ADVISORY COMMITTEE
ON
CRIMINAL RULES

Alexandria, VA
May 7, 2019

AGENDA

Meeting of the Advisory Committee on Criminal Rules
May 7, 2019
Alexandria, VA

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A. Update on Measures to Protect Cooperators; Proposed Rule 49.2

7. NEXT MEETING: September 24, 2019, Philadelphia, PA

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Donald W. Molloy Chair	D	Montana	Chair:	2015	2019
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James C. Dever III	D	North Carolina (Eastern)		2014	2020
Donna Lee Elm	FPD	Florida (Middle)		2017	2020
Gary Feinerman	D	Illinois (Northern)		2014	2020
Michael J. Garcia	JUST	New York		2018	2021
Denise Page Hood	D	Michigan (Eastern)		2015	2021
Lewis A. Kaplan	D	New York (Southern)		2015	2021
Orin S. Kerr	ACAD	Washington, DC		2013	2019
Raymond M. Kethledge	C	Sixth Circuit		2013	2019
Bruce J. McGiverin	M	Puerto Rico		2017	2020
Catherine M. Recker	ESQ	Pennsylvania		2018	2021
Susan M. Robinson	ESQ	West Virginia		2018	2021
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee		2007	Open

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Liaisons for the Advisory Committee on Appellate Rules	**Judge Frank Mays Hull**	***(Standing)***
	Judge Pamela Pepper	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge William J. Kayatta, Jr.**	***(Standing)***
Liaisons for the Advisory Committee on Civil Rules	**Peter D. Keisler, Esq.**	***(Standing)***
	Judge A. Benjamin Goldgar	***(Bankruptcy)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Jesse M. Furman**	***(Standing)***
Liaisons for the Advisory Committee on Evidence Rules	**Judge Carolyn B. Kuhl**	***(Standing)***
	Judge Sara Lioi	***(Civil)***
	Judge James C. Dever III	***(Criminal)***

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 10, 2018 | Nashville, TN

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Nashville, Tennessee, on October 10, 2018. The following members, liaison members, and reporters were in attendance:

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

And the following persons were present to support the Committee:

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

The following persons attended to inform to the Committee about Department of Justice disclosure procedures for expert witnesses:

Kira Antell, Senior Counsel, Office of Legal Policy
Eric Booker, Section Chief of FBI laboratory at Quantico
Andrew Goldsmith, National Criminal Discovery Coordinator
Zachary Hafer, Chief of the Criminal Division, District of Massachusetts

Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
Elizabeth J. Shapiro, Deputy Director, Civil Division, Department of Justice
Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

Finally, two observers attended:

Patrick Egan, American College of Trial Lawyers
Amy Brogioli, American Association for Justice

Judge Molloy brought the meeting to order, and welcomed the new members: Judge Michael Garcia from the New York Court of Appeals; Katie Recker (who has attended many meetings in the past as a representative of the American College of Trial Lawyers); Susan Robinson, from Charleston, West Virginia; and Brian Benczkowski, Assistant Attorney General for the Criminal Division of the Department of Justice.

The Committee unanimously approved the minutes of the April 2018 meeting, subject to typographical corrections brought to the reporters' attention.

Ms. Womeldorf reported on the progress of Rules amendments. She noted that the Standing Committee and the Judicial Conference had approved Rule 16.1 and the changes to the Rules for 2254 and 2255 cases, which will be forwarded to the Supreme Court. Assuming the Court accepts them, they will be forwarded to Congress. If Congress does not act, those rules will be effective December 1, 2019. She drew the Committee's attention to p. 57 of the Agenda Book, which includes language added to the Committee Note by the Standing Committee to address a concern about the relationship between the new rule and local rules.

Professor Beale explained that this Committee first included a reference to local rules in the Committee Note to accommodate local rules with shorter time periods. We intended to make it clear that the Rule doesn't prevent local rules from setting shorter time periods, but just sets an outer boundary. At the Standing Committee, members emphasized that local rules cannot contravene the Rules of Criminal Procedure, and expressed concern that the statement in the Note might be read to undercut that principle. The new language referring to local rules that "supplement and [are] consistent with" was added to the Note by the Standing Committee to highlight that everything being done under local rules must be consistent with the Rules of Criminal Procedure. The language was inserted into a sentence that this Committee had approved, which had focused on making sure that the Rule didn't override the existing authority of the district judge. Professor Coquillette noted that he agreed with what had been said about local rules, and this was an important change.

Ms. Womeldorf then reported on Judicial Conference developments and noted the public release of the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program. That Committee has been working for a number of years. A key recommendation, and major change, is that Congress create an independent federal defender commission within the judicial branch but outside the oversight of the Judicial Conference. The idea is to parallel the

Sentencing Commission, which is part of the judicial branch but not under the judiciary's control. A member added there have long been concerns that defense attorneys run into conflicts because of the need to keep something confidential, and that led to this recommendation. They are now working on an interim plan that looks like it has been approved by several of the committees, so we are going ahead with the plans. But the recommendation will take Congressional action.

In response to a question about how many of the roughly 34 recommendations made in the report had been adopted, Ms. Womeldorf stated that many have been adopted. But it is a large report and other recommendations are still under study. The full report is available on the uscourts.gov website.

Ms. Wilson provided the legislative update, referencing the chart in the Agenda Book, pp. 113-121, and noted there were no legislative developments that would amend the Criminal or Habeas Rules. The Rules staff is monitoring a lot of activity on the Civil Rules, including a bill to restructure the Ninth Circuit and provisions creating new federal judgeships.

Judge Molloy turned to the proposal to amend Rule 43, which emanated from a decision of the Seventh Circuit suggesting that the Rules be amended so that under certain circumstances a defendant need not be present for plea or sentencing. He noted this is not the same as the issue the Committee addressed recently, where a judge wanted to sentence remotely while the defendant was in the courtroom. This proposal concerns a defendant who was sentenced at his own request while not in the courtroom and then raised the issue on appeal.

Professor Beale reported that this proposal came from the Circuit Executive of the Seventh Circuit Court of Appeals, who forwarded an opinion in which the Seventh Circuit panel said it had no authority to uphold a guilty plea and sentence where the defendant wasn't present, regardless of the circumstances. The defendant in the case, Bethea, had several very severe health conditions, and even touching him could break his bones. So it was to the defendant's advantage not to have to travel to the courtroom in another city for his guilty plea and sentencing. But on appeal, he challenged the legitimacy of his sentence, and the court of appeals set it aside. The court held that Rule 43 says the defendant must be present, and there is error even if the defendant asked not to be present. The court also suggested it might be a good idea if the rule was more flexible.

Professor Beale noted that the Committee has previously considered on at least two occasions whether to allow a video plea or sentencing in felony cases, and the answer has been no. But those were different suggestions. One arose when we were doing a complete review of changes to implement improvements in technology. For example, we concluded that it would be advantageous to allow electronic service and filing of the grand jury indictment, and we amended Rule 6 accordingly. But we did not provide for video pleas and sentencing. The second, more recent, proposal the Committee rejected was from an individual judge who spent many months away from his courthouse and thought it would be convenient to be able to sentence remotely, unless the defendant could show a very good reason he had to be present.

This question raised by this proposal is different: whether Rule 43 should be amended to allow a defendant to be absent for sentencing if, on a case-by-case basis, the defendant could show exceptional circumstances, perhaps after waiving or being advised of his right to be present. If this might be a good idea, we would need a subcommittee to determine whether such an exception could be narrowly drafted. This Committee is on record saying it is far, far, better to take pleas and sentence in person. So the key policy question is whether we should permit any exceptions, which, inevitably, could creep. That is what is teed up for discussion.

Professor King added that in researching this topic in federal and state courts the reporters had identified issues any subcommittee asked to take on this proposal may have to tackle, including any limits on when the defendant could make a request, under what circumstances the judge could refuse a defense request, whether the prosecutor has to agree, and how to avoid pressure from the prosecutor and the judge to waive presence. If there was sentiment on the Committee to convene a subcommittee, there is plenty to consider.

Judge Molloy asked for members to express their views.

One member stated that the Rule is sufficiently clear the way it is.

Another indicated she had been in the courtroom on multiple occasions where a defendant decides at the plea hearing he doesn't want to plead. It is far preferable to have a defendant in front of the judge at that solemn time.

A member agreed it is far preferable to have the defendant there in person, but noted that the Seventh Circuit case presented a much more compelling situation than those we previously addressed, where the judge wanted to be absent. It is worth taking a look at this.

Another member stated that she had a client who did this once for a very compelling reason, and did not appeal. She said it is curious this case was appealed. She favored sending this issue to a subcommittee, because there are rare compelling cases, and the letter of the rule is so strict that it would not allow exceptions.

