiltz agreed that the case would go to the jury, but it is unlikely that jurors would credit the inconsistent statement over the five people who testified. There are already convictions based on out-of-court statements made by people who do not testify in court, such as excited utterances by victims in domestic violence cases. Under this proposal, the person who made the prior inconsistent statement would need to be in court, under oath, and subject to cross-examination.

Ms. Shapiro commented that Judge Schiltz made a compelling argument. As she had expressed to the Advisory Committee, the prosecutor community generally opposed this proposal. First, prior inconsistent statements are definitionally hearsay and unreliable. Such statements contradict what is being said on the stand. Second, prosecutors are concerned about collateral litigation around proving statements that the witness denies ever making. Finally, limiting instructions are common, and we presume juries understand and apply these instructions. Amending this rule because jurors do not understand limiting instructions could lead to many other rule changes. On the other hand, there were some prosecutors who came from states where this proposal was the rule, and they did not have issues. The Department's civil litigators were agnostic.

Professor Capra responded that the prior inconsistent statement may or may not be credible, but the reliability is guaranteed by the person being on the stand and subject to cross-examination. With respect to collateral litigation about extrinsic evidence, that already happens when a party seeks to admit the statement for impeachment purposes, and this is no different from proving any other fact. Finally, this proposal is not an attack on all limiting instructions. This limiting instruction is particularly hard to understand, which was also true in 2014 with respect to amendments addressing prior consistent statements.

Judge Bates asked Ms. Shapiro if prosecutors had a position on the agent notes issue that was raised earlier. Ms. Shapiro explained that federal agent interview notes, such as FBI FD-302 forms, are turned over during discovery as statements of the witness, but the notes are actually the work product of the agent. When an agent is testifying and there is something potentially inconsistent in the interview notes, there can be fights over whether the statement belongs to the witness or the agent. Judge Schiltz commented that these issues exist today, and this proposal does not create new problems in this respect.

Judge Schiltz and Professor Capra also noted that prosecutors coming from state courts that allow the use of prior inconsistent statements as substantive evidence say that the rule is very valuable in certain kinds of cases, like domestic violence and gang cases, where witnesses can be intimidated before the trial. And a panel of state prosecutors in California indicated several years ago that they could not bring many cases without this rule. There is also value to the defense side, and the Advisory Committee's public defender member voted in favor of publishing this rule.

Judge Bates noted that this proposal is only for publication and that further changes can be made later. He asked Judge Schiltz to clarify what the committee was voting on. Judge Schiltz

Draft

explained that the rule text is as proposed on pages 102–03 of the agenda book. The changes to the committee note are as follows: on page 103, line 31, "prior" was inserted before "inconsistent;" on page 105, line 77, the last sentence was deleted; on line 79, "timing" was deleted, and "requirement" became "requirements."

Upon motion by a member, seconded by another, and by show of hands: **The Standing Committee, with one abstention,[2] gave approval to publish the proposed amendment to Rule 801 for public comment.**

Information Items

Professor Capra reported on three topics being considered by the Advisory Committee. The written report begins on page 98 of the agenda book.

Artificial intelligence and machine-generated information. The Advisory Committee has convened two panels of experts to educate the committee about artificial intelligence and how it affects admissibility. The Advisory Committee is focusing on two issues: (1) reliability issues concerning machine learning and algorithms and (2) authenticity issues related to deepfake audio and visual presentations.

Regarding machine learning, the Advisory Committee is looking at Article VII of the Evidence Rules. Although the issue is still in its early stages: one possibility is a new Rule 707 treating machine outputs that are used like human experts the same as human expert testimony by applying *Daubert* and Rule 702 standards.

Regarding deepfakes, the problem is how to authenticate alleged fakes. The Advisory Committee is considering proposals to create a structure for resolving these disputes but is also considering waiting and monitoring the caselaw. A New York State Bar Association commission decided to wait to see what courts are doing. In 2010, with respect to social media and allegations of hacking, the Advisory Committee determined that the authenticity rules were sufficiently flexible, and courts handled it well. The question is whether deepfakes are a difference in kind as opposed to degree. Timing also presents a dilemma. If the rule is too specific, it may no longer be relevant in three years. But a rule that is too general may not be helpful.

Rule 609 (Impeachment by Evidence of a Criminal Conviction). Under Rule 609(a)(2), convictions that involve dishonesty or false statement are automatically admissible for impeachment. Rule 609(a)(1) allows a party to impeach with prior convictions that do not involve dishonesty or false statement. For non-falsity convictions, there are two balancing tests. In deference to a defendant's right to testify, Congress provided a more protective rule for defendants: the conviction is admissible only if the probative value outweighs its prejudicial effect. For all other witnesses, the admissibility is governed by Rule 403.

One professor urged the Advisory Committee to abrogate the entire rule because, as many academics argue, the rule does not make sense and is unfair. Many problematic convictions under

[2] Ms. Shapiro indicated that the DOJ would abstain for now and await publication.

Rule 609(a)(1) are being admitted against criminal defendants, particularly those similar to the crime being charged. Professor Capra explained that some Advisory Committee members felt that the problem was not with the rule but its application. On the other hand, if courts are misapplying the rule, then it may be a rule problem.

The Advisory Committee first considered eliminating Rule 609(a)(1) entirely and leaving only Rule 609(a)(2) for convictions that involve dishonesty or false statement. Some members felt that went too far so the Advisory Committee is focusing on a proposal to make the balancing test more protective for criminal defendants under Rule 609(a)(1)—the probative value must *substantially* outweigh the prejudice.

Some Advisory Committee members were also skeptical about whether this proposal would make a difference in how likely criminal defendants are to testify. Trying to determine whether, or to what extent, this rule impacts a defendant's decision to testify is difficult, and the FJC and Sentencing Commission will hopefully be able to help with data.

Evidence of prior false accusations made by complainants in criminal cases. The final information item related to false complaints, most often in sexual assault cases. This proposal came from a law professor who explained that courts are not using a consistent set of rules to handle the admissibility of false complaints of sexual assault. They might use Rule 404(b), Rule 608, or Rule 412. She proposed a new Rule 416 specifically addressing false complaints.

The proposal is in a nascent stage. Reducing confusion would be good. But states have much more experience handling false complaints of sexual assault, and the Advisory Committee resolved to first look at what states are doing. Professor Liesa Richter, Consultant to the Advisory Committee, is conducting a 50-state survey on this issue.

Judge Bates thanked Judge Schiltz and Professor Capra for the report and for Judge Schlitz's many years of excellent service.

OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 606 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the current legislative session will end shortly before the Standing Committee's next meeting.

Action Item

Judiciary Strategic Planning. As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

2024 Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (2024 Privacy Report). This was the last item on the meeting's agenda, and the draft 2024 Privacy Report is included in the agenda book starting on page 616. Mr. Byron asked for the

Draft

Standing Committee's approval of this draft with authorization for the Chair and Secretary to make minor changes based on feedback leading up to the Judicial Conference.

Judge Bates noted that the CACM Committee played a substantial role in preparing the 2024 Privacy Report. Mr. Byron added that the FJC also meaningfully contributed. The report describes the first phase of a study that the FJC conducted, which will assist both the CACM Committee and the Rules Committees in evaluating the adequacy of the privacy rules.

Without objection, the Standing Committee recommended that the Judicial Conference approve the 2024 Privacy Report, subject to any minor revisions approved by the Chair, and ask the AO Director to transmit it to Congress in accordance with law.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on January 7, 2025, in a location to be announced.

Draft

TAB 1C

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 6 and 39, 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. 2-4

2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1 and 8006, 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, effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, 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; and

   c. Approve, effective December 1, 2024, the proposed amendments to Official Form 410, 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. 7-9

3. Approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, 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. 11-13

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

4. Approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law .... pp. 16-18

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

- Federal Rules of Appellate Procedure .... pp. 2-6
  - Rules and Form Approved for Publication and Comment .... pp. 4-6
  - Information Items .... p. 6
- Federal Rules of Bankruptcy Procedure .... pp. 7-11
  - Rules Approved for Publication and Comment .... pp. 9-10
  - Information Items .... p. 11
- Federal Rules of Civil Procedure .... pp. 11-14
  - Information Items .... pp. 13-14
- Federal Rules of Criminal Procedure
  - Information Items .... pp. 14-15
- Federal Rules of Evidence
  - Rule Approved for Publication and Comment .... p. 16
  - Information Items .... p. 16
- Judiciary Strategic Planning .... pp. 18-19

Agenda E-19
Rules
September 2024

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 4, 2024. All members participated.

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

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

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, U.S. 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[1] 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 Bankruptcy, Civil, and Criminal Rules Committees on attorney admission rules, and by those committees and the Appellate Rules Committee on electronic filing by pro se litigants and on the redaction of Social Security numbers (SSNs).

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 6 and 39. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor stylistic changes to each rule.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Rule 6 make changes to Rule 6(a) (dealing with appeals from judgments of a district court exercising original jurisdiction in a bankruptcy case) to clarify the time limits for post-judgment motions in bankruptcy cases and Rule 6(c) (dealing with direct appeals from bankruptcy court to the court of appeals) to clarify the procedures for direct appeals. The amendments also make stylistic changes to those provisions and to Rule 6(b) (dealing with appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The proposed amendments to Rule 6(a) clarify the time for

[1]Please refer to Laws and Procedures Governing Work of the Rules Committees for more information.

filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. The proposed amendments provide that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rules of Bankruptcy Procedure. The proposed amendments to Rule 6(c) clarify the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2), providing more detail about how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted. The Rule 6(c) amendments dovetail with the proposed amendment to Bankruptcy Rule 8006(g) described later in this report.

Rule 39 (Costs on Appeal)

The proposed amendments are in response to the Supreme Court's holding in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). In that case, the Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court.

The proposed amendments 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, the district court, or the clerk of either court calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments codify the holding in *Hotels.com*, providing 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 establish a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments clarify and improve Rule 39's parallel structure.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 6 and 39, 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 and Form Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 29 and 32, and the Appendix of Length Limits, as well as Form 4, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with minor changes to the proposed amendments to Rule 29.

Rule 29 (Brief of an Amicus Curiae)

After much consideration, the Advisory Committee recommended publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. In considering the proposed amendments, the Advisory Committee was mindful of First Amendment concerns and proposed legislation regarding amicus filings.

The proposed amendments require all amicus briefs to include, as applicable, a description of the identity, history, experience, and interests of the amicus curiae along with an explanation of how the brief will help the court. Also, the proposed amendments require an amicus entity that has existed for less than 12 months to state the date the entity was created.

The proposed amendments add two new disclosure requirements regarding the relationship between a party and an amicus curiae. Those disclosure requirements focus, respectively, on ownership or control of the amicus (if it is a legal entity), and contributions to the amicus curiae; in each instance the focus is on ownership, control, or contributions by (1) a party, (2) its counsel, or (3) any combination of parties, counsel, or both. The first provision would require the disclosure of a majority ownership interest in or majority control of

a legal entity submitting the brief. The second provision would require disclosure of contributions to an amicus curiae, with a threshold amount of 25 percent of annual revenue, with the reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure.

In addition, the proposed amendments revise the disclosure obligation with respect to a relationship between a nonparty and an amicus curiae. The current rule requires disclosure of contributions intended to fund preparing or submitting the brief by persons "other than the amicus curiae, its members, or its counsel." The proposed amended rule would retain the member exception, but would limit that exception to persons who have been members of the amicus for at least the prior 12 months or who are contributing to an amicus that has existed for less than 12 months. (As noted above, an amicus that has existed for less than 12 months must state the date it was created.) These proposed amendments would require a new member making contributions earmarked for a particular brief to be effectively treated as a non-member for these purposes and would require disclosure.

The proposed amendments would also eliminate the option for a non-governmental entity to file an amicus brief based on the parties' consent during a court's initial consideration of a case on the merits, and would therefore require a motion for leave to file the brief.

Finally, the proposed amendments set the length limit for amicus briefs at 6,500 words (rather than one-half the maximum length authorized for a party's principal brief) to simplify the calculation for filers.

At its meeting, the Standing Committee made minor changes to the rule. The phrase "may be of considerable help to the court" was changed to "may help the court" both to improve the style and readability and because the Committee determined that including the word "considerable" could create an unintentional burden. The disclosures required by the rule were

added to the required contents of the motion for leave. And to promote clarity, the phrase "a party, its counsel, or any combination of parties or their counsel" was changed to "a party, its counsel, or any combination of parties, their counsel, or both." Other changes to improve style and consistency were made to the rule and the committee note.

Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rule 32 conform Rule 32(g)'s cross-references to the proposed amendments to Rule 29.

Appendix of Length Limits

The proposed amendments to the Appendix of Length Limits conform the Appendix's list of length limits for amicus briefs to the proposed amendments to Rule 29.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

The proposed amendments, in response to several suggestions, simplify Form 4 to reduce the burden on individuals seeking in forma pauperis (IFP) status (including the amount of personal financial detail required), while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.

Information Items

The Advisory Committee met on April 10, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a possible new rule regarding intervention on appeal, considered the possibility of improving the length and content of appendices, and discussed possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention). Also, the Advisory Committee removed from consideration a suggestion to eliminate PACER fees, because it is not a subject governed by the rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval: (1) amendments to Bankruptcy Rule 3002.1 and six new Official Forms related to those amendments; (2) amendments to Rule 8006; and (3) amendments to Official Form 410. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Related Official Forms

Rule 3002.1 is amended to encourage a greater degree of compliance with its provisions by adding an optional motion process the debtor or case trustee can initiate to determine a mortgage claim's status while a chapter 13 case is pending to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The changes also add more detailed provisions about notice of payment changes for home-equity lines of credit.

Accompanying the proposed amendments to Rule 3002.1 is a proposal for adoption of six new Official Forms:

- 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 Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim)

Under Rule 3002.1(f), an official form motion (410C13-M1) can be used by the debtor or trustee over the course of the plan to determine the status of the mortgage. An official form response (410C13-M1R) is used by the claim holder if it disagrees with facts stated in the motion. If there is a disagreement, the court will determine the status of the mortgage claim. If

the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under Rule 3002.1(g), after all plan payments have been made to the trustee, the trustee must file the new official form notice (410C13-N) concerning disbursements made, amounts paid to cure any default, and whether the default has been cured. The claim holder must respond to the notice using the official form response (410C13-NR) to provide the required information. Rule 3002.1(g) also provides that either the trustee or the debtor may file a motion, again using an official form (410C13-M2), for a determination of final cure and payment. If the claim holder disagrees with the facts set out in the motion, it must respond using Official Form 410C13-M2R.

Stylistic changes are made throughout the rule, and its title and subdivision headings have been changed to reflect the amended content.

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

Rule 8006 addresses the process for requesting that an appeal go directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal. This amendment dovetails with the proposed amendments to Appellate Rule 6 discussed earlier in this report.

Official Form 410 (Proof of Claim)

The form is amended to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Bankruptcy Code, not merely electronic payments in chapter 13 cases. In addition, an amendment is made to the margin note in "Part 3: Sign Below" to conform to the restyled rules approved by the Judicial Conference in September 2023 (JCUS-SEP 2023, p. 24): the reference to Rule 5005(a)(2) is changed to Rule 5005(a)(3).

Recommendation: That the Judicial Conference approve the following:

a. Proposed amendments to Bankruptcy Rules 3002.1 and 8006, 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. Effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, 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; and

c. Effective December 1, 2024, the proposed amendments to Official Form 410, 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 Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to (1) Rule 3018; (2) Rules 9014, 9017, and new Rule 7043; and (3) Rules 1007, 5009, and 9006, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with changes to the language in the committee note to Rule 9014 addressing the different treatment of adversary proceedings and contested matters with respect to allowing remote testimony.

Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan)

The proposed amendments would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor's attorney or authorized agent.

Rules 9014 (Contested Matters), 9017 (Evidence), and new Rule 7043 (Taking Testimony)

The proposed amendments would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 (Taking Testimony) to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would retain the applicability of Fed. R. Civ. P. 43 in

adversary proceedings—thereby authorizing remote witness testimony in adversary proceedings "for good cause in compelling circumstances and with appropriate safeguards"; and (3) amend Rule 9014 to allow a court in a contested matter to permit remote witness testimony "for cause and with appropriate safeguards" (i.e., eliminating the requirement of "compelling circumstances"). The effect of this proposal would be to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters. This proposed change rests on the difference between adversary proceedings and contested matters: whereas adversary proceedings resemble civil actions, contested matters proceed by motion and can usually be resolved less formally and more expeditiously by means of a hearing, often on the basis of uncontested testimony.[2]

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Proposed changes to Rules 1007, 5009, and 9006 are made to reduce the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation upon completion of the course. The proposed amendments to Rule 1007, along with conforming amendments to Rule 9006, would eliminate the deadlines for filing the certificate of course completion. The proposed amendment to Rule 5009 would provide for two notices instead of just one, reminding the debtor of the need to take the course and to file the certificate of completion.

[2]The Advisory Committee on Bankruptcy Rules previously requested input on these proposed amendments from the Committees on Court Administration and Case Management (CACM Committee) and the Administration of the Bankruptcy System, which advised that the proposals would not appear to create any conflict with existing Judicial Conference policy regarding remote access or remote proceedings, nor impact the CACM Committee's ongoing consideration of potential revisions to the remote public access policy.

Information Items

The Advisory Committee on Bankruptcy Rules met on April 11, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a proposal to require redaction of the entire SSN in court filings; two suggestions to eliminate the requirement that all notices given under Rule 2002 include in the caption, among other things, the last four digits of the debtor's SSN; and a suggestion to allow the appointment of masters in bankruptcy cases and proceedings.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 16 and 26, and new Rule 16.1. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor changes to the proposed amendments to new Rule 16.1.

Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (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) would provide that the court may address the timing and method of such compliance in its scheduling order.

After public comment, the Advisory Committee recommended final approval of the proposed amendments as published with minor changes to the committee notes.

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. After several years of work by its MDL subcommittee, extensive discussions with interested bar groups, consideration of multiple drafts, three public hearings on the published draft, and subsequent revisions based on public comment, the Advisory Committee unanimously recommended final approval of new Rule 16.1.

Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. An initial management conference allows for early attention to matters identified in Rule 16.1(b), which may be of great value to the transferee judge and the parties. Because it is important to maintain flexibility in managing MDL proceedings, proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b)—a revised version of what was published as subdivision (c)—encourages the court to order the parties to submit a report prior to the initial management conference. The report must address any topic the court designates—including any matter under Rule 16—and unless the court orders otherwise, the report must also address the topics listed in Rules 16.1(b)(2)-(3). Rule 16.1(b)(2) directs the parties to provide their views on appointment of leadership counsel; previously entered scheduling or other orders; additional management conferences; new actions in the MDL proceeding; and related actions in other courts. Rule 16.1(b)(3) calls for the parties' "initial views" on consolidated pleadings; principal factual and legal issues; exchange of information about factual bases for claims and defenses; a discovery plan; pretrial motions; measures to facilitate resolving some or all actions before the court; and referral of matters to a magistrate judge or master. Because court action on some matters identified in paragraph (b)(3) may be premature before leadership counsel is appointed,

those topics are categorized separately from those in paragraph (b)(2). Rule 16.1(b)(4) permits the parties to address other matters that they wish to bring to the court's attention.

Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion. This order controls the MDL proceedings unless and until modified.

Following public comment, the Advisory Committee made some minor changes to the proposed new rule as published. In response to extensive public input, it removed a provision inviting courts to consider appointing "coordinating counsel." For the reasons noted above, it restructured the list of matters to be included in the parties' report into the "views" called for by Rule 16.1(b)(2) and the "initial views" called for by Rule 16.1(b)(3), and it revised those provisions to direct parties to address the listed topics unless the court orders otherwise (rather than obligating the court to affirmatively set out minimum topics to be addressed). It also made stylistic changes based on input from the Standing Committee's style consultants.

At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, 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 Civil Rules met on April 9, 2024. 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 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, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 81(c)(3)(A) (Applicability of the Rules in General; Removed Actions) regarding demands for a jury trial in removed cases. The Advisory Committee also discussed issues related to sealed filings and use of the word "master" in the rules, and was briefed on the random case assignment policy adopted by the Judicial Conference in March 2024 (*see* JCUS-MAR 2024, p. 8) and the importance of monitoring its implementation, as well as ongoing research related to rulemaking authority in this area. Finally, the Advisory Committee discussed a new proposal to amend Rule 43(a) (Taking Testimony) and Rule 45(c) (Subpoena) concerning the use of remote testimony in certain circumstances, and a new subcommittee was formed to consider this proposal.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 18, 2024, and discussed several information items, including two new suggestions.

The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee is working to develop a draft of a proposed amendment to clarify the rule and expand the scope of parties' authority to subpoena material from third parties before trial. The subcommittee has tentatively concluded that any proposed amendment should provide for case-by-case judicial oversight of each subpoena application, express authorization of ex parte subpoenas, and different standards or levels of protection for personal or confidential information and other information.

Last year, the Advisory Committee received two suggestions regarding Rule 53 (Courtroom Photographing and Broadcasting Prohibited) and proceedings in the cases of *United States v. Donald J. Trump*. The Advisory Committee concluded that it did not have the authority to exempt specific cases or parties from the rule's prohibition on broadcasting, and it acknowledged that any amendment under the Rules Enabling Act process would likely take three or more years. The Advisory Committee determined, however, that further examination of the proposal to amend Rule 53 was warranted, and, as previously reported to the Judicial Conference, a subcommittee was formed. The subcommittee is in early stages of its consideration of potential amendments and will coordinate with other committees evaluating issues of remote public access to federal judicial proceedings.

The Advisory Committee also discussed two new suggestions. The Department of Justice has submitted a suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) to require the use of pseudonyms—instead of initials—to mask the identity of minors in court filings. A new subcommittee was formed to consider this proposal as well as other privacy issues under Rule 49.1. The Advisory Committee received another suggestion to clarify Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) as it applies when a defendant from outside the district is arrested for violating conditions of release. The Advisory Committee recently received a related submission (from the Administrative Office's Magistrate Judges Advisory Group) which includes a comprehensive proposal for additional amendments to Rule 40. Consideration of these proposals will continue.

FEDERAL RULES OF EVIDENCE

Rule Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 801(d)(1)(A) with a recommendation that it be published for public comment in August 2024. The Standing Committee (with the Department of Justice representative abstaining) approved the Advisory Committee's recommendation, with minor amendments to the committee note.

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

The proposed amendment provides that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403. The current Rule 801(d)(1)(A) includes a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness, providing that a prior statement is substantively admissible only when it was made under oath at a formal proceeding.

Information Items

The Advisory Committee met on April 19, 2024. In addition to the recommendation discussed above, the Advisory Committee held a panel discussion on artificial intelligence and machine-generated information, and the possible impact of artificial intelligence on the Federal Rules of Evidence. The Advisory Committee also discussed a possible amendment to Rule 609(a) (Impeachment by Evidence of a Criminal Conviction) and a possible new rule to address evidence of prior false accusations made by alleged victims in criminal cases.

PROPOSED 2024 REPORT OF THE JUDICIAL CONFERENCE ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L.

No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules"—Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1—took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." The most recent prior report was completed in June 2022. This report covers the period from June 2022 to June 2024. The Committee considered and approved the proposed draft 2024 report of the Judicial Conference on the Adequacy of the Privacy Rules Prescribed under the E-Government Act of 2002, subject to revisions approved by the chair in consultation with the Rules Committee Staff.

Part I of the 2024 report describes the consideration of several proposed rule changes that include privacy-related issues. The Bankruptcy, Civil, and Criminal Rules Committees are reconsidering the need for the last four digits of SSNs in court filings, and they are also considering whether the privacy rules need to remain uniform with respect to the level of redactions applied to SSNs. One suggestion noted in the 2022 report resulted in the proposed amendments to Appellate Form 4 (discussed earlier in this report) that will be published for comment in August 2024. Several more recent privacy-related suggestions are in the beginning stages of consideration. Part II of the 2024 report describes ongoing judiciary implementation efforts to protect privacy in court filings and opinions. Among other things, the CACM Committee sent a memorandum to the courts in May 2023 sharing suggested practices to protect personal information in court filings and opinions and encouraging continued outreach and educational efforts. The memorandum also reminded courts about the possible inclusion of sensitive information in Social Security and immigration opinions and reminded courts of a software fix implemented in 2020 that can mask certain information in extracts of Social Security and immigration opinions. Part II also reports that the CACM Committee asked

the Administrative Office and the FJC to explore other ways to increase awareness of the need to protect privacy in court filings and opinions. This has led the Administrative Office to update the judiciary's internal and external websites, and the FJC to consider increased ways to address privacy issues in educational materials for new judges and other judiciary officials. Part III of the 2024 report, in turn, discusses the FJC's 2024 update of its studies in 2010 and 2015 concerning the rate of compliance with existing privacy rules regarding unredacted SSNs in court filings, conducted at the request of the CACM Committee. The FJC's 2024 study reveals that instances of non-compliance remain very low. Upcoming FJC studies addressing other aspects of the privacy rules will be considered by the rules committees and the CACM Committee in the coming years and will be addressed in future privacy reports.

The CACM Committee considered the draft report at its May 2024 meeting and endorsed a recommendation that the Judicial Conference approve the 2024 report and ask the AO Director to transmit it to Congress in accordance with the law.

> **Recommendation:** That the Judicial Conference approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide input on the proposed process for the 2025 review and update of the *Strategic Plan for the Federal Judiciary*. The Committee's views were

communicated to Judge Scott Coogler (N.D. Ala.), the judiciary planning coordinator, by letter dated June 17, 2024.

Respectfully submitted,

John D. Bates, Chair

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

* * * * *

TAB 1D

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:
- Transmitted to Congress (Apr 2024)

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

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

Revised August 12, 2024

Effective (no earlier than) December 1, 2024

Current Step in REA Process:
- Transmitted to Congress (Apr 2024)

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025

Current Step in REA Process:
- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:
- Published for public comment (Aug 2023 – Feb 2024 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.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025

Current Step in REA Process:
- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:
- Published for public comment (Aug 2023 – Feb 2024 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, 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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

TAB 1E

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

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Trafficking Survivors Relief Act of 2024	**H.R. 7137** *Sponsor:* Fry (R-SC) *Cosponsors:* 37 bipartisan cosponsors **S. 4214** *Sponsor:* Gillibrand (D-NY) *Cosponsors:* 9 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7137/BILLS-118hr7137ih.pdf https://www.congress.gov/118/bills/s4214/BILLS-118s4214is.pdf **Summary:** Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	• 09/25/2024: H.R. 7137 Judiciary Committee mark-up session held; ordered to be reported from Committee • 04/30/2024: S. 4214 introduced in Senate; referred to Judiciary Committee • 01/30/2024: H.R. 7137 introduced in House; referred to Judiciary Committee
Marijuana Misdemeanor Expungement Act	**H.R. 8917** *Sponsor:* Carter (D-LA) *Cosponsor:* Armstrong (R-ND)	CR; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8917/BILLS-118hr8917ih.pdf **Summary:** Would require the Supreme Court to prescribe rules, within one year of enactment, for the review, expungement, sealing, sequester, and redaction of official records related to certain marijuana misdemeanors and civil infractions.	• 07/02/2024: H.R. 8917 introduced in House; referred to Judiciary Committee
Closing Bankruptcy Loopholes for Child Predators Act of 2024	**H.R. 8077** *Sponsor:* Ross (D-NC) *Cosponsor:* Tenney (R-NY)	BK 2004, 9018	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8077/BILLS-118hr8077ih.pdf **Summary:** Would directly amend BK 2004 and 9018 to provide additional procedures in cases related to the alleged sexual abuse of a child.	• 04/18/2024: H.R. 8077 introduced in House; referred to Judiciary Committee
Bankruptcy Threshold Adjustment Extension Act	**S. 4150** *Sponsor:* Durbin (D-IL) *Cosponsors:* 5 bipartisan cosponsors	BK 1020; BK Forms 101 & 201	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s4150/BILLS-118s4150is.pdf **Summary:** Would extend the CARES Act definition of debtor in Section 1182(1) with its $7.5m subchapter V debt limit for a further two years.	• 04/17/2024: S. 4150 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Bankruptcy Venue Reform Act **SHOP Act**	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsors:* 7 Democratic & 2 Republican cosponsors **S. 4095** *Sponsor:* McConnell (R-KY) *Cosponsors:* Cotton (R-AR) Tillis (R-NC)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf https://www.congress.gov/118/bills/s4095/BILLS-118s4095is.pdf **Summary:** Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.	• 04/10/2024: S. 4095 introduced in Senate; referred to Judiciary Committee • 02/14/2023: H.R. 1017 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 136 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 43 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.	• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders • 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization. Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 160 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena. Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.	• 07/28/2023: H.R. 5048 referred to the subcommittee on Economic Development, Public Buildings, and Emergency Management • 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 19 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 21 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 33 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant.	• 04/27/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

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

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Election Day Holiday Act of 2024 **Election Day Act** **Freedom to Vote Act**	**H.R. 7329** *Sponsor:* Eshoo (D-CA) **H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) **H.R. 11** *Sponsor:* Sarbanes (D-MD) **S.1; S. 2344** *Sponsor:* Klobuchar (D-MN) Each bill has several Democratic or Democratic-caucusing cosponsors.	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf https://www.congress.gov/118/bills/hr6267/BILLS-118hr6267ih.pdf https://www.congress.gov/118/bills/hr11/BILLS-118hr11ih.pdf https://www.congress.gov/118/bills/s1/BILLS-118s1is.pdf https://www.congress.gov/118/bills/s2344/BILLS-118s2344is.pdf **Summary:** Would make Election Day a federal holiday.	• 02/13/2024: H.R. 7329 introduced in House • 11/07/2023: H.R. 6267 introduced in House • 07/25/2023: S. 1 introduced in Senate • 07/18/2023: S. 2344 introduced in Senate • 07/18/2023: H.R. 11 introduced in House • Among others, house bills referred to Oversight & Accountability Committee; senate bills referred to Committee on Rules & Administration
Indigenous Peoples' Day Act	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 86 Democratic cosponsors **S. 2970** *Sponsor:* Heinrich (D-NM) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf https://www.congress.gov/118/bills/s2970/BILLS-118s2970is.pdf **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 • 09/28/2023: S. 2970 introduced in Senate; referred to Judiciary Committee
Patriot Day Act	**H.R. 5366** *Sponsor:* Fitzpatrick (R-PA) *Cosponsors:* Gottheimer (D-NJ) Malliotakis (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5366/BILLS-118hr5366ih.pdf **Summary:** Would make Patriot Day a federal holiday.	• 09/08/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 15 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would make Diwali (a/k/a Deepavali) a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 4 Democratic & 2 Republican cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday.	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday.	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 58 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 115 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee

TAB 2

TAB 2A

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

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

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

DATE: **October 9, 2024**

I. Introduction

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

Judge Dever appointed a subcommittee, which is now composed of Judge Mosman (chair),[2] Judge Burgess, Judge Harvey, Ms. Mariano, and Ms. Tessier representing the Department of Justice.[3]

Prior to the Advisory Committee's April meeting, the Subcommittee reviewed materials detailing the history of Rule 53, including all prior efforts to amend the rule, and it developed a list of issues on which it sought more information. Members expressed great interest in what is happening in the states, including rules and policies now in use, and particularly any studies about the effects of the state procedures allowing broadcasting—especially experience broadcasting in criminal proceedings.

A second topic of concern was coordination with other relevant committees, particularly the Committee on Court Administration and Court Management (CACM). In September 2023, CACM recommended—and the Judicial Conference adopted—a policy permitting audio broadcasting of proceedings in civil and bankruptcy cases when testimony is not being taken. Members expressed interest in learning more about the information CACM relied upon.

---

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

[2] Judge Robert Conrad was the original chair, but he resigned from the Advisory Committee when he was appointed Director of the Administrative Office of U.S. Courts.

[3] Jonathan Wroblewski represented the Department of Justice on this subcommittee until his retirement from the Department.

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

The purpose of this memorandum is to describe the material gathered for the Subcommittee, the Subcommittee's deliberations, and its recommendation.

II. Information gathered by the Subcommittee

A. The expansion of broadcasting under JCUS Policy 420

Judge Dever and the reporters spoke at length with CACM's chair, Judge Gregory F. Van Tatenhove, about the research and the process that led to the expansion of broadcasting under Policy 420. A few key points emerged from the discussion.

First, CACM sharply distinguishes between remote public access by audio or video broadcasting, and remote participation by the parties, counsel, or witnesses. JCUS Policy 420 concerns only remote public access, not remote participation. That dovetails with the discussion in our Subcommittee's March 18 call, in which Judge Dever and other members stressed the importance of that distinction. The proposal to amend Rule 53 concerns only public access, not remote participation.

Second, in light of the absolute prohibition of all broadcasting in Rule 53, CACM did not consider or discuss the advisability of making any change in criminal proceedings.

Third, Judge Van Tatenhove explained that CACM made a policy decision to make a small incremental expansion of public access—giving the courts discretion to permit audio only, and only in civil and bankruptcy proceedings not involving testimony. CACM currently has no plans for further expansion.

B. State experience

Most states permit some form of broadcasting in some judicial proceedings, though the details vary greatly from state to state. Ms. Hooper and her colleagues at the FJC provided the Subcommittee with a comprehensive review of state law and a summary of the academic commentary on the issues raised by providing remote public access to criminal proceedings. Their report is undergoing an internal review process before it can be placed on the public record. A link will be provided when the public document is available.

William Raftery at the National Center for State Courts, who has worked on numerous reports and publications on the topic over the past several years, was especially helpful in tracking down information on the experience of state courts. Mr. Raftery is very knowledgeable about current developments. He advised the reporters that there is very little research into the actual performance of the widely varying state policies on remote public access in criminal

cases, or effort to collect the experiences of judges, attorneys, victims, or the public. The one resource he recommended was the recent work in Minnesota, which had a fairly restrictive court rule regulating the use of remote public access in criminal proceedings. There, the Supreme Court Advisory Committee on Rules of Criminal Procedure conducted an investigation and wrote a report, leading to some amendments to the state's court rule. These informative materials follow this memorandum.

- **Minnesota Supreme Court Orders ADM10-8049 & ADM09-8009 and dissent;**
- **Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure, Report and Proposed Amendment.**

Unfortunately, as the FJC's literature review and the materials gathered by the Minnesota Supreme Court Advisory Committee make clear, there has been very little empirical research evaluating the effect of expanded remote public access. A research memo provided to the Minnesota Advisory Committee concluded:

> The methodology of most data on how cameras in the courtroom impact judicial outcomes is flawed. First, the short length of the studies (which generally range from one to three years), and diversity of cases makes it difficult to obtain a representative sample, collect accurate data, and generalize and apply the results. Furthermore, the evaluation design of most studies, self-reporting questionnaires, is defective. As frequently opined by social scientists, self-reporting question[n]aires are highly unreliable. Most of the "research" has not been reproduced and is limited in application to that specific trial. There is much room for improvement in the scientific data surrounding cameras in the courtroom.
>
> * * * * *
>
> Current data on the impact of cameras in the courtroom is limited. The studies that exist suffer from low sample sizes, self-reporting bias, and the inability to be replicated. Therefore, the data is generally not applicable to populations other than the exact population that was studied. However, the data is still useful at offering a limited perspective in how cameras in the courtroom impact trials. Most of the data shows that very few negative impacts are realized when cameras are in the courtroom. While further research is necessary, the limited data supports the move towards allowing cameras in the courtroom. However, anecdotal evidence from other jurisdictions may also support a cautionary approach to implementing cameras in the courtroom.

Memorandum to Justice Thissen from Kaitlin Yira, Cameras in the Courtroom Studies (Nov. 1, 2021) (footnote omitted).

III. The Subcommittee's deliberations and recommendation

Subcommittee members stressed the need for a cautious approach to broadcasting in criminal cases. Members emphasized a variety of concerns about broadcasting in criminal cases, and they noted that the very limited empirical research to date did not dispel their concerns.

In general, members thought cameras would have a negative effect on witnesses and victims in criminal cases. One member described his experience in prosecuting cases in Indian Country, where he found that witnesses and victims in cases involving sexual abuse or murders were terrified. They would certainly not want to testify if the case would be broadcast. The member noted this was not unique to these kinds of prosecutions. A bank teller in a robbery case might feel the same way. Indeed, in a recent RICO prosecution it had been necessary to use contempt to compel a FedEx driver to testify about making a delivery. Jurors are afraid of gangs and have heightened fear in certain kinds of cases. And criminal cases often involve confidential informants, whose identity and the assistance provided should not be broadcast. Moreover, even witnesses who do testify may restrict what they are willing to say if they know their testimony will be broadcast.

Another member also expressed concern about what would happen to information that had been broadcast. Where would it remain after the proceedings concluded? For example, it might be possible to capture the image of a person involved in a criminal case and create a narrative around it. This might have very negative consequences for that person.

Referencing comments from the defense bar in the Minnesota report, a member commented that cameras in the courtroom could be very dangerous for lawyers and defense witnesses in criminal cases. She commented that although the FJC had reviewed the limited information now available, she was still concerned about what is not yet known.

Although some Subcommittee members expressed interest in a pilot study of limited broadcasting, limited broadcasting in certain districts would conflict with Rule 53's complete prohibition of broadcasting. Ms. Tessier (who participated in the Subcommittee's discussions but stated that the Department of Justice had not yet taken an official policy position on any of these issues) suggested that it might be helpful to have a new general rule allowing for pilot studies.[4]

The Subcommittee discussed the feasibility of extending JCUS Policy 420, which allows audio broadcasting of proceedings in civil and bankruptcy cases when testimony is not being taken, to criminal cases. Members noted that the policy would have to be modified for criminal cases, because even proceedings that do not involve taking testimony present many of the same concerns as those in which testimony is taken. These include, for example, proffers of the testimony a witness may give, and sentencing proceedings, which frequently include discussions of a defendant's cooperation.

[4] Ms. Tessier also commented that it would be useful to clarify in the Rule the difference between general broadcasting and closed-circuit access in overflow onsite courtrooms and remote closed-circuit access for victims. Unfortunately, because Committee Notes can be amended only when a rule's text is amended, it would not be possible to make this clarification by amending only the note.

Members also noted that JCUS Policy 420 is very new, and it would be important to study the issues raised by its implementation before considering adapting it to criminal proceedings. If there is continued interest in considering some form of broadcasting in criminal cases, the Committee could return to the issue after enough time has passed to allow a formal review of the impact of JCUS Policy 420, including questions such as who seeks to listen live, in what types of cases, whether there have been capacity issues, and whether there have been issues concerning the recording and rebroadcasting of audio from proceedings.

The Subcommittee recommends no change in Rule 53 at the present time.

TAB 2B

Ballard Spahr LLP

23-CR-F

1909 K Street, NW
12th Floor
Washington, DC 20006-1157
TEL 202.661.2200
FAX 202.661.2299
www.ballardspahr.com

Charles D. Tobin
Tel: 202.661.2218
Fax: 202.661.2299
tobinc@ballardspahr.com

Leita Walker
Tel: 612.371.6222
Fax: 612.371.3207
walkerl@ballardspahr.com

October 5, 2023

Via Email and Fedex

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

Re: Revising Federal Rule of Criminal Procedure 53

Dear Secretary Byron:

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

[4] *Id.* at 18.

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

[28] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

***

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

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

[44] *Supra* at 10-12.

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

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

Very truly yours,

Charles D. Tobin

Leita Walker

TAB 2C

FILED
March 15, 2023
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8049
ADM09-8009

ORDER PROMULGATING AMENDMENTS TO THE GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS

By order filed on June 18, 2021, we directed the Supreme Court Advisory Committee on the Rules of Criminal Procedure to review Minn. Gen. R. Prac. 4.02(d)–(e) and consider whether the rule, which governs requests for visual and audio coverage of criminal proceedings in the district courts, should be modified or expanded. *In re the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure*, No. ADM10-8049, Order at 3 (Minn. filed June 18, 2021). As we explained in that order, under the current rules, which had been in place for over 5 years, coverage is allowed "with the consent of all parties" before a guilty plea has been accepted or a guilty verdict is returned, and after a plea is accepted or a verdict is returned, coverage is allowed absent good cause. *Id.* at 1 (citing and quoting Minn. Gen. R. Prac. 4.02(d)–(e)). In the order, we noted that "[p]ublic interest in and access to judicial proceedings is vital to the fair, open, and impartial administration of justice." *Id.* at 2. And as we were expanding in-person proceedings following visual and audio coverage of court proceedings during the COVID-19 pandemic, we recognized that "now is also the time to consider whether the requirements that currently govern audio and video coverage of criminal proceedings should be modified." *Id.*

In a report filed on June 30, 2022, a majority of the committee recommended no modifications to Minn. Gen. R. Prac. 4.02(d) (governing coverage of criminal proceedings before a guilty plea or verdict), although the report included some alternative language to provide limited discretion to district courts to allow visual and audio coverage of criminal trials based on the facts and circumstances of a particular case if the court determined that a rule change was needed.[1] The committee recommended limited modification to Minn. Gen. R. Prac. 4.02(e) (governing coverage of criminal proceedings after a guilty plea or verdict). The committee also proposed an amendment to Minn. Gen. R. Prac. 4.01 to add an updated definition for new technology utilized by the district courts.

By order filed on July 6, 2022, we established a period for the public to file written comments in response to the report filed by the committee. *Order Establishing Comment Period and Public Hearing on Proposed Amendments to the Minnesota General Rules of Practice for the District Courts*, Nos. ADM10-8049, ADM10-8009, Order at 2 (Minn. filed July 6, 2022). Thirteen written comments were filed. Commenters included news media organizations, attorneys, district court judges, and nonprofit organizations working on issues related to the criminal justice system, media ethics, and access to government

---

[1] The committee's report with the proposed amendments is available on the public access site for the Minnesota Appellate Courts, under case number ADM10-8049 – *Report and Proposed Amendments to the Minnesota Rules* (filed June 30, 2022).

information.[2] On September 20, 2022, we held a public hearing and heard from the chair of the committee along with five individuals representing various organizations.[3]

We have thoroughly considered the recommendations of the committee, the public comments, and research materials on rules governing visual and audio coverage in courtrooms across the country. Ultimately, we amend Rules 4.01 and 4.02(d)–(e) to remove the requirement of party consent and give district courts broader discretion to allow visual and audio coverage of criminal trials before a verdict is reached and pair those changes with clear guardrails to mitigate risks associated with expanded visual and audio coverage.

Accepting amendments proposed as alternatives by the committee along with additional modifications to Rule 4.02(d)–(e) is consistent with a majority of the public comments submitted, which support an expansion of the current rule. The public commenters advocated in favor of more transparency, greater public trust, and broader

---

[2] Written comments were provided by the Star Tribune; Minnesota Chapter of the Society of Professional Journalists; Minnesota Coalition on Government Information; Association of Minnesota Public Educational Radio Stations; Minnesota District Judges Association; Silha Center for the Study of Media Ethics and Law; Court TV Media, LCC; a News Media Coalition consisting of American Public Media Group, CBS Broadcasting Inc., Gray Media Group, Hubbard Broadcasting, Inc., Sahan Journal, TEGNA Inc., among other organizations which also submitted individual comments; National Press Photographers Association; Joseph P. Tamburino; Minnesota Coalition Against Sexual Assault and Violence Free Minnesota; Minnesota Newspaper Association and Minnesota Broadcasters Association; and BLCK Press LLC.

[3] The following individuals and organizations appeared at the public hearing: the Honorable Richard H. Kyle, Jr., chair of the Supreme Court Advisory Committee on the Rules of Criminal Procedure; Mark Anfinson on behalf of the Minnesota Newspaper Association and the Minnesota Broadcasters Association; Leita Walker on behalf of a News Media Coalition; Suki Dardarian on behalf of the Star Tribune; Joe Spear on behalf of the Minnesota Chapter of the Society of Professional Journalists; and Hal Davis on behalf of the Minnesota Coalition on Government Information.

accessibility, all of which are important factors to consider here. The public commenters also observed that most other states have allowed more expansive use of visual and audio coverage of criminal proceedings, some for several decades. Nonetheless, under the modifications that we adopt now, Minnesota's rules regarding the visual and audio coverage of criminal proceedings will remain more restrictive than many other states.

Several of the committee's proposed changes to Rule 4.02(d) placed further guardrails around visual and audio coverage of criminal proceedings during particular portions of the proceedings, in certain case types, and for certain classes of witnesses and parties. We adopt some of those proposed changes. For instance, the modifications adopted today provide that the coverage of *voir dire* or pretrial proceedings is not authorized; the coverage of minor witnesses or minor defendants is never allowed; and coverage that may reveal the name or identity of a juror is not allowed. The modifications also update the provisions on coverage of criminal sexual conduct and domestic abuse cases to match current statutes.

We acknowledge serious and legitimate concerns raised by the committee and some public commenters about the risks and challenges accompanying broader visual and audio coverage of criminal trials. We conclude, however, that the modifications to the rules that we adopt provide important protections against those risks. The modified rules prohibit a district court judge from allowing visual and audio coverage if there is a substantial likelihood that coverage would expose any victim or witness who may testify at trial to harm, threats of harm, or intimidation. The modified rules specify a number of considerations that district judges should take into account to ensure the risks and

challenges are limited. In addition, the modifications authorize district court judges to impose additional limitations, beyond those specified in the rules, on visual and audio coverage of certain portions of, or participants in, criminal trials on a case-by-case basis. Ultimately, district court judges retain broad discretion to allow or disallow visual and audio coverage under the modified rules.

The Minnesota District Judges Association urged us to ensure that district court judges retain the ability to exercise discretion over visual and audio coverage on a case-by-case basis. The rule amendments we adopt today (in contrast to the current rule that restricts district court discretion) allow precisely that. In contrast to the existing presumption in favor of coverage of the post-guilt phase of criminal proceedings, Minn. R. Crim. P. 4.02(e), we decline to adopt a presumption of coverage during the pre-guilt phase of criminal proceedings because it would reduce a district court judge's discretion. Minnesota's judiciary understands that the courts in our state belong to all the people and that discretion to allow or disallow visual and audio coverage includes consideration that allowing greater visual and audio coverage of this public business in appropriate circumstances should increase transparency about how we conduct our business and enhance the public's understanding of, and confidence in, its court system.

We acknowledge the concerns expressed by victim advocate groups such as Minnesota Coalition Against Sexual Assault and Violence Free Minnesota and committee members that expanding coverage may discourage victims from reporting crimes and retraumatize survivors. The modified rules continue to prohibit coverage of victims themselves in both the pre-guilt and post-guilt phases of a criminal trial unless the victim

consents to the coverage. In contrast to the current rules, the modified rules include an absolute prohibition of coverage of minor victims. We are adding an express requirement that the court consider the "wishes of the victim(s)" in determining whether to allow visual or audio coverage.[4] Further, as noted above, the new language of the rule expressly prohibits a district court judge from allowing any visual or audio coverage of the trial if there is a substantial likelihood that coverage would expose any victim or witness who may testify at trial to harm, threats of harm, or intimidation. Accordingly, a district court judge retains the authority and is equipped with tools to protect the rights of victims during criminal proceedings.

We also acknowledge that allowing visual and audio coverage may impose additional complications and financial costs. Many of those costs will be borne by the media. The record does not tell us whether district courts will bear additional costs in a particular case related to audio or visual coverage (nor whether those additional costs may be offset by other savings). But to the extent that district courts face additional costs, the modified language in the rule asks district court judges to consider those additional costs as related to facility limitations, when deciding whether or not to grant a request to allow visual or audio coverage.

---

[4] Under current Rule 4.02(d), the court has power to allow visual and audio coverage of criminal trials with the consent of all parties. Accordingly, under the current rule, if both parties consent to visual and audio coverage, the district court may allow coverage without any consideration of the wishes of victims. Indeed, the current rule does not specifically allow a victim to object to trial coverage, although victims called as witnesses may object to coverage of their own testimony.

Finally, we acknowledge the possibility that any changes to how we conduct criminal trials in Minnesota may have a disproportionate adverse impact on certain groups of people based on race, gender, economic status, or other characteristics. The committee and public commenters did not identify, and we have not been able to find, definitive research on the impact of visual and audio coverage of criminal trials on persons based on their race, gender, or economic status.[5] We are committed to monitoring the impact of these modified rules on criminal defendants and crime victims based on race, gender, economic status, and other characteristics, and providing transparent reporting on those impacts.

In the end, we find that the modifications to Rules 4.01 and 4.02(d)–(e) that we adopt will promote transparency and confidence in the basic fairness that is an essential component of our system of justice in Minnesota and protect the constitutional rights and safety of all participants in criminal proceedings in the State.

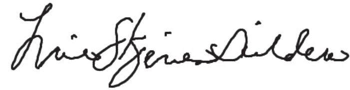
[5] We note that the Association of Minnesota Public Educational Radio Stations, representing "eighteen community radio stations throughout Minnesota that primarily serve underserved communities in Minnesota," wrote in strong support of expanding courtroom access. Additionally, BLCK Press LLC wrote in support of expanding coverage.

Based on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the attached amendments to Minn. Gen. R. Prac. 4.01 and 4.02(d)–(e) are prescribed and promulgated effective on January 1, 2024.

Dated: March 15, 2023

BY THE COURT:



Lorie S. Gildea
Chief Justice

D I S S E N T

McKEIG, Justice (dissenting).

The changes to Minn. Gen. R. Prac. 4.01 and 4.02 clearly express a desire for camera access in the courtroom in an effort to promote public confidence in Minnesota's justice system. This desire is understandable and important, but it is difficult to support expansion of camera access in the courtroom when the practitioners who regularly encounter these rules do not support expansion.

For example, The Minnesota District Judges Association noted in a written comment to this court that it "strenuously object[s] to any modifications to Rule 4.02," and noted that "public defenders, prosecutors, victims' organizations, The Minnesota County Attorneys' Association, The Minnesota Alliance on Crime, and The Minnesota Coalition Against Sexual Assault" also all generally oppose changes to Rule 4.02. The Minnesota District Judges Association explained that it has consistently, over the last 8 years, reiterated its belief that the rule should not change because "[j]ustice is best administered on a case-by-case basis," and district court judges should retain the ability to exercise their discretion to determine if visual and audio coverage are appropriate.

Another area of concern is the tangential but tremendous impact increased camera access could have on certain third parties—we also have no research on this topic. These third parties could include victims' families, defendants' families, and families of civil litigants. Increased camera access in the courtroom could negatively impact these third parties because, regardless of the type of case, the court process typically involves disclosure of deeply personal, embarrassing, or hurtful details involving the parties to a

case and their families. Despite these consequences, these third parties typically have no autonomy over the information shared, but still must deal with the fallout from the sensitive information's disclosure. It is not difficult to imagine examples where increased camera access could be challenging for these third parties. Consider the parent of an adult victim in a sexual assault case being forced to publicly encounter, explain, and confront the harrowing details of their child's assault because the trial was livestreamed; or imagine the child of a defendant who has to endure their parent being constantly vilified in the media, or questions from classmates or co-workers about gruesome details from their parent's case. These examples highlight the potential burden third parties may experience; limiting camera access in the courtroom could mitigate these burdens.

Another concern is the lack of information on how the rule changes may impact communities of color. The committee chair, the Honorable Richard H. Kyle, Jr., spoke at the public hearing and noted that there is minimal evidence or statistical data that discusses whether expanding camera access in the courtroom will negatively impact defendants of color. However, Judge Kyle noted that defense attorneys on the committee were concerned about the rights of their clients, their clients being publicized without consent, and the contribution to public misconception increased camera access may have. Judge Kyle explained that there was great interest in Derek Chauvin's Trial and many people found it to be educational, providing transparency to legal proceedings. But the Chauvin trial, and more recently Kimberly Potter's trial, involved white defendants. We have essentially no data to address how public perception would be impacted if those trials involved defendants of color. Research shows that "White Americans overestimate the proportion of crime

committed by people of color," "associate people of color with criminality," and "implicit bias research has uncovered widespread and deep-seated tendencies among whites—including criminal justice practitioners—to associate [people of color] with criminality." NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 3 (2014), https://www.sentencingproject.org/reports/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/ (last visited Feb. 22, 2023). Also, "media outlets reinforce the public's racial misconceptions about crime" by "over-represent[ing] racial minorities as crime suspects" and white people as victims. *Id.* We also know people of color are disparately punished by the American criminal justice system—Black and Latino people account for "30% of the general population, [but] they account for 58% of the prison population." *Id.* at 4. Given these widely-held societal beliefs, it is imperative for our court to obtain and consider data on how expanding access to cameras in the courtroom would disparately impact communities of color because expanding access could exacerbate these already prevalent issues.

Supporters of rule expansion consistently point to the Chauvin and Potter trials as examples of how increased use of cameras in the courtroom are helpful for the public. However, the Chauvin trial, alone, reportedly cost Hennepin County "about $3.7 million for employee salaries, courthouse security, victims' services," and other expenses. *Derek Chauvin Trial Cost Hennepin County $3.7M*, CBS MINN. (July 17, 2021, 12:54 PM), https://www.cbsnews.com/minnesota/news/derek-chauvin-trial-cost-hennepin-county-3-7m/ (last visited Feb. 22, 2023) [order attachment]. This total included a "single largest

expense" of $773,412 for added courthouse security—not including the cost of security staffing. *Id.*

Moreover, the Fourth Judicial District and Hennepin County are unlike any other in the State. The Fourth Judicial District only encompasses Hennepin County, but employs 63 judges, 13 referees, and 5 child support magistrates. MINNESOTA JUDICIAL BRANCH, ANNUAL REPORT 2021, 19 (Apr. 2022), https://www.mncourts.gov/mncourtsgov/media/PublicationReports/MJB-Annual-report-2021.pdf (last visited Feb. 22, 2023) [order attachment]. The next most comparable judicial district is the Tenth Judicial District, which encompasses *8 counties* and employs 45 judges and 4 child support magistrates. *Id.* at 31. Statewide, there were 5,042,568 cases filed from 2018 through 2022, 329,937 of which were major criminal cases. *District Court Case Data: Trends in Cases Filed, 2018 to 2022, All Judicial Districts*, MINN. JUD. BRANCH, https://www.mncourts.gov/Help-Topics/Court-Statistics/District-Court-Filings.aspx (last visited Feb. 27, 2023) [order attachment]. Of those numbers, 1,864,564 (37%) of the total cases filed and 65,396 (19.8%) of the major crime cases filed from 2018 through 2022 were filed in the Fourth Judicial District. *District Court Case Data: Trends in Cases Filed, 2018 to 2022, Fourth Judicial District*, MINN. JUD. BRANCH, https://www.mncourts.gov/Help-Topics/Court-Statistics/District-Court-Filings.aspx (last visited Feb. 27, 2023) [order attachment]. At the end of 2022's fiscal year, the Fourth Judicial District's current budget was $49,738,000, and the total projected expenditures for fiscal year 2022 was $46,758,112. The next closest district, again, is the Tenth Judicial District, which had a current budget of $30,835,300, and total projected

expenditures of $29,241,485 for fiscal year 2022. MINNESOTA JUDICIAL BRANCH, JUDICIAL COUNCIL END OF FISCAL YEAR (CLOSING) FINANCIAL UPDATE – FY2022 AS OF AUGUST 19, 2022, 6 (Aug. 19, 2022) [order attachment].

Thus, the Fourth Judicial District and Hennepin County are unique in the time, staffing, and monetary resources they have available. They likely have the most resources to navigate the challenges that come with expanding camera access in the courtroom. We have no research on how this rule change could impact other counties and districts in Minnesota. It stands to reason that if those districts and counties have fewer staffing and monetary resources than the Fourth Judicial District and Hennepin County, this rule expansion could hinder the expedient administration of justice in those counties and districts.

Increasing transparency and public confidence in the justice system are both legitimate and compelling interests. These interests, however, do not have to be vindicated by expanding camera access in the courtroom, especially given the lack of data on the impact this change could have for the various reasons stated above and the lack of support for expansion of camera access by judges, prosecutors, the defense bar, and victim advocates. For these reasons, I respectfully dissent.

AMENDMENTS TO THE GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS

[Note: in the following amendments, deletions are indicated by a line drawn through the text, and additions are indicated by a line drawn under the text.]

Rule 4.01 General Rule

Except as set forth in this rule, no visual or audio recordings, except the recording made as the official court record, shall be taken in any courtroom, area of a courthouse where courtrooms are located, or other area designated by order of the chief judge made available in the office of the court administrator in the county, during a trial or hearing of any case or special proceeding incident to a trial or hearing, or in connection with any grand jury proceedings. Visual coverage or recording includes film, video, livestreaming, and still photography. For purposes of this rule, a hearing held remotely using video technology is not considered livestreaming and any recording or broadcasting of such hearings is prohibited unless specifically authorized by the presiding judge.

This rule may be superseded by specific rules of the Minnesota Supreme Court relating to use of cameras in the courtroom for courtroom security purposes, for use of video or audio recording of proceedings to create the official recording of the case, or for interactive video hearings pursuant to rule or order of the supreme court. This Rule 4 does not supersede the provisions of the Minnesota Rules of Public Access to Records of the Judicial Branch.

Rule 4.02 Exceptions

***

(d) In criminal proceedings occurring before a guilty plea has been accepted or a guilty verdict has been returned, a judge may authorize~~, with the consent of all parties in writing or made on the record prior to the commencement of the trial,~~ the visual or audio recording and reproduction of ~~appropriate court~~ trial proceedings unless there is a substantial likelihood that coverage would expose any victim, or witness who may testify at trial, to harm, threats of harm, or intimidation. To determine whether to grant a request for visual or audio recording and reproduction, the presiding judge may consider any relevant factors, including but not limited to (1) the positions of the parties and wishes of the victim(s); (2) the level of public interest in the trial; (3) the necessity of coverage to safeguard the defendant's right to a public trial or the public's right of access to criminal trials; (4) the existence of security issues, courtroom or courthouse facility limitations, or public health concerns that would merit restricting observers from the physical courtroom; (5) courtroom or courthouse facility limitations that would render coverage impractical; (6) the positive or negative impact of recording and reproduction on the dignity and decorum of the trial proceedings; and (7) the effect of recording and reproduction on transparency, public education, and public trust and confidence in the proceeding or the judicial system. Coverage under this paragraph is subject to the following limitations:

(i) There shall be no visual or audio coverage ~~of~~during *voir dire*, and no visual or audio coverage of jurors at any time during the trial~~, including *voir dire*~~ or at any time when the name or identity of a juror could be revealed such as the polling of the jury.

(ii) There shall be no visual or audio coverage of any witness, victim, or defendant who is a minor at the time of trial. There shall be no visual or audio coverage of any adult witness or adult victim who objects thereto in writing or on the record before testifying.

(iii) Visual or audio coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings that occur in other areas of the court building.

(iv) There shall be no visual or audio coverage within the courtroom during recesses or at any other time the trial judge is not present and presiding.

(v) ~~Preceding or during a jury trial, t~~There shall be no visual or audio coverage of ~~hearings that take place outside the presence of the jury~~ any pretrial proceedings, including but not limited to bail hearings, arraignment, pretrial or omnibus hearings, motions *in limine* or any other proceedings prior to the jury being sworn, or any hearings that take place outside the presence of the jury. ~~Without limiting the generality of the foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, *in limine*, and to dismiss.~~

(vi) No visual or audio coverage is permitted in cases involving charges under Minn. Stat. §§ 609.293–.352, 609.185(a)(2), 609.365, 617.241, 617.246, or 617.247; or in cases in which a victim is a family or household member as defined in Minn. Stat. § 518B.01, subd. 2(b), and the charges include an offense listed in Minn. Stat. § 609.02, subd. 16, unless the victim(s) is an adult and makes a request in writing or on the record asking the judge to allow coverage.

In any court order authorizing visual or audio coverage of trial proceedings, the judge may include any other restrictions on coverage in the judge's discretion, including but not limited to restrictions on the coverage of certain parties, witnesses, or other participants, or graphic or emotionally disturbing or otherwise sensitive exhibits.

(e) In criminal proceedings occurring after a guilty plea has been accepted or a guilty verdict returned, a judge must, absent good cause, allow visual or audio coverage. The fact that a guilty plea will be accepted or a guilty verdict returned at the same hearing when sentencing will occur is not a basis to deny coverage of a sentencing proceeding. The consent of the parties is not required for coverage under this paragraph and lack of consent is not good cause to deny coverage. To determine whether there is good cause to prohibit coverage of the proceeding, or any part of it, the judge must consider (1) the privacy, safety, and well-being of the victim(s), defendant, participants, or other interested persons; (2) the likelihood that coverage will detract from the dignity of the proceeding; (3) the physical facilities of the court; and~~,~~ (4) the fair administration of justice. Coverage under this paragraph is subject to the following limitations:

(i) No visual or audio coverage is permitted ~~when a jury is present, including for~~ of jurors at hearings to determine whether there are aggravating factors that would support an

upward departure under the sentencing guidelines~~, or new pretrial and trial proceedings after a reversal on appeal or an order for a new trial~~.

(ii) ~~No~~Visual and audio coverage is not permitted at any proceeding held in a treatment court, including drug courts, mental health courts, veterans courts, and DWI courts except if participants are nearing graduation and consent to visual and audio coverage, in which case coverage may be permitted for purposes of producing videos or materials for promotional, educational, or stories in the public interest.

(iii) No visual or audio coverage is permitted in cases involving charges ~~of~~ under Minn. Stat. §§ 609.293–.352 or 609.185(a)(2), 609.365, 617.241, 617.246, or 617.247; or in any case in which a victim is a family or household member as defined in Minn. Stat. § 518B.01, subd. 2(b), and the charges include an offense listed in Minn. Stat. § 609.02, subd. 16, unless the victim(s) is an adult and makes a request in writing or on the record asking the judge to allow coverage.

(iv) No visual or audio coverage is permitted of a victim, as defined in Minn. Stat. § 611A.01(b), or a person giving a statement on behalf of the victim as the victim's proxy, unless the victim is an adult at the time of sentencing, and the adult victim, or when applicable the adult victim's proxy, affirmatively acknowledges and agrees in writing ~~before testifying~~ to the proposed coverage.

(v) Visual or audio coverage must be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings that occur in other areas of the court building.

(vi) No visual or audio coverage within the courtroom is permitted during recesses or at any other time the trial judge is not present and presiding.

Effective date is January 1, 2024.

TAB 2D

FILED
June 30, 2022
OFFICE OF
APPELLATE COURTS

REPORT AND PROPOSED AMENDMENTS TO THE MINNESOTA RULES

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

ADM10-8049
ADM09-8009

June 30, 2022

Hon. Richard Kyle, Jr., Chair

Hon. Michelle Anderson
David Bernstein
Michael Brandt
Jill Brisbois
Hon. Hilary Caligiuri
Anders Erickson
Emerald Gratz
John Gross
Nicholas Hydukovich
Marcus Jones
Kelsey Kelley
Dominick Mathews
Andrew Mohring
Lidia Morales
Virginia Murphrey
Hon. Peter Reyes
Greg Scanlan
Hon. Paul Scoggin
Cheri Townsend

Hon. Paul Thissen
Supreme Court Liaison

Karen Kampa Jaszewski
Staff Attorney

I. INTRODUCTION

In a June 18, 2021 order, the Supreme Court directed that this Committee review Rule 4.02(d)-(e) of the General Rules of Practice for the District Courts, update the information obtained during the pilot project conducted from 2015-2017 regarding the implementation of this rule in the district courts, and consider whether the requirements in that rule for audio and video coverage of criminal proceedings should be modified or expanded. As directed by the Court in its order, the Committee reviewed a variety of background materials including published articles and studies on cameras in court and 50-state survey information, obtained input from the public, reviewed data on requests for camera coverage in the district courts, debated the issues, and now submits this report and these recommendations.

II. DATA AND PUBLIC INPUT

The Committee reviewed updated data regarding camera coverage requests that have been collected since the beginning of the original pilot. As of June 15, 2022, since the criminal case pilot started in 2015, and not counting the four cases related to the death of George Floyd or the case of *State v. Potter*, notices of coverage have been filed in 383 cases. Of those 383 cases:

- 31 cases had notices of coverage for pre-guilt proceedings; other than the high-profile cases noted above, only one of the requests for pre-guilt coverage has been granted.
- 117 of the cases with notices for post-guilt coverage had coverage denied under the rule (e.g., categorical case type exclusion, good cause, untimeliness).
- One case was dismissed before a decision on coverage was made.
- 36 cases have pending notices of coverage.

The Committee also reviewed various scholarly articles including: 1) Eugene Borgida, Kenneth G. DeBono, & Lee A. Buckman, Cameras in the Courtroom; The Effects of Media Coverage on Witness Testimony and Juror Perceptions, *Law and Human Behavior*, 14(5), 489–509 (1990); 2) Jian Xu and Cong Liu, How Does Courtroom Broadcasting Influence Public Confidence in Justice? The Mediation Effect of Vicarious Interpersonal Treatment, *Frontiers in Psychology*, 11:1766 (2020); and 3) Paul Lambert, Eyeing the Supreme Court's Challenge: A Proposal to Use Eye Tracking to Determine the Effects of Television Courtroom Broadcasting, *Reynolds Courts & Media Law Journal*, 1(3) 277 (2011). Additionally, the Committee was provided the following documents, which were prepared specifically to aid in the discussion, and which are attached in the appendix to this report: 1) Cameras in the Courtroom Social Science Research Memo; 2) Cameras in the Courtroom Across Jurisdictions Memo; and 3) 50 State Survey.

The Committee also invited public comment and held a public hearing. Written comments were submitted by Hon. Peter Cahill, Fourth Judicial District; Adrianne McMahon, Assistant Public Defender; Hal Davis, Minnesota Coalition on Government Information; Robert Small, Minnesota County Attorneys Association; Jane Kirtley, Silha Center for the Study of Media Ethics and Law; Bobbi Holtberg, Minnesota Alliance on Crime; Joe Spear, Mankato Free Press; Ashley Sturz, Minnesota Coalition Against Sexual Assault; and Hon. Lois Conroy, Minnesota District Judges Association (MDJA). The submitted written comments are attached in the appendix.

In general, the public defender, prosecutor, and victim organizations and representatives oppose any expansion of the current rule. The MDJA opposes any change that would limit judge discretion. The Minnesota Alliance on Crime requests that the rule be further restricted by adding all crimes against the person to the list of cases that are automatically excluded from camera coverage. Media organizations and representatives as well as Hon. Peter Cahill expressed support for modification and expansion that would allow coverage at all proceedings, with Judge Cahill advocating for a rule that would leave the use and limits on cameras in court primarily to the discretion of the trial judge.

At the hearing, statements were made by Hal Davis, Jane Kirtley, Joe Spear, Hon. Lois Conroy, and Leita Walker, a First Amendment attorney who represents various media outlets. Overall, the statements made by media representatives were consistent with their written submissions: camera coverage should be allowed at every stage of a criminal case; coverage increases public access, promotes transparency, and fosters public trust and confidence in the judicial system; and judges can be trusted to exercise their discretion in managing their courtrooms and setting appropriate limits. In addition, the media representatives noted that because pooling is required by the rules and only one camera is permitted in any trial court proceeding (Rule 4.04(a)(1)), the recording of proceedings is many times less disruptive than having several print reporters sitting in the courtroom gallery.

Hon. Lois Conroy spoke for MDJA, noting that the administration of justice requires that judges weigh factors specific to the case in front of them, including the nature and posture of the case, the hardship to the victim, the defendant's right to fair trial, and the public's right to observe. For this reason, the MDJA opposes any rule change that would require coverage and would limit a judge's discretion to prohibit coverage.

III. COMMITTEE DISCUSSION

The Committee approached its discussion of whether to recommend modification or expansion of the rules governing audio and video coverage by separately addressing the rules that govern pre-guilt and post-guilt proceedings and discussing the issues specific to each set of rules.

A. PRE-GUILT PROCEEDINGS. The Committee discussed and debated whether to recommend any changes to the rule governing pre-guilt proceedings, which currently requires the consent of all parties before coverage can be granted. The Committee is aware that coverage has been authorized in two high profile trials, *State v. Chauvin* and *State v. Potter*, without the consent of both parties even though such coverage is not specifically authorized by the rules. The Committee was encouraged to and did consider a variety of proposed rule changes that would modify or expand coverage under a variety of different legal standards. Consensus could not be reached on any of the various proposals. Eventually, Committee members voiced concerns that they were discussing proposed rules changes even though it was clear a majority of the members oppose any change. The Committee put to a vote the question of whether members support any change to Rule 4 with respect to pre-guilt coverage and an overwhelming majority voted no. The Chair voted yes to considering further changes, all but 4 present and voting members voted no to any changes, and 4 abstained; 2 members were absent.

In opposition to any modification or expansion of coverage, members noted many of the same or similar concerns raised by the previous Committees in their previous reports to the Court on this issue: the presence of cameras distorts the process in that people may behave differently due to the presence of cameras; brief snippets of coverage by the media shed no real light on what happens in the course of a criminal case and provide no real public educational value; and litigating the question of camera coverage creates more work and is burdensome for the parties and the judge.

The arguments in support of expansion tend to be centered on the argument that cameras in court increase public access and education about the court process, as well as improve public trust and accountability.

While expanding camera coverage may give the appearance of transparency, the presence of cameras does not necessarily advance the public's understanding of court proceedings, may negatively impact the integrity of the process, and may be prejudicial to defendants. There is the potential that judges may modify their behavior in the presence of cameras or jurors may have the perception a defendant is "acting" for the camera. The Committee also continues to have concerns about the media's tendency to show snippets of coverage and believes that livestreamed gavel-to-gavel coverage of entire trials would not become the norm if the rules were expanded to allow trial coverage. Short snippet coverage does little to educate the public about the court process and could very well have more of a harmful than positive impact on public trust and confidence in the judicial system.

Additionally, the media has a tendency to only cover exceptional cases. If coverage is expanded to trials, those exceptional cases will be what the public thinks those in the justice system do every day. If the purpose of cameras is public education or

to promote the integrity or credibility of the system, coverage should provide a wholistic and realistic view of the court, and the mundane cases should be covered along with the exceptional. If the public only sees the exceptional and the shocking, which is all the media will likely cover, the public may tend to think that is the norm, which will only serve to inflame the public with fear about crime. The jury pool could be poisoned with the concept that if a defendant is in court, he or she must have done something exceptional or bad and the public or jury must make that right.

Unlike the legislative branch, the judicial branch is different in that judges are deciding individual cases rather than setting public policy. There must be an independence to the judicial branch and to the decisions of individual judges in individual cases. The Committee is concerned with the potential for influence that publicity could create. Additionally, once a recording exists, there are limits to what the court can do to control the use and dissemination. Preserving video forever is vastly different than public access.

The Committee is also concerned about the potential that expanded coverage could have a negative impact on victims and witnesses. Coverage could deter victims and witnesses from cooperating in the prosecution if they fear for their safety if they were to testify. Indeed coverage could result in actual harm or threats of harm to witnesses and other trial participants. Coverage may also have a chilling effect on any future victims or witnesses reporting crime or cooperating with law enforcement or prosecutors if they believe some day they too might be on camera.

Often victims and witnesses do not want to participate or be identified, especially in gang cases and violent person cases. Attorneys should be able to assure witnesses that video of their testimony will not appear on social media. Changing that will have a damaging effect on the state's ability to ensure justice is done. Most trials are very different than the *Chauvin* trial, which involved willing witnesses in a once in a century case. The *Chauvin* and *Potter* trials are not the standard by which to judge all cases because the resources available for and expended on those trials was not typical. Trying to prepare witnesses the week of trial, attorneys are going to have significant problems. Data are now available on the negative effect social media has on people, especially teenagers. When media is involved, it will most certainly make attorneys' and judges' jobs much more difficult.

Additionally, both public defenders and private defense attorneys have expressed concerns that the presence of cameras is a safety issue for them. Defense attorneys represent defendants charged with horrific crimes. At times, defense attorneys are taken down a back stairwell by deputies so as not to be visible to people who were in the courtroom. Camera coverage amplifies that exposure and being recognized in public could be a safety issue. In some cases, the media has specifically been ordered not to film attorneys for this very reason. Incidents of actual or threatened violence against lawyers

and witnesses, including expert witnesses, have been documented. The Committee is gravely concerned about the potential for actual harm if cameras are allowed at trial.

Given these concerns, the Committee considered whether it should at a minimum recommend a rule change that would allow more audio coverage but would prohibit showing anyone's face on camera without their consent. In some ways that approach would allay many concerns and the media would still be getting some video and audio coverage of trials. However, that approach may leave nothing left to cover but the few individuals who might want to be on video, or a static object in the courtroom. Also, audio coverage does not address all the concerns and safety issues as individuals can still be identified by their speaking voice or if anyone says the person's name.

Additionally, as a practical matter, there could be costs associated with more widespread coverage. Although the costs of cameras and broadcasting fall on the media, camera coverage is disruptive and attorney members of the Committee observed that there is work involved for the court when the media cover a hearing. The Committee is concerned the process not be overly burdensome for court administration, especially for courts that may have fewer staff or may even share a court administrator with another county. There is also a disparity in technology across the state as well as various facilities limitations. Although the media have claimed cameras are now smaller and less obtrusive, the types of cameras vary and some types of tripod cameras are still in use across the state. In some courts it would be almost impossible to accommodate a tripod camera. Thus it cannot be assumed that coverage will not have impacts on court operations.

However laudable the goals of expanded access to court proceedings, it is imperative to consider what recording (and the permanency of recordings and possibility of widespread dissemination) adds in terms of benefits and whether the benefits are worth the cost. Asking people to relive the worst moments of their lives and then broadcasting it will have an impact, and it will make it more difficult to get justice. The Committee believes that any benefits do not outweigh the costs, which is why the Committee strongly recommends against any major expansion of audio or visual coverage.

Although the vote was not unanimous, a majority of the Committee respectfully recommends to the Court that no change be made to Rule 4.02(d) that would modify the current consent rule or expand pre-guilt coverage.

Even though expansion of camera coverage is not favored, the Committee understands that the Supreme Court tasked the Committee to consider possible modifications or expansion. Thus, if the Court is inclined to consider changes to the rules, the Committee offers the following comments and suggestions based on its consideration of the following questions:

1. Whether jurors or jury selection should be subject to coverage.

The Committee recommends that there be no audio or visual coverage of jurors or of the jury selection process at all.

The Committee is concerned that coverage of jurors or of the jury selection process in the name of transparency will discourage jury service, expose jurors to public intimidation and harassment, and has the potential to fundamentally impact the integrity of the trial proceedings. Jurors are required to disclose very private information and honesty is necessary to ensure the parties are getting a fair and impartial jury. Although the jury selection process and the responses of jurors are recorded by the court reporter, the presence of a camera increases their exposure. It is reasonable to assume that jurors may be less likely to honestly discuss their true opinions or biases on issues like race when the cameras are on. And sensitive questions or topics are not only addressed in sex crimes or any specific subset of cases that could be carved out and excluded from coverage. For example, even a DWI trial can lead to prospective jurors discussing their own history or family history with alcoholism and the discussions can get very personal and very emotional.

Jurors are in court doing their civic duty, which sets them apart from the parties in the case. To protect the integrity of the proceedings, jurors as the decisionmakers must be protected. And unlike the parties, there is no attorney to look out for the interests of the individual jurors and nobody to argue good cause, or whatever legal standard may be set in court rule, on their behalf in support of a request to exclude them from coverage. Although judges would undoubtedly be committed to protecting jurors, there is simply no way to be certain that a particular juror who has a valid concern would feel empowered to raise that concern. It is unfair to jurors to subject them to this. The Committee feels strongly that the court needs to balance the interests of jurors and the administration of justice, with the increased transparency and public access, and on this particular issue the Committee has determined that there is no benefit worth the cost.

The Committee is also concerned that if the rules were to authorize coverage of juries, the result could be an increase in the number of requests for anonymous juries, which also has the potential to impact the integrity of the process. The Committee considered the scope of the protections that the rules should include, including whether there should or should not be coverage of the foreperson announcing the verdict, or during the polling of the jury, or if a juror speaks up during a trial. As a practical matter if a trial were livestreamed there would be no way to cut the camera or prevent coverage of unpredictable comments a juror might make during a trial, and that should be a relatively rare occurrence. The Committee acknowledges that a rule change cannot prevent this from happening, and trusts that a practical solution, like not having a microphone near the jurors should minimize the chance this could occur.

In light of the above, the Committee strongly recommends that jurors should never be subject to visual or audio coverage, in order to protect the integrity of the trial process and the jurors themselves. The Committee proposes a rule change that would clarify that regardless of the legal standard for coverage set in court rule, and even if the parties in a case agreed to camera coverage, coverage of voir dire is prohibited, and coverage of the jurors is prohibited at every stage of trial, including during polling of the jury.

2. *If the Court is inclined to modify the current standard in Rule 4.02(d) which requires "the consent of all parties" before a court may grant coverage of criminal proceedings before guilt has been determined, what should be the legal standard for the judge to apply?*

Again, the Committee recommends that no change be made to the rule requiring the consent of all parties. The Committee considered a variety of alternative legal standards including good cause and exceptional circumstances and could not come to consensus on any.

However, if the Court is inclined to modify the rule to give judges more discretion, first the Committee recommends a rule that sets a high standard, such as exceptional circumstances. The Committee considered whether at a minimum a recommendation should be made to the Court to codify in court rule the grounds cited by the judge who authorized coverage in the *Chauvin* case, which was essentially that camera coverage was necessary to ensure the defendant's right to a fair and public trial and the public's right of access to the trial. In the end, the Committee agreed that given the extremely rare factual circumstances (very high-profile trial during a global pandemic), and the fact that under Minn. Gen. R. Prac. 1.02 the court may always suspend or modify the application of the rules to prevent manifest injustice, which would include preserving constitutional rights, there is no need to codify this as grounds to authorize coverage explicitly in Rule 4.

Second, the Committee recommends that any rule expanding coverage to trial proceedings without consent of the parties include threshold considerations that would require a judge to prohibit coverage. Specifically, the Committee recommends that the rule prohibit coverage:

i) If the judge determines that coverage would violate the defendant's constitutional, statutory, or other rights, or
ii) If the judge determines there is a substantial likelihood that coverage would cause the defendant, a victim, a witness that may testify, a lawyer representing a party, court personnel, or any other person connected to the trial, physical or psychological harm, threats of harm, or intimidation.

Third, the Committee recommends that the same categorical case type exclusions for sex crimes and domestic abuse cases that are present in Rule 4.02(e) be incorporated

into any rule authorizing coverage of trial proceedings. The Committee also recommends that references to additional, similar offenses be added to the list including sections 609.365 (Incest), 617.241 (Obscene materials and performances), 617.246 (Use of minors in sexual performance), and 617.247 (Possession of pornographic work involving minors). Although the Committee opposes any expansion of the rule, it would be much more comfortable with expansion overall if all of these cases are excluded. The Committee's reasons for recommending the prohibition on camera coverage in sex crimes and domestic abuse cases include the sensitivity of the issues, the privacy of the records that are disclosed, and the potential chilling effect on victims reporting crime or cooperating with the prosecution.

Fourth, the Committee recommends that the rule should require that a judge hear and consider the position of the parties on whether coverage should be allowed and whether any limitations should be imposed on such coverage, and should be required to consider all other relevant factors. Specifically, in deciding whether to authorize coverage in whole or in part, the judge should be required to consider:

i) the positions of the parties;
ii) the impact coverage will have on the rights of the defendant;
iii) the impact coverage will have on the privacy, safety, and well-being of the victim(s), witnesses, defendant, trial participants, court staff, or other interested persons connected with the trial;
iv) the age of the defendant and any victim or witness who may testify at trial; and
v) the wishes of any victim, or any witness who may testify at trial, whether expressed by or on behalf of the victim or witness.

The rule should further require that a judge may consider any other relevant factors, including but not limited to:

i) the nature of the charges;
ii) the level of public interest in the trial;
iii) whether coverage is necessary to safeguard the defendant's right to a public trial;
iv) whether coverage is necessary to safeguard the public's right of access to the trial;
v) whether courtroom or courthouse facility issues or limitations exist that would render camera presence obtrusive or distracting, or would make it difficult to adequately protect certain areas of the courtroom such as the jury box from being covered on camera;
vi) whether public health concerns exist that require limits on the number of observers that can attend from the physical courtroom;
vii) whether the dignity and decorum of the court proceedings would be impacted positively or negatively; and

viii) whether allowing visual or audio coverage would promote transparency, education, and public trust and confidence in the judicial system.

The Committee recognizes that it may be a challenge for a judge to measure factors such as "public interest" when deciding such issues. Although it may not be clear what type of record needs to be made to establish the level of public interest, the factor is important and should be included in the rule as something the judge should consider.

Finally, as noted above, litigating the question of camera coverage creates work and is burdensome for the parties and the judge. The Committee recommends that any rule expanding coverage take steps to simplify the litigation of these issues to the extent possible.

3. *Should any proceedings be specifically included or excluded, e.g., bail hearings, pretrials, other proceedings and hearings outside the presence of the jury? Rule 4.02(d)(v).*

The Committee discussed the current Rule 4.02(d)(v) and whether it should be modified to authorize coverage of any pre-trial hearings and agrees it should not.

The Committee considered proposing rules that would authorize coverage of bail hearings but had concerns about coverage of hearings where a defendant may be in jail clothing or handcuffs, and where the court is discussing the defendant's financials, prior offenses and prior warrants, mental health issues, and whether the defendant is on probation, all of which could impact the potential jury pool. The Committee is also concerned that authorizing any pretrial coverage could result in coverage of hearings where potential testimony or evidence is discussed, including evidence that may be excluded from being admitted at trial. The Committee considered whether the rule should authorize coverage of guilty plea hearings but had concerns about the potential impact to the jury pool if the defendant withdraws the plea or the plea agreement falls apart. The Committee also strongly opposes any coverage of the weekly treatment court hearings.

Based on concerns about the potential impact on the jury pool and a defendant's right to a fair trial, the Committee recommends that the rules not be modified to authorize coverage of pretrial proceedings, and instead be modified to specifically prohibit coverage of any pretrial hearing, and only authorize coverage of trials.