A member wondered how often this happens and whether, when it does, there is usually no appeal. It seems likely that it happens quietly for the benefit of the defendant. If it is rare, and there are quiet workarounds, it is not obvious that we need to go through the work of trying to draft rules to deal with a very unusual set of circumstances. He was skeptical about having a subcommittee.

Another member responded that there are societal interests in sentencing, not just the defendant's. Accordingly, having the Rule clearly stated is important. Judge Molloy noted the Crime Victim's Rights Statute states victims have a right to be present.

Another member was skeptical of the need for a subcommittee. First, this doesn't seem to happen very much and there are probably workarounds when these problems do arise. He also expressed doubt about the Seventh Circuit's ruling that presence is not waivable. The opinion says proceeding without the defendant is per se prejudice, but that assumes the issue has been

presented to the court for it to consider. But this is outright waiver. The defendant is asking the district court to do something, the court does it, and then the defendant wants to appeal. That's not forfeiture, it's waiver. His condition is so extraordinary, but this is a really important value, and the Rule is really clear. That member stated that he'd be very reluctant to do anything to the Rule. And this case does not present a compelling instance to do something.

Another member said a lot happens in a plea, and the potential for the defendant and the judge not to be communicating at the same level because they are separated by video screens is very concerning. Just getting through the factual basis from the client's perspective is very, very difficult, and the member would be reluctant to see any further alienation between the defendant and that experience.

A member agreed that physical presence is extraordinarily important in the sentencing context, and he'd be reluctant to see any deviation. He was not quite as sure about the plea context. This as a really compelling case. The member agreed that the court might have mixed up per se prejudice with waiver, and saw the value of a subcommittee examining a possible amendment for pleas.

Another member said she thought with both pleas and sentencing there is a lot going on in the room. If you have it on video conference it's not clear whether the judge gets the impression of everybody participating in it so that there isn't any error. Technology will get better and better. But this is a slippery slope. If we start to allow it, there's a danger that things may be characterized as extraordinary that it might not really be extraordinary. She did not believe the Committee would want to look at it again.

Professor Coquillette commented that this is an area where the Supreme Court has historically taken a role in rule making, particularly Justice Scalia. They are extremely sensitive about this area.

Assistant Attorney General Benczkowski stated that as a general matter the Department does not seek to take pleas or conduct sentencings in this manner. The Department would be skeptical about going down this road for many of the reasons already stated.

Judge Campbell observed that the Civil Rules Advisory Committee has tried to draw a very narrow exception to the requirement that a witness be in court to testify during a trial. Civil Rule 43(a) says "for good cause in compelling circumstances, and with appropriate safeguards, the court may permit" remote testimony. He also asked why Criminal Rule 43 makes an exception allowing defendants to be in a remote location for initial appearances and arraignments under Rules 5 and 10, but not for a plea?

Professor King stated that when the Committee addressed in a comprehensive way where technology such as video conferencing might be appropriate or inappropriate, members thought it was too important to be present at pleas and sentencings to allow for an exception. The reasons were like those just articulated about the importance of one on one communication

between the judge and the defendant, there was no interest in moving videoconferencing to pleas and sentencing.

Professor Beale noted several differences between the current proposal and earlier amendments allowing video presence. The waivers that occurred at the plea hearing are a different order of magnitude from those at earlier points in the process, where the Committee was persuaded that the advantages, convenience, and speed at which things could be done would warrant allowing for some ability to conduct proceedings remotely. In recent discussions, the 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. As a member once said, sentencing is the most human thing a judge does. Those are more significant, requiring the face-to-face.

Judge Molloy remembered discussion on similar issues when Judge Anthony Battaglia brought some of these issues to the Committee. It was important that the defendant had to ask for the video. It couldn't be the court that asked. And many members who do defense work stressed the importance of having the defendant in the courtroom. What happens is much different when people are doing it remotely, than if you are eyeball to eyeball.

Professor King recalled that there may also have been a much more pragmatic reason for allowing videoconferencing in preliminary proceedings. Especially in the large Western districts where apprehension and immediate detention may take place a long distance from the judge, and transporting the defendant was sometimes not feasible within the required time frame, there were already efforts to have videoconferencing for those preliminary proceedings. So it fit with not only the view of the judges about the relative importance of those proceedings, but also the way that they were already starting to use video technology.

Professor Beale agreed and added it might be a drive of 300 miles, and in bad weather in the winter. The question the Committee wrestled with was how important was presence in the courtroom was for each procedure, and whether exceptions were sensible if something had to be done quickly.

Judge Campbell noted there were cases where the defendant was so disruptive that you couldn't conduct a trial with the defendant in the courtroom, and courts have authorized proceedings to have the defendant taken out to watch by video. He doubted whether the Seventh Circuit's per se prejudice rule is necessarily correct. Professor Beale responded that Rule 43(c)(1)(C) authorizes the judge to have the defendant removed after a warning about disruptive behavior.

A member noted that a waiver by misconduct can go all the way through sentencing. He also related that he once had a case where the defendant claimed he was a sovereign citizen, opted out, and did not recognize the validity of the proceeding. He had a trial, was convicted, and sentenced. The member did not know if he appealed. Another member noted he had a capital case where the defendant punched his lawyer in his face and was removed.

Professor Beale observed that in the *Bethea* case the defendant got a lot longer sentence than he anticipated, and this likely led to the appeal.

A member indicated this wouldn't have happened in the case where her office represented someone remotely sentenced, because it was a Rule 11(c)(1)(C) case, where the plea stipulation covered the sentence.

A member suggested that the Seventh Circuit's decision in *Bethea* may be a one off. Professor Beale responded that there was the other district court case cited in the reporters' memo where the defendant was very, very ill and the estimate was it was going to cost at least $4000 to bring him to court in an ambulance. It is unclear how many of these cases are there. We have an aging population, and people who are not in good health can commit crimes from their keyboards at home. Maybe the Committee should wait and see if there are a number of these cases. If there are, it could return to the issue. In addition to the Civil Rules language, there are some state cases, and state rules on this we could consider. And there is some language in our own rules – Rule 15(a), discussing when depositions can be taken, says "because of exceptional circumstances and in the interest of justice," and that might cover the interests of victims and others. But perhaps there are not yet enough of these cases that we think it is a good idea to start creating an exception.

Judge Molloy noted this is a published opinion of a circuit court, and it would be a good idea to have a subcommittee look into it, explore the ideas that have been expressed here, and come back with some definitive answer. The Seventh Circuit obviously had a concern about it, although they may have gotten it wrong. He stated that he would establish a subcommittee to consider the issue. Judge Campbell added that there are other parts of the rules that are implicated if a subcommittee is formed. For example, Rule 11(b)(2) says the court must address the defendant personally in open court.

Answering a question from another member inquiring about any cases where the defendant has tried to achieve a quiet work around and the judge said "No, the Rule is clear," one member said she was aware of another case where a defendant was sentenced by video a little while ago, but she didn't know of any case where a person who has legitimate need has been turned down.

Professor Beale said Rule 43(c)(1)(B) says sentencing can proceed if the defendant is voluntarily absent after being there for trial. So there are some exceptions already in the rule. Some of the pressure points are taken care of already.

Another member suggested that the Court's decision in *United States v. Davila* might be relevant. The Supreme Court ruled that the Eleventh Circuit had erred in applying a per se reversal rule for judicial participation in plea negotiations, and there was a specific reference to the harmless error standard in Rule 11(h). He agreed that this Seventh Circuit case is an oddity.

Judge Molloy turned to the next matter on the agenda: the time for ruling on habeas petitions. Professor King noted that the discussion of this proposal begins on p. 147 of the

Agenda Book. It came to the Committee from Mr. Peel, who is litigating his own 2255 case. He wanted the Civil and Criminal Rules Committees to consider a rule that judges must decide pending petitions and motions within a certain period of time.

Based on prior consideration of timelines for judicial decisions by the Civil and Criminal Rules Committees over the years, the reporters thought a strict timing rule for the consideration of 2254 and 2255 cases would be a non-starter for many reasons. However, the issue of delay in resolving these matters has been a problem raised in commentary. It has been a particular problem in capital cases, and very controversial there. But this proposal concerns only non-capital cases. There have been two studies in the past documenting this delay, as noted in the reporters' memo.

Professor King projected two bar graphs on the screen, one from each study, showing the variation in average time to disposition for 2254 noncapital cases in every district, with many districts taking multiple years on average to close these cases. The author of the more recent study argued that the reason for delay in these cases is that these cases are not among those that must be reported as motions that have been pending for more than six months. They've been exempted from that reporting requirement. This author suggested that the exemption be removed. The reporters included that suggestion in the memorandum as one potential response to Mr. Peel's proposal. There are a few other options also suggested at the end of the memo, if the Committee is concerned about delay in these cases. The memo also explains that there is language about the judge "promptly" examining, but there is no specific timeline for the court's decision. So the question for the Committee is whether to create a subcommittee, do something else, or just let it go.