4. *Whether a judge should be able to authorize coverage of a witness over their objection, and whether coverage over a witness's objection could be by video or only by audio. Rule 4.02(d)(ii).*

The Committee discussed whether the current standard in Rule 4.02(d)(ii) should be modified to authorize coverage of a witness over their objection, including whether

perhaps audio coverage should be authorized even if video coverage is prohibited. The current rule provides that "There shall be no visual or audio coverage of any witness who objects thereto in writing or on the record before testifying." The Committee does not recommend expanding the rule to authorize coverage over a witness's objection given the potential for a chilling effect on witness cooperation if coverage over a witness's objection were authorized.

Additionally, the Committee recommends expanding the protections in the rule to not only prohibit coverage of an adult witness who objects, but to also prohibit coverage of any minor witness, minor victim, or minor defendant. Although the current rule provides an option for witnesses to object to coverage, a minor should be considered too young to make such decisions or to consent to coverage. Finally, for consistency, the Committee recommends that the Court adopt the same standard for coverage of victims in this rule as is currently in Rule 4.02(e)(iv), which requires affirmative consent.

The Committee strongly recommends against any rule change that would give judges the discretion to authorize coverage of victims or witnesses at trial who may object, especially in sex crimes and domestic abuse cases.

If the Court is inclined to authorize the coverage of minors, or of witnesses over their objections, or of victims without their affirmative consent, the Committee recommends that the wishes of the victim and the age of any trial participant be specifically included as factors the court can consider when deciding whether to grant or deny coverage in whole or in part.

B. POST-GUILT PROCEEDINGS. Regarding the rules that govern coverage post-guilt, the Committee considered the following questions:

1. *Whether the rules should be modified to authorize coverage of treatment courts in paragraph (ii). The Committee is aware that coverage has been authorized in treatment court even though such coverage is prohibited by this rule.*

The Committee viewed videos that have been produced by treatment courts and posted online to promote and spotlight treatment court, which include coverage of treatment court hearings. The Committee agrees the rules should be modified to support the creation of such videos.

The Committee is mindful, however, that sensitive and personal issues are often discussed at treatment court hearings and although the hearings are public, that does not mean they should be recorded or broadcast. To ensure the court is encouraging the sharing of such information at these hearings when necessary, the Committee does not support allowing cameras when such sensitive and personal issues are discussed.

The Committee recommends a modification to the rule that would authorize coverage of treatment court hearings but only for promotional videos or for stories in the public interest, only with the consent of the participants, and only when the participants are nearing the point of graduation to minimize the possibility that a defendant will be sharing any particularly sensitive or personal issues or that a defendant will consent to coverage simply to curry favor with the judge.

Additionally, the new veterans sentencing statute, section 609.1056, may result in some overlap of treatment court cases and cases where coverage is prohibited under the sex crimes and domestic abuse provisions of the rule. The Committee recommends an amendment to the rule noting that possible overlap to ensure coverage of treatment court is only authorized if coverage is not otherwise prohibited under the existing provisions.

2. *Whether the rules should be modified to eliminate the categorical case-type exclusions in paragraph (iii).*

The Committee consistently disfavored and does not support any rule change that would eliminate or modify the prohibition on coverage of sex crimes and domestic abuse cases or give judges discretion to cover these cases. These cases are particularly emotional and there are no guarantees the court could protect victims from being covered intentionally or even inadvertently by the media, especially given the layout of some courtrooms. The Committee is genuinely concerned regarding the possible chilling effect on victims coming forward and continuing to participate throughout court proceedings if they believe they might one day be covered on camera. The Committee is also concerned that a rule change might discourage victim impact statements.

The Committee acknowledges that in rare circumstances there may be a victim in these types of offenses who wants camera coverage of the sentencing. Thus, although the Committee recommends that the categorical exclusion remains the presumption, the Committee supports a rule change that would allow a judge to authorize coverage at the specific request of a victim.

3. *Whether there should be any change to the requirement for affirmative consent by victims under paragraph (iv).*

The Committee considered whether to modify the requirement for affirmative consent and recommends leaving the rule unchanged.

The Committee is aware that a prior Committee had recommended to the Court language that would prohibit coverage if the victim objects, rather than allowing coverage upon the victim's signed consent. The current rule language adopted by the Court was clearly well-intentioned but has had the unintended consequence of the media seeking out victims to get signed consent forms, which is not an ideal atmosphere for

victims in court. The Committee discussed whether to propose a change mirroring what the previous Committee had recommended. The Committee also discussed whether perhaps the rule should specifically place the onus on the prosecutor to obtain victim consent and/or prohibit the media from asking the victim to consent. Getting the consent form signed is not a media obligation under the court rule but clearly there is a benefit to the media in getting the form signed so they can cover the victim impact statement. Although the prosecutor usually talks to the victim, in any case where they don't get a signed form, the media tries to get it.

The Committee agrees that prosecutors should have these conversations with victims and that this process can be handled rather quickly and efficiently and can be combined with the conversation on victim impact statements. The Committee also agrees that a return to the previously recommended rule does not solve any of these issues because without the signed consent form there is no way to know whether a victim agrees to coverage, the parties and court must then wait to get confirmation, and the issue tends to be dealt with "on the courthouse steps." Despite the challenges, the affirmative consent rule is preferred as it provides more protection for victims, and the rule should remain unchanged in terms of prohibiting the media from having this conversation with victims as that is not something the court can or should try to control or regulate.

The Committee would note, however, that in a prior report to the Court on this issue a prior Committee recommended eliminating the word "testifying" from the victim-coverage provision, Rule 4.02(e)(iv), as victims do not testify at sentencing but instead provide a victim impact statement under Minn. Stat. § 611A.038. That proposed rule was not adopted by the Court. The Committee again proposes that this change be made.

Finally, although outside the scope of the Supreme Court's directive to the Committee, the Committee recommends that the court form published on the Minnesota Judicial Branch website for victim consent should perhaps be modified to have the victim select either that they consent or do not consent to coverage. The Committee further encourages prosecutors to file that form in every case where a notice of coverage has been filed. This approach will ensure that the victim's position is made part of the record, and will help avoid the current situation where the lack of a consent form leaves room for confusion and questions about whether the victim does not consent or has not been asked.

4. *Whether there should be any expansion of the coverage in the presence of a jury under Rule 4.02(e)(i) (Blakely trials), so long as the jury itself is not covered.*

The Committee discussed whether to modify the rule governing *Blakely* trials and agreed that *Blakely* trials should only be covered if the trial is covered. The *Blakely* trial is where the most egregious facts are discussed, so coverage of the *Blakely* phase alone would place emphasis on the most extreme portion of the trial. Again, the Committee

recommends that the jurors themselves should never be subject to audio or visual coverage.

C. LOGISTICS ISSUES. Since the implementation of the original pilot rules, the media has voiced concerns with the lack of consistency among the district courts as to the preferred method for transmitting notices of coverage to the court, with some insisting on facsimile and other allowing email transmission. The rule currently requires that the media provide notice to the district court but does not specify a method.

The Committee agrees that the media have raised a valid concern, and that if possible the rule should establish a consistent process statewide. The Committee is aware that the previous Committee recommended against requiring or even suggesting that the media utilize the Minnesota Judicial Branch e-filing system. This Committee agrees with the reasoning of the prior Committee and does not recommend that the rule be amended to require notices to be "filed" or to allow notices to be e-filed. When the Committee discussed this issue, staff from the Minnesota Judicial Branch Court Information Office (CIO) was present and explained the role that Office plays in assisting the media and the courts with the process and the issues that arise relating to camera coverage. Staff for that Office offered that perhaps the rule could be amended to require that the media provide notice to the CIO, and that the CIO promptly provide the notice to the district court judge and court administrator. The Committee supports such a rule change assuming the Court agrees this is an appropriate use of that Office, and that naming that Office as the point of contact for the media will ensure notices of coverage are always routed to the judge, court administrator, and the parties in a timely manner.

The media has also expressed the desire for a shorter timeframe for providing notice of coverage than the rule currently requires. Although the Committee understands the media's concern and agrees that 3 days' notice might be adequate time to prepare for coverage, the challenge is that the parties need adequate time to object, and prosecutors need adequate time for communication with victims regarding consent to coverage. For these reasons no changes are recommended on the time requirements for notice of coverage.

D. FINAL THOUGHTS. Regarding the public input received, whether a particular individual or entity is in support of or in opposition to expansion or modification of the current rules, there seems to be consensus on the need for judicial discretion in deciding these issues. The Committee agrees and opposes any rules that would require coverage of certain cases or under certain circumstances. The Committee recommends that if the Court does decide to adopt rules expanding camera coverage, judges continue to be given the discretion in the rules to limit coverage in whole or in part based on the facts and circumstances of a particular case. The Committee recommends the addition of a new paragraph at the end of Rule 4.02(d) to codify this discretion.

The Committee also discussed the intersection of cameras in court and the concept of livestreaming. There are 2 types of livestreaming in this context: the type done by media from the courtroom for distribution to the public as was done in the recent high-profile trials, and the type that occurs when the court is holding a hearing remotely by video technology. Although the latter is a "livestreamed" hearing in the sense that it is being streamed over the internet, the media are not allowed to record or rebroadcast because of the limitations in Rule 4. The Committee agreed that a definition of livestreaming needs to be added to the introductory paragraph of Rule 4 to clarify that while remote hearings are "livestreamed" the Committee does not support any media broadcast of such hearings unless specifically authorized by the judge.

Finally, the Committee recommends adding references to the defendant everywhere there are specific references to victims, witnesses, or other participants. The intent of this change is to ensure fairness and balance in the rule. The Committee recommends that any rule change adopted by the Court should always provide for a balancing of considerations, keeping the list of factors that are salient to each party evenly weighted.

III. CONCLUSION

As noted above, although the vote was not unanimous, a majority of the Committee respectfully recommends to the Court that no change be made to Rule 4.02(d) that would modify the current consent rule or expand pre-guilt coverage. And although there is not unanimous agreement on the opposition to expansion, the Committee unanimously recommends the attached proposed amendments to Minn. Gen. R. Prac. 4. If the Court is inclined to make additional modifications to the rule, the Committee respectfully requests that the Court consider the suggestions made in this report.

Respectfully Submitted,

ADVISORY COMMITTEE ON
RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO THE GENERAL RULES OF PRACTICE

The Supreme Court Advisory Committee on Rules of Criminal Procedure recommends that the following amendments be made in the Minnesota General Rules of Practice. In the proposed amendments, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

1. **Amend Minn. Gen. R. Prac. 4.01 as follows:**

Rule 4.01. General Rule

Except as set forth in this rule, no visual or audio recordings, except the recording made as the official court record, shall be taken in any courtroom, area of a courthouse where courtrooms are located, or other area designated by order of the chief judge made available in the office of the court administrator in the county, during a trial or hearing of any case or special proceeding incident to a trial or hearing, or in connection with any grand jury proceedings. Visual coverage or recording includes film, video, livestreaming, and still photography. For purposes of this rule, a hearing held remotely using video technology is not considered livestreaming and any recording or broadcasting of such hearings is prohibited unless specifically authorized by the presiding judge.

This rule may be superseded by specific rules of the Minnesota Supreme Court relating to use of cameras in the courtroom for courtroom security purposes, for use of video or audio recording of proceedings to create the official recording of the case, or for interactive video hearings pursuant to rule or order of the supreme court. This Rule 4 does not supersede the provisions of the Minnesota Rules of Public Access to Records of the Judicial Branch.

2. **Amend Minn. Gen. R. Prac. 4.02(d) as follows:**

(d) In criminal proceedings occurring before a guilty plea has been accepted or a guilty verdict has been returned, a judge may authorize, with the consent of all parties in writing or made on the record prior to the commencement of the trial, the visual or audio recording and reproduction of ~~appropriate court~~trial proceedings.

Coverage under this paragraph is subject to the following limitations:

(i) There shall be no visual or audio coverage ~~of~~ during voir dire, or coverage of jurors at any time during the trial~~, including voir dire~~ or coverage at any time during trial when the name or identity of a juror could be revealed through visual or audio coverage such as during polling of the jury.

(ii) There shall be no visual or audio coverage of any witness, victim, or defendant, who is a minor at the time of trial, or of any adult witness other than a victim who objects thereto in writing or on the record before testifying, or of any

adult victim unless the adult victim affirmatively acknowledges and agrees in writing to the proposed coverage.

(iii) Visual or audio coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings that occur in other areas of the court building.

(iv) There shall be no visual or audio coverage within the courtroom during recesses or at any other time the trial judge is not present and presiding.

(v) ~~Preceding or during a jury trial, t~~There shall be no visual or audio coverage of any pretrial proceedings, including but not limited to bail hearings, arraignment, pretrial or omnibus hearings, motions in limine or any other proceedings prior to the jury being sworn, or any hearings during trial that take place outside the presence of the jury~~. Without limiting the generality of the foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, in limine, and to dismiss~~.

(vi) No coverage is permitted in cases involving charges under Minn. Stat. §§ 609.293-.352, 609.185(a)(2), 609.365, 617.241, 617.246, or 617.247; or in cases in which a victim is a family or household member as defined in Minn. Stat. § 518B.01, subd. 2(b), and the charges include an offense listed in Minn. Stat. § 609.02, subd. 16.

In any court order authorizing video or audio recording of trial proceedings, the judge may include any other restrictions on coverage in the judge's discretion, including but not limited to restrictions on coverage of certain parties, witnesses, or other participants, or graphic or emotionally disturbing or otherwise sensitive exhibits.

3. Amend Minn. Gen. R. Prac. 4.02(e) as follows:

(e) In criminal proceedings occurring after a guilty plea has been accepted or a guilty verdict returned, a judge must, absent good cause, allow visual or audio coverage. The fact that a guilty plea will be accepted or a guilty verdict returned at the same hearing when sentencing will occur is not a basis to deny coverage of a sentencing proceeding. The consent of the parties is not required for coverage under this paragraph and lack of consent is not good cause to deny coverage. To determine whether there is good cause to prohibit coverage of the proceeding, or any part of it, the judge must consider (1) the privacy, safety, and well-being of the victim(s), defendant, participants, or other interested persons; (2) the likelihood that coverage will detract from the dignity of the proceeding; (3) the physical facilities of the court; and, (4) the fair administration of justice.

Coverage under this paragraph is subject to the following limitations:

(i) No visual or audio coverage is permitted ~~when a jury is present, including for~~ of jurors at hearings to determine whether there are aggravating factors that would support an upward departure under the sentencing guidelines, and coverage of such hearings is only permitted if the underlying trial was also covered~~, or new pretrial and trial proceedings after a reversal on appeal or an order for a new trial~~.
(ii) ~~No coverage~~Unless coverage is otherwise prohibited by clause (iii) of this rule, coverage is permitted at ~~any~~ proceedings held in a treatment court, including drug courts, mental health courts, veterans courts, and DWI courts but only with the consent of the treatment court participant, only at the point where the participants to be covered are nearing graduation, and only for purposes of producing videos or materials for promotional, educational, or outreach purposes, or for stories in the public interest.
(iii) No coverage is permitted in cases involving charges under Minn. Stat. §§ 609.293-.352, ~~or~~ 609.185(a)(2), 609.365, 617.241, 617.246, or 617.247; or in cases in which a victim is a family or household member as defined in Minn. Stat. § 518B.01, subd. 2(b), and the charges include an offense listed in Minn. Stat. § 609.02, subd. 16, except upon the specific request of the adult victim.
(iv) No visual or audio coverage is permitted of a victim, as defined in Minn. Stat. § 611A.01(b), or a person giving a statement on behalf of the victim as the victim's proxy, unless the victim is an adult at the time of sentencing and the adult victim, and when applicable the adult victim's proxy, affirmatively acknowledges and agrees in writing ~~before testifying~~ to the proposed coverage.
(v) Visual or audio coverage must be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings that occur in other areas of the court building.
(vi) No visual or audio coverage within the courtroom is permitted during recesses or at any other time the trial judge is not present and presiding.

APPENDIX:

1) Cameras in the Courtroom Social Science Research Memo

2) Cameras in the Courtroom Across Jurisdictions Memo

3) 50 State Survey

4) Comments submitted by:

Hon. Peter Cahill, Fourth Judicial District
Adrianne McMahon, Assistant Public Defender
Hal Davis, Minnesota Coalition on Government Information
Robert Small, Minnesota County Attorneys Association
Jane Kirtley, Silha Center for the Study of Media Ethics and Law
Bobbi Holtberg, Minnesota Alliance on Crime
Joe Spear, Mankato Free Press
Ashley Sturz, Minnesota Coalition Against Sexual Assault
Hon. Lois Conroy, Minnesota District Judges Association (MDJA)

TO: Justice Thissen

FROM: Kaitlin Yira

RE: Cameras in the Courtroom Studies

DATE: 11/01/2021

CAMERAS IN THE COURTROOM SOCIAL SCIENCE RESEARCH

1. LIMITATIONS OF THE CURRENT DATA.

The methodology of most data on how cameras in the courtroom impact judicial outcomes is flawed. First, the short length of the studies (which generally range from one to three years), and diversity of cases makes it difficult to obtain a representative sample, collect accurate data, and generalize and apply the results.[1] Furthermore, the evaluation design of most studies, self-reporting questionnaires, is defective.[2] As frequently opined by social scientists, self-reporting questionaries are highly unreliable. Most of the "research" has not been reproduced and is limited in application to that specific trial. There is much room for improvement in the scientific data surrounding cameras in the courtroom.

2. PUBLIC PERCEPTION OF THE JUDICIAL SYSTEM.

> "To work effectively, it is important that society's criminal process satisfy the appearance of justice . . . and the appearance of justice can best be provided by allowing people to observe it."[3]

In 2020, new data on the influence cameras in the courtroom have on public perception of the judicial system was published.[4] The data showed that media coverage of trials increases public

---

[1] Emily Ittner, *Technology in the Courtroom: Promoting Transparency or Destroying Solemnity*, 22 COMMLAW CONSPECTUS 347, 369 (2014).
[2] Ittner, *supra* note 1.
[3] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980) (citing Matthew Hale and William Blackstone).
[4] Jian Xu and Cong Liu, *How Does Courtroom Broadcasting Influence Public Confidence in Justice? The Mediation Effect of Vicarious Interpersonal Treatment*, 11 FRONTIERS PSYCH. 1, 2 (2020).

confidence in the judicial system, though through an indirect path. The data showed, with statistical significance, audiences of court trial videos who perceive a judge's positive interpersonal treatment of a litigant tend to be more confident about receiving fair treatment and outcomes in their own future encounters with the legal system.[5] Additionally, people who view trial court videos where they perceive a trial court's interpersonal treatment of a litigant is positive, have a greater sense of procedural justice.[6] Procedural justice has long been noted as a key factor that enhances individuals' favorability to the outcome of distribution by an authority or institution and their evaluations, such as their trust in and positive affect toward, and their perceived legitimacy of the authorities or institutions.[7] It also induces supportive intentions such as compliance, cooperative behaviors, and voting.[8]

The social science behind public perception of the judiciary as it is impacted by camera coverage of trials was not previously well-understood. This recent data provides insight into the mechanisms that are at play when the public views trial video footage. This study highlights how media coverage of the judicial system can be used as a tool to increase public trust in the judicial system. However, the study also highlights the importance of the behavior of the judge in increasing public trust. This study emphasized the positive effects media coverage of trials will have on the public are limited to how positively the public perceives a judge's behavior. Thus, the importance of maintaining decorum and showing respect to all parties by the presiding judge cannot be overstated when cameras are in the courtroom.

---

[5] Xu & Liu, *supra* note 4 at 3.
[6] *Supra* at 4.
[7] *Supra*.
[8] *Supra*.

3. IMPACT ON WITNESS TESTIMONY.

Data shows that witnesses' ability to recall the details of the crime and communicate effectively were not impacted by the presence of cameras in the courtroom.[9] Witnesses have self-reported nervous behavior at higher rates when in front of cameras than witnesses who were not in front of cameras have reported.[10] However, this perceived nervousness has not been shown to decrease the accuracy of the testimony the witnesses. That is, witnesses in front of cameras give as accurate of testimony as witnesses who were not testifying in front of cameras.[11] The impact cameras in the courtroom would have on witnesses is often cited as a large reason to limit media coverage of trials. However, the data supports the notion that the integrity of witness testimony is not threatened by cameras in the courtroom.

4. IMPACT ON JURORS AND SENTENCING.

While limited, the prevailing data supports the notion that jurors are not receptive to any nervousness cameras in the courtroom causse witnesses. Jurors rated witnesses in front of cameras with the same level of credibility as witnesses who were testifying in front of cameras. Therefore, the concern that jurors will react to whatever nervousness cameras cause to testifying witnesses is unsupported. However, there are many ways jurors may be impacted by cameras in the courtroom that have not been qualified by empirical research.

Interestingly, one study found that expanded media coverage leads to an increase in sentencing lengths. However, this increase was only true for severe violent crimes in jurisdictions where judges are elected (vs. appointed).[12] This study provides an interesting

---

[9] SHORT & ASSOCS., EVALUATION OF CALIFORNIA'S EXPERIMENT WITH EXTENDED MEDIA COVERAGE OF COURTS, SUBMITTED TO ADMINISTRATIVE OFFICE FOR THE COURTS (1981).
[10] Eugene Borgida, et al., *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 15 LAW & HUM. BEHAV. 489, 505 (1990).
[11] *Supra*.
[12] Lim et al. *Measuring Media Influence on U.S. State Courts* 1, 21-22 (2010).

perspective on how media coverage of trials may implicitly influence judges who are elected by the public.

5. DATA.

I. HOYT STUDY (1977).[13]

a. Summary:

Individuals were shown a film and then asked questions about the content of the film with either (1) an obvious television camera in front of them, of which they were told was recording their answers for later viewing by a large audience, (2) a camera that was hidden behind a mirror in front of them, or (3) no camera in front of them.

b. Results:

The study found "no significant differences" in the respondents' verbal behavior when they faced a hidden television compared to when no camera was present. Thus, the assumption that when faced by a television camera, persons' memory may fail, etc., was not supported."[14] This study showed that when cameras in the courtroom are inconspicuous or hidden, they may not impact victim/witness testimony or memory of events. Because modern technology allows cameras to be small, discrete, and almost silent, it is feasible that victim/witness testimony would not be impacted by their presence. Additionally, this study supports rulemaking

[13] James L. Hoyt, *Courtroom Coverage: The Effects of Being Televised*, 21 J. BROADCASTING 489 (1977).
[14] *Supra* at 490-91.

ensuring the presence of cameras in the courtroom will be inconspicuous.[15]

II. SHORT STUDY (1981).[16]

a. Summary:

A 1981 study surveyed participants in 200 legal proceedings on whether they were distracted by the presence of cameras (i.e., self-reports). The researchers also placed neutral observers in proceedings to record the perceived reaction, if any, of participants to the cameras.

b. Results:

The study found that the presence or absence of cameras had little, if any, effect on trial participants' attentiveness, demeanor (calm or anxious), or ability to communicate. It also found little effect on courtroom decorum. The study concluded that "there is little evidence to suggest that [electronic media coverage] causes significantly more changes in behavior than does conventional media coverage.[17]

III. BORGIDA STUDY (1990).[18]

a. Summary:

Undergraduate student subjects served as either witnesses or jurors in one of three types of trials: electronic media coverage (EMC), in which a video camera was present; conventional media coverage

[15] Paul Lambert, *Eyeing the Supreme Court's Challenge: A Proposal to Use Eye Tracking to Determine the Effects of Television Courtroom Broadcasting*, 1 REYNOLDS CT. & MEDIA L. J. 277, 289 (2011).
[16] Short & Assocs., *supra* note 9 at 228.
[17] *Supra*.
[18] Borgida et al., *supra* note 10.

(CMC), in which a journalist was present; or, a no-media control, in which no representative or equipment was present. Students who served as witnesses first viewed videotape of a reenacted armed robbery. Days later, these students testified as witnesses in front of a jury of peers. Measures assessed the following: witness and juror attitudes toward witness report and juror perceptions of nervousness and media distraction, juror perceptions ness testimony, and witnesses' ability to accurately recall aspects of the crime.[19]

b. Results:

The Borgida Study concludes that electronic media coverage (EMC) witnesses were significantly more nervous than non-EMC witnesses, and the EMC witnesses were as clear as conventional media witnesses, although both groups were less clear than the control witnesses.[20] Alternatively, EMC witnesses required significantly fewer prompts to recall items, although the amount and accuracy of information provided were the same compared to conventional media witnesses and the control group.[21] The researchers of the study concluded that the presence of the camera in the courtroom had a perceived psychological effect, although there appears to be no significant positive or negative effects of cameras in the courtroom.[22]

---

[19] Borgida et al., *supra* note 10.
[20] *Supra* note 10 at 502.
[21] *Supra* note 10 at 503-04.
[22] *Supra* note 10 at 504-05.

IV. FEDERAL JUDICIAL CENTER STUDY (1991-1994).[23]

a. Summary:

Cameras were allowed in six federal district courts and two appellate courts as part of a pilot study. In all, 147 proceedings had cameras recording inside the courtroom. The results of the study are based on post-trial surveys of the trial participants.

b. Results:

Most of the judges with electronic media experience felt that the greatest potential benefit of electronic coverage is the educational value it provides to the public, although this benefit was realized only moderately under the experimental program.[24] The judges in the experimental program noted that ruling on objections to electronic media coverage took very little time.[25] The judges were also nearly unanimous that the presence of cameras did not create a lack of courtroom decorum, nor did the presence of cameras have a negative effect on the attorneys.[26] Attorneys surveyed by the Federal Judicial Center were also favorable towards cameras in the courtroom, with sixty-six percent saying that the favored electronic media coverage, twenty-one percent opposing coverage, and thirteen percent having no opinion.[27] Overall, both judges and court personnel reported that the

---

[23] FEDERAL JUDICIAL CENTER, COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS, 4-5 (1994).
[24] *Supra* note 22 at 24.
[25] *Supra*.
[26] *Supra* at 25.
[27] *Supra* at 19.

> media were very cooperative and complied with program guidelines and other restrictions that were imposed.[28]

6. CONCLUSION

Current data on the impact of cameras in the courtroom is limited. The studies that exist suffer from low sample sizes, self-reporting bias, and the inability to be replicated. Therefore, the data is generally not applicable to populations other than the exact population that was studied. However, the data is still useful at offering a limited perspective in how cameras in the courtroom impact trials. Most of the data shows that very few negative impacts are realized when cameras are in the courtroom. While further research is necessary, the limited data supports the move towards allowing cameras in the courtroom. However, anecdotal evidence from other jurisdictions may also support a cautionary approach to implementing cameras in the courtroom.[29]

---

[28] *Supra* note 22 at 7.
[29] See appendix for data from New York State Courts' Cameras in the Courtroom research.

Appendix

V. NEW YORK COURTS STUDY.[30]

Attorneys Reported:

- Thirty-seven percent of attorneys reported that the atmosphere in the courtroom was tense and 35% stated that the atmosphere was uneasy as a result of audio-visual coverage. Thirty-seven percent of the attorney respondents reported that they were more self-conscious as a result of audio-visual coverage.
- Thirty-eight percent of attorney respondents stated that the testimony of witnesses was affected by audio-visual coverage. Among those who said that witnesses were affected by audio-visual coverage, 28% of the attorney-respondents stated that witnesses had a reluctance to be identified or broadcasted; 14% said that audio-visual coverage places pressure on the witnesses; 10% believed that witnesses appeared nervous and/or anxious; 7% reported that witnesses appeared to be putting on an act and/or looking for public exposure, and an additional 7% felt that witnesses did not concentrate on the testimony as a result of the presence of the media.
- Thirty-four percent of attorney-respondents were concerned that au- dio-visual coverage would affect the security of their witnesses and clients.

[30] JACK T. LITMAN, MINORITY REPORT OF THE COMMITTEE ON AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, 16-18 (1994) (quoting Joseph Jaffe, New York State Bar Ass'n, Memorandum (1991), derived from Office of Ct. Admin., Report A-109 to A-125 (Mar. 1991)).

- Twenty-three percent of the attorney-respondents found the presence of cameras distracting.
- Twenty-seven percent of attorney-respondents believed that the procedures leading to the decision to permit audio-visual coverage did not allow them sufficient time to ascertain the views of their clients or witnesses.
- Five percent of the attorneys who had one or more of their witnesses receive audio-visual coverage stated that one or more of their witnesses refused to and did not testify because of audio-visual coverage. Fifteen percent of attorneys whose witnesses experienced audio-visual coverage stated that one or more of their witnesses initially declined to testify because of audio-visual coverage, but nonetheless did testify.
- 3% of attorneys stated that the court compelled one or more of their witnesses to testify.
- Forty-six percent of attorneys believe that audio-visual coverage of arraignments negatively affects fairness.
- Forty-four percent of attorneys stated that audio-visual coverage of trials negatively affects fairness.
- With regard to suppression hearings and sentencings, 64% and 34%, respectively, believe that audio-visual coverage affects these proceedings negatively.

Defense Attorneys Reported:

- Fifty-six percent of defense attorneys felt that the fairness of trials was negatively affected by audio-visual coverage.

- Sixty-seven percent of defense attorneys felt that the fairness of arraignments was negatively affected by audio-visual coverage.
- Eighty percent of defense attorneys felt that the fairness of suppression hearings was negatively affected by audio-visual coverage.
- Fifty-four percent of defense attorneys felt that the fairness of sentencings was negatively affected by audio-visual coverage.

Prosecutors Reported:

- Twenty-six percent of prosecutors felt that the fairness of trials was negatively affected by audio-visual coverage.
- Overall, 18% of prosecutors reported being opposed to audio-visual coverage in the courtroom.
- Twenty-three percent of prosecutors felt that the fairness of arraignments was negatively affected by audio-visual coverage.
- Fifty-three percent of prosecutors felt that the fairness of suppression hearings was negatively affected by audio-visual coverage.
- Ten percent of prosecutors felt that the fairness of sentencings was negatively affected by audio-visual coverage.

Jurors Reported:

- Nineteen percent of the jurors thought that fairness of trials would be negatively affected.
- The presence of cameras made 28% of juror respondents think the proceeding was more important.

Witnesses Reported:

- 27% of witnesses reported feeling either anxious or nervous because of the presence of cameras. 30% of witnesses reported feeling somewhat uneasy, and 39% felt either tense or somewhat tense.
- 39% of witnesses reported that the presence of cameras had some effect on them. Of these witnesses, 39% indicated they were tense or somewhat tense, 30% felt somewhat uneasy, 44% felt somewhat more self-conscious, 16% felt somewhat insecure, 10% were reluctant to participate, 21% felt that the case was more serious, and 19% of the witnesses reported being distracted.

TO: Justice Thissen
FROM: Kaitlin Yira
RE: Cameras in the Courtroom
DATE: 11/04/2021

CAMERAS IN THE COURTROOM ACROSS JURISDICTIONS

I. JURISDICTIONS VARY ON THE NUMBER OF CAMERAS AND MEDIA PERSONNEL ALLOWED IN THE COURTROOM.

Most states have a rule that specifies the number of cameras and media personnel that can be inside the courtroom during a trial. Connecticut courts allow one still camera, one audio recording device, and one TV camera in the courtroom.[1] Artificial lighting is not permitted in Connecticut courts. The judge presiding judge is responsible for determining the placement of the cameras. The judge must minimize intrusion when placing the cameras while, also, maximizing the view the camera captures. Connecticut courts do not allow camera operators to move until the end of the trial (once the camera location has been designated).

In Indiana, all recording equipment must be in place at least 30 minutes before the start of oral argument and may not be moved until adjournment or recess.[2] Additionally, camera operators are not allowed to change lenses or cassettes during the proceedings. In Indiana, the court is responsible for designating suitable areas for recording equipment. These areas must provide "reasonable access to coverage."[3]

Maryland courts allow one TV camera in trial courts and up to two TV cameras in appellate courts.[4] The courts limit still cameras to one photographer using up to two still cameras with up to two lenses for each camera. Maryland further specifies that only one audio system for

[1] CONN. PRACTICE BOOK §§ 1-10-11C, 70-9 (2021).
[2] STANDARDS GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY AT ORAL ARGUMENTS IN THE COURT OF APPEALS OF INDIANA (Ind. 2019).
[3] *Id.*
[4] MD. R. CTS. JUDGES & ATT'YS Rule 16-607 (2020).

broadcasting shall be permitted in a proceeding. Only if the Maryland court does not have a built-in audio system may the media use their own equipment to record audio. Limitations are in place to ensure the microphones are mutable and no privileged communication is recorded. Media personnel and their equipment must stay withing in the location which was approved by the judge prior to trial. There shall be no movement of media personnel or their equipment until recess or conclusion of the trial.

New Jersey does not allow any equipment that produces a distracting sound or light.[5] The court may require proof that the equipment meets these guidelines before the equipment is used in a proceeding. If during a proceeding the court finds the equipment to produce distracting sound or light, the court may order the operator to cease use of the distracting equipment. New Jersey courts do not allow any artificial light sources to be brought into the courtroom. However, with the court and building owner's approval, modifications, and additions to the light sources in the courtroom may be made at the cost of the media.

North Carolina requires that media personnel and their equipment are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.[6] This is done by way of booth or other partitioning device built at the expense of the media. The build must be in harmony with the style and décor of the courtroom and must be approved by the most senior judge and the governing body that owns the facility.

II. JURISDICTIONS VARY ON WHO MUST CONSENT TO MEDIA COVERAGE.

Most states require, at minimum, the presiding judge's approval before expanded media coverage of a trial. Other states, like Alabama, also require written consent from the attorneys the

[5] N.J. DIRECTIVES Dir. 11-20 (2020).
[6] N.C. SUPER. CT. & DIST. CT. R. 15 (2021).

parties involved in a matter before expanded media coverage is allowed.[7] Trial courts in Maryland require the written consent of all parties or consent stated on the record in open court before extended media coverage is allowed.[8] Consent of the parties is not required in Maryland's Court of Appeals. In comparison, New Jersey cameras in the courtroom rules explicitly state the court shall not condition the decision of whether to grant the media's request to broadcast "upon obtaining consent of any party, and party's attorney, or any witness or participant in a proceeding."[9]

III. JURISDICTIONS VARY ON WHO MAY OBJECT TO MEDIA COVERAGE.

In Alaska, judges may only deny requests for media coverage with specific, on the record findings that the harm from one of the delineated factors outweighs the public benefit of expanded media coverage.[10] In Nebraska, any party to the proceeding may object to media coverage of the trial.[11] In addition, any witness may object to coverage and, upon showing of good cause, a judge may deny media coverage of that witness' testimony. In Arizona, parties must object to media coverage in writing or on the record before the start of the proceeding. A party waives the right to object to coverage after the proceeding begins. In contrast, victims or witnesses may object to media coverage at any time in Arizona courts.[12]

In Vermont, any judge wishing to limit media coverage must have a hearing on the motion.[13] In that hearing the court will consider: (1) the impact of recording or transmitting on the rights of the parties to a fair trial, (2) whether the private nature of testimony outweighs its public value, (3) the likelihood that physical, emotional, economic or proprietary injury may be

---

[7] ALA. CANONS OF JUD. ETHICS Canon 3(A)(7), 7(B) (2019).
[8] MD. R. CTS. JUDGES & ATT'YS Rule 16-607 (2020).
[9] N.J. DIRECTIVES Dir. 11-20 (2020).
[10] ALASKA R. ADMIN. 50 (2021).
[11] NEB. R. CT. § 6-2003 (2021).
[12] R. ARIZ. SUP. CT. R. 122 (2021).
[13] ORDER ABROGATING AND REPLACING RULE 79.2 VT. R. CIV. PRO (2019).

caused to a witness, a party, the alleged victim, or other person or entity, (4) the age, mental condition, and medical condition of the party, witness, or alleged victim, (5) whether sequestration of the jury, a delay in transmitting until a verdict has been rendered (if agreed upon by the media or person seeking to transmit), or some other means short of prohibition would protect the interests of the parties, witnesses, or other persons, and (6) other good cause. The person seeking an order has the burden of persuading the court by a preponderance that the court should limit media coverage.[14]

IV. JURISDICTIONS VARY ON WHETHER A JUDGE'S DECISION TO EXPAND OR LIMIT MEDIA COVERAGE IS APPEALABLE.

In Nebraska, a judge's decision on whether to limit or deny media coverage is a non-appealable temporary injunction or a suspension of expanded media coverage.[15] In New Jersey any requestor aggrieved by a decision concerning expanded media coverage may move for leave to appeal the decision to a higher court.[16] The motion must be made within three business days after such decision. In Wisconsin, a judge's decision on expanded media coverage is only appealable to the chief judge of the administrative district as an administrative matter.[17] The appellate courts in Wisconsin have no authority to review a lower court's decision on expanded media coverage.

In Alaska, a party whose request for expanded media coverage has been denied or restricted may ask for a reconsideration.[18] The reconsideration request must be in writing in the form of a letter and submitted to the trial court's judicial officer. It must state the reasons the denial of expanded coverage was improper and be served upon all parties. The judge may request

[14] *Id*.
[15] NEB. R. CT. § 6-2003 (2021).
[16] N.J. DIRECTIVES Dir. 11-20 (2020).
[17] WIS. S. CT. R. 61.10 (1979).
[18] ALASKA R. ADMIN. 50 (2021).

the parties submit memoranda in response to the reconsideration request. If the reconsideration request is denied, the party may petition for review under the Alaska Appellate Rules. In Colorado, only a party to the case may appeal the ruling on expanded media coverage. The appeal may be by review of a ruling by original proceeding, if otherwise appropriate, or by post-trial appeal.

V. MOST JURISDICTIONS AGREE COURTROOM CAMERA FOOTAGE IS NOT ADMISSIBLE AS EVIDENCE.

The applicable rule from North Carolina states, "[n]one of the film, . . . or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings."[19] In New Jersey, the rule states that not recordings shall be admissible as evidence or used to challenge the accuracy of the official court record.[20] However, in New Jersey, it is the court's discretion whether recordings can be used as evidence in a separate proceeding. In general, however, the majority of jurisdictions do not allow courtroom camera footage to be used as evidence in subsequent trials or appeals.

VI. MOST JURISDICTIONS HAVE RULES TO FACILITATE POOLING AGREEMENTS AMONGST THE MEDIA.

To limit the obtrusion of media in the courtroom, most courts require the media to create pooling agreements so that the number of media personnel present during a trial is limited. Connecticut makes the pooling agreements the responsibility of the media personnel.[21] Maryland specifies that pooling agreements are to be the responsibility of the media and that the courts will

[19] N.C. SUPER. CT. & DIST. CT. R. 15 (2021).
[20] N.J. DIRECTIVES Dir. 11-20 (2020).
[21] CONN. PRACTICE BOOK §§ 1-10-11C, 70-9 (2021).

not get involved with any disputes surrounding pooling agreements.[22] South Dakota requires media personnel to facilitate pooling agreements and implement procedures required by the court.[23] South Dakota courts have a media coordinator who oversees media coverage and acts as the designated liaison between the courts and the media.

VII. SOME JURISDICTIONS SPECIFY HOW VIOLATIONS OF CAMERAS IN THE COURTROOM RULES ARE HANDLED.

The punishment for violating the court rules surrounding media coverage vary by jurisdiction. In Nebraska, media personnel must be credentialed by the court administrator to record in the courtroom.[24] Media personnel may lose this credential if there is good cause to find the media has acted or failed to act in accordance with the courts' rules regarding cameras in the courtroom. South Carolina courts give the presiding judge authority to subject any media representative to an "appropriate sanction" upon failure to comply with the court's media rules.[25] Failure to comply with the court's media rules in South Dakota is punishable by sanction or contempt proceedings pursuant to South Dakota law.[26] Yet other jurisdictions do not directly specify how violations of the court's camera rules will be handled.

In general, jurisdictions vary broadly on the specificity of courtroom camera rules. Some jurisdictions prioritize the openness of courtrooms and prioritize media access to the courts. Other jurisdictions favor the protection of the rights of the parties and witnesses in the courtroom over media access. Another approach is to leave courtroom camera rules to the discretion of the presiding judge. As follows, a contrasting approach is to have the supreme court of the state

[22] MD. R. CTS. JUDGES & ATT'YS Rule 16-607 (2020).
[23] S.D. CODIFIED LAWS § 16-20-3 (2021).
[24] NEB. R. CT. § 6-2003 (2021).
[25] S.C. R. CT. APP. R. 605 (2021).
[26] S.D. CODIFIED LAWS § 16-20-3 (2021).

create specific and uniform rules that are to be followed by all courts in the state. Whichever approach is taken depends greatly on the policy arguments that the judicial system finds most persuasive.

IS AUDIO/VIDEO RECORDING ALLOWED?

	Pretiral	Trial	Post-conviction
ALABAMA		Yes, but only with Supreme Court authorization, consent of parties and local officals, as perscribed by the Alabama Cannons of Judical Ethics. Cannon 3 of the Cannons of Judical Ethics governs, and the rules do not differentiate between pretrial, trial, and post-conviction matters. Ala. Cannons Jud. Ethics, cannon 3.	
ALASKA		Yes, but district court trials requires the permission of the presiding judicial officer or the clerk of the court of appeals. Permission is requested by submitting an application, entitled "Application for Photographing, Filming, Recording, or Streaming." Rule 50 of the Alaska Courts Rules of administration govern, and they do not differentiate between pretrial, trial, and post-conviction matters. Alaska Ct. R. Admin. 50.	
ARIZONA	Yes, but any recording or photography must be preapproved by the presiding judge. For any non-trial proceeding, a written application must be submitted as soon as possible, but no less than 48 hours before the start of the proceeding. Ariz. R. Sup. Ct. 122.	Yes, but any recording or photography must be preapproved by the presiding judge. For trials, a written application to record must be sumitted 7 days prior. Ariz. R. Sup. Ct. 122.	Yes, but any recording or photography must be preapproved by the presiding judge. For any non-trial proceeding, a written application must be submitted as soon as possible, but no less than 48 hours before the start of the proceeding. Ariz. R. Sup. Ct. 122.
ARKANSAS		Yes, but with approval of the presiding judge. Certain exceptions apply. The rules do not differentiate between pretrial, trial, and post conviction matters. Ark. Admin. Ord. 6 (b).	
CALIFORNIA		Yes, but only with permission of the presiding judge granted by written order. The judge may permit, refuse, limit, or terminate media coverage at their discretion. Requests for media coverage must be submitted 5 days prior to the proceeding, and there is a standardized request form that must be submitted titled "Media Request to Photograph, Record, or Broadcast: form MC-510" Cal. R. Ct. 1.150(e). The rules do not differentiate between pretrial, trial, and post conviction matters.	
COLORADO	No media coverage of pretrial hearings in criminal cases, except for advisements and arraignments. Colo. Pub. Access R. 3(3)(A).	Yes, with prior authorization of the presiding judge. A written request must be submitted at least one day prior to the proceeding, unless the judge specifies otherwise, and the request shall list the type of media coverage requested(audio, video, or still photography) and any pooling arrangements that may be required. The judge shall rule on the request(and any subsequnt objections) on the record and state any reasoning behind their decision. Colo. Pub. Access R. 3(6). The rules do not differentiate post-conviction matters.	
CONNECTICUT	Media coverage of criminal arraignments requires authorization of the presiding judge, which is to be submitted via email prior to the hearing to the chief court administrator. The request must be shared with involved parties. Electronic coverage will not be allowed until the defendant has had the opportunity to object to the coverage on the record, should they wish to do so. If a request is granted or denied over the defendant's objection, the judge must state the reasoning for such decision on the record. Conn. R. Superior Cts. §1-11A.	Yes, subject to certain limitations. For criminal cases, a written notice of media coverage must be submitted three days prior to the administrative judge of the relevant judical district. The presiding judge has the authority to limit or preclude the media coverage, and must do so at a hearing with notice given to all impacted parties. Parties will have the opportunity to object. If the judge decides to limit of preclude the request, they must state their reasoning on the record and the decision shall be final. Conn. R. Superior Cts. §1-11C(a).	
DELAWARE		No. This is prohibition is even directly in the Delaware Judges' Code of Judicial Conduct, which states "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except as authorized by a court rule or administrative directive which has been either promulgated or approved by the Delaware Supreme Court." Del. Judges Code Jud. Conduct 2.10(c).	
FLORIDA		Yes, subject to the discresion of the presiding judge in the proceeding. The rules do not describe the procedures for applying or requesting permission. The rules do not differentiate between pretrial, trial, and post-conviction matters. The rules also apply to both trial court and appellate courts. Fla. R. Gen. Prac. & Jud. Admin. 2.450(a).	
GEORGIA	No. Criminal pretrial proceedings happen in front of the State Courts, whereas trials happens in front of the Superior Courts. The Uniform Rules of the State Courts do not contain provisions allowing for the recording of proceedings. *See generally* Uniform R. State Cts Ga.	Yes, if approved by the judge after submitting a written application within 24 hours of the procceding. The judge must supply a copy of that request to all parites, witnesses, and victims, and must hold a hearing on the request if the judge plans to deny the request or if any notified person objects to the request. Any objection to the recording taking place must happen in writing prior to, or on the record at the start of the proceeding. Uniform R. Superior Ct. Ga. 22(F).	
HAWAII		Yes, with authorization from the presiding judge. Any party wishing to record must submit a written "request for extended coverage" to the designated administrative cordinator in the given court. The request must be made with "reasonable advanced notice." Requests for coverage cover an entire case, including pretrial, post-conviction motions, and any appeals, and one request will be sufficent for any media or organizations that wosh to cover the case. All effected parties shall be given notice of the request for coverage. The judge shall dispose of requests on the record if requested by a party, and if the request is denied or limited, must make written finding of fact and law related to the decision. Haw. R. Sup. Ct. 5.1 (e) & (f).	
IDAHO		Yes, with advanced approval of the presiding judge. Approval may be obtained by submitting a written request form in advance of the hearings, after which point the judge will issue an order granting, denying, or limiting the scope of the request. The rules do not differentiate between pretrial, trial, and post-conviction matters. Idaho Ct. Admin. R. 45(g).	
ILLINOIS		Yes, but only with prior approval to the "extended media coverage" by both the presiding judge and the chief judge of the circuit. The application for extended media coverage must be made 14 days prior to the proceeding, and the nature and scope of the request must be shared with all parties and counsel by the Court Clerk. The rules laid out in the order do not differentiate between pretrial, trial, and post-conviction matters. Ill. Sup. Ct. Ord. MR 2634, 1.3(b).	
INDIANA		No, as a general rule, no broadcasting or recording is allowed. However there is an exception for a limited pilot project involving five judges, which still requires rhe authorization of the presiding judge. Appellate level arguments may also be recorded and broadcast. Ind. Code Judicial Conduct 2.17.	
IOWA	Special rules for initial appearances in criminal cases.	Yes. Expanded news media coverage requires express judicial officer authorization. Request must be made at least seven days in advance to the proceeding to the regional expanded news media coordinator. Iowa R. Civ. P. 25.2	

KANSAS		Yes, but only with permission of the presiding judge, limited to news and educational media organizations for the narrow use of education and news dissemination. All requests must be made one week in advance of the procceding. The rules do not describe the mechanisms for making such request. The rules do not differentiate between pretrial, tiral, and post-conviction matters. R. Adopted Sup. Ct. Kan. 1001(e).	
KENTUCKY		Recording and audio coverage permitted in appellate and trial court proceedings with authorization of the presiding judge. Requests for approval do not need to be in any particular form. Ky. SCR 1.	
LOUISIANA		Yes, but only permission of the presiding judge in advance of the proceeding. The request for "extended coverage" must be filed with the clerk of the court 20 days prior to the proceeding. The judge has discretion to prohibit or limit the coverage as they see fit. La. Code Jud. Conduct, Appendix to Cannon 3, III.	
MAINE		Yes, but only if authorized by the presiding judge of the proceeding. Requests for coverage must be made at least 24 hours in advance of the proceedings to the Clerk of Court office that is handling the case. The decision to grant coverage is at the sole discretion of the presiding judge, and is not subject to appeal or review by a higher court. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), II. The rules do not differentiate between pretrial, trial, and post conviction matters, but they do differ between civil and criminal proceedings.	
MARYLAND		Yes, but coverage is limited to civil matters only, with advanced approval of the presiding judge. Requests for "extended media coverage" must be made in writing five days in advance of the proceeding. The request must be filed with the court clerk, who is responsible for sharing it with all parties. Md. R. Ct. Admin. 16-604. The presiding judge may grant or deny the request with any limitations of conditions they find appropriate. Md. R. Ct. Admin. 16-605. The rules do not differentiate between pretril, trial, and post-conviction matters.	
MASSACHUSETTS		Yes, with prior authorization of the presiding judge or magistrate. In the absence of advanced notice, the judge may refuse to admit the media who is hoping to cover the proceeding. The rules do not differentiate between pretrial, trial, and post-conviction matters. Mass. Sup. Jud. Ct. R. 1:19	
MICHIGAN		Yes, up to the discretion of the presiding judge, if requested at least three days before the proceeding. The request must be made in writing to the clerk of the court, and the court is to share the request with all parties. The rules do not differentiate between pretrial, trail, and post-conviction matters. Mich. Sup. Ct. Admin. Ord. 1981-1, 2(a)(i).	
MINNESOTA		Yes, but only with advanced notice to the court, and certain to several limitations laid out in the rules. Notice must be made 7 days prior to the proceeding, and must be shared with the judge and court administrator. The court administrator will share the notice with all parties involved in the proceeding, who will then have the opportunity to object via written notice. Minn. Ct. Genral R. Prac. 4.02, 4.03.	
MISSOURI		Yes, permitted on a case-by-case basis with the prior authorization of the presiding judge. Mo. Ct. Operating R. 16.02(a). Requests for media coverage must be made at least two days prior to the proceeding to the appointed media coordinator, who will then share the request with all parties and the judge. The judge may choose to hold a hearing concerning the requests and any objections, and may set terms and conditions for the coverage. Mo. Ct. Operating R. 16.03. The rules do not differentiate between pretrial, trial, and post conviction matters.	
MISSISSIPPI		Yes, subject to the permission of the presiding judge, who may limit or terminate the coverage at any point at their discretion. Media wishing to cover a proceeding must provide notice to the clerk and court administrator at least 48 hours prior. Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 3(a), rule 6. The rules do not differentiate between pretrial, trial, and post conviction matters.	
MONTANA		Yes, subject to the discretion of the presiding judge. See Mont. Cannon of Jud. Ethics, 35. The general rules are contained in the Cannons of Ethics, however the local rules of the judicial district may also apply, which may limit what can be covered and set forth other terms and conditions. I've included examples from the local rules of District 4 and Disctrict 19 throughout.	
NEBRASKA		Yes, recording is allowed with prior authorization of the judicial officer. Neb. Sup. Ct. R. § 6-2003(A). Requests should be made in writing seven days prior to the proceeding to the clerk of the court. Copies of the request shall be shared with all parties. Neb. Sup. Ct. R. § 6-2004(C).	
NEVADA	Yes. There is a presumption that any courtroom proceeding open to the public is subject to electronic coverage. News reporters desiring permission to provide electronic coverage of a proceeding in the courtroom must file a written request with the judge at least 24 hours before the proceeding commences. The judge may grant requests on shorter notice or waive the notice requirement altogether. Nev. Sup. Ct. R. 230.	Yes. There is a presumption that any courtroom proceeding open to the public is subject to electronic coverage. News reporters desiring permission to provide electronic coverage of a proceeding in the courtroom must file a written request with the judge at least 24 hours before the proceeding commences. The judge may grant requests on shorter notice or waive the notice requirement altogether. Nev. Sup. Ct. R. 230.	Yes. There is a presumption that any courtroom proceeding open to the public is subject to electronic coverage. News reporters desiring permission to provide electronic coverage of a proceeding in the courtroom must file a written request with the judge at least 24 hours before the proceeding commences. The judge may grant requests on shorter notice or waive the notice requirement altogether. Nev. Sup. Ct. R. 230.
NEW HAMPSHIRE		Yes, recording is allowed so long as the proceeding is open to the public and advance notice, either in-writing or on the record, is provided to the court. NH. R. Super. Ct. 204(a), (c). The rules do not differentiate between pretrial, trial, and post conviction matters.	
NEW JERSEY		Yes, recording is allowed with advanced permission of the court. The court retains all discretion to modify or rescind such permission as needed. N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts. (H) §§ 2, 3. The rules do not differentiate between pretrial, trial, and post conviction matters.	
NEW MEXICO		Yes, at the discretion of the judge. Advanced notice of coverage, made to the clerk 24 hours prior to the proceeding, is required. N.M. Sup. Ct. Gen. R., 23-107(a), (c). The rules do not differentiate between pretrial, trial, and post conviction matters.	

NEW YORK	Yes, subject to the limitations of the rules and at the discretion of the presiding judge. See N.Y. R. of the Chief Admin. Judge §131. Media coverage may be requested prior to the proceeding in writing by members of the media. The judge may also issue an order granting access orally on the record, or via order, if no request from media has been formally made. When necessary, the judge may hold a pre-trial conference to consider the impacts of the media coverage and the opinions of the parties involved. See N.Y. R. of the Chief Admin. Judge §131.3(b). The rules do not differentiate between pretrial, trial, and post conviction matters.	
NORTH CAROLINA	Yes, subject at all times to the authority and discretion of the presiding judge. Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(b)(1). The rules do not differentiate between pretrial, trial, and post conviction matters.	
NORTH DAKOTA	Yes, limited to the members of the media and at the discretion of the court. N.D. Sup. Ct. Admin. R. 21 § 4(b). Media must request access to cover the proceeding seven days in advance. Notice of the request must be shared with all parties. N.D. Sup. Ct. Admin. R. 21 § 5(b). The rules do not differentiate between pretrial, trial, and post conviction matters.	
OHIO	Yes. With advanced permission of the presiding judge, requested in writing, and granted via written order of the judge. R. of Superintendence for Cts of Ohio, rule 12(A). The rules do not differentiate between pretrial, trial, and post conviction matters.	
OKLAHOMA	Yes, but only if permitted by local district court rules. Local rule example: in Oklahoma County, express permission of the judge must be obtained before recording or photography of any kind is allowed. Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01	
OREGON	Yes, if requested in advance of the proceeding and with permission of the court at their discretion. Notice of the request must be shared with all parties. Or. Uniform Trial Ct. R. 3.180(1), (2).	
PENNSYLVANIA	Generally no. However limited coverage may be allowed in non-jury civil trials. See Penn. Sup. Ct R. 1910.	
RHODE ISLAND	Yes, at the sole discretion of the presiding "trial justice." R.I. Sup. Ct. R., Art. VII, cannon 11.	
SOUTH CAROLINA	Yes, in limited circumstances if authorized by the presiding judge. Written notice in advance of the proceeding is required. S.C. Appellate Ct. R. 605(f).	
SOUTH DAKOTA	Yes, with the authorization of the presiding judge. See S.D. Cannons of Jud. Conduct 3(b)(12).	
TENNESSEE	Yes, subject to the authority of the presiding judge. Requests for coverage must be made at least two days in advance of the proceeding. Notice of the request must be made to the clerk who is responsible for posting the notice on the public docket. Tenn. Sup. Ct. R. 30A. Before a judge limits or denys a request for coverage, they must hold an evidentiary hearing on the record to consider the requests, its merits, and rule on the matter. Tenn. Sup. Ct. R. 30D(2).	
TEXAS	Generally yes, local district/county rules determine whether or not recording is allowed in criminal trial courts. Civil and appellate courts are governed by state rules and typically permitted with some limitations. Local rules example: media coverage o fpublic proceedings is allowed, subject to the courts discretion to determine competing rights and to preseve the dignity of the court. R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex. 1,2.	
UTAH	Yes, with advanced permission and subject to the judge's discretion to limit or prohibit coverage in certain circumstances. News reporters wishing to cover a proceeding must submit a written request at least one day in advance of the proceeding Utah Code of Jud. Admin. 4-401.01(2), (3).	
VERMONT	Yes, but limited to registered media members, and at the discretion of the court. Members of the media may either apply for permanent registration, or one-time registration with the Court Administrator. Vt. R. Crim. Proced. 53(d)(2).	
VIRGINIA	Yes, but only if authorized by the court's sole discretion. Cd. of Va. R. Crim. P. § 19.2-266.	
WASHNGTON	Yes, allowed with express permission of the presiding judge. Wash. St. Ct. Gen. R. 16(a).	
WEST VIRGINIA	In trial courtrooms, cameras and audio equipment permitted at the discretion of the presiding circuit court judge or magistrate ("presiding officer"). Requests must be made at least 1 day prior to proceeding. WV Trial Ct. Rule 8.01, 8.02.	Audio recording devices are prohibited—the media must use the court designated live audio feed. WV Rules. App. Proc., Rule 42(a), (f). With early as possible notification, media coverage using cameras or equipment used for word processing may receive permission from the Court for a trial proceeding. WV Rules. App. Proc., Rule 42(a)–(b). The Clerk or public information officer may terminate coverage at any time during the proceeding if the coverage will impede justice or will create unfairness for any party. WV Rules. App. Proc., Rule 42(c); WV Trial Ct. Rule 8.03.
WISCONSIN	Yes, audio and recording allowed in courtrooms. The trial judge shall receive notice of media intent to bring cameras or recording equipment into courtroom three days in advance. However, the trial judge may exercise discretion in waiving the notice rule for cause. Wisc. Sup. Ct. R. 61.02(2)	
WYOMING	Under the Wyoming Rules of Criminal Procedure, audio and video recording allowed in appellate and trial court level courtrooms at the discretion of the judge. Requests must be made 24 hours before the proceeding unless good cause shown for later request. Wyo. R. Cr. P. 53(1).	

ARE THERE LIMITATIONS ON THE TYPES OF PROCEEDINGS WHERE AUDIO/VIDEO RECORDING IS ALLOWED?

	Pretrial	Trial	Post-conviction
ALABAMA		No, all decisions are left up to the Supreme Court when authorizing a coverage plan and the rules do not differentiate between different types of proceedings. Ala. Cannons of Jud. Ethics, cannon 3.	
ALASKA		No limits on certain types of proceedings that may be recorded (after permission has been received) However, the rules state that bench conferences, and any confidential communications between counsel and or clients, cannot be recorded. Alaska Ct. R. Admin. 50.	
ARIZONA		There are no direct limitations in the rules on the types of proceedings that can be recorded, and is ultimately up to the discreition of the presiding judge when approving the application for coverage. However, the rules specify that recording devices cannot be used while the judge is off the bench, bench conferences and conversations between counsel and clients are also off limits for any recording. Ariz. R. Sup. Ct. 122.	
ARKANSAS		Yes, the rules state that any "in camera" proceedings shall not be broadcast, recorded, or photographed. However no other type of proceeding is directly prohibited and all decisions are left up to the presiding judge with some exceptions. Ark. Admin. Ord. 6 (C)(4).	
CALIFORNIA		The rules state the following are prohibited from media coverage: (A) Proceedings held in chambers; (B) Proceedings closed to the public; (C) Jury selection; (D) Jurors or spectators; or (E) Conferences between an attorney and a client, witness, or aide; between attorneys; or between counsel and the judge at the bench. Cal. R. Ct. 1.150(e)(6).	
COLORADO	No media coverage of pretrial hearings in criminal cases, except for advisements and arraignments. Colo. Pub. Access R. 3(3)(A).	Yes. The following are off limits for media coverage: jury voir die, audio or close-up photography of bench conferences and counsel/client conversation, in camera heaarings. Colo. Pub. Access R. 3(3).	
CONNECTICUT	For pretrial arraignments, the following limitations apply: proccedings where the case was transferred from juvenile court are not allowed to be covered until there is a determination that the case was properly transferred. Conn. R. Superior Cts. §1-11(C)(7).	Yes. No broadcasting, televising, recording or photography of the following proceedings: any proceedings held in the absence of the jury during a jury trial, any proceedings that are not held in open court on the record. Conn. R. Superior Cts. §1-10B(a).	
DELAWARE		No.	
FLORIDA		The only limitation described in the rules prohbits the audio pick up or broadcast of bench conferences between counsel and the judge, between co-counsel, and conversations between counsel and clients. Fla. R. Gen. Prac. & Jud. Admin. 2.450(a).	
GEORGIA		Yes. No recording of bench confernces is allowed, nor are any privlegd or confidential communications. In addition, "the nature of the proceeding" is a factor by which the judge is to consider when making their decision on a request for coverage. Uniform R. Superior Cts. Ga. 22(F).	
HAWAII		No, any proceeding that is open to the public may potentially be recorded, subject to the permission of the judge and the perameters of the Rules of the Supremem Court. However, conferences between attorney's and clients, co-counsel and clients or parties, or between counsel and the judge are also off limits, this includes conversation in chambers. *See* Haw. R. Sup. Ct. 5.1(4).	
IDAHO		Yes. No broadcast, video or audio coverage, or recording of: conferences between attonrey's and clients, between co-counsel, or between counsel and the presiding judge. In-camera sessions and jury deliberations are also off limits. Idaho Ct. Admin. R. 45(c)(1), (2).	
ILLINOIS		Yes. No audio or visual broadcast/recording is allowed of conferences involving attorneys and client, between co-counsel, between attorney's and opposing counsel, or between attorneys and the judge. Ill. Sup. Ct. Ord. MR 2634, 1.2(e).	
INDIANA		For the limited scope of the pilot project, the following are prohibited from broadcast: jury selection, attorney-client communications and bench conferences. Ind. Sup. Ct. Ord. 21S-MS-454, 7.	
IOWA	Expanded media coverage permitted during initial appearances in criminal proceedings with authorization by judicial officer and is subject to objection by the prosecutor, defendant, or defendant's attorney. Iowa R. Civ. P. 25.2(4).	Expanded news media coverage prohibited in jury selection, private court proceedings required by Iowa law, and court conferences. Iowa R. Civ. P. 25.2(5)–(7).	
KANSAS		Conferences between attorneys and clients, among cocouncel, counsel and opposing counsel, or among attorneys and the judge are off limits. But other than that the rule is discretionary and provides no other direct limitations or prohibitions. R. Adopted Sup. Ct. Kan. 1001(e).	
KENTUCKY		Coverage of attorney-client conferences or conferences at the bench are prohibited. Ky. SCR 6.	
LOUISIANA		Extended coverage is prohibited in any proceeding that may or must be held in private by law. La. Code Jud. Conduct, Appendix to Cannon 3 III(B).	
MAINE		For civil proceedings, the following are prohibited from coverage: any proceeding that is closed to the public by statute, rule or order, and any bench, sidebar, or in-chambers conferences with lawyers, clients, and or witnesses. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), IA1(f), IA4. For criminal proceeding, the following are prohibted from coverage: witness testimony in both jury and non-jury trials, grand jury proceedings unless the witness is acting in an offical or representative capacity, any proceeding that is closed to the public by statute, rule or order, and any bench, and any bench, sidebar, or in-chambers conferences with lawyers, clients, and or witnesses. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), IB1.	
MARYLAND		Any recording, broadcast or other extended media coverage of criminal proceeding is prohibited by statute, including any trial, hearing, motion, or argument, whether in trial court or in front of a grand jury. Md. Code. Crim. Proc. §1-201(a)(1).	
MASSACHUSETTS		Voir dire hearings are off limits for any recording, in addition to any bench and side-bar confernces between counsel, and between counsel and clients. Mass. Sup. Jud. Ct. R. 1:19, 2(b).	
MICHIGAN		The jury selection process shall not be recorded. Mich. Sup. Ct. Admin. Ord. 1989-1, 2(a)(iii).	
MINNESOTA	For both civil and criminal proceeding, coverage is prohibited during voir dire, regardless of consent of parties. Minn. Ct. Genral R. Prac. 4.02(c)(i), (d)(i).	For both criminal proceedings that occur before a guilty plea has been entered or guilty verdict returned, and for civil proceedings, the following limitations apply: there shall be no coverage of hearings that take place outside the presence of the jury, no coverage of the court facility outside of the courtroom, and no coverage inside of the courtroom unless the judge is present and presiding. Minn. Ct. Genral R. Prac. 4.02(c)(iii), (iv), (v); (d)(iii), (iv), (v).	For criminal proceedings after a guilty plea has been accepted or guilty verdict returned, no coverage is allowed in: treatment courts, any hearing where the jury is present to determine aggravating factors, or when new pretrial proceedings begin after a reversal or an order for new trial. Minn. Ct. Genral R. Prac. 4.02(e)(i), (ii).
MISSOURI		Jury selection is off limits for media coverage. In addition, conferences between attorney's and clients, between co-counsel, between counsel and the judge held at the bench or in chambers, or between judges in an appellate proceeding are all off limits. Mo. Ct. Operating R. 16.02(b).	
MISSISSIPPI		Jury selection is off limits. Any procceding held in chambers, those closed to the public, and any off-record conversations are off limits. Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 4(b), (c), (d).	
MONTANA	Local rule example: jury voir dire proceedings are off limits for media coverage. Mont. 4th Jud. Dist. R. of Pract., 29.	The general rules state that any proceeding that is open to the public shall be open to media coverage, subject to the discretion of the presiding judge and any local rules. See Mont. Cannon of Jud. Ethics, 35.	
NEBRASKA	Pretrial motion hearings in criminal are off limits for media coverage. Additionally, all criminal and civil jury selection and grand jury proceeding are off limits. Neb. Sup. Ct. R. § 6-2003(F).	The following are off limits for media coverage: all proceedings in juvenile courts. Neb. Sup. Ct. R. § 6-2003(F).	
NEVADA		The general rule states any proceeding open to the public is subject to media coverage. Privileged conversations may not be recorded. Nev. Sup. Ct. R. 239.	
NEW HAMPSHIRE		No, all meetings open to the public may be recorded, subject to the discretion of the presiding judge. *See* NH. R. Superior Ct. 204.	
NEW JERSEY		"Transmission, broadcasting, recording and/or photographing is prohibited at any proceeding closed by court order, statute or Rule of Court." In addition, all juvenile proceedings are off limits for recording. N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts. (H) §§ 5, 6.	

NEW MEXICO	Jury selection process is off limits for media coverage. N.M. Sup. Ct. Gen. R., 23-107(A)(3).	"[R]ecording of a conference in the courtroom between members of the court, court and counsel, co-counsel, or counsel and client is not permitted." N.M. Sup. Ct. Gen. R., 23-107(A)(6).
NEW YORK	Coverage of the voir dire process is prohibited. N.Y. R. of the Chief Admin. Judge §131.7(b).	Any procceding that is closed to the public shall be prohibited from media coverage. N.Y. R. of the Chief Admin. Judge §131.7(g) Suppression hearings are also prohibited from media coverage, absent consent of all parties. N.Y. R. of the Chief Admin. Judge §131.7(h). Further, any conferences that occur between attorney's and their clients, between co-counsel of a client, or between counsel and the presiding trial judge, may not be recorded in anyway absent affirmative consent of parties. N.Y. R. of the Chief Admin. Judge §131.7(a).
NORTH CAROLINA		Coverage of the following types of proceedings is prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings. Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(b)(2).
NORTH DAKOTA	Jury selection may not be photographed, recorded, or broadcast. N.D. Sup. Ct. Admin. R. 21 §4(d).	The following are prohibited from media coverage: proceedings held in chambers, proceedings closed to the public, and conferences between an attorney and client, witness or aide, between attorneys, or between counsel. N.D. Sup. Ct. Admin. R. 21 §4(d).
OHIO		No, broadcasting or recording by electronic means and the taking of photographs, shall be permitted in any proceeding that is open to the public. R. of Superintendence for Cts of Ohio, rule 12.
OKLAHOMA		Local rule example: coverage is limited only to those proceedings which are open to the public. No coverage of criminal proceedings before the issues have been submitted to the jury, unless the defendant consents. Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01(A)(5)(b).
OREGON	Voir dire proceedings are off limits. Or. Uniform Trial Ct. R. 3.180(9)(e).	Proceedings in chambers are off limits. Or. Uniform Trial Ct. R. 3.180(9)(a). Recesses and anything that occurs off the record in a courtroom may not be recorded. Or. Uniform Trial Ct. R. 3.180(9)(g).
PENNSYLVANIA		Recording of any type is prohibited in any criminal proceeding. Penn. R. of Crim. Proced. 112(A)(1).
RHODE ISLAND	Voir dire examination of prospective jurors is off limits for media coverage. R.I. Sup. Ct. R., Art. VII, cannon 10.	Media coverage is not allowed in juvenile proceedings, adoption proceedings, or any other matters in the Family Court in which juveniles are significant participants in the court proceedings. In addition, any recording outside the courtroom, and recording inside the courtroom of proceedings that occur outside the pressense of a jury is prohibited, this includes: motions to suppress evidence, motions for judgment of acquittal or directed verdict, hearings to determine competence or relevance of evidence, motions in limine, and motions to dismiss for legal inadequacy of the indictment, information or complaint (criminal or civil). R.I. Sup. Ct. R., Art. VII, cannon 3.
SOUTH CAROLINA	Camera and audio coverage of prospective jurors during selection is prohibited. S.C. Appellate Ct. R. 605(f)(2)(iii).	Coverage of proceedings which are otherwise closed to the public is prohibited. S.C. Appellate Ct. R. 605(f)(2)(i). In addition, conferences between attorneys and their clients, between co-counsel of a client, between adverse counsel or between counsel and the presiding judge, are prohibited from any recording or broadcast. S.C. Appellate Ct. R. 605(f)(2)(ii).
SOUTH DAKOTA		There are no proceeding type limitations in the rules. *See* S.D. Cannons of Jud. Conduct 3(b)(12).
TENNESSEE	Media coverage of jury selection is prohibited. Tenn. Sup. Ct. R. 30C(2).	Media coverage of proceedings which are otherwise closed to the public by law is prohibited. Tenn. Sup. Ct. R. 30C(4). Further, media coverage of any conferences is prohibited, including those "between attorneys and their clients, between co-counsel of a client, between counsel and the presiding judge held at the bench or in chambers, or between judges in an appellate proceeding." Tenn. Sup. Ct. R. 30C(6).
TEXAS	Local rule example: media coverage of jury selection is prohibited. R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex. 5.1.	Local rule example: media coverage of proceedings held in chambers, and proceedings closed to the public, is prohibited. In addition, conferences between attorneys, clients, witnesses, and or the judge outside the pressence of the jury, may not be recorded. R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex. 5.1, 5.2.
UTAH		Media coverage is prohibited for the following: exhibits or documents not in the record, proceedings in chambers, bench conferences, and confidential communications between counsel and client, between clients, or between counsel. Utah Code of Jud. Admin. 4-401.01(6).
VERMONT		The following are off limits for media coverage: bench conferences, conferences between co-counsel, and proceedings in chambers. Vt. R. Crim. Proced. 53(e)(2).
VIRGINIA		No recording or broadcast of sound from conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench or in chambers. Cd. of Va. R. Crim. P. § 19.2-266(5).
WASHNGTON		There are no limitations in the rules, rather all limitation are left to the discretion of the presiding judge. *See* Wash. St. Ct. Gen. R. 16.
WEST VIRGINIA		Coverage limited to proceedings open to the public. WV Trial Ct. Rule 8.04. No audio or broadcasting coverage of conferences between attorneys and clients, or between attorneys, clients, and presiding officer. WV Trial Ct. Rule 8.04. Coverage of "nonjudicial meetings" may be permitted with the consent of the sponsoring group and the public information officer or the Clerk. WV Trial Ct. Rule 8.05.
WISCONSIN		Audio, broadcast, or recording of a conference in court facility between attorney and client, co-counsel, or attorneys and the trial judge not permitted. SCR 61.07. No audio or visual permitted during a recess in a court proceeding. Wisc. Sup. Ct. R. 61.08
WYOMING		No audio record of conferences between attorney and client or between counsel and presiding judge. Wyo. R. Cr. P. 53(6).

ARE THERE LIMITATIONS OF A SUBSTANTIVE NATURE OF PROCEEDINGS WHERE AUDIO/VIDEO RECORDING IS ALLOWED (e.g. sexual violence cases). Are these absolute prohibitions or discretionary limitations?

	Pretrial	Trial	Post-conviction
ALABAMA		There are no substantive limitiation or prohibitions in the rules. All limitations are up to the discretion of the Supreme Court when they authorize the plan by request of the trial or appellate judge. Ala. Cannons Jud. Ethics, cannon 3.	
ALASKA		The rules perscribe some limitation for certain types of cases in front of the Supreme Court and Court of Appeals, where the case involves "domestic violence, child custody and visitation, paternity, or other similar family proceedings, including child in need of aid cases, and in proceedings involving involuntary commitments or the involuntary administration of medications, in criminal cases involving a sexual offense, or in other cases where confidentiality is necessary" Recording can still take place, but counsel must use pseudonyms and parties, victims, and minors shall not appear on camera. Alaska Ct. R. Admin. 50.	
ARIZONA		Juvenile proceedings are not allowed to be recorded or broadcast, as perscribed by Arizona statute. Ariz. R. Sup. Ct. 122.	
ARKANSAS		The following are prohibited from broadcast, recording, or photography: "all juvenile matters in circuit court, all probate and domestic relations matters in circuit court (e.g., adoptions, guardianships, divorce, custody, support, and paternity), and all drug court proceedings." In Arkansas, circuit courts are trial courts of general jurisdiction. Ark. Admin. Ord. 6 (c)(3).	
CALIFORNIA		No. However, the sustantive nature of the proceedings is to be considered as a factor by the presiding judge when granting or denying a request. Cal. R. Ct. 1.150(e)(3)(D).	
COLORADO		No, there are no substantive limitiations directly in the rules. Any limitations on media coverage is up to the presiding judge. *See* Colo. Pub. Access R. 3.	
CONNECTICUT		No broadcasting, televising, recording or photography of the following proceedings: family relations matters(as defined in General statute §46b-1), juvenile matters(as defined in General statute §46b-121), sexual assault cases, and cases involving trade secrets. Conn. R. Superior Cts. §1-10B(a).	
DELAWARE		n/a	
FLORIDA		No subtantive limits are set out in the rules governing the use of electonic media in the courtrooms. *See generally* Fla. R. Gen. Prac. & Jud. Admin. 2.450.	
GEORGIA		No subtantive limits are stated in the rules, however "the nature of the proceeding" is a factor by which the judge is to consider when making their decision on a request for coverage. Uniform R. Superior Cts. Ga. 22(G)(1)(a).	
HAWAII		Proceedings that are closed to the public will be off limits for any recording, this includes: grand jury proceeding, juvenile cases, child abuse and neglect cases, paternity cases, and adoptions cases. Haw. R. Sup. Ct. 5.1 (g)(1).	
IDAHO		Any proceeding which are normally closed to the public cannot be recorded or covered, including: adoptions, mental health proceedings, child protective act proceedings, termination of parent child relations, grand jury proceedings, issuance of arrest and search warrant proceedings covered by Rule 32, Idaho Administrative Rules, or a comparable rule when the proceeding may be closed to effectuate the purposes of the rule. Idaho Ct. Admin. R. 45(c)(3).	
ILLINOIS		Yes. Any procceding which is required to be held in private by law is off limits for extended media coverage, which includes: any juvenile, dissolution, adoption, child custody, evidence suppression or trade secret cases. Ill. Sup. Ct. Ord. MR 2634, 1.2(c).	
INDIANA		For the limited scope of the pilot project, the following are prohibited from broadcast: Juvenile and CHINS(child in need of service) matters, guardianships, contested adoptions, mental health commitments, protection order hearings, and trade secrets. Ind. Sup. Ct. Ord. 21S-MS-454, 7.	
IOWA		Coverage is prohibited in any juvenile, dissolution, adoption, child custody, or trade secret cases unless consent on the record is obtained from all parties, including a parent or guardian of a minor child. Iowa R. Civ. P. 25.2(5).	
KANSAS		The rules state that if a participant to the proceeding requests coverage be prohibited, and the proceeding is either an evidence suppression hearing, a divorce proceeding, or a case involving trade secrets, than the judge must prohibit such coverage. R. Adopted Sup. Ct. Kan. 1001(e)(7).	
KENTUCKY		No media coverage permitted at juvenile proceedings because they are closed to the public. Ky. Rev. Stat. § 610.070.	
LOUISIANA		No, the governing rules do not place any limitations based on the substantive nature of the proceedings. See generally La. Code Jud. Conduct, Appendix to Cannon 3.	
MAINE		For civil proceedings, the following are prohibited from coverage: family division cases, child custody, child protection, adoption, paternity, and parental rights cases, cases involving protection from abuse or harassment, cases involving sexual assault or sexual misconduct, and trade secret cases. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), IA1. There are no sustantive limitations for criminal proceedings.	
MARYLAND		In general, any civil proceeding that is open to the public may be covered, so long as the consent requirments are followed. Md. R. Ct. Admin. 16-605.	
MASSACHUSETTS		No, the rules do not place any limitations based on the substance of the proceeding, but rather all limitations are left to the discretion of the presiding judge. *See* Mass. Sup. Jud. Ct. R. 1:19.	
MICHIGAN		Jurors may not be recorded or covered by media. All other limitations are left to the sole discretion of the presiding judge. Mich. Sup. Ct. Admin. Ord. 1989-1, 2(a)(iii).	
MINNESOTA		For civil proceedings, no coverage is allowed in cases involving: child custody, marriage dissolution, juvenile proceedings, child protection, paternity, orders for protection, or any proceeding not open to the public. Minn. Ct. Genral R. Prac. 4.02(c)(vi). For criminal proceedings that occur before a guilty plea has been entered or guilty verdict returned, no substantive limitations apply. *See* Minn. Ct. Genral R. Prac. 4.02(d).	For criminal proceedings after a guilty plea has been accepted or guilty verdict returned, no coverage is allowed when: the charged crime falls under the sex crimes statutes, or for murder in the first degree, or in any case where the victim is a familiy or household member, or any charge that is categorized as a qualified domestic violence-related offense. Minn. Ct. Genral R. Prac. 4.02(e)(iii).
MISSOURI		Any proceeding which is required to be closed to the public by Missouri law is off limits for coverage, including: certain juvenile, adoption, domestic relations, or child custody proceedings, except a judge may permit media coverage of a juvenile who is being prosecuted as an adult in a criminal proceeding. Mo. Ct. Operating R. 16.02(b).	
MISSISSIPPI		Procceding of the following type are prohibited from coverage: divorce; child custody; support; guardianship; conservatorship; commitment; waiver of parental consent to abortion; adoption; delinquency and neglect of minors; determination of paternity; termination of parental rights; domestic abuse; motions to suppress evidence; proceedings involving trade secrets; and in camera proceedings. Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 3(c).	
MONTANA		Neither the general rules, nor the local rules of the 4th and 19th judicial district, contain any substantive limitations.	
NEBRASKA		The following are off limits for media coverage: criminal and civil cases where the plaintiff and/or defendant is under 19 years of age(unless charged as an adult), dissolution/divorce/modification/child support enforcement hearings, all adoption proceedings, all paternity case proceedings, all protection order hearings, all guardianship/conservatorship/probate case proceedings, all trade secret case proceedings. Neb. Sup. Ct. R. § 6-2003(F).	
NEVADA		No substantive limits are set out by the rules governing media coverage. Generally, the media may be present wherever the public is entitled to be. Judges do have discretion on whether to grant media coverage, and one factor to consider is the right of privacy for parties and witnesses. Nev. Sup. Ct. R. 230.	
NEW HAMPSHIRE		No, all meetings open to the public may be recorded, subject to the discretion of the presiding judge. See NH. R. Superior Ct. 204.	
NEW JERSEY		No. There are no limits based on the substantive nature of the proceedings. See N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts. (H).	
NEW MEXICO		There are no limitation based on the substance of the proceeding, rather all limitations are up to the discretion of the presiding judge. N.M. Sup. Ct. Gen. R., 23-107.	
NEW YORK		There are no substantive limits directly in the rules. *See* N.Y. R. of the Chief Admin. Judge §131.	
NORTH CAROLINA		There are no substantive limitation in the rules, rather all limitations are categorized as either a proceeding type or person type limitation. See Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15.	
NORTH DAKOTA		All substantive nature limitations are left to the discretion of the judge, but certain categories to be considered are laid out in the rules and listed under the Judges discretion standard section of this document. See N.D. Sup. Ct. Admin. R. 21 §4(b).	
OHIO		No, there are no limitation in the rules based on the substantive nature of the proceedings. *See* R. of Superintendence for Cts of Ohio, rule 12.	
OKLAHOMA		Local rule example: there are no substantive limitations. *See* Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01.	
OREGON		The following are off limits for any recording: dissolution, juvenile, paternity, adoption, custody, visitation, support, civil commitment, trade secrets, and abuse, restraining and stalking order proceedings. Or. Uniform Trial Ct. R. 3.180(9)(c). Proceedings involving sex crimes will also be off limits is specifically requested by the victim. Or. Uniform Trial Ct. R. 3.180(9)(d).	
PENNSYLVANIA		Support, custody, and divorce proceedings may not be covered. *See* Penn. Sup. Ct R. 1910(D).	

RHODE ISLAND	No, there are no limitation in the rules based on the substantive nature of the proceedings, any such limitation is at the sole discretion of the trial justice. *See* R.I. Sup. Ct. R., Art. VII, cannon 11.
SOUTH CAROLINA	No, there are no substantive limitations in the rules. All limitations are left to the discretion of the presiding judge. S.C. Appellate Ct. R. 605(f)(1)(iii).
SOUTH DAKOTA	There are no substantive limtiations in the rules. *See* S.D. Cannons of Jud. Conduct 3(b)(12).
TENNESSEE	Recording of juvenile proceedings is not prohibited, however, they do require an added level of consideration before media coverage can occur, this includes: notifying parties and counsel of the request and their right to object to the coverage. An objection from a witness in a juvenile proceeding prohibits coverage of just that witness, however an objection from a party or criminal defendant in a juvenile proceeding prohibits all media coverage of the proceeding. Tenn. Sup. Ct. R. 30C(5).
TEXAS	Local rules example: there are no substantive limitations. *See* R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex.
UTAH	There are no substantive limtiations in the rules. *See* Utah Code of Jud. Admin. 4-401.01.
VERMONT	There are no substantive limitations, rather limitations based on the nature of the dispture are left up to the discretion of the judge and are to be considered as a factor when determining whether to grant, limit, or deny coverage. Vt. R. Crim. Proced. 53(e)(3).
VIRGINIA	Coverage of the following types of judicial proceedings shall be prohibited: adoption proceedings, juvenile proceedings, child custody proceedings, divorce proceedings, temporary and permanent spousal support proceedings, proceedings concerning sexual offenses, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings. Cd. of Va. R. Crim. P. § 19.2-266(2).
WASHNGTON	There are no limitations in the rules, rather all limitation are left to the discretion of the presiding judge. *See* Wash. St. Ct. Gen. R. 16.
WEST VIRGINIA	The proceeding type must be open to the public. Rules did not provide more specific classifications. Photographs, video recordings, sound recordings, or any other form of recording of proceedings, or any sound, video, or other form of transmission or broadcast of proceedings prohibited in family court proceedings unless prior permission granted by the court. W.V. Rules of Practice and Procedure for Family Court, Rule 8.
WISCONSIN	Requests to prohibit media coverage in evidentiary hearings are presumed valid.
WYOMING	In evidentiary suppression hearings, a presumption of validity attends requests to prohibit photographing, radio, or television broadcast of a person in a court proceeding. Wyo. R. Cr. P. 53(9).