Professor Beale noted that the reporters asked Ms. Womeldorf whether this Committee can make suggestions about things that are not about the rules, such as whether these kinds of motions should be included among those that courts are asked as an administrative matter to report. The general answer was that we can make such a suggestion, to the CACM Committee or others, but we obviously don't have the ability to make that change ourselves. There might also be best practices that move these things along expeditiously, such as additional training, specialization, or organization of the pro se clerks. Although this Committee cannot promulgate best practices, if we think this is a problem, we can talk about what we might be able to usefully suggest to other groups who may want to look at this.

Professor King added that even though the proposal went to both the Civil and Criminal Rules Committees, and 2254 cases are governed by the Civil Rules as well as the 2254 Rules, this Committee had jurisdiction over habeas cases and the rules governing them. So if this Committee doesn't do anything, it is not likely to happen.

Judge Kaplan joined the meeting by phone at this point and gave his report on the Task Force on Protecting Cooperators, with the remainder of the discussion on habeas delay to follow.

Judge Kaplan regretted he couldn't be at the meeting because of a trial. The Task Force on Protecting Cooperators rendered its Final Report to Director James Duff in August. That was

the second installment. There was an interim report earlier that dealt with recommendations principally relating to the Bureau of Prisons (BOP). Director Duff has written to the BOP forwarding that report. The BOP is in the process of deciding what they intend to do about it. Director Duff appointed Judge Amy St. Eve to be the liaison to the BOP, and she is in the best position to report about where that stands. The second and final part of the report made five principal recommendations.

The first recommended a modification of our approach to docketing and filing of materials on CM/ECF from which the fact of cooperation and the details of cooperation could be ascertained. As a result of very hard work by the working group charged with this area, chaired by Judge Phil Martinez, the recommendation proposes something called the plea and sentencing folder approach, or PSF approach. He described the essentials of this approach in very broad strokes. Once implemented, each docket sheet would have tabs for two sub folders, one called the plea documents folder and the other called the sentencing documents folder. All documents that relate to sentencing or to pleas would go into the respective folders. The plea documents would include the plea agreement, plea transcript, and the like. The sentencing folder would include 5K letters, character letters, sentencing motions, sentencing memos and transcripts, and other things. The documents for both folders would be available for public viewing at the courthouse, but only on a restricted basis. Someone who wanted to view those folders would have to furnish appropriate identification, and their access would be logged by the Clerk's Office. The object is to create a record of who had access so that if there is an incident involving a cooperator, it would be possible to determine who saw what and when. That would give the investigative personnel something to go on. Remote access to those folders would not be available to the general public, but would be available to attorneys, self-represented parties in the cases in which they are representing themselves, and individuals who demonstrate to the judge assigned a need for the documents. The objective of this is to restore, to some degree, the practical obscurity enjoyed by court filings that had cooperator information before we converted over to CM/ECF.

There are details to be worked out, and there will be some significant implementation time. There will also be a lot of flexibility left to local courts. Each judge and district would have discretion to vary. For example, any judge, just as today, could seal any document that he or she thought appropriate. If a document were sealed by a judge or otherwise restricted by him, the same restrictions on access that apply today would apply even with respect to people who view the content of the folders at the courthouse after providing identification and even to attorneys and others who have remote access. So there is a considerable amount of room there for local courts, particularly for those who want to be more protective, to do that. Another thing to flag is that a deliberate decision was made to leave the question of press remote access to individual districts. The thinking there was two-fold. First, press access tends to be more of an issue in some of the larger districts and not much of an issue in many others. Second, there was a sense that given that premise, it would be better not to wave a red flag in circumstances where a national controversy could erupt unnecessarily. Courts have been pretty successful in dealing

appropriately with press access in appropriate cases and the Task Force thought it best to leave that where it is.

The second major recommendation is to modify criminal docket sheets. No information would be ultimately removed by this, but the sheets would be modified essentially to take what is referred to as JS-3 information off the top of the docket sheet. The information would still be in there, but it would be less readily available.

The other recommendations are much less extensive.

- Deletion of references to Rule 35(b) on the amended judgment form. That form currently indicates whether a sentence has been amended as a result of a Rule 35(b) motion, which is for substantial assistance to the government.

- An educational program be undertaken so that people understand and properly implement the system. It is clear to the Task Force that once this whole system is adopted and implemented, there will be a need for a considerable amount of education for judges, US Attorneys, BOP, probation and pretrial staff, and others.

- Asking the BOP to track incidents of assault and other misbehavior affecting cooperators on the basis of motivation, that is, whether the assault was cooperation related. The BOP does not do this now and it would be extremely helpful if that data were collected so that we would have some means of measuring how successful these recommendations once implemented prove to be, whether the trend line is in the right direction or the wrong direction. The BOP does not really want to have that information in the institutions, so the suggestion has been made that an anonymized database be created by the Department of Justice based on information furnished by the BOP. The information would available in a useful form and would be out of the institutions.

In terms of where this all stands, it is on Director Duff's desk. There was a conference call with him last week about just exactly how this becomes policy, assuming that it does, and he is taking appropriate advice from the AO General Counsel and no doubt others as to whether this lies within his authority to simply adopt, or whether he needs to or wishes to present it to the Executive Committee or the Conference. He has promised an early report back.

Judge Kaplan continued that he, and Judges St. Eve and Martinez, have recommended to Director Duff that it would be desirable to refer different parts of these recommendations to different entities: the changes in CM/ECF to adopt the PSF approach and the modification of the docket sheets and judgment form to the CACM Committee; the education program to the FJC; and the creation of the anonymized data base to be implemented by the CACM Committee and the Criminal Law Committee. All of these committees will need cooperation from the BOP and DOJ.

That is the proposal. Judge Kaplan said they expect to hear from Director Duff shortly about the mechanics of getting this into full implementation mode. It is clear that some of these recommendations might take longer than others. There is significant software work that will have to be done in order to implement the PSF approach, and we don't yet have a timeline on that. That will fall to the CACM Committee to work out.

In conclusion, he added that the Task Force consisted of seven voting judge members—three from the CACM Committee, three from the Criminal Rules Advisory Committee, and Judge St. Eve from the Standing Committee—and eight adjunct members representing every constituency affected by this: the BOP, DOJ, Criminal Law Committee, and others. We had also a very helpful hearing in Washington last spring with a representative group of federal defenders. Ultimately the work done by the working groups on the BOP and CM/ECF was critical and we ended up with a unanimous consensus on all of this, which he was enormously pleased to report. He offered to take questions.

Judge Molloy noted that the report was a monumental piece of work by Judge Kaplan, Judge St. Eve, and other members of the Committee. He asked if it was correct that the recommendations of the Task Force are not subject to debate when they are referred to the CACM Committee, the Criminal Law Committee, or others: would it be a direction to implement what has been proposed and recommended by the Task Force?

Judge Kaplan responded yes, the question is whether Director Duff is going to make that policy decision or whether he's going to go with some or all of it to the Conference.

A member inquired whether the recommendations address who or what would qualify as a press organization that would be able to get remote access. Judge Kaplan said the recommendations do not address the issue, leaving the question of whether and who gets remote access on the basis of press to each district. He personally despaired of being able to define "press" for this purpose. A member said that anybody can be press at this point and expressed concern that certain elements might create a press organization as a front for obtaining information for purposes that we might not want them to have the information. Judge Kaplan agreed that concern is well founded

Judge Campbell inquired whether, if the Director moves forward with this, the Rule this Committee was considering on limiting remote access would be moot, or at least taken off the table for now. Judge Kaplan said that would be his view, and Judge Molloy said that was consistent with his view, too.

Judge Molloy asked Judge St. Eve if she could report any supplemental information about the BOP.

Judge St. Eve commended Judge Kaplan for strong leadership on this project. As for the BOP, in late April a letter was sent to then Director Mark Inch with the 14 recommendations that came out of the Task Force. The day before Director Duff was scheduled to discuss the Task Force recommendations with the BOP's main representative to the Task Force, BOP Director

Inch resigned, so that put us back a little bit. The BOP now has an acting Director, and they are juggling multiple issues. Judge St. Eve was keeping in monthly contact with the BOP trying to keep this on their plate so that the BOP implements some of these recommendations. And Jonathan Wroblewski and Judge St. Eve have been in discussion as well. The BOP is interested in putting this in place, but they have hurdles, including their Union, that they have to jump through. They are already doing some of the recommendations, such as encouraging video teleconferencing when appropriate. But they have not yet put in place the meatier recommendations. Judge St. Eve described continuing efforts to arrange a meeting between Director Duff and the BOP's acting leadership. She encouraged the Department of Justice to continue supporting the Task Force recommendations, and to help us push the BOP.