ARE THERE LIMITATIONS ON THE TYPES OF PERSONS WHO CAN BE INCLUDED ON IN THE VIDEO OR AUDIO RECORDING (e.g., jurors or victims or certain witnesses). Are these absolute prohibitions, a discretionary limitation, or are the mechanisms for obtaining consent?

	Pretiral	Trial	Post-conviction
ALABAMA		No. However the Alabama Cannons on Judical Ethics do perscribe that recording must stop whenever there is an objection to the recording by a witness, the parent/guardian of a minor witness, a juror, party, or attorney. Ala. Cannons Jud. Ethics, cannon 3.	
ALASKA		Victims of sexual offenses, party's under a protective order (pursuant to AS 18.65.850 – 18.65.870 or under AS 18.66.100 – 18.66.990), jurors, and minors, may not be recorded(audio or video), photographed, sketched, streamed, posted on the internet, broadcasted, etc. Victims of sexual offenses and party's under a protective order may consent, with court approval. Jurors may consent but only if they have been discharged. Minors may not consent, however if they are being prosecuted as an adult these protections do not apply. Alaska Ct. R. Admin. 50.	
ARIZONA		Jurors cannot be recorded or photographed. Jurors may consent to an interview after they have been discharged. Juveniles may not be recorded or photographed. Victims and witnesses may request recording be limited, the judge has the discretion to prohibit certain portions of testimony from being recorded, order face and identity be obscured, order recording to audio only, or other measures to protect victims, witnesses, but also defendants and law enforcement officers. Ariz. R. Sup. Ct. 122.	
ARKANSAS		"Jurors, minors without parental or guardian consent, victims in cases involving sexual offenses, and undercover police agents or informants shall not be broadcast, recorded, or photographed." Ark. Admin. Ord. 6(C)(5). Further, all witnesses have the right to refuse to be broadcast, recorded, or photographed and shall exercise that right via objection. Ark. Admin. Ord. 6(C)(2).	
CALIFORNIA		Jurors and spectators are not allowed to be recorded at any time. Further, the rules state that the presiding judge should consider "[t]he privacy rights of all participants in the proceeding, including witnesses, jurors, and victims," and "[t]he effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding; when granting or denying a request" as factors when determing whether or not to grant a request. Cal. R. Ct. 1.150(e)(3)(E-F).	
COLORADO		Jurors are off limits for "close-up photography" and the jury voir dire process is also closed from any media coverage. Colo. Pub. Access R. 3(3). There are no other direct limitations in the rules regarding classes of people, but they do state the judge "may restrict or limit expanded media coverage as may be necessary to perserve the dignity of the court or to protect parties, witnesses, or jurors." Colo. Pub. Access R. 3(4).	
CONNECTICUT	For pretrial arraignments, the following limitations apply: Coverage of other criminal defendants and persons not subject to the electronic coverage order, excluding participants in the proceeding, order shall be prohibited. Defendants cannot be recorded when entering or exiting custody, and any coverage of defendants in restraints should be prohibited when possible. Judical marshalls and Dept. of Corrections staff should not be recorded when possible. Conn. R. Superior Cts. §1-11A(c).	No recording of jurors or the jury selection process is allowed. There are no limitations on witnesses or parties, although the presiding judge is charged with considering the saftery and privacy concerns of them when considering to limit or preclude coverage. Conn. R. Superior Cts. §1-11C.	
DELAWARE		No person-type limits are described in the applicable rules.	
FLORIDA		No person-type limits are set out in the rules governing the use of electonic media in the courtrooms. *See generally* Fla. R. Gen. Prac. & Jud. Admin. 2.450.	
GEORGIA		Recording of jurors and potential jurors is prohibited. The judge is also to look at the impact of the recording on parties, witnesses, and victims and the special circumstances around the case, as a factor when determining the merits of the request. The judge may limit recording to protect the identity of witnesses and parties as they see fit. Juveniles are governed by a separate set of rules(see sheet labled "other" for more info). Uniform R. Superior Cts. Ga. 22(F).	
HAWAII		No coverage of jurors or potential jurors is allowed. The judge has the discretion to prohibit or limit coverage as they see fit for specific persons involved in the proceedings. Haw. R. Sup. Ct. 5.1.	
IDAHO		Jurors are off limits, including potential jurors during the selection process. The rules also directly state the presiding judge may exclude or limit the coverage of any particular particpant, or otherwise take steps to conceal the identity of any particpant. The rules state the presiding judge is to exercise particular sensitivity to victims of crime. Idaho Ct. Admin. R. 45(d), (h).	
ILLINOIS		Victims of sexual abuse who testify may not be covered by media, unless they affirmatively consent to the coverage. Jurors are also off limits. All other witnesses are given the opportunity to object, upon notice of the request being shared with all parties. All other decisions are left up to the discretion of the judge in deciding to limit the coverage or protect the identity of individuals involved. Ill. Sup. Ct. Ord. MR 2634, 1.2.	
INDIANA		For the limited scope of the pilot project, the following are prohibited from broadcast: police informants, undercover agents, minors, victims of sex-related offenses, and jurors. Ind. Sup. Ct. Ord. 21S-MS-454, 7.	
IOWA		A witness may refuse media coverage upon objection and show of good cause. Iowa R. Civ. P. 25.2(3)(a). Sexual abuse victim testimony not permitted unless victim witness consents. Iowa R. Civ. P. 25.2(3)(b). Any objection made by victim or witness in a forcible felony prosecution, police informant, undercover agent, and relocated witness have a rebuttable presumption of validity. The presumption may be overcome by a showing that media coverage will not have substantial effect on witness that would be qualitatively different from effect on general members of the public. Iowa R. Civ. P. 25.2(3)(c).	
KANSAS		The rules state that if a participant to the proceeding requests coverage be prohibited, and the requesting participant is a victim or witness of a crime, a police informant, an undercover agent, a relocated witness, or a juvenile, then the judge must prohibit such coverage. Juveniles who are being prosecuted as adults do not fall into category. R. Adopted Sup. Ct. Kan. 1001(e)(7). Any close up photography or recording of juorors is also prohibited. R. Adopted Sup. Ct. Kan. 1001(e)(6).	
KENTUCKY		No, the governing rules do not place any limitations based on the type of person participating in the proceedings, outside of closed juvenile proceedings (see substantive nature limitations tab). See generally, Ky. Supreme Court Rules.	
LOUISIANA		No, the governing rules do not place any limitations based on the type of person participating in the proceedings. See generally La. Code Jud. Conduct, Appendix to Cannon 3.	
MAINE		For civil proceedings, the following categories of persons may elect to have their appearance or testimony excluded from coverage: any person with a visible or audibly detectable physical or mental handicap or dissability, and any person who is a victim oof any alleged criminal conduct. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), IA2. For criminal proceedings, no minors may be covered unless they are being charged as an adult. In addition, no testifying witnesses may be covered unless they are acting in an offical capacity such as law enforcement, private investigators, public officals, government employees, expert witnesses, emergency and medical personnel, counselors and treatment providers, and representative of corporate or business entities. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), B1(b).	
MARYLAND		When inside the courtroom, any person that appears in the presence of the presiding judge may be covered, absent any court order mandating something different. When outside of a courtroom, but still within the court facility, any persons present for a judicial or grand jury proceeding may not be recorded. Md. R. Ct. Admin. 16-606.	
MASSACHUSETTS		Minors, victims of sexual assault, and jurors may not be recorded. The judge has the discretion to limit or suspend media coverage "if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence." The judge may also impose other limitations as necessary to protect the rights of any party, witness or juror. Mass. Sup. Jud. Ct. R. 1:19, 2(b), (c).	
MICHIGAN		The rules do state some categories of witnesses where exclusion should be considered, including but not limited to, victims of sex crimes andtheir families, police informants, undercover agents, and relocated witnesses. The rules make clear any exclusions and limitations are not mandated by the rules, but rather up to the discretion of the judge. Mich. Sup. Ct. Admin. Ord. 1989-1, 2(a)(ii).	
MINNESOTA		For criminal proceedings that occur before a guilty plea has been entered or guilty verdict returned, and for civil proceedins, no specific person-type limitations apply. See Minn. Ct. Genral R. Prac. 4.02(c), (d).	For criminal proceedings after a guilty plea has been accepted or guilty verdict returned, no coverage is allowed of: victims, persons giving statements on behalf of victims, unless the victim affirmatively consents to the coverage prior to the hearing. Minn. Ct. Genral R. Prac. 4.02(e)(iv).
MISSOURI	Criminal defendants may not be covered until they are represented by counsel or have waived such representation. Mo. Ct. Operating R. 16.02(b)(2).	Jurors and prospective jurors are off limits for coverage. Mo. Ct. Operating R. 16.02(b)(3). The following categories of participants may request that coverage be prohibited: victims of crime, police informants, undercover agents, relocated witnesses, and juveniles. Mo. Ct. Operating R. 16.02(b)(4).	
MISSISSIPPI		Coverage of the following categoriesof witnesses are prohibited: police informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse. Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 3(d).	
MONTANA		Local rule example: jurors, victims, and the family of victims may not be recorded or photographed in anyway. Mont. 4th Jud. Dist. R. of Pract., 29.	
NEBRASKA		Expanded news media coverage of the testimony of an alleged victim/witness in criminal or civil cases when the alleged victim/witness is a minor under 19 years of age, the proceedings relate to sexual abuse or sexual assault, or such are essential elements of the matter is not allowed. Neb. Sup. Ct. R. § 6-2003(D)(2). Jurors are also off limits. Neb. Sup. Ct. R. § 6-2003(G).	
NEVADA		Not explicitly. Consent is not needed to photograph or record jurors, but the media must not deliberately do so. The court recognizes that it is sometimes impossible to exclude jurors from media coverage based on the layout of the courtroom. Nev. Sup. Ct. R. 238. Consent is not needed to photograph or record the parties, but the judge may rule to limit the coverage of a party if a party does not want to be recorded. Nev. Sup. Ct. R. 240.	
NEW HAMPSHIRE		Jurors and prospective jurors may not be recorded. The rules also state that all equipment "must remain a reasonable distance from the parties, counsel tables, alleged victims and their families and witnesses." N.H. R. Superior Ct. 204(k)(4).	
NEW JERSEY		Any recording of victims of crime under the age of 18, and any witnesses under the age of 14, is prohibited. Jurors are also off limits. N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts. (H) § 6.	
NEW MEXICO		The court has the sole discretion to exclude coverage of certain witnesses, but is not mandaded to exclude such coverage, this includes (but not limited to): the victims of sex crimes and their families, police informants, undercover agents, relocated witnesses, and juveniles. N.M. Sup. Ct. Gen. R., 23-107(2). Jury members may also not be recorded. N.M. Sup. Ct. Gen. R., 23-107(3).	
NEW YORK		No coverage of victims in cases involving rape, sodomy, sexual abuse, or other sex offenses. N.Y. R. of the Chief Admin. Judge §131.7(e). Further, "no coverage of any participant shall be permitted if the presiding trial judge finds that such coverage is liable to endanger the safety of any person." N.Y. R. of the Chief Admin. Judge §131.7(f). Jurors, including alternates, may not be recorded at any time. N.Y. R. of the Chief Admin. Judge §131.7(d).	
NORTH CAROLINA		Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex climes. Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(b)(3). Coverage of jurors is also prohibited at any stage of the trial process. Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(b)(4).	
NORTH DAKOTA		Close-up photography of jurors is prohibited. N.D. Sup. Ct. Admin. R. 21 §4(d). All other limitations based on a person type category are left to the discretion of the judge, but certain categories to be considered are laid out in the rules and listed under the Judges discretion standard section of this document. See N.D. Sup. Ct. Admin. R. 21 §4(b).	
OHIO		Victims and witnesses have the right to object to being filmed, videotaped, recored, or photographed. Victims and witnesses shall not be recorded if they object to it. R. of Superintendence for Cts of Ohio, rule 12(c)(2).	
OKLAHOMA		Local rule example: no witness, juror, or party to the proceeding who ojects to coverage shall be recorded or photographed, including any testimony they may give. Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01(A)(4).	
OREGON		Jurors are off limits during the course of a trial. Or. Uniform Trial Ct. R. 3.180(9)(f). The court also has the discretion to limit coverage when " necessary to preserve the solemnity, decorum or dignity of the court or to protect the parties, witnesses, or jurors" and when the court believes "The electronic recording of a particular witness would endanger the welfare of the witness or materially hamper the testimony of the witness." Or. Uniform Trial Ct. R. 3.180(7).	
PENNSYLVANIA		"No witness or party who expresses any prior objection to the judge shall be photographed nor shall the testimony of such witness or party be broadcast or telecast." See Penn. Sup. Ct R. 1910(D).	
RHODE ISLAND		Jurors may not be photographed or recordef unless they consent. R.I. Sup. Ct. R., Art. VII, cannon 10.	

SOUTH CAROLINA	Members of the jury may not be photographed or recorded, unless they are in the background of another subject being photographed or recorded. S.C. Appellate Ct. R. 605(f)(2)(iii). All other limitations, including testimony of particular witnesses, are left to the discretion of the presiding judge. S.C. Appellate Ct. R. 605(f)(1)(iii).
SOUTH DAKOTA	Any testifying witness must consent to recording, but otherwise there are no person type limtiations in the rules. S.D. Cannons of Jud. Conduct 3(b)(12)(b)(ii).
TENNESSEE	Media coverage of a witness, party, or victim who is a minor is prohibited in any judicial proceeding, except when a minor is being tried for a criminal offense as an adult. Tenn. Sup. Ct. R. 30C(1). Media coverage of jurors during the judicial proceeding is also prohibited. Tenn. Sup. Ct. R. 30C(3).
TEXAS	Local rules example: jurors and alternate jurors may not be photographed or recorded. R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex. 5.3
UTAH	Media coverage is prohibited for the following: jurors, prospective jurors until they are dismissed, and minors. Utah Code of Jud. Admin. 4-401.01(6)(A), (B).
VERMONT	Jurors and prospective jurors may not be covered by media or otherwise subject to any recording. Vt. R. Crim. Proced. 53(e)(2). Any other person type limitations are left up to the discretion of the judge and are to be considered as a factor when determining whether to grant, limit, or deny coverage.
VIRGINIA	Coverage of the following categories of witnesses shall be prohibited: police informants, minors, undercover agents and victims and families of victims of sexual offenses. Cd. of Va. R. Crim. P. § 19.2-266(3). In addition, coverage of jurors at any stage of the proceedings is prohibited. Cd. of Va. R. Crim. P. § 19.2-266(4).
WASHNGTON	There are no limitations in the rules, rather all limitation are left to the discretion of the presiding judge. *See* Wash. St. Ct. Gen. R. 16.
WEST VIRGINIA	Prior approval by the presiding officer is required for any kind of media coverage where the face of a juror is shown or the identity of any juror is stated or is otherwise discernable. WV Trial Ct. Rule 8.10.
WISCONSIN	In cases involving victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in evidentiary hearings, divorce proceedings and cases involving trade secrets, a presumption of validity attends the requests. The trial judge has broad discretion in determining whether there is cause for prohibition. The list is not exclusive. Wisc. Sup. Ct. R. 61.11. Access to juvenile proceedings limited. Wisconsin's Juvenile Justice Code, Wis. Stat. chapter 938. Individual jurors cannot be photographed unless juror provides consent. If it is impossible to not capture jurors as part of the background, photography permitted, not close-ups prohibited.
WYOMING	No close-up or visual recording of jury members. Wyo. R. Cr. P. 53(7). In cases involving victims of crimes, confidential informants, undercover agents, and evidentiary suppression, a presumption of validity attaches to request to prohibit media coverage. Wyo. R. Cr. P. 53(9). This list is not exhaustive and a judge may find for cause prohibition in comparable situations.

IS THE CONSENT OF THE PARTIES REQUIRED BEFORE THE PROCEEDING MAY BY RECORDED?

	Pretiral	Trial	Post-conviction
ALABAMA		Yes. Once a plan is authorized by the Supreme Court, it must also be affirmatively consented to via written statement by all defendant(s) and the lead prosecuting attorney. In addition, before the plan can be authorized by the Supreme Court, a petition must be filed with the Supreme Court signed by the presiding judge of the circuit, the district attorney, president of the local bar association and the chairman of the county commission, which can reccomend safeguards and sign off on the proposal for recording. Ala. Cannons Jud. Ethics, cannon 3.	
ALASKA		No. However there is nothing in the rules preventing the presiding judge from considering consent of parties when deciding whether or not to approve a request to record. Alaska Ct. R. Admin. 50.	
ARIZONA		Technically no, but the Court must notify parties when a request to record has been received and any objections may be considered by the presiding judge. After being notified, parties may object to the application to record via written notice, or on record statements at the begining of the proceeding. Victims and witnesses may also request the recording be prohibited or limited for certain portions of the proceedings, the nature of such limitations is up to the presiding judge but may include prohibiting the recording of certain victims or witness, obscuring identity and voices, prohibiting certain testimony, etc. Ariz. R. Sup. Ct. 122.	
ARKANSAS		No, however a timely objection from a party or counsel "shall preclude broadcasting, recording, or photographing of the proceedings." So although consent is not technically required, parties can object and such objection should have a preclusionary effect." So although consent is not technically required, party's objections carry great weight in the rules. Ark. Admin. Ord. 6(C)(1).	
CALIFORNIA		No. However, "[t]he parties' support of or opposition to the request" is to be considered as a factor by the presiding judge when granting or denying a request. Cal. R. Ct. 1.150(e)(3)(c).	
COLORADO		No, however all parties and witnesses have the opportunity to submit a written objection to media coverage, for the entire proceeding or a portion. Parties and witnesses shall be provided a copy of the written request for media coverage upon it being filed. Parties can seek review of a granted or denied media coverage request, but witnesses and media entities making the request may not. Colo. Pub. Access R. 3(6)(B-D).	
CONNECTICUT		Consent of parties is not required, but the rules require all parties be given the opportunity to object on the record to any recording. In homicide cases involving sexual assault, no coverage is allowed absent the affirmative consent of the victim's family. Conn. R. Superior Cts. §1-11C(g).	
DELAWARE		n/a	
FLORIDA		No. Consent of parites is not discussed in the rules. *See generally* Fla. R. Gen. Prac. & Jud. Admin. 2.450.	
GEORGIA		Not required, but consent of parties, in addition to witnesses and victims, is all to be considered by the judge when considering a request. Uniform R. Superior Cts. Ga. 22(G)(1)(b).	
HAWAII		No, however if a party does object to extended coverage at any new stage of the case, there shall be a hearing on the record to determine the merits of the request and the objection. Haw. R. Sup. Ct. 5.1 (f)(4).	
IDAHO		No. Consent of parties is not discussed in the rules, nor is disclosure of the requests to parties contemplated. *See generally* Idaho Ct. Admin. R. 45.	
ILLINOIS		No. Consent of parties is not required, however the rules do lay out a mechanism for notifying parties of the request for extended coverage and how to enter objections. Objections must be made in writing three days prior to the proceeding, and can be entered by parties or witnesses. The judge may hold a hearing on the objections, or may issue a written order in response. Ill. Sup. Ct. Ord. MR 2634, 1.3(c).	
INDIANA		For the limited purpose of the pilot project, consent is not required. However notice of the request to broadcast must be shared with all parties. Ind. Sup. Ct. Ord. 21S-MS-454, 5.	
IOWA		Sexual abuse victims must consent to media coverage, otherwise prohibited. Iowa R. Civ. P. 25.2(3)(b). Coverage is prohibited in any juvenile, dissolution, adoption, child custody, or trade secret cases unless consent on the record is obtained from all parties, including a parent or guardian of a minor child. Iowa R. Civ. P. 25.2(5).	
KANSAS		No, consent of parties is not required nor is it discussed in the rules. *See generally* R. Adopted Sup. Ct. Kan. 1001(e).	
KENTUCKY		The Kentucky Supreme Court Rules do not require any party consent. See generally, Ky. SCR.	
LOUISIANA		Consent or approval of parties is not required when granting a request for extended media coverage, however the rules do state that parties may object in writing to the coverage, which must be submitted 10 days prior to the proceeding. The presiding judge may limit or deny the coverage in response to such objection, or on their own motion. La. Code Jud. Conduct, Appendix to Cannon 3, III	
MAINE		Consent of parties is not required for granting coverage of either civil or criminal proceedings. The rules do not even require notice of the request being shared with parties. *See* Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11).	
MARYLAND		Consent of all parties is required for extended media coverage of civil proceedings, unless the party is: a federal, state, or local government, or unit thereof, or a government offical in their offical capacity. Any party may move to terminate the coverage at any time. Md. R. Ct. Admin. 16-605(a).	
MASSACHUSETTS		Consent is not required. However the rules to provide a mechanism for parties to enter objections to coverage of a proceeding. The party most make a motion to the court objecting to the coverage, and are also required to share that motion with Bureau Chief of the local Associated Press. The judge then is to hold a hearing on the motion. Mass. Sup. Jud. Ct. R. 1:19, 2(g).	
MICHIGAN		No, consent is not required. However, notice of the request for coverage must be shared with parties, and consent can be considered by the judge in making any decisions to limit or exclude coverage. *See generally* Mich. Sup. Ct. Admin. Ord. 1989-1, 2(a).	
MINNESOTA		Consent of all parties is required for coverage of criminal proceedings that occur before a guilty plea has been entered or guilty verdict returned. Minn. Ct. Genral R. Prac. 4.02(d). In civil proceedings consent of parties is not required. Minn. Ct. Genral R. Prac. 4.02(c).	Consent of parties is not required for criminal proceedings after a guilty plea has been accepted or guilty verdict returned. Minn. Ct. Genral R. Prac. 4.02(e). However consent is required to cover any victims or victim proxy statements. Minn. Ct. Genral R. Prac. 4.02(e)(iv).
MISSOURI		Consent is not required, however the presiding judge may entertain objections from parties and choose to limit or prohibit coverage as they deem appropriate. Mo. Ct. Operating R. 16.03(d).	
MISSISSIPPI		Consent is not required. Parties may object to coverage by written motion, as laid out in the rules, and the judge may consider objections when making decision to deny or limit coverage. Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 5.	
MONTANA		Consent of parties is not required, nor discussed in the general rules and the local rules of the 4th and 19th judicial district.	
NEBRASKA		Consent of parties is not required. The rules do lay out proceedures for filing objections to coverage, which is to be filed in writing three days prior to the proceeding. The judical officer may limit or prohibit the coverage based on the objection, or on their own discretion. Neb. Sup. Ct. R. § 6-2004(D).	
NEVADA		Consent of parties is not needed, but if a party objects, a judge may choose to rule limiting the scope of media coverage. Consent of jurors is also not needed, but the media may not deliberately focus on the jurors when recording. Nev. Sup. Ct. R. 240, 238.	

NEW HAMPSHIRE	No, consent of parties is not required. However, the rules to state parties can bring a motion to limit or prohibit the coverage. Upon filing the motion, the judge may hold a hearing involving all interested parties to the request for coverage. It is the burden of the moving party to show: "(1) that the relief sought[to limit or prohibt coverage] advances an overriding public interest that is likely to be prejudiced if the relief is not granted; (2) that the relief sought is no broader than necessary to protect that interest; and (3) that no reasonable less restrictive alternatives are available to protect the interest." NH. R. Superior Ct. 204(d), (f).
NEW JERSEY	Consent of parties, witnesees, or any participant is not required. However, parties may object to coverage and the judge may hold a pretrial conference with all involved parties to make a decision on the request and consider the merits of the objection. Any limitation or conditions to the coverage that will be imposed as a result must be reduced to writing by the judge. N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts. (H) §§ 2, 8.
NEW MEXICO	Consent is not required, but the rules to establish a process by which parties may object to media coverage. Objection are to be considered by the presiding judge and the outcome is ultimately left up to their sole discretion and is not appealable. N.M. Sup. Ct. Gen. R., 23-107(G).
NEW YORK	Consent of parties is not required. However, objections to coverage by parties may be considered when a judge is determining whether or not to grant media access. N.Y. R. of the Chief Admin. Judge §131(b)(2), (c).
NORTH CAROLINA	Consent of parties is not required, nor is the objection of parties even contemplated in the rules. See Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(b)(3).
NORTH DAKOTA	Consent is not required, however, the rules do describe how parties may enter objections to requested media coverage, which must happen in writing three days prior to the proceeding. In considering the objection, the judge may request parties present addtional evidence on the matter. N.D. Sup. Ct. Admin. R. 21 §6.
OHIO	Consent of parties is not required. R. of Superintendence for Cts of Ohio, rule 12.
OKLAHOMA	Local rule example: consent of parties is not required, unless a party is a testifying witness. Any testifying witness may object to being recorded and such objection must be honored. Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01(A)(4).
OREGON	Consent of parties is not required. See Or. Uniform Trial Ct. R. 3.180.
PENNSYLVANIA	Consent of all parties is required, in addition to consent of any testifying witness is also required, limited to non-jury civil trials. Penn. Sup. Ct R. 1910(c)(2).
RHODE ISLAND	Consent of parties is not required. *See* R.I. Sup. Ct. R., Art. VII.
SOUTH CAROLINA	If the recording is being made for "educational use" then consent of parties and witnesses is required. S.C. Appellate Ct. R. 605(e)(2). If the recording is being taken by media representatives, then consent is not required. See S.C. Appellate Ct. R. 605(f).
SOUTH DAKOTA	Consent of all parties and witnesses is required for any photographic and electronic recording. S.D. Cannons of Jud. Conduct 3(b)(12)(b).
TENNESSEE	Consent of parties is not required, except for juvenile proceedings. Tenn. Sup. Ct. R. 30C(5).
TEXAS	Local rules example: consent of parties is not required. *See* R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex.
UTAH	Consent of parties is not required, nor is it or even objections from parties discussed in the rules. *See* Utah Code of Jud. Admin. 4-401.01.
VERMONT	Consent of parties is not required, but can be considered as a factor when the court is determing to permit, deny, or otherwise limit media access. Vt. R. Crim. Proced. 53(e).
VIRGINIA	Consent of parties is not required. *See* Cd. of Va. R. Crim. P. § 19.2-266.
WASHNGTON	Consent of parties is not required. *See* Wash. St. Ct. Gen. R. 16
WEST VIRGINIA	No rules establishing consent required. Parties may object, but judicial officer holds discretion.
WISCONSIN	Consent required from jurors.
WYOMING	Requests to limit media coverage enjoy presumption of validity in cases involving victims of crimes, confidential informants, and undercover agents, as well as evidentiary suppression hearings. (include this in Substantive nature limitations)

IS THERE A PRESUMPTION THAT THE PROCEEDING IS OPEN FOR AUDIO/VIDEO RECORDING OR IS THE PRESUMPTION THAT NO AUDIO/VIDEO RECORDING IS ALLOWED? OR IS THERE NO PRESUMPTION?

	Pretrial	Trial	Post-conviction
ALABAMA		There is no presumption directly stated in the rules. However because recording may only be done with Supreme Court authorization, in addition to consent of parties and local officals, its fair to say the presumption is against recording with such a high bar to meet. Ala. Cannons Jud. Ethics, cannon 3.	
ALASKA		Although not stated in such terms, for Court of Appeals and Supreme Court arguments, the presumption is in favor of recording. For district court trials, the presumption is against recording becasue if no application for recording is submitted and approved, no recording will be allowed. Alaska Ct. R. Admin. 50.	
ARIZONA		There is no presumption directly stated in the rules. However the rules do specify that a properly submitted request to record should be approved, but it is ultimately up to the judge, who can deny, or limit coverage. If no application is submitted, no recording will be allowed. Ariz. R. Sup. Ct. 122.	
ARKANSAS		The rules do not directly state a presumption either way. However the wording of the rule states "a judge may authorize" such recording, so this is ultimately a discretionary standard. Ark. Admin. Ord. 6(b).	
CALIFORNIA		The rules specifically state that there is no "presumption for or against granting of permission to photograph, record, or broadcast court proceedings." Cal. R. Ct. 1.150(a).	
COLORADO		There is no presumption directly stated in the rules, but any recording or photography will not be allowed without submitting a written request for coverage to the presiding judge. Colo. Pub. Access R. 3(6)(A).	
CONNECTICUT		The rules state that recording "should be allowed" subject to the limitations laid out in the rules. In my opinion, this language should serve as a presumption in favor of allowing recording. Conn. R. Superior Cts. §1-10B(a).	
DELAWARE		n/a	
FLORIDA		The rules state that electronic media and still photography shall be allowed. Although a presumption is not stated directly, this language seems to default in favor of allowing coverage. Fla. R. Gen. Prac. & Jud. Admin. 2.450(a).	
GEORGIA		The rules directly state "a properly submited request for recording should generally be approved," this language clearly serves as a preumption in favor of the recording. Uniform R. Superior Cts. Ga. 22(G).	
HAWAII		The presumption is in favor of allowing the recording. "A judge shall grant requests for extended coverage of a proceeding unless, by a preponderance of the evidence, good cause is found to prohibit such coverage." Haw. R. Sup. Ct. 5.1(f)(3).	
IDAHO		There is no direct presumption stated in the rules, but without approval of the judge no coverage will be allowed. *See generally* Idaho Ct. Admin. R. 45.	
ILLINOIS		There is no presumption in the rules. The general rule is that no photography, broadcast, or recording is allowed, unless an applicable exception applies, which includes the Supreme Court's Extended Media Coverage order, and the exception for remote hearings that are open to the public. Ill. Sup. Ct. R., 44.	
INDIANA		Because the general rule states a prohibition on any broadcasting, with limited exceptions for appellate arguments and the pilot projects, this basically functions as a presumption against recording. Ind. Code Judicial Conduct 2.17.	
IOWA		Expanded media coverage is prohibted unless judicial officer approval, however the langauge indicates a presumption that the court room is open for audio and video recording because the judge must conclude that the media coverage would materially interfere with the rights of the parties to a fair trial. Iowa R. Civ. P. 25.2(2).	
KANSAS		There is no presumption directly stated in the rules. However, the preface to the governing rule does include language that states, " The Courts should champtionthe enhanced access and the transparency made possible by the use of these [recording] device while protecting the integrity of the court." R. Adopted Sup. Ct. Kan. 1001(a).	
KENTUCKY		The Kentucky Supreme Court Rules do not state any applicable presumptions. See generally, Ky. SCR.	
LOUISIANA		There are no pressumptions directly stated in governing rules. However, the overarching rule does state a general prohibition on "broadcasting, televising, recording, or taking of photographs in the courtroom" unless the exceptions of the Code of Judicial Conduct apply. *See* La. District Ct. R., title I, 6.1(e).	
MAINE		There is no presumption stated directly in the rules. See Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11).	
MARYLAND		There is a presumption in favor of allowing extended coverage. The rules direct that extended media coverage is permitted unless an exception, limitation or condition of the rules apply. "Nothing in this Chapter is intended to restrict the general right of the news media to observe and report judicial proceedings." Md. R. Ct, Admin. 16-603.	
MASSACHUSETTS		There is no presumption stated directly in the rules. *See* Mass. Sup. Jud. Ct. R. 1:19.	
MICHIGAN		The rules state "media coverage shall be allowed upon request in all court proceedings." This language serves as a presumption in favor of coverage. Mich. Sup. Ct. Admin. Ord. 1989-1, 2(a)(i).	
MINNESOTA		The general rule states no visual or audio recording is allowed, unless an excpetion in the rules, or other order of the Supreme Court applies. This language serves as a presumption against allowing coverage. Minn. Ct. Genral R. Prac. 4.01.	
MISSOURI		There is no presumption stated in the governing rules. *See* Mo. Ct. Operating R. 16.	
MISSISSIPPI		The presumption is against allowing recording. The comments to the rules make this clear, where it states: "Section 3B(12) of the Code of Judicial Conduct prohibits broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Supreme Court. Also, Rule 1.04 of the Uniform Rules of Circuit and County Court allows cameras only "in accordance with the Code of Judicial Conduct." Thus, electronic coverage is allowed only for special purposes authorized in Section 3B(12), or under these Rules for Electronic and Photographic Coverage of Judicial Proceedings (MREPC.)" Comments to the Miss. R. Electronic & Photographic Coverages of Jud. Proceedings.	
MONTANA		The general rules serve as a presumption in favor of allowing media coverage, by stating the presiding judge "shall permit" media coverage "unless he is convinced" that such coverage will "substantially and materially interfere with the primary function of the court." Mont. Cannon of Jud. Ethics, 35.	
NEBRASKA		The general rule states " Expanded news media coverage shall be permitted in the county and district courtrooms in Nebraska courts, except as otherwise provided for within these rules." which serves as a presumption in favor of allowing recording. Neb. Sup. Ct. R. § 6-2001(A).	
NEVADA		There is a presumptionthat any proceeding open to the public is open for media coverage. Nev. Sup. Ct. R. 230.	
NEW HAMPSHIRE		There is a strong presumption in favor of recording, as the general rule requires the judge to allow the coverage unless a few of the limited excpetions apply. See NH. R. Superior Ct. 204(a).	
NEW JERSEY		The general rule serves as a presumption in favor of allowing recording, stating the judge "should permit broadcasting, televising, recording and the taking of photographs in the courtroom" so long as the directives of the Supreme Court order are followed. R. Governing Cts. of N.J., Code of Jud. Conduct., rule 3.11.	
NEW MEXICO		There is no presumption in favor, nor against allowing media coverage. The "authorize" the broadcasting of proceedings in accordance with the rules, but leave decisions entirely up to the discretion of the presiding judge. *See* N.M. Sup. Ct. Gen. R., 23-107.	
NEW YORK		The language of the rules serves as an indirect presumption in favor of recording, in stating "it is the policy of the Unified Court System to facilitate the audio-visual coverage of court proceedings to the fullest extent permitted by the New York Civil Rights Law and other statutes." N.Y. R. of the Chief Admin. Judge §131(a).	
NORTH CAROLINA		The rules state "Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below." This language serves as a presumption in favor of allowing media coverage, but ultimately left to the discretion of the presiding judge. Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(b).	
NORTH DAKOTA		There is no presumption directly in the rules, however, the rule strictly uses "may" language, implying it is all permissive at the judges discretition, and not mandatory. See N.D. Sup. Ct. Admin. R. 21.	
OHIO		Presumption is in favor of allowing recording, in stating the judge "shall permit" the recording if the proceeding is open to the public. R. of Superintendence for Cts of Ohio, rule 12(A).	
OKLAHOMA		Local rule example: presumption is against allowed recording or any media coverage, in stating at the preamble "the use of cameras, television or other recording or broadcasting equipment is prohibited in a courtroom." Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01(A).	
OREGON		The rules state electronic recording "shall be allowed in any courtroom except as provided undewr this rule." Or. Uniform Trial Ct. R. 3.180(2). This language serves as a presumption in favor of allowing recording.	
PENNSYLVANIA		Presumption is against recording of any sort. The preamble to the applicable rules state "judges should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions..." with a limited excpetion for non-jury civl trials. Penn. Sup. Ct R. 1910.	
RHODE ISLAND		There is no presumption directly in the rules, rather the decision to allow media coverage rests solely in the presiding trial justice. R.I. Sup. Ct. R., Art. VII, cannon 1.	
SOUTH CAROLINA		There is a presumption against allowing any type of recording, the general rule states "the broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions is prohibited." S.C. Appellate Ct. R. 605(b).	

SOUTH DAKOTA	There is a presumption against allowing any type of recording, The general rule states "a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recess between sessions..." S.D. Cannons of Jud. Conduct 3(b)(12).
TENNESSEE	There is a presumption in favor of allowing media coverage. The general rule states "Media coverage of public judicial proceedings in the courts of this State shall be allowed in accordance with the provisions of this rule." Tenn. Sup. Ct. R. 30A(1).
TEXAS	Local rules example: there is no direct presumption, but they do state "The policy of these rules is to allow electronic media coverage of public criminal court proceedings to facilitate the free flow of information to the public concerning the judicial system and to foster better public understanding about the administration of justice." R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex. 1.
UTAH	Yes, there is a presumption in favor of allowing recording stated directly in the rules. "There is a presumption that electronic media coverage by a news reporter shall be permitted in public proceedings where the predominant purpose of the electronic media coverage request is journalism or dissemination of news to the public. The judge may prohibit or restrict electronic media coverage in those cases only if the judge finds that the reasons for doing so are sufficiently compelling to outweigh the presumption." Utah Code of Jud. Admin. 4-401.01(2)(A).
VERMONT	There are no presumptions directly in the rules. *See* Vt. R. Crim. Proced. 53.
VIRGINIA	There is no presumption in the rules, all language used is permissive, not mandatory. *See* Cd. of Va. R. Crim. P. § 19.2-266.
WASHNGTON	There is a passive presumption in favor of allowing recording, in stating that "Video and audio recording and still photography by the news media are allowed in the courtroom during and between sessions." Wash. St. Ct. Gen. R. 16(a). This presumption is made more clear in the comment to rule 16, where it states "The intent of the 1991 change[in which rule 16 was adopted] was to make clear both that cameras were fully accepted in Washington courtrooms and also that broad discretion was vested in the court to decide what, if any, limitations should be imposed." Wash. St. Ct. Gen. R. 16, comment.
WEST VIRGINIA	No presumptions.
WISCONSIN	The presumption of courtroom openness includes access for reports and their cameras in the courtroom.
WYOMING	There is a general presumption in favor of media coverage except in specified situations where objections to media coverage are presumed valid (e.g., evidentiary hearings, cases involving victims of crimes, confidential informants, and undercover agents). Wyo. R. Cr. P. 53.

IF THE JUDGE HAS DISCRETION, WHAT IS THE STANDARD (e.g., good cause) What factors are considered?

	Pretiral	Trial	Post-conviction
ALABAMA		The Supreme Court, when considering authoriization of a plan to allow recording, looks at the following: the recording will not (1) detract from the dignity of the court proceedings, (2) distract any witness in giving testimony, (3) degrade the court, or (4) otherwise interfere with the achievement of a fair trial. Ala. Cannons of Jud. Ethics, cannon 3.	
ALASKA		The use of cameras and electronic devices in a courtroom is subject at all times to the authority of the judicial officer or the clerk of the appellate courts to ensure: (A) decorum and prevent distractions; (B) the fair administration of justice in the pending case and future proceedings; (C) protection of the reasonable privacy interests of a minor or any other person; and (D) the security of the court and all court users. Alaska Ct. R. of Admin. 50.	
ARIZONA		Judges may deny or limit a request for coverage only after making specific, on-the-record findings that there is a likihood of harm arising from one or more of the following factors: (A) the impact of coverage upon the right of any party to a fair hearing or trial; (B) the impact of coverage upon the right of privacy of any party, victim, or witness; (C) the impact of coverage upon the safety and well-being of any party, victim, witness, or juror; (D) the likelihood that coverage would distract participants or that coverage would disrupt or detract from the dignity of a proceeding; (E) the adequacy of the physical facilities of the court; (F) the timeliness of the request pursuant to paragraph (c)(2) of this rule; (G) whether the person making the request is engaged in the dissemination of news to a broad community; and (H) any other factor affecting the administration of justice. Ariz. R. Sup. Ct. 122.	
ARKANSAS		The rules state a judge may authorization recording, "provided that the participants will not be distracted, nor will the dignity of the proceedings be impaired." This is the only discussion of standards by which decisions should be made in the rule. Ark. Admin. Ord. 6(b).	
CALIFORNIA		The judge is to consider the following factors when granting or denying a request for coverage: (A) The importance of maintaining public trust and confidence in the judicial system; (B) The importance of promoting public access to the judicial system; (C) The parties' support of or opposition to the request; (D) The nature of the case; (E) The privacy rights of all participants in the proceeding, including witnesses, jurors, and victims; (F) The effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding; (G) The effect on the parties' ability to select a fair and unbiased jury; (H) The effect on any ongoing law enforcement activity in the case; (I) The effect on any unresolved identification issues; (J) The effect on any subsequent proceedings in the case; (K) The effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness; (L) The effect on excluded witnesses who would have access to the televised testimony of prior witnesses; (M) The scope of the coverage and whether partial coverage might unfairly influence or distract the jury; (N) The difficulty of jury selection if a mistrial is declared; (O) The security and dignity of the court; (P) Undue administrative or financial burden to the court or participants; (Q) The interference with neighboring courtrooms; (R) The maintenance of the orderly conduct of the proceeding; and (S) Any other factor the judge deems relevant. Cal. R. Ct. 1.150(e)(3).	
COLORADO		When deciding to grant expanded media coverage, the presiding judge is to consider the following factors: (A) Whether there is a reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial; (B) Whether there is a reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum and dignity of the court; and (C) Whether expanded media coverage would create adverse effects which would be greater than those caused by traditional media coverage. Colo. Pub. Access R. 3(2).	
CONNECTICUT		"The judicial authority, in deciding whether to limit or preclude electronic coverage of a criminal proceeding or trial, shall consider all rights at issue and shall limit or preclude such coverage only if there exists a compelling reason to do so, there are no reasonable alternatives to such limitation or preclusion, and such limitation or preclusion is no broader than necessary to protect the compelling interest at issue." Conn. R. Superior Cts. §1-11C(f).	
DELAWARE		n/a	
FLORIDA		The rules charge the presiding judge to consider the following when making determinations on media coverage In the courtroom: "(i) control the conduct of proceedings before the court; (ii) ensure decorum and prevent distractions; and (iii) ensure the fair administration of justice in the pending cause." Fla. R. Gen. Prac. & Jud. Admin. 2.450(a).	
GEORGIA		The rules require the judge to use a balancing test when determining whether to grant a request for recording, that "there is a substanital liklihood of harm arising from one or more of the following factors, and that the harm outwieighs the benefit of the recording to the public." The factors to be considered are: (a) The nature of the particular proceeding at issue; (b) The consent or objection of the parties, witnesses, or alleged victims whose testimony will be presented in the proceedings; (c) Whether the proposed recording will promote increased public access to the courts and openness of judicial proceedings; (d) The impact upon the integrity and dignity of the court; (e) The impact upon the administration of the court; (f) The impact upon due process and the truth finding function of the judicial proceeding; (g) Whether the proposed recording would contribute to the enhancement of or detract from the ends of justice; (h) Any special circumstances of the parties, witnesses, alleged victims, or other participants such as the need to protect children or factors involving the safety of participants in the judicial proceeding; and (i) Any other factors affecting the administration of justice or which the court may determine to be important under the circumstances of the case. Uniform R. Superior Cts. Ga. 22(G)(1).	
HAWAII		A presumption in favor of allowing exists, becasue the rules require "good cause" to limit or deny a request for coverage. Good cause exists in the following circumstances: (i) the proceeding is for the purpose of determining the admissibility of evidence; or (ii) testimony regarding trade secrets is being received; or (iii) testimony of child witnesses is being received; or (iv) testimony of a complaining witness in a prosecution for any sexual offense under Part V of the Hawai'i Penal Code is being received; or (v) a witness would be put in substantial jeopardy of serious bodily injury; or (vi) testimony of undercover law enforcement agents who are involved in other ongoing undercover investigations is being received. Haw. R. Sup. Ct. 5.1 (f)(5).	
IDAHO		While the rules make clear the presiding judge has discretion in making these decisions, there are no formal standards laid out in the rules to guide that decision making. However, the rules do state that authorization may be revoked at the discretion of the court if it appear that the coverage is "interfering in any ways with the proper administration of justice." Idaho Court Admin. R. 45(a).	
ILLINOIS		The rules don't direct state any standards. However they do state the judge may "refuse, limit, amend, or terminate" media coverage when the judge finds that "substantial rights of individual participants or rights to a fair trial will be prejudiced. Ill. Sup. Ct. Ord. MR 2634, 1.2(I). The rules also require that "extended media coverage shall not be distracting or interfere with the solemnity, decorum and dignity of the court making decisions that affect the life, liberty, or property of citizens. Ill. Sup. Ct. Ord. MR 2634, 1.0.	
INDIANA		There are no standards described in the rules for the judical discretion granted in the pilot project order. See generally Ind. Sup. Ct. Ord. 21S-MS-454.	

IOWA	Expanded news media coverage of a proceeding is permitted, unless the judicial officer concludes, for reasons stated on the record, that under the circumstances of the particular proceeding, such coverage would materially interfere with the rights of the parties to a fair trial. Iowa. R. Civ. P. 25.2(2). Witnesses must demonstrate good cause in order to obejct to media coverage. See Person Type Limitations.	
KANSAS	The rules do not describe any applicable standards to guide the judges discretion, but the rules do make clear the judge does have absolute discretion and states "The privilege granted by tis rule does not limit or restrict the judge's power, authority, or responsibility to control the proceedings." R. Adopted Sup. Ct. Kan. 1001(e)(3).	
KENTUCKY	The Kentucky Supreme Court Rules does not provide a judicial discretion standard beyond requests for coverage shall be made to the presiding judge. Ky. SCR 1(d). If the media cannot agree on "pooling" arrangements, the judge shall exclude all contesting media from the proceeding. Ky. SCR 1(e).	
LOUISIANA	There are no standards directly stated in the governing rules, but they do state the following principle: "All extended media coverage of court proceedings shall be governed by the principle that the decorum and dignity of the court, the courtroom and the judicial process will be maintained at all times. Resolution of any question of coverage or procedure not specifically addressed in this section will be guided by this overriding principle." La. Code Jud. Conduct, Cannon 3, II.	
MAINE	There are no formal standards in the rules to guide the judges use of discretion. The rules make clear the decision to allowing recording is left to the sole discretion of the presiding judge, and may be granted "if the integrity of the court proceedings will not be adversely affected." Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11).	
MARYLAND	The rules require the presiding judge to find "good cause" to limit, deny, or terminate extended coverage. "Examples of good cause include unfairness, danger to a person, undue embarrassment, or hindrance of proper law enforcement." The rules also state that good cause shall be presumed in cases that involve: domestic violence, custody of or visitation with a child, divorce, annulment, minors, relocated witnesses, and trade secrets. Md. R. Ct. Admin. 16-608.	
MASSACHUSETTS	There are no standards stated in the rules. See Mass. Sup. Jud. Ct. R. 1:19.	
MICHIGAN	No standards are directly stated in the rules. However, they do state that a judge is to terminate, suspend, limit, or exclude coverage when "the fair administration of justice requires such action." Mich. Sup. Ct. Admin. Ord. 1989-1, 2(a)(ii).	
MINNESOTA		For criminal proceedings after a guilty plea has been accepted or guilty verdict returned, the following factors are to be considered when determing if good cause exists to prohibit coverage: (1) the privacy, safety, and well-being of the participants or other interested persons; (2) the likelihood that coverage will detract from the dignity of the proceeding; (3) the physical facilities of the court; and, (4) the fair administration of justice. Minn. Ct. Genral R. Prac. 4.02(e).
MISSOURI	There are no standards directly discussed, but the rules do state "a judge shall limit or disallow media coverage of a proceeding if the judge concludes, under the circumstances, such coverage would materially interfere with the rights of the parties, including but not limited to the security or privacy of participants to the proceedings, or the fair administration of justice." Mo. Ct. Operating R. 16.03(d).	
MISSISSIPPI	Any coverage is subject to the authority of the presiding judge, who is charged to "(i) control the conduct of the proceedings, (ii) ensure decorum and prevent distraction, and (iii) ensure fair administration of justice in the pending case." Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 3(a). This statement is the closest the rules come to directly describing standards.	
MONTANA	Standards to guide the judicial discretion are not discussed in the general, nor local rules of the 4th and 19th judicial district. However, the general rules do require that if the judge wishes to limit or prohibit coverage, "he must state his reasons for such prohibition in the record of such case." Mont. Cannon of Jud. Ethics, 35.	
NEBRASKA	"Good cause means a substantial reason; one that affords a justifiable basis which is a subjective, factual question within the sole discretion of the judicial officer. A finding of good cause by the judicial officer for exclusion, suspension, or termination of expanded news media coverage does not constitute closing in whole or in part judicial proceedings." Neb. Sup. Ct. R. § 6-2002(C).	
NEVADA	The judge may consider the following factors: (a) The impact of coverage upon the right of any party to a fair trial; (b) The impact of coverage upon the right of privacy of any party or witness; (c) The impact of coverage upon the safety and well-being of any party, witness or juror; (d) The likelihood that coverage would distract participants or would detract from the dignity of the proceedings; (e) The adequacy of the physical facilities of the court for coverage; and (f) Any other factor affecting the fair administration of justice. Nev. Sup. Ct. R. 230.	
NEW HAMPSHIRE	Standards are not directly stated in the rules, however they do require the judge to "ensure that the photographing, recording or broadcasting will not be disruptive to the proceedings and will not be conducted in such a manner or using such equipment as to violate the provisions of this rule." NH. R. Superior Ct. 204(a).	
NEW JERSEY	The rules state that recording "may be excluded in any proceeding where the court determines such use would cause a substantial increase in the threat of, or the potential for, harm to a litigant, juror, witness, or any other participant in the case or would otherwise unduly interfere with the integrity of the proceeding. In determining whether such substantial increase in the threat of, or the potential for, harm exists, a court may appropriately consider the potential for intimidation of witnesses, victims and others when exercising its discretion..." N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts. (H) §7(a).	
NEW MEXICO	The rules state that media coverage is entirely disctionary to the presiding judge, who is to consider the following when considering requests: (a) control the conduct of the proceedings before the court; (b) ensure decorum and prevent distractions; and (c) ensure fair administration of justice in the pending cause. N.M. Sup. Ct. Gen. R., 23-107(A)(1).	
NEW YORK	The presiding judge is to consider the following factors when considering a request for coverage: (1) the type of case involved; (2) whether the coverage would cause harm to any participant; (3) whether the coverage would interfere with the fair administration of justice, the advancement of a fair trial, or the rights of the parties; (4) whether the coverage would interfere with any law enforcement activity; (5) whether the proceedings would involve lewd or scandalous matters; (6) the objections of any of the parties, victims or other participants in the proceeding of which coverage is sought; (7) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse; and (8) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought." In addition, the presiding judge "shall consider and give great weight to the fact that any party, victim, or other participant in the proceeding is a child." N.Y. R. of the Chief Admin. Judge §131.3(d).	
NORTH CAROLINA	There are no standards directly stated in the rules, but they make clear that "The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings, in thecourtroom or the corridors immediately adjacent thereto." Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(b)(1).	

NORTH DAKOTA	A judge may deny or limit coverage when they find: (1) Expanded media coverage would materially interfere with a party's right to a fair trial; (2) A witness or party has objected and shown good cause why expanded media coverage should not be permitted; (3) Expanded media coverage would include testimony of an adult victim or witness in a prosecution under N.D.C.C. chapter 12.1-20 or for charges in which an offense under that chapter is an included offense or an essential element of the charge, unless the victim or witness consents; (4) Expanded media coverage would include testimony of a juvenile victim or witness in a proceeding in which illegal sexual activity is an element of the evidence; or (5) Expanded media coverage would include under cover agents or relocated witnesses. N.D. Sup. Ct. Admin. R. 21 §4(b). Good cause is defined as follows: "'Good cause,' for exclusion under subsection 21(4)(b)(2), means expanded media coverage having a substantial effect on the objector which would be qualitatively different from the effect on members of the general public and from coverage by other types of media." N.D. Sup. Ct. Admin. R. 21 §2(a).
OHIO	There are no formal standards in the rules, but they do state the recording shall be allowed "if the judge determines that to do so would not distract the participants, impair the dignity of the proceedings or otherwise materially interfere with the achievement of a fair trial." R. of Superintendence for Cts of Ohio, commentary to rule 12(A).
OKLAHOMA	Local rule example: there is no standard described in the rules. *See* Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01.
OREGON	The rules state: "The granting of such permission[to record a proceeding] to any individual person or entity is subject to the court's discretion, which may include considerations of the need to preserve the solemnity, decorum, or dignity of the court; the protection of the parties, witnesses, or jurors; or whether the requestor has demonstrated an understanding of all provisions of this rule." Or. Uniform Trial Ct. R. 3.180(3). It further states:" The court shall not wholly prohibit all electronic recording of a court proceeding unless the court makes findings of fact on the record setting forth substantial reasons that establish: (i) There is a reasonable likelihood that the electronic recording will interfere with the rights of the parties to a fair trial or will affect the presentation of evidence or the outcome of the trial; or(ii) There is a reasonable likelihood that the costs or other burdens imposed by the electronic recording will interfere with the efficient administration of justice." Or. Uniform Trial Ct. R. 3.180(4).
PENNSYLVANIA	Coverage may only be granted in non-jury civil trials when the court finds "the means of recording will not distract participants or impair the dignity of the proceedings." Penn. Sup. Ct R. 1910(c)(1).
RHODE ISLAND	There are no formal standards discussed, but the rules make clear that "Proceedings in court should be conducted with fitting conduct and decorum." R.I. Sup. Ct. R., Art. VII, cannon 11.
SOUTH CAROLINA	There are no standards directly in the rules, but they do state the presiding judge has the authority to refuse and limit media coverage "as may be required in the interests of justice." S.C. Appellate Ct. R. 605(f)(1)(iii).
SOUTH DAKOTA	The judge may authorize recording under the following conditions: "(i) the means of recording will not distract participants or impair the dignity of the proceedings; (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction; (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and (iv) the reproduction will be exhibited only for instructional purposes in educational institutions." S.D. Cannons of Jud. Conduct 3(b)(12).
TENNESSEE	The rules make clear that any media coverage is subject to the judge's discretion, who must consider the requests while balancing their requirements to: "(i) control the conduct of the proceedings before the court; (ii) maintain decorum and prevent distractions; (iii) guarantee the safety of any party, witness, or juror; and (iv) ensure the fair and impartial administration of justice in the pending cause." Tenn. Sup. Ct. R. 30A(1).
TEXAS	Local rules example: there are no direct standards in the rules, but they do state the rules that "Nothing in these rules shall be construed to limit or deny access by the public [to] the courts. However, the Sixth Amendment right to a public trial is not absolute and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, or ensuring that a defendant recieves a fair trail." R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex. 1,2.
UTAH	Yes, there is a presumption in favor of allowing recording stated directly in the rules. "There is a presumption that electronic media coverage by a news reporter shall be permitted in public proceedings where the predominant purpose of the electronic media coverage request is journalism or dissemination of news to the public. The judge may prohibit or restrict electronic media coverage in those cases only if the judge finds that the reasons for doing so are sufficiently compelling to outweigh the presumption." Utah Code of Jud. Admin. 4-401.01(2)(A).
VERMONT	The court may permit, prohibit, terminate, limit, or postpone the recording or transmitting of all or any part of a proceeding. When deciding on such an issue, the court is the consider the following factors: the impact of recording or transmitting on the rights of the parties to a fair trial; whether the private nature of testimony outweighs its public value; the likelihood that physical, emotional, economic, or proprietary injury may be caused to a witness, a party, the alleged victim, or other person or entity; the age, mental condition, and medical condition of the party, witness, or alleged victim; whether sequestration of the jury, a delay in transmitting until a verdict has been rendered (if agreed upon by the media or person seeking to transmit), or some other means short of prohibition would protect the interests of the parties, witnesses, or other persons; other good cause. Vt. R. Crim. Proced. 53(e)(3).
VIRGINIA	The rule requires a finding of "good cause" under which "the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice." The rules do not further define "good cause." Cd. of Va. R. Crim. P. § 19.2-266(1).
WASHNGTON	In determining what, if any, limitations should be imposed on the news media coverage, the judge shall be guided by the following principles: (1) Open access is presumed; limitations on access must be supported by reasons found by the judge to be sufficiently compelling to outweigh that presumption; (2) Prior to imposing any limitations on courtroom photography or recording, the judge shall, upon request, hear from any party and from any other person or entity deemed appropriate by the judge; and (3) Any reasons found sufficient to support limitations on courtroom photography or recording shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views. Wash. St. Ct. Gen. R. 16(c).
WEST VIRGINIA	Any party, witness, or counsel may object to the use of cameras or audio recording and the judicial officer has the discretion to approve the media coverage. WV Trial Ct. Rule 8.02.
WISCONSIN	A trial judge more for cause prohibit media coverage of a participant in the court proceedings on the judge's own motion or at the request of the participant. Wis. Sup. Ct. R. 61.11.
WYOMING	Trial judge has broad discretion in deciding whether there is cause for prohibition of coverage. Wyo. R. Cr. P. 53(9). In major trials, the judge may appoint a media coordinator. Wyo. R. Cr. P. 53(2).

DOES THE STATE ALLOW LIVESTREAMING OF DISTRICT COURT TRIALS OR OTHER PROCEEDINGS? ARE ANY SPECIFIC TYPES OF PRETRIAL PROCEEDINGS ADDRESSED (BAIL HEARINGS, PROBABLE CAUSE)?

	Pretrial	Trial	Post-conviction
ALABAMA		Yes, but only as part of an authorized plan signed off on by the Supreme Court, parties and local officals. The rules do not differentiate between different types of proceedings and methods of recording. Ala. Cannons Jud. Ethics, cannon 3.	
ALASKA		Yes, allowed if specifically requested via application and such application is approved. The rules do not differentiate what types of recording is allowed at which type of proceeding. Alaska Ct. R. Admin. 50.	
ARIZONA		Livestreaming is not prohibited by the rules, however all technology used is up to the decision of the presiding judge. The judge may also direct the location of equipment within the courtroom, and limit the number and types of euipment allowed. If the judge approves multiple requests to record or live broadcast, then the parties who submitted requests must pool resources to limit the pieces of equipment in the courtroom. Ariz. R. Sup. Ct. 122.	
ARKANSAS		Yes. Based on the full context of these rules, the term broadcasting does encompass livestreaming. The rules do not discuss different types of proceedings that can be livestreamed, this is ultimately up to the decision of the presiding judge. The rules do discuss how various pieces of equipment may be used and has provisions for pooling of resources. Ark. Admin. Ord. 6(b).	
CALIFORNIA		Livestreaming is not prohibited by the rules, however all types of technology used is up to the decision of the presiding judge and depends on what is specifically requested. The rules do not differentiate between pretrial, trial, and post conviction proceedings. The presiding judge may also ordr jury pooling when two or more requests are made for the same type of media coverage. Cal. R. Ct. 1.150(e)(3).	
COLORADO		Livestreaming is prohibited by the rules, so long as authorized by the judge as prescribed in the rules it would be allowed. However any recording or photography remains off limits for pretrial criminal hearings (with an exceptionf for advisements and arraignments). Colo. Pub. Access R. 3(A). The rules do set forth various limitations on where and how technology can be used in the courtroom, including pooling arrangements when their are multiple requests for the same procceding. Colo. Pub. Access R. 3(5).	
CONNECTICUT		Livestreaming is not prohibited by the rules. The rules implement restrictions on the number of pieces of technology that can be used and set forth media pooling requirements. Conn. R. Superior Cts. §1-11C(f).	
DELAWARE		No livestreaming is allowed trial courts. However, the Delaware Supreme Court does livestream and post recordings of all Oral Arguments. Video for all arguments dating back to December 11, 2013 are available online, and prior to that audio-only recordings are available dating back until February 3, 2004. No such archieves exist nor are allowed for trial courts. *See* Supreme Court Oral Arguments Video Recordings, Delaware Courts.	
FLORIDA		Livestreaming is not directly discussed in the rules, nor is it prohibited. *See generally* Fla. R. Gen. Prac. & Jud. Admin. 2.450.	
GEORGIA		Livestream is allowed, subject to approval of the Judge per the process laid out in the rules. The rules also give the judge the ability to place pooling requirments in place to limit the amount of equipment in the courtroom. Uniform R. Superior Ct. of Ga. 22(I).	
HAWAII		Livestreaming is not prohibited. The rules do limit the number of pieces of equipment that can be allowed in the courtroom, and do require pooling arrangments if multiple parties request the same type of coverage are made. Haw. R. Sup. Ct. 5.1(h), 5.2(a).	
IDAHO		Livestreaming is not prohibited byt the rules. The rules lump in livestreaming with other forms of live broadcast, which is not prohibited when approval is received per the rules. The rules do limit the number of pieces of equipment and opperators that can be present, and requires media pooling in certain circumstances. Idaho Ct. Admin. R. 45(h).	
ILLINOIS		Livestreaming is not prohibted in the rules, nor is it directly discussed. However, live broadcasting is allowed, with proper advanced approval, and subject to certain equipment limitations and media pooling requirments. Ill. Sup. Ct. Ord. MR 2634, 1.4.	
INDIANA		Livestreaming is allowed as part of the limited pilot project. Ind. Sup. Ct. Ord. 21S-MS-454, 2(a).	
IOWA		Judicial officers may broadcast or livestream a judicial proceeding to alternative locations outside the courtroom to accommodate overflow crowds or for other purposes at the presiding judge's discretion. Iowa R. Civ. P. 25.2(14). These rules do not apply to appellate court oral argument or hearing that are livestreamed or broadcasted. Iowa R. Civ. P. 25.5(2)	
KANSAS		Livestreaming in not prohibited by the rules. The rules do require media pooling if there are multiple requests from different groups, and also limit the location where the equipment may be used and the number of people who can be used to operate said equipment. R. Adopted Sup. Ct. Kan. 1001(e)(12-14).	
KENTUCKY		The governing rules do not prohibt livesteaming. Live video and audio broadcasting of Supreme Court oral arguments available live and archived. Livestream available for appellate courts, no archives. Kentucky Court of Justice.	
LOUISIANA		Livestreaming is not prohibited by the rules, however all technology used is up to the decision of the presiding judge. The rules do place some limitations on the type of equipment that can be used, how it can be used, where it can be set up, and does provide for media pooling as needed. La. Code Jud. Conduct, Appendix to Cannon 3, VII-XI.	
MAINE		Livestreaming is not discussed by the rules, however all technology used is up to the decision of the presiding judge, including the location the equipment can be set up, and requires media pooling when there are multiple requests. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), IC.	
MARYLAND		Livestreaming is not directly stated in the rules, but they do allow for "broadcasting" of the proceedings, which in effect is the same. Md. R. Ct, Admin. 16-601(a).	
MASSACHUSETTS		Livestreaming is not discussed by the rules, nor are the specific types of recording or equipment allowed described. The rules to provide for where equipment can be placed in the courtroom, and also provide for media pooling as needed. Mass. Sup. Jud. Ct. R. 1:19, 2(d).	
MICHIGAN		Livestreaming is not discussed in the rules. What is allowed is "any recording or broadcasting of court proceedings be the media using television, radio, photographic or recording equipment." Livestreaming should be allowed under this standard as a form of electronic broadcast. Mich. Sup. Ct. Admin. Ord. 1989-1, 1(a).	
MINNESOTA		Livestreaming may be allowed as a form of visual coverage or recording, assuming all other requirements of the rules can be satisfied. See Minn. Ct. Genral R. Prac. 4.02.	
MISSOURI		livestreaming is not discussed in the rules. However, livestreaming is likely allowed as a form of "media coverage" which includes "audio, video or electronic recording; broadcasting, filming or televising; photographing; or otherwise transmitting information, including by text, electronic mail, online post or other electronic message, whether for live or later dissemination in any medium." Mo. Ct. Operating R. 16.01(e).	
MISSISSIPPI		Livestreaming is not discussed in the rules. However, the rules define "electronic media coverage" very broadly, which likely encompasses livestreaming. ""Electronic media coverage" and 'electronic coverage' shall mean any reporting, recording, broadcasting, narrowcasting, cablecasting, and webcasting of court proceedings by the media using television, radio, photographic, recording, or other electronic device." Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 2(b).	
MONTANA		Local rule example: livestreaming is not discussed directly, however the local rules do limit coverage to "local broadcast networks," limits the amount of equipment that can be used, and prevents the usage of any distracting equipment. Mont. 4th Jud. Dist. R. of Pract., 29.	
NEBRASKA		Livestreaming is allowed, as it fits the definition of "live electronic reporting" which is an allowable form of "expanded media coverage." Neb. Sup. Ct. R. § 6-2002(C).	
NEVADA		Livestreaming is not discussed in the rules. However, the rules define "electronic media coverage" very broadly, which likely encompasses live streaming. "Electronic coverage" means broadcasting, televising, recording or taking photographs by any means, including but not limited to video cameras, still cameras, cellular phones with photographic or recording capabilities or computers. Nev. Sup. Ct. R. 229.	
NEW HAMPSHIRE		Livestreaming is not discussed in the rules. They do allow for "broadcasting" so long as the technical requirements for technology use that are spelled out in the rules are followed, including limiting the number of pieces of equipment, requiring media pooling as necessary, placing equipment only in designated areas, no artifical lighting or flash, etc. N.H. R. Superior Ct. 204(k).	
NEW JERSEY		Livestreaming is not directly discussed, but the definitions used in the rules does classify "electronic devices" to include those that "transmit (wired or wireless), [or] broadcast" such a broad definition encompasses livestreaming. So we can infer it is allowed so long as all the other provisions of the rules are followed. N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts. (H) §7(a).	
NEW MEXICO		Livestreaming is not directly discussed in the rules, but is likely allowed as a permissible form of "broadcasting" which the rules account for. *See* N.M. Sup. Ct. Gen. R., 23-107.	
NEW YORK		Livestreaming is not directly discussed in the rules, but the broad definition of "audio-visual coverage" used in the rules, which includes "electronic broadcasting" likely encompasses livestreaming. N.Y. R. of the Chief Admin. Judge §131.2(b).	
NORTH CAROLINA		Livestreaming is not discussed in the rules. *See* Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15	
NORTH DAKOTA		Livestreaming is not discussed in the rules. *See* N.D. Sup. Ct. Admin. R. 21.	
OHIO		Livestreaming is not discussed in the rules, however they do account for "broadcasting" and "recording by electronic means" which likely includes livestreaming. R. of Superintendence for Cts of Ohio, rule 12(A).	
OKLAHOMA		Local rule example: livestreaming is not discussed in the rules. *See* Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01.	
OREGON		"Live streaming" is directly listed as a form of acceptable "electronic recording" in the rules, so this is allowed so long as the other provisions of the rule are followed. Or. Uniform Trial Ct. R. 3.180(1).	
PENNSYLVANIA		Livestreaming is not discussed in the rules. *See* Penn. Sup. Ct R. 1910.	
RHODE ISLAND		Livestreaming is not discussed in the rules. *See* R.I. Sup. Ct. R., Art. VII, cannon 11.	
SOUTH CAROLINA		Livestreaming is not discussed in the rules. *See* S.C. Appellate Ct. R. 605.	
SOUTH DAKOTA		Livestreaming is not discussed in the rules, nor are any technical requirements or limitations on equipment. *See* S.D. Cannons of Jud. Conduct 3(b)(12).	

TENNESSEE	The rules do not directly discuss livestreaming, but the rules definition of "coverage" is broad enough to likely include livestreaming, which states "'Coverage' means any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment." Tenn. Sup. Ct. R. 30B(1).
TEXAS	Local rules example: livestreaming is not discussed directly, but likely fits into the definition of "Electronic media coverage" which is defined as "recording or broadcasting of court proceeding by the media using television, radio, photographic, or recording equipment." R. Governing Recording and Broadcasting of Ct. Proceedings in Crim. Cases, Tarrant County Tex. 3.2
UTAH	Livestreaming is not directly discussed in the rules, but the terminology used in the rules likely encompasses livestreaming. "'Electronic media coverage' as used in this rule means recording or transmitting images or sound of a proceeding." Utah Code of Jud. Admin. 4-401.01(1)(c).
VERMONT	Livestreaming is not discussed in the rules. *See* Vt. R. Crim. Proced. 53.
VIRGINIA	Livestreaming is not discussed in the rules, nor are any specifics regarding what technology can be used under the rules. They do limit the location equipment can be placed, and limit the number of pieces of equipment and personnel, if those number limits are exceeded media pooling is mandated. Cd. of Va. R. Crim. P. § 19.2-266.
WASHNGTON	Livestream, nor any technology or restrictions on media personnel, are discussed in the rules. *See* Wash. St. Ct. Gen. R. 16.
WEST VIRGINIA	West Virginia's highest court provides live audio and visual broadcastings. *See* West Virginia Judiciary: Argument Webcast.
WISCONSIN	Wisconsin Supreme Court and Court of Appeals provide live audio streaming of oral arguments. See Wisconsin Court System: Livestream courts.
WYOMING	The Wyoming District Courts, Circuit Courts, and Supreme Court provides a live courtroom-audio broadcast to the public. *See* Wyoming Judicial Branch: Live Boadcast.

ANY OTHER STATE-SPECIFIC ISSUES?

	Pretiral	Trial	Post-conviction
ALABAMA			
ALASKA		Alaska rules provide a mentod by which a request to record can be reconsidered after the initial application has been denied, which is done via written letter to the presiding judge. On reconsideration, the presiding judge may request memoranda from parties to seek their input on the request. Alaska Ct. R. Admin. 50.	
ARIZONA		The rules also prescribe that any recording or photograph of a judicial proceeding may not be used to supplement the record at future proceedings, nor can it be used as evidence unless it satisfies the Arizona Rules of Evidence. Ariz. R. Sup. Ct. 122	
ARKANSAS		The rules state that "decisions made as to the details [of the recording] are final and are not subject to appeal." And further, that the court may terminate the recording at any time "in the interest of justice. Ark. Admin. Ord. 6(d)(2).	
CALIFORNIA		Some California trial courts(called Superior Courts) have their own local rules on recording in the courtroom. These local rules must not violate the California Rules of Court provisions. Los Angeles local rules describe limitations on use of personal recording/photography and cell phones. See the Los Angeles Superior Court local rule 2.17.	
COLORADO		The rules specifically state that a judge may authorize the use of electronic technology for the perpetuation of the record and for other purposes of judicial administration. Colo. Pub. Access R. 3(5).	
CONNECTICUT		Connecticut has different rules govering media coverage for appellate and trial matters. The Supreme Court and Appellate courts are presumed to be open to coverage by cameras and electronic media, which is governed by the Rules of Appellate Procedure. Conn. R. App. Proc. § 70-9, 70-10.	
DELAWARE		Delaware Courts did launch a trial period in 2004 where media coverage was permitted in a handful of select counties, but only for non-jury proccedings. The trial period was orginally six months, but ended up being extended, and eventually ended on May 16th, 2005. Del. Cts. Admin. Directive. No. 155. Many (if not all) Delaware Court still ban any use of cellphones, cameras, or any other personal electronic devices in their entirity from courtrooms.	
FLORIDA		The rules place strict limits on the amount of equipment and equipment operators allowed in the courtroom. No more than 1 still photographer, using two cameras, will be allowed. No more than 1 audio recording/broadcast system is allowed. The number of tv cameras is left up to the discretion of the presiding judge. The rules also require media pooling arangments and place limits on where equipment can be set up. Fla. R. of Gen. Prac. & Jud. Admin. 2.450(b-d).	
GEORGIA		Of note, these rules apply only to Georgia Superior Courts, which are general jurisdiction trial courts. Juvenile proceedings are subject to a separate set of rules called the "Uniform Rules of the Juvenile Courts of the State of Georgia." Georgia also hasmagistrate courts(handeling low level criminal and small dollar civil matters), probate courts, state courts(county courts handeling some pretrial criminal matters and other civil matters), all of which have their own set of rules governing media coverage. The state appellate courts also have their own rules around media and recording. *See* Sup. Ct. Ga. R.	
HAWAII		Consent of the presiding judge is only required trial court matters, for appellate matters a request for extended coverage must still be submitted, but only to give notice to the Court and parties. Haw. R. Sup. Ct. 5.1(f)(1).	
IDAHO		The Idaho Supreme Court and Court of Appeals has a separate rule govering cameras in courtrooms, as opposed to the general rules which apply to the trial courts. See Idaho Ct. Admin. R. 46(a).	
ILLINOIS		The general rule, which is cameras are not allowed, is laid out in Rule 44 of the Illinois Supreme Court Rules. Rule 44 provides that cameras may be permitted if the provisions of the Supreme Court's Extended Media Coverage Policy(Ill. Sup. Court Order MR 2634). The rule also states that live broadcasts of remote proceedings which are open to the public is allowed(subject to the remote proceeding rules 45, and 241). Ill. Sup. Ct. R. 44.	
INDIANA		Even though the Indiana Code of Judicial Conduct prohibits cameras in, the Supreme Court does live stream all oral arguments and places the recordings online. The same is true of the Indiana Court of Appeals. *See* Indiana Courts: Oral Arguments Online.	
IOWA		Distinct provision for state Supreme Court and Court of Appeals. The rules in chapter 25 do not apply to remote viewing of any appellate court oral argument or other hearing being livestreamed or broadcasted. Iowa R. Civ. P. 25.5(2).	
KANSAS		The Kansas Supreme Court does directly livestream all oral arguments onto their website. *See* Kansas Judicial Branch: Supreme Court Oral Argument Livestream.	
KENTUCKY		The governing rules limit the number of recording devices and still cameras permitted in the courtroom. For example, the rules permit one television camera in trial court proceedings and two television cameras in appellate court proceedings. Ky. SCR 1(a)–	
LOUISIANA		Louisiana's governing rules on this affirmatively state that when extended coverage is permitted, all media representatives shall have equally the right to provide coverage. La. Code Jud. Conduct, Cannon 3, VII. This is the first such affirmative right extended to media i have seen granted by a state so far in working on this project.	
MAINE		Advanced approval is not required for proceedings in front of the Supreme Judicial Court, however notice must still be given and the process for that is laid out in the same set of rules. Me. Sup. Jud. Ct., Admin. Ord. JB-05-15(A. 9-11), ID.	
MARYLAND		The Court of Appeals does livestream its arguments to its website in real time, video archives of arguments are also available. *See* Maryland Courts: Courts of Appeals Live Webcast.	
MASSACHUSETTS		The Supreme Court does livestream its arguments through a partnership with the Suffolk University Law School. *See* Suffolk University Law School: Massachusetts Supreme Judicial Court, Oral Arguments	
MICHIGAN		Michigan Supreme Court, Court of Appeals, and Court of Claims, all make their proceedings available for livestream through their website. *See* Michigan Courts, Court Livestreams.	
MINNESOTA		The rules describe in depth technical stanards required for any visual, audio, or broadcast coverage that may be allowed, which includes limiting number of personnel, location of equipment, and sound and light restrictions. See Minn. Ct. Genral R. Prac. 4.03.	
MISSOURI		The rules also state that a judge may limit or terminate coverage after it has already been granted, if the judge finds that "(1) Any media has violated this operating rule or any directives the judge imposed pursuant to this operating rule; or (2) Any substantial rights of individual participants or rights to a fair trial may be prejudiced if media coverage is allowed to continue." Mo. Ct. Operating R. 16.02(e).	
MISSISSIPPI		The rules limit the ability to cover the proceeding to"media" members, which is defined in the rules as " all persons and organizations engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, professional journal, and other news reporting or news gathering agencies." Miss. R. Electronic & Photographic Coverages of Jud. Proceedings, rule 2(a).	
MONTANA		Media coverage of Supreme Court oral arguments is generally allowed, and subject to its own rules and regulations. *See* Mont. Code. R. Civ. Procedure, Rule 18.	

NEBRASKA	The rules also lay out technical requirements that must be followed for any media coverage, indluding limiting the number or pieces of equipment, pooling requirements, and location of equipment. *See* Neb. Sup. Ct. R. § 6-2005.
NEVADA	Unless specifically authorized by the judge, no more than one television camera person and one still photographer may be taking pictures in the courtroom at any one time. If more than one news reporter has permission to participate, it is up to the news reporters to determine who will participate. If news reporters cannot agree, the judge shall decide who may participate. Nev. Sup. Ct. R. 233.
NEW HAMPSHIRE	New Hampshire has two separate trial courts, the Superior Courts and the District Division of the Circuit Courts. Both have areas of indpendent jurisdiction, and areas of overlapping juridiction. Both are subject to their own set of rules, however the rules governing photographing, recording and broadcasting in the courtroom are identical for both. For the purposes of this project I focused on the Superior Court rules, but the District Division of the Circuit Court rules on this subject matter are identical. See NH. R. Cir. Ct. Dist. Division.
NEW JERSEY	The rules also establish technical requirements on the use of devices to record in the courtroom, these include limiting the locations where equipment can be placed, requires pooling of media in certain circumstances, limits artificial lighting, etc. See Appendix 1, §§ A, B, C, to N.J. Sup. Ct. Guidelines on Media Access & Electonic Devices in Cts.
NEW MEXICO	The rules list technical requirements on both equipment and personnel, limiting the number of pieces of equipment and the number of people who can opperate them. The rules also require media pooling as needed to comply with the equipment and personnel limitations. N.M. Sup. Ct. Gen. R., 23-107(E).
NEW YORK	When a judge has approved media access to a proceeding, they must hold a pretrial conference with members of the media and all parties to the proceeding, to consider any objections that have been raised, to determine any limitations on the coverage, and to discuss a plan for the coverage in terms of equipment/personnel in the courtroom and to make media pooling arangements if necessary. N.Y. R. of the Chief Admin. Judge §131.5.
NORTH CAROLINA	The rules also regulate location, and technical specifications of equipment and personnel. Gen. R. of Pract. Superior & Dist. Cts. of N.C., rule 15(c), (e).
NORTH DAKOTA	The rules establish the right of the judge to revoke permission at any time if there is a failure to comply with the conditions of the rule or judge. R. of Superintendence for Cts of Ohio, rule 12(D).
OHIO	Local rule example: violations of the local rules, or any condition imposed by a judge related to recording in the courtroom can lead to contempt of court proceedings. Ct. R. 7th & 26th Admin. Dist of Okla., rule 39.01(B).
OKLAHOMA	
OREGON	The rules explicitly state that the court may order any person who has recorded a proceeding to turn over that recording to the court for an in camera review to determine whether terms of the rules have been violated, or "to assure the effective administration of justice." Or. Uniform Trial Ct. R. 3.180(12).
PENNSYLVANIA	The same strict standards for trial courts apply to the Supreme Court, who does not publically broadcast or record Oral Arguments unless excpetional circumstances warrant it.
RHODE ISLAND	
SOUTH CAROLINA	The Supreme Court issued an Order on 9/28/2020, which extended the Appellate Court Rule 605 to all proceedings, including all Circuit, Family, Probate, Master in Equity and Summary court proceedings. The order was granted in response to the Covid-19 pandemic, and remains in effect today. *See* Sup. Ct. S.C. Ord. 2020-09-08-01.
SOUTH DAKOTA	Audio broadcasts of Supreme Court arguments are made available on their website. *See* South Dakota Unified Judicial System: Supreme Court Hearings.
TENNESSEE	
TEXAS	Texas does not have state wides rules or regulations on the broadcasting of criminal proceedings, but rather local rules for the given district/county control the issue. The Supreme Court of Texas must adopt the local rules, essentially giving their stamp of approval, so long as the local rules are in line with US Supreme Court and Texas precedent regarding sixth amendment and due process rights.
UTAH	Although there is a strong presumption in the rules in favor of allowing recording, there is a disclaimer rule which states: "Except as provided by this rule, recording or transmitting images or sound of a proceeding without the express permission of the judge is prohibited. This rule shall not diminish the authority of the judge conferred by statute, rule, or common law to control the proceedings or areas immediately adjacent to the courtroom." Utah Code of Jud. Admin. 4-401.01(7).
VERMONT	
VIRGINIA	The statute says these rules "shall serve as guidelines" underwhich local districts may implement more detailed regulations. Cd. of Va. R. Crim. P. § 19.2-266.
WASHNGTON	
WEST VIRGINIA	Any media coverage may not be admissible as evidence unless the presiding officer designated it as part of the official record of the proceeding. WV Trial Ct. Rule 8.09. Only one television camera and one still photographer are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements. WV Trial Ct. Rule 8.06.
WISCONSIN	SCR 61.10 provides process for resolving disputes involving this chapter, Rules Governing Electronic Media and Still Photography Coverage of Judicial Proceedings.
WYOMING	In the Wyoming Supreme Court, absent express authorization by the court, individuals attending or participating in open court or confidential proceedings cannot use or operate any camera, video recording device, or audio recording device to record, broadcast, or photograph the proceedings. Rule 5 of the Supreme Court of Wyoming. Also of note: Uniform Rule 804 for District Courts of the State of Wyoming provides: "Media access, as set forth in Rule 53, W.R. Cr. P., is available in civil cases governed by the Wyoming Rules of Civil Procedure." Uniform Rules for District Courts of the State of Wyoming

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

PETER A. CAHILL
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS. MINNESOTA 55487-0422
(612) 596-8733
peter.cahill@courts.state.mn.us

January 28, 2022

To the Advisory Committee on the Rules of Criminal Procedure

Re: Cameras in the courtroom

Thank you for the opportunity to comment on potential modifications to the rules governing cameras in the courtroom. My comments are limited to the use of cameras in criminal cases.

As a district court judge, I have opposed the use of cameras in the courtroom in criminal cases, but my recent experience in *State v. Chauvin* has changed my opinion such that I now believe cameras in the courtroom can be helpful in promoting trust and confidence in the judicial process and are sometimes necessary to safeguard both the defendant's right to a public trial and the public's right of access to criminal trials. I am not, however, a proponent of removing all limits on the use of cameras. Instead, I believe the use and limitations on cameras in criminal cases should be left primarily to the discretion of the trial judge presiding over an individual case. As trial judges, it is our responsibility to manage hearings and trials such that dignity and decorum are maintained while constitutional rights and Due Process requirements are respected. As part of that process, cameras can facilitate effective trial management in the right case but might be unnecessary or inappropriate in other cases. While parties certainly should have input into the court's decision, the party-consent provision that is currently in the rules should be eliminated.