Assistant Attorney General Benczkowski thanked Judge St. Eve for her comments, and said the Department will continue to push the BOP. He noted, however, that the BOP director reports to the Deputy Attorney General, not to him. Mr. Benczkowski stated that he intended to speak to the Deputy Attorney General to request that he keep this moving forward. He appreciated the work that went into the Task Force, expressed the Department's support, and stated they would continue to push the BOP.

Ms. Womeldorf said that there is still considerable desire in some quarters that this Committee move forward with Rule 49.2, which was put on the back burner to see what came out of the Task Force process. There is considerable overlap between the PSF approach and that Rule, and she thought that in prior discussions this Committee thought that the PSF approach would achieve a lot of the objectives behind protecting cooperator information without necessitating a rule. But there are certain constituencies that would like to see a rule with notice and comment and hearings if there is going to be a change of this nature to public access to these kinds of documents. There is still discussion about the question whether the Task Force recommendations moot the Rule. She has been asked by staff of the CACM Committee whether this Committee will have more formal consideration of Rule 49.2 and another vote on that. She informed the staff that she did not know, and would raise it. She observed that Director Duff would not refer the issue back to Criminal Rules, because it is his understanding that it is still on our docket. Judge Kaplan commented that Ms. Womeldorf was indispensable to this process, and we owe her a debt of gratitude.

Professor King asked if Ms. Womeldorf was suggesting that this Committee should decide whether it is going ahead with consideration of Rule 49.2, regardless of whether the Task Force believes that is moot. Ms. Womeldorf answered that was the issue for this Committee to decide. It was not the Task Force's decision whether or not to move forward with a Rule, it is this Committee's decision. But she noted that the Committee may consider that decision to have already essentially been made through the Committee's last discussion, which tabled Rule 49.2 pending Task Force action.

Professor King suggested it would be helpful to hear from Judge Kaplan, who is the chair of the Cooperators Subcommittee, what his views are about whether the Committee needs to do something about that pending proposal on Rule 49.2. Judge Molloy asked Judge Kaplan whether

Rule 49.2, which was tabled, is now moot? Or does it require some actual determination by our Committee?

Judge Kaplan said he was inclined to think the answer to both questions was yes, but he'd like to think about that some more. His present view is that the Committee doesn't need to amend the Rule, but in any case the Committee has to make the decision not to go forward.

Professor Beale suggested that as we don't have Judge Kaplan here at the meeting, there has been no final decision on that report, it is unclear who would have to approve it, and Director Duff is still deciding whether it needs to be referred to other groups, perhaps that decision whether it is time to take this off our agenda could be deferred until our spring meeting. Then we could decide if our rules should reflect the new reality in some way, which would then provide a place for Notice and Comment. But we can put that off, since we held it pending the Task Force action, which isn't quite finished. The Agenda Book could reflect that the spring will be the time for final action on whether to take it off the agenda or move forward.

Judge Molloy asked Ms. Womeldorf to clarify what would happen if the Committee decided that the Task Force Report takes care of it, and we are not going to amend the rules. Was there nonetheless some pressure to have that discussion and possibly hearings?

Ms. Womeldorf answered that this is the Committee's decision to make. She also explained that concerns about the E-Government Act are what's lurking in the background. Professor Beale reminded the Committee that it is clear under the E-Government Act if a limitation on electronic access is made by rule, there is no problem. Ms. Womeldorf agreed.

Professor King agreed putting a decision off a little while makes a lot of sense and that the E-Government issue is one that the Subcommittee could look at before it comes back to the full Committee. And it could talk to people who have strong concerns about that, then bring that information back to the Committee so we are not trying to do that on the fly.

Judge Molloy said that when Judge Kaplan finishes his trial, we will bring that issue to the Subcommittee. Professor Beale noted we've lost some members of that Subcommittee and will have to replace them. Judge Molloy thanked Judge Kaplan for the report, so he could return to his trial.

The Committee returned to the request regarding habeas delay. Judge Molloy said those statistics are terrible but that he was not sure our Committee even has jurisdiction to resolve that problem. Professor Beale noted there had been some conversation before the meeting about who would have jurisdiction, and we concluded it was the CACM Committee, primarily because they have previously recommended changes be made to the Civil Justice Reporting Act requirements, precisely to create a greater incentive to move faster with bankruptcy appeals and social security cases. That discussion is on page 150 of the Agenda Book. Since our Committee does not have jurisdiction to change those guidelines for reporting the question is whether to make any recommendations to the CACM Committee, or recommend that the FJC study this, or do nothing.

A member observed that 2255 and 2254 cases are reportable on the three-year list, and asked whether there are a lot of them going beyond three years.

Professor King answered yes, at least as of the date the data was collected. There is also a citation in the memo to a decision of a district judge who read the article suggesting the reporting requirement be modified and agreed with it.

A member said she would be remiss if she didn't speak up for the defendants in the 2254 and 2255 cases who are up against AEDPA and are limited on time severely, and then have the court just run on sometimes for years. She can appreciate their frustration. The Committee has the authority to impose a time limit on these, but that is unwise. The size of these cases varies. She asked the judges, does that reporting requirement really impact you moving faster?

Judge Molloy answered that it depends on the district. We get a monthly report from the clerk of court that says here are the cases that have been waiting for 30 days, 60 days, and 90 days. That creates an incentive to get matters off of that list. Arizona does something similar to that. He noted that some of these handwritten petitions can barely be read when they are filed, and the pro se law clerks get the first stab at them. Cases should not be hanging out for two or three years, but putting artificial dates or time limits in a rule would not necessarily solve the problem. With the new work formulas, it looks like pro se law clerks are being cut back, which may affect the screening process.

Judge Campbell said if the question is would putting this on the CJRA report change the behavior of Article III judges, the answer is yes, it would. Not all. But there are a lot of judges who are conscious of that report and work hard to comply with it. So he did think it would change behavior, and perhaps more than putting it in a rule would. He noted he tends to be a hawk on these things, and would love to see it in the report. He'd prefer to see it in a three-month report rather than a six month report, but that would draw strong opposition.

Professor Beale observed that judges are human. If there will be a public list that shows if you are late, almost everything is being measured for the list, and this is the one thing that isn't, then you will try to get to your numbers and the one thing not being measured will get pushed down. That seems undesirable.

Judge Campbell said there are some places where this is a real challenge for the judges. The Eastern District of California, which includes all of the major prisons in the state, is Exhibit A. They have five judges, Congress hasn't given them any more judgeships, and they are just buried with prisoner litigation including 2254s and 2255s. So whoever takes on this issue would need to talk to the districts where it is really a challenge. It's sort of the out of sight out of mind idea. If there isn't the CJA report reminding the judge that this motion is pending and something is going to happen if it isn't decided, that motion can remain on the docket for way too long. Our Committee does not have jurisdiction to change the reporting requirement. But if it concludes the issue should be studied, there would be nothing inappropriate in its writing to the CACM Committee and say here is Mr. Peel's recommendation, here are some studies, and we recommend that you look at this.

A member said she favored recommending that it be examined, at least for the reporting. Judges are trying to do good work, but they are balancing things, and the reporting requirement matters.

Another member agreed that if these cases went on the CJRA report, then judges are going to look at it. In the member's district, judges would look at it a lot. And in other districts, that's what keeps them on track. The member was especially interested in getting the views of districts that are overwhelmed with these cases.

Ms. Womeldorf suggested that this could be one of the things the CACM Committee could do as part of its investigation. It is not uncommon to do what Judge Campbell is suggesting, in this case a letter from Judge Molloy to the new chair of the CACM Committee. As a matter of deference to another Judicial Conference committee on matters falling within their jurisdiction, it would probably be disfavored to presume the outcome in the referral. The committee with jurisdiction would have to do the study and talk to the jurisdictions that would be most affected. And the CACM Committee also has responsibility for different metrics such as how that weighs into staffing formulas. Possibly measuring this and the delay more precisely than the current system would help the other staffing problems that have been noted. Professor Beale commented that this might even help some districts make the case for more judges.

A member wondered if the letter should mention that we have not investigated those districts with heavy prisoner caseloads, and Ms. Womeldorf agreed a referral letter could mention that, as well as the Falkoff study and Professor King's work. It is fine to call things to another committee's attention, just not to suggest where it should end up.

Another member noted another issue: if there is to be a reporting requirement, what is the triggering event? In his district, 2254s pose very different issues than 2255s, because the records of the local courts in 2254 cases are in Spanish. Getting the local record is a problem, because it has to be translated. And the government takes the position they don't have any money to do the translating. So we wait months and months to get the record. Every district has its own story. But whoever does look into this there is going to be a lot to look into and a lot to consider.

Ms. Womeldorf noted that this discussion will be captured in the minutes, and available to the CACM Committee as well.

Another member said he agreed with everything everybody has said. It is a CACM Committee issue, and it is worth looking at. Like most things in life, you get what you measure from people, but it is up to them to decide. Another member agreed. Whether something is on the Biden report is impactful on judges.

Another member observed that on appeal he had not noticed any particular problem in terms of our administration of these cases. He agreed these reporting requirements do change behavior. Although the courts of appeals don't have the Biden rule, his court does it internally. It shames people, one person has one number and everyone else has something else.

Judge Molloy said he would draft a letter and run it by Ms. Womeldorf and send it to the CACM Committee, with Mr. Peel's materials. Judge Molloy thought a vote wasn't needed, but asked for objections and there were none.

In preparation for its consideration of possible changes in Rule 16's provisions concerning expert witnesses, the Committee then heard presentations from the following representatives from the Department of Justice:

- Andrew Goldsmith, National Criminal Discovery Coordinator
- Zachary Hafer, Chief of the Criminal Division, District of Massachusetts
- Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
- Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
- Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

The presentations covered the Department's development and implementation of new policies governing disclosure, its efforts to improve the quality of its forensic analysis, and its practices in cases involving forensic and non-forensic evidence. They also provided an opportunity to compare discovery in criminal cases with the discovery provided under Civil Rule 26(a).

Professor Beale introduced the next agenda item, a proposal from the Association of Professional Background Screeners, which recommended that the Civil and Criminal Rules, and the architecture of the PACER system, be revised to provide greater information, specifically each criminal defendant's full name and full date of birth. The suggestion was that this information would not be visible to the general public when it accessed PACER, but would be available as a search term so that background screeners would be able to perform their search functions more accurately and efficiently. Professor Beale noted that this is similar to a request that the Association made in 2006 when Criminal Rule 49.1 and the other E-Government Act amendments were promulgated. The Association's request was a little broader at that time. They wanted Social Security numbers, and probably now recognize that that would be a nonstarter. But the Association is still seeking to persuade the Committee that their proposal is good for them and good for society at large because the results of their screening will be more efficient and accurate. Accordingly, they made this request to us and to the Civil Rules Advisory Committee, and sought changes in the PACER architecture without perhaps being clear on who would have the necessary authority over the PACER system. The proposal emphasizes that something similar is presently done in the bankruptcy system to identify assets and so on. The Association argues that a similar change could be implemented in civil and criminal cases.

Professor Beale stated that the question before the Committee is whether there is enough interest in this proposal to move it forward. She commented that it is really not the function of the rules to assist such external groups not involved in criminal litigation.

Judge Molloy asked Mr. Hatten for his views. Mr. Hatten expressed the view that this is not a purpose that the PACER system was designed for, and it would not be a good idea to add these types of personal data that might be of interest to hackers. He expressed concern that it would be a slippery slope to begin changing the PACER system in order to benefit a group interested in searching our records. Why not the same for another group? He also noted that the system was undergoing changes. He added that PACER itself has little data and relies on each individual court to supply the information. So this would filter down. The courts would have to enter this type of information in each of their databases, and then PACER would make it available. That would create a small burden on the courts. Mr. Hatten stated that legislation has been introduced that would make CM/ECF a single system, searchable and made available to the states for a fee, but Mr. Hatten was not sure whether it would get serious consideration. He did not see this as a viable purpose of the system.

Judge Molloy asked other members for their views. None favored taking up the proposal. The information provided in bankruptcy serves a different function, and the suggested change did not serve the functions that the Criminal Rules are designed to serve. Judge Molloy agreed that the Committee should not pursue the proposal.

Noting that the spring meeting of the Committee would take place on May 7, 2019, in Alexandria, Virginia, Judge Molloy adjourned the meeting.

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ADVISORY COMMITTEE ON CRIMINAL RULES
APPENDIX TO MINUTES (DRAFT)
October 10, 2018 | Nashville, TN

Judge Molloy announced that the Committee would go next to Tab 6 in the Agenda Book. In anticipation of the mini-conference, one of the things that has been discussed on a number of fronts is the interaction between the rules and practical aspects of discovery in criminal cases. We wanted to flesh out Rule 16 as it relates to expert reports as well as other discovery. Jonathan Wroblewski put together a panel of experts to help us understand what the Justice Department sees as some issues regarding both expert disclosure and discovery in general.

Mr. Wroblewski explained that after the discussion at our last meeting about discovery and forensic cases, the Department undertook various research projects to learn what's going on in the field, where there are problems, and where our guidance has addressed some of those problems. The reporters and Judge Malloy thought it would be a good idea to present some of these developments here, beginning with Andrew Goldsmith, the Department's National Criminal Discovery Coordinator.

Mr. Goldsmith thanked Judge Molloy for inviting him to address the Committee, as he had done in the past. He expressed pleasure at returning and seeing familiar faces, and apologized for having to leave early. Mr. Goldsmith introduced the other speakers on behalf of the Department:

- Zack Hafer, the Criminal Chief in the District of Massachusetts, to discuss examples of discovery in criminal cases involving non-forensic experts;
- Ted Hunt, who is the Senior Advisor on Forensic Science, to talk about the Department's efforts to improve forensic science;
- Erich Smith, from the FBI's Firearms and Toolmarks Unit, to describe an example of forensic analysis and its documentation which is directly relevant to discovery related issues; and
- Jeannette Vargas, Deputy Chief of the Civil Division in the Southern District of New York, to talk about discovery in civil cases involving experts.

Mr. Goldsmith described his experience and the history of his position to provide context for what the Department has done, is doing, and will do, when it comes to discovery. His position was created around 2010 as a short-term detail assigned to the Executive Office of U.S. Attorneys. Mr. Goldsmith described himself as a career prosecutor, first in DA's office and later as an AUSA in New Jersey in the 1990's. He noted that his experience "in the trenches" gives him credibility in developing policies and training prosecutors.

In late 2011, Mr. Goldsmith's position was converted to a career SES level position, in response to concerns raised by the Rules Committee that the Department's discovery efforts might be a temporary fix and may change in a new administration. This is now a career position

at the highest level in the Justice Department. Mr. Goldsmith has now worked for multiple Deputy Attorneys General. When a new administration comes in, he is one of three or four senior career officials remaining in the Deputy's office.

Mr. Goldsmith noted that this discovery is a bedrock priority for the Department. The Deputy Attorney General oversees all 6000 federal prosecutors, both those in U.S. Attorney's Offices and in Main Justice, and all of them receive the policies that Mr. Goldsmith issues on discovery and the related training. In 2014, Mr. Goldsmith became an Associate Deputy Attorney General, which is the fourth highest position in the Justice Department, which is a further indication of how significant criminal discovery is to the Department.

Mr. Goldsmith said that discovery training became mandatory as a direct result of concerns raised at the Criminal Rules Committee's 2010 meeting in Chicago. The Department responded by making training mandatory under the United States Attorney's Manual (which was recently renamed the Justice Manual). There is now online mandatory training as well as live training at the National Advocacy Center, and Mr. Goldsmith has visited 60 U.S. Attorney's Offices. Training topics come from a variety of sources, including defense attorneys, judges, and prosecutors. The Department also has a new criminal discovery bootcamp for prosecutors. There are also extensive resources, including the ESI protocol (for discovery of electronically stored evidence), which was developed in a collaboration between the Justice Department and defender services organizations. Mr. Goldsmith and his colleagues also worked with the Federal Judicial Center to develop a 90-page criminal e-discovery pocket guide for judges. They also answer questions every day from the field.

Mr. Goldsmith described the Department's supplemental guidance for prosecutors regarding criminal discovery involving forensic evidence and experts. After receiving input from various stakeholders (including Judge Rakoff and other judges) regarding criminal discovery in cases involving forensics, the Department decided to take a closer look. Deputy Attorney General ("DAG") Yates asked Mr. Goldsmith to work closely with a working group that consisted of federal prosecutors, law enforcement personnel, and forensic scientists, to develop pragmatic meaningful guidance.