A trial court judge's discretion should not be completely unfettered and should be subject to certain presumptions and prohibitions. For example, I believe that there should be a presumption against broadcasting pretrial hearings. Those hearings will often involve litigation about evidence that might ultimately not be admissible and the possibility that potential jurors could be inadvertently exposed to such excluded evidence should be limited as much as possible before trial. On the other hand, there should be a presumption that cameras be allowed in trials and sentencings. Jurors are routinely ordered to avoid media coverage once jury selection begins, and my experience, based on post-trial discussions with jurors, is that jurors regularly follow that order. To guide trial judges in deciding whether cameras will be allowed, factors

should be listed in the rule, including whether there is high public interest in the trial, whether security or public health concerns exist that would merit restriction of observers from the physical courtroom itself, and whether the use of cameras would promote transparency and public access.

If cameras are allowed, limitations should be placed in the rule concerning what proceedings should be limited to audio coverage only or not broadcast at all. Jurors should never appear on video. No minor witnesses should appear on video. No criminal sexual conduct victims should appear on video or audio. Autopsy photos or video should never be broadcast outside the courtroom. The same should be true for any exhibits that are extremely graphic or emotionally disturbing.

Finally, as you can tell from my order in *State v. Chauvin* (attached), details matter, and the trial judge should have wide discretion over the choice of the pool camera vendor and the procedures to be followed during the trials or hearings. A single person claiming to be a member of the media who just wants to prop a camera up in the courtroom would be distracting and not meet the goal of cameras being unobtrusive. To effectuate all the detailed procedures that should be a part of any court order allowing cameras, only experienced and professional media sources should be utilized.

Thank you again for allowing me to share my thoughts.

Sincerely,

Peter A. Cahill
Judge of District Court

STATE OF MINNESOTA | DISTRICT COURT
COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

DEREK MICHAEL CHAUVIN,
TOU THAO,
THOMAS KIERNAN LANE,
J. ALEXANDER KUENG,

Defendants.

ORDER ALLOWING AUDIO AND VIDEO COVERAGE OF TRIAL

Dist Ct. File 27-CR-20-12646
Dist Ct. File 27-CR-20-12949
Dist Ct. File 27-CR-20-12951
Dist Ct. File 27-CR-20-12953

This matter came before the Court on June 29, 2020 and September 11, 2020, on Defendants' motions for audio and video broadcast of the trial(s) in these cases.

Matthew Frank, Assistant Attorney General, appeared on behalf of the State of Minnesota at the June 29, 2020 hearing. Keith Ellison, Minnesota Attorney General, Matthew Frank, Assistant Attorney General and Neal Katyal, Special Assistant Attorney General, appeared on behalf of the State of Minnesota at the September 11, 2020 hearing. The State does not consent to audio or video coverage of any trials in these cases.[1]

Eric J. Nelson, Attorney at Law, appeared on behalf of Defendant Chauvin. Robert M. Paule and Natalie R. Paule, Attorneys at Law, appeared on behalf of Defendant Thao. Earl P. Gray, Attorney at Law, appeared on behalf of Defendant Thomas Lane. Thomas C. Plunkett,

[1] The State filed its July 27, 2020 letter stating this position into all for cases. *See, e.g.*, *Chauvin*, 27-CR-20-12646, Dk # 62; *Thao*, 27-CR-20-12949, Dk # 66; *Lane*, 27-CR-2012951, Dk # 76; and *Kueng*, 27-CR-20-12953 Dk # 70.

Attorney at Law, appeared on behalf of Defendant Kueng. All Defendants were present at the June 29 and September 11, 2020 hearings, with Chauvin appearing remotely via Zoom at the June 29, 2020 hearing. All Defendants have requested audio and video broadcast of the trial pursuant to Rule 4.02(d) of the Minnesota General Rules of Practice for the District Courts.

Based upon all the files, records, and proceedings, the Court makes the following:

ORDER

1. The joint jury trial to be held in the above-captioned cases commencing March 8, 2021 may be recorded, broadcast, and livestreamed in audio and video subject to the conditions listed below.
2. Audio and video recording, broadcasting, and livestreaming will be allowed only from Courtroom 1856, the trial courtroom, of the Hennepin County Government Center and only during trial sessions. Only matters that are on the record are subject to audio coverage. Sidebar discussions among the Court and counsel will be presumed to be off the record unless the Court indicates otherwise. Off the record matters may be covered by video, but only when the judge is on the bench and the trial is in session.
3. No video photography, still photography, or audio recording may be conducted in any other Hennepin County Government Center location where the use of recording devices is otherwise prohibited.
4. Up to three video cameras may be installed in the trial courtroom: one in the back of the courtroom facing the witness stand, one on the wall behind the jury box, and one on or near the bench facing the lectern where counsel examines witnesses. After installation before the beginning of trial, cameras will not be moved from their fixed positions.

5. Video cameras will be installed and operated by a single media organization ("Pool Producer"), selected by the Court, that is experienced in televising court proceedings. The Pool Producer will also be responsible for producing a single transmission feed to the Court for use in overflow courtrooms and to media outlets for recording, broadcasting, and livestreaming. The Pool Producer will not be compensated for its operation of the cameras and production of the single transmission feed. Neither the Pool Producer nor any media outlet will hold a copyright or any other intellectual property right for any of the raw footage from cameras or the single transmission feed that is produced that would prevent any other media outlet or entity from using, broadcasting, or sharing the footage or any other free use thereof. The Pool Producer shall also manage an audio, still photography, and video feed from the computers being used to publish exhibits to the jury, and may include such footage in its production of the single transmission feed. Finally, the Pool Producer will provide a "YouTube ready" version of the single transmission feed for the Minnesota Judicial Branch to use as it wishes.
6. Pan, tilt, and zoom (PTZ) functions of cameras may be used at the discretion of the Pool Producer, but with the following limitations:
    a. No juror or potential juror shall appear in any video at any time. Audio of potential jurors during jury selection will be allowed, except that no audio shall be allowed for any *in camera* examination of a juror pursuant to Minn. R. Crim. P. 26.02 subd. 4(4).
    b. No witness under the age of 18 shall appear in any video unless the witness and at least one parent or guardian of the witness consents in writing before the witness is called. Audio coverage shall be allowed regardless of whether video is allowed.
    c. No members of the George Floyd family shall appear in any video unless the witness consents in writing or orally on the record before the witness is sworn. Audio coverage shall be allowed regardless of whether video is allowed.

d. With the exception of when a verdict is taken, no video of counsel tables, including video of counsel for the State, the defendants, or defense counsel, shall be allowed unless all tables, counsel and parties are visible in the image (*i.e.*, no zooming in on any one table of participants).

e. The camera on or near the bench cannot be positioned or manipulated to view anything on the horizontal surface of either the bench or witness stand.

f. Camera PTZ functions shall be performed remotely and as quietly as possible so as to be imperceptible to trial participants.

7. The Pool Producer shall have a technician present in the courtroom during trial to troubleshoot and to facilitate communication between the Court and the Pool Producer.

8. No microphones will be placed at any counsel table and no audio coverage of conversations occurring at counsel tables shall be allowed.

9. Within two weeks of the conclusion of trial, the Pool Producer will provide to the Fourth Judicial District Administrator four copies of the single transmission feed. The District Administrator will file a copy of the single transmission feed as a court exhibit in each of the four cases. The format of the copies should be in a format approved by the Court.

10. The attached memorandum is incorporated.

BY THE COURT:

____

Peter A. Cahill
Judge of District Court

Memorandum

The right to a public trial, guaranteed by both the Sixth Amendment of the United States Constitution and Art I, § 6 of the Minnesota Constitution, is for the benefit of the defendant, not the public. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 381 (1979); *State v. Lindsey,* 632 N.W.2d 652, 660 (Minn. 2001). This right ensures that:

> the public may see [the defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions."

Gannett Co., 443 U.S. at 380; *see also Estes v. Texas*, 381 U.S. 532, 538-39 (1965).

But concurrent with the defendant's right to a public trial is the press and general public's First Amendment right of access to public trials, recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 580 (1980), *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605-06 (1982), and *Waller v. Georgia*, 407 U.S. 39, 44 (1984). The interests promoted by this First Amendment right of public access are similar to those promoted by the defendant's Sixth Amendment right to a public trial:

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.

Globe Newspaper, 457 U.S. at 606 (citations omitted).[2]

---

[2] *See also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-09 (1984) (emphasis in original; citations omitted):

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. . . . [The openness of criminal trials] has what is sometimes described as a "community therapeutic value." . . . Criminal acts . . . often provoke public concern, even

The defendant's Sixth Amendment right to a public trial and the public and media's rights of access to criminal trials under the First Amendment are not unlimited. *Globe Newspaper,* 457 U.S. at 606; *State v. Fageroos,* 531 N.W.2d 199, 201 (Minn. 1995). In the past, failures to restrict public and media access inside the courtrooms of high-profile trials resulted in media action that was so intrusive and disruptive that defendants' rights to a fair trial were violated.[3] While the right of the press and public to attend criminal trials is sacrosanct, and carries with it the right to report what has occurred during the trial, the right does not include a right to "telecast" the actual proceedings. *Estes v. Texas,* 381 N.W.2d 532, 541-542 (1965).

Against this historical background, the Minnesota Supreme Court promulgated the current version of Minn. Gen. R. Prac. 4, which limits audio and visual media coverage of criminal proceedings. While that rule sets out a general rule of prohibition,[4] it also allows for the visual and/or audio recording and reproduction of trial proceedings with the consent of all parties.[5] Even with the consent of all parties, visual or audio recording of trial proceedings is limited.[6] Normally, this rule can be applied without concern that it will impinge on the right to a public trial or the right of access held by the public and press. Spectators may freely attend trials, and the usual trial receives little attention, except from family and friends of the victim or

---

> outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. . . . Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

[3] *See Estes v. Texas,* 381 U.S. 532 (1965); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 548-549 (1980) (discussing trial in the Lindbergh baby kidnapping and murder).
[4] Minn. Gen. R. Prac. 4.01.
[5] Minn. Gen. R. Prac. 4.02(d). All Defendants have moved for audio and video broadcast of the trial. The State has objected.
[6] Minn. Gen. R. Prac. 4.02(d)(i)-(v).

the defendant and the Court can easily accommodate those wishing to attend the trial in person. On occasion, members of the media attend and report on the proceedings. All spectators, whether journalists, interested parties, or casual observers, may, in normal times, come and go as they please.

The instant situation, however, not only is abnormal—it is in fact quite unique. The COVID-19 pandemic persists and requires social distancing, especially during jury trials. All four Defendants here have been joined for trial by separate order filed today in all four cases in which this Court has granted the State's motion for trial joinder. The joint trial requires extra counsel tables, and thus a higher demand on the space within the courtroom. Even when this Court used the largest courtroom in the Fourth Judicial District[7] for the joint motion hearing on September 11, 2020, only a handful of family and media representatives could fit into the courtroom given all the parties and counsel and the social distancing requirements in the courtroom necessitated by the COVID-19 pandemic and various orders issued by Chief Justice Gildea and the Judicial Council in the wake of the COVID-19 pandemic.[8] Most family and media had to observe the proceedings through a closed-circuit feed to other courtrooms,[9] and even then had trouble hearing all of the proceedings. The general public could only observe from a closed-circuit feed to a courtroom several blocks away in the Hennepin County Government Center. The closed-circuit feed was limited to a static wide-view of the courtroom

---

[7] Courtroom 630 of the Hennepin County Family Justice Center.

[8] *See, e.g.*, https://mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/Statewide-JMRT-Recommendations-for-Jury-Trials.pdf; https://mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/Order-5152020.pdf; https://mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/Order-070720.pdf.

[9] Arguably, the use of these "overflow courtrooms" necessitates audio and video coverage of the proceedings that is not permitted by Minn. Gen. R. Prac. 4.02(d).

from a single camera above the jury box. This was a hearing that did not require space for jurors and it was still cramped.

A courtroom has been rebuilt in the Hennepin County Government Center, Courtroom 1856, for the upcoming joint trial in these cases. Spacing requirements mean there will be little, *if any*, room for any spectators in that courtroom during the trial.[10] That includes not only family members and friends of George Floyd and the Defendants, but also members of the public and the press.

Not surprisingly, these cases continue to hold the interest of the press and the general public on an international scale. Virtually every filing by the parties in these cases is reported in the media, both locally and nationally. This Court's substantive orders also receive local and national news coverage. Protests demanding justice for George Floyd continue. It is expected that, even with some overflow courtrooms, the demand by family members, the public, and the press to attend the joint trial will outstrip the court's ability to provide meaningful access.

This Court concludes that the only way to vindicate the Defendants' constitutional right to a public trial and the media's and public's constitutional right of access to criminal trials is to allow audio and video coverage of the trial, including broadcast by the media in accordance with the provisions of the attached order. As the U.S. Supreme Court observed in *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966):

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

---

[10] A non-traditional setting for the trial (high school auditorium, *etc.*) is not a feasible alternative because of the security concerns outlined in a separate Order for an anonymous jury, also being filed today.

The Court acknowledges that the attached order allows for greater audio and video coverage than that contemplated by Minn. Gen. R. Prac. 4.02(d), even if all parties had consented. It could be argued that the Court should simply follow the limitations of the rule to protect the constitutional rights of the Defendants, the public, and the press. The limitations of the rule are so extensive, however, that nothing would be known about the empaneled jurors, all witnesses could veto coverage of their testimony, and the public would be left with nothing but the arguments of counsel. That is hardly a basis for the public "to participate in and serve as a check upon the judicial process."

The Court's attached order seeks to accommodate the interests served by the current rule by expanding audio and video coverage only as necessary to vindicate the Defendants' constitutional right to a public trial and the public's and press rights of access to criminal trials in the unique circumstances currently prevailing in the COVID-19 pandemic and the intense public and media interest in these cases. By doing so, the Court is confident that "the public may see [that Defendants] [are] fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep [their] triers keenly alive to a sense of their responsibility and the importance of their functions."

PAC

Date: 1/31/2022

To: Advisory Committee on the Rules of Criminal Procedure

From: Adrianne McMahon, Assistant Public Defender

Re: Audio and Visual Coverage of District Court Criminal Proceedings

---

Please accept this memo as my comments re: the proposal to review the rules regarding cameras in the courtrooms for criminal proceedings. As a public defender who has been practicing for 13 years, I am strongly opposed to changing the rules to allow for cameras to be present in the courtrooms and I worry that allowing that to happen would only serve to diminish the quality of justice, rather than improve it. While transparency in the court process is extremely important, it is my opinion that the current rules allow for the appropriate level of public access, and that allowing cameras in the courtroom will not improve the system. There are several reasons I have this concern.

1. The Chauvin trial was the first live-streamed criminal case in my memory in Minnesota. I watched this trial the entire way through, either as it was happening live or later on in the day, when I had time after work. I also followed the trial on social media and stayed up to date on the things that were being said and done within the community as a result of all of the public being able to see the trial, instead of just the people who could physically be present in a courtroom (assuming, of course, normal, non-pandemic times). I was horrified to hear that people were going after the defense expert witness because he testified for the defense, including leaving a pig's head at the expert's former residence[1]. As a public defender, I found this extremely troubling. In order to be able to zealously advocate for my clients, I need to be able to ensure that expert witnesses are able to testify and when situations like this occur, it can cause a chilling effect on potential expert witnesses who will not want to be harassed or targeted by members of the public who disagree with their testimony. This occurred after the expert had testified; if it becomes a concern for experts or other witnesses before they testify, they may choose to not testify or they may disregard a subpoena. In the case of law witnesses, they may choose not to cooperate with the defense investigation for fear that they may be called to testify and could be targeted. It is worth noting that the pig's head incident took place in California, a completely different state than ours, which shows the reach of cameras and the publicity of cases and just how far it can extend if members of the public want to harass and intimidate witnesses, regardless of where they are located.

2. In addition to the potential for intimidation and retaliation against witnesses, there is also concern for me as a defense attorney and for my clients. Earl Gray, one of the attorneys

[1] https://apnews.com/article/derek-chauvin-expert-witness-pig-head-ca8eacbbfdc14928e1480671bff648f9

who represents Thomas Lane, a co-defendant of Mr. Chauvin, reported that he and his client were physically attacked outside of the courthouse by a mob of people and that the mob damaged the car that they were in[2]. As a public defender, I do not have the option of declining cases and I must represent anyone that I am assigned to represent. That includes people who are charged with very awful crimes, in which the parties involved can feel very strongly about the outcomes and the court process. I have dealt with angry family members of victims and the occasional insulting comment on a newspaper article about how I am a terrible person for defending "criminals." However, those are very limited instances and when the vitriol has been directed at me in person at a courthouse, it has been one or two people, usually family members or friends of the alleged victim(s), and I have not felt unsafe by this. However, with cameras in the courtrooms allowing everyone to be aware of the cases that are ongoing, especially high-profile cases, I worry that I will be targeted in much the same way as Mr. Gray reported he was targeted. As a woman and a defense attorney, I would not feel safe having to navigate through an angry mob of people in order to get to my court hearings. I would feel like I was risking physical harm or that my client would be risking physical harm. Cameras in the courtrooms broadcasting everything that is happening in a case lets members of the public who may have no connection whatsoever to the case be aware of everything happening in a case, very easily, and the advent of social media means that people can coordinate efforts much faster than they used to be able to do. It would not be difficult for a section of the public to congregate outside of the courthouse on a day that I have a hearing in a high-profile case and threaten, harass, or intimidate me. The cameras make everything much more highly visible and as a result, allows people who otherwise would have no interest or awareness in a case suddenly become activists, not all of whom are going to be reasonable about their activism. I would be very worried about something like what Mr. Gray reported happening to him happening to me in the future if cameras are allowed.

3. Similar to my second point, I would also worry about members of the general public finding out where I live and harassing me. Again, defense attorneys are not very well respected by the general public, who see us as "getting criminals off." We battle with that stigma every day already. But, I have never had to be worried that I would be bombarded at my home by angry members of the public who don't like that I do the work that I do. This has happened recently, to Judge Regina Chu, where a mob showed up outside of what they believed to be her residence[3]. I am a single woman who lives alone—the terror I would feel at a group of people outside my first floor residence, screaming at me, would be indescribable. Cameras in the courtroom mean that everyone will be able to see every single thing that happens, not just something that a reporter

---

[2] https://www.mprnews.org/story/2020/10/01/attorney-angry-crowd-justifies-a-change-of-venue-in-floyd-trial

[3] https://www.startribune.com/demands-against-judge-in-kimberly-potter-trial-lead-to-protest-at-condo-unit/600114225/

picks up and chooses to publish in an article. That means that people can get upset about everything that happens, anything they disagree with can set them off and cause them to rally together to go after a person in the courtroom. And the reality is that most of the time, it's going to be the defendants and their lawyers that are going to be held up as the villains. With a reporter in the courtroom, they generally have a routine of being in the courtrooms so they have a better understanding of how things work in courtrooms and what to expect than members of the general public who don't understand the nuances of things or whether things are common or not. In the Rittenhouse case in Wisconsin, there was much made about the fact that the judge determined that the prosecution could not refer to the alleged victims as "victims[4]." I had family and friends who were extremely upset about that ruling and I had to explain to them that that is actually quite common for the defense to request that, that I make that request in every case I have that goes to trial, and that it's fairly common that a judge will grant that request. As members of the general public, they didn't know that, so seeing that made them extremely upset. That was the consensus of many people on social media, as well. People who aren't in the courtroom every day, or very often, do not have the understanding of what is common, what is controversial, or what is important or not. A reporter has more experience in this realm and is less likely to blow something out of proportion that is actually quite insignificant.

4. Outside of the potential for in person threats or intimidation due to cameras making cases more widely accessible to non-involved persons, there is the very real issue of harassment in other forms that defense attorneys would most certainly receive. Eric Nelson, the attorney who represented Mr. Chauvin, received plenty of hateful emails, letters, and phone calls, as did another attorney named Eric Nelson who was not at all related to the case[5]. The Hill ran an opinion piece urging people should not hate Eric Nelson for simply doing his job[6], a job which is absolutely vital, absolutely critical, to maintaining the legitimacy of our judicial system. People who didn't appear at the courthouse or the attorneys' homes to express their unhappiness with attorneys representing high profile defendants in the Chauvin and Potter cases still had to deal with a deluge of hateful vitriol in the form of emails, letters, and phone calls. Being a public defender is extremely hard work. We often feel like we are not respected by anyone else in the courtroom, by our clients, by our clients' families, or by the general public. When someone actually *thanks* me for the work I do, it almost brings me to tears because it is so rare for me to hear that. Other public defenders feel the same way. It's hard enough to be screamed at by clients or their families, to hear from your boss that despite everything you have done for a client

[4] https://www.cnn.com/2021/10/27/us/kyle-rittenhouse-trial-victim-terminology/index.html

[5] https://bringmethenews.com/minnesota-lifestyle/thats-not-me-divorce-lawyer-with-same-name-as-chauvin-attorney-clarifies

[6] https://thehill.com/opinion/criminal-justice/549420-chauvin-verdict-dont-hate-his-lawyer

they have still contacted your boss to say how terrible you are, to have clients tell a judge that you are just a "public pretender." We deal with it, since it's part of the work and we can handle this from a few clients at a time. The stress of having to constantly be barraged with emails, letters, and phone calls from people who have no affiliation with the case, telling me how horrible I am and how I should die and how I am the devil, etc., etc. would be enough to break me and cause me to leave this job. I know for many public defenders, especially now with the pandemic backlog, our psyches are hanging on by a thread, our mental health is in poor shape, and we are barely holding it together. Add on the stress of being screamed at by total strangers and told how terrible and worthless you are when you answer your work phone, and you will not have many people who will be willing to do this work. None of this is happening now because the general public has to actually *come to the courthouse* to see the minutia of what's going on in a case, or catch a recap in the news. But if people can sit at home, streaming the action in the courtroom, and simply pop off a scathing, insulting email from their laptop or phone from the comfort of their couch, the level of hatred we get is going to skyrocket.

5. Even if people in the general public don't reach out in person or via letter, email, or phone to harass the lawyers involved in high profile, media covered cases, the fact remains that people will always mock others and by allowing everyone to have constant access to the courtroom by way of cameras in court, rather than people coming to the courthouse or catching it on the news, that enables more and more widespread and public mockery. One can argue that it's just words, but over time, those things can become too much for a person to bear. Memes circulate now quickly on social media and the lawyers involved in recent high-profile cases have become the butt of cruel and unkind jokes. Multiply that into the thousands every day and try to imagine the toll that would play on someone's mental health. Memes about attorney Eric Nelson cropped up almost instantly, as did comments on social media about how he was stupid, evil, dumb, unethical, etc. Reading that, hearing that, finding out about that over and over and over again is inevitably going to run someone into the ground. Access to videos, either live or recorded, of courtroom proceedings means that clips of a person speaking in court can be turned into a gif or a meme; images of someone in court can be turned into a cruel internet joke. All this adds up to take its toll on someone's mental health and well-being.

The chilling effect that cameras would have on witnesses, experts, and even attorneys themselves who wish to avoid being ridiculed, harassed, threatened, or intimated, would destroy the foundation of the judicial system. Perhaps if social media were not such a prevalent factor in our lives today, this would be different, but the reality is that social media can and does quickly create mobs and momentum to attack, harass, intimidate, or ridicule people that the public has decided is the villain. That includes attorneys who are assigned to represent the indigent. There is nothing preventing someone from coming in to the courtroom and viewing a trial or court proceeding if they wish—even in today's world with the pandemic, a person can request and receive the Zoom courtroom login from court administration for a particular case/hearing and

they can watch as an observer, without there being a live-stream to the general public or a recording. People are able to be in courtrooms, in person or virtual, to see what is happening and have transparency. Trials continue to be public events as required by the Constitution, even during covid, with the ability to have two-way closed circuit video from the courtroom to a viewing room and vice versa. Adding cameras to the courtrooms to “improve” transparency will do nothing more than create targets on defendants’ and defense attorneys’ backs. It will impede the ability for the defense to find witnesses, lay or expert, willing to work with the defense for fear of retaliation. It will harm attorneys’ mental health and well-being.

I strongly urge the Committee to leave the Rules as they are and not to expand or modify them.

MINNESOTA COALITION ON GOVERNMENT INFORMATION (MNCOGI)
Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure

Hal Davis

Comment on Cameras in Courtrooms

February 4, 2022

The Minnesota Society of Professional Journalists endorses this statement.

The Minnesota Coalition on Government Information urges the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure to recommend that Court procedures for audio or video coverage of criminal proceedings be expanded to accommodate public access to all proceedings.

MNCOGI supports expanding cameras in Minnesota courts as a way for the public to see what happens in its courtrooms. Cameras allow the public to observe government officials perform important duties that only a select few can witness in person. Such coverage provides the public with information vital to its role in a functioning democracy and helps ensure that the information disseminated is more complete and accurate.

With national viewership of the livestreamed murder trial of former Minneapolis police Officer Derek Chauvin in the death of George Floyd, Ramsey County Judge Richard Kyle Jr., Chair of the Advisory Committee, pointed out the proceedings went smoothly.

Several committee members have argued against cameras.

Some members said cameras may intimidate witnesses or encourage attorneys to grandstand. The Chauvin trial proved those fears groundless. The cameras did not disrupt the proceedings, and the public saw for themselves what happened in court.

On November 9, 2021, in her "Order Granting A/V Coverage of Trial [of *State v. Kimberly Ann Potter*]," Hennepin County Judge Regina Chu stated: "Televising the trial will not and does not violate the Defendant's right to a fair trial. The Chauvin trial should allay any trepidations about cameras in the courtroom." (p. 3.)

Some defense lawyers contend that the current rules give the public a distorted view of criminal defendants since video is allowed only after a finding of guilt. Brief camera coverage of sentencing hearings doesn't shed light on what has occurred in the course of a criminal case.

MNCOGI agrees. The best way to shed light would be to allow cameras at every stage of criminal proceedings, since many such cases end in acquittals.

On January 19, 2022, Hennepin County Judge Peter Cahill ordered that trial exhibits in the Chauvin case, including the entirety of the trial filmed by Court TV, be made available to the public and the news media for viewing and inspecting, from Feb. 7 to Feb. 18. Court TV's hard drive of the livestream of jury selection and trial is Court Exhibit 30. Judge Cahill ordered that the Court Administration shall make copies of Exhibit 30 requested by any member of the public or press who provides a suitable hard drive and pays the standard court copying charge.

Judge Cahill's order shows that the Court Administration can order full video of a trial made available to the public. In fact, one member of this committee – Greg Scanlan, a Hennepin County assistant public defender – suggested the Minnesota Judicial Branch provide video coverage of all trials.

This has been the case in at least one state since 2012. In Ohio, video is one way the court makes a record of day-to-day activities at the trial level.

This is from the Rules of Superintendence for the Courts of Ohio:

http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf

RULE 11. Recording of Proceedings.

(A) **Recording devices**. Proceedings before any court and discovery proceedings may be recorded by stenographic means, phonogramic means, photographic means, audio electronic recording devices, **or video** recording systems. The administrative judge may order the use of any method of recording authorized by this rule. (*Emphasis added*.)

This means that the transcript of trial court proceedings can be video public record. A member of the public can call the Ohio Office of Court Services and ask for the minutes of, for example, June 10, 2021, of Courtroom X of the Montgomery County Court of Common Pleas, and get a DVD of the public proceedings the same day.

As to the effect of cameras on Ohio jurisprudence, Ohio Chief Justice Maureen O'Connor wrote this: "As a prosecutor and trial judge, I spent nearly three decades in courtrooms with cameras and, over the past 10 years, have heard hundreds of cases at the Ohio Supreme Court that were broadcast live on TV. I have seen no evidence that the presence of cameras has a negative effect on proceedings."

MNCOGI believes it is time to let the people of Minnesota see what goes on in the people's courtrooms.

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

February 7, 2022

Mr. Kyle Christopherson
Communications Specialist
Court Information Office
305 Minnesota Judicial Center
25 Rev. Martin Luther King Jr., Blvd.
St. Paul, MN 55155

RE: Comment on Cameras in Courtrooms

Dear Mr. Christopherson,

The Minnesota County Attorneys Association is deeply committed to protecting the rights of victims, witnesses and litigants in criminal cases. Prior to the adoption of the pilot project regarding cameras in the courtroom, the members of our association, along with a number of victim advocacy groups, expressed strong reservations about victims and witnesses being further traumatized by the presence of cameras during the proceedings.

We appreciate that the Court's August 12, 2015 Order instituting the pilot program recognized these concerns. The Court significantly limited the kinds of cases where audio and visual could be present, limited the coverage to post-verdict hearings, prohibited the coverage of victims and their families to those instances where the victims affirmatively consented, prohibited the coverage of other witnesses where those witnesses objected to the coverage, and required adequate notice by news media prior to any coverage.

The Criminal Rules Committee has now invited any person or organization to provide written comments in support of or in opposition to modification or expansion of the requirements of Rule 4 of the General Rules of Practice. The Minnesota County Attorneys Association is opposed to any further expansion of audio and video coverage in criminal cases. We are committed to implementing these current rules in a manner that assures they work for all of the stakeholders.

Thank you for considering our comments.

Sincerely,

Robert M. Small
Executive Director

100 Empire Drive, Suite 200 • St. Paul, MN 55103 • 651-641-1600 • Fax: 651-641-1666
www.mcaa-mn.org

Before the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure
Comments on Cameras in Minnesota State Courts

Silha Center for the Study of Media Ethics and Law
February 2022

On June 18, 2021, the Minnesota Supreme Court directed the Advisory Committee on the Rules of Criminal Procedure to review Rule 4.02 of the General Rules of Practice for the District Courts, and "consider whether the requirements set forth in that rule for audio and video coverage of criminal proceedings should be modified or expanded."[1]

Rule 4 of the Minnesota General Rules of Practice governs "Visual and Audio Recordings." Rule 4.02 (d) currently allows media cameras to record most criminal proceedings only when the defense, prosecution and presiding judge consent.[2] The Silha Center believes that this rule should be modified and expanded to create a presumption allowing camera access to all criminal district court proceedings. Encouraging extended media access to criminal court proceedings will help enhance public oversight of and trust in the judicial process and fulfill the First Amendment access rights of the press and public.

Minnesota is an outlier among the states because it allows cameras in most criminal proceedings only with the consent of all parties. Most surrounding states, including Iowa and Wisconsin, have allowed cameras in criminal trials for many years. Although opponents of cameras in Minnesota criminal trials have argued that the presence of cameras could detract from

---

[1] In Re The Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure. Minnesota Office of Appellate Courts. June 18, 2021. https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/ADM10-8049_Order_6-18-2021.pdf.

[2] MINN. R. 4 (last amended Sept. 1, 2018). https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/GRP-Tit-I.pdf.

or disrupt the solemnity of the proceedings, the successful "gavel-to-gavel" coverage of the Derek Chauvin and Kimberly Potter trials demonstrates that Minnesota is ready to implement this change.

Citing the unique circumstances of the Chauvin trial during the COVID-19 pandemic, Hennepin County District Judge Peter Cahill permitted limited audio and video recording, broadcasting, and livestreaming of the trial, informed by the advocacy of a media coalition which included the Silha Center and with the support of Hennepin County Chief Judge Toddrick Barnette. His order expanded public access to a degree that was unprecedented in this state. According to Nielsen, at least 23.2 million Americans watched the trial live on television, and even more watched via cellphones or laptops.[3]

Moreover, the order allowing camera coverage increased public access without detracting from the proceedings. Many individuals who had opposed cameras in Minnesota criminal trials, based largely on hypothetical concerns, changed their minds after observing expanded access in practice. Minnesota Attorney General Keith Ellison initially opposed camera coverage, but told KMSP-TV on April 28, 2021 that his opinion had changed. "I wanted this trial to be a pursuit of truth and I was worried cameras might interfere with that goal," he said. "But it turned out, it worked better than I thought, so I'll say, I can be wrong, I guess I was a little bit." Hennepin County Chief Judge Barnette told Minnesota Public Radio on April 29, 2021 that he was a "longtime skeptic" of cameras in the courtroom, but that working with journalists in the media pool during the trial changed his mind. "Over time, I felt more comfortable that they were really interested in the integrity of the process and worked very hard to make sure there were no

---

[3] *Nielsen: at least 23.2 million watched Chauvin verdict.* AP NEWS. Apr. 22, 2021. https://apnews.com/article/george-floyd-death-of-george-floyd-arts-and-entertainment-90295405db812108acd9c45433b2a879.

violations of Judge Cahill's order," he said. Law professor Mary Moriarty, who served as Chief Public Defender for Hennepin County from 2014 to 2020, also initially opposed cameras in court. She told MPR on April 29, 2021 that her view changed. "I think it was important for people to see what happened, what the witnesses said, what the lawyers said, what the judge did, for the legitimacy of the process."

Similarly, presiding Judge Regina Chu permitted cameras to cover the trial of former Brooklyn Center police office Kimberly Potter. In her order allowing coverage, Chu said the success of media coverage during the Chauvin trial "should allay any trepidations about cameras in the courtroom."[4] Former Hennepin County District Court Chief Judge Kevin Burke told MPR News on Feb. 3, 2022 that the success of media coverage in the Potter trial advanced the argument for making this access permanent. "I believe that the Chauvin trial, and more recently, the Potter trial, have gotten a lot of people who historically had been opposed to say, 'Maybe we should go ahead and do this."[5] Televising the Chauvin and Potter trials demonstrated that cameras were not disruptive and did not violate the privacy interests of jurors or witnesses.[6]

As it considers recommending revisions to Rule 4, we urge the Advisory Committee to create a presumption that camera access will be permitted, while still allowing presiding judges to exercise appropriate discretion. For example, Judge Cahill prohibited video of Floyd family members and juvenile witnesses unless they consented, as well as prohibiting video coverage of jurors' faces. That said, in our view, judges should limit or exclude cameras only if one of the

[4] Order Granting A/V Coverage of Trial. 27-CR-21-7460. Nov. 9, 2021. https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-21-7460/Order-Regarding-Audio-Video-Coverage_1.pdf.

[5] Nina Moini. *Federal trial of former MPD cops raises court access concerns.* MPR NEWS. Feb. 3, 2022. https://www.mprnews.org/story/2022/02/03/federal-trial-of-former-officers-raises-court-access-concerns.

[6] Steve Karnowski. *Media groups protest restrictions for 3 ex-officers' trial.* ASSOCIATED PRESS. Jan. 18, 2022. https://apnews.com/article/death-of-george-floyd-paul-magnuson-tou-thao-george-floyd-minneapolis-9d7bb83a893ad3cfd842912b21bf5136.

parties can demonstrate that the presence of cameras will cause harm. As a former Justice of the Florida Supreme Court, Peggy A. Quince, has written, the standard for demonstrating such harm must be high, and attorneys representing the media must have an opportunity to be heard in opposition.[7]

Expanding camera access permanently would be a positive step in the larger movement to increase public access to the courts. The COVID-19 pandemic kickstarted acceptance of remote proceedings and has dramatically enhanced public access to court processes. After the public health situation improves, it is essential that this momentum is not lost. As Robert B. Mitchell and Monica A. Romero wrote in the *National Law Review* in January 2022, "Of the [38] states that have adopted a live audiovisual broadcasting system in response to the COVID-19 pandemic's impact on court access, public engagement has greatly increased … fear of the unknown and dark predictions of grandstanding have lost much of their power in the debate over cameras in the appellate courtroom."[8]

Minnesota must not return to the pre-COVID status quo. Abstract concerns about the presence of cameras intimidating witnesses or jurors, creating security problems, or violating privacy all proved to be unfounded during the Chauvin and Potter trials. Those hypothetical concerns pale in comparison to the reality of diminishing public trust in American institutions, including the courts. Allowing meaningful public access to courtrooms by admitting cameras will help to revive that public trust. As the Minnesota Supreme Court's June 18, 2021 order acknowledged, public access has an integral role in promoting civic confidence and engagement:

---

[7] Peggy A. Quince. *Cameras in the Courtroom: Looking Back Over 30 Years.* FLORIDA BAR NEWS. Apr. 1, 2009. https://www.floridabar.org/the-florida-bar-news/cameras-in-floridas-courts/.

[8] Robert B. Mitchell & Monica A. Romero. *COVID-19: Cameras in the Courtroom: Public Access to Appellate Proceedings Post-COVID-19.* NAT'L L. REV. Jan. 10, 2022. https://www natlawreview.com/article/covid-19-cameras-courtroom-public-access-to-appellate-proceedings-post-covid-19.

"Public interest in and access to judicial proceedings is vital to the fair, open, and impartial administration of justice; it promotes confidence in the basic fairness that is an essential component of our system of justice."

Building and restoring confidence in government institutions is essential. As Judge Burke wrote for the Hennepin County Bar Association in June 2020: "Trust is a precious commodity, and as a result, courts need to pay attention to building a reservoir of trust to withstand the tide winds that inevitably occur when an unpopular decision is issued. … Trust in institutions is fractured. And while that fractured trust is not mostly directed at courts, it is dangerously close."[9]

Although the U.S. Supreme Court has not yet found an explicit right for cameras to be present in courts, its case law overwhelmingly favors robust interpretation of its long-recognized First Amendment presumption of access for the press and public to criminal proceedings. The High Court first found this right of access to criminal trials in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980). Subsequently, in *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.,* the High Court held that this right was so strong that a blanket state law excluding public and press from criminal trials involving minor victims of sexual offenses was unconstitutional. 457 U.S. 596 (1982). The *Press Enterprise* cases extended this First Amendment right of access to preliminary hearings and *voir dire. Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501 (1984); *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1 (1986). Significantly, in *Chandler v. Florida,* although the High Court declined to hold that the First Amendment guarantees camera access to courtrooms, it did determine that allowing cameras in criminal courts does not violate criminal defendants' constitutional rights. 449 U.S. 560 (1981).

[9] Kevin S. Burke. *Cameras in the Courtroom: An Outmoded Issue.* HENNEPIN LAWYER. June 29, 2020. https://www.mnbar.org/hennepin-county-bar-association/resources/hennepin-lawyer/articles/2020/06/29/cameras-in-the-courtroom-an-outmoded-issue.

All these cases recognize a constitutionally-based right of *meaningful* public and media access to state criminal proceedings. Expanding Rule 4 to create a presumption of camera coverage is a reasonable interpretation of this right. Livestreaming, recording, and broadcasting criminal trials allow all members of the public – not only those who are physically able to attend court proceedings – the opportunity to observe and draw their own conclusions about the judicial process and to participate meaningfully in the criminal justice process.

Perhaps former Supreme Court Justice Warren Burger said it best: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[10]

Respectfully submitted,

SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

By Jane E. Kirtley, J.D.*
Director, Silha Center for the Study of Media Ethics and Law
Silha Professor of Media Ethics and Law
Hubbard School of Journalism and Mass Communication
University of Minnesota**

kirtl001@umn.edu
(612) 625 9038

*Admitted to practice in New York, the District of Columbia, and Virginia.
**For identification purposes only.

[10] *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 572 (1980).

APPENDIX TO COMMENTS OF THE SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

This is a link to a column written by Silha Professor and Silha Center Director Jane E. Kirtley on the topic of cameras in the courts in July 2021.

> "Making the Case for Cameras in the Court," *Smerconish for Independent Minds*, July 3, 2021. https://www.smerconish.com/exclusive-content/making-the-case-for-cameras-in-the-courts

Brief biography:

JANE E. KIRTLEY is the Silha Professor of Media Ethics and Law at the Hubbard School of Journalism and Mass Communication at the University of Minnesota, where she directs The Silha Center for the Study of Media Ethics and Law. Prof. Kirtley is also an affiliated faculty member at the University of Minnesota Law School, and has held visiting professorships at Suffolk University and Notre Dame law schools. She was a Fulbright Scholar teaching U.S. media law and media ethics at the University of Latvia's Law Faculty in Riga during Spring 2016, and has received numerous Speaker and Specialist grants to lecture abroad for the U.S. State Department, most recently in Brazil in May 2019. Prof. Kirtley has written friend of the court briefs filed in the U.S. Supreme Court, two books, and many book chapters and articles for scholarly journals and the popular and professional press, including *The New York Times*, *The Conversation*, and the *Guardian* (UK).

Before coming to Minnesota in 1999, Prof. Kirtley served as Executive Director of The Reporters Committee for Freedom of the Press for 14 years. Prior to that, she practiced law in New York, Virginia, and Washington, D.C., and was a reporter for newspapers in Indiana and Tennessee. Her honors include the Edith Wortman First Amendment Matrix Foundation Award; the National FOI Hall of Fame; and the John Peter Zenger Award for Freedom of the Press and the People's Right to Know. She was a Pulitzer Prize juror in 2015. Prof. Kirtley's J.D. is from Vanderbilt University Law School, and her bachelor and master of journalism degrees from Northwestern University's Medill School of Journalism.

One West Water Street, Suite 260, St. Paul, Minnesota 55107
Phone (612) 940-8090 / (866) 940-8090 · www.mnallianceoncrime.org

RE: RULE 4 of the General Rules of Practice

I am providing feedback regarding the use if cameras in the courtroom, on behalf of MAC's ninety-six (96) member programs who provide support and services to victims of crime throughout Minnesota. Seventy-two (72) are victim/witness programs that reside within prosecutorial offices. remaining members are either community or law enforcement-based victim service programs.

MAC surveyed member programs to collect feedback regarding the current requirements of Rule 4 of the General Rules of Practice. While there certainly have been acknowledged benefits, the majority of victim advocates would not support broader use of cameras in courtrooms and they they would like to see increased exclusions to include most, if not all, person crimes.

The benefits that have been documented center around two themes;

1) Education of the general public regarding the current criminal/legal system in Minnesota; and

2) Increased accountability of all courtroom players, e.g. disparaging comments towards a victim and dispositional sentencing that is not supported by the fact of a case.

While both of these examples of benefits should be taken into consideration, there is also strong sentiment that educating the public about the court process and holding judicial officials accountable can both be achieved without use of cameras in the courtroom.

The concerns and documented negative experiences by those victimized as a result of cameras being present in the courtroom far outweigh any benefits. In reviewing all feedback MAC received, we heard several recurring themes

1) Victims/survivors and families need additional preparation for the pressures of the cameras. Adding this burden on top of the already intense feelings regarding courtroom testimony can sometimes be too much. The mental health of the victim and/or family members should be prioritized over the use of cameras.
2) The identity of the victim/survivor should be preserved despite the cameras. State witnesses can be instructed and cautioned regarding this, however, the state has no control over defense witnesses who may deliberately try to disclose the identity of the victim despite best efforts. This has resulted in a loss of victim participation. A victim advocate from Hennepin County wrote: "I have a difficult time getting victims to 1) want to appear for court on their case even on Zoom, 2) request restitution since they think that will make a defendant angry and retaliate, 3) provide a victim impact statements for the same reason as #2. Witnesses that are subpoenaed for court always try to not be needed and believe they will be retaliated against if they testify. Now add cameras to the mix. Trying to find justice for victims and their families is difficult even without cameras. With social media and the internet, in general, trying to stay private is an ever-eluding issue even for those of us who work in the system. I

One West Water Street, Suite 260, St. Paul, Minnesota 55107
Phone (612) 940-8090 / (866) 940-8090 · www.mnallianceoncrime.org

believe any expanded use of cameras in the courtroom will mean critical witnesses will not show, let alone other people (who do not want to not be connected) to the case. The level of violence is escalating in the community-victims are being chased down if they run from being carjacked, people are being watched and then followed home to be robbed at gunpoint, victims are getting shot even after giving up their car keys. Why would any victim choose to participate in the prosecution of their perpetrator if we cannot guarantee safety and privacy?"

3) For small communities (namely BIPOC, immigrant, and other marginalized communities), seeking justice via the legal system may not be seen as a supported option or choice. If a victim/survivor chooses to report an incident of violence against the wishes or practices of their community, this could mean expulsion from the community, the inability to return to a home country, or alienation from family and community at an increased rate if cameras were allowed in the courtroom.

MAC also identified potential future negative impacts that should also be considered;

1) We know that what is found on the internet can have a drastic impact on people's future. We are concerned about what impact televised court proceedings could have on a victim/survivor's ability to find housing, employment, social relationships, etc.
2) Victim/survivors fleeing violence require confidentiality to ensure their safety as they move through the court process and beyond. In many court proceedings, it is essential to establish venue, that victim/survivors must on the record current addresses, locations, and other personal information. How will Safe at Home participants be protected?

Unfortunately, Minnesota has experienced too many tragic "high profile" criminal cases over the past two (2) years. This has resulted in the call for transparency within the criminal/legal systems and expanded use of cameras in the courtroom. There is no evidence that the outcome of cases or public response to the dispositions was benefited from having cameras in the courtroom. Instead, it has fed a voyeuristic hunger that has no connection to achieving just outcomes for victims and/or their family members and further marginalizes the safety and accessibility of the criminal/legal system for victims and witnesses of crime.

In closing, on behalf of MAC's membership who work with crime victims and witnesses every day, inside of courtrooms throughout Minnesota, we oppose and change to Rule 4 that would expand opportunities for cameras in the courtroom and ask that the Advisory Council explore adding all person crimes to the list of crime types that automatically exclude cameras in the courtroom.

Sincerely,

Bobbi Holtberg/Executive Director

The Minnesota Alliance on Crime connects systems, service providers, and victims to advance the response of victims of all crime.

Feb. 9, 2022

To the committee on rules of criminal procedure

My name is Joe Spear. I am the managing editor of the Mankato Free Press where I have worked for 31 years, the last 16 as managing editor. I am also the media coordinator for the 5th and 1st Judicial Districts for the cameras in the court program.

I am past president and current member of the Minnesota Chapter of the Society of Professional Journalists, who I represent here today.

I have become very familiar with how the current cameras in the court program works. In the last 10 years or so that I have seen all the media requests for cameras in those districts, I have heard of no complaints from victims, witnesses, lawyers, judges or others involved in a trial where cameras were allowed.

I submit that evidence and evidence provided by my colleagues and the recent high-profile televised cases of the George Floyd murder trial and the Daunte Wright manslaughter trial to strongly advocate that the cameras in the court be allowed in all criminal proceedings as outlined by various proposals.

In all my years in journalism, I have met face to face with many people who are angry at the courts or who do not understand the courts. These folks were both victims, the accused and the general public who often think sentences are too easy on criminals.

I realize there are competing interests here with press freedom and victim privacy. But the committee should also consider damage done to the institution of the judiciary by the current lack of transparency.

Of course, complete victim privacy can never happen in public courts.

My colleagues and others will point out cameras in courts have been the norm in our neighboring states for years. There appears to be little or no evidence of disruption of the courts or damage to victims in those states.

As a member of the media, I appreciate recent outreach efforts of the courts to hold hearings in outstate locations, and to allow for full broadcast of appeals court and Minnesota Supreme Court arguments.

But criminal courts have a broader impact on the public. It is the place where rights and freedom are decided. Freedom from incarceration in a democracy should be taken

seriously. The governed have a huge stake in the power of prosecutors and judges and the freedom of the people. The masses have a right to easily see how their courts work.

In the end, the truth is the truth. A camera doesn’t change that. It only sheds more light on it.

Joe Spear

Managing Editor

Mankato Free Press

Past President MNSPJ

507-317-8073

jspear@mankatofreepress.com

Artika Roller
Executive Director
The Minnesota Coalition Against Sexual Assault
161 St. Anthony Avenue
Suite 1001
St. Paul, MN 55103

February 9, 2022

To Kyle Christopherson,

The Minnesota Coalition Against Sexual Assault (MNCASA) is the voice for over 60 sexual assault victim advocacy programs statewide. These programs support survivor needs on a 24-7 basis through crisis lines, support groups, connection to services, and access to the legal system.

MNCASA supports upholding Rule 4 of the General Rules of Practice with no changes. In particular, we support the continued prohibition of cameras in courtrooms in sexual assault cases.

Even in this #MeToo era of heightened awareness about sexual harassment and sexual violence, we see survivors encounter disbelief and outright hostility when they go public. This is true especially in high profile cases when they report against someone powerful and well-known in the community or when the victim/survivor is a member of an oppressed community. The allowance of cameras often amplifies the backlash victims/survivors experience in the criminal legal system, potentially endangering and retraumatizing them. In addition, allowing cameras may discourage other survivors from reporting and may be triggering.

MNCASA does agree that an open and transparent legal system and independent media monitoring government activities are central to a healthy democracy. There may be cases when the allowance of cameras is necessary to uphold human rights and transparency. But, the fact remains that we live in a society that continues to place the burden on victims of sexual violence to prove that the violence was not their fault. For that reason, MNCASA asks the court to make no changes to Rule 4 and ensure the continued privacy of survivors.

Thank you for your consideration. Please contact MNCASA if the Advisory Committee on the Rules of Criminal Procedure has any questions or would like more information.

Sincerely,

Artika Roller

Executive Director
The Minnesota Coalition Against Sexual Assault

Phone: 651.209.9993 Fax: 651.209.0899 Email: info@mncasa.org

PRESIDENT
Judge Lois Conroy
Fourth Judicial District
Hennepin County Gov't Center
300 South Sixth Street
Minneapolis, MN 55487
lois.conroy@courts.state.mn.us
(612) 596-9010

VICE-PRESIDENT
Judge Eric Schieferdecker
Ninth Judicial District
Clearwater County Courthouse
213 Main Avenue, #303
Bagley, MN 56621
eric.schieferdecker@courts.state.mn.us
(218) 694-6177

PAST-PRESIDENT
Judge John C. Hoffman
john.hoffman@courts.state.mn.us

TREASURER
Judge Richard H. Kyle Jr.
Second Judicial District
Ramsey County Courthouse
15 West Kellogg Blvd.
St.Paul, MN 55102
Richard.kyle@courts.state.mn.us
(651) 266-8467

~~~

STAFF ATTORNEY
Jenifer J. O'Leary
Minnesota Judicial Center, Suite 130
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155
jenifer.oleary@courts.state.mn.us
(651) 297-7582

PROGRAM COORDINATOR
Jen Rico
Minnesota Judicial Center, Suite 120
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155
jen.rico@courts.state.mn.us
(651) 297-6821

MINNESOTA DISTRICT JUDGES ASSOCIATION

MDJA

February 22, 2022

The Honorable Richard H. Kyle Jr.
Chair, Minnesota Supreme Court Advisory Committee on Rules
15 West Kellogg Boulevard
St. Paul, MN 55102

Dear Judge Kyle and Members of the Committee:

Thank you for your work in reviewing Rule 4.02. Also, thank you for the opportunity to submit a letter and provide testimony regarding the contemplated rule change.

The Minnesota District Judges Association objects to any change to Rule 4.02. Our Board of Directors met on February 19, 2022, and by unanimous vote (with your understandable abstention) objects to any change to expanding mandates for cameras in the courtroom. This reaffirms MDJA's long-held position.

In 2014, our then MDJA President and now current First Judicial District Chief, Judge Kevin Mark wrote the Advisory Committee on Rules, "[T]he Board met on October 17, 2014, and by unanimous vote, directed me as President of the Association to express our strenuous objection and disapproval of the recommendations made by the Supreme Court Advisory Committee on the Rules of Criminal Procedure in its report of July 29, 2014." Seven years later, our position remains the same.

Justice will not be served by the expansion of Rule 4.02. Judges must continue to retain the discretion to weigh factors, such as the nature of the case, the procedural posture, the parties, the public's right to observe, the hardship on a victim, the hardship on the victim's family, and the Defendant's right to a fair trial. When judges stop examining these factors, a judge is no longer ensuring a result that is right and just.

Any change to the Rule appears to be a solution in search of an undefined problem. We have many recent examples in Minnesota of high-profile cases where the court has carefully weighed the issues of cameras in the courtroom. In some cases, cameras were permitted and in others, they were not. Justice is best administered on a case-by-case basis carefully weighing both the advantages and disadvantages of having cameras in the courtroom.

For these reasons, we urge the Committee not to make any changes to Rule 4.02. Thank you for your work and for considering our position.

Warmest regards,

Judge Lois R. Conoy
President, MDJA

25 Rev. Dr. Martin Luther King Jr. Blvd. ~ Saint Paul, Minnesota 55155
~~~

TAB 3

TAB 3A

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

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

RE: **Reference to Minors by Pseudonyms, Rule 49.1 (24-CR-A and 24-CR-C)**

DATE: **October 9, 2024**

The Rule 49.1 Subcommittee, chaired by Judge Michael Harvey, held a Teams meeting to discuss the following items, which are included at the end of this report:

- The Department of Justice proposal (24-CR-A) to revise Rule 49.1 to require use of pseudonyms rather than initials to refer to minors;
- A supporting letter from the American Association for Justice (AAJ) and the National Crime Victim's Bar Association (NCVBA) (24-CR-C) ;
- Senator Wyden's proposal (22-CR-B) to revise Rule 49.1 to redact the entire social security number; and
- Mr. Byron's summary of the privacy working group's recommendation that our deliberations should not be expanded to include other clarifying amendments to the privacy rules.

This memorandum summarizes the Subcommittee's discussion and its recommendations.

I. The use of pseudonyms to refer to minors

As explained in the Department's suggestion (24-CR-S), referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—may be insufficient to ensure the child's privacy and safety. The Department's prosecutors and victim witness personnel point out that child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and they assert that child-exploitation offenders sometimes track federal criminal filings and take other measures in an effort to uncover the identity of child victims and contact and harass the minors. Accordingly, the Department proposes that Rule 49.1(a) be amended as follows:

> **(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
> (2) the year of the individual's birth;
> (3) ~~the minor's initials~~ <u>in reference to a minor, a pseudonym</u>;

(4) the last four digits of the financial-account number; and
(5) the city and state of the home address.

* * * * *

The AAJ and NCVBA (24-CR-C) support the Department's proposal, but they add the suggestion that the Advisory Committees "consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence." They state "the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover."

The Subcommittee unanimously supports the proposed revision requiring the use of pseudonyms, rather than initials, in public filings. This practice is already well established among federal prosecutors,[1] and Subcommittee members stated that neither defenders nor the courts have experienced any problems. Moreover, Subcommittee members agreed that minor victims are very fearful of being identified, and a change to address this issue would be important.

The Subcommittee found the suggestion of amending the text to require gender-neutral names to be more problematic (though members were more open to encouraging the use of gender-neutral names, where possible, in the Committee Note). Ms. Tessier explained the Department's practice is to use as little identifying information as possible in public documents, so federal prosecutors already use gender-neutral terminology where possible. But the Department was concerned that having this requirement in the text of Rule 49.1 would prove difficult in cases where gender is central to the operative facts of the case. Another member agreed that in some cases the evidence is graphic and not gender neutral. Ms. Tessier noted that the Department would have considerably less concern about adding language to the Advisory Committee notes indicating that gender neutral or other non-identifying terms should be considered where possible.

The Subcommittee discussed whether using gender-neutral pronouns would make restitution to victims more difficult. The Committee's clerk liaison, Ms. Noble, explained that using gender-neutral pronouns would not create new difficulties for restitution, since the victim's name is generally on a sealed page of the docket.

The Subcommittee concluded that there was no need for the rule to require consistent pseudonyms across cases to enable tracking of victims across cases for the purpose of restitution. (If restitution applies jointly and severally to multiple defendants, restitution received in one case should offset restitution owed in another case.)

---

[1] The public Attorney General Guidelines from 2022 reflect the Department's policy of not including any identifying information in public records. The most relevant language is on p. 29: "Department personnel should scrupulously protect children's privacy in accordance with 18 U.S.C. § 3509(d), the AG Guidelines, and other Department policies. A child's name or other identifying information (other than a pseudonym) should not be reflected in court documents or other public records unless otherwise required by law." See also 2022 AG Guidelines at 5.

At the Subcommittee's request, Ms. Tessier discussed this issue with her colleagues after the meeting. She did so, and she commented that the proposed rule would assist traceability across jurisdictions only if the rule required unique pseudonyms, which would be practically difficult and prevent prosecutors from using such pseudonyms as "Minor Victim 1" and "Minor Victim 2." And it is not clear that requiring unique pseudonyms would resolve the traceability concerns identified during the Subcommittee's meeting. A member had observed that tracing difficulties arise when courts have incomplete information about what restitution payments have gone to (or should go to) which victims. But any solution to this problem requires coordination with the Administrative Office of U.S. Courts and clerks of court and is likely better suited to an informal, collaborative, iterative process addressing collection and distribution of restitution payments, rather than a rigid change to Rule 49.1. Finally, Ms. Tessier noted that the proposed amendment would not be limited to victims who are receiving restitution across multiple jurisdictions. It would apply to all minor participants, regardless of whether there is any need for a uniform pseudonym for that minor. In some circumstances, a uniform pseudonym could inadvertently negatively affect their privacy interests, because individuals seeking to identify minors might be able to piece together identifying information across jurisdictions to identify the minor's real name.

II. Senator Wyden's proposal (22-CR-B) to redact the entire social security number

Senator Ron Wyden has expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules—permit filings to include "the last four digits of the social-security number and taxpayer-identification number."

The Subcommittee discussed the rationale for the current rule, and the three most important issues raised by the proposal to require full redaction: (1) the need, if any, for the last four digits in criminal cases, (2) the value of uniformity if Bankruptcy still needs the last four digits, and (3) the need for full redaction when possible.

A. The rationale for the current rule: usefulness in bankruptcy proceedings

The principal reason for allowing the last four digits of social security numbers in public court records was their usefulness in bankruptcy proceedings, and the other Advisory Committees agreed that Bankruptcy should take the lead in assessing whether that information is still useful in bankruptcy proceedings. A bankruptcy subcommittee studied that question with the assistance of the FJC. It concluded that the last four digits remain important at various stages in bankruptcy proceedings and recommended no change in Bankruptcy Rule 9037. The Bankruptcy Committee agreed with the subcommittee, subject to reconsidering if persuaded by the reasoning of the other advisory committees.

B. The need for the last four digits in criminal cases

Although full social security numbers are often relevant in certain kinds of prosecutions (such as those for various forms of fraud), members were unable to identify any reason that the

last four digits were needed in public filings. Indeed, some thought that full redaction was likely easier in cases in which social security numbers were included in sealed filings or covered by protective orders. Ms. Tessier said that the fraud division attorneys she had consulted had not raised any concerns about full redaction from public filings.

C. The value of uniformity

Uniformity was a cardinal value during the drafting of the privacy rules, including Rule 49.1, though certain features of Rule 49.1 are unique. The exemptions from redaction in (b)(1) include the following:

> (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;
> (8) an arrest or search warrant; and
> (9) a charging document and an affidavit filed in support of any charging document.

The Bankruptcy Committee's conclusion that the last four digits of social security numbers continue to be useful for certain purposes in bankruptcy proceedings raises the question whether it is important that the criminal rule concerning social-security numbers to include the same text as the rule for bankruptcy cases—or civil cases and appeals?

The Subcommittee was not sure how to assess the value of uniformity in this context, and it would like input from the full Criminal Rules Committee (and its sister committees) on this point.

D. The value of full redaction

Before making a recommendation on full redaction, the Subcommittee would also like to have additional research on the potential for harm as a result of allowing public filings to include the last four digits of social security numbers, as well as the current best practices. This research would aid not only the Criminal Rules Committee, but also its sister committees.

Although we have not researched this question, we note, for example, that the Consumer Financial Protection Bureau urges that individuals be especially cautious in giving out the last four digits of their number, because

> [T]hey're unique to you. Dishonest people can find out the other numbers in your Social Security number, but not the last four.

https://pueblo.gpo.gov/Publications/pdfs/CFPB466.pdf. So it appears that even if social security numbers are truncated, there is a risk that the truncated numbers together with names can be matched with other available data to reveal full social security numbers.

III. The privacy working group recommendation

Finally, the Subcommittee discussed the privacy working group's recommendation that our deliberations should not be expanded to include other clarifying amendments to the privacy rules. The Subcommittee agreed that none of the other issues identified in that report warranted further action at this time.

TAB 3B

U.S. Department of Justice

Criminal Division

Acting Assistant Attorney General *Washington, DC 20530*

March 7, 2024

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

*   *   *

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

Sincerely,

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

Nicole M. Argentieri
Acting Assistant Attorney General

TAB 3C

March 27, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: DOJ Proposed Fed. R. Crim P. 49.1(a)(3) and Fed. R. Civ P. 5.2(a)

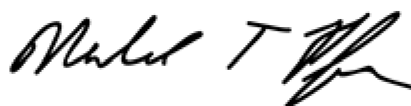
The American Association for Justice (AAJ) and the National Crime Victim's Bar Association (NCVBA) are voluntary bar associations whose members represent victims injured by sex abuse, trafficking, and violence. The AAJ and NCVBA support the proposed rules amendments from the U.S. Department of Justice requiring that all publicly available court filings refer to minors by pseudonyms instead of initials and encourage the Advisory Committees to undertake this rulemaking in conjunction with other important privacy protections already under evaluation involving the elimination of partial social-security numbers as identifiers.

In addition, the AAJ and NCVBA strongly urge the Advisory Committees to consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence. While the use of a pseudonym is clearly preferable over a minor's initials, the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover.

Our organizations encourage the advisory committees to move forward with DOJ's proposals. If we can be of further assistance or provide additional information about how best to protect victims, please contact Sue Steinman, Senior Director of Policy and Senior Counsel at AAJ (susan.steinman@justice.org) or Renee Williams, Executive Director at NCVBA (rwilliams@victimsofcrime.org).

Sincerely,

Sean Domnick
President
American Association for Justice



Michael Pfau
President
National Crime Victims Bar Association

TAB 3D

RON WYDEN
OREGON

CHAIRMAN OF COMMITTEE ON FINANCE

221 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224–5244

United States Senate
WASHINGTON, DC 20510–3703

COMMITTEES:
COMMITTEE ON FINANCE
COMMITTEE ON THE BUDGET
COMMITTEE ON ENERGY AND NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

August 4, 2022

The Honorable John G. Roberts, Jr
Chief Justice
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Dear Chief Justice Roberts:

* * *

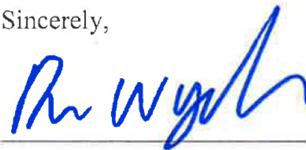
Twenty years ago, when Congress required federal courts to publish court records online, it required the Supreme Court to establish rules to protect the privacy and security of Americans whose information was contained in public court records. Congress also required the courts to report back every two years to describe whether the rules were in fact protecting Americans' privacy and security. * * *

* * *

The most recent report, which was provided to my office in draft form, * * * describes how in 2015-2016, the Judicial Conference considered a proposal to redact the entire SSN from court filings, as federal court rules currently permit, and in some cases require, records to include the last four digits. * * *

* * *

Sincerely,



Ron Wyden
United States Senator

911 NE 11TH AVENUE
SUITE 630
PORTLAND, OR 97232
(503) 326–7525

405 EAST 8TH AVE
SUITE 2020
EUGENE, OR 97401
(541) 431–0229

SAC ANNEX BUILDING
105 FIR ST
SUITE 201
LA GRANDE, OR 97850
(541) 962–7691

U.S. COURTHOUSE
310 WEST 6TH ST
ROOM 118
MEDFORD, OR 97501
(541) 858–5122

THE JAMISON BUILDING
131 NW HAWTHORNE AVE
SUITE 107
BEND, OR 97701
(541) 330–9142

707 13TH ST, SE
SUITE 285
SALEM, OR 97301
(503) 589-4555

HTTPS://WYDEN.SENATE.GOV

PRINTED ON RECYCLED PAPER

TAB 3E

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Rules Committee Chief Counsel

Re: Potential issues related to the privacy rules

Date: August 21, 2024

The Rules Committees have received several suggestions that address particular issues related to the privacy rules (Appellate Rule 25, Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1): (1) a suggestion to reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B); (2) suggestions to streamline the caption on many bankruptcy notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J); and (3) a suggestion to amend Criminal Rule 49.1(a)(3) and corresponding provisions of the other privacy rules, which currently require including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestions 24-CR-A, 24-AP-B, 24-BK-D, 24-CV-C). The appropriate Advisory Committees will continue to consider those pending suggestions. This memo addresses whether those deliberations should expand to encompass other privacy-related issues, and recommends against such an expansion.

I. Background and Overview

At the spring 2024 meetings, the Advisory Committees discussed a suggestion from Senator Wyden (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B) that would require complete redaction of social-security numbers. The agenda books included a sketch of a draft rule amendment but did not recommend that the amendment be considered at that time. (Our March 19, 2024, memorandum is attached for reference.) Based on the recommendation of the reporters' working group, the committees decided to defer consideration of a draft rule amendment until after discussion of pending suggestions and possibly other potential issues concerning the privacy rules.

In addition to the pending suggestions that are under consideration by the Bankruptcy and Criminal Rules Committees, we have identified several potential

issues common to all three rule sets (Bankruptcy, Civil, and Criminal).[1] This memorandum explains the tentative conclusion of the working group that those issues, outlined below, do not warrant further study by the advisory committees. We seek input from each committee about that recommendation and about whether any other issues related to the privacy rules deserve consideration at this time.

Each of the issues described below represents an area where some clarifying changes could be made to the privacy rules or where they could be expanded to cover additional information. But our consensus view is that there is no demonstrated need for the Rules Committees to take up any of these issues. Put simply, there is no real-world problem that we need to solve right now. That initial question—whether there is an actual problem in the application of the rules that could be solved by an amendment—has long driven the focus of the rules committees, and it properly reflects the limited time and other resources available to the committees, as well as the presumption that rule amendments should be limited to avoid disruption of settled practices.

That view could change if we receive a specific suggestion for a rule amendment that identifies a practical problem in the privacy rules or if case law or other information reflects real uncertainty or divergence in how the rules are being interpreted or applied. In that event, we will ask the committees to consider how to address the particular concern. Similarly, if another Judicial Conference committee, such as CACM or IT, were to identify a privacy-related concern that could be addressed by a rule amendment, the rules committees could consider the issues raised in that context.

In the meantime, the Bankruptcy and Criminal Rules Committees will continue to consider the pending proposals for amendments to the privacy rules. The suggestion for an amendment requiring complete redaction of social-security numbers can be considered along with any proposed amendments that result from that ongoing work on pending suggestions.

The following summaries describe the issues considered by the working group:

II. Potential Privacy-Rule Issues

A. Ambiguity and overlap in the exemptions

The exemptions from the redaction requirements, set forth in subdivision (b) of each of the privacy rules, include language that appears ambiguous or possibly

[1] Appellate Rule 25(a)(5) generally provides that that the appropriate privacy rule in the Bankruptcy, Civil, or Criminal Rules will govern in particular categories of cases in the appellate courts. Unless otherwise noted, privacy rule citations in this memo are to the common provisions of the Bankruptcy, Civil, and Criminal Rules.

overbroad, although we are not aware of any particular problems or concerns related to the application of these provisions. Here are two examples:

Subdivision (b)(3) refers to the "official record from a state-court proceeding"; rules committee records indicate that this exemption was originally intended to refer to the records of state cases removed to federal court. But that focus is not apparent in the text of the rules. And state-court records can be included in filings in other types of cases as well.

Subdivision (b)(4), which exempts "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed," was initially aimed at pre-2007 federal court records, although the rule text appears to apply much more broadly to the record of any court or tribunal. It appears to overlap, and perhaps make redundant, some more specific exemptions for: (1) the record of administrative or agency proceedings, in subdivision (b)(2); (2) the official record of a state-court proceeding, in subdivision (b)(3); and (3) state-court records in a pro se action brought under 28 U.S.C. § 2254, in subdivision (b)(6) of Civil Rule 5.2 and Criminal Rule 49.1.

B. Scope of the waiver

The waiver provision in subdivision (h) of Civil Rule 5.2 and Criminal Rule 49.1, and subdivision (g) of Bankruptcy Rule 9037, can be read narrowly to provide only that an individual does not violate the rule by failing to comply with the redaction requirements with respect to the person's own personally identifiable information (PII). That is, inclusion of a person's own unredacted PII waives the redaction requirement for that party with respect to that specific PII in that particular filing only. However, the records of the rules committees' original consideration of the privacy rules support a broader reading of the waiver provision: Under that view, once a person waives the protection of subdivision (a)'s redaction requirements in a filing as to the person's own information, other filers no longer need to redact the disclosed PII in subsequent filings in the case (or perhaps even in other cases).

The broader view is not apparent from the rule text or committee note. But the ambiguity inherent in the term "waives," as well as the rules committees' public records on the subject, leaves open the possibility that the waiver provision could be read by some litigants to permit inclusion of unredacted PII in a broad range of court filings. Here too, however, we have not received any indication of a problem in practice related to the waiver provision.

C. Expansion of protected information subject to redaction

Since their adoption in 2007, the privacy rules have required redaction of "an individual's social-security number, taxpayer-identification number, or birth date," as well as "the name of an individual known to be a minor" and "a financial-account

number." Civil Rule 5.2(a). Other categories or identifiers might equally warrant protection in court filings as PII. For example, an individual's passport or driver's license number could potentially cause harm if disclosed, and there seems little or no reason why an unsealed filing would need to disclose those kinds of details. Similarly, online login information such as account identifiers and passwords could cause harm if disclosed.

Other information, such as an individual's birthplace, could—in conjunction with other data—facilitate identity theft or similar malicious activity. Telephone numbers and physical or email addresses could pose different considerations, as they are generally required for attorneys and pro se filers to ensure that courts and parties can reach litigants. But there might be little reason to allow routine disclosure of third parties' information.

At this point, we have not received any indication that disclosure of these categories of information in court filings is widespread or has led to specific problems. And the absence of such a suggestion seems sufficient reason not to devote resources to these questions now.

D. Protection of other sensitive information

Beyond redaction of specific PII, there might also be additional categories of information that warrant protection from public disclosure. For example, medical records and related information about an individual's health conditions are protected from disclosure in certain circumstances, although the privacy rules do not address that type of information. And geolocation information (such as from cellphone records, smartwatches, GPS devices, or Bluetooth trackers) can also include sensitive personal information that might be considered private in some circumstances. The privacy rules specifically mention filings made under seal in subdivision (d), and these categories of information raise the question whether the rules should protect specific categories of privacy-related information that might need to be known to parties in litigation but should not be subject to wider public disclosure.

A 2023 submission from Lawyers for Civil Justice (23-CV-W) questions whether the rules as a whole do enough to ensure the protection of sensitive personal information from disclosure. The Civil Rules Committee has not yet discussed that suggestion, and its consideration of the issues could provide additional relevant guidance to the other Advisory Committees. At this time, however, there is no indication that the privacy rules need to be amended to address these broader concerns.

MEMORANDUM

To: Advisory Committee Chairs

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

Re: Update on Review of Privacy Rules

Date: March 19, 2024

I. Background and Overview

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

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

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

II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

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

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

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

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

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

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

III. Other Privacy Rule Issues

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

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

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

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

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

* * * *

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

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

TAB 4

TAB 4A

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

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

RE: **Rule 40, clarifying procedures for previously released defendant arrested in one district under a warrant issued in another district (24-CR-D & 23-CR-H)**

DATE: **October 10, 2024**

The Committee has received two proposals advocating revisions to clarify Rule 40, which currently provides:

> **Rule 40. Arrest for Failing to Appear in Another District or Violating Conditions of Release Set in Another District**
>
> **(a) In General.** A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:
>
> **(i)** failing to appear as required by the terms of that person's release under 18 U.S.C. §§3141 –3156 or by a subpoena; or
>
> **(ii)** violating conditions of release set in another district.
>
> **(b) Proceedings.** The judge must proceed under Rule 5(c)(3) as applicable.
>
> **(c) Release or Detention Order.** The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.
>
> **(d) Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

At its April 2024 meeting, the Committee had a preliminary discussion of the first proposal (23-CR-H) from Magistrate Judge Zachary Bolitho. Judge Bolitho identified an ambiguity in Rule 40, its relationship with the Bail Reform Act, and how he had resolved the issue.

In preparation for April meeting, Judge Harvey had consulted several other magistrate judges; they all agreed that the rule is confusing and difficult to apply, but who did not agree which issues needed to be addressed. Judge Harvey also reported that the Magistrate Judge Advisory Group (MJAG) would be submitting a more comprehensive request regarding amendments to Rule 40, which would encompass the issue raised by Judge Bolitho, as well as additional issues. The Committee deferred consideration of Judge Bolitho's suggestion in order to consider it together with the more comprehensive proposal expected from MJAG.

MJAG has now submitted its comprehensive proposal, 24-CR-D. Its proposal identifies seven points of confusion involving procedures and substantive rights, such as the application of

related rules, informing a defendant of an alleged violation, providing a defendant with notice of their right to counsel, applicable detention standards, and modification of detention orders:

- Which parts of Rule 5(c)(3) apply?
- Why does the rule exclude "adjacent district" as an option?
- Why does the rule not address informing the defendant of the alleged violation?
- Why does the rule not address informing the defendant about the right to consult counsel, and how does the previous appointment of counsel in the issuing district affect the right?
- What detention standard applies?
- Under what circumstances would a judge in the arresting district modify a detention order?
- Does a magistrate judge in the issuing district have the authority to modify a detention order by a magistrate judge in the arresting district?

MJAG's proposal also addresses the issue of the frequency with which these issues arise, which caused the Committee to decline to amend Rule 40 in 2019. At that time, the Advisory Committee acknowledged that Rule 40 is confusing, but it declined to pursue an amendment because it believed the circumstances occur infrequently. The Committee's discussion at that time ended with this comment:

> [E]very Rules committee could identify an example of a rule that could be clarified. But there is a cost to amending rules too often, and we do get complaints when they are amended too often. So unless there is a real need on the ground to solve a problem, it is best for the committees not to try to achieve every clarification that they could in the rules."[1]

In response, MJAG offers both a summary of reported cases wrestling with the issues it has identified, as well as some statistics on the frequency cases where pretrial in one district issues a warrant after a petition is filed there alleging a violation, and the defendant is arrested outside of that issuing district. During FY 2023, in eight districts, between 6% and 40% of such warrants resulted in outside-district arrests. These outside-district arrests for alleged violations of pretrial release constituted 1% to 18% of all violation petitions filed in these districts during FY 2023.

The question for discussion at the November meeting is whether to refer these proposals to a subcommittee for further discussion.

[1] May 2019 Meeting Minutes at p. 7.

TAB 4B

Hon. Zachary Bolitho (23-CR-H)

November 27, 2023

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

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

TAB 4C

Chambers of
Janis van Meerveld
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street
New Orleans, Louisiana 70130

May 14, 2024

Honorable James C. Dever III
Chair, Advisory Committee on Criminal Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Sent by email to: RulesCommittee_Secretary@ao.uscourts.gov

Dear Judge Dever:

I write to you on behalf of the Magistrate Judges Advisory Group (MJAG) on which I serve as chair. On May 10, 2024, the Advisory Group voted unanimously to approve a package proposing changes to Fed. R. Crim. P. 40. The package, attached for your committee's consideration, would clarify and update procedures that apply when a previously released defendant is arrested in one district under a warrant issued in another district.

At its March 2023 meeting the MJAG began its discussions of Rule 40. Magistrate Judge David Horan (N.D. Tex.), wrote to the Advisory Group seeking feedback on a proposal to modify Fed. R. Crim. P. 40. The Advisory Group quickly discovered that a similar proposal from Magistrate Judge Patty Barksdale (M.D. Fla.) was circulating in the 11th Circuit, and that practices related to Rule 40 varied across the country. Magistrate Judge Joseph Volpe, the prior MJAG chair, asked Judge Barksdale to lead a group of judges to develop a proposal to address the concerns with Rule 40.

The resulting MJAG Rule 40 proposal identifies seven points of confusion involving procedures and substantive rights, such as the application of related rules, informing a defendant of an alleged violation, providing a defendant with notice of their right to counsel, applicable detention standards, and modification of detention orders. Advisory group judges also provided fiscal year 2023 statistics on the number of matters that involve Rule 40 in their districts.

The MJAG proposal would extract procedural provisions of Rule 40 to create a new Rule 5.2, "Revoking or Modifying Pretrial Release," that would model the structure of Fed. R.

Crim. P. 32.1, "Revoking or Modifying Probation or Supervised Release." The new rule 5.2 would include seven specific provisions, including ones that ensure the defendant is informed of the alleged violation of pretrial release, has a reasonable opportunity to consult with counsel, and one to allow virtual revocation proceedings with the defendant's consent.

The Rule 40 proposal was developed by a group of judges who worked diligently to produce an excellent document with the input of MJAG judges from across the country. The Advisory Group unanimously supports these changes to Rule 40 and we hope your committee will agree and act favorably.

Thank you for your consideration of this proposal.

Sincerely,

Janis van Meerveld
Chair, Magistrate Judges Advisory Group

Enclosure

cc: Michael Harvey
Joseph T. Phillips

Suggested Amendments
Rule 40, Federal Rules of Criminal Procedure

Contents

I. Overview 1

II. Rule 40 2

III. History 2

IV. Issues 3

V. Previous Discussion 7

VI. Frequency 7

VII. Laws to Consider 9

VIII. Select Cases 10

IX. Suggestions 12

Attachment: Previous versions of Rule 40

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141–3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

(b) Proceedings. The judge must proceed under Rule 5(c)(3) as applicable.

(c) Release or Detention Order. The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.

(d) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; Pub. L. 96–42, § 1(2), July 31, 1979, 93 Stat. 326; Apr. 28, 1982, eff. Aug. 1, 1982; Pub. L. 98–473, title II, §§ 209(c), 215(d), Oct. 12, 1984, 98 Stat. 1986, 2016, eff. Oct. 12, 1984, and Nov. 1, 1987; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.)

I. Overview

Rule 40 is confusing in at least seven ways. As a result, procedures vary from district to district and division to division. With little guidance, magistrate judges must determine the hearings to which a defendant is entitled and create resulting procedures. To promote clarity and uniformity, the Magistrate Judge Advisory Group requests consideration of revisions to Rule 40.

II. Rule 40

Rule 40 governs procedures that apply when a person is arrested in one district ("arresting district") under a warrant issued in another district ("issuing district") under three circumstances:

1. The issuing district issued the warrant for a criminal defendant's arrest based on a petition or motion alleging the defendant violated a condition of pretrial release.

2. The issuing district issued the warrant for a criminal defendant's arrest because the defendant failed to appear in court or at the designated place of incarceration as required by a condition of pretrial, pre-sentencing, or post-sentencing release.

3. The issuing district issued the warrant because a person failed to appear in court or elsewhere as required by a subpoena.

III. History

Rule 40 used to contain procedures for two additional circumstances:

1. The issuing district issued the warrant for a criminal defendant's arrest based on a charge in a complaint, information, or indictment.

2. The issuing district issued the warrant for a criminal defendant's arrest based on a petition alleging the defendant violated a probation or supervised release condition.

See Attachment (previous versions of Rule 40).

Procedures for those two circumstances were moved to Rule 5 ("Initial Appearance") and Rule 32.1 ("Revoking or Modifying Probation or Supervised Release") without substantive changes for the other circumstances.

IV. Issues

Rule 40 is confusing in at least seven ways.

1. **Which parts of Rule 5(c)(3) apply?** Rule 40(b) states the judge in the arresting district "must proceed under Rule 5(c)(3) as applicable." Rule 5 governs initial appearances under a warrant or summons based on a criminal charge in a complaint, information, or indictment. Rule 5(c)(3) has five subsections. Which subsections apply is unclear.

   a. **Informing the defendant of Rule 20**. Rule 5(c)(3)(A) states the judge in the arresting district "must inform the defendant about the provisions of Rule 20." Rule 20 governs transferring a prosecution for a plea and sentencing "from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present." This subsection does not apply under the second circumstance, where the order to appear is entered after a plea or sentencing. This subsection does not apply under the third circumstance because that circumstance addresses a person who has failed to appear as required by a subpoena. Does this

subsection apply under the first circumstance, where the defendant is alleged to have violated a condition of pretrial release?

b. **Issuing a warrant**. Rule 5(c)(3)(B) states that "if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district." This subsection does not apply because Rule 40 applies only when an arrest is made under a warrant.

c. **Conducting a preliminary hearing**. Rule 5(c)(3)(C) states "the magistrate judge must conduct a preliminary hearing if required by Rule 5.1." Rule 5.1 requires a preliminary hearing if "a defendant is charged with an offense other than a petty offense" unless the defendant waives the hearing, the defendant is indicted, the government files an information, or the defendant is charged with a misdemeanor and consents to trial before a magistrate judge. Rule 5.1 has a 21-day deadline for a defendant who is not detained. Does this subsection apply?

d. **Conducting an identity hearing**. Rule 5(c)(3)(D) requires a magistrate judge to "transfer the defendant to the district where the offense was allegedly committed if: (i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and (ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant." Does this subsection apply if the

defendant is being supervised in the arresting district (and whose identity therefore is known)?

e. **Transferring papers to the issuing district**. Rule 5(c)(3)(E) states "when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed." This section applies.

2. **Why is "adjacent district" excluded as an option?** Rule 40(a) states that a "person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district." Rule 5(c)(2) addressing an initial appearance on a complaint, information, or indictment, and Rule 32.1(a)(1)(B) addressing an initial appearance on an alleged violation of a condition of probation or supervised release permit taking a defendant without unnecessary delay before a magistrate judge in the arresting district or "an adjacent district if the appearance can occur more promptly there," or, for Rule 5(c)(2), an adjacent district if the offense was allegedly committed there and the initial appearance will occur on the day of the arrest." Why does Rule 40 exclude an "adjacent district"?

3. **Why is informing the defendant of the alleged violation excluded?** Rule 32.1(a)(3), addressing an initial appearance on an alleged violation of a condition of probation or supervised release, requires the judge to inform the defendant about the alleged violation. Why does Rule 40 exclude this requirement?

4. **Why is informing the defendant about the right to consult counsel excluded? How does the previous appointment of counsel in the issuing district affect the right?** Rule 32.1(a)(3), addressing an initial appearance on an alleged violation of a condition of probation or supervised release, requires the judge

to inform the defendant about the right to retain counsel or request an appointment of counsel. Why does Rule 40 exclude a similar requirement? How does the fact that the defendant already has counsel in the issuing district affect any right to counsel for any proceedings in the arresting district?

5. **What detention standard applies?** 18 U.S.C. § 3148 provides, "A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer **in the district in which such person's arrest was ordered for a proceeding** in accordance with this section. To the extent practicable, a person charged with violating the condition of release that such person not commit a Federal, State, or local crime during the period of release, shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer (1) finds that there is—(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or (B) clear and convincing evidence that the person has violated any other condition of release; and (2)finds that—(A) based on the factors set forth in section 3142(g) …, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or (B) the person is unlikely to abide by any condition or combination of conditions of release." What standard does the arresting district use to determine whether a defendant should be detained for transportation back to the issuing district (which can be lengthy) or should be released and ordered to appear in the issuing district?