In January 2017, DAG Yates issued what was called the supplemental guidance for prosecutors regarding criminal discovery involving forensic evidence and experts. At the outset, the guidance notes that forensic science covers a variety of fields and specialties such as DNA testing, chemistry, as well as ballistics and impression analysis. Although it specifically informs prosecutors of the parts of Rule 16 that are triggered when it comes to forensics, the guidance goes beyond the rule. It reminds prosecutors of potential disclosure obligations under *Brady*, *Giglio,* and the Jencks Act. It sets forth an easy-to-understand four-step process to ensure the prosecutors meet their disclosure obligations. Although not legally required, the guidance instructs prosecutors to provide the defense with a copy of/access to laboratory or forensic expert's "case file," either in electronic or hard copy form. Finally, it reiterates one of the key parts of the Department's culture in the last decade: "We go further than the law requires. We go farther than the legal minimum."

In 2017, the guidance became part of the Department's mandatory criminal discovery training. Mr. Goldsmith recorded a session, and when prosecutors logged on to watch their discovery training, they listened to him tell them what this guidance means in terms of their day-to-day responsibilities. This is also part of the mandatory training for new prosecutors in discovery boot camp. In fact, today he was initially scheduled to be training new prosecutors on disclosure of forensic evidence under Rule 16.

Finally, Mr. Goldsmith responded to concerns that the 2017 guidance, while extremely helpful, might not continue as a policy under the current administration. To the contrary, he proudly reported, the guidance has become formalized and codified as § 9-5.003 of the Justice Manual (formerly known as the U.S. Attorney's Manual). The Department has also hired Ted Hunt as a Senior Advisor on Forensics, and it is issuing clear and transparent guidance on several key topics including testimony monitoring, and uniform language for testimony of reports.

Next, Mr. Goldsmith discussed why the Department believes that Rule 16, as written, deals well with expert testimony generally. Although it specifically addresses forensics, § 9-.003 of the Justice Manual provides useful framework, setting forth key parts of Rule 16 for experts and a four-step approach that is just as useful for all experts, whether forensic or otherwise. Step 2 emphasizes to prosecutors how critical it is to provide a written summary for expert witnesses that the government intends to call at trial, summarizing the analyses formed, describing any conclusion reached, and explaining the basis and the reason for the expert's inspected testimony. Mr. Goldsmith noted that Rule 16 applies to all experts, not just forensic experts. The Department's position is no change in the law is needed. Rather, practitioners, prosecutors, and defense attorneys alike need to understand how important it is to follow the rules.

Mr. Goldsmith thought it would be a bad idea to incorporate parts of Rule 26 of the Rules of Civil Procedure into the Criminal Rules. Rule 26 itself provides extensive discovery requirements for witnesses who are retained or specifically employed to provide expert testimony in a civil case. But virtually all expert witnesses in civil cases are retained by one of the parties, so it is hardly surprising that under the rule they have extensive discovery obligations. In contrast, most experts in criminal cases are not retained – at least not those called by the government – except in a few circumstances that Mr. Hafer will discuss. The main job of most experts called by the government is investigating and solving crimes, both to help convict the guilty but also exonerate the innocent. To saddle them with far more burdensome discovery obligations means they would spend the bulk of their time writing extensive reports rather than doing that important work.

Mr. Goldsmith also emphasized several other differences between civil and criminal cases. A civil case tends to operate as something of a closed universe: the expert report is generated, it goes to the other side, depositions occur, and the trial is based on all of that information. In contrast, criminal cases are affected by the Speedy Trial Act, the prosecution's higher burden of proof, and constitutional and statutory obligations that require provision of a fair amount of information helpful to the defense. Notwithstanding Rule 16's reciprocal discovery obligations, unfortunately, many defense counsel fail to comply with their obligations.

Frequently the prosecution does not learn until the eve of trial who the defense plans to call, what the defenses are, or if the defendant will testify. This may cause government expert witnesses to change their report as defenses shift and witnesses change up until the last minute. As a result, he said, the requirements in Rule 26 would disproportionally – if not exclusively – be visited on the government.

Moreover, Mr. Goldsmith predicted that if Rule 26's extensive discovery obligations were adopted in criminal cases, they would be unfortunately used aggressively and affirmatively by certain defense attorneys to saddle the government with additional responsibilities, and to suggest to the court that the government is failing to comply. Although some of these would be legitimate, based on seeing the day-to-day administration Mr. Goldsmith said he believes it would burden the court, distract from the search for the truth, and possibly raise challenges under the Speedy Trial Act. He concluded that the expert disclosure would end up being the "tail wagging a much larger dog," because that's where the focus would be if Rule 26 requirements were applied to criminal cases. Mr. Goldsmith's experiences as a career prosecutor, and as the person responsible for ensuring that all federal prosecutors meet their discovery obligations, caused him to conclude that Rule 16 is sufficient for expert witnesses. It is critical that prosecutors understand the law, which is what the Department is striving to achieve with clear policies and increases in regular training.

Judge Kethledge observed that we are going to have a mini-conference, and it was fair to say there is very serious interest in revising Rule 16's expert disclosure requirements to require more detailed and meaningful disclosures for the parties and the court in criminal cases. Obviously, he noted, the Department is strongly opposed to something like adopting Civil Rule 26 wholesale; but it would be very helpful to our Subcommittee (and ultimately for the Department) if the Department gave us a proposal it thinks does make sense, perhaps something between the current rule and the Rule 26 approach. He observed that proposals to the Committee from the other side were coming over the transom, and we hear the Department's objections about certain things in those proposals. But it would be helpful if the Department were more than a critic and gave us a proposal that it thinks makes sense. Mr. Goldsmith replied, "message received."

Judge Molloy asked Mr. Goldsmith how the Department audited compliance. You have all the training, but how do you audit whether it is being followed? Mr. Goldsmith responded that there is no formal audit, but he has a good overview because of the enquiries from the field and his nationwide contacts with prosecutors. That permits him to start to see patterns.

The next speaker was Zach Hafer, the Chief of the Criminal Division in the U.S. Attorney's office in Boston, who supervises more than 100 Assistant U.S. Attorneys. Mr. Hafer addressed non-forensic expert discovery in criminal cases, specifically case-in-chief experts but not rebuttal or sentencing experts. Noting that the distinction between forensic and non-forensic experts is often gray, he said his focus was not lab-type experts, and not DEA agents who might testify about coded drug dealer language. He began by stating that when the government presents a criminal case, the goal is to be stream-lined, and not turn it into an expert battle. In

the vast majority of criminal cases, the Department does not use retained non-forensic experts. He would present three examples in which the government did in fact use retained non-forensic, but he emphasized again that such experts are relatively rare, and not found in the garden variety criminal cases that most of you see day-in and day-out.

Mr. Hafer stated it is relatively straightforward to explain the kinds of cases in which the government will present a non-forensic expert. It depends on the elements of the crimes you've charged, and the prosecutors make a determination whether an expert would provide necessary context on a complex subject or assist in proving an element of one of the offenses beyond a reasonable doubt. He described four kinds of scenarios in which federal prosecutors most commonly determine that they need a non-forensic expert. In the first, and likely least common, during the investigatory phase the AUSAs determine the identity of an actual expert they will need at trial, and they retain the expert, prior to charging. (He noted that he would describe one of those cases, the NECC case out of Boston, later.) In the second scenario, during the investigation at some point the AUSA might realize he or she might need an expert, but they identify only the need for an expert, not the individual expert. In the third scenario, after indictment, within what he called the court-approved pretrial window, the AUSA identifies the need for an expert. The final scenario is what he called eve-of-trial identification due to a last-minute change in defense strategy – perhaps a stipulation has collapsed, for example, and the government realizes in a child pornography case that it needs an expert on pre-pubescent children or something like that. Those would be the four most common ways in which an AUSA to identify experts in a criminal case.

Mr. Hafer said there is little integration of experts into the prosecution's case before charging (though the NECC case was an exception to that rule). After indictment in a case where the prosecutors have recognized a need for an expert, they most likely will consult with several. Often, they will choose not to use one. But if they decide to retain one, they do not want circuit riders or hired guns. The government wants to use experts who maintain impartiality and does not want them to become part of the trial team. To that end, he said, prosecutors control the information that the expert reviews. And if it's an opinion case, forming the opinion, the prosecutor controls what the expert reviews, whether it's 302's, financial documents, or whatever the expert uses to form his or her opinion on the case. He emphasized that the government will never offer expert opinion on the issue of guilt.

Mr. Hafer identified the four most operative rules and statutes: (1) the Speedy Trial Act; (2) Federal Rule of Criminal Procedure 16(a)(1)(G), which provides that the government shall provide a witness summary of its case-in-chief expert testimony including a witness opinion, a basis therefore, and the witness qualifications; (3) the Jencks Act, 18 U.S.C. § 3500, which requires prosecutors to turn over witness statements after the witness has testified; and (4) Massachusetts Local Rule16.1(c)(1)(A), which requires all information discoverable under Federal Rule 16(a)(1) to be produced to the defendant within 28 days of arraignment.