6. **Under what circumstances would a judge in the arresting district modify a detention order?** Rule 40 permits the judge in the arresting district to modify a detention order. Under what circumstances would a defendant be arrested under a warrant

for violating a detention order, which assumes the defendant is detained? Does this provision refer to an order establishing a date to report to a designated facility? Does this provision refer to an order by the issuing court directing the defendant's detention upon arrest under the warrant by the issuing court (an outdated practice)?

7. **Does a magistrate judge in the issuing district have the authority to modify a detention order by a magistrate judge in the arresting district?** At least two courts have held no. *See U.S. v. Manley*, 659 F. Supp. 3d 15 (D.D.C. 2023); *U.S. v. Patterson*, No. 13-137, 2013 WL 5375438 (E.D. La. Sept. 24, 2013). Some magistrate judges in issuing districts modify orders entered by magistrate judges in arresting districts, including sua sponte to conform language to local bail practice and special conditions preferred by the issuing district's pretrial officers.

V. Previous Discussion

The Advisory Committee on Criminal Rules considered amending Rule 40 in May 2019 based on a suggestion in December 2018 (18-CR-G). See discussions beginning on page 169 of the May 2019 agenda book and page 169 of the May 2019 meeting minutes.

The committee acknowledged Rule 40 is confusing but declined to pursue an amendment. Based on membership understanding, informal surveys, or both, the committee believed the circumstances occur infrequently. The discussion ended with this comment: "[E]very Rules committee could identify an example of a rule that could be clarified. But there is a cost to amending rules too often, and we do get complaints when they are amended too often. So unless there is a real need on the ground to solve a problem, it is best for the committees not to try to achieve every clarification that they could in the rules." Minutes at p. 7.

VI. Frequency

It is unclear how often the first circumstance occurs (the issuing district issued the warrant for a defendant's arrest based on a petition alleging the defendant violated a condition of pretrial release). Empirically, the first circumstance occurs with some frequency in some districts. Here are FY 2023 figures for a few districts.

Eastern District Arkansas

- Total defendants with alleged violations submitted through petitions: 265
- Of 265, total defendants for whom pretrial requested warrants: 61 (23%)
- Of 61, total arrests occurring outside the district: 8 (**13%**)

Middle District of Florida

- Total defendants with alleged violations submitted through petitions: 114
- Of 114, total defendants for whom pretrial requested warrants: 52 (46%)
- Of 52, total arrests occurring outside the district: 6 (**12%**)

District of Kansas

- Total defendants with alleged violations submitted through petitions: 45
- Of 45, total defendants for whom pretrial requested warrants: 33 (73%)
- Of 33, total arrests occurring outside the district: 3 (**9%**)

Eastern District of Louisiana

- Total defendants with alleged violations submitted through petitions: 18
- Of 18, total defendants for whom pretrial requested warrants: 16 (**89%**)
- Of 16, total arrests occurring outside the district: 1 (**6%**)

Southern District of New York

- Total defendants with alleged violations submitted through petitions: 200
- Of 200, total defendants for whom pretrial requested warrants: 10 (5%)
- Of 10, total arrests occurring outside the district: 4 (**40%**)

Western District of Oklahoma

- Total defendants with alleged violations submitted through petitions: 150
- Of 150, total defendants for whom pretrial requested warrants: 50 (33%)
- Of 50, total arrests occurring outside the district: 9 (**18%**)

District of Oregon

- Total defendants with alleged violations submitted through petitions: 204
- Of 204, total defendants for whom pretrial requested warrants: 107 (52%)
- Of 107, total arrests occurring outside the district: 6 (**6%**)

Northern District of West Virginia

- Total defendants with alleged violations submitted through petitions: 121
- Of 121, total defendants for whom pretrial requested warrants: 59 (49%)
- Of 59, total arrests occurring outside the district: 18 (**31%**)

Western District Washington

- 8 defendants charged in other districts were seen in Seattle in FY2023

VII. Laws to Consider

18 U.S.C. § 3141	Release and detention authority generally
18 U.S.C. § 3142	Release or detention of a defendant pending trial
18 U.S.C. § 3143	Release or detention of a defendant pending sentencing or appeal
18 U.S.C. § 3144	Release or detention of a material witness
18 U.S.C. § 3145	Review and appeal of a detention order
18 U.S.C. § 3148	Sanctions for a violation of release conditions
18 U.S.C. § 3149	Surrender of an offender by a surety
18 U.S.C. § 3156	Definitions (for 18 U.S.C. §§ 3141–3150)
Fed. R. Crim. P. 4	Arrest Warrant or Summons on a Complaint
Fed. R. Crim. P. 4.1	Complaint, Warrant, Or Summons by Telephone or Other Reliable … Means
Fed. R. Crim. P. 5	Initial Appearance
Fed. R. Crim. P. 9	Arrest Warrant or Summons on an Indictment or Information
Fed. R. Crim. P. 17	Subpoena
Fed. R. Crim. P. 32	Sentencing and Judgment
Fed. R. Crim. P. 32.1	Revoking or Modifying Probation or Supervised Release
Fed. R. Crim. P. 42	Criminal Contempt

Fed. R. Crim. P. 43	Defendant's Presence
Fed. R. Crim. P. 44	Right to and Appointment of Counsel
Fed. R. Crim. P. 46	Release from Custody; Supervising Detention
Fed. R. Crim. P. 50	Prompt Disposition
Fed. R. Crim. P. 59	Matters Before a Magistrate Judge
Fed. R. Civ. P. 45	Subpoena

VIII. Select Cases

Review of Issuing District's Order

U.S. v. Manley, 659 F. Supp. 3d 15 (D.D.C. 2023) (holding a magistrate judge in the issuing district lacks authority to reopen a detention hearing conducted by a magistrate judge in the arresting district)

U.S. v. Patterson, No. 13-137, 2013 WL 5375438 (E.D. La. Sept. 24, 2013) (holding a magistrate judge in the issuing district lacks authority to reopen a detention hearing conducted by a magistrate judge in the arresting district)

U.S. v. Godines-Lupian, 816 F. Supp. 2d 126 (D.P.R. 2011) (holding the district judge in the issuing district is the appropriate judge to review a release or detention order by a magistrate judge in the arresting district; staying the release order pending transportation to the issuing district within five days)

Authority to Conduct Detention Hearing in Arresting District; Standards Unspecified or Reversion to Standards in 18 U.S.C. § 3142

U.S. v. Thomas, No. 23-30099, 2023 WL 2523502 (E.D. Mich. Mar. 14, 2023) (rejecting the government's position that the magistrate judge in the arresting district had no authority to hold a detention hearing considering that the magistrate judge in the issuing district had entered an order revoking bond pending the defendant's return to the issuing district; applying standards in 18 U.S.C. § 3142)

U.S. v. Lank, No. 3:23-mj-339 (N.D. Fla. Nov. 21, 2023) (holding a defendant has a right to a detention hearing in the arresting district and determining standards to apply if the defendant is awaiting sentencing)

U.S. v. Alonzo, No. 3:22-MJ-1077-BN, 2022 WL 17182076 (N.D. Tex. Nov. 23, 2022) (holding the standards in 18 U.S.C. §§ 3142 and 3144 apply during a detention hearing by the magistrate judge in the arresting district)

U.S. v. Fellows, No. 1:21-MJ-0314 (DJS), 2021 WL 3025741 (N.D.N.Y. June 23, 2021) (holding a defendant has a right to a detention hearing in the arresting district; standards unspecified)

U.S. v. Savader, 944 F. Supp. 2d 209 (E.D.N.Y. 2013) (discussing the history of Rule 40; holding a defendant is entitled to a detention hearing in the arresting district; observing deference must be given to detention determinations in the issuing district but observing the arresting district may be in a strong position to make findings on the defendant's ties to the community; applying the standards in 18 U.S.C. § 3142)

U.S. v. Murphy, No. 1:11-mj-615-KPF, 2011 WL 5023534 (S.D. Ind. Oct. 19, 2011) (holding the issuing district is the more appropriate district to have a detention hearing than the arresting district)

<u>Government's Motion for Transporation to the Issuing District as a Modification of the Issuing District's Release Order; Standards Unspecified</u>

U.S. v. Turner, No. 1:02-CR-699, 2023 WL 2401581 (W.D.N.C. Mar. 8, 2023) (declining to conduct a preliminary hearing in the arresting district as "more appropriately reserved for the court in the charging district" and considering the government's motion for detention during transportation to the issuing district a motion for a temporary modification of the release order; standards unspecified)

U.S. v. Szczerbiak, No. 1:21 MJ 28 WCM, 2021 WL 1784341 (W.D.N.C. May 5, 2021) (observing the parties did not believe detention during transportation to the issuing district would be a temporary modification of the release order; noting "authorities clearly supporting that view have not been located immediately," and holding to the extent placing the defendant in

custody for transportation is a change, the change is warranted; standards unspecified)

Rule 40 Inapplicable Where Person is Arrested on Warrant for Civil Contempt

Civ. Contempt Proc. Pending in United States Dist. Ct., W. Dist. of Texas (Austin Div.) v. Schmidt, No. 1:20-CV-00273-RP, 2020 WL 2777495 (S.D. Fla. May 29, 2020) (ruling Rule 40 does not apply in a civil proceeding where a person is arrested in one district based on a civil-contempt warrant issued in another district)

No Right to Preliminary Hearing in Arresting District

United States v. Jaitly, No. 09-644-M, 2009 WL 3260554 (E.D. Pa. Oct. 8, 2009) (holding a defendant has no right to a preliminary hearing in the arresting district)

IX. Suggestions

The Magistrate Judges Advisory Group suggests considering these amendments to address the first circumstance and any other resulting amendments to address the second and third circumstances.

1. Move the procedures for the first circumstance (the issuing district issued the warrant for the arrest of a defendant based on a petition alleging the defendant violated a condition of pretrial release) from Rule 40, which is under Title VIII "Supplementary and Special Proceedings," to a new Rule 5.2, which would be under Title II "Preliminary Proceedings."

2. Title new Rule 5.2, "Revoking or Modifying Pretrial Release," consistent with Fed. R. Crim. P. 32.1, "Revoking or Modifying Probation or Supervised Release."

3. Include in new Rule 5.2 seven provisions:

a. The requirement in current Rule 40(a) ("A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for … (ii) violating conditions of release set in another district") but modifying the language consistent with Rule 5(c)(2) to say, "A defendant must be taken without unnecessary delay before a magistrate judge if the defendant has been arrested under a warrant issued in another district for violating conditions of pretrial release set in another district."

b. A new requirement using language from Rule 5(c)(2) and Rule 32.1(a)(1)(B) that the initial appearance must be (a) in the district of arrest; or (b) in an adjacent district if: (1) the appearance can occur more promptly there; or (2) the warrant was issued there and the initial appearance can occur on the day of arrest.

c. The procedure in Rule 32.1(a)(3)(A) that "[t]he judge must inform the person of … the alleged violation of probation or supervised release" but change "probation or supervised release" to "pretrial release";

d. The procedure in Rule 5(c)(3)(D) that the judge must transfer the defendant to the district where the offense is pending upon production of the warrant and an identity finding but changing "the district where the offense was allegedly committed" to "the

district in which the defendant's arrest was ordered." *See* 18 U.S.C. § 3148(b) ("A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such person's arrest was ordered for a proceeding in accordance with this section.").

e. The right in Rule 5(d)(2) that the judge "must allow the defendant reasonable opportunity to consult with counsel." (Note: The defendant will already have counsel in the issuing district but usually not in the arresting district.)

f. The videoconferencing option in current Rule 5(f) and Rule 40(d), but also enabling the issuing district to virtually conduct the revocation proceeding with the defendant's consent.

g. A standard for determining whether the defendant should be detained for transport back to the issuing district, perhaps with reference to the 18 U.S.C. § 3142(d) and (g), considering whether the standard is different if the defendant is awaiting sentencing.

TAB 5

TAB 5A

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

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

RE: **Use of videoconference technology to allow virtual presence of the defendant at pretrial, plea, and sentencing hearings, Rule 43 (24-CR-B)**

DATE: **October 13, 2024**

I. The current proposal

Judge Brett Ludwig has written requesting that the Committee consider amending Rule 43 to extend the district courts' authority to use videoconferencing, beyond initial appearances and arraignments, with the defendant's consent.[1] He contends that experience under the CARES Act demonstrated that there is no good reason to limit the use of technology to only initial appearances and arraignments. He urges that under the CARES Act "courts around the country embraced the use of technology without any noticeable deficit in the administration of justice," and his own court and others were "able to fairly and efficiently conduct all manner [of] pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32."

Judge Ludwig notes several advantages of expanding the authority to use videoconferencing. It would give judges flexibility to make use of the expenditures already made for these resources, showing Congress and the public that the courts are taking steps to offer substantial affirmative cost savings in many districts, including his own, where there are no long-term pretrial detention facilities within close proximity to the courthouse. Bringing defendants to the courthouse imposes significant costs for personnel, transportation, and security expenses at both the jail and courthouse, and imposes physical and mental costs on defendants. He states that "[w]hen the CARES Act authority ended, several frustrated defendants and defense counsel complained, insisting they would have preferred to appear by videoconference. Under the current rules, I could not accommodate them."

II. The Committee's prior consideration of related proposals

What follows is a summary of the Advisory Committee's consideration of expanding the use of remote procedures (i.e., videoconferencing) in criminal cases in non-emergency situations from 2002 to the present. Although the Committee has allowed for videoconferencing in some proceedings, it has emphatically—and unanimously—opposed expanding the use of videoconferencing for felony pleas and sentencings. When the Advisory Committee has permitted videoconferencing, its consideration has been replete with cautionary warnings against starting down a slippery slope that leads to virtual felony pleas and sentences. For example, the minutes from October 2018 state:

[1] Judge Ludwig also notes that his proposal would also eliminate the need for separate authorization in Rules 5 and 10.

> [T]he Committee has concluded that the line should be drawn at pleas and sentencing. Pleas because of the importance of making sure the defendant really knows what is going on. And sentencing, because presence has such a huge impact on the defendant and his ability to allocute, as well as to understand what is happening.[2]

2002: Initial Appearance and Arraignment.

The Criminal Rules were restyled in 2002. In addition to being restyled, Rules 5, 10, and 43 were substantively amended to permit, with the defendant's consent, "video teleconferencing" in the initial appearance and the arraignment. Although these amendments introduced videoconferencing to these proceedings, the Advisory Committee emphasized and enumerated the benefits of physical presence. For example, the 2002 Advisory Committee Note to Rule 10 stated "[w]hile it is difficult to quantify the intangible benefits and impact of requiring a defendant to be brought before a federal judicial officer in a federal courtroom, the Committee realizes that something is lost when a defendant is not required to make a personal appearance." It is also worth noting that while there were also several substantive changes to Rule 11 in 2002, the requirement that the court "address the defendant personally in open court," was not changed. Fed. R. Crim. P. 11(b)(2).

2008–10: The Technology Amendments.

In 2011, following a comprehensive review of the Criminal Rules to identify rules that required updating to incorporate technological advances, a package of "technology amendments" went into effect. During this process, the Advisory Committee considered whether to expand the proceedings that could be conducted by videoconference. Rule 40 was amended to permit a defendant to appear by "video teleconferencing" in a proceeding involving an arrest for failing to appear in another district or for violating conditions of release set in another district with the defendant's consent. This amendment was intended to mirror the provisions in Rule 5.

The technology amendments also included an amendment to Rule 43(b)(2) permitting videoconferencing with the defendant's written consent in plea, trial, and sentencing in *misdemeanor* cases. The rule already provided that these misdemeanor proceedings could occur in the defendant's absence. Although several members opposed allowing videoconferencing, the Advisory Committee ultimately concluded that proceeding by videoconference would be preferable to proceeding in the defendant's absence. The example often used was the defendant whose alleged offense was minor, "such as a traffic violation committed in a national park that the defendant visits while on vacation . . . . [R]equiring the accused to travel long distances to attend the proceeding is unreasonable. Instead of relinquishing the right to attend the misdemeanor or petty offense proceeding altogether, the proposed amendments offer the judge the option of permitting the accused to participate in the arraignment, plea, trial, and sentencing."[3]

---

[2] Minutes of the Oct. 10, 2018 Criminal Rules Committee Meeting at 6.1 (statement of Professor Beale).

[3] September 2010 Report to the Judicial Conference at 23.

The technology amendments also included a proposed amendment to Rule 32.1 that would have authorized the defendant to participate by videoconference in proceedings concerning the revocation or modification of probation or supervised release. This proposal was controversial from the start. Four members of the Advisory Committee voted against recommending it for publication. It was the only proposal in the package of "technology amendments" that did not receive unanimous support. The concern was summarized as follows:

> While recognizing that in some instances being transported back to the district where sentencing occurred may work a hardship, some members expressed concern that this amendment would become a slippery slope towards sentencing by video. There was also some concern that defendants might be pressured to appear by video teleconference in order to save the government the expense of transportation.[4]

Although the proposal was published for public comment, after consideration of the public comments submitted and after "extended discussion," the Advisory Committee voted to withdraw the proposed amendment to Rule 32.1.[5] A comment submitted by the Federal Public Defender Program for the Northern District of Illinois opposed the proposed amendment on similar grounds. The organization was concerned that the proposed amendment would have (a) detracted from the solemnity of the proceeding; (b) made it less likely that defendants would believe they were being treated fairly; (c) cast doubt on whether there was knowing consent; (d) failed to provide a true right of allocution; and (e) affected the ability for the defendant and counsel to adequately consult and interact. There were also concerns about potential technological problems and how that might disadvantage the defendant.

2017: Felony Sentencing.

In 2017, Judge Donald E. Walter (W.D. La.) submitted a suggestion that Rule 43 be amended to allow the option of conducting felony sentencings by videoconference "absent a timely objection, for good cause shown, by the defendant." (17-CR-A). Judge Walter owned a second home in Maine and wanted to be able to appear for sentencings via videoconference. At its October 2017 meeting, the Advisory Committee considered the suggestion and unanimously decided to remove it from the agenda.

The Reporters explained the Advisory Committee's reasoning as follows:

> Multiple judicial members opposed an extension of sentencing by video conference. They stressed the difference between proceedings conducted by video conferencing and those done in person, face-to-face. Being in the courtroom allows the judge to better gauge whether the defendant understands the proceedings, and whether there is any coercion. It is the most human thing judges do, and physical presence allows the judge to understand the defendant better. Also, given the grave consequences, it is appropriate for the judge to be in the courtroom with the defendant. Finally, members noted that the rule already

[4] May 11, 2009 Report of the Advisory Committee on Criminal Rules at 20–21.
[5] May 19, 2010 Report of the Advisory Committee on Criminal Rules at 18.

provides some flexibility. For example, Rule 43(c)(1)(B) permits waiver by a defendant who was present for trial or the plea proceedings, and who then chooses to be voluntarily absent from sentencing.[6]

2019: Felony Plea and Sentencing (Consideration of a Narrow Hardship Exception).

In 2018, the Circuit Executive for the Seventh Circuit brought to the Advisory Committee's attention *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018).[7] In *Bethea*, the defendant suffered from serious health issues and limited mobility, and he was permitted to appear by videoconference at his combined guilty plea and sentencing. On appeal, he argued that his sentence should be vacated because Rule 43(a) required that he be physically present. The court agreed, holding that the plain language of Rule 43 "requires all parties to be present for a defendant's plea and that a defendant cannot consent to a plea via videoconference."[8] The court further stated: "We also agree with various courts that have stated it would be sensible for Rule 43 to allow discretion in instances where a defendant faces significant health problems."[9]

The Advisory Committee discussed the suggestion at its October 2018 meeting. While unenthusiastic, it formed a subcommittee to study the suggestion since it originated from a published opinion of a circuit court of appeals.[10] The Subcommittee was charged with studying whether Rule 43(a) should be amended to include a narrow hardship exception to the requirement that the defendant be physically present for the plea and the sentencing.

The Reporters provided a memorandum to the Subcommittee that detailed the policy reasons justifying the insistence in the current rules that the defendant and the judge both be physically present: the stakes are higher in a plea than in a preliminary proceeding; it is imperative that a defendant have private and interactive access to his counsel; and the judge must be able to determine if the defendant's many waivers are knowing and voluntary.[11]

The Subcommittee unanimously agreed to recommend that the Advisory Committee not proceed further with an amendment to permit videoconferencing at either the plea or sentencing phase. Members stressed the crucial importance of the judge addressing the defendant face-to-face, which gives the judge the opportunity to read subtle cues. A defense member also commented that anything that separates the defendant from the process is undesirable. Members also commented that (as the Reporters' memorandum explained) there are ways to avoid the problem in *Bethea*. The members were not convinced that there was a serious or widespread problem warranting an amendment, which several also referred to as potentially creating a

[6] Reporters' Memorandum to the Advisory Committee (Sept. 11, 2018) available in Criminal Rules Committee Agenda Book (Oct. 10, 2018 Meeting) at 129.
[7] See Suggestion 18-CR-C.
[8] Id. at 867.
[9] Id. at 868.
[10] See Minutes of the Oct. 10, 2018, Criminal Rules Committee Meeting, at 7.
[11] See Reporters' Memorandum to the Rule 43 Subcommittee (Feb. 18, 2019) available in Criminal Rules Committee Agenda Book (May 7, 2019 Meeting) at 135-52.

slippery slope.[12] The Advisory Committee unanimously agreed with the recommendation of the subcommittee.[13]

2020: Initial Appearances, Arraignments, Detention Hearings, and Changes of Plea.

Magistrate Judge Thomas M. Parker (N.D. Ohio) submitted a suggestion that the Criminal Rules be amended to permit initial appearances, arraignments, detention hearings, and change of plea proceedings by videoconference "on a regular basis, not only in the case of national emergency."[14] He also suggested that the ability to conduct proceedings by videoconference "should not be contingent upon the approval of either party."

The Reporters noted "the proposal would permit more videoconferencing 'on a regular basis' than the current subcommittee draft of Rule 62 allows during a rules emergency," which "retains a strong preference for in-person proceedings in open court, and requires the defendant's consent for videoconferencing at initial appearances, arraignments, and change of plea proceedings even in emergency situations."[15]

The Advisory Committee unanimously declined to pursue consideration of this suggestion and removed the item from its agenda. In his report to the Standing Committee, Judge Kethledge stated:

> In recent years the Committee has received several similar proposals to expand the use of videoconferencing. Each time the Committee has reaffirmed the importance of in-person proceedings, even in cases in which the parties consent to virtual proceedings. Accordingly, there was no interest in further consideration of this issue at the present time.[16]

III. The issue before the Committee

The question for discussion is whether to appoint a subcommittee to return to the question whether to expand the availability of videoconferencing as a substitute for defendant's physical presence in criminal cases.

Although the Committee has declined on multiple occasions to expand videoconferencing, the only post-pandemic occasion involved a proposal that would have dispensed with the defendant's consent. None of the other proposals anticipated the experience under the CARES Act.

New research has materialized since the Committee last considered this issue, including a study by the Federal Judicial Center, published in 2022, of the views of district and magistrate

---

[12] Reporters' Memorandum to the Advisory Committee (Apr. 15, 2019) available in Criminal Rules Committee Agenda Book (May 7, 2019 Meeting) at 131.
[13] Minutes of the May 7, 2019 Criminal Rules Committee Meeting at 5.
[14] Suggestion 20-CR-G.
[15] Reporters' Memorandum to the Committee (Oct. 9, 2020), available in Criminal Rules Committee Agenda Book (November 2, 2020 Meeting) at 191.
[16] Dec. 4, 2020, Report of the Advisory Committee on Criminal Rules at 2-3.

judges about the use of virtual technology.[17] Although the study found respondents were generally more cautious regarding the use of virtual technology in criminal proceedings compared to civil proceedings, it also found significant support in the federal judiciary for some expansion of the use of virtual technology. This table[18] provides one snapshot of the FJC findings:

Table 8. Use of Virtual Technology for Criminal Proceedings
Please indicate your overall view about using virtual technology for criminal court proceedings, outside of the circumstances of a pandemic or other emergency.
Respondents were able to select multiple answers. Percentages are out of the number of respondents, not responses.

	N	Percentage
I am generally in favor of individual judge discretion about when to use virtual technology for criminal proceedings.	308	33%
I am generally in favor of judges using virtual technology for criminal proceedings, subject to applicable laws and policies.	254	27%
I believe some criminal proceedings are conducive to being held using virtual technology, while others should always be held in person.	516	56%
I am opposed to judges using virtual technology for any criminal proceedings, except in rare circumstances.	178	19%
Total Respondents	926	

Notably, more than half of the respondents agreed with the statement that "I believe some criminal proceedings are conducive to being held using virtual technology, while others should always be held in person."

The number of states permitting remote appearance by defendants at criminal proceedings has also increased, following the experience of state courts with remote participation during the pandemic.[19]

If the Committee decides to look at these issues once again, the pending proposal is not the only option. Other possibilities include incremental changes, involving only certain proceedings, or requiring prerequisites, such as a written motion by the defendant, a judicial

[17] Carly Giffin & Rebecca Eyre, Results of a Survey of U.S. District and Magistrate Judges: Use of Virtual Technology to Hold Court Proceedings (2022), https://www.fjc.gov/sites/default/files/materials/41/Report%20on%20DJ%20MJ%20survey%20re%20VT%20FINAL.pdf.
[18] *Id.*, table 8 at 13.
[19] *See, e.g.*, National Center for State Courts, **National scan of authority for remote or virtual court proceedings (Dec. 2023).**

case-specific finding of compelling need or manifest injustice, conditions on provisions for counsel communication, etc.

TAB 5B

From: Brett Ludwig
Sent: Sunday, March 24, 2024 8:23 PM
To: RulesCommittee Secretary
Subject: Proposed Change to Federal Rules of Criminal Procedure -- Post-COVID Use of Videoconferencing Technology

Dear Rules Committee,

My name is Brett Ludwig. I serve as a District Judge in the Eastern District of Wisconsin. I write to urge the committee to amend the Federal Rules of Criminal Procedure to allow district judges greater flexibility in using videoconference technology to conduct pretrial hearings in criminal cases. The change I propose is minor; it simply extends a court's authority to use videoconferencing, beyond Initial Appearances and Arraignments, with the defendant's consent. I am attaching a Word document showing how this could be accomplished with two minor revisions to Fed. R. Crim P. 43. The change would also eliminate the need for separate authorization in Rules 5 and 10; simplification of those rules is also shown in the attachment.

Currently, the Rules allow the use of videoconferencing with the defendant's consent, but only for Initial Appearances and Arraignments. *See* Fed. R. Crim P. 5(g) and 10(c). There is no good reason to limit the use of technology to those types of hearings. During the COVID-19 pandemic, the CARES Act expanded district court authority to use videoconferencing, and courts around the country embraced the use of technology without any noticeable deficit in the administration of justice. Indeed, my court and others were able to fairly and efficiently conduct all manner pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32. With the expiration of the CARES Act on May 11, 2023, however, courts lost this ability and were forced to abandon the use of videoconferencing, even when doing so would have been more efficient and even when a defendant wished to proceed by videoconference. Indeed, in my circuit, district courts are *prohibited* from conducting change of plea or sentencing hearings by videoconference, even when a defendant consents. *See United State v. Bethea*, 888 F.3d 864 (7th Cir. 2018) (reversing and remanding district court's sentencing judgment based on use of videoconferencing even though defendant affirmatively requested sentencing by videoconference.)

Allowing the use of videoconferencing technology post-pandemic would enable district judges to continue to schedule and conduct hearings in a flexible manner while also ensuring that judicial resources are maximized. Most courts were required to invest additional judiciary funds in technology in response to the COVID-19 pandemic. Authorizing courts to continue to use videoconferencing will ensure that the judiciary makes the most of those expenditures. At a time of increased budget scrutiny, the judiciary should show Congress and the public that we are taking steps to maximize our efficient use of appropriated funds.

Use of videoconferencing also offers substantial affirmative cost savings in many districts, including mine. Our district does not have long-term pretrial detention facilities within close proximity to the courthouse. Accordingly, when a pretrial hearing requires a defendant's physical presence in the courtroom, we must expend significant resources to comply. These costs include personnel, transportation and security expenses at both the jail and courthouse. And these costs must be incurred even for relatively short (sometimes mere 20 minute) hearings. As our COVID experience showed, we can avoid those costs without sacrificing the rights of defendants or the needs of judicial administration.

The current rules also impose a physical and mental cost on defendants. By requiring their physical presence in the courthouse, the rules force defendants to get up early, well in advance of the hearing, to be transported to the courthouse, where they wait in a small holding cell until their hearing commences. They then have to undergo the time and hassle associated with their return trip to their holding facility. When the CARES Act authority ended, several frustrated defendants and defense counsel complained, insisting they would have preferred to appear by videoconference. Under the current rules, I could not accommodate them.

In the end, my proposal is a modest one. I simply ask that the rules be amended to permit courts to use technology that was already purchased during the pandemic to handle pretrial hearings as we did during the pandemic with the defendant's consent.

Let me know if you have any questions. I look forward to hearing from you.

Brett Ludwig

Brett H. Ludwig
United States District Judge
Eastern District of Wisconsin
United States Federal Building and Courthouse
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-297-3071

Fed. R. Crim. P. 43: Defendant's Presence

(a) **When Required**. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

   (1) the initial appearance, the initial arraignment, and the plea;

   (2) every trial stage, including jury empanelment and the return of the verdict; and

   (3) sentencing.

(b) **When Not Required**. A defendant need not be present under any of the following circumstances:

   (1) **Organizational Defendant**. The defendant is an organization represented by counsel who is present.

   (2) **Misdemeanor Offense**. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur ~~by video teleconferencing or~~ in the defendant's absence.

   (3) **Conference or Hearing on a Legal Question**. The proceeding involves only a conference or hearing on a question of law.

   (4) **Sentence Correction**. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) **Waiving Continued Presence**.

   (1) **In General**. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

      (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant or an obligation to remain during trial;

      (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

      (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

   (2) **Waiver's Effect**. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(d) **Definition of Presence**. A defendant is present when appearing in person in the courtroom. The court may, for good cause and with the defendant's consent, allow a defendant to be present by videoconference from another location, or when videoconference is not feasible, by teleconference.

Rule 5: Initial Appearance

~~(g) **Video Teleconferencing**. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.~~

Rule 10: Arraignment

(a) **In General**. An arraignment must be conducted in open court and must consist of:

   (1) ensuring that the defendant has a copy of the indictment or information;

   (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

   (3) asking the defendant to plead to the indictment or information.

(b) **Waiving Appearance**. A defendant need not be present for the arraignment if:

   (1) The defendant has been charged by indictment or misdemeanor information;

(2) The defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) The court accepts the waiver.

~~(c) **Video teleconferencing**. Video teleconferencing may be used to arraign a defendant if the defendant consents.~~

TAB 6

TAB 6A

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

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

RE: **Rule 42 and contempt proceedings (23-CR-C)**

DATE: **October 8, 2024**

Joshua Carback has submitted a law review article in which he advocates comprehensive changes to federal contempt law, including statutory amendments and changes in the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, as well as the Federal Rules of Evidence.[1] As he explains the proposal's features concerning criminal proceedings:

> I propose that the federal government amend 18 U.S.C. § 401 and Criminal Rule 42 to be more comprehensive in three ways.
>
> First, Congress should modify 18 U.S.C. § 401 to provide explicit notice of the three penalties or purge conditions that a court may prescribe for contempt: reprimand, fines, and imprisonment. The language for this amendment should be broad and permissive, not exhaustive. Courts should be allowed ample room for discretion and creativity in handling contempt matters.
>
> Second, Criminal Rule 42 should be amended to allow parties to file petitions out of court or move in court for civil and/or criminal contempt proceedings.
>
> Third, Criminal Rule 42 and 18 U.S.C. § 401 should also expressly declare the right of the court to initiate contempt proceedings sua sponte. These amendments will render criminal contempt statutes, especially statutes in the genre of obstruction of justice (perjury, witness tampering, violation of bail and probation orders, etc.) superfluous and justify their repeal.

---

[1] Mr. Carback's letter introducing his law review article defines his broader proposal as follows:

> My proposal recommends, among other things, the creation of a civil analogue to Criminal Rule 42; the revision of Criminal Rule 42; the revision of 18 U.S.C. §§ 401, 3484, and 3499; and the repeal of 18 U.S.C. §§ 1703, 1503, 1509, 1512–13, 1621–23, 3146–49. This proposal will thereby fulfill the following objectives:
>
> 1. Define and distinguish criminal contempt and civil contempt;
> 2. Explain the scope of criminal contempt and civil contempt;
> 3. Create a formal process for parties to petition for contempt proceedings;
> 4. Clarify the range of penalties and purge conditions for contempt proceedings;
> 5. Shift discretion for contempt prosecutions from the executive to the judiciary; and
> 6. Authorize bankruptcy courts to wield contempt power.

> One might argue that such a widespread effort to repeal criminal contempt statutes is unjustified. Criminal contempt statutes are normally merely declaratory of a court's right to punish an offense through its inherent power. But the purpose of the criminal contempt statutes at issue is not simply to express what the law is. By rendering an offense that is sui generis by default into a crime as such, the discretion for prosecution and punishment shifts from the judiciary to the executive. That is the real purpose behind the criminal contempt statutes that saturate the federal criminal code. The criminalization of contempt forms a chokehold on judicial discretion. It represents a fear that judges will not adequately punish contempt if left to their own devices.
>
> * * * * *
>
> In light of my proposed amendments to 18 U.S.C. § 401 and Criminal Rule 42, I propose that Congress repeal the following criminal statutes: 18 U.S.C. §§ 1073, 1503, 1509, 1512, 1523, 1621– 1623, 3484, 3498–3499, and 3146–3149. These repeals will require amendments to the current model federal jury instruction for contempt under Section 401 as well. The federal criminal code is obese. This is a good place to trim fat. One cannot complain that this pattern of repeal will amplify the threat of impunity. Those liabilities once contemplated by criminal contempt statutes will simply collapse into 18 U.S.C. § 401 and Criminal Rule 42.

Joshua Carback, *Contempt Power and the United States Courts*, 44 Mitchell Hamline L.J. of Pub. Policy and Practice, 105, 126-127 (2023) (footnotes omitted).

We recommend that the Committee remove Mr. Carback's suggestion from its agenda. Many of the elements of the proposed amendment of Rule 42 appear to be substantive, rather than procedural, and hence beyond the Committee's authority under the Rules Enabling Act. Moreover, the proposed amendments to Rule 42 depend upon and are interwoven with his proposal to amend 18 U.S.C. § 401 and to repeal a host of statutes. These matters are properly addressed to Congress, not to this Committee.

TAB 6B

J O S H U A   T .   C A R B A C K

23-AP-D
23-BK-E
23-CV-K
23-CR-C
23-EV-A

April 1, 2023
H. Thomas Byron III, Esq., Secretary
ADMINISTRATIVE OFFICE OF THE U.S. COURTS
Office of the General Counsel, Rules Committee Staff
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Secretary Byron,

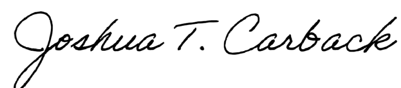
I write to you to formally submit my proposal for reforming judicial rules governing contempt proceedings. The inherent power of the judiciary to initiate contempt proceedings is well established. The culmination of decades of rulemaking under the interbranch framework instituted by the Rules Enabling Act of 1934, unfortunately, transformed what was once a relatively simple exercise of discretion into a more onerous and complicated task than it needs to be. Federal contempt law, by my count, now consists of at least 178 opinions issued by the United States Supreme Court, 182 statutes in the United States Code, 95 regulations in the Code of Federal Regulations, 37 nationwide rules of federal practice and procedure, 10 circuit wide rules governing policy and procedure, and 151 local rules governing practice and procedure.

I attach to this letter a published law review article expressing my proposal for reforming federal contempt law, including my proposed revisions to federal statutes, rules, and regulations. I also attach a supplement containing proposed revisions that I updated since that article was published. My proposal is comprehensive and systematic. My proposed rule revisions, in particular, affect appellate procedure, bankruptcy procedure, civil procedure, criminal procedure, and evidence. I therefore request that you transmit my proposal to the Standing Committee on Rules of Practice and Procedure and its five advisory committees for their mutual consideration. My proposal recommends, among other things, the creation of a civil analogue to Criminal Rule 42; the revision of Criminal Rule 42; the revision of 18 U.S.C. §§ 401, 3484, and 3499; and the repeal of 18 U.S.C. §§ 1703, 1503, 1509, 1512–13, 1621–23, 3146–49. This proposal will thereby fulfill the following objectives:

1. Define and distinguish criminal contempt and civil contempt;
2. Explain the scope of criminal contempt and civil contempt;
3. Create a formal process for parties to petition for contempt proceedings;
4. Clarify the range of penalties and purge conditions for contempt proceedings;
5. Shift discretion for contempt prosecutions from the executive to the judiciary; and
6. Authorize bankruptcy courts to wield contempt power.

I believe that the adoption of my proposal will promote the clarity, simplicity, efficiency, and fairness of contempt proceedings.

Respectfully,



Joshua T. Carback, Esq.

SUPPLEMENTAL PROPOSED REVISIONS TO CONTEMPT AUTHORITIES

New Fed. R. Civ. P. 42: Civil Contempt

(a) Definition.

(1) Civil contempt is disobedience out of the court's presence, such as

(i) A violation of a court order or decree;

(ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(iii) A violation of a statute constituting contempt per se.

(2) Civil contempt is coercive, not punitive.

(3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to compel compliance with an order or decree.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or tribunals who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

(1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or a tribunal that lacks authority to conduct the proceeding.

(2) The court may initiate a civil contempt proceeding sua sponte.

(3) A party to an action can request a civil contempt proceeding by filing a petition with the court against the alleged contemnor.

(4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must

(i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);

(ii) schedule deadline for the filing of an answer by the alleged contemnor;

(iii) state the time and place of any prehearing conference or hearing; and

(iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fine and any period of incarceration.

(5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:

(i) A valid order or decree of the court was in effect;

(ii) The alleged contemnor knew of that order or decree; and

(iii) The alleged contemnor breached that order or decree.

(6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that

(i) provides a short and concise explanation of its disposition;

(ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and

(iii) states the precise manner in which the purge conditions must be satisfied.

(7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. Purge conditions may be imposed individually or in combination. Purge conditions may be imposed immediately upon a finding of civil contempt or contingently in the event that a contemnor does not comply with an order or decree of court by a specified deadline. The following is an inexhaustive list of purge conditions:

(1) Reprimand;

(2) Report to any state bar or equivalent professional body; and

(3) Fine;

(i) A fine may be payable to the court, a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.

(ii) A fine must be calculated according to the character and magnitude of the harm or prejudice threatened by continued breach of the court's order or decree.

(e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or contingently if another purge condition is not timely satisfied.

(f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

Revised Fed. R. Crim. P. 42: Criminal Contempt

(a) Definition.

(1) Any disrespect or violation of the court's dignity may be liable for criminal contempt.

(2) Criminal contempt is punitive, not coercive.

(3) Direct criminal contempt is misbehavior in the court's presence or so near to it as to obstruct the administration of justice.

(4) Constructive criminal contempt is disobedience to the court outside of the court's presence, and can involve the following:

(i) violation of a court order or decree;

(ii) interference with or obstruction of the administration of justice, including improper threats, tampering, or other undue influences directed toward grand jurors, petit jurors, witnesses, officers of the court, and other persons operating under court order or decree;

(iii) violation of bail or parole conditions;

(iv) material misrepresentation to the court, including perjury;

(v) violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(vi) violation of a statute constituting contempt per se.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend criminal contempt sanctions and certify them for disposition by a court with proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or tribunals that do not possess authority to adjudicate civil contempt proceedings but are authorized to recommend them may certify those recommendations for disposition under this rule.

(c) Direct Criminal Contempt Procedure

(1) Misbehavior committed in the court's presence can be adjudicated through summary proceedings if the presiding judge certifies that he saw or heard the misbehavior.

(2) Direct criminal contempts are sui generis and therefore have no elements, mens rea, or standard of proof.

(3) Following a summary proceeding, the presiding judge must promptly issue a signed order filed with the clerk providing a short and concise statement of facts and an explanation for his disposition.

(4) The court cannot enter a summary contempt judgment relating to misbehavior in its presence nunc pro tunc.

(5) A presiding judge who can lawfully preside over a summary proceeding for direct criminal contempt can nevertheless refer the matter for a constructive criminal contempt proceeding under section (d) of this rule if doing so is in the interest of justice.

(d) Constructive Criminal Contempt Procedure

(1) Constructive criminal contempts must be adjudicated through a separate proceeding with a separate caption from the action in which the contempt arose.

(2) The court may initiate a constructive criminal contempt proceeding sua sponte or by petition.

(3) The court must give the alleged contemnor notice in open court and issue a show cause order or an arrest order. The alleged contemnor must be released or detained as Federal Rule of Criminal Procedure 47 [former Rule 46] provides. The alleged contemnor is entitled to a trial by jury. The show cause order or arrest order must

(i) Recite a short and plain basis for the criminal contempt proceeding, including the essential facts constituting the criminal contempt charged;

(ii) Schedule the time and place of a trial;

(iii) Allow the alleged contemnor a reasonable time to prepare a defense; and

(iv) Expressly state any penalties requested under (d)(2) if offered.

(4) The court may request that the alleged criminal contempt be prosecuted by the government or, if interest of justice so requires, another attorney. If the government declines to prosecute, the court must appoint another attorney to prosecute.

(5) The prosecuting attorney must prove the following elements beyond a reasonable doubt:

(i) There was a lawful and reasonably specific order, decree, or proceeding;

(ii) The alleged contemnor violated that order or decree, or misbehaved in the court's presence; and

(iii) The alleged contemnor's conduct was willful.

(6) If the alleged criminal contempt involved disrespect or criticism towards a judge, that judge is disqualified from presiding over the trial or hearing unless the alleged contemnor consents.

(7) Upon a finding or verdict of guilty, the court may impose punishment.

(e) Punishment. Punishment for criminal contempt must involve the least possible power adequate to the end proposed. Penalties for direct and constructive criminal contempt can be imposed individually or in combination. The following is an inexhaustive list of potential penalties:

(1) Reprimand

(2) Fine

(i) The fine can be imposed on a per diem basis or consist of a single sum.

(ii) The fine may be payable to the court, to a party prejudiced by the contempt as compensation, or some other recipient for the purpose of atoning for any disrespect or indignity.

(iii) The fine must be calculated according to the character and magnitude of any disrespect or indignity.

(3) Incarceration

(i) Direct Criminal Contempt. If the alleged contemnor is found guilty of direct criminal contempt, he can be sentenced to a period of incarceration not exceeding six months for a single contemptuous act. He may, however, be sentenced to a period of incarceration exceeding six months for more than one

contemptuous act, provided that the increment of incarceration attributed to each act does not exceed six months.

(ii) Constructive Criminal Contempt. If the alleged contemnor is found guilty of constructive criminal contempt, he can be sentenced to a period of incarceration exceeding six months.

(f) Civil Contempt. Nothing in this rule can be construed to detract from the court's authority to correct defiance of its orders or decrees through civil contempt proceedings under Federal Rule of Civil Procedure 42 and any other relevant authorities.

Criminal Amendments and Federal Judgeship Act of [Year]

An Act

To amend Title 18 of the United States Code regarding the authority of federal courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Criminal Amendments and Federal Judgeship Act of [Year].

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Sec. 401 of Title 18, United States Code, is amended to read as follows:

"§ 401. Power of Court

"(a) A court of the United States has power to punish and correct contempt of its authority and none other, sua sponte or by petition, including—

(1) Misbehavior or disobedience in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any judicial officer in their official transactions; and

(3) Disobedience or resistance to their lawful writs, processes, orders, rules, decrees, or commands out of their presence.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Fine;

(3) Imprisonment.

Sec. 3484 of Title 18, United States Code, is amended to read as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).

Service in United States, Rule 17(d), (e,1)1.

Service in foreign country, Rule 17(d), (e,2)1.

Indigent defendants, Rule 17(b).

On taking depositions, Rule 17(f).

Papers and documents, Rule 17(c).

Disobedience of subpoena as contempt of court, Rule 42.

Sect. 3499 of Title 18, United States Code, is amended to read as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disobedience of subpoena without excuse as contempt, Rule 42

Sec. 1073 of Title 18, United States Code is deleted.

Sec. 1503 of Title 18, United States Code is deleted.

Sec. 1509 of Title 18, United States Code is deleted.

Sec. 1512 of Title 18, United States Code is deleted.

Sec. 1513 of Title 18, United States Code is deleted.

Sec. 1621 of Title 18, United States Code is deleted.

Sec. 1622 of Title 18, United States Code is deleted.

Sec. 1623 of Title 18, United States Code is deleted.

Sec. 3146 of Title 18, United States Code is deleted.

Sec. 3147 of Title 18, United States Code is deleted.

Sec. 3148 of Title 18, United States Code is deleted.

Sec. 3149 of Title 18, United States Code is deleted.

18 U.S.C. § 401 – Power of Court

(a) A court of the United States ~~shall~~ ~~have~~ has power to punish ~~by fine or imprisonment, or both,~~ and correct contempt of its authority ~~and none other~~, sua sponte or by petition, ~~as~~ including~~—~~

(1) Misbehavior or disobedience of any person in its presence or so near ~~thereto~~ as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

   (1) Reprimand;

   (2) Report to any state bar or comparable ethics institution;

   (3) Fine; and

   (4) Imprisonment.

18 U.S.C. § 3484 Subpoenas—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).

Service in United States, Rule 17(d), (e,1)1.

Service in foreign country, Rule 17(d), (e,2)1.

Indigent defendants, Rule 17(b).

On taking depositions, Rule 17(f).

Papers and documents, Rule 17(c).

Disobedience of subpoena as contempt of court, ~~Rule 17(g)~~ Rule 42.

18 U.S.C. § 3499 Contempt of court by witness—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disobedience of subpoena without excuse as contempt, ~~Rule 17(g)~~ Rule 42.

Bankruptcy Amendments and Federal Judgeship Act of [Year]

An Act

To amend Title 11 of the United States Code regarding the authority of bankruptcy courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Bankruptcy Amendments and Federal Judgeship Act of [Year].

TITLE I—BANKRUPTCY JURISDICTION AND PROCEDURE

Sec. 105(a) of Title 11, United States Code, is amended to read as follows:

"§ 105. Power of Court

"(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed

to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105 – Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, <u>including orders for civil and criminal contempt</u>. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 44 | Issue 1 Article 6

2023

Contempt Power and the United States Courts

Joshua Carback

Follow this and additional works at: https://open.mitchellhamline.edu/policypractice

Part of the Courts Commons, Judges Commons, Legal Ethics and Professional Responsibility Commons, and the Litigation Commons

Recommended Citation

Carback, Joshua (2023) "Contempt Power and the United States Courts," *Mitchell Hamline Law Journal of Public Policy and Practice*: Vol. 44: Iss. 1, Article 6.
Available at: https://open.mitchellhamline.edu/policypractice/vol44/iss1/6

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Journal of Public Policy and Practice by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

CONTEMPT POWER AND THE UNITED STATES COURTS

*Joshua T. Carback**

I. INTRODUCTION 109
A. OVERVIEW OF CONTEMPT LAW.................................. 109
B. DEFECTS IN CONTEMPT LAW 110
C. REFORM FOR CONTEMPT LAW 110
D. ROADMAP FOR THIS ARTICLE 111
II. BACKGROUND 112
A. JUDICIAL RULEMAKING GENERALLY 112
B. JUDICIAL RULEMAKING AND CONTEMPT RULES 114
1. ARTICULATION OF CONTEMPT LIABILITY. 116
2. EXTERNAL & INTERNAL CROSS-REFERENCES.... 123
III. ANALYSIS 126
A. CRIMINAL CONTEMPT LEGISLATION 126
B. BANKRUPTCY CONTEMPT LEGISLATION 128
C. ADMINISTRATIVE STATE LEGISLATION 129
D. CRIMINAL CONTEMPT SENTENCING GUIDELINES 130
E. CONTEMPT RULES OF CIVIL PROCEDURE 130
F. CONTEMPT RULES OF CRIMINAL PROCEDURE 133
G. CONTEMPT RULES OF BANKRUPTCY PROCEDURE 135
H. CONTEMPT RULES OF APPELLATE PROCEDURE 135
I. CONTEMPT RULES OF EVIDENTIARY PROCEDURE 136

*Joshua T. Carback© is an independent author and a civil litigator. He thanks the editors of the *Mitchell Hamline Law Journal of Public Policy and Practice* for their work on this manuscript. The opinions expressed in this article are strictly those of the author and should not be construed to reflect the views of any other person or institution.

J. Contempt Rules of Specialty Courts 1366
K. Contempt Rules and Secondary Sources 137
L. Contempt Rules of Circuit Procedure 138
M. Contempt Rules of Local Procedure 139
IV. Conclusion 140
V. Appendix A: Proposed Statutory Reforms................. 141
A. Criminal Amendments and Federal Judgeship Act of [Year] 141
B. 18 U.S.C. § 401 – Power of Court........................... 143
C. Bankruptcy Amendments and Federal Judgeship Act of [Year] 144
D. 11 U.S.C. § 105 – Power of Court........................... 144
E. Model Contempt Statute for Administrative Law Courts.. 145
F. Model Contempt Statute for Enforcing Agency Subpoenas 145
VI. Appendix B: Proposed Amendments to Rules of Practice and Procedure... 146
A. Fed. R. Civ. P. 4.1: Serving Other Process 146
B. Fed. R. Civ. P. 37: Failure to Disclose or to Cooperate in Discovery; Sanctions..................... 146
C. Fed. R. Civ. P. 42: Civil Contempt 1488
D. Fed. R. Civ. P. 45: Subpoena (Renumbered Rule 46) 152
E. Fed. R. Civ. P. 53: Masters (Renumbered Rule 54) 152
F. Fed. R. Civ. P. 56: Summary Judgment (Renumbered Rule 57) 153

G. FED. R. CIV. P. 70: ENFORCING A JUDGMENT FOR A SPECIFIC ACT (RENUMBERED RULE 71) 153
H. FED. R. CRIM. P. 6: THE GRAND JURY 153
I. FED. R. CRIM. P. 7: THE INDICTMENT AND THE INFORMATION 154
J. FED. R. CRIM. P. 17: SUBPOENAS 154
K. FED. R. CRIM. P. 42: CRIMINAL CONTEMPT 155
L. FED. R. BANKR. P. 9020: CONTEMPT PROCEEDINGS ... 159
M. [NEW] FED. R. APP. P. 42: CONTEMPT 160
N. FED. R. EVID. 1101: APPLICABILITY OF THE RULES 160
O. JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY RULE 13(D) 160

VII. APPENDIX C: PROPOSED LOCAL RULES 160
A. [NEW] SUPREME CT. L. R. 1: SCOPE; ENFORCEMENT.. 161
B. MODEL LOCAL RULE FOR UNITED STATES CIRCUITS COURTS OF APPEAL 161
C. MODEL LOCAL RULE FOR ARTICLE III UNITED STATES DISTRICT COURTS 161
D. MODEL LOCAL RULE FOR ARTICLE IV TERRITORIAL COURTS 161
E. MODEL RULE FOR ARTICLE III SPECIALTY COURTS.... 162
F. MODEL RULE FOR ARTICLE I SPECIALTY COURTS DELEGATED THE CONTEMPT POWER 162
G. MODEL LOCAL RULE FOR ARTICLE I SPECIALTY COURTS NOT-DELEGATED CONTEMPT POWER 162

VIII. APPENDIX D: PROPOSED JURY INSTRUCTIONS 162
A. 1 MOD. FED. JURY INSTR.-CRIM. P. 20.01; 20.02........ 162

1. INSTRUCTION 20-10 THE INDICTMENT AND THE STATUTE 162
2. INSTRUCTION 20-10 THE INDICTMENT AND THE STATUTE 163
IX. APPENDIX E: SUPREME COURT CONTEMPT CASES 163
X. APPENDIX F: FEDERAL RULES OF PRACTICE AND PROCEDURE 169
XI. APPENDIX G: CIRCUIT RULES 170
XII. APPENDIX H: LOCAL RULES 170
XIII. APPENDIX I: STATUTES 172
XIV. APPENDIX J: REGULATIONS 175
XV. APPENDIX K: SENTENCING GUIDELINES 176

I. INTRODUCTION

Federal law governing the contempt power of the United States Courts is disorganized, cluttered, and poorly drafted. The lack of consolidation within and between various sources of federal legal authority is a critical problem. Contempt provisions lie scattered in piecemeal form across the entire breadth of the United States Code. Contempt provisions comprising federal common law likewise lie scattered across five separate sets of judicial rules of practice and procedure, covering five separate subject areas, using five separate numerologies: these rules govern bankruptcy procedure, appellate procedure, civil procedure, criminal procedure, and evidence. The high volume and lack of coordination between these interrelated authorities needlessly complicate contempt litigation. The objectives of this article are therefore to comprehensively survey the authorities governing contempt power and rectify their defects.

A. *Overview of Contempt Law*

The power to punish disrespect and disobedience through contempt proceedings is inherent to the judicial power and implied under Article III of the United States Constitution. There are two important distinctions mediating this power. The first distinction is between criminal contempt and civil contempt. Criminal contempt is contempt of a court's dignity. Civil contempt is disobedience of a court's order, rule, or judgment. Criminal contempt and civil contempt are not mutually exclusive categories; they often overlap. An act of disobedience can insult a court's dignity; an insult against a court's dignity can arise from an act of disobedience.[1]

The second distinction is between direct contempt and constructive contempt. Direct contempt occurs within a court's presence, that is, within the proximity of the presiding tribunal. Constructive contempt occurs beyond the proximity of the

[1] *See generally* U.S. Const. art. III; *see also* SIR JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 1 (1927).

courthouse. All direct contempt is criminal. Constructive contempt can be criminal, civil, or both.[2]

B. *Defects in Contempt Law*

The Strategic Plan for the Federal Judiciary declares seven core values: rule of law, equal justice, judicial independence, diversity and respect, accountability, excellence, and service.[3] Federal contempt law does not reflect these values. The scope of the contempt power of the United States Courts is not clearly expressed in federal contempt authorities for four reasons. First, there is no statute that comprehensively governs civil contempt.

Second, the principal statute governing criminal contempt, 18 U.S.C. § 401, is defective. It does not adequately declare, for example, the distinction between civil and criminal contempt procedures or what penalties are liable upon conviction for criminal contempt.

Third, there is a lack of clarity about whether bankruptcy judges possess contempt power.

Fourth, judicial rules governing contempt procedures are poorly organized. There are multiple sets of contempt rules governing different courts with different jurisdictions. There is a lack of coordination between contempt provisions *within* these sets of rules. There is also a lack of coordination *between* these different sets of rules. These defects undermine the uniformity, simplicity, and efficiency of federal practice and procedure as a whole.[4]

C. *Reforming Contempt Law*

I propose to systematically improve federal contempt law in three ways. First, I propose to improve the statutory regime for contempt procedures by eliminating redundancy between criminal contempt statutes and passing legislation that explicitly gives bankruptcy courts contempt power.

---

[2] Fox, *supra* note 1, at 1.

[3] U.S. JUD. CONF., STRATEGIC PLAN FOR THE FED. JUDICIARY 2 (2020).

[4] *Cf.* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1687–88 (1995).

Second, I propose new rules and rule amendments to streamline contempt procedures for the United States Supreme Court, United States Courts of Appeals, United States District Courts, specialty courts, territorial courts, and administrative courts.

Third, I propose to nationalize local contempt rules derived from specific courts with local contempt provisions that deserve to be replicated. Simplification of contempt provisions at one level of authority generates a cascade of improvements by eliminating the need for similar provisions at others. An improved nationwide rule can eliminate the need for needlessly complicating local derivations. If a nationwide rule says more, moreover, a statute should say less. Improvements to nationwide rules of practice and procedure, in other words, eliminate superfluous and needlessly complicating local derivations and statutory counterparts.

D. *Roadmap for this Article*

Part II of this article explains the interbranch process for generating federal judicial rules of practice and procedure. It recounts how the federal government created contempt provisions at the inception of the interbranch rulemaking process in order to provide historical perspective. It also explains in more detail how the four defects I identified in contemporary federal contempt law undermine the efficacy of contempt procedures in federal courts.[5] Part III of this article provides precise instructions for implementing my three overarching proposals for reforming federal contempt law.[6] Part IV concludes.[7] Parts V – IX are appendices containing strikethrough copies of authorities currently comprising federal contempt law along with my proposed reforms and revisions. Parts IX – XV are appendices containing clean copies of authorities comprising federal contempt law in its current form. The appendices in Parts V – XV serve both as specific references for my proposals in this article as well as general references for practitioners and judges engaged in contempt proceedings. I encourage the reader to turn back and forth

---

[5] *See infra*-Part II.
[6] *Compare supra*–Part I.C, *with* infra-Part III.
[7] *See infra*-Part IV.

between each proposal and the appendix containing its respective authority revised according to my proposed specifications. The footnotes in each section of each part of this article cross-reference the particular appendices relevant to each proposal.[8]

II. BACKGROUND

The Rules Enabling Act of 1934 created the modern interbranch framework for making rules of practice and procedure for the federal judiciary, including rules governing contempt proceedings. It was a landmark achievement in the annals of American institutional reform. But successive generations of incremental tinkering slowly spun a doctrinal web so intricate and dense that the authorities governing federal contempt law practically shun attorneys from seriously considering contempt power as an effective recourse for problems that arise in litigation. The needless complexity of the federal contempt law chills judges from understanding and applying contempt power on behalf of the courts as well.[9]

A. *Judicial Rulemaking Generally*

The Rules Enabling Act of 1934, now codified in Title 28, Chapter 31 of the United States Code, balances the competing interests and equities of each branch of the federal government in judicial rules of procedure by requiring cooperation, collaboration, and contribution from each branch in the judicial rulemaking process. Section 2071 specifically provides that rules promulgated by the Supreme Court "shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."[10] The ball for judicial rulemaking therefore starts in the judiciary's court, pun intended.[11] The Supreme Court, however, no longer bears the weight of that responsibility alone—the Supreme

[8] *See infra*–Part V–IV.
[9] U.S. CONST. ARTS. I–III; 28 U.S.C. §§ 2071 et seq.
[10] 28 U.S.C. § 2071.
[11] *See* 28 U.S.C. § 2072.

Court delegates its rulemaking responsibility through several layers of the federal judiciary's administrative hierarchy.

The United States Judicial Conference administers the federal judiciary at the national level by supervising the Administrative Office of the United States Courts, facilitating internal disciplinary actions, developing national policies, proposing federal legislation, and improving federal practice and procedure.[12] The Judicial Conference delegates its rulemaking responsibility to its Standing Committee on Rules of Practice and Procedure.[13]

The Standing Committee reviews and coordinates the rulemaking recommendations of five advisory committees, each dedicated to a different subject area: appellate procedure, bankruptcy procedure, civil procedure, criminal procedure, and evidence. The meetings of the advisory committees are open and recorded. Each advisory committee has sub-committees dedicated to different projects within their respective domains. The roster of each committee consists of a chair, several members, a reporter, a secretary, and independent "contributors"—subject matter experts such as practicing attorneys, law professors, and representatives from the United States Department of Justice.[14]

Proposals to reform federal rules of practice and procedure must survive a daunting seven-stage gauntlet of interbranch scrutiny. First, the advisory committees to the Standing Committee make recommended rule amendments predicated on study, discussions, and consultations with their respective subcommittees.

Second, upon the approval of the Standing Committee, the advisory committees publish proposed rule amendments and solicit public comment.

Third, at the conclusion of the public comment period, the advisory committees review public feedback and, if worthy, submit proposed rule amendments incorporating public comment to the Standing Committee.

---

[12] 28 U.S.C. § 331; 28 U.S.C. § 604; 28 U.S.C. §§ 2071 et al.

[13] 28 U.S.C. § 2073(b).

[14] McCabe, *supra* note 4, at 1664–66; U.S. Cts., Rules Committees – Chairs and Reporters (July 28, 2020).

Fourth, the Standing Committee reviews proposed rule amendments by the advisory committees, typically at its June meeting, and, if deemed worthy, submits those proposed rule amendments to the Judicial Conference.

Fifth, the Judicial Conference reviews proposed rule amendments, typically at its September meeting, and, if worthy, submits those proposed rule amendments to the Supreme Court.[15]

Sixth, the Supreme Court reviews proposed rule amendments and, if worthy, transmits them to the United States Congress for review on May 1.[16]

Seventh, there is a congressional review period of seven months. During that period Congress may act on proposed rule amendments and reject, modify, or defer them. Unless Congress acts, proposed rule amendments become legally effective by on December 1.[17]

B. *Judicial Rulemaking and Contempt Rules*

Congress intended for judicial rules to govern contempt proceedings from the beginning.[18] The Standing Committee and its constituent advisory committees therefore spent a significant amount of time deliberating how to make contempt rules efficient and clear. The advisory committees identified several common issues in the course of their deliberations: the extent to which the civil contempt and criminal contempt provisions should mirror each other; the distinction between constructive contempt and direct contempt; the distinction between civil contempt and criminal contempt; the scope of what constitutes "the court's presence" for the purposes of

---

[15] 28 U.S.C. § 2073.
[16] 28 U.S.C. § 2074.
[17] 28 U.S.C. §§ 2074–2075; Fed. Judicial Ctr., How Rules of Procedure are Developed and Revised in the U.S. Courts (2020); McCabe, *supra* note 4, at 1656–57, 72–75; U.S. Courts, Governance & The Judicial Conference, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Aug. 3, 2020; 3:45 p.m.).
[18] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 12 (Sept. 8, 1941) (statement of James J. Robinson, Dir., Inst. of Crim. L. & Criminology).

delimiting the boundaries of direct criminal contempt; whether conduct can be subject to both criminal contempt and civil contempt simultaneously; and whether corporations can be held in contempt.[19]

The advisory committees resolved these issues over time as follows. Contumacious conduct can be subject to both civil and criminal contempt proceedings simultaneously. Artificial persons, corporations, are liable for contempt like natural persons. The scope of conduct constituting direct criminal contempt subject to summary judgment includes conduct not only occurring in the courtroom during a proceeding, but also conduct in the judge's chambers, the clerk's office, other areas of a courthouse, and the courthouse's immediate surround. A court's "presence," for the purpose of contempt law, is not limited to the actual room where a presiding judge sits.[20]

Congress continued to tinker with contempt procedures but lacks a sufficiently comprehensive vision necessary to achieve true

[19] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 697–703 (Jan. 14, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; George Z. Medalie, U.S. Att'y., S.D.N.Y; G. Aaron Youngquist, Assistant Att'y. Gen. U.S. Dep't of Just.; George F. Longsdorf, Att'y.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 457–58, 535–36 (May 19, 1942) (statements of George F. Longsdorf, Att'y; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Aaron Youngquist, Assistant Att'y. Gen. U.S. Dep't of Just.; James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Herbert Wechsler, Assist. Att'y. Gen., U.S. Dep't of Just.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 87–90, 390, 569, 571, 573–74 (Feb. 19, 1943) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Atty; George H. Dession, Prof., Yale L. Sch.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 895–98 (Feb. 23, 1943).

[20] *See U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 8 (Aug. 2–3, 1973); *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book,* U.S. S. Ct. (Oct. 7–8, 1999); Dave Schlueter, Memorandum to Criminal Rules Advisory Committee re: Restyling Project – Rules 10 to 22 (Second Draft of Rules and First Draft of Notes 234 (Sept. 9, 1999), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Oct. 7–8, 1999); *see also* 18 U.S.C. § 402 (noting that corporations and associations are liable for contempt).

progress.[21] The federal judiciary's advisory committees likewise strived to make contempt rules compatible with contempt statutes for years. But the fit was never flush. Although the legislature and judiciary worked to establish the groundwork for the federal contempt law, they failed to operationalize general principles through a system of interlocking statutes and rules that is sufficiently concise, compact, and clear.

The history of how the federal judiciary's advisory committees grappled with drafting contempt rules revealed two maladies afflicting the current regime governing contempt law: *first*, the selective articulation of contempt liability in the federal rules of practice, and procedure; and *second*, the dizzying array of external and internal cross-references between different contempt authorities.

1. Articulation of Contempt Liability.

A difficult question presented from the very beginning was how often to punctuate the conclusion of a rule with the fact that non-compliance is liable for contempt. Should every rule have a contempt clause? In discussing Criminal Rule 4 (summons) in 1941, for example, the criminal rules advisory committee pondered whether it should state that noncompliance may result in contempt proceedings. On one hand, they could insert a contempt clause for every rule to ensure clarity. On the other hand, they could leave a contempt clause out of every rule on the theory that contempt is an implicit sanction for all disobedience or disrespect; therefore, mentioning it in provision after provision would be overly redundant and needlessly take up space.

An excerpt from the committee's discussion in 1941 illustrates how the rule makers serving in the Judicial Conference in different capacities pondered this conundrum:

[21] Act of June 25, 1948, ch. 645, 62 Stat. 701 (codified as amended at 18 U.S.C. § 3285, §§ 3691–3692); Act of May 24, 1949, ch. 139, § 8(c), 63 Stat. 89, 90; Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended at 28 U.S.C. § 2077); Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended at 28 U.S.C. § 2072).

Murray Seasongood: Will people say, "Well, after all, the only penalty is for contempt, and I won't pay any attention to it."

Alexander Holztoff: Then he will issue a warrant if the defendant does not appear.

Murray Seasongood: Could anybody say that is a limitation, that the only penalty is the penalty for contempt of court for not obeying a summons?

James J. Robinson: I tried to save space, possibly at some cost.

Murray Seasongood: If he does not appear in response to the summons, then a warrant shall be issued. Perhaps that should be in.

George H. Dession: That could be done in any case. That does not have to go in.

Frederick E. Crane: I do not know, but any court process, if it is disobeyed, is subject to contempt. Do you have to add that to every order or process of the court? I did not think that you needed to emphasize it. I may be wrong, but I took for granted that any order or process, whether a summons or warrant or any order, civil or criminal, is subject to contempt.

Chairman Arthur T. Vanderbilt: That is true. This is the language so that the man who receives it will be apprised of that fact.

Frederick E. Crane: That may be the answer, then.[22]

---

[22] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. (Sept. 8, 1941) (statements of Chairman Arthur T. Vanderbilt, Chief Justice, Sup. Ct. of N.J.; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Hon. Frederick E. Crane, N.Y. Ct. of App.) (discussing

The less rigid approach prevailed over time. As criminal rules advisory committee member George Medalie noted in 1943, "There are some things we had better leave to the courts, to their experience and practical judgment. You cannot cover everything."[23]

The advisory committees did not incorporate contempt power into federal rules in a coordinated, systematic matter. Instead, they opted to gradually reform rules implicating contempt power on a case-by-case basis. They employed four different approaches to amendments to contempt rules over time.

First, there were cases when the advisory committees intentionally added contempt provisions to rules because they were certain that contempt power was available, and that availability was worthy of emphasis.[24]

---

a former version of FED. R. CRIM. P. 4); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 63–64 (Sept. 8, 1941) (statements of James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Assoc. J., N.Y. Ct. of App.) (discussing a former version of FED. R. CRIM. P. 4); *see also U.S. Jud Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 345 (Sept. 9, 1941) (statement of Murray Seasongood, Partner, Warrington & Paxton) (discussing a draft of former Fed. R. Crim. P. 9).

[23] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 87–90 (Feb. 19, 1943) (statement of George Z. Medalie, U.S. Att'y., S.D.N.Y).

[24] FED. R. BANKR. P. 9014; FED. R. BANKR. P. 9020; FED. R. CIV. P. 4 & 1963 Amend. Comm. note on subdivision (f); FED. R. CIV. P. 4.1(b) & 1993 Amend. Comm. note on subdivision (b); FED. R. CIV. P. 11 & 1983 Amendment Comm. note; FED. R. CIV. P. 37(b) & 1937 Comm. note; FED. R. CIV. P. 45(g) & 1937 Comm. note subdivision (e), 1991 Amend. Comm. note subdivisions (a) and (f), 2013 Amend. Comm. note subdivisions (c), (f), & (g); FED. R. CIV. P. 53(c)(2); FED. R. CIV. P. 56(h); FED. R. CIV. P. 73 & 1983 Comm. note subdivision (a); FED. R. CRIM. P. 6(e)(5),(7) & Comm. note 1977 Proposed Amends., 1983 Amend. Comm. note, 2002 Amend. Comm. note; FED. R. CRIM. P. 7(a)(1) & 2002 Amend. Comm. note; FED. R. CRIM. P. 17(g) & 2002 Amend. note; FED. R. CRIM. P. 42; Notes of Conference Call with the Discovery Subcomm. of the Advisory Comm. on Civ. Rules 2–4 (July 23, 2012), *reprinted in U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Book*, U.S. S. Ct. 183 (Nov. 1–2, 2012) (removing a bracketed limitation excluding contempt from the list of available sanctions listed in FED. R. CIV. P. 37(b)(2)(A)); *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. (Apr. 4–5, 2011) ("The Committee unanimously approved the suggested addition to Rule 45(g), described above, adding at line 272,

Second, there were cases when the advisory committees were certain that contempt should not be available as an enforcement mechanism. They effectuated this intent in one of two ways: by deliberately omitting reference to the contempt power, such as in Civil Rule 35 (medical examination) and Bankruptcy Rule 2005

page 102, these words: 'may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order relating to the subpoena."); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. (Jan. 14, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; George F. Longsdorf, Att'y) (discussing drafts of former Fed. R. Crim. P. 45 and 107); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim Proc., Meeting Minutes,* U.S. S. Ct. 326–330 (May 19, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Atty. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Att'y; George H. Dession, Prof., Yale L. Sch.; Hugh D. McLellan, J., U.S. Dist. Ct. D. Mass.) (discussing whether an explicit contempt clause in a rule governing summons was necessary); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim Proc., Meeting Minutes,* U.S. S. Ct., 457–58 (May 19, 1942) (statements of George F. Longsdorf, Att'y; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Aaron Youngquist, Assistant U.S. Att'y. Gen.; James J. Robinson, Dir., Inst. of Crim. L. & Criminology); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 87–90, 390, 569, 571 (Feb. 19, 1943) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Atty. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Att'y; George H. Dession, Prof., Yale L. Sch.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Draft Minutes*, U.S. S. Ct. 4, 223–24 (June 21–22, 1999) (statements of J. Smith, Kate Stith, Prof., Yale L. Sch.; Fern M. Smith, U.S. Dist. J. for N.D.C.A.), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Boo*k, U.S. S. Ct. (Oct. 7–8, 1999); *see also U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes,* U.S. S. Ct. 12–13 (Apr. 20–21, 2009) (editing the text in Fed. R. CIV. P. 45(h) regarding the availability of sanctions in such a manner as not to detract from the availability of contempt as an enforcement mechanism).

(apprehension);[25] or by affirmatively disclaiming that contempt was unavailable, such as in Criminal Rule 4 (summons).[26]

Third, there were cases when advisory committees were divided or agnostic on the availability of contempt as an enforcement mechanism for a particular rule. The criminal advisory committee, for example, deliberated the scope of contempt liability for unauthorized release of grand jury materials under Criminal Rule 6(e) in 1999. It ultimately decided to defer the resolution of that issue to judicial interpretation (case law) or congressional action. This anecdote illustrates the troublesome fact that while the Standing Committee was generally zealous to conserve its rulemaking prerogatives, its constituent organs, like any bureaucratic entity, tended to "punt the football" on difficult questions.[27] This anecdote also reveals the tradeoff for delegating rulemaking responsibility across multiple levels of review involving a larger group of people. When power is diffuse, the reins are loose.

Fourth, there were cases when the advisory committees were certain that contempt power was available as an enforcement mechanism but decided not to insert an explicit textual affirmation of

---

[25] FED. R. CIV. P. 35; FED. BANKR. R. 2005; *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 1568–69, 1572 (Nov. 18, 1935) (statements of Chairman William DeWitt Mitchell, Att'y.; Edson R. Sunderland, Prof., U. Mich. L. Sch.) (discussing the availability of contempt in former Rule 65 governing medical examinations); *U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Meeting Minutes*, U.S. S. Ct. 16–17 (Feb. 15, 18, 1967) (statements of Edward T. Gignoux, U.S. Dist. Ct. D. Me.; Frank R. Kennedy, Prof., U. Mich. L. Sch.) (noting that J. Edward Gignoux withdrew his suggestion that Bankruptcy Rule 2005—then Bankruptcy Rule 2.21—cross-reference Criminal Rule 42—then Criminal Rule 40—because there was unanimity that the criminal contempt rule had content that ought not be in the bankruptcy rule).

[26] FED. R. CRIM. P. 4 & 1944 Comm. note (a)(4); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 63–64 (Sept. 8, 1941) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George H. Dession, Prof., Yale L. Sch.; Hon. Frederick E. Crane, N.Y. Ct. of App.).

[27] FED. R. CRIM. P. 6(e)(5),(7); U.S. Jud. Conf., Advisory Comm. on Rules of Crim. Proc., Rule 1–31 Preliminary Draft of the Proposed Revision of the Federal Rules of Criminal Procedure Using Guidelines for Drafting and Editing Court Rules 30, 63 (2000), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book,* U.S. S. Ct. (Jan. 10–11, 2000).

that fact. Given that contempt power is inherent to the judicial power, the advisory committees often wanted to avoid emphasizing the availability of contempt as an enforcement mechanism when they believed it was clearly implied. They left out any explicit reference to contempt power in some rules, in other words, not because they were agnostic or even had negative views about the availability of contempt proceedings, but rather because they thought it was more economical to keep silent or because the availability of contempt power was deemed unworthy of emphasis. The banality of contempt liability for disrespect or disobedience therefore bears some blame for why federal rules of practice and procedure are so inconsistent in explaining if and to what extent contempt power applies to any given situation.[28]

The history of advisory committee deliberations about how to incorporate contempt power into the federal rules of practice and procedure reveals an institutional tendency to prefer flexibility over systemization. It is a general principle of law that anyone who disobeys the authority or denies the dignity of an Article III court is liable for contempt whether or not a particular rule explicitly says so. The particular rules where the Standing Committee intentionally omitted any reference to contempt power or affirmatively prohibited the applicability of contempt power consequently were quite few. When the Standing Committee explicitly disclaimed contempt liability in particular rules, it was for emphasis, not as a matter of course. The fact that the Standing Committee did treat silence as a prohibition on a few occasions, however, created some uncertainty in the rules: silence did not always mean the same thing. The negative

[28] Memorandum to the Chairman and Members of the Committee on the Administration of the Bankruptcy System: Proposals to Reduce Certain Costs of the Bankruptcy Process 4–5 (Jan. 7–8, 1993), *reprinted in U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Agenda Book,* U.S. S. Ct. (Feb. 18–19, 1993) (weighing the merits of adding a contempt provision to Bankruptcy Rule 4004(g)); *cf. U.S. Jud. Conf. Advisory Comm. on Rules Crim. Proc., Meeting Minutes*, U.S. S. Ct. 63–64 (Sept. 8, 1941) (James J. Robinson, Dir., Inst. of Crim. L. & Criminology) (stating that he left certain language out of Criminal Rule 4 to save space).

implication canon does not apply consistently across the board. Sometimes silence meant "Yes." Sometimes silence meant "No." [29]

The history of contempt power yields an interesting paradox: the advisory committees were intentional in creating, yet they were not always clear about what their intentions created. They recognized from the beginning that there was a cost to taking a flexible approach by sprinkling textual references to contempt power here and there, rather than systematically confirming in every rule whether contempt power was available or not. In the end, that decision cost them in terms of clarity and consistency.

The use of four different approaches rather than one created confusion. The tradeoff of having three levels of rules committees—the Standing Committee, advisory committees, and advisory subcommittees—was injecting more expertise *into* the rules at the cost of creating more "noise" *between* the rules. There are therefore now too many cooks in the kitchen. For the justice system to become more efficient, systematization, not flexibility, must be the prime

---

[29] *See, e.g.*, Notes of Conference Call with Discovery Subcomm. of the Advisory Comm. on Civil Rules (July 5, 2012), *reprinted in U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Book*, U.S. S. Ct. (Nov. 1–2, 2012) ("The focus is on whether the failure to preserve [under FED. CIV. R. 37(g)(2)] has had a severe impact on the truth-seeking process. This discussion prompted a question: What happens if there was unquestioned bad faith, but no prejudice? For example, the most outrageous effort to destroy the evidence might be bungled. Is there nothing the judge can do in the face of such conduct? One reaction was that the court surely has abundant inherent authority to respond to such behavior. Another was that there are cases that say prejudice can be presumed if there has been bad faith activity. A third was that the courts surely have inherent authority to punish outrageous conduct. This discussion prompted reference to the inherent authority question that hovers in the background of the discussions."); Mark D. Shapiro, Memorandum to Advisory Comm. on Civ. R., Fed. R. of Att'y. Conduct (FRAC) (March 28, 2000), *reprinted in U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Books,* U.S. S. Ct. 6 (Apr. 10–11, 2000) ("A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civ. R. 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power."); *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 1544 (Nov. 18, 1935) (statement of Hon. George Donworth, U.S. Dist. Ct. W.D. Wash.) (in discussing former FED. R. CIV. P. 57 concerning interrogatories involving documents and tangible things, stating, "Does not the general law of contempt cover all these things about refusing to obey the order of the court?").

directive. Federal rulemaking requires a new paradigm: fewer hands, and more delicate fingers.

2. External & Internal Cross-References.

The Rules Enabling Act did not fully dredge the swamp of disparate authorities that stymied litigators during the nineteenth century. It simply provided enough drainage to allow for a more level playing field. But cross-references between judicial rules and statutes operationalizing federal procedures still needlessly complicated the game. Not every judicial rule has a statutory cross-reference, of course, but many do. Advisory committees recognized early on that zigzagging between disparate authorities to figure out how a particular contempt procedure works is not ideal.[30]

There are two types of cross-references in contempt law. The first type of cross-references are external cross-references: procedural rules that cross-reference procedural statutes. The Standing Committee took the view that it should keep authority for enforcement procedures, like contempt power, exclusively within the rules whenever possible. In 1953, the civil rules advisory committee noted that its draftsmanship of Civil Rule 45(e) was so good, it rendered its coordinate statute unnecessary, therefore, Congress abolished that statute outright.[31] In 1973, the criminal rules advisory committee voted to keep the punishment for unauthorized release of grand jury testimony set forth in Criminal Rule 6 (grand jury) strictly within the scope of the Federal Rules of Criminal Procedure, rather

---

[30] 28 U.S.C. § 1652; *cf. U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 27 (Apr. 20–21, 2009) ("It is clear that Rule 45 is a long and complicated rule. 'You have to work hard to find what it means.' Many judges say that it is a perfectly fine rule, that the problem is that lawyers do not understand it. A fine rule that lawyers cannot understand may deserve some clarification.").

[31] *U.S. Jud. Conf. Advisory Comm. on Rules Civ. Proc., Meeting Minutes*, U.S. S. Ct. 442–43 (May 19, 1953) (statement of Hon. Charles Edward Clark, U.S. Ct. App. 2d Cir.) ("I just comment in passing that is one of the difficulties that occurred as to the poor admiralty people. [FED. R. CIV. P.] 45(e) is a very good rule of subpoena. It was so good that the revisers of Title 28 U.S. Code said it was lovely, and since it was so good[,] they didn't need any statute. They abolished the statute, and then we had the question what to do in admiralty.").

than requesting that Congress enact coordinate statutes in the United States Code to serve that purpose.[32]

We find a less stark example in 2000 when the criminal rules advisory committee considered inserting an external cross-reference to 28 U.S.C. § 1784. Section 1784 governs contempt proceedings against foreign residents who fail to respond to subpoenas. The committee minutes reveal that there was no consensus about whether the general rule governing criminal contempt—Criminal Rule 42 (then Criminal Rule 43)—even applied to Section 1784. The committee opted to omit a cross-reference. It was satisfied with only having a cross-reference to Section 1784 in Criminal Rule 1, which outlined the scope of the Federal Rules of Criminal Procedure as a whole.[33] In 2001, the criminal rules advisory committee accepted a subcommittee recommendation to amend Criminal Rule 42 (criminal contempt) to reflect the new authority of magistrate judges to preside over contempt proceedings. This amendment simply inserted a cross-reference to the relevant statute granting magistrate judges the contempt power.[34]

The second type of cross-references are cross-references *between* rules. One might wonder if it was ever possible to make each rule hermetically sealed and self-sufficient. The principle of autarky in, though academically interesting, never caught on. Not only did the advisory committees frequently draft rules *within* a given subject area that cross-referenced other subject areas—they occasionally even

[32] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 8 (August 2–3, 1973) ("A discussion of unauthorized release of grand jury testimony followed. Judge Gesell urged that this should be a statutory offense, noting that at present the only apparent means of enforcement is through the contempt power. Justice Cutter urged that solutions be kept within the framework of the Criminal Rules rather than statutes, if possible. It was VOTED to recommend no changes in the subpoena practice.").
[33] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. (Oct. 19–20, 2000).
[34] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. (Apr. 25–26, 2001).

drafted internal cross-references *between* subject areas. Bankruptcy Rule 9.11, for example, was drafted in the likeness of Civil Rule 11.[35]

Over time, advisory committees made case-by-case decisions as to whether cross-references in the body of a rule or its comments were appropriate. Some rules ended up being more self-sufficient than others. The criminal rules advisory committee opted in 2000 to not include an internal cross-reference in Criminal Rule 42 (criminal contempt) to Criminal Rule 32 (sentencing) for the purpose of clarifying whether a criminal contempt sentencing would require the production of a presentence report (it did not).[36]

The criminal rules advisory committee agreed with a subcommittee proposal in 2001 to insert an internal cross-reference in Criminal Rule 7 (indictment and information) clarifying that contempt charges under Criminal Rule 42 (criminal contempt) need not be initiated by indictment.[37] Suffice it to say that both internal and external cross-references made contempt law more convoluted than necessary. Anyone who needs to prepare for a contempt proceeding practically needs to wear a neck brace to mitigate the amount of

---

[35] *U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Meeting Minutes*, U.S. S. Ct. 3 (Oct. 31 & Nov. 2, 1966) (statements of Frank R. Kenny, Prof., U. Mich. L. Sch.; Hon. Elmore Whitehurst, Assist. Dir., Admin. Off. U.S. Cts.) ("Judge Whitehurst referred to the last sentences of Rule 9.11(a) and said he wondered just what he should do, if, as a referee, he [was] [sic] confronted with a violation of the rule. Professor Kennedy stated that the sentences came right out of Rule 11 of the Federal Rules of Civil Procedure. He said that perhaps any sanction other than citation for contempt might be imposed by the referee. He suggested that unless Judge Whitehurst wished the Committee and reporter to pursue this matter further, the draft of Rule 9.11 should follow the corresponding Federal Civil Rule.").

[36] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 2 (Jan. 10–11, 2000).

[37] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 5 (Apr. 25–26, 2001); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Draft Minutes*, U.S. S. Ct. 14 (Apr. 25–26, 2001), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Apr. 25–26, 2002); Hon. Anthony J. Scirica, U.S. Jud. Conf., Comm. on R. Prac. & P., Memorandum to the Chief Justice of the United States [&] Associate Justices of the United States re: Summary of the Proposed Amendments to the Federal Rules 4 (Nov. 13, 2001), *reprinted in U.S. Jud. Conf., Advisory Comm. on Rules of Crim. Proc.,* U.S. S. Ct. (Apr. 25–26, 2002).

whiplash they will suffer from jerking back and forth between so many different interconnected contempt authorities.

III. Analysis

The three branches of the federal government must work together to reform statutes, sentencing guidelines, and judicial rules governing the contempt power of the United States Courts. I provide specific recommendations for contempt reforms in the context of criminal, civil, bankruptcy, and administrative procedure below.

A. *Criminal Contempt Legislation*

I propose that the federal government amend 18 U.S.C. § 401 and Criminal Rule 42 to be more comprehensive in three ways. First, Congress should modify 18 U.S.C. § 401 to provide explicit notice of the three penalties or purge conditions that a court may prescribe for contempt: reprimand, fines, and imprisonment. The language for this amendment should be broad and permissive, not exhaustive. Courts should be allowed ample room for discretion and creativity in handling contempt matters.[38]

Second, Criminal Rule 42 should be amended to allow parties to file petitions out of court or move in court for civil and/or criminal contempt proceedings.[39]

Third, Criminal Rule 42 and 18 U.S.C. § 401 should also expressly declare the right of the court to initiate contempt proceedings sua sponte. These amendments will render criminal contempt statutes, especially statutes in the genre of obstruction of justice (perjury, witness tampering, violation of bail and probation orders, etc.) superfluous and justify their repeal.

One might argue that such a widespread effort to repeal criminal contempt statutes is unjustified. Criminal contempt statutes are normally merely declaratory of a court's right to punish an offense through its inherent power. But the purpose of the criminal contempt statutes at issue is not simply to express what the law is. By rendering

---

[38] *See infra*–Part V.A–B.

[39] *See infra*–Part V.K.

an offense that is sui generis by default into a crime as such, the discretion for prosecution and punishment shifts from the judiciary to the executive. That is the real purpose behind the criminal contempt statutes that saturate the federal criminal code. The criminalization of contempt forms a chokehold on judicial discretion. It represents a fear that judges will not adequately punish contempt if left to their own devices.

I maintain that if there is anywhere where judicial discretion in punishment should have priority, it is in the zone of the judiciary's inherent power to punish contempt. When the judicial power guaranteed under Article III is the greatest "victim" of an offense, the judicial power should have the greatest prerogative in vindicating that offense. I believe that the judiciary is capable of using its broad sentencing discretion to adequately punish conduct contemplated by criminal contempt statutes. For hundreds of years, common law courts punished indignities against them under their inherent power, not as crimes as such, without any problems. I do not see any justification for departing from this tradition.[40] Criminal contempt statutes are, in my view, unnecessary.

In light of my proposed amendments to 18 U.S.C. § 401 and Criminal Rule 42, I propose that Congress repeal the following criminal statutes: 18 U.S.C. §§ 1073, 1503, 1509, 1512, 1523, 1621–1623, 3484, 3498–3499, and 3146–3149.[41] These repeals will require amendments to the current model federal jury instruction for contempt under Section 401 as well. The federal criminal code is obese. This is a good place to trim fat. One cannot complain that this pattern of repeal will amplify the threat of impunity. Those liabilities once contemplated by criminal contempt statutes will simply collapse into 18 U.S.C. § 401 and Criminal Rule 42.[42]

---

[40] *E.g.*, King v. Bellingham (1649) 82 K.B. 582, Style 126 (Eng.) (punishing perjury with a fine of ten pounds); Wingfield's Case (1633) 79 K.B. 819, Cro. Car. 251 (Eng.) (punishing men who assaulted a sheriff of Middlesex with fines ranging between 500 marks and 500 pounds); Royson's Case (1629) 79 K.B. 729, Cro. Car. 146 (Eng.) (punishing breach of bail with imprisonment and standing in the pillory with a paper proclaiming the contemnor's offense).

[41] *See infra*-Part V.A.

[42] *Compare* Leonard B. Sand et al., 1 Model Fed. Jury Instr.-Crim. P. 20.01–02 (Lexis Nexis Nov. 2022), *with infra*-Part VIII.A.

The reversion of criminal contempt of court from a class of statutory crime as such back into a sui generis offense will resolve separation of powers concerns triggered under the Appointments Clause when the judiciary appoints independent prosecutors under Rule 42. The proper way to achieve both a balance and separation of power between the coordinate branches of the federal government is to reduce the burden of each branches' involvement in vindicating each other's prerogatives to the greatest extent possible. The means and ends of criminal contempt proceedings, for example, is to vindicate judicial power that is both inherent and implied under Article III. The executive power under Article II therefore ought to be involved to the minimum extent possible in enforcing and upholding the dignity of the judicial power under Article III through contempt proceedings. To that end, it is perhaps appropriate that the default prosecutor for criminal contempt charges should be an independent prosecutor rather than a public prosecutor.[43]

B. *Bankruptcy Contempt Legislation*

I propose new legislation to settle the question of whether bankruptcy judges possess contempt power. The passage of the Bankruptcy Amendments and Federal Judgeship Act in 1984 did not clarify whether bankruptcy judges and magistrate judges had contempt power. The Federal Courts Improvement Act of 2000 clarified that magistrate judges do indeed possess contempt power, but the status of bankruptcy judges was left unresolved. I am not convinced that bankruptcy courts currently have contempt power. Such power cannot, in my mind, be granted to an Article I court sub silentio.[44] Since Congress gave contempt power to magistrate judges, I see no reason why bankruptcy judges should not possess it as well. But Congress must grant such power expressly, not by implication.[45]

[43] *Cf.* Donziger v. United States, 38 F.4th 290 (2d Cir. 2022), *petition for cert. filed* (Sept. 20, 2022) (No. 22-__).
[44] Laura B. Bartell, *Contempt of the Bankruptcy Court – A New Look*, 1996 U. ILL. L. REV. 1, 56 (1996).
[45] *See infra*–Part V.C–D.

C. *Administrative State Legislation*

I propose two sets of statutory reforms affecting administrative entities within the executive branch. First, I propose that Congress harmonize laws regulating referrals of contempt matters by administrative courts, boards, agency panels, etc., to federal district courts. The specific administrative entities implicated by this proposal include United States Departments of Agriculture, Commerce, Health and Human Services, Interior, Labor, Justice, Defense, Homeland Security, Treasury, Transportation, as well as some independent agencies. The particular administrative law courts implicated by this proposal include agency tribunals such as the National Labor Relations Board, the Harbor Workers' Compensation Benefits Review Board, immigration courts, the Trademark Trial and Appeal Board, and the Patent Trial and Appeal Board. I drafted a model statute to fulfill this proposed administrative reform for all of these administrative entities. The draft language states that the certification of contempt matters arising before administrative law courts, bodies, boards, agency panels, etc., should be adjudicated by a federal court that can exercise jurisdiction over the underlying subject matter or the alleged contemnor. The proceedings should be governed by federal rules of practice and procedure (i.e., Criminal Rule 42) as if the contempt arose in proceedings before the federal court receiving the certification itself.[46]

Second, I propose that Congress harmonize one hundred and fifty or so statutes and regulations governing subpoena enforcement for the departments and independent agencies within the executive branch referred to above. I crafted model language to facilitate this objective. Congress can incorporate this language into a statute or regulation. This language states that the certification of a matter involving the enforcement of a subpoena issued by an administrative entity should be adjudicated under the relevant federal rules of practice and procedure governing the federal court that can exercise jurisdiction over the administrative process or the person accused of contempt of the subpoena. The federal court that has jurisdiction over the administrative proceeding requiring the enforcement of a

[46] *See infra*–Part V.E.

subpoena should then adjudicate a contempt of the relevant administrative entity as if it arose in proceedings before that court itself.[47]

D. *Criminal Contempt Sentencing Guidelines*

I am content with the current sentencing regime for criminal contempt statutes established by United States Guidelines 2J1.1 and 2X5.1. The United States Sentencing Commission should, however, amend these guidelines to reflect my proposed amendments to Title 18, Section 401 of the United States Code. Because the proposed amendments render most, if not all, criminal contempt statutes superfluous, the guidelines must reflect the repeal of those statutes. The Sentencing Commission should also modify the guidelines to reference statutes that sound in criminal contempt but are not eliminated by my proposed reforms.[48]

E. *Contempt Rules of Civil Procedure*

The Standing Committee should modify the Federal Rules of Civil Procedure by adopting a new rule comprehensively governing (constructive) civil contempt. The new rule should be an analogue to Criminal Rule 42 and styled as "Civil Rule 42." The numerology of the Civil Rules following New Civil Rule 42 should "bump down" to create as much symmetry as possible between the Civil Rules and Criminal Rules.

My inspiration for a comprehensive federal civil contempt rule arises in part from civil contempt provisions found in the local rules of the United States District Courts for the Northern, Southern, Eastern, and Western Districts of New York; the Eastern District of North Carolina; the Southern District of West Virginia; the rules of specialty courts like the United States Court of Claims, the United States Court of International Trade, the United States Foreign Intelligence Surveillance Court; and the rules of state courts with civil

---

[47] *See infra*–Part V.F.
[48] *See infra*-Part XV.

contempt rules like the State of Maryland.[49] A comprehensive civil contempt rule is practical because it improves the harmony between the various rules of practice and procedure. A comprehensive civil contempt rule is also justified for pedagogical reasons: it instructs the bench and bar how civil contempt processes work, what purge conditions are available, etc.

New Civil Rule 42 should be framed to achieve the following objectives:

(1) Define civil contempt and distinguish it from criminal contempt;

(2) Explain that the scope of the rule encompasses civil contempt under the Civil Rules, local rules, and statutes sounding in civil contempt;

(3) Articulate discrepancies in contempt authority between Article III judges and judicial officers, such as masters, magistrates, bankruptcy judges, etc.;

(4) Explain that an institution that cannot exercise inherent or statutory contempt power can certify a contempt in proceedings before them to an institution that can under this particular rule;

(5) Clarify the authority of the court to initiate civil (constructive) contempt proceedings sua sponte;

(6) Clarify that parties in interest to a case can petition for civil (constructive) contempt;

(7) List the requirements for a party-initiated petition for civil (constructive) contempt;

---

[49] *See* N.D.N.Y. L.R. 83.5; S.D.N.Y. L.R. Civ. 83.6; E.D.N.Y. L.R. Civ. 83.6; W.D.N.Y. L.R. Civ. 83.4; E.D.N.C. L.R. Civ. 100.3; S.D. W.Va. L.R. P. 4.1.1–3; Ct. Int'l Trade L.R. 37(b); Ct. Int'l Trade L.R. 45(f); Ct. Int'l Trade L.R. 53(c)(2); Ct. Int'l Trade L.R. 56(h); Ct. Int'l Trade L.R. 86.2; Ct. Fed. Claims R. 4.1; F.I.S.C. L.R. 19; Md. Rule 15-206; Md. Rule 15-207.

(8) List the requirements for a show cause order to be entered by the court upon granting a petition;

(9) List the requirements for service of process;

(10) Cross-reference other rules as necessary when special exemptions or applications are in order; Clarify the wide range of purge conditions that a court can impose; and

(11) Clarify that civil contempt proceedings do not foreclose concurrent or consecutive criminal contempt proceedings.

The committee note to New Civil Rule 42 should reference published federal appellate precedents exemplifying the variety of purge conditions available. These precedents should include cases when courts held parties in constructive civil and constructive criminal contempt simultaneously, provide guidance on how to proceed when such a finding is appropriate, and explain how such cases are treated on appeal.[50]

Contempt provisions in Old Civil Rules 4.1, 37(b), 53, 56, and 70 must be amended in light of the implementation of New Civil Rule 42. New Civil Rule 42 will supersede Old Civil Rule 4.1(b); therefore, the latter should be deleted. Civil Rule 4.1 should also be restyled to remove subsection (a) from the header because there is only one provision in the new version of the rule, not two. Old Civil Rule 37 should be amended. Section (b) of Old Civil Rule 37 should focus on non-contempt sanctions. This way there is no danger of surplusage in New Civil Rule 42. Subsections (b)(1) and (b)(2)(vii) of Old Civil Rule 37 should be simplified by incorporating an internal cross-reference to New Civil Rule 42 and revised Criminal Rule 42. Old Civil Rule 45 should be renumbered as New Civil Rule 46.[51]

The amendments to Civil Rule 42 will render Subsection (g) of Old Civil Rule 42 superfluous, therefore, Subsection (g) of Old Civil Rule 42 should be deleted. Old Civil Rule 53 should be renumbered as New Civil Rule 54. New Civil Rule 42 will render

[50] *See infra*-Part VI.C.
[51] *See infra*-Part VI.A–B, D–G.

Subsection (c)(2) of Old Civil Rule 42 superfluous, and therefore, Subsection (c)(2) of Old Civil Rule 42 should be deleted. Old Civil Rule 56 should be renumbered as New Civil Rule 57. The amendments to New Civil Rule 42 will render the contempt language in Section (h) of Old Civil Rule 42 superfluous, therefore, Section (h) of Old Civil Rule 42 should be deleted. New Civil Rule 42 should internally cross-reference New Civil Rule 42 and revised Criminal Rule 42 in lieu of Section (h) of Old Civil Rule 42. Old Civil Rule 70 should be renumbered as New Civil Rule 71. The amendments to New Civil Rule 42 will render Section (e) of Old Civil Rule 42 superfluous, therefore, Section (e) of Old Civil Rule 42 should be deleted.[52]

F. *Contempt Rules of Criminal Procedure*

The Standing Committee should revise Criminal Rule 42 to eliminate unnecessary criminal contempt statutes and trim unnecessary contempt provisions in other criminal rules. There is no need to "bump down" the numerology of subsequent rules in the Federal Rules of Criminal Procedure. The Standing Committee should amend other criminal rules with contempt provisions, however, in light of my proposed amendments revising Criminal Rule 42.

Revised Criminal Rule 42 does the following:

(1) Defines criminal contempt and distinguishes it from civil contempt;

(2) Explains that the scope of the rule encompasses criminal contempt under the Criminal Rules, local rules, and statutes sounding in criminal contempt;

(3) Articulates discrepancies between contempt power of Article III judges and judicial officers, such as masters, magistrates, bankruptcy judges, etc.;

[52] *Id*.

(4) Explains that authorities who cannot exercise inherent or statutory contempt power can certify contempt to federal courts that can specifically under this rule;

(5) Clarifies the authority of the court to initiate criminal (direct and constructive) contempt proceedings sua sponte;

(6) Clarifies that parties in interest to a case can petition for criminal (constructive) contempt;

(7) Lists the requirements for a party-initiated petition for criminal (constructive) contempt;

(8) Lists the requirements for a show cause order to be entered by the court upon granting a petition;

(9) Lists the requirements for service of process;

(10) Cross-references other rules as necessary when special exemptions or applications apply;

(11) Clarifies the wide range of penalties that can be imposed; and

(12) Clarifies that criminal contempt proceedings do not foreclose consecutive or concurrent civil contempt proceedings.

The committee note to revised Criminal Rule 42 should reference published federal appellate precedents exemplifying the variety of penalties and the relevant guidelines in the United States Sentencing Guidelines for executing them. These precedents should include cases when a party was held in constructive civil and constructive criminal contempt simultaneously and provide guidance on how to proceed when such a finding is appropriate.[53]

One might contend that prosecutors should have absolute discretion and the final word in criminal contempt matters, therefore, there should be no appointment of independent prosecutors if the

---

[53] *See infra*-Part VI.K.

executive does not wish to prosecute.[54] I disagree. The doctrine of separation of powers must not be left in a vacuum. The inherent authority of the federal judiciary, in my view, encompasses the ability to appoint independent counsel to represent and effectuate its institutional prerogatives, especially in proceedings initiated to vindicate those prerogatives.

The ultimate tool of the executive for balancing the power distributed between it and the judiciary in criminal contempt proceedings is not prosecutorial discretion by a "semi-autonomous" Department of Justice; it is the power of the President of the United States to grant pardons. The Standing Committee should therefore modify Old Criminal Rule 6(e) to internally cross-reference New Civil Rule 42 and revised Criminal Rule 42. Old Criminal Rule 7(a) should be modified to internally cross-reference revised Criminal Rule 42. Old Criminal Rule 17(g) is rendered superfluous by revised Criminal Rule 42(g); therefore, Old Criminal Rule 17(g) should be eliminated.[55]

G. *Contempt Rules of Bankruptcy Procedure*

I propose that the Federal Rules of Bankruptcy Procedure be modified in light of my proposed statutory reform officially conferring bankruptcy courts with contempt power. If and when bankruptcy courts are statutorily given contempt power, Bankruptcy Rule 9020 should be amended to simply state that New Civil Rule 42 and revised Criminal Rule 42 govern contempt matters in proceedings before bankruptcy courts. Bankruptcy Rule 9020's current internal cross-reference to Bankruptcy Rule 9014 should be eliminated.[56]

H. *Contempt Rules of Appellate Procedure*

I propose that the Standing Committee modify the Federal Rules of Appellate Procedure by adopting a new rule governing

---

[54] *See* Neal Devins & Steven J. Mulroy, *Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt Prosecutors in Young v. United States* ex rel *Vuitton et fils S.A.*, 76 KY. L.J. 861 (1988).
[55] *See infra*-Part VI.H–K.
[56] *See infra*-Part VI.L.

contempt in appellate proceedings that is designated as Federal Rule of Appellate Procedure 42. All rules subsequent to New Appellate Rule 42 should "bump down." New Appellate Rule 42 should simply state that New Civil Rule 42 and revised Criminal Rule 42 govern contempt matters in proceedings before federal appellate courts. Again, this will improve the harmony, efficiency, and clarity of the federal rules of practice and procedure as a whole.[57]

I. *Contempt Rules of Evidentiary Procedure*

The Standing Committee should modify Evidence Rule 1101 to internally cross-reference revised Criminal Rule 42(c).[58]

J. *Contempt Rules of Specialty Courts*

I propose that Article III specialty courts uniformly adopt a model contempt rule into their local rules. This model contempt rule will render all other contempt provisions unnecessary. This model contempt rule will simply state that contempt will be adjudicated under New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model rule is uniformly styled as "Rule 42" to maintain the symmetry of contempt provisions between national and local rules of practice and procedure.[59]

I propose that Article I specialty courts uniformly adopt a model contempt rule. This model contempt rule will render all other local contempt provisions currently in force for such courts unnecessary. This model rule must have two different versions because not all Article I specialty courts are statutorily delegated the contempt power, and even if so, not necessarily to the same degree as Article III courts. My preference is that both versions of this model rule—whichever is applicable—be uniformly adopted and styled by the Article I specialty court in question as "Rule 42" to maintain the symmetry in contempt provisions between national rules of practice and procedure and local or jurisdictionally specific ones.[60]

---

[57] *See infra*-Part VI.M.
[58] *See infra*-Part VI.N.
[59] *See infra*-Part VII.B–C.
[60] *See infra*-Part VII.F–G.

The first version of this rule, applicable to Article I specialty courts that are statutorily delegated contempt power by Congress, should dictate that the rules of those courts are enforceable through civil and criminal contempt proceedings in the same manner as articulated in New Civil Rule 42 and revised Criminal Rule 42. This model rule applies to the United States Court of Federal Claims and the United States Tax Court.[61]

The second version of this rule, applicable to Article I specialty courts that are not statutorily delegated contempt power by Congress, should dictate that their rules are enforceable through certification of contempt matters to a federal district court that can exercise jurisdiction over the subject matter or over the alleged contemnor in the underlying proceeding. This model rule applies to the United States Trademark Trial and Appeal Board, the United States Patent Trial and Appeal Board, the Armed Services Board of Contract Appeals, the Civilian Board of Contract Appeals, the Postal Service Board of Contract Appeals, the United States Merit Systems Protection Board, and the United States International Trade Commission.[62]

K. *Contempt Rules and Secondary Sources*

The Federal Judicial Center should collaborate with the Standing Committee towards creating a manual on contempt power. This manual should include a concise history of the contempt power; a glossary referencing every contempt provision in federal rules, regulations, statutes; and a bibliography of helpful scholarly treatises, law review articles, and other secondary authorities explicating federal contempt law. The manual should gloss leading case law from every circuit on every facet of contempt law. The bench book for federal district judges and the manual on recurring problems in criminal trials contain some good material to start with. But the

[61] *See infra*-Part VII.F.
[62] *See infra*-Part VII.G.

manual I envision will be grander in scope so that it is helpful to every judge in every court.[63]

L. *Contempt Rules of Circuit Procedure*

I propose reforms for rules that govern at the regional level of the federal judiciary, that is, rules governing the United States Circuits Courts of Appeals and Judicial Councils. These reforms should go hand-in-hand with proposed statutory reforms. The Standing Committee should modify Judicial Conduct and Judicial Disability Rule 13(d) to explicitly state that contempt proceedings will be conducted in a manner that substantially conforms to New Civil Rule 42 and revised Criminal Rule 42. The current rule does not articulate how the contempt power of a special investigative committee interfaces, if at all, with contempt procedures outlined in the federal rules of practice and procedure. The processes I propose in New Civil Rule 42 and revised Criminal Rule 42 are sufficient to guide special investigative committees in enforcing the Judicial Conduct and Disability Act through contempt proceedings.[64]

I also propose that a model local rule be uniformly adopted and incorporated into regional rules affecting United States Circuits Courts of Appeals and other specialty appellate courts, such as the United States Court of Appeals for Veterans Claims. This model rule should dictate that the rules of the circuit or specialty appellate court in question are controlled by New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model local rule be incorporated and styled as "Local Rule 42" to maintain the symmetry of all contempt provisions between the local rules of all circuit courts of appeals, the local rules of specialty appellate courts, and the federal rules of practice and procedure.[65]

---

[63] *See infra*-Parts IX–XV; *cf.* FED. JUD. CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES §§ 7.01–.02 (6th ed. 2013); FED. JUD. CTR., MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS pt. 4 (6th ed. 2010).
[64] *See infra*-Part VI.O.
[65] *See infra*-Part VII.B.

M. *Contempt Rules of Local Procedure*

I propose revisions to the Rules for the Supreme Court of the United States and the local rules of United States District Courts, Bankruptcy Courts, and Territorial Courts. Though Supreme Court Rules are not "local rules" for the purposes of Civil Rule 83, I nevertheless address them here because they are effectively local rules specific to the Supreme Court as the court of last resort. To that end, I propose that the Supreme Court adopt a single rule governing its exercise of contempt power. Because the Supreme Court's rules are sui generis, however, I do not recommend that they merely replicate the contents of New Civil Rule 42 and revised Criminal Rule New 42 as I recommended for the local rules of the lower courts.

Less is more when it comes to the highest court in the land—the fountainhead for the judiciary's inherent power. I fear that words do more to constrict than to empower here. I therefore think it is sufficient for the Supreme Court to merely institute a rule declaring that the Court has both inherent and implied constitutional authority to correct disobedience and punish indignities against its prerogatives, including through civil and criminal contempt proceedings. No further details are required.[66]

Thanks to the language in New Civil Rule 42(a)(1)(ii) and revised Criminal Rule 42(a)(5)(iv), most if not all contempt provisions in local rules promulgated under Civil Rule 83 are rendered superfluous and should be eliminated.[67] Pending the implementation of my proposed modifications to the Civil Rules and Criminal Rules, however, I offer model local rules to be uniformly adopted by Article III district courts and Article IV territorial courts as well as Article I specialty courts.

These model local rules should simply state that the "local rules" in question are enforceable through civil and criminal contempt proceedings as articulated in New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model local rule be incorporated

[66] *See infra*-Part VII.A.

[67] *Cf.* FED. JUD. CTR., UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY COURT RULES 1 (2012) ("Likewise, many national rules address matters about which there is no apparent need for local rules.").

and styled as "Local Rule 42" to maintain the symmetry in contempt provisions across all national and local rules of practice and procedure. Individual chambers should feel free to refer to these rules in their chambers-specific orders and guidelines.[68]

IV. CONCLUSION

The basic principles of contempt power under English common law are manifest in federal common law. The interbranch framework for judicial rulemaking instituted by the Rules Enabling Act generated the authorities governing contempt procedures today. But those procedures are deficient in multiple respects. The strategic plan of the federal judiciary emphasizes the importance of enhancing access to justice and the judicial process by ensuring that court rules, processes, and procedures meet the needs of lawyers. This article proposes three overarching reforms for fulfilling the objectives established by the federal judiciary's strategic plan in the context of federal contempt law.[69]

First, I propose making 18 U.S.C. § 401 and Criminal Rule 42 more comprehensive. This reform will lay the groundwork for eliminating most if not all criminal contempt statutes. It will therefore reduce unnecessary bulk in the federal code. It will also shift the burden of discretion for punishing contemptuous behavior from prosecutors back to the judiciary, a shift I think is both legally sound and normatively justified.

Second, I propose amendments streamlining contempt procedures for every federal adjudicative body, including Article I courts, Article III courts, and Article IV courts. I recommend, for example, that the Standing Committee draft a civil analogue to Rule 42 of the Federal Rules of Criminal Procedure. By implementing a comprehensive civil contempt rule, the Standing Committee will eliminate disparate contempt provisions found in other areas of the rules of practice and procedure, the rules of specialty courts, and local rules. All of these improvements will make federal procedural common law more concise, clear, and compact.

---

[68] *See infra*-Part VII.C–G.

[69] *See supra* note 3, at 21.

Third, I propose model local contempt rules that nationalize best practices from district courts whose rules are exceptionally helpful. The standardization of rules at the local level across the country relieves the need for rules at the national level to be unnecessarily granular. Improvements at each level of the procedural hierarchy have a positive cascading effect in reinforcing the clarity and coherence of the whole system.

My hope is that all of these proposals will enhance the dignity and efficacy of the judicial system and therefore benefit the bench and bar alike.

V. Appendix A: Proposed Statutory Reforms[70]

Below are proposed statutory amendments to Title 18 of the United States Code and two model statutes bearing on contempt power in administrative courts and regulating subpoena enforcement respectively.

A. *Criminal Amendments and Federal Judgeship Act of [Year]*

An Act

To amend Title 18 of the United States Code regarding the authority of federal courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Criminal Amendments and Federal Judgeship Act of [Year].

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

[70] I provide the boilerplate language for these reforms below. I offer proposed language for statutory reforms through draft revisions to both the relevant statute at large and its replicated form in the United States Code. Strikethrough text is language currently in force that recommend Congress eliminate. Underlined language is language not currently in force that I propose Congress add.

Sec. 401 of Title 18, United States Code, is amended to read as follows:

"§ 401. Power of Court

"(a) A court of the United States has power to punish and correct contempt of its authority and none other, sua sponte or by petition, including—

(1) Misbehavior or disobedience in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any judicial officer in their official transactions; and

(3) Disobedience or resistance to their lawful writs, processes, orders, rules, decrees, or commands out of their presence.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Fine;

(3) Imprisonment.

Sec. 1073 of Title 18, United States Code is deleted.

Sec. 1503 of Title 18, United States Code is deleted.

Sec. 1509 of Title 18, United States Code is deleted.

Sec. 1512 of Title 18, United States Code is deleted.

Sec. 1513 of Title 18, United States Code is deleted.

Sec. 1346 of Title 18, United States Code is deleted.

Sec. 1347 of Title 18, United States Code is deleted.

Sec. 1348 of Title 18, United States Code is deleted.

Sec. 1349 of Title 18, United States Code is deleted.

Sec. 1523 of Title 18, United States Code is deleted.

Sec. 1621 of Title 18, United States Code is deleted.

Sec. 1622 of Title 18, United States Code is deleted.

Sec. 1623 of Title 18, United States Code is deleted.

Sec. 3484 of Title 18, United States Code is deleted.

Sec. 3498 of Title 18, United States Code is deleted.

Sec. 3499 of Title 18, United States Code is deleted.

B. *18 U.S.C. § 401 – Power of Court*

(a) A court of the United States ~~shall~~ ~~have~~ has power to punish ~~by fine or imprisonment, or both,~~ and correct contempt of its authority ~~and none other~~, sua sponte or by petition, ~~as~~ including—

   (1) Misbehavior or disobedience of any person in its presence or so near ~~thereto~~ as to obstruct the administration of justice;

   (2) Misbehavior or disobedience of any of its officers in their official transactions;

   (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

   (1) Reprimand;

   (2) Report to any state bar or comparable ethics institution;

   (3) Fine; and

   (4) Imprisonment.

C. *Bankruptcy Amendments and Federal Judgeship Act of [Year]*

An Act

To amend Title 11 of the United States Code regarding the authority of bankruptcy courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Bankruptcy Amendments and Federal Judgeship Act of [Year].

TITLE I—BANKRUPTCY JURISDICTION AND PROCEDURE

Sec. 105(a) of Title 11, United States Code, is amended to read as follows:

"§ 105. Power of Court

"(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

D. *11 U.S.C. § 105 – Power of Court*

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, <u>including orders for civil and criminal contempt</u>. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

E. *Model Contempt Statute for Administrative Law Courts*

Enforcement. If a person is allegedly contemptuous of a [administrative law authority], that [administrative law authority] can, at its discretion, certify the facts underlying that allegation to any federal district court that can exercise jurisdiction over the matter or where the alleged contemnor resides or carries on business. The district court must adjudicate the certified contempt allegation under the federal rules of practice and procedure as if those facts arose in a proceeding before that same district court.

F. *Model Contempt Statute for Enforcing Agency Subpoenas*

The [department, agency, board, authority, etc.] can make such investigations as the [department, agency, board, authority, etc.] deems necessary for the effective administration of this chapter or to determine whether any person subject to this [title, chapter, subtitle, etc.] engaged or is about to engage in any act that constitutes or will constitute a violation of this [title, chapter, subtitle, etc.], an order issued to facilitate the execution of this [title, chapter, subtitle, etc.], or any rule or regulation issued under this [title, chapter, subtitle, etc.].

For the purpose of such investigation, the [department, agency, board, authority, etc.] can administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. The [department, agency, board, authority, etc.] can require attendance of witnesses and the production of records from any place in the United States or abroad. In case of refusal to obey a subpoena, the [department, agency, board, authority, etc.] can certify the matter to any district court that can exercise jurisdiction over the investigation or where the alleged violator resides or carries on business. The federal district court can require the attendance and testimony of the alleged violator and the production of records. The federal district court may issue an order requiring the alleged violator to appear before the [department, agency, board, authority, etc.] to

produce records or to give testimony regarding the matter under investigation.

The district court can punish and correct any failure to obey its orders through any means permitted under the federal rules of practice and procedure, including through contempt proceedings governed by those rules. Service of process in these cases must occur in the judicial district where the person is an inhabitant or wherever the person can be found.

VI. Appendix B: Proposed Amendments to Rules of Practice and Procedure

Below are proposed revisions to the Federal Rules of Civil Procedure, Criminal Procedure, Bankruptcy Procedure, Evidence, and Judicial Conduct and Disability.

A. *Fed. R. Civ. P. 4.1: Serving Other Process*

~~(a)In General.~~ ~~Process—~~Other than a summons under Rule 4 or a subpoena under Rule 45—must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

~~(b)Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.~~

B. *Fed. R. Civ. P. 37: Failure to Disclose or to Cooperate in Discovery; Sanctions*

(b) Failure to Comply with a Court Order.

(1) Sanctions Sought in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or ~~to~~ answer a question and the deponent fails to obey, the failure may be ~~treated as contempt of court~~ sanctioned. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be ~~treated as contempt of~~ sanctioned by either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Federal Rules of Civil Procedure 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party;

(vii) initiating sanction proceedings under Federal Rule of Civil Procedure 11; or

(viii) ~~treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination~~ initiating contempt proceedings under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

C. *[New] Fed. R. Civ. P. 42: Civil Contempt*

(a) Definition.

(1) Civil contempt is disobedience out the court out of the court's presence, such as

(i) A violation of a court order or decree;

(ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(iii) A violation of a statute constituting contempt per se.

(2) Civil contempt is coercive, not punitive.

(3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to coerce compliance with an order or decree.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or courts who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

(1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or courts lacks authority to conduct the proceeding.

(2) The court may initiate a civil contempt proceeding sua sponte.

(3) A party to an action can initiate a civil contempt proceeding by filing a petition with the court against the alleged contemnor.

(4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must

(i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);

(ii) schedule deadline for the filing of an answer by the alleged contemnor;

(iii) state the time and place of any prehearing conference or hearing; and

(iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fines and any period of incarceration.

(5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:

(i) A valid order or decree of the court was in effect;

(ii) The alleged contemnor knew of that order or decree; and

(iii) The alleged contemnor breached it.

(6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that

(i) provides a short and concise explanation of its disposition;

(ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and

(iii) states the precise manner in which the purge conditions must be satisfied.

(7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. They may be imposed individually or in combination. They may be imposed immediately upon a finding of civil contempt or as a contingent liability of the contemnor does not comply with an order of court by a specified deadline. The following is an inexhaustive list of purge conditions:

(1) Reprimand;

(2) Report to any state bar or equivalent professional body; and

(3) Fine;

(i) A fine may be payable to the court, to a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.

(ii) A fine must be calculated according to the character and magnitude of the harm threatened by continued breach of the court's order or decree.

(e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or until another purge condition is satisfied.

(f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

D. *FED. R. CIV. P. 45: Subpoena [Renumbered Civil Rule 46]*

~~(g)Contempt. The court for the district where compliance is required and also, after a motion is transferred, the issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.~~

E. *FED. R. CIV. P. 53: Masters (Renumbered Civil Rule 54)*

(a) Master's Authority

(1) In General. Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) Sanctions.

(A) The master may by order impose on a party any noncontempt sanction ~~provided by~~ under Federal Rules of Civil Procedure 37 or 45.~~, and may recommend a contempt sanction against a party and sanctions against a nonparty the master;~~

(B) The master may recommend a contempt sanction and certify it for disposition under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

F. *FED. R. CIV. P. 56: Summary Judgment [Renumbered Civil Rule 57]*

(g) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may sanction the imposing party. ~~may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.~~

G. *FED. R. CIV. P. 70: Enforcing a Judgment for a Specific Act [Renumbered Civil Rule 71]*

~~(e) Holding in Contempt. The court may also hold the disobedient party in contempt.~~

H. *Fed. R. Crim. P. 6: The Grand Jury*

(e) Recording and Disclosing the Proceedings.

***

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. ~~A knowing~~ ~~v~~Violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

I. *FED. R. CRIM. P. 7: The Indictment and the Information*

(a) When Used.

(1) Felony. An offense (other than criminal contempt under Federal Rule of Criminal Procedure 42) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

J. *Fed. R. Crim. P. 17: Subpoenas*

~~(g) Contempt. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge~~

~~may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate as provided in 28 U.S.C. § 636(e).~~

K. *Fed. R. Crim. P. 42: Criminal Contempt*

(a) Definition.

(1) Any disrespect or violation of the court's dignity may be liable for criminal contempt.

(2) Criminal contempt is punitive, not coercive.

(3) Direct criminal contempt is misbehavior in the court's presence or so near to it as to obstruct the administration of justice.

(4) Constructive criminal contempt is disobedience to the court outside of the court's presence, and can involve the following:

(i) violation of a court order or decree;

(ii) interference with or obstruction of the administration of justice, including improper threats, tampering, or other undue influences directed toward grand jurors, petit jurors, witnesses, officers of the court, and other persons operating under court order or decree;

(iii) violation of bail or parole conditions;

(iv) material misrepresentation to the court, including perjury;

(v) violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(vi) violation of a statute constituting contempt per se.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend criminal contempt sanctions and certify them for disposition by a court with proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or courts that do not possess authority to adjudicate civil contempt proceedings but are authorized to recommend them may certify those recommendations for disposition under this rule.

(c) Direct Criminal Contempt Procedure

(1) Misbehavior committed in the court's presence can be adjudicated through summary proceedings if the presiding judge certifies that he saw or heard the misbehavior.

(2) Direct criminal contempts are sui generis and therefore have no elements, mens rea, or standard of proof.

(3) Following a summary proceeding, the presiding judge must promptly issue a signed order filed with the clerk providing a short and concise statement of facts and an explanation for his disposition.

(4) The court cannot enter a summary contempt judgment relating to misbehavior in its presence nunc pro tunc.

(5) A presiding judge who can lawfully preside over summary proceeding for direct criminal contempt can nevertheless refer the matter for constructive criminal contempt proceedings under section (d) of this rule if doing so is in the interest of justice.

(d) Constructive Criminal Contempt Procedure

(1) Constructive criminal contempts must be adjudicated through a separate proceeding with a separate caption from the action where the contempt arose.

(2) The court may initiate a constructive criminal contempt proceeding sua sponte or by petition.

(3) The court must give the alleged contemnor notice in open court and issue a show cause order or an arrest order. The alleged contemnor must be released or detained as Federal Rule of Criminal Procedure 47 [former Rule 46] provides. The alleged contemnor is entitled to a trial by jury. The show cause order or arrest order must

(i) Recite a short and plain basis for the criminal contempt proceeding, including the essential facts constituting the criminal contempt charged;

(ii) Schedule the time and place of a trial;

(iii) Allow the alleged contemnor a reasonable time to prepare a defense; and

(iv) Expressly state any penalties requested under (d)(2) if offered.

(4) The court may request that the alleged criminal contempt be prosecuted by the government or, if in interest of justice so requires, another attorney. If the government declines

to prosecute, the court must appoint another attorney to prosecute.

(5) The prosecuting attorney must prove the following elements beyond a reasonable doubt:

(i) There was a lawful and reasonably specific order, decree, or proceeding;

(ii) The alleged contemnor violated that order or decree, or misbehaved in the court's presence; and

(iii) The alleged contemnor's conduct was willful.

(6) If the alleged criminal contempt involved disrespect or criticism towards a judge, that judge is disqualified from presiding over the trial or hearing unless the alleged contemnor consents.

(7) Upon a finding or verdict of guilty, the court may impose punishment.

(e) Punishment. Punishment for criminal contempt must involve the least possible power adequate to the end proposed. Penalties for direct and constructive criminal contempt can be imposed individually or in combination. The following is an inexhaustive list of potential penalties:

(1) Reprimand

(2) Fines

(i) The fine can be imposed on a per diem basis or consist of a single sum.

(ii) The fine may be payable to the court, to a party prejudiced by the contempt as compensation,

or some other recipient for the purpose of promoting compliance.

(iii) The fine must be calculated according to the character and magnitude of the disrespect or dignity suffered by the court.

(3) Incarceration

(i) Direct Criminal Contempt. If the alleged contemnor is found guilty of direct criminal contempt, he can be sentenced to a period of incarceration not exceeding six months for a single contemptuous act. He may, however, be sentenced to a period of incarceration exceeding more than six months for more than one contemptuous acts, provided that the increment of incarceration attributed to each act does not exceed six months.

(ii) Constructive Criminal Contempt. If the alleged contemnor is found guilty of constructive criminal contempt, he can be sentenced to a period of incarceration exceeding six months.

(f) Civil Contempt. Nothing in this rule can be construed to detract from the court's authority to correct defiance with its orders or decrees through civil contempt proceedings under Federal Rule of Civil Procedure 42 and any other relevant authorities.

L. *Fed. R. Bankr. P. 9020: Contempt Proceedings*

~~Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.~~ Enforcement of Local Rules. Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42 govern contempt proceedings.

M. *[New] Fed. R. App. P. 42: Contempt*

Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42 govern contempt proceedings.

N. *Fed. R. Evid. 1101: Applicability of the Rules*

(b) To Cases and Proceedings. These rules apply in

(1) civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;

(2) criminal cases and proceedings; and

(3) contempt proceedings except ~~those in which the court may act summarily.~~ proceedings for direct criminal contempts governed by Federal Rule of Criminal Procedure 42(c).

O. *Judicial-Conduct and Judicial-Disability Rule 13(d)*

(a) Delegation of Subpoena Power; Contempt. The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena. Contempt proceedings under Section 332(d) are governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

VII. Appendix C: Proposed Local Rules

Below are proposed model local rules for the United States Supreme Court, Article III circuit courts of appeal, Article III district courts, Article IV territorial courts, Article III, specialty courts, and Article I specialty courts.

A. *[New] Supreme Ct. L. R. 1: Scope; Enforcement*

(a) Scope. These rules govern procedure in all actions in the Supreme Court of the United States. They must be construed, administered, and employed by the Court and the parties to secure the just, speedy, and inexpensive determination of every action of proceeding.

(b) Enforcement. The Court possesses both inherent and implied constitutional authority to sanction disrespect and correct disobedience, such as through civil contempt and criminal contempt proceedings.

B. *Model Local Rule for United States Circuits Courts of Appeal*

Enforcement of Local Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

C. *Model Local Rule for Article III United States District Courts*

Enforcement of Local Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

D. *Model Local Rule for Article IV Territorial Courts*

Enforcement of Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

E. *Model Rule for Article III Specialty Courts*

Enforcement of Rules. The Court may enforce these rules with sanctions, such as through sanctions under Federal Rule of Civil Procedure 11, Federal Rule of Civil Procedure 42, and Federal Rule of Criminal Procedure 42.

F. *Model Rule for Article I Specialty Courts Delegated the Contempt Power*

Enforcement of Rules. The Court may enforce these rules through contempt proceedings. Contempt proceedings will be governed in the same manner as that prescribed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

G. *Model Local Rule for Article I Specialty Courts Not-Delegated Contempt Power*

Enforcement of Rules. These rules are enforceable through certification to any district court with jurisdiction over this court or the alleged contemnor. Contempt proceedings before the federal district court are governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42. A certification must include a concise statement reciting the facts underlying the allegation of contempt and a recommendation for the district court's disposition.

VIII. APPENDIX D: PROPOSED JURY INSTRUCTIONS

Below are proposed jury instructions for Title 18, Sections 401 and 403 of the United States Code.

A. *1 Mod. Fed. Jury Instr.-Crim. P. 20.01; 20.02*

1. Instruction 20-10: The Indictment and the Statute

The indictment charges the defendant with contempt. The indictment reads as follows

[Read indictment]

The defendant has been charged with violating section 401(a)(1) of Title 18 of the United States Code. That subsection provides that:

A court of the United States ~~shall have~~ ~~has discretionary power~~ has power to punish . . . ~~such~~ contempt of its authority . . . ~~as~~ including— Misbehavior or disobedience of any person in its presence or so near thereto as to obstruct the administration of justice.

2. Instruction 20-10: The Indictment and the Statute

The indictment charges the defendant with the crime of [describe the offense]. The indictment reads as follows:

[Read indictment]

The defendant has been charged with violating section 401(a)(3) of Title 18 of the United States Code. That subsection provides that:

'A court of the United States ~~shall have~~ has ~~the~~ power to punish . . . ~~such~~ contempt of its authority, ~~as~~ including—. . . ~~[d]~~Disobedience or resistance to its lawful writ, process, rule, decree or command.

IX. APPENDIX E: SUPREME COURT CONTEMPT CASES

1. *Ex parte Bollman*, 8 U.S. 75 (1807)
2. *United States v. Hudson*, 11 U.S. 32 (1812)
3. *Anderson v. Dunn*, 19 U.S. 204 (1821)
4. *Ex parte Kearney*, 20 U.S. 38 (1822)
5. *Ex parte Tillinghast*, 4 Pet. 108 (1830)
6. *Ex parte Watkins*, 28 U.S. 193 (1830)
7. *Lord v. Veazie*, 49 U.S. 251 (1850)
8. *Wiswall v. Sampson*, 55 U.S. 52 (1852)
9. *Cleveland v. Chamberlain*, 66 U.S. 419 (1861)
10. *Ex parte Yerger*, 75 U.S. 85 (1868)
11. *In re Bradley*, 74 U.S. 364 (1868)
12. Davis v. Gray, 83 U.S. 203 (1872)
13. *Ex parte Robinson*, 86 U.S. 505 (1873)

14. *City of New Orleans v. N.Y. Mail S.S. Co.,* 87 U.S. 387 (1874)
15. *In re Chiles*, 89 U.S. 157 (1874)
16. *Hayes v. Fischer*, 102 U.S. 121 (1880)
17. *Kilbourn v. Thompson*, 103 U.S. 168 (1880)
18. *Barton v. Barbour*, 104 U.S. 126 (1881)
19. *Ex parte Rowland*, 104 U.S. 604 (1881)
20. *The Laura*, 114 U.S. 411 (1885)
21. *In re Terry*, 128 U.S. 289 (1888)
22. *Ex parte Cuddy*, 131 U.S. 280 (1889)
23. *Ex parte Savin*, 131 U.S. 267 (1889)
24. *Eilenbecker v. Dist. Ct. of Plymouth Cnty.*, 134 U.S. 31 (1890)
25. *Delgado v. Chavez*, 140 U.S. 586 (1891)
26. *Pettibone v. United States*, 148 U.S. 197 (1893)
27. *Ex parte Tyler*, 149 U.S. 164 (1893)
28. *In re Swan*, 150 U.S. 637 (1893)
29. *Interstate Comm. Comm'n v. Brimson*, 154 U.S. 447 (1894)
30. *In re Debs*, 158 U.S. 564 (1895)
31. *Ex parte Chetwood*, 165 U.S. 443 (1897)
32. *In re Chapman*, 166 U.S. 661 (1897)
33. *Hovey v. Elliott*, 167 U.S. 409 (1897)
34. *Tinsley v. Anderson*, 171 U.S. 101 (1898)
35. *Mueller v. Nugent*, 184 U.S. 1 (1902)
36. *In re Watts*, 190 U.S. 1 (1903)
37. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904)
38. *In re Christensen Engineering Co.*, 194 U.S. 458 (1904)
39. *Alexander v. United States*, 201 U.S. 117 (1906)
40. *Nelson v. United States*, 201 U.S. 92 (1906)
41. *Doyle v. London Guar. & Accident Co.*, 204 U.S. 599 (1907)
42. *United States v. Shipp*, 214 U.S. 386 (1909)
43. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911)
44. *Merrimack River Sav. Bank v. City of Clay Ctr.*, 219 U.S. 527 (1911)
45. *Wilson v. United States*, 221 U.S. 361 (1911)
46. *Grant v. United States*, 227 U.S. 74 (1913)
47. *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918)
48. *Ex parte Hudgings*, 249 U.S. 378 (1919)
49. *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922)
50. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923)

51. *Michaelson v. United States*, 266 U.S. 42 (1924)
52. *Myers v. United States*, 264 U.S. 95 (1924)
53. *Cooke v. United States*, 267 U.S. 517 (1925)
54. *Farmers' & Mech.'s Nat. Bank v. Wilkinson*, 266 U.S. 503 (1925)
55. *Ex parte Grossman*, 267 U.S. 87 (1925)
56. *United States v. Goldman*, 277 U.S. 229 (1928)
57. *Sinclair v. United States*, 279 U.S. 749 (1929)
58. *Blackmer v. United States*, 284 U.S. 421 (1932)
59. *Lamb v. Cramer*, 285 U.S. 217 (1932)
60. *Bevan v. Krieger*, 289 U.S. 459 (1933)
61. *Clark v. United States*, 289 U.S. 1 (1933)
62. *Fox v. Capital Co.*, 299 U.S. 105 (1936)
63. *Hill v. United States*, 300 U.S 105 (1937)
64. *McCrone v. United States*, 307 U.S. 61 (1939)
65. *Amalgamated Utility Workers v. Consol. Edison Co.*, 309 U.S. 261 (1940)
66. *Bridges v. State of Cal.*, 314 U.S. 252 (1941)
67. *Nye v. United States*, 313 U.S. 33 (1941)
68. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)
69. *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426 (1941)
70. *Cudahy Packing Co. of La. v. Holland*, 315 U.S. 788 (1942)
71. *St. Pierre v. United States*, 319 U.S. 41 (1943)
72. *In re Bradley*, 318 U.S. 50 (1943)
73. *In re Michael*, 326 U.S. 224 (1945)
74. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945)
75. *May Dept. Stores Co. v. N.L.R.B.*, 326 U.S. 376 (1945)
76. *Pennekamp v. State of Fla.*, 328 U.S. 331 (1946)
77. *Craig v. Harney*, 331 U.S. 367 (1947)
78. *Penfield Co. of Cal. v. S.E.C.*, 330 U.S. 585 (1947)
79. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947)
80. *Maggio v. Zeitz*, 333 U.S. 56 (1948)
81. *In re Oliver*, 333 U.S. 257 (1948)
82. *Fisher v. Pace*, 336 U.S. 155 (1949)
83. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)
84. *State of Md. v. Balt. Radio Show*, 338 U.S. 912 (1950)
85. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)
86. *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951)

87. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)
88. Sacher v. United States, 343 U.S. 1 (1952*)*
89. *Brown v. United States*, 348 U.S. 11 (1954)
90. *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954)
91. *N.L.R.B. v. Warren Co.*, 350 U.S. 107 (1955)
92. *In re Murchison*, 349 U.S. 133 (1955)
93. *Cammer v. United States*, 350 U.S. 399 (1956)
94. *Ullmann v. United States*, 350 U.S. 422 (1956)
95. *Nilva v. United States*, 352 U.S. 385 (1957)
96. *Watkins v. United States*, 354 U.S. 178 (1957)
97. *Yates v. United States*, 355 U.S. 66 (1957)
98. *Brown v. United States*, 356 U.S. 148 (1958)
99. *Knapp v. Schweitzer*, 357 U.S. 371 (1958)
100. *Green v. United States*, 356 U.S. 165 (1958)
101. *N.A.A.C.P. v. State of Ala., ex rel. Patterson*, 357 U.S. 449 (1958)
102. *Anonymous Nos. 6 and 7 v. Baker*, 360 U.S. 287 (1959)
103. *Brown v. United States*, 359 U.S. 41 (1959)
104. *Scull v. Virginia*, 359 U.S. 344 (1959)
105. *Uphaus v. Wyman*, 360 U.S. 72 (1959)
106. *N.A.A.C.P. v. Williams*, 359 U.S. 550 (1959)
107. *Levine v. United States*, 362 U.S. 610 (1960)
108. *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398 (1960)
109. *Reina v. United States*, 364 U.S. 507 (1960)
110. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961)
111. *Ex parte George*, 371 U.S. 72 (1962)
112. *Petition of Green*, 369 U.S. 689 (1962)
113. *In re McConnell*, 370 U.S. 230 (1962)
114. *Russell v. United States*, 369 U.S. 749 (1962)
115. *Wood v. Ga.*, 370 U.S. 375 (1962)
116. *Yellin v. United States*, 374 U.S. 109 (1963)
117. *Johnson v. State of Va.*, 373 U.S. 61 (1963)
118. *Panico v. United States*, 375 U.S. 29 (1963)
119. *Ungar v. Sarafite*, 376 U.S. 575 (1964)
120. *Reisman v. Caplin*, 375 U.S. 440 (1964)
121. *Donovan v. City of Dallas*, 377 U.S. 408 (1964)
122. *United States v. Barnett*, 376 U.S. 681 (1964)

123. *First Sec. Nat. Bank & Trust Co. v. United States*, 382 U.S. 34 (1965)
124. *Harris v. United States*, 382 U.S. 162 (1965)
125. *Holt v. Va.*, 381 U.S. 131 (1965)
126. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966)
127. *State of S.C. v. Katzenbach*, 383 U.S. 301 (1966)
128. *Stevens v. Marks*, 383 U.S. 234 (1966)
129. *Shillitani v. United States*, 384 U.S. 364 (1966)
130. *Bitter v. United States*, 389 U.S. 15 (1967)
131. *I.L.A.C. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64 (1967)
132. *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)
133. *DeStefano v. Woods*, 392 U.S. 631 (1968)
134. *Brussel v. United States*, 396 U.S. 1229 (1969)
135. *In re Herndon*, 394 U.S. 399 (1969)
136. *Frank v. United States*, 395 U.S. 147 (1969)
137. *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383 (1970)
138. *Rowan v. United States Post Office Dep't.*, 397 U.S. 728 (1970)
139. *Russo v. United States*, 404 U.S. 1209 (1971)
140. *Mayberry v. Penn.*, 400 U.S. 455 (1971)
141. *Johnson v. Miss.*, 403 U.S. 212 (1971)
142. *Donaldson v. United States*, 400 U.S. 517 (1971)
143. *United States v. Ryan*, 402 U.S. 530 (1971)
144. *Gelbard v. United States*, 408 U.S. 41 (1972)
145. *In re Little*, 404 U.S. 553 (1972)
146. *Colombo v. N.Y.*, 405 U.S. 9 (1972)
147. *Tierney v. United States*, 409 U.S. 1232 (1972)
148. *Lefkowitz v. Turley*, 414 U.S. 70 (1973)
149. *Farr v. Pitchess*, 409 U.S. 1243 (1973)
150. *Taylor v. Hayes*, 418 U.S. 488 (1974)
151. *Codispoti v. Penn.*, 418 U.S. 506 (1974)
152. *Eaton v. City of Tulsa*, 415 U.S. 697 (1974)
153. *Menna v. New York*, 423 U.S. 61 (1975)
154. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947)
155. *Maness v. Meyers*, 419 U.S. 449 (1975)
156. *Withrow v. Larkin*, 421 U.S. 35 (1975)
157. *Muniz v. Hoffman*, 422 U.S. 454 (1975)

158. *Gruner v. Sup. Ct. of Cal. in and for Fresno Cnty.*, 429 U.S. 1314 (1976)
159. *United States v. Mandujano*, 425 U.S. 564 (1976)
160. *Juidice v. Vail*, 430 U.S. 327 (1977)
161. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)
162. *Dolman v. United States*, 439 U.S. 1395 (1978)
163. *N.Y.T. Co. v. Jascalevich*, 439 U.S. 1317 (1978)
164. *Orr v. Orr*, 440 U.S. 268 (1979)
165. *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375 (1980)
166. *In re Roche*, 448 U.S.1312 (1980)
167. *In re Snyder*, 472 U.S. 634 (1985)
168. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)
169. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988)
170. *United States v. Providence J. Co.*, 485 U.S. 693 (1988)
171. *Morrison v. Olson*, 487 U.S. 654 (1988)
172. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992)
173. *United States v. Dixon*, 509 U.S. 688 (1993)
174. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994)
175. *Pounders v. Watson*, 521 U.S. 982 (1997)
176. *United States v. Martinez-Salazar*, 528 U.S. 304 (2000)
177. *Multimedia Holdings Corp. v. Circuit Ct. of Fla.,* 544 U.S. 1301 (2005)
178. *Turner v. Rogers*, 564 U.S. 431 (2011)

X. APPENDIX F: FEDERAL RULES OF PRACTICE AND PROCEDURE

1. FED. R. CIV. P. 4.1
2. FED. R. CIV. P. 37(b)
3. FED. R. CIV. P. 45(g)
4. FED. R. CIV. P. 53(c)
5. FED. R. CIV. P. 56(h)
6. FED. R. CIV. P. 70(e)
7. FED. R. CRIM. P. 6(e)
8. FED. R. CRIM. P. 7(a)
9. FED. R. CRIM. P. 17(g)
10. FED. R. CRIM. P. 42
11. FED. R. BANKR. P. 9020
12. FED. R. EVID. 1101
13. C.A.A.F. L.R. 41(b)
14. CIT L.R. 37(b)(1), (2)(A)
15. CIT L.R. 45(f)
16. CIT L.R. 53(c)
17. CIT L.R. 56(h)
18. CIT L.R. 86.2
19. Ct. Fed. Cl. L.R. 4.1
20. Ct. Fed. Cl. L.R. 37(b)
21. Ct. Fed. Cl. L.R. 45(g)
22. Ct. Fed. Cl. L.R. 56(h)
23. Ct. Fed. Cl. L.R. 83.2(n)
24. F.I.S.C. L.R. 19
25. Tax Ct. 13(d)
26. Tax Ct. 104(a), (c)
27. Tax Ct. L.R. 147(e)
28. Tax Ct. L.R. 202(c), (i)
29. TTAB L.R. 404.03(a)(2)
30. TTAB L.R. 411.05
31. TTAB L.R. 502.05
32. TTAB L.R. 527.01(a)
33. TTAB L.R. 528
34. ASBCA L.R. 22(g)
35. 33 C.F.R. § 210.5 (1980)
36. 37 C.F.R. § 2.120 (2017)
37. 37 C.F.R. § 2.127 (2017)

XI. APPENDIX G: CIRCUIT RULES

1. 1st Cir. L.R. 9(a)
2. 1st Cir. L.R. 11
3. 4th Cir. L.R. 9(c)
4. 5th Cir. I.O.P. B.S. (J)
5. 6th Cir. I.O.P. 28(c)
6. 6th Cir. L.R. 31(c)(2)(A)
7. 6th Cir. L.R. 34(c)(2)
8. 9th Cir. L.R. 3-5
9. 11th Cir. I.O.P. 15-4.4(a)
10. J. C. & D. R. 13(d)

XII. APPENDIX H: LOCAL RULES

1. N.D. ALA. L.R. 83.1(k)
2. S.D. ALA. L.R. 83.1
3. D. ALASKA L.R. CRIM. 32.2(g)
4. D. ARIZ. L.R. CIV. 83.1(f)
5. E.D. ARK. L.R. 14
6. W.D. ARK. L.R. 14
7. C.D. CAL. L.R. 7-8
8. C.D. CAL. L.R. 83-3.2.7
9. C.D. CAL. L.R. 83-6
10. C.D. CAL. 83-6.4.1
11. E.D. CAL. L.R. 184(a)
12. S.D. CAL. 83.5
13. D. COLO. L.R. CIV. 72.1(b)(7)
14. D. COLO. L.R. CIV. 83.1(d)
15. D. COLO. L.R. CIV. 83.2(a)
16. D. COLO. L.R. CRIM. 57.1(b)
17. D. COLO. L.R. CRIM. 57.3(c)
18. D. COLO. L.R. CRIM. 57.4
19. D. COLO. L.R. ATT'Y. 7(d)(2)
20. D. COLO. L.R. ATT'Y 10(a)(1)
21. D. CONN. L.R. 32
22. D. CONN. L.R. 83.5(4)
23. D. DEL. L.R. CIV. 83.6(m)
24. D.D.C. L.R. 40.9(b)
25. D.D.C. 83.8(b)(4)
26. D.D.C. 83.13(b)
27. D.D.C. 83.15(b)(3), (d)
28. D.D.C. L.R. 83.16(d)(5), (8)
29. D.D.C. L.R. CRIM. 6.1
30. D.D.C. L.R. CRIM. 57.15(b)
31. D.D.C. L.R. CRIM. 57.21(b)
32. D.D.C. L.R. CRIM. 57.26
33. D.D.C. L.R. CRIM. 57.27(d)
34. M.D. FLA. L.R. 2.04(g)
35. N.D. FLA. L.R. 11.1(g)
36. S.D. FLA. L.R. 11.1(b)
37. N.D. GA. L.R. CIV. 83.1(F)
38. N.D. GA. L.R. 83.5(C)

39. S.D. GA. L.R. 72.4(k)
40. S.D. GA. L.R. 83.5
41. S.D. GA. 83.31
42. D. IDAHO L.R. CIV. 83.5(b)(1)
43. C.D. ILL. L.R. 72.1(A)(2)
44. C.D. ILL. L.R. 83.5(G)
45. C.D. ILL. 83.6(C)
46. C.D. ILL. 16.2(E)
47. N.D. ILL. R. 37.1(a)–(c)
48. N.D. ILL. L.R. 40.1(c)
49. N.D. ILL. L.R. 83.25
50. N.D. ILL. L.R. CRIM. 32.1(j)
51. N.D. ILL. L.R. CRIM. 50.2
52. S.D. ILL. L.R. 83.3(a)(5), (g)
53. N.D. IND. L.R. 40-1
54. N.D. IND. L.R. 83-6.1(b),
55. N.D. IND. L.R. APP'X C.(h)
56. S.D. IND. L.R. 40-1
57. S.D. IND. L.R. CRIM. 31-1(i)
58. N.D. IOWA L.R. 72(i)(28)
59. N.D. IOWA L.R. 83(g)(5)
60. S.D. IOWA L.R. 72(i)(28)
61. S.D. IOWA L.R. 83(g)95)
62. E.D. KY. L.R. CIV. 83.3(d)
63. E.D. KY. L.R. CRIM. 57.3(d)
64. W.D. KY. L.R. CIV. 83.3(d)
65. W.D. KY. L.R. CRIM. 57.3(d)
66. W.D. LA. L.R. 83.3.13
67. D. ME. L.R. 83.3(1)
68. D. MD. L.R. 204(6)
69. D. MD. L.R. 301(6)
70. D. MD. L.R. 506(3)
71. D. MD. L.R. 602
72. D. MASS. L.R. 83.6.4
73. E.D. MICH. L.R. 16.3(h)
74. E.D. MICH. L.R. 83.20
75. E.D. MICH. L.R. 83.22
76. E.D. MICH. L.R. 83.31
77. E.D. MICH. L.R. 83.32(g)(3)
78. E.D. MICH. L.R. CRIM. 56.5(d)
79. E.D. MICH. L.R. CRIM. 57.1
80. E.D. MICH. L.R. CRIM. 57.4
81. D. MINN. L.R. 83.6(b)
82. D. MINN. L.R. 83.13
83. N.D. MISS. L.R. CIV. 83.1(d)
84. S.D. MISS. L.R. CIV. 83.1(d)
85. E.D. MO. L.R. 83.12.02
86. W.D. MO. L.R. 83.6(k), (l)
87. W.D. MO. L.R. 99.3
88. W.D. MO. L.R. 83.6(k), (l)
89. W.D. MO. L.R. 99.3
90. D. MONT. L.R. CIV. 83(d)
91. D. MONT. APP'X B.1.B
92. D. NEV. L.R. IA 11-7
93. D. N.H. L.R. 47.1
94. D. N.H. L.R. 83.5, DR-12
95. D. N.J. L.R. CIV. 27.1
96. D. N.J. L.R. CIV. 104.1(m)
97. D. N.M. L.R. CIV. 30.2
98. E.D.N.Y. L.R. CIV. 1.3(a)
99. E.D.N.Y. L.R. CIV. 83.6
100. N.D.N.Y. L.R. 83.1(a)(1)
101. N.D.N.Y. L.R. 83.49(k)
102. N.D.N.Y. L.R. 83.5
103. S.D.N.Y. L.R. CIV. 1.3(a)
104. S.D.N.Y. L.R. CIV. 83.6
105. W.D.N.Y. L.R. CIV. 83.4
106. E.D.N.C. L.R. CIV. 83.1(k)
107. E.D.N.C. L.R. CIV. 83.9

108. E.D.N.C. L.R. CIV. 100.1
109. E.D.N.C. L.R. 100.3
110. E.D.N.C. L.R. CRIM. 83.1(k)
111. E.D.N.C. L.R. CIV. 100.1
112. M.D.N.C. L.R. CIV. 83.10m
113. M.D.N.C. L.R. CRIM. 32.2
114. W.D.N.C. L.R. 83.2(b)
115. W.D.N.C. L.R. 83.3(b)(2)
116. W.D.N.C. L.R. L.R. 32.1(k)
117. N.D. OHIO L.R. CIV. 83.7(m)
118. E.D. OKLA. L.R. CIV. 83.6
119. E.D. OKLA. L.R. CIV. 83.7
120. N.D. OKLA. L.R. CIV. 83.6
121. N.D. OKLA. L.R. CIV. 83.7
122. N.D. OKLA. L.R. CRIM. 44.5
123. N.D. OKLA. L.R. CRIM. 44.7
124. W.D. OKLA. L.R. 83.6(g), (h)
125. D. ORE. L.R. CIV. 83-1(d)
126. D. ORE. L.R. CRIM. 3003
127. E.D. PA. L.R. CIV. 83.6.11
128. E.D. PA. L.R. CRIM. 41.1(a)
129. W.D. PA. L.R. 32
130. W.D. PA. L.R. 83.3(J)
131. D. P.R. 83E(d)
132. D. S.C. L.R. CIV. 83.I.08
133. E.D. TENN. L.R. 83.7(a)
134. M.D. TENN. L.R. 160.02(f)
135. M.D. TENN. L.R. 72.05
136. M.D. TENN. L.R. 83.01(e)(1)
137. W.D. TENN. L.R. 72.1
138. D. VT. L.R. P. 83.2(b)(5)
139. E.D. VA. L.R. CIV. 45(c)
140. E.D. VA. L.R. CIV. 83.1(H)
141. E.D. VA. L.R. CIV. 83.1
142. E.D. VA. L.R. CRIM. 57.4(H)
143. W.D. WASH. L.R. CIV. 83.3
144. W.D. WASH. L.R. CRIM. 42
145. S.D. W. VA. L.R. P. 4.1.1
146. S.D. W. VA. L.R. P. 4.1.2
147. S.D. VA. L.R. P. 4.1.3
148. D. N. M.I. L.R. 83.2(e)
149. D. N. M.I. L.R. 83.6
150. D. V.I. L.R. P. 83.2(d)
151. D. V.I. L.R. A.D. 1(c)

XIII. APPENDIX I: STATUTES

1. 2 U.S.C. § 288d (1986)
2. 5 U.S.C. § 552 (2016)
3. 5 U.S.C. § 555 (1966)
4. 5 U.S.C. § 1204 (2014)
5. 5 U.S.C. § 1507 (1978)
6. 5 U.S.C. § 7132 (1978)
7. 5 U.S.C. § 8125 (1966)
8. 5 U.S.C. § 8480 (2009)
9. 7 U.S.C. § 9 (2010)
10. 7 U.S.C. § 87f (1994)
11. 7 U.S.C. § 499m (1978)
12. 7 U.S.C. § 1446 (1991)
13. 7 U.S.C. § 2115 (1970)
14. 7 U.S.C. § 2354 (1994)

15. 7 U.S.C. § 2622 (1990)
16. 7 U.S.C. § 2717 (1974)
17. 7 U.S.C. § 2909 (1985)
18. 7 U.S.C. § 3412 (1977)
19. 7 U.S.C. § 4317 (1981)
20. 7 U.S.C. § 4511 (1983)
21. 7 U.S.C. § 4610a (1991)
22. 7 U.S.C. § 4816 (1985)
23. 7 U.S.C. § 4911 (1993)
24. 7 U.S.C. § 6010 (1991)
25. 7 U.S.C. § 6108 (1991)
26. 7 U.S.C. § 6208 (1991)
27. 7 U.S.C. § 6809 (1993)
28. 7 U.S.C. § 7420 (1996)
29. 7 U.S.C. § 7449 (1996)
30. 7 U.S.C. § 7469 (1996)
31. 7 U.S.C. § 7488 (1996)
32. 7 U.S.C. § 7733 (2008)
33. 7 U.S.C. § 7808 (2000)
34. 7 U.S.C. § 8314 (2008)
35. 8 U.S.C. § 1225 (2009)
36. 8 U.S.C. § 1229a (2006)
37. 8 U.S.C. § 1324b (1996)
38. 8 U.S.C. § 1324c (1996)
39. 8 U.S.C. § 1451 (1994)
40. 8 U.S.C. § 1446 (1991)
41. 9 U.S.C. § 7 (1951)
42. 10 U.S.C. § 848 Art. 48 (2011)
43. 11 U.S.C. § 110 (2010)
44. 12 U.S.C. § 1784 (2006)
45. 12 U.S.C. § 1833a (2006)
46. 12 U.S.C. § 2404 (1974)
47. 12 U.S.C. § 2617 (2011)
48. 12 U.S.C. § 5562 (2010)
49. 15 U.S.C. § 49 (1975)
50. 15 U.S.C. § 57b-1 (1994)
51. 15 U.S.C. § 77v (2010)
52. 15 U.S.C. § 78dd-2 (1998)
53. 15 U.S.C. § 78dd-3 (1998)
54. 15 U.S.C. § 78jjj (2010)
55. 15 U.S.C § 78u (2015)
56. 15 U.S.C. § 80b-9 (2010)
57. 15 U.S.C. § 155 (1970)
58. 15 U.S.C. § 330c (1971)
59. 15 U.S.C. § 634 (2018)
60. 15 U.S.C. § 687b (2000)
61. 15 U.S.C. § 717m (1970)
62. 15 U.S.C. § 771 (1974)
63. 15 U.S.C. § 772 (1976)
64. 15 U.S.C. § 796 (2004)
65. 15 U.S.C. § 1116 (2008)
66. 15 U.S.C. § 1267 (1960)
67. 15 U.S.C. § 1314 (1980)
68. 15 U.S.C. § 1714 (2011)
69. 15 U.S.C. § 2076 (2011)
70. 15 U.S.C. § 2610 (2016)
71. 15 U.S.C. § 3364 (1978)
72. 15 U.S.C. § 5408 (1999)
73. 15 U.S.C. § 6107 (1994)
74. 15 U.S.C. § 7304 (2002)
75. 16 U.S.C. § 470ff (1979)
76. 16 U.S.C. § 470ff (1979)
77. 16 U.S.C. § 1174 (1983)
78. 16 U.S.C. § 1858 (1996)
79. 16 U.S.C. § 2407 (1978)
80. 16 U.S.C. § 2437 (2015)
81. 16 U.S.C. § 3373 (2008)
82. 16 U.S.C. § 5507 (1995)
83. 17 U.S.C. § 502 (1976)
84. 18 U.S.C. § 401 (2002)
85. 18 U.S.C. § 402 (1994)
86. 18 U.S.C. § 403 (1990)
87. 18 U.S.C. § 1507 (1994)
88. 18 U.S.C. § 3148 (1986)
89. 18 U.S.C. § 3285 (1948)
90. 18 U.S.C. § 3484 (1948)

91. 18 U.S.C. § 3486 (2012)
92. 18 U.S.C. § 3498 (1948)
93. 18 U.S.C. § 3499 (1948)
94. 18 U.S.C. § 3511 (2015)
95. 18 U.S.C. § 3600 (2016)
96. 18 U.S.C. § 3613A (1996)
97. 18 U.S.C. § 3691 (1948)
98. 18 U.S.C. § 3692 (1948)
99. 18 U.S.C. § 3693 (1948)
100. 19 U.S.C. § 1333 (1990)
101. 19 U.S.C. § 1510 (1993)
102. 21 U.S.C. § 853 (2009)
103. 21 U.S.C. § 876 (1988)
104. 21 U.S.C. § 969 (1955)
105. 22 U.S.C. § 703 (1946)
106. 22 U.S.C. § 286f (1945)
107. 25 U.S.C. § 2715 (1988)
108. 26 U.S.C. § 7456 (2008)
109. 26 U.S.C. § 7604 (1990)
110. 28 U.S.C. § 332 (2002)
111. 28 U.S.C. § 1365 (1996)
112. 28 U.S.C. § 1784 (1964)
113. 28 U.S.C. § 2521 (1992)
114. 28 U.S.C. § 2405 (1948)
115. 28 U.S.C. § 3003 (1990)
116. 29 U.S.C. § 161 (1980)
117. 29 U.S.C. § 528 (1959)
118. 29 U.S.C. § 657 (1998)
119. 29 U.S.C. § 660 (1984)
120. 29 U.S.C. § 1303 (2014)
121. 30 U.S.C. § 813 (2006)
122. 30 U.S.C. § 816 (1984)
123. 30 U.S.C. § 823 (1979)
124. 30 U.S.C. § 1717 (1983)
125. 31 U.S.C. § 313 (2010)
126. 31 U.S.C. § 716 (2017)
127. 31 U.S.C. § 3733 (2009)
128. 31 U.S.C. § 3804 (1986)
129. 31 U.S.C. § 5318 (2014)
130. 33 U.S.C. § 927 (1972)
131. 33 U.S.C. § 1319 (1990)
132. 33 U.S.C. § 1321 (2017)
133. 33 U.S.C. § 1322 (2008)
134. 33 U.S.C. § 1369 (1988)
135. 34 U.S.C. § 12391 (2017)
136. 34 U.S.C. § 20142 (2017)
137. 38 U.S.C. § 4323 (2008)
138. 38 U.S.C. § 5713 (1991)
139. 38 U.S.C. § 7265 (1991)
140. 39 U.S.C. § 504 (2006)
141. 39 U.S.C. § 3008 (1970)
142. 39 U.S.C. § 3016 (1999)
143. 41 U.S.C. § 7103 (2011)
144. 41 U.S.C. § 7105 (2011)
145. 42 U.S.C. § 405 (2018)
146. 42 U.S.C. § 2000h (1964)
147. 42 U.S.C. § 2000h-1 (1964)
148. 42 U.S.C. § 2281 (1992)
149. 42 U.S.C. § 2286b (2019)
150. 42 U.S.C. § 4915 (1972)
151. 42 U.S.C. § 5411 (1980)
152. 42 U.S.C. § 5413 (2000)
153. 42 U.S.C. § 6299 (1987)
154. 42 U.S.C. § 6384 (2004)
155. 42 U.S.C. § 7607 (1990)
156. 42 U.S.C. § 7617 (1978)
157. 42 U.S.C. § 7621 (1977)
158. 42 U.S.C. § 9622 (2002)
159. 42 U.S.C. § 9609 (1986)
160. 42 U.S.C. § 11045 (1986)
161. 43 U.S.C. § 1619 (1971)
162. 46 U.S.C. § 50306 (2006)
163. 46 U.S.C. § 6304 (1983)
164. 47 U.S.C. § 409 (1990)
165. 49 U.S.C. § 502 (1994)
166. 49 U.S.C. § 1113 (2011)

167. 49 U.S.C. § 1321 (2015)
168. 49 U.S.C. § 13301 (1995)
169. 49 U.S.C. § 32505 (1994)
170. 49 U.S.C. § 32706 (1997)
171. 49 U.S.C. § 32307 (1994)
172. 49 U.S.C. § 32910 (1994)
173. 49 U.S.C. § 33115 (1994)
174. 49 U.S.C. § 46104 (2001)
175. 49 U.S.C. § 60120 (2012)
176. 50 U.S.C. § 4101 (1980)
177. 50 U.S.C. § 4555 (2003)
178. 52 U.S.C. § 20504 (1993)
179. 52 U.S.C. § 10101 (1965)
180. 52 U.S.C. § 10310 (2006)
181. 52 U.S.C. § 30107 (1986)
182. 52 U.S.C. § 30109 (2013)

XIV. APPENDIX J: REGULATIONS

1. 5 C.F.R. § 5501.106 (2005)
2. 5 C.F.R. § 8301.105 (2020)
3. 8 C.F.R. § 1003.102 (2017)
4. 10 C.F.R. § 207.8 (1997)
5. 10 C.F.R. § 429.8 (2011)
6. 10 C.F.R. § 431.406 (2011)
7. 11 C.F.R. § 111.53 (2014)
8. 12 C.F.R. § 308.146 (2015)
9. 12 C.F.R. § 1080.10 (2012)
10. 14 C.F.R. § 13.205 (1990)
11. 14 C.F.R. § 406.109 (2007)
12. 15 C.F.R. Pt. 0, App. A
13. 15 C.F.R. § 270.315 (2003)
14. 15 C.F.R. § 280.211 (2000)
15. 15 C.F.R. § 719.11 (2006)
16. 15 C.F.R. § 785.9 (2008)
17. 16 C.F.R. § 2.13 (2012)
18. 16 C.F.R. § 3.42 (2015)
19. 18 C.F.R. § 1308.55 (1979)
20. 28 C.F.R. § 163.10 (2013)
21. 20 C.F.R. § 10.617 (2011)
22. 20 C.F.R. § 725.351 (2016)
23. 20 C.F.R. § 802.103 (2006)
24. 20 C.F.R. § 1002.289 (2006)
25. 20 C.F.R. § 1002.314 (2006)
26. 22 C.F.R. § 92.87 (1995)
27. 25 C.F.R. § 11.311 (2008)
28. 25 C.F.R. § 11.315 (2008)
29. 25 C.F.R. § 11.912 (2008)
30. 25 C.F.R. § 11.1206 (2008)
31. 25 C.F.R. § 11.1212 (2008)
32. 26 C.F.R. § 301.6503(j)-1 (2009)
33. 26 C.F.R. § 301.7604-1 (1973)
34. 27 C.F.R. § 70.24 (2006)
35. 27 C.F.R. § 478.103 (2014)
36. 28 C.F.R. § 0.45 (2008)
37. 28 C.F.R. § 2.10 (1982)
38. 28 C.F.R. § 2.20 (2003)
39. 28 C.F.R. § 2.51 (1998)
40. 28 C.F.R. § 2.104 (2002)
41. 28 C.F.R. § 2.217 (2003)
42. 28 C.F.R. § 522.10 (2010)
43. 28 C.F.R. § 522.11 (2005)
44. 28 C.F.R. § 522.12 (2005)
45. 28 C.F.R. § 522.13 (2005)
46. 28 C.F.R. § 522.14 (2005)
47. 28 C.F.R. § 522.15 (2005)
48. 28 C.F.R. § 523.17 (2005)
49. 28 C.F.R. § 551.101 (2004)
50. 28 C.F.R. § 802.27 (2017)

51. 29 C.F.R. Pt. 18, Subpt. B, App.
52. 29 C.F.R. § 101.9 (1988)
53. 29 C.F.R. § 101.15 (1988)
54. 29 C.F.R. § 102.31 (2017)
55. 29 C.F.R. § 102.119 (2020)
56. 29 C.F.R. § 580.18 (2019)
57. 31 C.F.R. § 212.10 (2011)
58. 31 C.F.R. § 1010.916 (2011)
59. 32 C.F.R. § 66.7 (2016)
60. 32 C.F.R. § 93.5 (2003)
61. 32 C.F.R. § 516.8 (1994)
62. 32 C.F.R. § 589.2 (1990)
63. 32 C.F.R. § 589.4 (1991)
64. 32 C.F.R. § 719.112 (1991)
65. 32 C.F.R. § 719.142 (1985)
66. 32 C.F.R. § 720.42 (1990)
67. 32 C.F.R. § 720.45 (1990)
68. 32 C.F.R. § 725.9 (1993)
69. 32 C.F.R. § 935.53 (2002)
70. 33 C.F.R. § 210.5 (1980)
71. 36 C.F.R. § 1220.30 (2009)
72. 36 C.F.R. § 1222.24 (2009)
73. 37 C.F.R. § 2.120 (2017)
74. 37 C.F.R. § 2.127 (2017)
75. 38 C.F.R. § 2.2 (1999)
76. 38 C.F.R. § 20.709 (2019)
77. 39 C.F.R. § 273.5 (1991)
78. 39 C.F.R. § 913.3 (2000)
79. 39 C.F.R. § 952.19 (2011)
80. 39 C.F.R. § 955.35 (2009)
81. 39 C.F.R. § 962.14 (2016)
82. 40 C.F.R. § 52.1470 (2019)
83. 40 C.F.R. § 282.86 (2019)
84. 42 C.F.R. § 51.42 (1997)
85. 42 C.F.R. § 430.86 (2012)
86. 45 C.F.R. § 99.23 (1998)
87. 45 C.F.R. § 213.23a (1975)
88. 45 C.F.R. § 303.6 (2017)
89. 45 C.F.R. § 304.20 (2017)
90. 45 C.F.R. § 702.12 (2002)
91. 45 C.F.R. § 1626.4 (2014)
92. 45 C.F.R. § 1326.103 (2016)
93. 45 C.F.R. § 1326.110 (2016)
94. 48 C.F.R. Ch. 2, App. A
95. 49 C.F.R. § 1503.607 (2009)

XV. Appendix K: Sentencing Guidelines

1. USSG § 2J1.1 (2018)

TAB 7

MEMORANDUM

DATE: August 21, 2024

TO: Advisory Committees on the Bankruptcy, Civil, and Criminal Rules

FROM: Judge J. Paul Oetken
Andrew Bradt
Catherine T. Struve

RE: Joint Subcommittee on Attorney Admission Report

We write on behalf of the Joint Subcommittee on Attorney Admission to report on the Subcommittee's ongoing deliberations. As you know, the Subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees[1] and has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.[2]

We are grateful for the feedback provided by the Advisory Committees at their spring 2024 meetings. This memo summarizes our inquiries since then. Part I of this memo provides a brief summary of the project to date, including the 2024 discussions in the Standing Committee and Advisory Committee meetings. Part II turns briefly to the question of statutory authority for rulemaking on the topic of attorney admission. Part III considers the admission of attorneys to practice in the federal appellate courts. Part IV discusses local-counsel requirements and how those might affect the efficacy of any national rule that might be adopted concerning attorney admission. Part V summarizes what we have learned to date concerning attorney admission fees. Part VI explores the question of how a rule concerning admission to practice in federal district courts might intersect with state law concerning the unauthorized practice of law. And Part VII

1 The Subcommittee members are: Judge J. Paul Oetken (Chair; member, Bankruptcy Rules Committee), Judge André Birotte Jr. (member, Criminal Rules Committee), Thomas G. Bruton (Clerk of Court representative on the Civil Rules Committee), David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee), Judge M. Hannah Lauck (member, Civil Rules Committee), and Catherine M. Recker, Esq. (member, Criminal Rules Committee).

2 See Suggestions 23-BK-G, 23-CR-A, and 23-CV-E, available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-23-bk-g .

notes that concerns about challenges facing attorneys who are military spouses may be partially addressed through other mechanisms.

I. The project to date

In this Part, we briefly sketch some of the major developments since the project's inception.

A. October 2023 Subcommittee discussion

The Subcommittee held its initial discussion in October 2023, and considered the three possible options sketched by Dean Morrison: (1) creating a national "Bar of the District Court for the United States," (2) adopting a rule providing that admission to any federal district court entitles a lawyer to practice before any federal district court, or (3) adopting a rule barring the district courts from requiring (as a condition of admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.