He observed that the experience in Massachusetts was fairly representative of the country. Notwithstanding that 28-day period set by the local rules, typically during the initial

status conference before the magistrate, the parties will say they have negotiated the date back, and ask the court to set off the trial date for expert disclosures.

Mr. Hafer stated that he had reviewed scores of examples from Massachusetts, and the date for expert disclosures averaged about 45 days prior to trial (though there were longer and shorter ones). But in their experience a date too far in advance of trial is unhelpful because of the nature of criminal cases involving defenses, strategies, and so forth. They generally make expert disclosures about 45 days before trial.

Mr. Hafer premised his description of the disclosures with a comment about the philosophy of expert disclosures. He read Attorney Harrison's proposal [18-CR-F] stating that in a typical case, prosecutors simply disclose a double-spaced 2-3-page summary of what we hope the expert will say on broad topics. Mr. Hafer said that has not been my experience and would not be reflected in the three examples that he would present. He said that their goal is to make comprehensive, specific disclosure regardless of whether there is an expert report. In two of the cases he would review for the Committee, one included an expert report and the other did not.

Mr. Hafer stated that when the expert disclosure comes up short or is inaccurate for whatever reason, there are several existing remedies for defense counsel and the court to address disclosure that is determined to be inadequate. But their goal is to provide comprehensive, case-specific disclosures. They have no per se objection to signed expert reports. There are many, many cases where they are warranted. But they should not be required in every case.

Mr. Hafer described a typical expert disclosure. It will include the expert's CV, and if it does not list his or her publications, the government will provide those separately. It will include the written summary that Rule 16(a)(1)(G) requires of the expected testimony in that case. If it is an opinion as opposed to a context case, the materials that the expert relied on in forming his or her opinion will be disclosed. Obviously, if there is a report, it will be disclosed. In most cases the government also discloses any prior testimony; that could be prior testimony in criminal or civil cases, or Congressional testimony. He noted that there is an ongoing controversy as to whether the government is required to do that, but he noted that when they do so it is with the proviso that it is a courtesy production of the prior testimony and not one required by the Jencks Act. But typically they will provide prior testimony.

Mr. Hafer then turned to the disclosures made in three cases, noting again that it is relatively rare for the government to retain non-forensic experts.

The first case Mr. Hafer described was a Boston case, *United States v. David Wright*. Wright was an ISIS recruiter who plotted to kill a blogger who had organized a Prophet Mohammed cartoon drawing contest. With Wright's blessing, Wright's uncle, Mr. Rahim, decided to go after Boston police officers before going after the blogger. Mr. Rahim was shot and killed on the streets of Boston as he approached several Boston police officers with a large knife. Wright was charged with material support to ISIS. Mr. Hafer explained that the government retained an expert, Aaron Zelin, primarily for two purposes. The first was to provide the jury with background and context on the history and structure of ISIS, a classic

subject beyond the ken of the average juror. The second was more specific, which was to connect known ISIS members to certain [unintelligible] killed by Boston police officers and to offer an opinion with respect to specific items that had been found in the apartment, for example the ISIS magazine. Mr. Zelman did not author a report in this case, but the prosecutor disclosed a summary of his testimony, his CV, and prior testimony in other cases.

Mr. Hafer stated that this expert did not write a report. He is only going over the disclosure to show what actually was disclosed. He projected the material, noting it might be a little hard for the Committee to read, but it was from the actual disclosure. He then described what the Committee was seeing. The government began by disclosing Mr. Zelman's identity, what he was an expert in, and the prior cases in which he had testified on jihadist groups. It provided the transcripts of those proceedings, and then went on in some length in the second paragraph to talk about Mr. Zelman's qualifications as an expert on this subject. This is the second page of the disclosure. Mr. Hafer left it up for a minute, and then focused on the highlighted sections. Again, he said, the point is that this was a very specific and comprehensive disclosure with respect to what Mr. Zelman was going to testify to, beginning not just with ISIS history and structure, which is the beginning of this disclosure, above the first highlighted section, but then as you get into the highlighted section you can see the government specifically disclose that Mr. Zelman would identify and describe the ISIS members with whom Rahim had spoken and explain the fatwahs that were issued using the internet. They gave a specific example. Mr. Zelman would testify that Hussain was an English-speaking ISIS recruiter who used Twitter to encourage terrorist attacks in the United States and Europe until he was killed by an air strike in Syria. The second highlighted section goes into detail about specific code words that Mr. Zelman would testify to, including the meaning of terms like "going on vacation," and "green birds," and how those relate to the jihad and becoming a martyr. And then the disclosure lists other terms and the significance of certain dates. Mr. Hafer explained this case was included as an example of what he described as a comprehensive disclosure. There is no report, but there is a detailed disclosure as to what it is Mr. Zelman is going to testify to, and provision of prior testimony.

Mr. Hafer observed that in the Wright case the government identified the need for an expert prior to indictment, but the actual expert was not identified until after. In such a national security case, where there was a long-term investigation, you may have an unexpected incident on the streets of Boston that requires the government to indict before you have done everything that you would do in a normal case. You might know you are going to need an ISIS expert, but you do not retain that person or identify that person in the grand jury. In this case, the government was forced to bring the case sooner than it otherwise would have because of the act of violence in Boston.

The next case that Mr. Hafer discussed also arose in Boston and was referred to as the NECC ("New England Compounding Center") case. It involved horrible facts, a multi-state outbreak of fungal meningitis among patients who had received contaminated steroid injections that all emanated from a compounding center in Framingham, Massachusetts. He explained that

the contaminated compounds went all across the country, and as a result 800 people were sickened. These were debilitating, and in many instances paralyzing, illnesses. Seventy-six people died as a result of these contaminated steroids. In December of 2012, the United States Attorney's Office brought a RICO case against 14 NECC employees, including the president and the pharmacist. In addition to second degree murder predicates, the principal RICO predicate was fraud, and the government's theory of fraud turned heavily on the conditions in the lab and the compounding center. In other words, he explained, they charged that the NECC had so far departed from the standard custom and practice of high-risk compounding centers that one could infer fraud given the nature of the departures. There are specific standards on cleanliness and everything else at these types of labs, and the government realized very early it would need an expert to describe these standards for high risk compounding centers and compare the conditions that existed at the time that the steroids were contaminated to what they should have been under the USPF protocols (an acronym referring to the standards in high risk compounding labs). This was the very rare case where the government actually identified the expert that it was going to use prior to charging the case. The disclosure here is far shorter because these two experts on this USPF wrote reports summarizing all the work they had done. They worked together, and Professor Newton wrote an 18-page single spaced report. As part of the government's expert disclosure they provided that report and the CV, and then they provided a three-page excel spreadsheet index with all their other publications, and all the documents and materials that these two experts relied on in forming their opinion that in this case the NECC's labs departed so substantially from the standard and custom in high risk compounding labs.

A member asked how long it took to write the report. Mr. Hafer did not know, but guessed 40-50 hours. The government typically pays such experts $300-400 per hour, at total expense of approximately $20,000. That would be 40-50 hours to inspect the labs and write the reports.

Mr. Hafer emphasized that the final case he would describe, from Los Angeles, again was not a garden-variety criminal case. It was an arms-export control case: the defendant had tried to purchase and then export American weaponry and military equipment, suppressors, ammunition, 50 caliber rifles, and night vision goggles. He was charged under the AECA with several offenses. The government disclosed an expert report, a CV, and a summary. Mr. Hafer displayed the summary of Dr. Doherty, an expert on Soviet and Russian surface-to-air missile systems. Mr. Hafer characterized the report and the disclosure with respect to Mr. Doherty, as extremely specific and detailed. On the screen he highlighted the two particular sections where the government disclosed that Mr. Doherty would testify regarding specific anti-aircraft missile systems and how they use explosive and incendiary rockets and missiles guided by systems designed to enable the rocket or missile to seek. He said this was a very specific disclosure about these specific missile systems within Dr. Doherty's expertise. The government disclosed that he would testify that these systems employed devices designed to launch or guide a rocket or missile towards an aircraft. And then, in the second highlighted paragraph the government again disclosed that Dr. Doherty may testify about the acquisition of these types of systems.

A member questioned the reference to things the expert "may testify to," and asked Mr. Hafer to explain why that is appropriate in this context. There was a suggestion in some of the materials that it would be more helpful to the defense, and the defense discovery, for the government to know what is coming and not veer off in directions that may turn out to be irrelevant.