Subcommittee members expressed no interest in Dean Morrison's Option (1), and a number of members questioned its feasibility and/or predicted that it would generate much opposition. Some participants did express interest in considering Option (3). Participants also discussed the possibility of modeling a national rule for the district courts on Appellate Rule 46.

The Subcommittee members considered various policy concerns regarding any change from the current system. It was noted that requiring in-state bar admission is particularly burdensome in states that require applicants to take the bar examination. But participants also noted the need to allow districts to pursue their goal of protecting the quality of practice within the district – a goal that implicates both a lawyer's experience level and also the capacity of the admitting court to know of discipline imposed on the lawyer in other jurisdictions. The Subcommittee recognized that changing the rules on attorney admission might pose a revenue concern and observed that fee revenues currently fund a range of important court functions.

We also noted that any proposal would need to address questions of whether the rulemakers have statutory authority to address the topic of attorney admission.

The Subcommittee summarized its progress in a December 2023 report that was published in the agenda book for the Standing Committee's January 2024 meeting.[3]

3 That report starts on page 101 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf .

B. Morrison / Alvord December 2023 comment

On December 21, 2023, after publication of the Subcommittee's December 2023 report to the Standing Committee, Dean Morrison and Thomas Alvord responded to the report:

> … Our primary goal in making this proposal was to eliminate the many barriers that prevented lawyers who are admitted to practice in one district court from practicing in other districts. It was our view that centralizing admission in the Administrative Office of the U.S. Courts would be the easiest way to accomplish that goal, but we are by no means wedded to that alternative.
>
> In particular, we have no interest in removing the authority from individual districts to discipline attorneys, and our suggestion to centralize discipline was based on our view about centralizing admission.
>
> As for the issues of costs of implementation and loss of revenue, we also recognize that the AO has much better access to the data than we do. In that connection, we note that different districts have different rules on how often attorneys must renew their licenses and how much the court charges for renewal. The lack of uniformity might be another issue the Subcommittee might consider if it is not inclined to support a centralized system of admission….

C. January 2024 Standing Committee discussion

At the Standing Committee's January 2024 meeting, the Subcommittee Chair and reporters summarized the Subcommittee's initial discussion (as well as the new Morrison / Alvord comments) and sought the Standing Committee's reactions.[4]

Multiple members of the Standing Committee expressed support for pursuing the project. A number of members expressed support for dropping Option (1), and no one expressed interest in pursuing that option. A couple of members expressed support for considering Option (3). It was noted that in-state bar admission is not a close proxy for quality of lawyering and that fees to local counsel can be costly for litigants. A committee member encouraged us to consider whether and how to assist military spouses who must practice law while moving multiple times.

Participants did express some reservations, as well. One member wondered whether lawyers admitted only to federal court would forum-shop into federal court; and other participants expressed concern that permitting out-of-state lawyers to handle state-law claims in diversity or supplemental jurisdiction could offend federalism values. It was noted that

---

4 The relevant portion of the draft minutes of the meeting is available starting on page 22 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

admission to practice in the courts of appeal is not a close model for admission to practice in the trial court, where more can go wrong (e.g., with discovery).

Ethics and client-protection concerns were also highlighted. There was concern about national practitioners soliciting clients whom they can only represent in federal court. The importance of collaboration between district courts and state disciplinary authorities was noted. A member asked whether broadening admission standards for lawyers who are not members of the encompassing state's bar could raise questions of unauthorized practice of law.

The question of fees was also discussed, with one member asking how fees and revenues vary across districts.

D. February 2024 Subcommittee discussion

The Subcommittee held its second meeting on February 12, 2024. We first reported on the Standing Committee's January discussion.

The issue of local-counsel requirements emerged as a key theme during our February discussion. It was noted that some judges would oppose a rule amendment that would prevent the court from requiring the involvement of local counsel in every case. That requirement, for instance, could be viewed as important in a district that maintains a practice of moving cases quickly. Would broadening attorney admission requirements do much to increase access if the broadening rule change were offset by a broadened local-counsel requirement? Members suggested that it would be helpful to learn more about why the courts that require local counsel do so.

Attorney discipline also emerged as a matter of concern. While courts each have their own disciplinary systems, and can also coordinate with the disciplinary authorities of other jurisdictions, we questioned how any particular district court could stay abreast of disciplinary activity in far-flung jurisdictions. One idea was to require the admitted attorney to update the court concerning subsequent disciplinary actions in other jurisdictions.

Tim Reagan had already been researching the various district courts' attorney-admission fees, and he undertook to prepare an additional report on local-counsel requirements. (His findings on these topics are discussed in Parts IV and V, below.)

E. Spring Advisory Committee discussions

We provided a report to each of the relevant Advisory Committees (Bankruptcy, Civil, and Criminal) during their spring 2024 meetings. The most extensive discussion took place at the

Civil Rules Committee meeting.[5]

At the Civil Rules Committee's April 9, 2024 meeting, two judge members voiced strong opposition to the project, and a third judge member's comments were also somewhat skeptical. The first judge questioned why this is a rules issue; to him, this is a matter for state bars. He can see why a court would want lawyers practicing before it to be part of the state bar, as that increases the chances of repeat players and a sense of community. He also questioned the analogy to practice in the courts of appeals; coming in to argue an appeal differs from establishing a law practice in the state. The second judge agreed, noting that districts have distinct cultures and important traditions. This judge felt that admission pro hac vice suffices to accommodate the legitimate needs of out-of-state lawyers. The third judge noted that a district's bar-admission practices reflect the culture of the local bar as well as that of the local bench. During the Civil Rules discussion, Dan Coquillette also underscored the need to look at the unauthorized-practice issue.

Our report on the project did not generate feedback during the Bankruptcy Rules Committee's April 11, 2024 meeting, but a member shared a suggestion for a potential contact with state bar authorities. At the Criminal Rules Committee's April 18, 2024 meeting,[6] Jonathan Wroblewski (the DOJ representative) noted that the U.S. Supreme Court has very permissive practices about admitting attorneys to its bar, and he asked how the Court handles situations in which an attorney it has admitted is disbarred in another jurisdiction.

F. Summer 2024 Subcommittee discussion

The Subcommittee met virtually in July 2024. It reviewed Tim Reagan's research (detailed in Parts IV and V below) concerning local-counsel requirements and admission fees. Participants continued discussing the potential significance of local-counsel requirements, which might offset the effects of any new rule requiring the district courts to loosen their attorney-admission practices. The Subcommittee also discussed issues relating to the unauthorized practice of law (noted in Part VI of this memo). Participants noted that it would be useful to make inquiries among state bar authorities to learn whether they would have concerns about a national rule loosening district-court admission requirements for out-of-state lawyers. It was also noted that learning more about circuits' practices under Appellate Rule 46 (see Part III.A below) would be useful.

---

5 The Civil Rules discussion is also described in the Civil Rules Committee's draft minutes starting at page 566 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

6 The Criminal Rules discussion is also described in the Criminal Rules Committee's draft minutes starting at page 600 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

II. Questions of rulemaking authority

One threshold question, as always, is whether the Rules Enabling Act provides rulemaking authority on this issue. In the language of the statute, would rulemaking regarding district court bar membership fit the category of "general rules of practice and procedure . . . for cases in the United States district courts" and not "not abridge, enlarge or modify any substantive right." The Reporters are continuing research on this question, though the existence of Appellate Rule 46, detailed further below, for a half century provides strong precedent on the general issue.

Questions were also raised about the relevance of 28 U.S.C. § 1654. We enclose a helpful memo from the then-Rules Law Clerk, Zachary Hawari, on that topic.

III. Federal appellate courts as a model?

As the Subcommittee has already discussed, the federal appellate courts might provide a model for attorney admission at the district-court level. Part III.A summarizes what we know of the courts of appeals' approaches under Appellate Rule 46, and Part III.B discusses the approach taken by the U.S. Supreme Court under its rules. Part III.C notes reasons why the appellate court experience may not generalize to the district court.

A. The federal courts of appeals

This subpart recapitulates Rule 46's features and summarizes what we have learned about admission fees and attorney discipline in the courts of appeals.

Appellate Rule 46 reads:

(a) Admission to the Bar.

> (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).
>
> (2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:
> "I, ________________, do solemnly swear [or affirm] that I will

conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

A few features of Rule 46 are worth noting. Rule 46(a)(1) mandates that an attorney is eligible for admission to the bar of a court of appeals if the attorney is "of good moral and professional character" and admitted to the bar of the U.S. Supreme Court, a state high court, another federal court of appeals, or a federal district court. Rules 46(a)(2) and (3) accord the court of appeals the authority to set the form of the application and to prescribe the fee. Rule 46(b) recognizes the court of appeals' authority to suspend or disbar the attorney, subject to a loose substantive test (suspension or disbarment by another court, or "conduct unbecoming") and some basic procedural protections. And Rule 46(c) recognizes a court of appeals' authority to

impose discipline short of suspension or disbarment upon lawyers practicing before the court, so long as it provides notice and an opportunity to be heard.

Thanks to helpful research by Tim Reagan, we know that the fee for admission to the bar of a court of appeals varies across the circuits.[7] It is "$199 plus any additional fee that the local court charges."[8] "The median [total] bar admission fee is $239, and the range is from $214 to $300."[9] Tim notes that because Appellate Rule 46 requires that the attorney seeking admission be admitted to another bar, the attorney will also have to pay for a certificate of good standing from that other bar.[10] Three circuits charge a renewal fee (of from $20 to $50) every five years.[11] Some circuits exempt stated categories of lawyers from paying the admission fee (or, in some instances, permit the lawyer to appear pro hac vice without paying a fee). The most common exemptions are those for federal government lawyers and lawyers representing IFP litigants.

As noted, Rule 46(b)(1)(A) provides for discipline based upon suspension or disbarment in another jurisdiction. In the Subcommittee's discussions, the question has arisen how a court of appeals would become aware of discipline imposed by another jurisdiction. Anecdotally, a court of appeals is more likely to be contacted about attorney discipline by authorities from states within the circuit than by authorities from states outside the circuit. But on at least some occasions, a court of appeals may become aware of discipline imposed by an out-of-circuit state. In at least one circuit, a local rule appears to require that members of the court's bar update the court if they are suspended or disbarred in another jurisdiction.[12] Self-reporting is of course an imperfect system; one can find examples where lawyers who should have self-reported failed to do so.

There is reason to think that not all attorney-discipline opinions can be found on electronic case-reporting systems such as WestlawNext or Lexis. It is thus perhaps unsurprising that an initial very rough search found not many opinions available on WestlawNext concerning reciprocal discipline.

The Subcommittee is currently making inquiries with the Circuit Clerks to ascertain how

---

7 See Tim Reagan, Fees for Admission to Federal Court Bars 2 (FJC 2024) ("Reagan Fee Report"). Tim's report was distributed to the Subcommittee previously; you can also download it at https://www.fjc.gov/content/385023/fees-admission-federal-court-bars (last visited August 12, 2024).

8 Id. at 1.

9 Id. at 2.

10 Id. at 1 (noting that the fee for a certificate of good standing "in the states and territories range from no fee to $50").

11 Id. at 2.

12 Ninth Circuit Rule 46-2(c) provides in part: "An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction."

Rule 46 is functioning and whether the Rule's relatively open approach to attorney admission causes any problems with attorney conduct in the circuits.

B. The U.S. Supreme Court

Like the federal courts of appeals, the U.S. Supreme Court has a relatively permissive admission standard. Supreme Court Rule 5.1 provides:

> To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

Supreme Court Rule 8 governs disbarment and disciplinary action. It provides:

> 1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely fled, the Court will enter an appropriate order.
>
> 2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

The Supreme Court Practice treatise offers this description of the Supreme Court's approach:

> The issuance of an order to show cause is usually premised, as Rule 8 indicates, on a report by federal or state bar authorities that some form of serious discipline has been imposed upon the attorney in question…. The Supreme Court also learns of disbarment or disciplinary actions affecting members of its Bar from the periodic reports of the American Bar Association Center for Professional Responsibility, which maintains a computerized information system referred to as the National Discipline Data Bank. That data bank records disciplinary actions of all state, federal, and appellate courts and bar authorities. The Supreme Court

> Clerk's Office carefully reviews the reports of the Center for Professional Responsibility to determine whether any members of the Supreme Court Bar have been subjected to disbarment or other discipline, and it provides the Center with information concerning disbarment or discipline imposed by the Court….
>
> If reports of state disciplinary actions are made and it appears that any member of the Supreme Court Bar has been the subject of such discipline, the Clerk then makes an evaluation of the disciplinary sanction. A mere reprimand or other minor sanction is not likely to result in the issuance of a show cause order by the Court, although the fact that the state imposed such a sanction is duly noted. But if the state has imposed some significant disciplinary sanction falling short of permanent disbarment, a show cause order may well issue from the Court. In such situations, the Court has been known to impose a more severe sanction than that imposed by the state authorities, the sanction of permanent disbarment.[13]

The National Lawyer Regulatory Data Bank (as it is now called) warrants a bit of explanation. The ABA's website states:

> The ABA National Lawyer Regulatory Data Bank is the only national repository of information concerning public regulatory actions relating to lawyers throughout the United States. It was established in 1968 and is operated under the aegis of the ABA Standing Committee on Professional Discipline. ... The Data Bank is particularly useful for disciplinary authorities and bar admissions agencies in providing a central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere. All states and the District of Columbia, as well as many federal courts and some agencies, provide regulatory information to the Data Bank.[14]

An important limitation of the Data Bank is that submission of data is voluntary, and thus may not be complete.[15] Moreover, one commentator stated in 2012 that disciplinary authorities "are not informed automatically when lawyers they license are reported to the Data Bank."[16] And

---

13 Stephen M. Shapiro et al., Supreme Court Practice ch. 20, § 20.8 (11th ed. 2019) (ebook).

14 American Bar Association, National Lawyer Regulatory Data Bank, available at https://www.americanbar.org/groups/professional_responsibility/services/databank/ (last visited August 12, 2024).

15 See Jennifer Carpenter & Thomas Cluderay, Implications of Online Disciplinary Records: Balancing the Public's Interest in Openness with Attorneys' Concerns for Maintaining Flexible Self-Regulation, 22 Geo. J. Legal Ethics 733, 746 (2009).

16 Arthur F. Greenbaum, The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap, 73 Ohio St. L.J. 437, 506 n.277 (2012).

even when the authorities are told about the imposition of discipline in another jurisdiction, there may be mix-ups concerning who was disciplined: "because [the Data Bank] does not employ a universal identification number system, it is sometimes hard to identify whether a given lawyer, particularly one with a common name, has been reported."[17] Note, as well, that the "Data Bank only includes those who have actually been disciplined, thus, excluding lawyers who have been sanctioned by courts, but not disciplined."[18]

C. Whether the appellate experience generalizes to the district court

Initial anecdotal data suggest that, at least in one circuit, the current system has not led to problems with the quality of practice before the court of appeals. This is so even though it is possible that the court does not learn about disciplinary problems encountered by all the lawyers that practice before it. Similarly, the U.S. Supreme Court maintains a very large bar and a very permissive admission standard.

However, a number of participants in discussions of this project have questioned whether the experience of the federal courts of appeals with attorney admission can generalize to the context of admission to practice at the trial level. They note that the typical appellate proceeding involves a very confined set of activities and comparatively few deadlines (briefing and perhaps argument), whereas at the trial level – where the record is made and where the participants conduct discovery, hearings, and trials – much more can go awry if an unskilled or unscrupulous practitioner is involved.

IV. Local-counsel requirements

Many districts currently require that an attorney admitted pro hac vice associate local counsel. Dean Morrison and his fellow rule-change proponents appear to assume that admission to a district court's bar would exempt an out-of-state lawyer from the requirement of associating local counsel in a case.[19] But in the Subcommittee's most recent discussions, participants asked whether expanding access to district court bars would be a Pyrrhic victory for the rule change's

---

17 Greenbaum, supra note 16, at 506 n. 277.

18 Lonnie T. Brown, Jr., Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 Ohio St. L.J. 1555, 1607–08 (2001).

19 Dean Morrison's proposal for a national rules change does not discuss local-counsel requirements. But the appended materials (which he and others previously submitted to the Northern District of California in support of a proposal for a local rule amendment) explain that not being admitted to practice in the district subjects litigants to onerous local-counsel requirements. See Petition of Public Citizen Litigation Group & 12 Others Pursuant to Local Rule 83-2 To Amend Local Rule 11-1(b) (Feb. 6, 2018), at 11 ("[U]nder the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some judges, to appear in court.").

proponents if districts responded by also expanding their local-counsel requirement so that it encompasses attorneys who are admitted in the district but not in the encompassing state.

Currently, more than half of federal districts require participation by local counsel in litigation conducted by an attorney who is admitted pro hac vice. Tim found that "[f]ifty-six districts (60%) require local-counsel participation for pro hac vice appearances. In addition to being a member of the district court's bar, local counsel may be required to live or work in the district or be a member of the local state's bar."[20]

Some districts even require local counsel for some cases litigated by members of the district court's bar;[21] these districts do so in (variously) three types of circumstances: (1) if the attorney is not an in-state bar member, (2) if the attorney neither resides nor has an office in the district, and (3) if the attorney either doesn't reside in the district or lacks a full-time office there.

Courts vary in the degree of involvement that they require of local counsel. Many courts require that local counsel make the motion for non-local counsel's admission pro hac vice; it's possible that this might be one way that a district assures itself that someone has checked that the non-local counsel is in good standing with their home-state bar. The court may also require that local counsel:

- sign the first pleading,[22]
- review and sign all filings,[23]
- be available for service of litigation papers,[24]
- be prepared to try the case,[25]

---

20 Tim Reagan, Local-Counsel Requirements for Practice in Federal District Courts (FJC 2024), at 10. Tim's report and its appendices are available here: https://www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts (last visited August 12, 2024).
21 See Reagan, Local-Counsel Report, at 6 ("Thirteen districts (14%) require association with local counsel even for some members of the district court's bar."). In six of those districts, though, as Tim notes, the rules don't themselves require local counsel in this situation, but accord the judge discretion to require it.
22 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("The local attorney shall sign the first pleading filed and shall continue in the case unless other local counsel is substituted.").
23 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("Unless waived by the court … , local counsel must review and sign all motions and other filings [and] ensure that all filings comply with all local rules of this court ….").
24 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("Any notice, pleading or other paper may be served upon the local counsel with the same effect as if personally served on the non-resident attorney.").
25 M.D. Tenn. Local Rule 83.01(e)(4) ("Entry of an appearance or otherwise participating as

- be prepared to step in for the lead counsel whenever necessary,[26]
- attend all court appearances,[27] and/or
- be "equally responsible with *pro hac vice* counsel for all aspects of the case."[28]

We might try to infer from the nature of these requirements the reasons why courts require local counsel. To take an obvious example, the requirements that local counsel be available to accept service seem addressed to a simple logistical point – and one that may be largely obsolete now that service of papers subsequent to the commencement of the case is ordinarily accomplished via CM/ECF. A requirement that local counsel review and sign all filings suggests that the court wishes to have a local (and thus more accountable?) lawyer review the filings' compliance with Civil Rule 11. Requirements that local counsel be available to step in at any time suggest that the court is concerned that out-of-district lawyers not cause delay. (A related example might be the Eastern District of Virginia, where local counsel are viewed as important to fulfilling the demands of the court's "rocket docket.") An additional possibility is that, by requiring local counsel, some courts are trying to address behavior by lawyers that doesn't rise to the level of a discipline issue but that implicates questions of quality of lawyering, civility, and professionalism.

Another theme that has emerged is the potential significance of the court's discretion to excuse compliance with the local-counsel requirement. Some local rules explicitly provide for such discretion. Additionally, some local rules expressly exempt some categories of attorney from the local co-counsel requirement.[29]

Dean Morrison and the other rule-change proponents are not taking direct aim at the local counsel requirements themselves (perhaps because they are not focusing on the relatively small number of districts that require local counsel even for some admitted attorneys). Rather, they appear to assume that admission would release an out-of-district lawyer from any obligation to associate local counsel. To test the plausibility of that assumption, it may make sense to focus on districts that currently require in-state bar membership for admission and ask whether those

---

counsel of record is a representation that the attorney will be prepared to conduct the trial of the case, from which the attorney may only be relieved by approval of the Court.").

26 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("By agreeing to serve as local counsel and by signing the pro hac vice application, local counsel attests that he or she is authorized and will be prepared to handle the matter in the event the applicant is unable to be present on any date scheduled by the court.").

27 See E.D. Mich. Local Rule 83.20(f)(2) ("Local counsel must attend each scheduled appearance on the case unless the Court, on its own motion or on motion or request of a party, dispenses with the requirement.").

28 M.D. Tenn. Local Rule 83.01(d)(6).

29 See, e.g., N.D. Okla. Loc. Gen. Rule 4-3(c) (exempting lawyers for the federal government, federal defenders, and CJA lawyers); M.D. Tenn. Local Rule 83.01(d)(2) (exempting lawyers for the federal government and federal defenders).

districts also impose a local-counsel requirement for attorneys who are only admitted pro hac vice.

We have not yet compiled that full list, but as a starting point, one can look at the nine districts in California, Delaware, Florida, and Hawaii that currently require in-state bar membership for admission (it is in those districts, of course, that in-state bar membership is the most onerous barrier because it requires taking the state bar exam). Here is a chart of those districts:

District	Local counsel required where lead attorney is admitted pro hac vice?
Central District of California	Yes. See C.D. Cal. Local Civil Rule 83-2.1.3.4.
Eastern District of California	Not exactly? E.D. Cal. Local Rule 180(b)(2)(ii) requires that an attorney admitted pro hac vice "shall … designate … a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding that attorney's conduct of the action and upon whom service shall be made."
Northern District of California	Yes. See N.D. Cal. Local Civil Rule 11-3(a)(3) (requiring "[t]hat an attorney, identified by name and office address, who is a member of the bar of this Court in good standing and who maintains an office within the State of California, is designated as co-counsel").
Southern District of California	Not exactly? S.D. Cal. Civil Rule 83.3(c)(4) requires that an attorney admitted pro hac vice must "designate … a member of the bar of this court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers will be served."
District of Delaware	Yes. See D. Del. Local Rule 83.5(d): "Unless otherwise ordered, an attorney not admitted to practice by the Supreme Court of the State of Delaware may not be admitted pro hac vice in this Court unless associated with an attorney who is a member of the Bar of this Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel"). … Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court."
Middle District of Florida	Apparently not. (N.B.: This district's version of pro hac vice admission is called "special admission," see M.D. Fla. Local Rule 2.01(c).).
Northern District of Florida	Apparently not.
Southern District of Florida	Yes. See Rules 1(b)(1) (local counsel to move admission pro hac vice) and 1(b)(3) (requiring designation of "at least one member of the bar of this Court who is authorized to file through the Court's electronic filing system, with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, and who shall be

	required to electronically file and serve all documents and things that may be filed and served electronically, and who shall be responsible for filing and serving documents in compliance with the CM/ECF Administrative Procedures”).
District of Hawaii	Yes. See D. Haw. Local Rule 83.1(c)(2)(B)(vi) (requiring “designation of a current member in good standing of the bar of this court who maintains an office within the district to serve as associate counsel” and also “the associated attorney’s commitment to at all times meaningfully participate in the preparation and trial of the case with the authority and responsibility to act as attorney of record for all purposes; to participate in all court proceedings (not including depositions and other discovery) unless otherwise ordered by the court; and to accept service of any document”).

We can see that more than half of these districts (five of nine) require attorneys admitted pro hac vice to associate local counsel. It’s not implausible to surmise that at least some of these districts – if required by national rule to admit to their bar attorneys not admitted to the bar of the encompassing state – might consider whether to extend the local-counsel requirement to such attorneys.

These reflections prompt the following questions:

- Is this sampling of districts representative of the districts that currently take a restrictive approach to bar admissions?

- In districts with rules that require local counsel, how often are those requirements waived in practice?

- Would a national rule change on bar admission simply prompt widespread enlargement of local-counsel requirements?

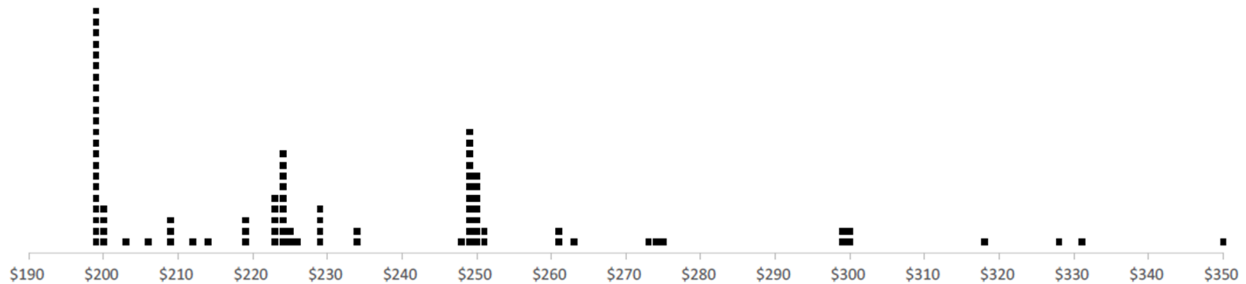
If the answer to the last of these questions is yes, then unless the rulemakers are willing to enlarge this project to encompass districts’ ability to require local counsel, one might question the prospects for effectively addressing the access and expense concerns that underpin the proposals we are currently considering.

V. Attorney admission fees

Our discussions have also focused on the fiscal implications of potential changes to the district courts’ attorney-admission framework. This Part briefly summarizes what we have learned about the revenue coming in and the uses to which it is put.

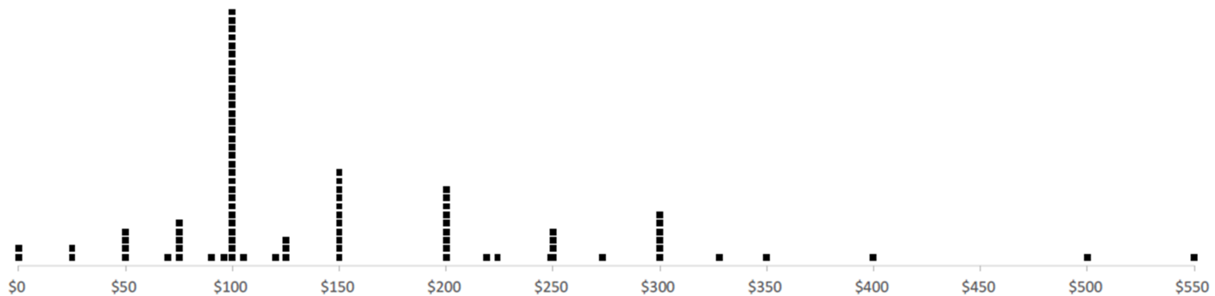
A. Revenue coming in

Tim Reagan has provided us with an overview of the fees charged by districts around the country. He reports that "admission fees range from the national minimum of $199 to $350."[30] His helpful graph[31] suggests that most districts set the fee in the $199 - $250 range:



In addition, roughly a quarter of districts charge periodic dues or renewal fees. "Twenty-five districts (27%) charge dues, often referred to as renewal fees. Renewal periods range from one to six years, and annualized dues range from $3 to $75."[32] From the detailed discussion in the accompanying footnote, it looks as though five districts have annualized 'dues' of more than $25.[33]

Separate from admission fees are the fees charged for pro hac vice admission. Tim reports that "[p]ro hac vice fees range from no fee to $550."[34] His accompanying graph[35] suggests that most districts charge $150 or less, with additional clusters at $200, $250, and $300:



30 Reagan Fee Report, supra note 7, at 3.
31 See id.
32 Id.
33 See id. at 3 n.6.
34 See id. at 3.
35 See id. at 4.

B. Uses to which revenue is put

The district courts do not keep the "national" portion of the admission fee, which is $199;[36] they remit that portion to the Administrative Office of the U.S. Courts. By contrast, there is no "national" portion of any fee for renewing a bar admission or for admission pro hac vice, and so the districts keep the entirety of those fees.

As we have previously noted, districts put their portion of the fees to various uses, including funding a clinic for self-represented litigants; guardians ad litem for defendants who are minors; bench/bar activities; reimbursement of pro bono expenses; and support for a court historical society.

VI. Unauthorized practice of law

During our discussions, a number of participants have stressed the importance of examining the relevance of state law concerning the unauthorized practice of law. An initial look at this field confirms that this topic is well worth the Subcommittee's consideration.

To some, the idea of federal-court attorney-admission barriers intersecting with unauthorized-practice-of-law issues might seem somewhat counterintuitive. After all, if a federal district court *authorizes* someone to practice as a member of the court's bar, how could practice in that court be *unauthorized*? An answer to this question becomes easier to discern if one distinguishes between different types of situations in which the question might be posed.

Some might intuitively imagine a scenario that a big-firm lawyer usually encounters: Big Corp. gets sued in federal court in State A, looks around for a high-powered lawyer, finds Lawyer B in State C, and hires B to handle the federal-court lawsuit in State A. It seems (and likely is) straightforward that B can handle the suit, without being admitted to practice in State A, so long as B is admitted to practice, or gets permission to appear pro hac vice, in the relevant federal district court in State A.

But a look at the caselaw indicates that unauthorized-practice issues usually come up in quite a different type of scenario. Lawyer D, say, is admitted to practice in State E but not in State F. Lawyer D moves to State F and doesn't get admitted in State F, but gets admitted in the federal district court for the District of F. Lawyer D hangs out a shingle in State F, sees clients, triages them, and only takes cases Lawyer D can bring in federal court. In at least some states, it seems, there is a potential risk that the state bar authorities would consider D to be engaging in the unauthorized practice of law in State F by so doing. The strictest caselaw on this topic is in some instances decades old, and there has been some movement toward making the rules on

36 See District Court Miscellaneous Fee Schedule (setting fee "[f]or original admission of attorneys to practice" at $199), available at https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule (last visited June 28, 2024).

unauthorized practice of law more forgiving, but nonetheless it appears from an initial look at the caselaw that Lawyer D could run a substantial risk in a number of states by behaving as described.

We will not review here the details of the caselaw that we have gathered thus far. By definition, a field of law (like professional responsibility) that is governed state-by-state is challenging to summarize comprehensively. Moreover, some of the notable caselaw is relatively dated. Instead, we note a few key lines of authority and sketch some relevant concepts. A better sense of the scope and nature of likely problems might emerge from an inquiry with state bar authorities as the project moves forward.

It's useful to start with two sources of authority that might be influential to those shaping state law on unauthorized practice: the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers.

Model Rule of Professional Conduct 5.5[37] currently provides in relevant part:

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) **A lawyer who is not admitted to practice in this jurisdiction shall not:**

(1) **except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law**; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) **A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that**:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

37 See American Bar Association, Model Rules of Professional Conduct Rule 5.5, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/ (last visited August 12, 2024).

(2) **are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized**;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) **A lawyer admitted in another United States jurisdiction** or in a foreign jurisdiction, **and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof**, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, **may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:**

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) **are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction…**.

Model Rule 5.5 (emphases added).

Much of the contents of the current version of Model Rule 5.5 – including most of the bolded language above – was contained in the version of Model Rule 5.5 adopted by the ABA House of Delegates in August 2002.[38] Of particular interest in the current context is Rule

38 See American Bar Ass’n Center for Professional Responsibility, Client Representation in the

5.5(d)(2), which authorizes the provision, by a lawyer not admitted in the state, "through an office or other systematic and continuous presence in this jurisdiction," of "services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction."

A key question is what the drafters meant by "authorized by federal … law or rule." Neither the Commentary nor the 2002 Report of the Commission on Multijurisdictional Practice addresses whether a federal court's admission of a lawyer to practice would count as authorization for this purpose, or what the scope of that authorization would be.[39]

The Restatement of the Law Governing Lawyers also provides relevant, but somewhat equivocal, authority on this point. Section 3 of the Restatement provides:

> § 3 Jurisdictional Scope of the Practice of Law by a Lawyer
>
> A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:
>
> (1) at any place within the admitting jurisdiction;
>
> (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
>
> (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Comment g to Section 3 states in part:

21st Century: Report of the Commission on Multijurisdictional Practice title page & 19-20 (2002) ("MJP Commission Report"). An ABA commission is currently considering possible changes to Model Rule 5.5, including a proposal to authorize practice in all states based on admission in any single state. See Memorandum dated January 16, 2024 from David Machrzak, Chair, Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5 to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/issues-paper-for-comment-mr5-5.pdf (last visited August 19, 2024) ("ABA Issues Paper"). That proposal, if adopted, would significantly change the assumptions on which restrictive federal-court admission rules are based. The ABA project does not address more specifically the federal-court-practice issues of interest here.

39 MJP Commission Report, supra note 38, at 34.

g. Authorized practice in a federal agency or court. A lawyer properly admitted to practice before a federal agency or in a federal court (see § 2, Comment b) may practice federal law for a client either at the physical location of the agency or court or in an office in any state, so long as the lawyer's practice arises out of or is reasonably related to the agency's or court's business. Such a basis for authorized practice is recognized in Subsection (2). Thus, a lawyer registered with the United States Patent and Trademark Office could counsel a client from an office anywhere about filing a patent or about assigning the ensuing patent right, matters reasonably related to the lawyer's admission to the agency. (The permissible scope of practice of a nonlawyer patent agent may be less, since admission to the agency does not suggest competence to deal with matters, such as the assignment of patents, beyond the jurisdiction of the agency.)

A lawyer admitted in one state who is admitted to practice in a United States district court located in another state, but who is not otherwise admitted in the second state, can practice law in the state so long as the practice is limited to cases filed in that federal court. Local rules in some few federal district courts additionally require admission to the bar of the sitting state as a condition of admission to the federal court. The requirement is inconsistent with the federal nature of the court's business….

Reading this commentary, one might be tempted to impute to the Restatement a broad view about the preemptive force of federal-court rules governing attorney admission to practice in federal court. Before reaching that conclusion, though, it is useful also to consider this observation in the Reporter's Note to comment e: "There are few decisions dealing with the question of permissible out-of-state practice. Several involve clear instances of impermissible practice, through setting up an office in a state in which the lawyer is not admitted." Admittedly, the Reporter's Note expresses only the views of the Reporter, and not necessarily those of the ALI. But together, the commentary and the Reporter's Note suggest a view that admission to practice in a federal district protects the lawyer from unauthorized-practice accusations so long as the lawyer limits that practice to the cases actually filed in federal court – but that the lawyer courts trouble by actually opening an office in a state in which the lawyer isn't admitted.

It's also useful to consider the U.S. Supreme Court's decision in *Sperry v. State of Florida*, 373 U.S. 379 (1963). *Sperry* provides some support for the idea that a lawyer who only maintains an in-state office for purposes of a solely federal-tribunal practice does not violate state unauthorized-practice prohibitions. However, *Sperry* can be read narrowly to apply only to the context in which it arose – federal patent office practice – in which the topic area is well-defined and the jurisdiction is exclusively federal.

Sperry was "a practitioner registered to practice before the United States Patent Office"

who had "not been admitted to practice law before the Florida or any other bar."[40] He had an office in Tampa and held "himself out to the public as a Patent Attorney."[41] The Florida Supreme Court found that he was engaging in unauthorized practice and enjoined him from, inter alia, from calling himself a patent attorney, giving legal opinions (even on patentability), preparing legal documents (including patent applications), "holding himself out, in [Florida], as qualified to prepare … patent applications," or otherwise practicing law.[42] The U.S. Supreme Court vacated and remanded, holding that 35 U.S.C. § 31[43] and regulations promulgated thereunder authorized the admission of persons, including nonlawyers, to practice before the Patent Office.[44] The Court did not define exactly what the state was foreclosed from prohibiting, but offered this guidance:

> Because of the breadth of the injunction issued in this case, we are not called upon to determine what functions are reasonably within the scope of the practice authorized by the Patent Office. The Commissioner has issued no regulations touching upon this point. We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.[45]

One might read *Sperry* to stand for the proposition that any valid federal-law provision authorizing a person to practice before a federal tribunal preempts the application of state unauthorized-practice provisions to a lawyer's work in connection with such authorized practice before a federal tribunal. Note, however, that federal patent applications differ from ordinary federal-court litigation because the subject-matter is discrete and exclusively federal, and might well be ordinarily separable from matters that might be covered by state law.

---

40 Sperry, 373 U.S. at 381.

41 Id.

42 Id. at 382.

43 At the time, 35 U.S.C. § 31 provided:

> § 31. Regulations for agents and attorneys
> The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.

44 Id. at 384-85.

45 Id. at 402 n.47.

As noted previously, it is challenging to offer confident appraisals of state unauthorized-practice law as it might apply to practice by lawyers admitted in federal court but not to the bar of the encompassing state. Much of the relevant caselaw is somewhat dated – raising the possibility that subsequent changes in applicable state statutes or rules might have undermined earlier and more restrictive approaches. Also, the Rules of Professional Conduct may provide incomplete guidance in some states, because unauthorized-practice principles are also contained in statutes that might not have been updated at the same time as the state's Rules of Professional Conduct.

Initial research has uncovered some authority in a couple of states that suggests that admission to practice in an in-state federal court may not always immunize a lawyer (who is not admitted to the state bar) from charges of unauthorized practice. The picture emerging is that the clearest case for protection from unauthorized-practice allegations is where the client relationship arose in a state where the lawyer is admitted to practice and the client then decides to sue (or is sued) in a federal court (in a different state) where the lawyer is admitted. The clearest case of danger of unauthorized practice would be where the lawyer opens a permanent office only in the encompassing state without being admitted there, and brings in new clients by interviewing them in that in-state office. Even if the lawyer appears only in federal court, the lawyer might be regarded (at least by authorities in some states) as engaging in unauthorized practice.

Due to this complexity, it may be difficult to draft a national rule without giving attention to the unauthorized-practice question in some way. While the picture of unauthorized-practice-of-law doctrine is still emerging, this topic merits attention as the Subcommittee seeks the views of state bar authorities concerning the issues raised by this project.

VII. Addressing concerns about attorneys who are military spouses

In the discussions to date, participants have sometimes mentioned that particular types of attorneys face particular hardship from restrictive bar admission rules. Lawyers who are military spouses are an example, as their spouse's work might require the family to relocate multiple times.

That particular concern might be partly addressed at the state bar level. An effort is underway to persuade state bar authorities to adopt special provisions to accommodate military spouses. The Military Spouse J.D. Network Foundation provides this description of its ongoing efforts:

> In February 2012, with the support of the ABA Commission on Women in the Profession, the ABA House of Delegates adopted a ABA Resolution 108 (2012) supporting changes in state licensing rules for military spouses with law degrees.

In April 2012, Idaho became the first state to approve a military spouse licensing accommodation.

Then in July 2012, the Conference of Chief Justices voted to support a resolution for admission of military spouse attorneys without examination. ….

December 2012 saw the second state, Arizona, adopt a licensing rule specifically addressed the challenges faced by military spouse attorneys. Since then, other states have joined in the efforts to reduce barriers to employment for military spouses in the legal profession.

In the years since, MSJDN has seen more than 40 states and the U.S. Virgin Islands pass common sense license reciprocity rules for military spouse attorneys. Our efforts continue as we work to reach all 50 states. MSJDN has also begun to petition the nine states which passed license reciprocity for military spouses but included harmful supervision requirements which have rendered the rules unduly burdensome and ineffective in practice.[46]

VIII. Conclusion

This report provides a snapshot of the Subcommittee's efforts as of summer and fall 2024. The Subcommittee will provide further updates as it continues its inquiries, and welcomes any additional Advisory Committee feedback in the meantime.

Encl.

46 See Military Spouse J.D. Network Foundation, State Licensing Efforts, available at https://msjdn.org/rule-change/ (last visited August 12, 2024).

MEMORANDUM

To: Catherine T. Struve
Andrew Bradt

From: Zachary Hawari, Rules Law Clerk

Re: History of 28 U.S.C. § 1654

Date: December 28, 2023

History

Why and when was this statute first adopted, and what was its subsequent history?

The statutory right to plead and conduct one's own case personally or by counsel goes back at least to the founding of the United States courts, and its language remains largely unchanged. Section 35 of the Judiciary Act of 1789 provided "[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct their cases therein." 1 Stat. 73, 92 (1789).

The Judiciary Act of 1789 was introduced as Senate Bill No. 1 in the first legislative session of the first Congress, and its authorship is often credited to Oliver Ellsworth and the other two members of the drafting committee–William Paterson and Caleb Strong.[1] Section 35 contains the provision that became 28 U.S.C. § 1654, but it also included a more controversial provision providing for the appointment of United States Attorneys and the Attorney General.[2] I have not had much success in identifying the purpose or history of the relevant part of Section 35.

Some courts and commentators have since observed that the Sixth Amendment's right to counsel was being debated at the same time as the Judiciary Act.[3] The history of the common law right to self-representation, the Founders'

---

[1] *See* New Light on the History of the Federal Judiciary Act of 1789 (jstor.org); The Judiciary Act of 1789: Charter for U.S. Marshals and Deputies (usmarshals.gov); First Federal Congress: Creation of the Judiciary (gwu.edu)

[2] New Light on the History of the Federal Judiciary Act of 1789 (jstor.org).

[3] Historical Background on Right to Counsel | Constitution Annotated | Congress.gov | Library of Congress

skepticism toward lawyers, the Sixth Amendment's right to counsel, and the Judiciary Act was discussed extensively by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 812-32 (1975). More research would be required to understand how views during the 17th and 18th century led to Section 35, especially considering that views on the right to counsel in civil and criminal cases appears to have essentially reversed.[4]

In any event, Section 35 was codified in Section 747 of the Revised Statutes in the 1870s. The Judicial Code of 1911 then included a slightly modified version. 36 Stat. 1087, 1164 (1911). Section 272 of Chapter 11, which provided for provisions common to more than one court, stated: "In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, <u>are permitted</u> to manage and conduct <u>causes</u> therein" (changes emphasized). When Title 28 was reorganized, that provision was moved from 28 U.S.C. § 394 to § 1654.

In 1948, § 1654 was briefly shortened to: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel." 62 Stat. 869, 944 (1948). According to the reviser's notes for the 1948 amendment, the phrase "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" was "omitted as surplusage," and "[c]hanges were made in phraseology."[5] For example, "by the assistance of such counsel or attorneys at law" was apparently shortened to "by counsel."[6]

But in 1949, Congress "restore[d]" the "language of the original law." 63 Stat. 89, 103 (1949). Oddly, this restoration only included the "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" phrase.

---

[4] Several colonies in the 17th century prohibited pleading for hire. *Faretta*, 422 U.S. at 827. Interestingly, the Massachusetts Body of Liberties included a proto-attorney-admission element or, at least, a provision giving the court power to reject a representative:

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man *against whom the Court doth not except*, to helpe him, provided he give him noe fee or reward for his paines….

Id. at n.32 (quoting Art. 26 (1641)) (emphasis added).

[5] United States Code: General Provisions, 28 U.S.C. §§ 1651-1656 (1952) (loc.gov).

[6] It is not entirely clear whether shortening to "by counsel" was done in the 1948 amendment. The advisory committee notes to the 1944 amendment of Criminal Rule 44 quotes § 1654 with the assistance-of-counsel-or-attorney-at-law language. So, either there was another amendment between 1944 and 1948 or the 1949 amendment did not fully restore § 1654 to the 1911 version. Unfortunately, year-by-year versions of this statute have proven difficult to track down.

The change to "by counsel" survived the 1949 rollback. The allusion to the last phrase being "surplusage" in 1948 and its subsequent restoration in 1949 is intriguing, but I have not been able to find much legislative history on these changes. For example, the reviser's notes and several cases refer to 80th Congress House Report No. 308, but I cannot find it online.

The current § 1654 has not changed since 1949. To summarize, these are the differences between 1789 and today:

> "[I]n all ~~the~~ courts of the United States~~,~~ the parties may plead and ~~manage~~ conduct their own ~~causes~~ cases personally or by ~~the assistance of such~~ counsel ~~or attorneys at law~~ as, by the rules of ~~the said~~ such courts, respectively, ~~shall be~~ are permitted to manage and conduct ~~their cases~~ causes therein.

Rule-Making Authority and Appellate Rule 46

Does the statute's reference to counsel who are "permitted to … conduct causes" in the federal courts "by the rules of such courts" indicate that this statute accords the local courts authority over attorney admissions?

Courts were regulating attorney admissions and conduct prior to the REA, but it is not clear under what authority they did so—possibly inherent authority, some natural law theory, or statutory authorization like Section 35. *See generally Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (discussing attorney admission and discipline in the context of a Civil War era statute requiring attorneys to swear oaths).

More recently, the Supreme Court has "recogniz[ed] that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. See 28 U.S.C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). "This authority includes the regulation of admissions to its own bar." *Id.* This is a point on which the dissent agreed. *Id.* at 652 (Rehnquist, J., dissenting) ("It is clear from 28 U.S.C. § 1654 that the authority provided in § 2071 includes the authority of a district court to regulate the membership of its bar.").[7]

Nor was *Frazier* the first time the Supreme Court mentioned these provisions together as a basis for authority. The Court had previously noted that two district

[7] The Court held that the district court "was not empowered to adopt its local Rules to require members of the Louisiana Bar who apply for admission to its bar to live in, or maintain an office in, Louisiana where that court sits." *Frazier*, 482 U.S. at 645. The dissent, however, believed that the Supreme Court lacked authority to set aside a rule promulgated by a district court governing admission to its own bar merely because it found the rules "unnecessary and irrational." *Id.* at 652-55.

courts were "[a]cting under 28 U.S.C. §§ 1654, 2071, and Rule 83" when they promulgated local rules governing practice in their courts." *United States v. Hvass*, 355 U.S. 570, 571 (1958).[8]

Circuit courts have made similar statements. The Seventh Circuit stated that "[t]he authority to adopt rules relating to admission to practice before the federal courts was delegated by Congress to the federal courts in Section 35 of the Judiciary Act of 1789, … *now codified as* 28 U.S.C. § 1654." *Brown v. McGarr*, 774 F.2d 777, 781 (7th Cir. 1985); *see also Pappas v. Philip Morris, Inc.*, 915 F.3d 889, 895 (2d Cir. 2019) (quoting *Brown*). The Seventh Circuit also relied on § 2071 and inherent power to support the district court's authority to regulate attorney conduct.

It appears that courts have the necessary authority to regulate admission to the bar of that court under § 1654 and the REA, but it is not entirely clear whether § 1654, alone, would provide sufficient authority.[9]

If so, was this statute analyzed during prior rulemaking discussion on attorney admissions, for example in the lead-up to the adoption of Appellate Rule 46?

I have not found a direct reference to § 1654 in the discussion leading up to the addition of Appellate Rule 46 in the 1960s—at least not in the materials on the uscourts.gov website, namely the Committee Reports and Meeting Minutes. There is another archive of historical records that I have not yet searched, so there might still be something to be found.

Interestingly, however, in the minutes for the Appellate Rules Committee's August 1963 meeting, Dean O'Meara felt that attorney admission issues should be left for each appellate court to deal with by local rule while other members felt that this was an area where uniformity would be particularly helpful to the bar.[10]

[8] The issue in *Hvass* was not, however, about the validity of a local rule, but rather whether a willfully false statement made by an attorney under oath during the district court's examination, under its local rule, into his fitness to practice before it, constitutes perjury.

[9] The reviser's note to the 1940s amendments to § 1654 also mentions these sections together, stating that "the revised section [1654] and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court." That said, the reviser's note was getting at separate discussion about who can appear before the Tax Court and whether it should be limited to attorneys.

[10] Circuit courts as they existed in the 18th century looked very different from modern courts of appeal, which were created in the Evarts Act in 1891. Another potential avenue for follow-up research is determining when courts of appeals created local rules governing attorney admission (presumably in the late 19th and early 20th centuries but possibly earlier) and seeing what authority they cited.

TAB 8

MEMORANDUM

DATE: August 21, 2024

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Sketch of potential rule amendments concerning self-represented litigants' filing and service

As you know, a working group has recently been discussing possible rule amendments on the topic of self-represented litigants' filing and service. The working group has focused on two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via the court's electronic-filing system[1] or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive an electronic notice of filing (Notice of Filing)[2] through the court's electronic-filing system or through a court-based

---

1 In prior memos, this project had referred specifically to CM/ECF. This memo refers generically to the "court's electronic-filing system" in order to take account of other terms that courts may use for their electronic-filing system (such as the Appellate Case Management System, or "ACMS," that is in use in the Second and Ninth Circuits).

2 This memo uses "Notice of Filing" to denote an electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket. The term "Notice of Filing" encompasses the current terms "Notice of Docket Activity" and "Notice of Electronic Filing" or "NEF."

One Clerk representative questions the choice of "Notice of Filing" as the defined term, and suggests "Notice of Entry" or "Notice of Docket Activity" as possible alternatives: "Because electronic notices are sent whenever anything happens on the docket, we tend to think the term 'NDA' is more appropriate. There are many instances where nothing was 'Filed' and only a docket entry has been entered. Many courts issue docket text-only orders. It's not implausible to consider attorneys eventually doing this too. If so, would 'entry' be more accurate than 'document?'"

This is a good question. If one were thinking only of items that might be served by a party, then "Notice of Filing" seems like a logical choice, because the items that a party might typically need to serve under Rule 5 – usually, post-complaint pleadings, motions, and other papers – would also be filed. But Civil Rule 77(d)(1) incorporates Rule 5(b) when discussing the

electronic-noticing program.

The working group has collaborated on a very tentative sketch of a possible amendment to Civil Rule 5. This memo sets out the current version of that sketch for discussion at the fall Advisory Committee meetings. After providing a brief introduction (in Part I of this memo), I set out the sketch in Part II.

I. Overview of the project

General policy choices. The sketch in Part II implements two policy choices – one regarding service, and the other regarding filing.

As to service, the sketch eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. (See Part I of my September 2023 memo[3] for discussion of some courts that have already implemented such an exemption.)

The sketch also permits service by email to the address that the court uses to email Notices of Filing, so long as the sender has designated in advance the email address from which such service will be made.[4] This provision could be useful beyond the context of self-

---

clerk's service of notice of the entry of an order or judgment: "Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b)." So it's worthwhile to consider whether the choice of term should reflect the reality that many of the court-provided notices served electronically under Rule 77(d)(1) and Rule 5(b) concern docket entries that don't involve a separately *filed* court order. (See also Rule 79(a)(2), including among the things the clerk must enter in the docket "papers filed with the clerk" and "orders, verdicts, and judgments.")

On the other hand, I think that terminological issue is also baked into the current Rule as well, given that existing Rule 5(b)(2)'s description of service through CM/ECF reads in relevant part "A paper is served under this rule by: … (E) sending it to a registered user by filing it with the court's electronic-filing system." If that provision is sufficiently clear as it applies currently to Rule 5(b) as incorporated by Rule 77(d)(1), then perhaps "Notice of Filing" would be sufficiently clear in the amended rule as applied to the same thing.

3 That memo is available starting at page 184 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf

4 The proviso about designating the email address from which the service will be made is designed to address the possibility that this sort of email service otherwise might end up in the

represented litigants; for example, discovery material that is served but not filed could also be served this way.

As to filing, the sketch makes two changes compared with current practice: (1) it presumptively permits self-represented litigants to file electronically (unless a court order or local rule bars them from doing so) and (2) it provides that a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

A court could comply with this amended filing rule by doing either of the following:

- Allowing reasonable access for self-represented litigants to the court's electronic-filing system. That access could (and I expect typically would) be limited to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training. (See Part II of my September 2023 memo for discussion of some courts that already provide such access.)

- Not allowing self-represented litigants to access CM/ECF, but providing them with an alternative electronic means for filing (such as by email or upload) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). (See Part III of my September 2023 memo for discussion of some courts that already have such alternative programs.)

Note that, under the amended filing rule, a court would need to adopt a local rule or court order *dis*allowing CM/ECF access for self-represented litigants if it wanted to foreclose such access; the default would be access. Note also that the rule would always permit a court to enter an order barring a particular litigant from using CM/ECF.

These policy choices, at present, are the product of discussions in the working group.

---

recipient's "junk mail" folder. This concern might arise with respect to service by a party in a way that it wouldn't arise with respect to notices from the court, because it's reasonable to expect those participating in the court's electronic-filing or electronic-noticing systems to take steps to ensure that emails from the court's email address won't be snared in a junk folder. In order for the participant to take similar steps with respect to service by another litigant, it may be necessary to require that a litigant making service by email has designated their email address in advance before using it to make email service.

It should be noted, though, that there is not full consensus on the inclusion of this proviso. One of the Clerk representatives argues that this proviso is unnecessary and "serves only to complicate the rule. A recipient's junk filters aren't really of concern to the courts. This potentially exists in the paper world too. (We mailed it, but it never arrived for any myriad of reasons.)"

After roughing out a sketch of the proposed rule changes based on those policy choices, we circulated the sketch to the Clerk representatives on the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for their comments. Their input has produced significant improvements in the draft shown here.

In addition, the Clerk liaisons' feedback made clear that – as the committees have already heard – the proposed changes regarding filing by self-represented litigants will be controversial at the level of the trial courts (though likely not at the level of the courts of appeals). Although the proposed rule and Note would make clear that e-filing need not be provided to incarcerated filers and that litigants who abuse the system can be barred from it, concerns persist that technological limitations or cybersecurity fears may nonetheless make it difficult for some trial courts to comply with either of the dual options noted above (providing self-represented litigants with either CM/ECF access or some alternative means of electronic filing and noticing).

In the event that the advisory committees decide to publish these proposed amendments for comment, we would expect to receive robust public input on the filing aspects of the proposal. A question for the Advisory Committees is whether to proceed with publication and comment of the filing portion of the project despite the concerns that have been expressed about it. On one hand, these concerns may ultimately lead the Advisory Committees to hold back from approving the filing aspects of the proposal sketched below (at least in the rule sets that apply to the trial courts). But on the other hand, publication and comment may usefully serve to generate new knowledge and awareness about practices in federal courts around the country, which may be salutary even if the changes concerning filing are not adopted in this rulemaking cycle.

In any event, whether or not the Advisory Committees decide to publish for public comment the aspects of the proposed rule concerning filing, the working group supports the publication (and adoption, assuming no unanticipated grounds for hesitation emerge from the comment period) of the proposed rule changes concerning service. The service-related changes sketched below have not generated substantive concerns to date (though, as noted in this memo, consensus is still emerging on the best language choices for the service provisions).

Implementation across the rule sets. As noted, we are using Civil Rule 5 for illustrative purposes. Once we arrive at a working draft of Civil Rule 5, we would then turn to working on parallel sketches for amendments to the other sets of rules.[5]

---

5 Here is my working list of the rules that would require consideration: Appellate Rule 25 (filing and service); Bankruptcy Rules 5005 (filing), 7005 (applying Civil Rule 5 in adversary proceedings), 8011 (filing & service in appeals to a district court or BAP), and 9036(c) (electronic service); and Criminal Rule 49.

In those other rules, there might be additional particularities to consider as drafting proceeds. For example, as noted in the text, our goal here is to address filing and service issues of documents subsequent to the initial complaint – hence the focus on Civil Rule 5 rather than

Application in the criminal, habeas, and Section 2255 contexts. We are contemplating possible amendments that would be generally parallel across the Appellate, Bankruptcy, Civil, and Criminal rule sets. It is also necessary to consider how the amendments would work in the context of state-prisoner habeas (i.e., Section 2254) and Section 2255 proceedings.

Criminal Rule 49's treatment of issues regarding self-represented litigants may at first appear beside the point, given that nearly all criminal defendants are represented. But Criminal Rule 49's potential applicability to Section 2255 proceedings means that there is a significant population of self-represented litigants that could be affected by the proposed changes to Criminal Rule 49. Admittedly, nearly all those self-represented litigants will be incarcerated, and the proposed amendments would not require courts to provide CM/ECF access for self-represented litigants who are incarcerated. So the on-the-ground effect of the proposed filing-related changes to Criminal Rule 49 would be minimal. However, the proposed service-related changes to Criminal Rule 49 (and Civil Rule 5) would be important for incarcerated self-represented litigants (in Section 2254 and Section 2255 proceedings), because those changes would relieve such litigants of a service requirement that is likely to be onerous for incarcerated litigants (who may have greater difficulty than non-incarcerated litigants in paying for postage).

There is a further reason to amend Criminal Rule 49 in tandem with Civil Rule 5. As you know, Rule 12 of the Rules Governing § 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Meanwhile, Rule 12 of the Rules Governing § 2255 Proceedings provides that "[t]he Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." To the extent that Civil Rule 5 and Criminal Rule 49 are amended so as to take the same approach to the service and filing questions discussed here, that would allow courts to avoid choosing which rule governs.

As drafting proceeds, the Appellate and Criminal Rules Committees might also wish to give attention to whether the proposed changes would require adjustment to the 'prison mailbox' provisions in Appellate Rules 4(c) and 25(a)(2)(A)(iii) and in Rules 3 of the habeas and Section

---

Civil Rule 4. In the bankruptcy context, the petition that initiates the bankruptcy may not be the only case-initiating document, because complaints in adversary proceedings might also be filed in the context of an ongoing bankruptcy. Thus, the Bankruptcy Rules Committee might wish to consider adjusting the language of the sketch's Committee Note, when transposing it into the context of Bankruptcy Rule 5005, to make clear that the amended rule does not displace any local requirement that a complaint initiating an adversary proceeding be filed in paper. The adjustment might be accomplished by this tweak to the Committee Note: "Also, a court could adopt a local provision stating that certain types of filings – for example, **complaints in adversary proceedings, and/or** notices of appeal – cannot be made by means of the court's electronic-filing system."

2255 rules.[6]

II. The tentative rule sketch

Below is the current sketch. A particular focus, in drafting, has been on terminology. We are trying to use language that maps onto the way in which court technology programs currently work and are likely to work in the future.

Currently, the court electronic-filing programs that we are aware of are the Case Management / Electronic Case Filing (CM/ECF) system and the Appellate Case Management (ACMS) system; both of those are encompassed in the term "the court's electronic-filing system." We are also aware of alternative electronic-filing options that some courts provide to self-represented litigants (such as the Electronic Document Submission System (EDSS)) and court-based electronic-noticing programs. Notice from a court-based electronic-noticing system is encompassed in proposed Rule 5(b)(2)'s reference to persons "registered to receive [a Notice of Filing] from the court's electronic-filing system" and in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for … receiving electronic notice of activity in the case." Alternative electronic-filing options (such as EDSS) are encompassed in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for filing documents … in the case."

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

---

6 I highlighted this question in a prior sketch of this project that was circulated to the Clerk representatives on the Advisory Committees and to selected additional court personnel. The feedback that we received included this suggestion: "This would be a good opportunity to amend [Appellate Rule] 4(c) to make explicit that the electronic service programs qualify as 'a system designed for legal mail' and to define 'deposited in the institution's mail system' for purposes of filing - what kind of document, statement, or evidence does the inmate need to provide when filing electronically, to get the benefit of the mailbox rule?"

The possibility of revising the prisoner-mailbox provisions to take account of prison e-filing programs may have been briefly considered the last time that the Appellate Rules' prison-mailbox rules were amended (effective 2016). At that time, no attempt was made to address institutional e-filing programs. But it may well be that the prevalence of prison e-filing programs has expanded in the 8+ years since the 2016 amendments were under consideration, so perhaps the time may be ripe for re-considering this question. In any event, that question seems potentially separable from the proposed rule changes addressed in the text of this memo.

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service by Means of the Court's Electronic-Filing System. The [court's sending of the][7] Notice of Filing [is] [constitutes][8] service under this rule [of the filed paper][9] on the Notice's[10] date on any person registered to receive the Notice from the court's electronic-filing system. The court may provide by local rule that [filings] [papers filed] under seal are not served under this Rule 5(b)(2).

(3) Service by Other Means ~~in General~~. A paper ~~is~~ can also be served under this rule by:

---

7 Some participants have suggested eliminating the phrase "court's sending of the" and saying, simply, "The Notice of Filing is" service. That shorter formulation may also work, but one benefit of the slightly longer formulation is that it might be clearer to users (such as self-represented litigants) who aren't generally familiar with the system.

8 Which of these verbs is better? Cf. Civil Rule 5(d)(3)(C) ("A filing made through a person's electronic-filing account . . . constitutes the person's signature.").

9 Is this bracketed language helpful or unnecessary? A participant suggested "of the filed document," but I would lean toward "of the filed paper" if we are adding this phrase, because Civil Rule 5 uses "paper" instead of "document."

10 Should we capitalize "Notice"? I believe that the CM/ECF authorities use capitals in the phrase "Notice of Electronic Filing," see, e.g., https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf. Presumably whether to capitalize the short form ("Notice") is a question for the style consultants.

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made – or by other electronic means that the person consented to in writing—in either of which events service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~

(4) Papers not filed. Rule 5(b)(3) governs service of a paper that is not filed.

(5) Definition of "Notice of Filing." The term "Notice of Filing" in this rule includes a Notice of Docket Activity, a Notice of Electronic Filing, and any other similar electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers after the Complaint. Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served under Rule 5(b)(2)~~by filing it with the court's electronic-filing system~~. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) Nonelectronic Filing. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing and Signing.

(A) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an Unrepresented Person—When Allowed or Required.

(i) A person not represented by an attorney~~: (i)~~ may file electronically ~~only if allowed by~~ unless a court order or ~~by~~ local rule bars the person from doing so; ~~and~~but ~~(ii)~~ may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(ii) A local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

(iii) A court may set reasonable conditions and restrictions on access to the court's electronic-filing system for persons not represented by an attorney.

(iv) A court may deny a particular person access to the court's electronic-filing system, and may revoke a person's prior access to the court's electronic-filing system for noncompliance with the conditions stated in (iii).

* * *

Committee Note

Rule 5 is amended to address two topics concerning self-represented litigants. Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "Notice of Filing" as any electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a Notice of Filing from the court's electronic-filing system. Litigants who are registered to receive a Notice of Filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the

Notice because they have registered for a court-based electronic-noticing program.[11] (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 5(b)(2) states that the court may provide by local rule that papers filed under seal are not served under Rule 5(b)(2). This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper can also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives Notices of Filing. This option might be useful for a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the Notice of Filing).

Subdivision (b)(3)(E). Subdivision (b)(3)(E) is amended in two ways. First, the prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2). Second, a new option is added: "sending [the paper] by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made." This provision enables a litigant to serve another case participant by email to the email address that the court uses to email Notices of Filing, but only if the sending litigant has already designated in advance the email address from which such service will be made. The latter proviso addresses the possible concern that otherwise an email from another litigant in the case might end up in the recipient's junk email folder.

---

11 N.B.: An initial sketch of Rule 5(b) included a proposed Rule 5(b)(3) that separately treated "service by means of the court's electronic-noticing system," but we have removed that provision because it appears that such service appears to be already covered in proposed Rule 5(b)(2). The reason is that – as far as we are aware – the way that electronic-noticing programs work, in the courts that have them, is that email addresses for those self-represented litigants who opt in to electronic noticing are simply added to the list of email recipients that will receive Notices of Filing from the court's electronic-filing system. (There seems to be no reason that any court would use a different method for their e-noticing program. However, if we are incorrect about this, public comment should bring that fact to light.)

Subdivision (b)(4). New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a Notice of Filing, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

Subdivision (b)(5). New Rule 5(b)(5) defines the term "Notice of Filing" as any electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of Filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "Electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(3)(B). Under new Rule 5(d)(3)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(3)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(3)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5(d)(3)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(3)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5(d)(3)(B)(ii) uses the term "general court order" to make clear that Rule 5(d)(3)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5(d)(3)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

* * *

A conforming amendment to Civil Rule 6(d) would be needed to adjust for the change in numbering of current Civil Rule 5(b)(2):

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

> **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

TAB 9

Date: August 12, 2024

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Completed Research for Rules Committees

Local-Counsel Requirements for Practice in Federal District Courts

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes when and where federal district courts require local counsel to participate in litigation and attorney admissions (www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts).

Fees for Admission to Federal Court Bars

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes fees charged for admission to federal court bars, including admission fees, pro hac vice fees, and fees charged by state and territory bars for certificates of good standing (www.fjc.gov/content/385023/fees-admission-federal-court-bars).

Current Research for Rules Committees

Broadcasting Criminal Proceedings

The Center is providing the Criminal Rules Committee with research support as it studies whether the proscription on remote public access to criminal proceedings should be amended.

Remote Participation in Bankruptcy Contested Matters

The Center is providing the Bankruptcy Rules Committee with research support as it studies remote participation in contested matters.

Prior Convictions as Impeachment Evidence for Criminal Defendants

At the request of the Evidence Rules Committee, the Center is conducting research on prior felony convictions as impeachment evidence against testifying criminal defendants.

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

The Need for Redacted Social Security Numbers in Bankruptcy Cases

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers in public filings.

Bankruptcy Judges' Use of "Special Masters"

At the request of the Bankruptcy Rules Committee, the Center will be gathering information from bankruptcy judges on how and whether they would use "special masters" if they had the authority to do that. It is acknowledged that there are concurrent proposals to discontinue use of the word "master" because of the word's historical association with involuntary servitude.

Default and Default-Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. Of particular interest was under what circumstances they are entered by clerks rather than judges. A completed report will be presented to the committee at its October 2024 meeting.

Complex Criminal Litigation Website

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

Completed Research for Other Judicial Conference Committees

Unredacted Social Security Numbers in Federal Court PACER Documents

At the request of the Committee on Court Administration and Case Management, as part of the Center's ongoing privacy study, the Center identified unredacted Social Security numbers in public filings apparently out of compliance with Federal Rules of Practice and Procedure: Appellate

Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. The Center found 22,391 unredacted Social Security numbers in a sample of 4.7 million filed documents (www.fjc.gov/content/387587/unredacted-social-security-numbers-federal-court-pacer-documents). Of those, 22% were exempt from the redaction requirement, and 6% belonged to pro se filers who waived the rules' privacy protection by disclosing their own Social Security numbers.

Current Research for Other Judicial Conference Committees

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

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

Remote Public Access to Court Proceedings

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

Case Weights for Bankruptcy Courts

The Center is collecting data for updated research on bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

Enhancing Efforts to Coordinate Best Workplace Practices Across the Federal Judiciary

This report, and the study of federal-judiciary workplace practices on which it is based, were undertaken by the Center and the National Academy of Public Administration pursuant to a House Committee recommendation under the Consolidated Appropriations Act of 2023 (www.fjc.gov/content/388247/enhancing-efforts-coordinate-best-workplace-practices-across-federal-judiciary).

JUDICIAL GUIDES

Completed

Mutual Legal Assistance Treaties and Letters Rogatory: Obtaining Evidence and Assistance from Foreign Jurisdictions

This guide, now in its second edition, provides an overview of the statutory schemes and procedural matters that distinguish mutual legal assistance treaties and letters rogatory (www.fjc.gov/content/386124/mutual-legal-assistance-treaties-letters-rogatory). It also discusses legal issues that arise when the prosecution, the defense, or a civil litigant seek to obtain evidence from abroad as part of a criminal or civil proceeding.

In Preparation

Manual for Complex Litigation

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

Reference Manual on Scientific Evidence

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

Manual on Recurring Issues in Criminal Trials

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

Benchbook for U.S. District Court Judges

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

HISTORY

Summer Institute for Teachers

In June 2024, the Center collaborated with the ABA to present a week-long professional-development conference for teachers focusing on three famous historical trials: The *Amistad* trial, *United States v. Guiteau*, and *United States v. Rosenberg*. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-two short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history).

Recent posts include "*Chy Lung v. Freeman*: Anti-Chinese Sentiment and the Supremacy of Federal Immigration Law" (www.fjc.gov/history/spotlight-judicial-history/chinese-immigration-restriction), "Eighth Amendment Prison Litigation" (www.fjc.gov/history/spotlight-judicial-history/eighth-amendment-prison-litigation), "The Certificate of Division" (www.fjc.gov/history/spotlight-judicial-history/certificate-division), and "NFL Television Broadcasting" (www.fjc.gov/history/spotlight-judicial-history/nfl-television-broadcasting).

A User Guide to the History of the Federal Judiciary Website

The Center recently added to its History website a user guide that provides brief descriptions of resources of interest to specific audiences, including the general public, judges and court staff, educators, students, and researchers (www.fjc.gov/history/user-guide).

Snapshots of Federal Judicial History, 1790–1990

The Center recently added to its History website extensive exhibits presenting data about the federal judiciary at various points in its evolution (www.fjc.gov/history/exhibits/snapshots-federal-judicial-history-1790-1990).

EDUCATION

Specialized Workshops

FJC–Center for Law, Brain & Behavior Workshop on Science-Informed Decision-Making

Participants at this three-day, in-person workshop on the incorporation of behavioral science into decisions made in criminal cases were judges and probation and pretrial services officers.

Judicial Seminar on Emerging Issues in Neuroscience

A two-day, in-person judicial seminar explored developments in neuroscience and the role that neuroscience can play in legal determinations, such as decisions about criminal culpability and the admissibility of evidence. The seminar was cosponsored by the American Association for the Advancement of Science and funded by a grant from the Dana Foundation.

Electronic Discovery Seminar

A two-day, in-person judicial workshop explored technologies, rules, and legal requirements related to the retrieval of electronically stored information. It was cosponsored by the Electronic Discovery Institute.

Employment Law Workshop

A two-day, in-person judicial workshop explored issues arising in employment-law litigation, including the use of experts, electronic discovery, case management, retaliation, implicit bias, big data, and the role of the whistleblower. The New York University School of Law's Institute of Judicial

Administration and Center for Labor and Employment Law cosponsored the program.

Ronald M. Whyte Intellectual Property Seminar

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual property law. It was cosponsored by the Berkeley Center for Law and Technology.

Antitrust Judicial Law and Economics Institute for Federal Judges

A three-day, in-person judicial workshop focused on antitrust law and economics fundamentals in the context of various procedural issues, including pleading an antitrust case after the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*; antitrust injury; class certification; and the use of experts at class certification, during damages analysis, and throughout trial. The program was a collaboration of the Center, the American Bar Association's Antitrust Section, the University of Chicago, and the University of California at Berkeley.

Distance Education

Court Web

A monthly webcast included as recent episodes "Generative AI and the Future of Legal Practice" (featuring Middle District of Florida Magistrate Judge Anthony Porcelli and Southern District of California Magistrate Judge Allison Goddard), "Election Litigation Update" (featuring Professors Richard Hasen and Derek Muller), "Hot Topics in Federal Sentencing" (featuring Northern District of Ohio Judge Benita Pearson and Alan Dorhoffer, director of the U.S. Sentencing Commission's Office of Education and Sentencing Practice), "Finding the Ripcords: Top Ten 'Safe Landing' Federal Practice Cases" (featuring attorney Jim Wagstaffe and discussing recent appellate cases addressing jurisdictional issues), "Best Practices for Serving Unrepresented Litigants in the Federal Courts" (featuring Northern District of California Judge Jacqueline Scott Corley and Western District of Missouri Judge Willie Epps), and "Below the Radar: Vital Civil Procedure Developments You Might Not Know" (featuring attorney Jim Wagstaffe and highlighting the most recent developments in federal jurisdiction and civil procedure).

Term Talk

The Center has presented periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes include "*Turkiye Halk Bankasi v. United States*; *Pugin v. Garland*" (discussing subject-matter jurisdiction over criminal prosecutions against foreign sovereigns) and "*Biden v. Nebraska*; *United States v. Texas*" (discussing state standing to sue

for losses suffered by a third party and standing to seek vacation of immigration guidelines).

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

Interactive Orientation for Federal Judicial Law Clerks

The Center provides term law clerks with online interactive training resources.

Customer Service in the Courts

Launched in 2023, this e-learning course discusses working with self-represented litigants, among other topics. The course objectives are to provide information and address concerns without crossing into legal advice.

General Workshops

National Leadership Conference for Chief Judges of United States District and Bankruptcy Courts

This is an annual conference. In addition to updates from various Judicial Conference committees, the 2024 workshop included a session on the evaluation of the interim recommendations of the Cardone Report.

National Workshop for U.S. District Court Judges

These three-day workshops are held in even-numbered years. Among the topics examined at the 2024 workshop were scientific evidence, artificial intelligence, employment-discrimination litigation, deferred sentencing, restorative justice, and managing mass litigation.

National Workshop for U.S. Magistrate Judges

These three-day workshops are held annually. Among the topics examined at the 2024 workshop were the impact of ChatGPT on court filings, including those by self-represented litigants, and the impact of “deepfakes” on evidence and procedure.

National Workshop for U.S. Bankruptcy Judges

These three-day workshops are held annually. Among the topics discussed in 2024 were sealing court records and healthcare bankruptcies.

Circuit Workshops for U.S. Appellate and District Judges

In 2023, the Center put on two- or three-day workshops for Article III judges in the Second, Ninth, and Eleventh Circuits.

National Conference for Appellate Staff Attorneys

The Center puts on biennial three-day educational conferences for appellate staff attorneys, now in odd-numbered years.

Wm. Matthew Byrne, Jr., Judicial Clerkship Institute for Career Law Clerks

Held in collaboration with Pepperdine University Caruso School of Law, this annual two-day program offers sessions on managing pro se litigation, bankruptcy appeals, and jurisdictional issues.

Federal Defender Capital Habeas Unit National Conference

This annual three-day conference is designed for attorneys, paralegals, investigators, and mitigation specialists.

National Seminar for Federal Defenders

This annual three-day seminar is designed for assistant federal defenders who have been practicing criminal law for a minimum of three years.

Orientation Programs

Orientation Programs for Judges

The Center invites newly appointed judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, judicial ethics, and opinion writing. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, case management, security, self-represented litigants, relations with the media, and ethics. Recent orientation programs for district judges have included updates on the Cardone Committee's recommendations and evaluation. Orientation programs for circuit judges include a program at New York University School of Law for both state and federal appellate judges.

Orientation Seminar for Assistant Federal Defenders

This week-long seminar is held every year.

TAB 10

TAB 10A

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

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

RE: **Rule 17 Subpoenas**

DATE: **October 13, 2024**

This memorandum reports on the progress of the Rule 17 Subcommittee and provides information to prepare Committee members for the discussion of Rule 17 on November 7 at the Committee's meeting in New York City.

Part I reviews the discussions of the Subcommittee. Part II provides some information about the discussion draft showing potential revisions to the text of Rule 17 and the accompanying draft Committee Note. Part III previews the November 7 session on Rule 17.

I. Subcommittee Progress to Date

A summary of the Subcommittee's work may be helpful, especially for members new to this project. The Subcommittee formed to consider changes to Rule 17 following a proposal by the White Collar Crime Committee of the New York City Bar. The Subcommittee has met thirteen times, beginning in March of 2022. Throughout this process, it has been understood that the representative from the Department of Justice—initially Mr. Wroblewski, then Ms. Tessier—could not state the Department's official position during these preliminary discussions as the Subcommittee has been developing its recommendations.

A. Initial Investigation Into the Need for Revision

To learn more about current subpoena practice in various districts and explore whether there is a problem that warrants revising Rule 17, the Subcommittee began by inviting a group of experienced practitioners to join the Committee Meeting in October 2022. Defense speakers described the need for subpoena authority in different kinds of cases to properly research possible defenses and lines of investigation. They also described very different experiences in different districts, ranging from narrow applications of the *Nixon*[1] case to more generous access in other districts.

The Subcommittee continued investigating this foundational question in the spring of 2023, reviewing the history of Rule 17, learning about cases in which the government has used Rule 17 subpoenas, meeting twice with experts whose practices included responding to subpoenas (tech companies, banks, and financial service companies), and hearing summaries of the Reporters' discussions with individuals representing medical providers, hospitals, and schools, as well as attorneys from the Department of Justice who work on victim and witness issues in the Executive Office of U.S. Attorneys.

[1] United States v. Nixon, 418 US 683 (1974).

At its meeting in April 2023, the Subcommittee tentatively decided that there is a sufficient basis to continue working on potential revisions that would

- clarify several procedural issues that have generated confusion and disagreement, including ex parte subpoenas, judicial oversight before issuance, and subpoena returns;
- expand, incrementally, access to third party information beyond that available in the districts that apply *Nixon* narrowly; and
- not override or affect any existing statutory regulation, such as the Stored Communications Act.

In the meetings that followed, the Subcommittee reviewed research from the Rules Law Clerks and the Reporters on several topics, including subpoena regulation in the states and case law applying *Nixon*.

B. Clarifying Procedures and Ex Parte Subpoenas

The Subcommittee tentatively agreed (not always unanimously) that the revisions should

(1) be entirely contained within Rule 17, not a new, additional rule;

(2) require judicial approval before a Rule 17(c) subpoena is issued, rejecting the practice in some districts of permitting parties to obtain subpoenas without judicial oversight;

(3) clarify that ex parte subpoenas should be available upon a showing of good cause;

(4) provide that the court itself may neither disclose information it receives from an ex parte subpoena to the opponent of the party who sought the information, nor order the party who seeks an ex parte subpoena to disclose the material produced to the other party when it is received;

(5) state explicitly that access by parties to information produced in response to an ex parte subpoena is regulated by existing disclosure rules (Rules 12.1, 16, etc.);

(6) authorize the court to order a witness to produce the items directly to counsel for the party requesting the subpoena, but require production to the court when a subpoena either is requested by a party without representation or seeks information that is protected, because greater judicial oversight is needed in those situations;

(7) retain without change Rule 17(c)(3)'s requirement of notice to victims about subpoenas for their personal or confidential information unless there are "exceptional circumstances," and

(8) not attempt to specify additional rules for providing notice of a subpoena, because many existing laws already regulate if, when, and what notice of a subpoena must be provided to specific people.

C. Subpoenas for Unprotected Information

The Subcommittee also tentatively agreed (not always unanimously) that the revisions should

(1) include a less demanding showing for obtaining a subpoena for unprotected information (such as recordings from a business's security cameras outside its premises) than for protected information;

(2) provide that, for subpoenas seeking unprotected information, the party seeking a subpoena must describe the information with reasonable particularity, and state facts showing each designated item is reasonably likely to be possessed by the subpoena recipient and is not reasonably available from another source, and that the item contains information that is, "material to preparing the prosecution or defense"; and

(3) state in the Note that the phrase "material to preparing" carries its meaning from 16(a)(1)(E)(i).

D. Subpoenas for Protected Information.

The Subcommittee's most challenging task has been developing a standard for obtaining a subpoena for protected information that would address concerns with the *Nixon* test. The Subcommittee solicited tentative preferences from every Subcommittee member and reviewed again the standards from the minority of states that provide wider access than *Nixon* provides. Members initially disagreed about whether the rule should include a "front-end" showing higher than that for unprotected information, with some members favoring only more rigorous "back-end" (post-issuance) *procedures* to avoid inappropriate disclosure. Members also disagreed about what information would be obtainable other than admissible evidence allowed under *Nixon*, if a front-end showing was required. The Subcommittee continued to work on these issues, and over a series of meetings, it

(1) revisited the debate about what would count as "protected" information, namely, whether that category should turn on the existence of legal protection for that information, or on general characteristics of the information (e.g. "personal or confidential"). A majority rejected an earlier tentative decision to use the term "personal or confidential" to define protected information and favored instead including both "personal or confidential information about a victim" and other information "protected by a privilege, confidentiality protection, or privacy protection under federal or state law."[2]

(2) discussed, without deciding, the need to clarify whether information is always "protected" once any law regulates its access or disclosure in any way, or rather, is "protected" only when the law protecting the information applies to the specific recipient of the subpoena who possesses it or to the specific party requesting it. (For example, is information that HIPAA

[2] An earlier formulation included "protected *from disclosure* by."

prohibits a health care provider from disclosing without first providing notice to the patient also "protected" when a subpoena seeks that same information from the patient?)

(3) did not resolve if or how to incorporate state law into the rule's definition of protected information, or its specifications for in camera review before disclosure, but instead decided to tee up those questions for committee members and participants at the November meeting.

(4) tentatively decided to require that the party seeking a subpoena for protected information must describe the information with "reasonable particularity" (preferring that phrase to *Nixon's* "specificity" requirement) and must "state *facts* showing" (no mere speculation) that each designated item is "*likely* to be possessed by the subpoena recipient" and is "not reasonably available from another source."

(5) tentatively favored language requiring a party also to state facts showing that the information is either "*likely to be* admissible as evidence," (instead of "is" admissible, under *Nixon*) and considered several alternatives to describe what protected information, *other* than information that is likely to be admissible, could be sought by subpoena. These options, some drawn from state law, included

- only "exculpatory" information; information "necessary to a determination of guilt or innocence;"

- information "likely to . . . lead to evidence admissible at trial, and without production of which the moving party cannot properly prepare for [trial],"

- or information "that, admissible or not: is inconsistent with an element of a charged offense, establishes a recognized affirmative defense, or casts substantial doubt upon the accuracy of evidence the other party is expected to introduce at trial or sentencing."

Most members favored something like the latter, although there was also support for language that would provide the government symmetric access to information, e.g., inadmissible information consistent with an element of the offense or inconsistent with an element of affirmative defense.

(6) tentatively decided that the rule should make it clear that Rule 17(c) subpoenas are available for proceedings other than trial, given that there is some authority for obtaining subpoenas for material to use at sentencing and other proceedings, but did not decide which proceedings should be included or excluded.

(7) tentatively rejected a restriction on access to subpoenas for only those proceedings already "scheduled," opting instead for the adjective "upcoming."

(8) tentatively approved language regarding in camera review to ensure that only information authorized to be disclosed is revealed.

(9) tentatively approved language leaving to the judge discretion to order protective steps (rather than a presumption that protective steps are required).

(10) tentatively endorsed revisions clarifying which parts of Rule 17 are applicable to grand jury subpoenas, and which are not, to avoid dividing the Rule into two separate rules, one for grand jury subpoenas and one for other subpoenas.

II. The Discussion Draft and Note

Given that several issues remain undecided or have yet to be discussed, the discussion draft attached is *not* a final recommendation of the Subcommittee. It reflects concepts and language on which the Subcommittee has agreed, as well as concepts and language it continues to debate. Brackets appear around alternative options for text in various places, but the absence of brackets does not indicate unanimous support. Indeed, the draft includes some changes made by the Reporters after the Subcommittee's last meeting that the Subcommittee and the style consultants have yet to review. Like the text, the draft Committee Note includes points on which Subcommittee disagreement persists. In other words, although the draft is sufficiently developed to provoke the constructive critique needed to inform the Subcommittee's continued deliberations, it is a work in progress that is expected to change.

III. The Panel Discussions Planned for November 7

The Subcommittee identified twelve speakers with diverse experience on these issues to join the Committee Meeting on November 7, share that experience with the Committee, provide their views on the discussion draft, and answer questions. The list of speakers appears at the end of this memo. It includes counsel with CJA, federal defender, and white collar experience, a privacy expert, a victim's advocate, and four attorneys suggested by the Department of Justice. The speakers represent many different districts with diverse Rule 17 practices.

Each speaker received a short list of issues on which the Subcommittee continues to deliberate, to encourage comment on those issues. Below is a general description of the issues identified for invitees:

(1) How should the rule define the scope of "protected" information requiring heightened standards for issuance and more judicial oversight before disclosure?

(2) What role, if any, should state law protections for information play in federal subpoena practice? For example, should the presence of state law protecting information be considered when determining if a subpoena for that information warrants heightened procedures, or if it can be disclosed?

(3) For what proceedings or hearings other than trial should Rule 17 subpoenas be available?

(4) Should the rule make any provision for subpoenas seeking inadmissible protected information after in camera review? If so, how should the scope of that information be defined?

(5) If subpoenas seeking unprotected information should be obtainable without the same showing as subpoenas for protected information, what showing would be sufficient?

(6) Are the draft procedures for the return, review, and disclosure of information appropriate?

(7) When should the rule authorize ex parte subpoenas? Are the draft provisions for issuing and handling ex parte subpoenas appropriate?

(8) Are the draft provisions addressing subpoenas requested by unrepresented parties appropriate?

This list does not define the only issues the Subcommittee expects to be discussed November 7, nor is it necessary that every issue on the list receive attention. Committee members should feel free to raise other questions and issues.

We have asked each speaker to identify the issues he or she is most interested in discussing, and we will use that information to organize the speakers into three different morning panels. There will be ample time for questions during each panel's session, as well as a session after lunch that is reserved for issues or questions that need more time, and/or new comments and questions. We expect a wide-ranging discussion.

TAB 10B

1 **Rule 17. Subpoena**
2 **(a) In General.** A subpoena must state the court's name and the title of the proceeding
3 and must include the court's seal.
4 **(b) Subpoena to Testify.**
5 **(1)** ***Content.*** The clerk must issue a blank subpoena—signed and sealed—to the party
6 requesting it, and that party must fill in the blanks before the subpoena is served.
7 The subpoena must require the witness to appear and testify at a specified time and
8 place.
9 **(2)** ***Defendant Unable to Pay [Costs and] Witness Fees.*** Upon a defendant's ex parte
10 application, the court must order that a subpoena be issued for a named witness if
11 the defendant shows an inability to pay the witness's fees and the necessity of the
12 witness's presence for an adequate defense. The process costs and witness fees will
13 then be paid as they are for witnesses responding to government subpoenas.
14 **(c) Subpoena to Produce Documents, Data, or Other Objects.**
15 **(1)** ***In General***. A subpoena requiring the recipient to produce any books, papers,
16 documents, data, or other objects must require the recipient to produce them at
17 a specified location.
18 **(2)** ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may
19 quash or modify the subpoena if compliance would be unreasonable or
20 oppressive.
21 **(3)** ***Non-Grand Jury Subpoena – Motion Required***. If a party seeks a subpoena other
22 than one issued for a grand jury, the party must do so by motion.
23 **(4)** ***Non-Grand Jury Subpoena – Protected Information***.
24 (A) *In General.* This paragraph (4) applies if a subpoena other than one issued
25 for a grand jury requires the production of items containing either:
26 (i) personal or confidential information about a victim; or
27 (ii) [the type of] information that [may/is likely to be] protected by [a
28 privilege, confidentiality protection, or privacy protection under federal
29 or state law].
30 (B) *Showing Required for Issuance.* In addition to describing each designated
31 item with reasonable particularity, a party must state facts showing that each
32 item:
33 (i) is likely to be possessed by the subpoena's recipient;
34 (ii) is not reasonably available to the party from another source;
35 (iii) contains information that [the/federal] law permits the subpoena's
36 recipient to disclose to the requesting party, and
37 (iv) contains information that is likely to be admissible at an upcoming
38 hearing, trial, or sentencing; or, whether admissible or not, is likely to[:
39 • cast substantial doubt on the accuracy of evidence the other party
40 is expected to introduce at an upcoming hearing, trial, or
41 sentencing;]
42 • cast substantial doubt on an element of a charged offense[,/;] or
43 • support an affirmative defense.
44 (C) *Producing Designated Items.* The subpoena must require the recipient to
45 produce the designated items to the court.

46 (D) *In Camera Review.* Before disclosing any information produced under the
47 subpoena, the court must determine in camera that the information meets the
48 criteria in (B)(iii)-(iv).
49 (E) *Disclosure Requirements.* The court [must ensure that disclosing any
50 information produced under the subpoena complies with the[federal] legal
51 requirements protecting that information, and] may order other protective
52 measures it considers necessary[, such as restrictions on inspecting,
53 duplicating, storing, retaining, or using the information].
54 **(5)** ***Non- Grand Jury Subpoena – Unprotected Information.***
55 (A) *In General.* This paragraph (5) applies if a subpoena other than one issued for
56 a grand jury requires the production of items containing information that is not
57 legally protected.
58 (B) *Showing Required for Issuance.* In addition to describing each designated item
59 with reasonable particularity, a party must state facts showing that each item:
60 (i) is reasonably likely to be possessed by the subpoena's recipient;
61 (ii) is not reasonably available to the party from another source; and
62 (iii) contains information material to preparing the prosecution or defense.
63 (C) *Production Requested by a Represented Party.* If requested by a represented
64 party, the subpoena may require the recipient to produce the designated items to
65 that party's counsel.
66 (D) *Production Requested by an Unrepresented Party; In Camera Review.* If
67 requested by an unrepresented party, the subpoena must require the recipient to
68 produce the designated items to the court. Before disclosing any information
69 produced by the subpoena, the court must determine in camera that the
70 information is material to preparing the defense.
71 **(6) N*on-Grand Jury Subpoena – Ex Parte Subpoenas.***
72 (A) *In General.* For good cause, a court may grant a party's ex parte motion for a
73 subpoena other than one issued for a grand jury.
74 (B) *Nondisclosure of Information.* Whether granted or denied, the motion and
75 supporting documents must be filed under seal and not disclosed to any other
76 party. If granted, the court must not disclose to a party who did not request the
77 subpoena any item that it produces.
78 (C) *Information Discoverable by Another Party.* A party who receives from an ex
79 parte subpoena information that is discoverable by another party under these
80 rules must comply with those rules.
81 **(7)** ***Non-Grand Jury Subpoena – Personal or Confidential Information About a***
82 ***Victim.*** After a complaint, indictment, or information is filed, a subpoena other than
83 one issued for a grand jury requiring the production of personal or confidential
84 information about a victim may be served on a third party only by court order. Before
85 entering the order and unless there are exceptional circumstances, the court must
86 require giving notice to the victim so that the victim can move to quash or modify the
87 subpoena or otherwise object.

88 **(d)** **Service.** A marshal, a deputy marshal, or any nonparty who is at least 18 years old
89 may serve a subpoena. The server must deliver a copy to the witness or the subpoena's
90 recipient and must tender to the witness one day's witness attendance fee and the legal
91 mileage allowance. The server need not tender the attendance fee or mileage
92 allowance when the United States, a federal officer, or a federal agency has requested
93 the subpoena.
94 **(e)** **Place of Service.**
95 **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial—
96 or requiring a recipient to produce documents, data, or other objects—may be
97 served at any place within the United States.
98 **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783
99 governs the subpoena's service.
100 **(f)** **Issuing a Deposition Subpoena.**
101 **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district
102 where the deposition is to be taken to issue a subpoena for any witness named or
103 described in the order.
104 **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court
105 may order—and the subpoena may require—the witness to appear anywhere the
106 court designates.
107 **(g)** **Contempt Order for Disobeying a Subpoena.** The court (other than a magistrate
108 judge) may hold in contempt a witness or subpoena recipient who, without adequate
109 excuse, disobeys a subpoena issued by a federal court in that district. As provided in 28
110 U.S.C. § 636(e), a magistrate judge may hold in contempt a witness or subpoena recipient
111 who, without adequate excuse, disobeys a subpoena issued by that magistrate judge.
112 **(h)** **Statements Not Subject to a Subpoena.** No party may subpoena a statement of a
113 witness or of a prospective witness under this rule. Rule 26.2 governs the production of the
114 statement.

TAB 10C

Rule 17. Subpoena

(a) **~~Content~~In General.** A subpoena must state the court's name and the title of the proceeding~~,~~ and must include the court's seal~~ of the court, and command the witness to attend and testify at the time and place the subpoena specifies.~~ .

(b) **Subpoena to Testify.**

(1) ***Content.*** The clerk must issue a blank subpoena~~-~~—signed and sealed~~-~~—to the party requesting it, and that party must fill in the blanks before the subpoena is served. The subpoena must require the witness to appear and testify at a specified time and place.

(2) **~~(b)~~** ***Defendant Unable to Pay [Costs and] Witness Fees*.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. ~~If the court orders a subpoena to be issued, the~~The process costs and witness fees will then be paid ~~in the same manner~~ as ~~those paid~~ they are for witnesses ~~the~~ responding to government subpoenas.

(c) **~~Producing~~Subpoena to Produce Documents~~ and~~, Data, or Other Objects.**

(1) ***In General*.** A subpoena ~~may order~~requiring the ~~witness~~recipient to produce any books, papers, documents, data, or other objects ~~the subpoena designates.~~ ~~The court may direct the witness~~must require the recipient to produce them ~~designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their~~

~~attorneys to inspect all or part of them~~at a specified location.

(2) ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) ~~***Subpoena* for**~~***Non-Grand Jury Subpoena – Motion Required***. If a party seeks a subpoena other than one issued for a grand jury, the party must do so by motion.

(4) ***Non-Grand Jury Subpoena – Protected Information***.

(A) *In General.* This paragraph (4) applies if a subpoena other than one issued for a grand jury requires the production of items containing either:

(i) personal or confidential information about a victim; or

(ii) [the type of] information that [may/is likely to be] protected by [a privilege, confidentiality protection, or privacy protection under federal or state law].

(B) *Showing Required for Issuance.* In addition to describing each designated item with reasonable particularity, a party must state facts showing that each item:

(i) is likely to be possessed by the subpoena's recipient;

(ii) is not reasonably available to the party from another source;

(iii) contains information that [the/federal] law permits the subpoena's recipient to disclose to the requesting party, and

(iv) contains information that is likely to be admissible at an upcoming hearing, trial, or sentencing; or, whether admissible or not, is likely to[:

- cast substantial doubt on the accuracy of evidence the other party is expected to introduce at an upcoming hearing, trial, or sentencing;]
- cast substantial doubt on an element of a charged offense[,/;] or
- support an affirmative defense.

(C) *Producing Designated Items.* The subpoena must require the recipient to produce the designated items to the court.

(D) *In Camera Review.* Before disclosing any information produced under the subpoena, the court must determine in camera that the information meets the criteria in (B)(iii)-(iv).

(E) *Disclosure.* The court [must ensure that the disclosure of any information produced under the subpoena complies with the[federal] legal requirements protecting that information, and] may order other protective measures it considers necessary[, such as restrictions on inspecting, duplicating, storing, retaining, or using the information].

(5) *Non- Grand Jury Subpoena – Unprotected Information.*

(A) *In General.* This paragraph (5) applies if a subpoena other than one issued for a grand jury requires the production of items containing information that is not legally protected.

(B) *Showing Required for Issuance.* In addition to describing each designated item with reasonable particularity, a party must state facts showing that each item:

(i) is reasonably likely to be possessed by the subpoena's recipient;

(ii) is not reasonably available to the party from another source; and

(iii) contains information material to preparing the prosecution or defense.

(C) *Production Requested by a Represented Party.* If requested by a represented party, the subpoena may require the recipient to produce the designated items to that party's counsel.

(D) *Production Requested by an Unrepresented Party; In Camera Review.* If requested by an unrepresented party, the subpoena must require the recipient to produce the designated items to the court. Before disclosing any information produced by the subpoena, the court must determine in camera that the information is material to preparing the defense.

(6) *Non-Grand Jury Subpoena – Ex Parte Subpoenas.*

(A) *In General.* For good cause, a court may grant a party's ex parte motion for a subpoena other than one issued for a grand jury.

(B) *Nondisclosure of Information.* Whether granted or denied, the motion

and supporting documents must be filed under seal and not disclosed to any other party. If granted, the court must not disclose to a party who did not request the subpoena any item that it produces.

(C) *Information Discoverable by Another Party.* A party who receives from an ex parte subpoena information that is discoverable by another party under these rules must comply with those rules.

(7) ***Non-Grand Jury Subpoena – Personal or Confidential Information About a Victim.*** After a complaint, indictment, or information is filed, a subpoena other than one issued for a grand jury requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

(d) **Service.** A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy ~~of the subpoena~~ to the witness or the subpoena's recipient and must tender to the witness one day's witness - – attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) **Place of Service.**

(1) ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial -- or requiring a recipient to produce documents, data, or other objects – may be served at any place within the United States.

(2) ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.

(f) Issuing a Deposition Subpoena.

(1) ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) ***Place.*** After considering the convenience of the witness and the parties, the court may order-—and the subpoena may require-—the witness to appear anywhere the court designates.

(g) Contempt Order for Disobeying a Subpoena. The court (other than a magistrate judge) may hold in contempt a witness or subpoena recipient who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. As provided in 28 U.S.C. § 636(e), a magistrate judge may hold in contempt a witness or subpoena recipient who, without adequate excuse, disobeys a subpoena issued by that magistrate judge ~~as provided in 28 U.S.C. § 636(e)~~.

(h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

TAB 10D

Committee Note

The amendment has two principal purposes. First, it expands the parties' authority to subpoena material from third parties before trial [or other proceedings]. Second, it clarifies the rule, particularly as to ex parte subpoenas, and the application of different provisions to subpoenas for testimony and for documents, data, and other objects.

Subdivision (a) has been retitled and contains a general requirement that applies to both subpoenas for testimony and subpoenas for documents or objects. Material relating only to subpoenas for testimony has been relocated to Subdivision (b).

Subdivision (b) consolidates provisions dealing with the issuance and costs of subpoenas for testimony, but makes no change in substance. The provision formerly in (a) regarding the clerk's issuance of blank subpoenas at a party's request and the requirement that the witness appear and testify at a specified time and place is now Subdivision (b)(1). Former Subdivision (b) containing the provisions governing situations in which a defendant is unable to pay for the subpoena to a witness is now Subdivision (b)(2).

Subdivision (c) governs subpoenas for documents, data, or objects, and has been significantly revised to clarify and enlarge the parties' ability to subpoena material from third parties. The revisions respond to conflicting interpretations and applications of the text of Rule 17(c), and problems resulting from the prevailing interpretation.

Paragraphs (c)(1) and **(2)** now position in one location the two provisions in (c) that apply to grand jury subpoenas as well as non-grand jury subpoenas for documents, data, or other objects. The term "non-grand jury subpoena" has been added to the heading of paragraphs (c)(3) through (7), and the phrase "other than a subpoena issued for a grand jury" has been added as well, to clarify that the procedures and restrictions in those paragraphs do not apply to grand jury subpoenas.

Paragraph (c)(1) is new and provides that the subpoena must require the recipient to produce the designated items at a specified location. The amended rule recognizes that in some circumstances, see subsection (c)(5)(C), a subpoena may allow for production to the requesting party's counsel rather than to the court. Mandating a specific location for production avoids confusion about whether the subpoena can be returned to the party who sought the subpoena or the court. The amendment deletes language providing that the court may direct the witness to produce designated items in court before trial or before they are to be offered in evidence, which reflected the view—rejected by the amendment—that the sole function of Rule 17(c) subpoenas is expediting the presentation of evidence at trial and avoiding delay. The revised rule recognizes that the ability for each party to obtain information from third parties when preparing for a proceeding is essential not only to avoid delay, but also to facilitate the fair and accurate [determination of guilt or innocence and sentence] [resolution of [insert when resolve which proceedings]].

45 **Paragraph (c)(2)** is language unchanged from former (c)(2), providing that upon prompt
46 motion, a court may quash or modify the subpoena if compliance would be unreasonable or
47 oppressive.
48
49 **Paragraphs (c)(3) through (c)(7)** apply to subpoenas—other than those issued for a
50 grand jury—that seek documents, data, or other objects.
51
52 **Paragraph (c)(3)** requires a party seeking such a subpoena to do so by filing a motion.
53 Subpoena authority is compulsory process, and judicial oversight is important to regulate its use
54 in criminal cases. Parties should not be able to use the threat of contempt of court to coerce third
55 parties to produce documents, data, or objects in hopes of finding something useful. A court must
56 first find that a subpoena meets the issuance standards set out in (c)(4) and (5) before it can issue.
57
58 **Paragraphs (c)(4) and (5)** are new. They set out specific standards and procedures for
59 subpoenas seeking documents, data, or other objects. There are two sets of standards and
60 procedures, depending upon the information the subpoena will produce.
61
62 The provisions replace the standard announced by the Court in *United States v. Nixon*,
63 418 U.S. 683, 700 (1974), when interpreting former Rule 17. There, the Court held that a party
64 seeking documents under former Rule 17(c) must "clear three hurdles: (1) relevancy; (2)
65 admissibility; [and] (3) specificity." The Rule, as *Nixon* interpreted it, required a party to show
66 that the specific material being sought will be admissible at trial (or other upcoming proceeding).
67 Although there is considerable variation from district to district, as applied in most districts the
68 *Nixon* standard has at times prevented the defense from obtaining material it needs from third
69 parties to [prepare and present its defense]. The admissibility requirement, in particular, is
70 difficult to meet for material that the defense has not been able to review or obtain through Rule
71 16 because the government does not possess it. In addition, the *Nixon* requirements, formulated
72 in a case involving sensitive documents and executive privilege, are unnecessarily rigid for
73 subpoenas seeking information that is not protected by privilege or other law limiting disclosure.
74
75 The new provisions in (c)(4) and (5) replace the *Nixon* standard with tailored standards
76 designed to accommodate many interests. Some of those interests favor greater access: the
77 interest of the parties in obtaining evidence necessary for the prosecution or the defense, and the
78 overriding interest in increasing accuracy and fairness. Other interests support careful limitations
79 on access: the interests of subpoena recipients who must respond, the interests of the people
80 whose information those recipients may disclose, and the interests of courts in limiting the time
81 and resources that must be devoted to overseeing the issuance of and compliance with these
82 subpoenas, as well as managing in camera review and disclosure. The amendment provides an
83 incremental expansion of the authority to obtain vital material in the hands of third parties [for
84 specified evidentiary hearings], with numerous safeguards for information protected by existing
85 law.
86
87 **Paragraph (c)(4)** sets out more stringent requirements for subpoenas for information that
88 is legally "protected." Specifically, subsection **(c)(4)(A)** defines subpoenas covered by
89 Subsection (c)(4) as those that require the production of either "personal or confidential

90 information about a victim" or "[the type of] information that [may/is likely to be] protected by
91 [a privilege, confidentiality protection, or privacy protection under federal or state law]."
92
93 Many state and federal laws now provide protection for privacy interests of various kinds.
94 These include, for example, federal laws governing stored electronic communications, school
95 records, and health records, as well as evidentiary privileges such as the privilege protecting the
96 psychotherapist-patient relationship.
97
98 **Subparagraph (c)(4)(B)** requires a party seeking a subpoena for protected information
99 falling within (c)(4)(A) to meet heightened standards for issuance. It restricts subpoenas for
100 protected items and information in five ways.
101
102 First, it requires a party to describe each item sought "with reasonable particularity."
103 General descriptions are insufficient. The particularity is necessary for the court to assess if the
104 remaining requirements are met and for the recipient to know what is being ordered and whether
105 to object.
106
107 Second and third, the party seeking the information must state facts, not conclusory
108 assertions, showing that each item sought is likely to be possessed by the subpoena's recipient,
109 as provided in subparagraph **(c)(4)(B)(i),** and is not reasonably available to the party from
110 another source, as provided in subparagraph **(c)(4)(B)(ii)**.
111
112 Fourth, subparagraph **(c)(4)(B)(iii)** provides that the party seeking the subpoena must also
113 state facts that show that "[federal] law protecting the information does not bar disclosure to the
114 requesting party." This requires compliance with law that restricts or precludes disclosure,
115 including any procedural requirements for notice or timing.
116
117 Finally, even if a motion meets these standards, subparagraph **(c)(4)(B)(iv)** limits what
118 protected information may be obtained, by requiring that the party's motion to include facts that
119 show that each item sought "contains information that is likely to be admissible as evidence at an
120 upcoming hearing, trial, or sentencing; or, whether admissible or not, is likely to:
121
122 [• cast substantial doubt on the accuracy of evidence the other party is expected to
123 introduce at an upcoming hearing, trial, or sentencing;]
124
125 • cast substantial doubt on an element of a charged offense[,/;] or
126
127 • support an affirmative defense.
128
129 In other words, the rule allows a party to subpoena protected information only if it is likely to be
130 used as evidence, or—even if inadmissible—it undercuts guilt, or casts "*substantial* doubt on the
131 accuracy" of an opponent's evidence at an [upcoming proceeding]. Significantly, unlike *Nixon*,
132 the amended rule does not require the party seeking a subpoena to show that the information
133 sought will itself be admissible, nor is there any suggestion that parties are limited to seeking
134 information intended only for trial. A party may obtain a subpoena seeking information from a
135 third party for [other [pretrial] hearings or at sentencing.]

Subparagraph (c)(4)(C) requires the recipient of any subpoena for protected information to produce that information to the court; production of potentially protected information directly to the party requesting the information is not allowed.

Subparagraph (c)(4)(D) requires the court to determine in camera, before disclosing any information produced by a subpoena issued under paragraph (4), that it does indeed fall within the categories allowed in subparagraph **(c)(3)(B)(iv)**. Requiring in camera review whenever a subpoena seeks protected information ensures that only information meeting these demanding criteria will be disclosed. It also helps the court tailor any protective order that might accompany the information's disclosure.

Subparagraph (c)(4)(E) requires that the court's disclosures comply with the requirements of law protecting that information, to ensure that any procedural and substantive requirements dictated by that law are honored. It also includes a non-exclusive list of potential protective terms and conditions a court could order as part of disclosure, such as restrictions upon inspection, duplication, storage, retention, or use of the information disclosed.

Paragraph (c)(5) prescribes procedures for non-grand jury subpoenas that require the production of [items containing] information that is not legally protected as defined in **(c)(4)(A)**, such as surveillance video of a business's premises recorded by that business. As with subpoenas seeking legally protected information, under subsection **(c)(5)(B),** the party must describe each item sought with "reasonable particularity," and, under subparagraph **(c)(5)(B)(ii)**, state facts showing that each item is not reasonably available to the party from another source. But instead of showing that each designated item is "likely" to be possessed by the subpoena's recipient, subparagraph **(c)(5)(B)(i)** requires that possession is "reasonably likely."

The most significant difference between the provisions addressing subpoenas for protected information in (4) and those addressing subpoenas for unprotected information in (5) is that instead of the quite narrow categories of information allowed under (4)(B)(iv), under subparagraph **(c)(5)(B)(iii)**, a party seeking a subpoena for unprotected information must state facts showing each item "contains information material to preparing the prosecution or defense." The phrase "material to preparing" is intended to carry the same meaning that it has acquired in Rule 16(a)(1)(E)(i), though here it applies to both prosecution and defense. The party seeking a subpoena for unprotected information need not show that the information would be admissible, or relevant to a specified upcoming hearing.

These requirements, combined with the recipient's ability to object to the subpoena, provide sufficient protection against potential abusive use of subpoenas for information that neither federal nor state law protects as privileged, private, or confidential.

Subparagraph (c)(5)(C) provides that when a subpoena is requested by a represented party, the court may order the recipient to produce the items described directly to that party's counsel. Direct production to the party's counsel may be more efficient than a two-step process in which the material is produced to the court first. The court may decide to allow direct production to the party's counsel if only unprotected information will be produced, and the court,

182 having granted the party's motion for the subpoena, sees no need to review the information
183 produced before counsel for the party requesting receives it.
184
185 **Subparagraph (c)(5)(D)** provides a different rule for subpoenas by unrepresented
186 defendants seeking unprotected materials. The new provision requires production to the court,
187 barring direct production to the unrepresented party, and it requires the court to conduct in
188 camera review to determine that information is "material to the defense" before disclosing it.
189 This requirement of judicial supervision is included because unlike defense counsel, an
190 unrepresented defendant is not bound by the rules of professional conduct that help to protect
191 against abuse of the subpoena process.
192
193 **Paragraph (c)(6)** is also new. Former Rule 17 did not address ex parte subpoenas, and
194 courts disagreed about whether it permitted them. Subparagraph **(c)(6)(A)** provides that for good
195 cause, the court may grant a party's ex parte motion for a subpoena, other than one issued for a
196 grand jury, issued under either paragraph **(c)(4) or (5)**. In authorizing ex parte subpoenas, the
197 amendment confirms that ex parte subpoenas serve an important function, allowing a party to
198 obtain and review information without prematurely disclosing its trial strategy or other
199 confidential information to its opponent.
200
201 **Subparagraph (c)(6)(B)** requires an ex parte motion and supporting documents to be
202 filed under seal and not disclosed to any other party. It responds to cases in which the court
203 permitted the defense to seek an ex parte subpoena but then required the material produced to be
204 provided to the government, even when that material would not be discoverable from the defense
205 under Rule 16. The revised rule prohibits the court from disclosing material produced by an ex
206 parte subpoena to any party that did not request the subpoena. Ex parte subpoenas allow a party
207 to seek vital information when there is a risk that some of the information produced will
208 undermine (in whole or part), rather than buttress its case. For example, the defense might seek
209 information it can show will probably be exculpatory, only to learn the material produced might
210 also include inculpatory information the government did not already have. Proceeding ex parte—
211 and precluding the court from ordering disclosure to the opposing party—allows counsel to
212 review the material that has been produced to determine whether to introduce it at trial.
213 Requiring automatic disclosure to the opposing party negates the purpose of providing for ex
214 parte subpoenas.
215
216 **Subparagraph (c)(6)(C)** expressly notes that the rules governing disclosure between
217 parties—principally Rule 16, as well as Rules 12.2, 12.3, and 12.4—remain applicable to
218 material produced by a Rule 17(c) subpoena and not affected by its provisions. This is to make it
219 clear that that an ex parte subpoena does not disadvantage the opposing party. Rule 17 does not
220 supplement or displace the carefully crafted disclosure requirements in these rules. For example,
221 if an ex parte subpoena results in the production of material that the party who sought the
222 subpoena intends to use in its case in chief at trial, Rule 16(a)(1)(E)(ii), Rule 16(a)(1)(F)(iii),
223 Rule 16(b)(1)(A)(ii), and Rule 16(b)(1)(B)(ii) require disclosure of that material to the opposing
224 party. Also, the government must of course honor its obligations under the Constitution to
225 disclose any exculpatory information it may receive through an ex parte subpoena, as well as
226 comply with Rule 16(a)(1)(E)(i) and (F)(iii) and disclose what it intends to introduce in its case
227 in chief, and any item material to preparing the defense. If, however, the defendant elects not to

228 use at trial the material produced in response to an ex parte subpoena, there is no disclosure
229 requirement.
230
231 **Paragraph (c)(7)** carries forward the text of the provision on subpoenas for personal or
232 confidential information about a victim, although this text from former subdivision (c)(3) is now
233 renumbered as subdivision (c)(6). The only change is the addition of a clause excluding grand
234 jury subpoenas, like the clause added to each of the other provisions in the Rule that do not apply
235 to grand jury subpoenas.
236
237 **Subdivision (d)** has been revised to add a reference to service of a copy of the subpoena
238 on the recipient of a subpoena for documents, data, or other objects.
239
240 **Paragraph (e)(1)** has been revised to include a reference to subpoenas for documents,
241 data, or other objects in the provision allowing service at any place within the United States.
242
243 **Subdivision (g)** has been retitled and revised to include language applicable to recipients
244 of subpoenas for documents, data, or other objects, to allow the court to hold the subpoena
245 recipient who disobeys the subpoena in contempt.

TAB 10E

Invited Speakers
Rule 17 Discussion – November 7, 2024

(click after the speaker's name for biographical information)

Eóin Beirne, partner, Mintz Levin, Boston, MA. https://www.mintz.com/our-people/eoin-p-beirne

Michael Caruso, Assistant Federal Public Defender, Southern District of Florida, Miami, FL. Mr. Caruso was the Federal Public Defender in the Southern District of Florida for many years, but recently stepped down to Assistant Federal Public Defender to do more trial work.

Matthew Fishbein, retired partner Debevoise & Plimpton, New York (co-author of New York City Bar Association proposal 22-CR-A). https://www.debevoise.com/matthewfishbein

Professor Stephen Henderson, Judge Haskell A. Holloman Professor of Law, University of Oklahoma School of Law, Norman, OK. https://law.ou.edu/faculty-and-staff/stephen-henderson

Geremy Kamens, Federal Public Defender, Eastern District of Virginia, Alexandria, VA. Mr. Kamens has been the Federal Defender in the Eastern District of Virginia since 2015; prior to joining the Federal Defender's Office, he was in private practice at Hunton & Williams.

Christopher Kavanaugh, United States Attorney, Western District of Virginia, Charlottesville, VA. https://www.justice.gov/usao-wdva/meet-us-attorney

Lisa Miller, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, Washington, D.C. https://www.justice.gov/criminal/staff-profile/deputy-assistant-attorney-general-lisa-h-miller

David Patton, partner, Hecker Fink LLP, New York, NY. https://www.heckerfink.com/our-talent/david-patton

Guy Petrillo, partner, Petrillo Klein Boxer, New York. https://www.pkbllp.com/team/guy-petrillo/

Craig Randall, Chief, Criminal Division, Western District of North Carolina, Huntersville, NC. Mr. Randall heads the Criminal Division of the U.S. Attorney's Office in the Western District of North Carolina; prior to joining the U.S. Attorney's Office, he served in the Navy's JAG Corps for six years.

Alixandra Smith, Criminal Chief, U.S. Attorney's Office, Eastern District of New York, Brooklyn. https://www.pli.edu/faculty/alixandra-e.-smith-i1518292

Renée Williams, Chief Executive Officer, National Center for Victims of Crime, Hyattsville, MD. https://victimsofcrime.org/leadership/

Honorable James C. Dever
Chair, Advisory Committee on Criminal Rules
United States District Court
310 New Bern Avenue
Raleigh, NC 27601

Honorable Jacqueline H. Nguyen
Chair, Rule 17 Subcommittee
United States Court of Appeals
125 South Grand Avenue
Pasadena, CA 91105

February 13, 2024

Re: Proposed Amendments to Rule 17 of the Federal Rules of Criminal Procedure

Dear Judge Dever and Judge Nguyen:

On behalf of the National Association of Criminal Defense Lawyers, which has more than 10,000 direct members and 40,000 affiliate members,[1] we write to address the need to amend Rule 17 of the Federal Rules of Criminal Procedure to allow the parties to issue subpoenas for documents and tangible items to third parties without leave of Court.

[1] NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. We, the undersigned, are members of a task force that NACDL formed to study Rule 17. In October 2022, the Chair of NACDL's Rule 17 take force, James Felman, spoke to the Advisory Committee about Rule 17. See Minutes, Advisory Committee on Criminal Rules, pp. 17–18 (Oct. 27, 2022).

In particular, we agree with the Rules Subcommittee that it "would be beneficial to expand the parties' authority to subpoena material from third parties before trial."[2] The current Rule 17 is ambiguous in critical respects, leading to disparate application that threatens the ability of defense counsel to adequately investigate, develop, and present available defenses, and thus to provide the level of assistance required by the Constitution. The realities of modern life have changed the ways facts are recorded and thereafter investigated, making compulsory process at the pretrial defense-investigation stage a necessity if the parties are to have a nearer-to-level playing field in the search for truth and defense counsel are to fulfill their constitutional function.[3]

We believe Rule 17(c) should be amended to allow defendants to issue *ex parte* third-party subpoenas for documents and tangible objects without advance leave of Court, and to remove any suggestion that such subpoenas are proper only to obtain evidence intended to be used at a hearing, trial or sentencing. Moreover, Rule 17 should be revised to clarify that the defense may issue subpoenas without having to predict exactly what records exist or their evidentiary status if later used at trial. If the recipient of a subpoena believes compliance would be unreasonably burdensome or oppressive, the recipient may challenge the subpoena by bringing a motion to quash before the District Court. Any materials produced would then be shared with the opposing party to the extent directed by the relevant provisions of Rule 16. Rule 17 should not amend other rules by implication.

We address additional complexities and subsidiary issues in our letter as well, some of which were discussed in the Subcommittee Letter. The challenge before the Committee is to identify revisions that facilitate the parties' efficient, equitable, and timely receipt of records while avoiding revisions that burden the courts with unnecessary motions practice and intrude unnecessarily on the defense function. We hope the Committee will find useful NACDL's perspective on the intersection of defense counsel's constitutional role with the questions before the Committee, and that the Committee will not hesitate to call on NACDL for further comment as it continues its important work on Rule 17.

---

[2] Letter of Professors Sara Sun Beale and Nancy King to Members, Criminal Rules Advisory Committee (Sep. 25, 2023) at 1 ("Subcommittee Letter").

[3] NACDL expresses no opinion in this letter as to whether any amendment to the Rule should also authorize the government to issue pretrial investigative subpoenas.

Rule 17 should be amended because it is ambiguous and inadequate.

Although the Rules Subcommittee has already been appropriately persuaded Rule 17 should be amended and expanded, we believe a brief summary of why Rule 17 should be amended may assist the Committee in drafting the final rule.

Largely unchanged since 1944, Rule 17 permits the issuance of pretrial subpoenas, but specifies no standards or practices governing their issuance. In practice, this ambiguity has led to disparate application and, too frequently, the denial of defense access to material information—when the defense overcomes the barriers to seeking it at all. For example, some courts have applied the so-called *Nixon* standard, and require a strict showing of specificity and admissibility before permitting pretrial subpoenas.[4] But proving what a third-party has and how it might lead to information to be admitted at trial is exceedingly difficult to do *before* the defense has access to records. Moreover, requiring a threshold showing of admissibility precludes the production of vital information that could lead to the discovery of admissible evidence.

In other courts or through agreement of the parties, pretrial subpoenas are frequently issued without application of *Nixon.* But even then, some courts view Rule 16 as the sole source of defense discovery. In others, the defense may issue pretrial subpoenas without a court order, subject to modification through a motion to quash by either the recipient of the subpoena or the other party. And in still others, the defense may seek a court order *ex parte*. The ambiguity in current Rule 17 practice is such that one district court judge recently pointed out that the "wide variance in local and individual practices has resulted in a caveat in the official form subpoena issued by the Administrative Office of the United States Courts." *United States v. Goel*, No. 22-cr-396 (PKC), 2023 U.S. Dist. LEXIS 48722, at *5 (S.D.N.Y. Mar. 22, 2023). The AO's form instructs parties to "consult the rules of practice of the court in which the criminal proceeding is pending to determine whether any local rules or orders establish requirements in connection with the issuance of such a subpoena." *Id.* According to the form's disclaimer, there are no uniform standards on judicial pre-approval, the site of a subpoena's return, or obligations to disclose subpoenaed records.

[4] In *United States v. Nixon*, 418 U.S. 683 (1974), the Court held that *the government* must show that documents sought via a pretrial subpoena for use at trial will be "evidentiary and relevant" and "not otherwise procurable reasonably in advance of trial," among other requirements.

This disclaimer is not surprising—Rule 17's current form presents too little guidance to courts and counsel concerning the means and manner by which defense counsel can issue subpoenas *duces tecum* returnable before trial. After learning the rule might be amended, NACDL polled our members to better understand how Rule 17 is currently used and interpreted. We found out that, although over 80% of our survey respondents "often" or "sometimes" seek or issue subpoenas *duces tecum* to third parties in their cases, nearly just as many (80%) think the rules governing third-party subpoenas need improvement.[5]

Rule 17's ambiguity has resulted in disparate application. Consequently, counsel must follow widely varying procedures, depending on the venue.[6] Our survey results show significantly varied experiences on what rules or standards of practice govern third-party subpoenas across jurisdictions:

- **42%** local rules
- **28%** a standard practice exists, but no local rules
- **22%** neither local rules nor a standard practice
- **8%** none of those previous categories applies

As a practical matter, the wide variation in local and individual practices requires parties to spend their limited resources on motions practice about *process* rather than the merits of the case—meaning that uncertainty or expense, or both, chills many defense counsel from what would otherwise be appropriate uses of the rule to fulfill their obligations.

---

[5] We received survey responses from 165 members; the results included in this letter have been rounded to the nearest whole number.

[6] *E.g.*, *United States v. Lawson*, No. 14-20115, 2016 U.S. Dist. LEXIS 13066, at *2–3 (E.D. Mich. Feb. 3, 2016) ("Under the plain language of Fed. R. Crim. P. 17, it is debatable whether Defendant must secure the authorization of this Court. . . .Nonetheless, the Court acknowledges that the case law is unclear as to whether a defendant must secure a court's pre-approval of a Rule 17(c) subpoena that seeks the pretrial production of materials . . . . *See United States v. Llanez-Garcia*, 735 F.3d 483, 498-500 (6th Cir. 2013) (noting the split of authority on this question and declining to 'provide controlling guidance concerning [the] Rule 17(c) procedures' that govern this process).").

Access to pre-trial subpoenas is particularly critical for the defense now that most cases are resolved by plea bargain.[7] Early and comprehensive access to information is critical because, "with plea bargaining the norm and trial the exception, for most criminal defendants a change of plea hearing is the critical stage of their prosecution." *Wright v. Van Patten*, 552 U.S. 120, 127 (2008) (Stevens, J., concurring). Trial used to be viewed as the "primary evidence generating event."[8] However, today, if defense counsel simply wait until Jencks materials are produced at trial, it is likely too late to help our clients. Moreover, defense counsel have Sixth Amendment and ethical obligations to investigate potential defenses in time to make effective use of them. *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The defense function is materially impeded if defense counsel cannot obtain materials that may generate additional investigative leads and allow them to timely develop defenses for use in, *e.g.*, plea negotiations, pretrial suppression hearings, and perhaps at trial. "The duty to investigate is essential to the adversarial testing process[.]" *Greiner v. Wells*, 417 F.3d 305, 320 (2d Cir. 2005) (referencing case-by-case reasonableness standard guided by national norms of practice). It is unethical and ineffective assistance for defense counsel to simply rely on the government's narrative and theory of prosecution. *See Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (noting "prejudice is presumed 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'"). The same is true of counsel's duty to provide informed advice as to the propriety of any potential plea agreement.

The government's Rule 16 and discovery obligations do not suffice for a constitutionally adequate defense. To be sure, Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963); the Due Process

---

[7] *See generally* National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 5 (2018), www.nacdl.org/trialpenaltyreport ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose.").

[8] *Cf.* Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 Am. Crim. L. Rev. 155, 168–69 (2018) ("The limits on discovery obligations, on pretrial depositions, and on related constitutional disclosure rules all implicitly look to the trial for its older function…as the primary *evidence-generating* event…. The federal rules, and the large number of state systems with similar rules, still reject the contemporary model of civil procedure that shifts evidence production to the pretrial discovery stage.") (citation omitted).

Protections Act, Pub. L. No. 116-182, 134 Stat. 894 (2020);[9] and the Jencks Act, 18 U.S.C. § 3500[10] require the disclosure to the defense of many of the materials collected by the government. These protections are substantial, but do not adequately address the defense need to investigate because the government's investigative efforts are often focused on the search for guilt.[11] Prosecutors are not responsible for producing favorable evidence they do not have, at least when its existence is unknown to the agents. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (describing disclosure duty in terms of evidence prosecutors have or that is known to "others acting on the government's behalf in the case, including the police"). And more commonly, the government may not know about the existence or location of all relevant or favorable materials.

Simply put, materials collected by the government and produced to the defense in discovery often do not tell the whole story of "what happened." And while in 1944 it may have been possible to conduct a complete factual investigation without pre-trial subpoenas, the Rule has not kept pace with advancements in technology and the electronic storage of information. In today's society, communications and documents are often created, transmitted, and stored electronically. It is, quite literally, impossible to learn what happened in a complex transaction without access to electronic information in the hands of third parties. The volume of this electronic information requires its production and review by the defense well in advance of any trial or other evidentiary hearing. In the civil context, permissive subpoena practice has evolved as the

---

[9] *See* Fed. R. Crim. P. 5(f).

[10] *See* Fed. R. Crim. P. 26.2 (Producing a Witness's Statement).

[11] *See* Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. Rev. 212, 222–23 (May 2021) [hereafter *Privacy Asymmetries*] ("At no point, from pretrial investigations through to conviction, does law enforcement have any constitutional, legal, or formal ethical obligation to affirmatively investigate evidence of innocence or to seek out any evidence in the possession of a third party that would support a defendant's theory of the case. Of course, *Brady v. Maryland* and its progeny require prosecutors to disclose material, exculpatory evidence that is in their constructive possession. And statutory discovery rules require prosecutors to disclose certain material information over which they have possession, custody, or control. But disclosure requirements are not investigative duties."); Rebecca Wexler, *Life, Liberty, and Data Privacy: The Global CLOUD, the Criminally Accused, and Executive Versus Judicial Compulsory Process Powers*, 101 Tex. L. Rev. 1341, 1360–61 (May 2023) (noting that NACDL "has repeatedly lobbied the Senate for amendments to MLAT [Mutual Legal Assistance Treaties] language that would permit judges to order the DOJ to use MLAT channels on behalf of the defenses").

technology and volume of documents have evolved. There is no reason the same should not be true in criminal matters.

An overarching point bears mention before we delve into specifics. The Subcommittee leaves for another day the question of what substantive standard should replace *Nixon*. That is understandable; we offer our suggestion below (Section V). But at several points, the Subcommittee appears to suggest that more rigorous procedural hurdles are necessary, or at least appropriate, to counterbalance a less forbidding substantive standard. We respectfully submit instead that identifying the fairest and most effective revamp of Rule 17(c) will require addressing at least three distinct questions:

(1) the substantive standard governing what materials may be obtained via Rule 17(c);
(2) the procedure for issuing a Rule 17(c) subpoena; and
(3) the procedure and substantive standards for challenging a Rule 17(c) subpoena.

The best version of the rule will reflect judgment about each of these individually as well as the interplay among them. For example, the Subcommittee's accurate recognition that the *Nixon* standard thwarts the truth-seeking function without advancing legitimate interests is welcome. *Nixon* should be jettisoned, full stop. But as summarized above *Nixon* is not the only culprit. The barriers to truth-seeking Rule 17(c) currently imposes are many: the time- and resource-intensive process of ascertaining individual judicial practices; the immense challenge of describing with specificity records one has never seen and explaining why the defense needs them; which is typically followed by motion practice on each and every subpoena against an adversary with a lengthy head-start on investigating the facts; with a low likelihood of success when facing harsh or subjective substantive standards—and all at the intangible, but weighty, "cost" of disclosing attorney work-product to both adversary and decisionmaker (as discussed further below). We respectfully request that as the Subcommittee evaluates the many options before it, it consider whether each such barrier is necessary to secure the equitable administration of justice.

We turn next to addressing what we respectfully submit are the issues at the fulcrum of the optimal balance among the interests of litigants, the courts, and subpoena recipients.

Revisions to Rule 17 should recognize the structural and constitutional reasons that protecting the confidentiality of defense strategy is essential.

As previewed above, we advocate a rule that allows the defense to issue pretrial subpoenas *ex parte* and without judicial pre-approval, as civil litigants do, subject to the same substantive standards and procedural protections for subpoena recipients. We acknowledge the Subcommittee's view that "judicial oversight is important to regulate [the] use" of compulsory process "in criminal cases" (Report at 2-3), though the Subcommittee does not explain why it believes judicial regulation of compulsory process is important in criminal cases but not in civil ones. Report at 2-3. We address that point in specific contexts below.

For background, we briefly explain the structural and constitutional reasons that routine judicial oversight, and a presumptively adversary process—with the concomitant disclosure of core attorney work product, defense strategy—pose disproportionate and unfair risks to criminal defendants *more* than civil litigants—suggesting that if anything, the rules should give greater protection to the criminal defense function, and certainly not less.

The breadth of the judicial role in criminal cases is one reason. In the more than 90% of federal criminal cases where the accused is convicted,[12] the judge decides the eventual penalty—unlike in civil cases, where the jury typically assigns damages after finding liability. For example, the U.S. Sentencing Guidelines require judges to consider uncharged "relevant conduct," which the court may find on a bare preponderance standard from materials untested at trial and not subject to the Rules of Evidence. As a result, a defendant in, say, a bank fraud case runs a grave risk when alerting the judge who (statistically) is nearly certain to sentence her eventually that she needs to examine records from a bank other than the one she is charged with defrauding. The Sentencing Reform Act requires the judge to consider an even broader range of information, including, *e.g.*, the "history and characteristics of the defendant." 18 U.S.C. §3553(a)(1). Thus defense counsel who needs to subpoena, *e.g.*, the defendant's psychiatric records, for plea negotiations or to

[12] *See* U.S. Courts, U.S. Dist. Courts, Criminal Statistical Tables for the Federal Judiciary, tbl. D-4 (December 31, 2022), *available at* https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2022/12/31 (showing that approximately 91% of federal defendants were convicted for the 12-month period ending December 21, 2022).

evaluate a diminished capacity defense, must weigh the risk of alerting the sentencing judge to a stigmatized diagnosis or troubling history.

Similar concerns apply at trial. Rulings on the scope of a conspiracy (Fed.R.Evid. 801(d)(2)(E)), the admissibility of other wrongs evidence (Fed.R.Evid. 404(b)), even relevance (Fed.R.Evid. 401), are driven by the broader context. Might a judge with foreknowledge of the cards the defense is holding give the government more leeway to counter them anticipatorily—effectively depriving the defendant of his constitutional right to decide not to present a defense when the government's case went badly? Perhaps more frightening for the defense is a judge who knows in advance which theories of the defense *did not pan* out, as the judge who approved pretrial subpoenas will know when the defendant never mentions again the line of inquiry the judge authorized him to pursue. That situation may even compromise the defendant's ability to highlight the government's genuine failure to prove a point on which the defense tried and failed to identify helpful evidence. A judge may deem a line of cross-examination or argument off-limits because she knows the defense explored it but turned nothing up.

The problems are compounded when the defense is barred from seeking judicial approval *ex parte*, which the Subcommittee recommends become the norm (*removing* protections defendants enjoy in many jurisdictions; see discussion below, at Section IV. The prosecution gets core work product of the type a civil adversary is conclusively barred from getting. *Cf*. Fed.R.Civ.P. 26(b)(3)(B). It may get insight into privileged communications, based on the facts asserted to support the request. It, too, will know pretrial where the defense is going, and be prepared to counter it—and it will be free to exploit its knowledge of defense theories that failed in all the ways described above. That power will carry into sentencing, given prosecutors' ability to control the Sentencing Guideline and statutory ranges via plea negotiations, and given DOJ's commitment to sharing with the U.S. Probation Office all information that may bear on the sentence.

The problems are compounded yet again if materials returned in response to a Rule 17(c) subpoena are routinely, or presumptively, produced to the prosecution as well—a question the Subcommittee leaves open for now. No defense lawyer can risk genuinely *investigating* the facts—asking questions to which they don't know the answers—in that situation. Yet as discussed above, in today's world no meaningful investigation is possible without subpoena authority. The

defense lawyer representing the person accused of bank fraud faces a colossal dilemma in that situation: find out whether another bank was affected, at the risk of handing the prosecution inculpatory evidence? Or rely on the prosecution for the facts? Relying on the prosecution for the facts violates ethical obligations and the Sixth Amendment. *See* citations above. But would rolling the dice on what the judge and prosecution will learn do otherwise? A rule that requires defense counsel to risk grievous harm to her client in order to fulfill her duties to the client is a rule that advances no interest of justice.

Defense counsel's duty to investigate, and the accused's right to the assistance of counsel who has done so, are prescribed in the constitution. Disclosing attorney work-product to the decision-maker and adversary cannot be the price of a constitutionally adequate defense. We urge the Subcommittee to allow these principles to guide its analysis, and we explain below how they relate to specific aspects of the proposed revisions.

Rule 17 should not require judicial approval before issuance of a third-party subpoena.

Although we strongly agree with the Subcommittee's view that Rule 17 must be amended and expanded, we respectfully suggest there is no need for a "requirement that the party seeking a subpoena do so by filing a motion."[13] Such a process would chill discovery and burden courts with unnecessary motion practice—particularly when the defendant and the subpoena recipient agree on the scope of discovery. Moreover, there is no reason to believe criminal defense counsel (or criminal law practitioners in general, should the final rule apply to the government as well) are more likely to abuse subpoena authority than are civil litigators. Instead, the Court should adopt criminal standards and procedures mirroring the civil ones, which are familiar to courts and counsel alike.

First, the government already engages in document discovery without court oversight. The prosecution (and supporting federal investigative agencies with their respective personnel and resources) amasses voluminous information pre-indictment through grand jury subpoenas issued without court pre-approval and motions practice. As in the civil arena, a recipient that believes a grand jury subpoena unduly burdensome has recourse to the courts—but the importance of the government's investigative interest allocates the burden of seeking redress to the aggrieved party.

[13] Subcommittee Letter at 3.

The constitutional importance of adequate defense investigation counsels the same balance of interests post-indictment. If defense counsel issues a subpoena the recipient deems unduly burdensome, the recipient may ask the court to intervene. But if the recipient deems compliance routine or simple, there is no reason to interpose barriers to defense access—and even less reason to embroil the courts in motion practice. There is no principled reason to allocate these burdens differently for post-indictment document discovery and pre-indictment discovery by the government, particularly given that post-indictment discovery will be subject to *some* substantive standard (see Section V, below), whereas grand jury subpoenas are not. Perhaps more to the point, the balance of interests should not favor greater access for civil litigators than for criminal defendants.

Second, requiring a motion disadvantages the defense because, at the time of the indictment, an informational imbalance often separates the prosecution and the accused. By then, the prosecution will have already amassed information by subpoenas, warrants, disclosure requests, and grand jury testimony.[14]

Because defendants and their counsel are often in the best position to know where these items are and who is their custodian, the defense must have the authority to obtain documents believed to be relevant to a matter. But requiring the defense to file a motion to justify its subpoenas adds nothing to the process. At the beginning of the case, the defense will undoubtedly know less than the government, potentially resulting in an unfair advantage in the motions process. Moreover, when defense counsel are pursuing theories of the defense, any motions requirements risks unfairly previewing these defenses for the government. The defense should not be put to the choice of relevant discovery versus tactical disadvantage in each case.

Ex Parte Subpoenas Should Be Allowed

For these reasons, NACDL believes that *ex parte* subpoenas should be permitted—though as explained below, that should be the default rule. In many district courts today, defense counsel

---

[14] *Cf.* Dept. of Justice, *Technology & Law*, 69 DOJ J. FED. L. & PRAC. 174, no. 3, 2021, https://www.justice.gov/media/1169626/dl?inline ("[L]aw enforcement has been permitted to obtain those [IP address] records with legal process less rigorous than a search warrant—including through grand jury and administrative subpoenas and emergency disclosure requests under 18 U.S.C. § 2702.").

may not issue any subpoenas without the court's preapproval, with full disclosure to the government of defense counsel's application *and* the material produced, thus revealing to them the nature of the evidence and potential witnesses that may be offered by the defense. In our survey, nearly one-third of respondents (32%) reported needing a court order to issue a subpoena.

Hence the need for *ex parte* subpoena applications. To require otherwise would reveal defense strategy to the government and potentially jeopardize potential defense witnesses. In our survey, only a slight majority of criminal defense lawyers reported that, in jurisdictions where a court order is required to issue a subpoena, the defense may seek it in an *ex parte* filing. A minority reported they sometimes can use an *ex parte* filing, and a slightly smaller minority reported that they cannot at all. The government's interest is usually to oppose the subpoena and gain litigation advantage over the defendant. The government can always send its agents to demand (or appear to demand) information from the subpoenaed source—a power not afforded defense counsel or their investigators. The power imbalance of the parties under the current Rule is one major reason for seeking its amendment.

We respectfully disagree with the Subcommittee's position that "good cause" should be required to proceed *ex parte*. As explained above, there is no upside to involving the Court in discovery unless and until the subpoena recipient disputes the subpoena's scope or applicability.[15] To the extent the Committee adopts the Subcommittee's view that "good cause" is necessary for an *ex parte* subpoena, we submit that the Committee should clarify that premature disclosure of defense strategy constitutes good cause.

Finally, although the Subcommittee has yet to take a position, any amendment to the Rules should be clear that *ex parte* subpoenas should be returnable only to the party seeking such discovery. More specifically, the Rule should allow defense counsel to receive these records directly. Disclosure to the court undermines the defense in the ways described above even if they are not disclosed directly to the prosecution (*see* discussion above), and courts frequently decide to release records to both parties in any event.

---

[15] We also respectfully note that the Subcommittee's suggestion that the government assist *pro se* defendants in showing good cause not to require disclosure to the government—which would be helping them make that showing—points to the layers of complications a good-cause standard would create.

NACDL also opposes any requirement that the items sought by the pre-trial subpoena be not "otherwise reasonably procurable," as has been proposed to this Committee.[16] If subpoenas cannot issue unless counsel successfully makes a series of threshold showings—including proof that materials are not otherwise procurable—subpoenas may become out of reach to practitioners with limited resources and heavy caseloads. Perhaps more importantly, it is difficult to overstate how intrusive into the defense function that standard would be.

Privacy interests of third parties may be protected while also permitting defense access.

There is no dispute that "personal and confidential information" should be protected. To whom such protections apply and the scope of such protections, however, should vary.

As for victims, NACDL agrees that "personal and confidential information" should be protected and subject to a heightened standard for discovery. We favor a narrow definition of this exception to provide greater certainty to parties and to conserve resources by limiting motions practice.[17] In addition, because victims' interests are protected by Rule 17(c)(3), we have proposed that the Committee clarify that standing to challenge a subpoena under Rule 17(c)(4) is limited to the witness to whom the subpoena is directed, and that a motion must be filed either before the time of compliance or within 14 days of receipt of the subpoena, whichever is earlier.

Regarding personal or confidential information for non-victims, such information should be discoverable to the extent it is relevant and proportional. Discovery regarding these sensitive issues is addressed every day in civil matters for topics including protected personal information, health records, and critical trade secrets. The Subcommittee's proposal to create a bifurcated standard for all confidential information—including email and texts—will lead to increased

---

[16] We are concerned that this proposed addition to Rule 17 will add ambiguity. It is not clear what kind of showing would be satisfactory. Before issuing a subpoena, would a party need to hire an investigator to try to interview a witness, or try to convince a social media company to voluntarily disclose information? And does the quantity or quality of "otherwise" available data (and metadata) matter to the analysis?

[17] The AO's form includes the vague admonition to "Please note that Rule 17(c) (attached) provides that a subpoena for the production of *certain information* about a victim may not be issued unless first approved by separate court order." *See* AO 89B (07/16) Subpoena to Produce Documents, Information, or Objects in a Criminal Case, https://www.uscourts.gov/sites/default/files/ao_089b_0.pdf (last visited Aug. 9, 2023) (emphasis added).

confusion and significant litigation.[18] Furthermore, the answer to confidential information is not to preclude discovery of such relevant materials, but to protect them. Courts are well-versed in crafting appropriate protective orders to shield public disclosure of such materials. And to the extent parties are concerned about producing such materials, they can file a motion seeking either to limit the subpoena's reach or enactment of an appropriate protective order.

Relevance should be the substantive standard governing Rule 17 subpoenas.

Although the Subcommittee has not offered its preferred standard for seeking discovery pursuant to third party subpoenas, we respectfully suggest that the criminal standard mirror the discovery standards established by the Federal Rules of Civil Procedure—that the discovery sought be "relevant" and "proportional"—and the procedures established in Civil Rule 45.

For the reasons cogently explained by the New York City Bar and others cited in their February 17, 2022, letter to the Committee, the *Nixon* standard and similar restraints on pre-trial subpoenas by the defense unreasonably frustrate the truth-seeking function. Until the defense sees the evidence at issue, it is virtually impossible to show that it is "evidentiary and relevant." But NACDL parts company with the New York City Bar in its suggestion of importing Rule 16's "relevant and material" standard into Rule 17. This standard sets the bar too high for parties seeking records during the post-indictment, pre-trial investigative stage. "Material" works for the government applying Rule 16 because the government already has records in its "possession, custody, or control" *before* it decides whether Rule 16 requires their production. A more flexible standard should apply when records are in third-parties' possession. We suggest a standard at least as permissive as the discovery standards established by the Federal Rules of Civil Procedure (*e.g.*, "relevant" and "proportional").[19] A better standard would be even more permissive given the

[18] If there were separate standards for emails and texts as opposed to business records, a request that sought "all documents regarding the company's purchase of asset X" would be subject to two different standards to the extent it reached both sales documents and emails about those sales documents. Such a standard would be unworkable in practice.

[19] *See* Fed. R. Civ. P. 26(b)(1). Notably, the government already has experience with the civil standard. *See generally* Dept. of Justice, *eLitigation*, 68 DOJ J. FED. L. & PRAC. 1, no. 3, 2020, https://www.justice.gov/media/1070351/dl?inline ("A constellation of changes in the quantity and variety of data, records, and electronic evidence collected in our criminal

constitutional rights at stake. After all, Rule 17 helps defense counsel implement the accused's constitutional rights to compulsory process, due process, and the effective assistance of counsel.

Conclusion

NACDL supports revisions to Rule 17 that will enhance the timely, efficient, and equitable access to records. Judicial gatekeeping and restrictive standards before a subpoena may issue are unnecessary: legitimate third-party and privacy interests may be adequately protected by motions to quash or for protective orders; subpoenas in criminal cases should have at least as much investigatory power as in civil litigation. As Justice Holmes emphasized more than 100 years ago, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87, 37 S. Ct. 68, 69 (1916).

Respectfully,

Michael P. Heiskell, President, NACDL[20]

National Association of Criminal Defense Lawyers
Rule 17(c) Task Force:

Jim Felman, Chair[21]
Benjamin Au[22]
Peter Goldberger[23]
Stephen Ross Johnson[24]

---

investigations and prosecutions, as well as in our civil practice, requires a new approach to all phases of civil and criminal litigation.").

[20] Proprietor, Johnson Vaughn & Heiskell (Texas), NACDL President, https://www.nacdl.org/People/MichaelPHeiskell.

[21] Partner at Kynes Markman & Felman (Florida) and NACDL Board Member, https://www.kmf-law.com/attorneys/james-e-felman/.

[22] Partner at Orrick (California) and NACDL Board Member, https://www.orrick.com/en/People/1/7/2/Ben-Au.

[23] Proprietor, Law Office of Peter Goldberger (Pennsylvania), https://www.linkedin.com/in/peter-goldberger-0292a431/.

[24] Partner at Ritchie, Davies, Johnson & Stovall (Tennessee) and NACDL Board Member, https://www.rdjs.law/attorneys/stephen-ross-johnson/.

Simon Latcovich[25]
Lisa Mathewson[26]
Katherine Tang Newberger[27]
Anne Passino[28]
Addy Schmitt[29]
Tom Ward[30]
Richard D. Willstatter[31]

Cc: Prof. Sara Sun Beale, Co-Reporter, Advisory Committee on Criminal Rules

Prof. Nancy King, Co-Reporter, Advisory Committee on Criminal Rules

---

[25] Partner at Williams & Connolly (Washington, D.C.), https://www.wc.com/Attorneys/Simon-A-Latcovich.

[26] Proprietor, Mathewson Law (Pennsylvania) and NACDL Board Member, https://www.linkedin.com/in/lisa-mathewson.

[27] First Assistant Federal Public Defender (Maryland) and NACDL Board Member, https://www.nacdl.org/People/KatherineTangNewberger.

[28] Attorney at Ritchie, Davies, Johnson & Stovall (Tennessee), https://www.rdjs.law/attorneys/anne-e-passino/

[29] Partner at Harris St. Laurent & Wechsler (Washington, D.C.) and NACDL Board Member, https://hs-law.com/addy-schmitt.

[30] Partner at McDermott Stuart & Ward (Colorado), https://mswdenver.com/attorneys/thomas-r-ward/.

[31] Partner at Green & Willstatter (New York) and NACDL Board Member, http://greenandwillstatter.com/firm/richard-willstatter/.

Ballard Spahr LLP

1909 K Street, NW
12th Floor
Washington, DC 20006-1157
TEL 202.661.2200
FAX 202.661.2299
www.ballardspahr.com

Charles D. Tobin
Tel: 202.661.2218
Fax: 202.661.2299
tobinc@ballardspahr.com

Leita Walker
Tel: 612.371.6222
Fax: 612.371.3207
walkerl@ballardspahr.com

November 1, 2024

Via Email and Fedex

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

Re: Revising Federal Rule of Criminal Procedure 53

Dear Secretary Byron:

One year ago, on behalf of a coalition of media organizations,[1] this firm wrote to request that the Judicial Conference revise Rule 53 of the Criminal Rules of Procedure to permit broadcasting of criminal proceedings or to at least create an “extraordinary case” exception to the prohibition on broadcasting. Our letter prompted the Standing Advisory Committee on Criminal Rules to create a Rule 53 Subcommittee to study the coalition’s proposal. We understand that, since then, the Subcommittee twice met to discuss Rule 53, and on October 9, 2024, it addressed a four-page memorandum to the Standing Committee

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

that "recommends no change in Rule 53 at the present time."[2] We now write to suggest that the Standing Committee ***reject*** the Subcommittee's recommendation and amend Rule 53 so that judges have discretion to permit cameras in courtrooms or, alternatively, to create an "extraordinary case" exception.

As a preliminary matter, we are concerned that the Subcommittee was comprised of only federal judges, a federal public defender, and a representative for the U.S. Department of Justice. Given that these Subcommittee members all work within the federal judicial system, none of them would seem to have any recent, significant, first-hand experience with cameras in courtrooms. Meanwhile, members of the coalition, and other members of the media, have extensive experience livestreaming and broadcasting state court proceedings, and state court judges and jurists around the country have overseen or participated in televised trials for decades. These individuals all could have addressed many of the concerns apparently raised during the Subcommittee's two meetings, yet, to our knowledge, no journalist was invited into those meetings, nor was a judge or jurist from any of the many states that permit cameras in courts. For that matter, no researcher who studies cameras in courts and who might have offered further insights into academic literature on the topic appears to have been invited, either.[3]

Moreover, members of the media—along with the general public—have an interest in maximizing courtroom transparency that is separate and distinct from that of judges and lawyers. For this reason, the Supreme Court has time and again recognized the press and public's right to be meaningfully heard on issues of court access, *see, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982), and the composition of the Subcommittee ignores the spirit, if not the letter, of this long line of precedent. Indeed, in our experience, judges and trial lawyers are often aligned in their opposition to cameras (at least until they personally experience a televised trial), due to the perceived hassle or unwanted scrutiny audiovisual coverage may cause.[4] The Subcommittee's recommendation thus

[2] *See* Meeting Agenda, Advisory Committee on Criminal Rules (October 9, 2024), Tab 2A, at 105-109, *available at* https://www.uscourts.gov/sites/default/files/2024-11_criminal_rules_meeting_agenda_book_final_10-24.pdf (hereinafter "Meeting Agenda").

[3] The coalition acknowledges that William Raftery at the National Center for State Courts apparently provided some information to the Subcommittee, as did individuals at the Federal Judicial Conference, though the Subcommittee's memorandum does not specify what information they provided or whether they joined the Subcommittee's discussions and offered any personal insights.

[4] While there may be administrative burdens to implementing cameras in courtrooms, transparency is a core feature of our courts and government, not a bug in the system. *See,*

suffers from its failure to consider the divergent viewpoints of obvious stakeholders. For this reason alone, we ask that you reject the Subcommittee's recommendation. In addition, we would appreciate the opportunity to appear before the Standing Committee, along with select journalists, judges, jurists, and academics, and address any questions it has before this conversation is brought to a close.

Moving to the substance of the Subcommittee's four-page memorandum, we ask that you reject it and the Subcommittee's ultimate recommendation for several reasons.

First, in rejecting the coalition's proposal, the Subcommittee seems to contemplate an exception-free amendment to Rule 53 in which cameras are constantly streaming and presiding judges have no authority to restrict when they are rolling or who they are trained upon. The Subcommittee then proceeds to address the perceived pitfalls of this strawman situation, pointing, for example, to the legitimate fears experienced by indigenous women who experience sexual assault. *This sort of amendment is not at all what the coalition proposes, nor is it how **any** state court rule on cameras in courts is fashioned*.[5] Rather, the coalition acknowledges that judges have inherent authority to manage their courtrooms and even to restrict camera coverage of certain proceedings or certain trial participants where the situation warrants. Indeed, even "[a] bank teller in a robbery case" would be entitled to have their interests in safety and privacy considered. In short, no one is asking for blanket *permission* to use cameras; the coalition is asking to abolish Rule 53's blanket *prohibition*.

Second, the Subcommittee's memorandum fails to recognize that many of the supposed "negative effect[s]" of cameras have actually been present in courtrooms since our nation's founding, due to its profound commitment, embodied in both the First and Sixth Amendments, to open criminal trials. The decision to value transparency over privacy

---

e.g, *In re Associated Press*, 172 F. App'x 1, 5-6 (4th Cir. 2006) (acknowledging "[w]e do not doubt that the administrative burdens facing the district court are enormous," but granting a petition for writ and directing the trial court to ensure same-day release of trial exhibits shown in court in furtherance of First Amendment right to judicial records).

[5] *See Cameras In The Courts – A State-By-State Coverage Guide*, Radio Television Digital News Ass'n, https://courts.rtdna.org/cameras-overview.php. In Minnesota, for example, the recently modified rules "*prohibit* a district court judge from allowing visual and audio coverage if there is a substantial likelihood that coverage would expose any victim or witness who may testify at trial to harm, threats of harm, or intimidation." *See* Order Promulgating Amendments to the Gen. Rules of Practice for the Dist. Cts., *In re Rules of Crim. Proc.*, No. ADM10-8049 (Minn. Mar. 15, 2023), included in Meeting Agenda, Tab 2C, at 128-35 ("Minnesota Order").

involves some very real trade-offs, which the coalition discussed at length in its October 5 suggestion.[6] But to put a finer point on it, jurors and witness are potentially *already* afraid of gangs, whose members are free to sit in public courtrooms and watch proceedings unfold. Any open-court testimony of confidential informants is *already* public and subject to public discussion. The media *already* have access to photographs of jailhouse bookings and so-called "perp walks," photographs of judges and lawyers obtained from websites or other appearances outside the courthouse, body-camera footage and other images entered into evidence, names of witnesses, transcripts of their testimony, and a long list of other publicly available information. All of this is *already* subject to reporting by the media, and the Subcommittee has not explained how courtroom camera coverage would exacerbate the risks to trial participants.

Third, and related, is the Subcommittee's expressed concern that "it might be possible to capture the image of a person involved in a criminal case and create a narrative around it" and "[t]his might have very negative consequences for that person." The coalition does not understand this concern, which is actually just a description of journalism and its unavoidable consequences. Journalists, authors, and documentarians have for decades (perhaps centuries) been creating narratives around court proceedings, ranging from books such as *A Civil Action* and *The Innocent Man* to documentaries such as *Making a Murderer* to podcasts such as *Serial*. These publications indeed leave readers, viewers, and listeners with viewpoints on trial participants, but that is an unavoidable consequence of our national commitment to open trials, regardless of whether the publications incorporate courtroom footage. Moreover, such public debate over how trials are conducted and whether justice has been served is not only healthy but also is a hallmark of our democracy and should be encouraged, not stifled.

Indeed, given the technology available to content creators of wide-ranging ethical standards, it would be naïve to assume that banning cameras in courtrooms will somehow prevent recreations of courtroom scenes and discussion about the proceedings depicted. Already, artificial intelligence tools can create convincing courtroom scenes using existing public imagery and transcripts of testimony.[7] The coalition respectfully submits that the public is entitled to authentic audiovisual records, and that preventing access to legitimate

---

[6] *See* Meeting Agenda, Tab 2B, at 123-35, https://www.uscourts.gov/sites/default/files/2024-11_criminal_rules_meeting_agenda_book_final_10-24.pdf.

[7] *See, e.g.*, *Brown Revisited*, Oyez, https://brown.oyez.org/ ("Experience history like never before, reimagined with AI-generated voices. Dive into the heart of the courtroom, where technology meets the pivotal moments that shaped civil rights.")

recordings will exacerbate the spread of mis- and dis-information and the rise of potentially dangerous conspiracy theories.

Fourth, the coalition rejects the Subcommittee's claim that "there has been very little empirical research evaluating the effect of expanded remote public access." The coalition's October 5 suggestion cites many studies and anecdotes that *uniformly* conclude that cameras in the courtroom do not impact the fair administration of justice, and that participating judges and attorneys are in favor of video recording proceedings.[8]

Beyond these cited sources, the "empirical evidence" of the impact of cameras in courtrooms is found in more than four decades of judicial decisions in states such as Florida and Wisconsin, where the administration of criminal justice has proceeded apace with that of other states such as Minnesota, which only recently began to permit cameras at criminal trials. There is simply *no* evidence that states permitting cameras have a higher rate of mistrials or verdict reversals due to prejudicial publicity, reluctant witnesses, or intimidated jurors.

Indeed, empirical evidence is even available from federal courts themselves. Thirty years ago, Court TV Founder and CEO Steven Brill wrote to the Standing Committee expressing frustration at the Judicial Conference's decision to reject any attempt to amend Rule 53 following studies of a pilot program in civil proceedings, after which "the judges

---

[8] *See, e.g.*, Molly T. Johnson, Carol Krafka, & Donna Stienstra, *Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project*, Fed. Jud. Ctr. (2016), *available at* https://www.fjc.gov/content/311380/video-recording-courtroom-proceedings-united-states-district-courts-report-pilot; Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom*, 115 Colum. L. Rev. Sidebar 79, 83 (2015), *available at* https://columbialawreview.org/content/judges-on-demand-the-cognitive-case-for-cameras-in-the-courtroom/; *In re Pet. of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 768, 775 (Fla. 1979) (finding that, after a one-year experiment, concern that cameras in the courtroom would negatively affect lawyers, judges, witnesses or jurors was "unsupported by any evidence."). *See also An Open Courtroom: Cameras in N.Y. Cts. 1995-1997*, N.Y. State Comm. to Review Audio Visual Coverage of Ct. Proceedings (Fordham Univ. Press 1997); *Report of the Comm. on Audio-Visual Coverage of Ct. Proceedings* (State of N.Y. 1994); Ernest H. Short & Assocs., *Evaluation of Cal.'s Experiment with Extended Media Coverage of Cts.* (Sept. 1981), *Report of the Chief Admin. Judge to the Legislature, the Governor, and the Chief Judge of the State of N.Y. on the Effect of Audio-Visual Coverage on the Conduct of Jud. Proceedings* (Mar. 1989); Molly T. Johnson & Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings* at 7, Fed. Jud. Ctr. (1994), *available at* https://www.fjc.gov/sites/default/files/2012/elecmediacov.pdf.

threw out their own evidence; they asked for an experiment to see if cameras could be present without impeding the judicial process, but when their own evidence came in they simply threw it out."[9] More recently, the federal courts had an opportunity to see the impact of a small lift on the Rule 53 ban, when the CARES Act permitted them to provide audio access to criminal proceedings during the height of COVID-19. At that time, thousands of individuals from all over the country were being prosecuted in the U.S. District Court for the District of Columbia for their participation in the January 6 riot at the U.S. Capitol. Journalists and members of the public who were not able to attend because of COVID, and may have not been able to travel to Washington even if the courtrooms were open to the public, were able to listen in on telephonic lines and follow the prosecutions of people from their communities. We are unaware of any disruptions or due process concerns raised by this limited opening of proceedings to the public.

Moreover, it bears noting that, even though the Subcommittee found the empirical evidence that exists insufficient, it cites and relies on the Minnesota Supreme Court Advisory Committee's finding that "[m]ost of the data shows that very few negative impacts are realized when cameras are in the courtroom." It also bears noting that although the Subcommittee relies heavily on the Minnesota committee's report, it fails to explicitly acknowledge that the Minnesota Supreme Court essentially *rejected* those findings and recommendation and amended the Minnesota rules to grant judges broad discretion in permitting cameras in criminal trials. All that being said, if there is some additional, empirical research that the Standing Committee would like to see conducted, the coalition would welcome a discussion about how it might support that research and what methodology the Standing Committee might find acceptable in the absence of another pilot program under Rule 53 that would provide the best and clearest evidence of how cameras impact federal criminal proceedings.

Fifth, although the Subcommittee did not find four decades of state court experience instructive, it did find "especially helpful" a nearly quarter-century-old statement by Judge Edward Becker, who served exclusively on the federal bench and thus never presided over a

---

[9] *See* Statement by Court TV Founder and CEO Steven Brill, Meeting Agenda, Advisory Committee on Criminal Rules (Oct. 6-7, 1994), at 103-04, *available at* https://www.uscourts.gov/sites/default/files/fr_import/CR1994-10.pdf. Through that program, Court TV alone "covered 36 federal cases," and "[a]fter each and every trial we also surveyed the judge involved and those judges told us that the camera experience had not in any way impeded the process of justice and had, according to them, enhanced the public's understanding of the justice system." *Id.*

televised trial.[10] Judge Becker's statement included passages from *Estes v. Texas*, 381 U.S. 532 (1965), "regarding the impact of publicity on the quality of witness testimony." While recognizing the precedential value of *Estes*, the coalition submits that a 60-year-old decision is largely a product of its time: In 1965, camera technology was big, loud, and manually operated, and "the activities of the television crews and news photographers led to considerable disruption of the hearings." *Id.* at 536. Now, though, technology is discrete and may be remotely operated, thus certain proceedings may be recorded or broadcast without intruding on the "judicial serenity and calm" of a courtroom to which the Court stated a criminal defendant is entitled. *Id.* Additionally, Justice Harlan had the foresight to observe that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." *See id.* at 595 (Harlan, J., concurring). Indeed, the Court itself recognized, four decades ago, how dated the *Estes* principle already had become, retreating from its categorical disapproval of cameras in *Chandler v. Florida*, 449 U.S. 560 (1981), which recognizes that each trial judge is in the best position to determine case-by-case whether cameras are harmonious with fair-trial concerns. In 2024, we all have personal audiovisual devices in hand or in our pockets at all hours of the day, and in high-profile cases, such as one against a former president, we will all be absorbing information about the case on our handheld screens. In other words, the day that the justices anticipated has long since passed.

Finally, we are disappointed that, even though our October 5 suggestion was the impetus for the Subcommittee's formation and was called "very thoughtful," the Subcommittee failed to address its key idea: that certain trials—including the upcoming trial of former President Trump for conspiring to obstruct the certification of the 2020 presidential electoral vote on January 6, 2021, *see United States v. Donald J. Trump*, 23-cr-257-TSC (D.D.C.)—are of such significant public interest and concern that barring cameras threatens to undermine trust in our institutions and democracy itself. Even Defendant Trump has said his upcoming trial in Washington should be televised.[11] It appears that the

---

[10] *See* Meeting Agenda, Advisory Committee on Criminal Rules (April 18, 2024), Tab 4, at 94-96, https://www.uscourts.gov/sites/default/files/2024-04_agenda_book_for_criminal_rules_meeting_final.pdf.

[11] *See* President Trump's Response to Media Coalition's Motion for Audiovisual, *United States v. Trump*, 23-mc-99-TSC (D.D.C.) (ECF No. 19) ("President Trump calls for sunlight. Every person in America, and beyond, should have the opportunity to study this case firsthand and watch as, if there is a trial, President Trump exonerates himself of these baseless and politically motivated charges."); *see also He did 'absolutely nothing wrong':*

Subcommittee did not discuss the value in ensuring maximum public access to similar cases of national interest (and with national potential implications). Rather, the Subcommittee appears to have focused solely on the misperceived dangers and unsubstantiated risks of broadcasting or livestreaming trials involving sensitive crimes such as sexual abuse, not-so-sensitive crimes such as bank robberies, and the misplaced fears trial participants have in cases involving gangs—risks that the Subcommittee members must realize already exist in courtrooms open to the public.

Given that there are two constitutional amendments requiring that criminal trials and proceedings be public, the first reaction to a purported lack of "empirical evidence," good or bad, should be to permit *more* public access to the courtrooms, not less. We respectfully ask that the Standing Committee reject the Subcommittee's recommendation and take up the coalition's original suggestion to amend Rule 53 to provide federal judges broad discretion to permit cameras in courtroom, or alternatively, to create an "extraordinary case" exception so that audiovisual recordings of trials of incredible import do not get lost in time.

Very truly yours,

Charles D. Tobin

Leita Walker

Cc: Judge James C. Dever III (jcd46@duke.edu, james_dever@nced.uscourts.gov)
Judge Michael W. Mosman (michael_mosman@ord.uscourts.gov)
Judge Timothy Burgess (tim_burgess@akd.uscourts.gov)
Judge G. Michael Harvey (michael_harvey@dcd.uscourts.gov)
Marianne Mariano, Esq. (marianne_mariano@fd.org)
Finnuala Tessier (Finnuala.Tessier@usdoj.gov)

Trump attorney John Lauro, Fox News (July 21, 2023), https://www.foxnews.com/video/6331632263112, at 6:05-6:31.

348 4th Ave., 1007, Brooklyn, N.Y. 11215

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C., 20544
Delivered via email

Nov. 4, 2024

Dear Mr. Byron:

Fix the Court is a national nonpartisan organization advocating for greater transparency and accountability in the federal judiciary. We write today following recommendations issued by the Criminal Rules Subcommittee that may push possible revisions of Rule 53 into 2026 or later. We have serious reservations with these recommendations and pray the Standing Advisory Committee on Criminal Rules rejects them.

To us, the broadcast issue comes down to how the judiciary might answer these two questions:

1. Do you want to create a primary source of what happens in a courtroom on a given day, or have you accepted the fact that thanks to Rule 53 and advanced AI, malign actors will make and distribute misleading videos of the proceedings, which will be the *only* videos of the proceedings?
2. Do you trust judges to maintain decorum in their courtrooms?

Regarding the first question, it's important to note that the move toward using AI to reenact or reimagine court proceedings is already happening. Earlier this year, CNN produced a simulation of what former President Trump's hush-money trial in New York might have sounded like using artificially created voice actors,[1] and during the Sam Bankman-Fried trial last year, an AI-generated sketch of the defendant went viral on social media.[2]

Once Trump's federal trials get underway, we would imagine content creators would do the same — though we doubt they would stop at fake sketches or audio, seeing as how there were several AI-generated deep-fake photos and videos of Trump's arrest and processing.[3] Some of these creators will be malign actors who use AI to take the things that are said in the courtroom out of context and depict events in a way that will help their proverbial side. That's the world we live in nowadays.

If the judiciary were to permit video-recording in criminal trials, the same bad actors might take the official, judiciary-produced courtroom video and manipulate it in some unseemly way. Again, that's to be expected.

But at the end of the day, permitting video in trials means that the majority of Americans, who understand the value of primary sources and who are not easily duped by deepfakes and conspiracy theories, would be able to rely on the videos filmed by the judiciary and released by the judiciary to know what actually took place inside a courtroom. That would be an invaluable resource that AI, no matter how good it is, would not be able to replace.

---

[1] *See* "CNN's new 'Inside the Trump Trial' series takes you inside the courtroom with the help of AI." CNN.com, May 28, 2024 (link).

[2] *See* Hurley, Bevan, "A fake courtroom sketch of a hulking Sam Bankman-Fried has gone viral – the court artist is far from impressed." *The Independent*, Nov. 1, 2023 (link).

[3] *See* Devlin, Kayleen and Cheetham, Joshua, "Fake Trump arrest photos: How to spot an AI-generated image." BBC News, Mar. 24, 2023 (link).

Second, we must point out that even now, 30 years after Judge Ito, the most common arguments against cameras in the courtroom still hearken back to a trial where a judge did a poor job managing his video-permitting courtroom. Enough already. In the intervening years, judges have learned what it takes to conduct a fair and decorous trial under the watchful lens of a TV camera — even the most challenging of trials under the most high-stakes circumstances.[4]

Federal judges especially — given their universally acknowledged and time-tested skills, and with wide variance in courtroom practice from district to district[5] — should have the chance to permit cameras in their own courtrooms and not be limited by a decades-old rule.

After all, even if Rule 53 were rescinded, many judges might maintain a full or partial cameras ban in their courtrooms when there are compelling reasons to maintain it (e.g., a trial involving national security issues or testimony of a minor). But the idea that a subcommittee consisting of a few judges would dictate how more than 1,700 jurists nationwide[6] run their courtrooms reveals a cynical lack of faith in judges' decision-making capabilities.

We say: trust judges' independence and their courtroom management skills.[7]

We all want to limit misinformation and build trust in our nation's judges. Permitting cameras in federal criminal trials will do both, and we thank you for your consideration of our views.

Kind regards,

Gabe Roth	Manny Marotta
Executive Director	Law Clerk
Fix the Court	Fix the Court

Cc: Judge James Dever
Judge Michael Mosman
Judge Tim Burgess
Judge Michael Harvey
Marianne Mariano
Finnuala Tessier

[4] *See* Tobin, Charles D. and Walker, Leita, "Revising Federal Rule of Criminal Procedure 53." Oct. 5, 2023: "Minnesota Attorney General Keith Ellison, who initially opposed cameras in the courtroom for this special exception, admitted afterward that 'it worked out better than [he] thought'" (link).

[5] It's well-known that although the Constitution and federal law are the same everywhere, judges' courtroom management practices vary greatly from judge to judge and from district to district.

[6] Our estimate of active district, senior district and magistrate judges in the federal system today.

[7] The ban may also be seen as a slight to potential courtroom or remote camera operators, whose jobs would depend on their compliance with a judge's instructions, such as "do not film the jury" or "turn the camera off when a minor or victim of violence is testifying." We have no doubt they would comply.