Mr. Hafer said that the default is to disclose as much as possible without being absurd. The goal is not to just put pages and pages of stuff that is very unlikely to come up. Here, he thought (though he had not spoken to the attorneys on the case) you would put 'may' assuming we are about 45 days prior to trial, because depending on what the defense is or what the cross-examination of the government's witnesses is, this may be an area in which expert testimony is useful. At the time of disclosure, 45 days prior to trial, it is unlikely that you would be able to state with 100% certainty that the expert would testify to something. He said this was not semantics as much as it is trying to be comprehensive in the scope of the disclosure, not knowing at the time what issues will actually be litigated at the trial.

Mr. Hafer also noted that further in the disclosure it says the expert 'may' describe the common employment of Toyota Hilux trucks as a vehicle of choice. We would put something like that in there if the issue of the use of Toyota Hilux trucks by terrorists was sort of conceded at trial, but we wouldn't need it if it wasn't for trying here. And again, the way this works in practice with AUSAs, if you have an order of proof for the witnesses going through the exhibits, the exhibits that are going to come in for each witness. In anticipating defenses, you want to have all your bases covered, but again, you just simply do not know what the defense is going to be. It is very rare that you would get the defense expert report 45 days prior to trial. There are confrontation clause and other issues. Most defense attorneys take the position that they do not have to disclose anything close to strategy at all.

Mr. Hafer concluded with three final points. First, he had tried to pick representative samples of the types of disclosures that AUSAs strive to make to provide notice to the court, to provide notice to the defense council, and to voice any doubtful issues prior to trial. He said that is their goal. He emphasized again that there are existing mechanisms in place, short of a rule change or imposing a report requirement, to address inadequate disclosures.

Second, if the defense feels that the disclosure is inadequate, Mr. Hafer noted the defense has the option of filing a motion for a comprehensive disclosure. Pretrial depositions also remain an option. In a recent case in his district the government decided at the eleventh hour (driven by a late change in the AUSA trying the case), that it needed a money laundering expert, and it disclosed this well past the 45-day deadline. The district court allowed the government to use the expert but gave the defense a 4-hour deposition the weekend before trial. He observed that late or inadequate disclosures can also be addressed by curtailing the scope of what an expert is allowed to testify to. In his experience, district court judges strictly enforce the limits of the disclosure and are very, very reluctant to admit testimony beyond the scope of the disclosure. And obviously there is the remedy of exclusion.

Finally, referring back to Mr. Harrison's proposal for signed expert reports, Mr. Hafer reiterated that there are many cases involving signed expert reports provided in discovery. But, he said, we have just as many cases where that requirement seems unnecessary and needlessly costly. It would certainly slow things down if it is 45 days prior to trial, you provided the first signed report, then the defense changes, because you'd have to go back to your expert, get a revised report, and go back and forth. In the Department's view, he said, the rule is working, there are existing remedies, and changing the rule to require reports in all cases taking any measure of discretion out of the process is, and would be, costly and inefficient.

A member asked Mr. Hafer what, in his view, would be required by Civil Rule 26 that is not already required by the Criminal Rule 16(a)(1)(G).

Mr. Hafer said the ISIS case would be one example. The expert witness, who had previously testified on ISIS's nature and structure, was able to review materials, and talk about things like the magazine. The government did not pay him in that particular case to create and sign a report. It would impose a cost that – in his view as a practitioner – is unnecessary in many instances given, among other things, cases that plead prior to trial. Mr. Hafer said there are many cases where a report is needed. But in a case like that you can make a comprehensive disclosure, putting the other side on notice about the scope of the testimony without a requirement that will make experts a lot more expensive, without adding anything, if the government has met both the letter and spirit of Rule 16(a)(1)(G).

The member asked how heavy a lift would it be to take your disclosure from criminal Rule 16(a)(1)(G) disclosure, which is a summary, and turn that into a report. What would have to be added if it were a report, other than the expert's signature?

Mr. Hafer said it would be necessary to give the expert a lot more information about the litigation in the first instance than is done now, because the government typically fronts everything it foresees as a possible issue at trial. The disclosure will say the expert may testify to this, this is his background, and he may testify to that. But it would involve a lot more time with the experts and a lot more education of the experts regarding the procedural posture of the case, to satisfy both Rule 16(a)(1) and the signed report requirement. It would be a significant addition.

A member asked what specifically are you concerned about in transforming the summary that was given in that case into a report that looks like a Rule 26(b)(2)(B) report?

Mr. Hafer was not sure there is a particular substantive concern, instead, it isn't clear what problem that would solve, given his view that the government is generally making very good disclosures, and when they are not, there are other remedies. He did not know what benefit there would be to imposing a report, undoubtedly it would be a costly requirement.

A member observed that Mr. Hafer said this would be a costly requirement. But if the Rule 16(a)(1)(G) summary looks a lot like what a Rule 26(a)(2)(B) report would look like, there should not be much additional cost.

Mr. Hafer responded that the Rule 16(a)(1)(G) summary was written by the prosecutor. That is the AUSAs work product. The prosecutor has a phone call with the expert, who may educate the prosecutor on specific things like the missile defense system, but the summary is really the prosecutor's work. In contrast, a signed report must be the expert's work. Mr. Hafer noted he is very reticent about spoon-feeding information to experts, when it is going to become their opinion. In his view, as a practical matter, it would be costly to require the expert to prepare the report. It is a big difference in terms of whose work product it is.

Noting that Mr. Hafer had said he was not talking about a DEA agent's testimony about gang language, a member asked him if it was his view that a disclosure similar to the one you displayed in the Wright case would be feasible for a DEA agent's expert testimony on gangs. It presents the expert's prior experience with this, former testimony, what the person will say and so forth. The follow up question was: is that what you do?

Mr. Hafer responded, yes. The first question is: do we take the position that that's permissible expert testimony, for a DEA agent to testify in that capacity to drug dealers' use of code words and that sort of thing. We do with a hedge. The government typically says it does not necessarily concede that this is expert testimony – because there are some cases that suggest it is lay opinion – but we disclose it anyway. And yes, the goal is to make those disclosures specific so if it is an organization that is using particular phrases for kilos and particular phrases for fentanyl versus heroin and that sort of thing those should go into the disclosure. The AUSA is sort of following the guidance and practice. He disclosed the agent's background, and the number of cases and investigations they have worked. Then you would go into: in this particular case, he or she would testify to and list the references to the stash house and the code for particular drugs and that sort of thing. With the hedge usually, and he thought in the First Circuit the government does not concede that that's FRE 702. It says, in essence, it might be, and in case it is, here is the disclosure. We also have several district court judges who do not like to qualify experts in front of the jury. We still have to lay the foundation, and if the judge determines that we laid the proper foundation, we can elicit the opinion testimony. But there is sort of a recent reticence in our district to have the judge make some type of finding in front of the jury that the individual is an expert. They certainly will not do it for the DEA witness. You have to lay the foundation, then you can move on and ask the appropriate questions. But it will not be with a judicial blessing that that agent is an expert. That would even go in a recent capital case where we had all sorts of forensic psychiatrists and other things on either side the judge would not find that the person was an expert in front of the jury.

A member asked whether there is anything in the department's policies that requires the disclosure of prior testimony of witnesses, specifically your DEA agent for example who may have testified in 15 court cases concerning the use of code words.

Mr. Hafer described an ongoing conversation about whether that counts as Jencks. He said he would disclose, and would follow up with the agent. If he was aware that the agent had testified similarly in other federal cases, he would disclose that.

In response to the question whether that meant there is no uniform policy throughout the United States, Mr. Hafer responded that he did not think disclosure of the DEA agent as an expert is required by Department policy, though he was not certain. Assuming it is not Brady, if it is Brady it is obviously required that we turn it over. If there is some type of exculpatory material in the prior testimony, then it is disclosed.

Following up, a member observed that assumes that you were actually reading all of those 15 prior testimonies to determine if it's Brady. So what extra cost is there to identify prior testimony that an agent has given as an expert? What extra costs or steps would be required to do that?

Mr. Hafer thought several steps would be required. You have to have a conversation with the agent and obviously trust and believe in their credibility. You ask the agent for a list of all the cases he or she has testified in, in a similar manner. The case that he referred to with the money laundering expert, we were aware that he had testified three or four times as a money laundering expert. We were going to use that same model, when we learned [that he was?] an IRS agent, we pulled the testimony. Whether something is Jenks turns on whether it is related. He does not think it is generally a good practice to dance on the head of that pin. The extra cost, I think would just simply be that the AUSA would have to both consult with the expert that he's putting on and have to find some sort of PACER search, and there are Westlaw and Lexis expert databases where you can run names and do stuff like that as a double check. He thought most federal agents know when they have offered that type of testimony, so you probably capture the vast, vast, vast majority by asking them.

A member thanked Mr. Hafer for his presentation and confirmed with Mr. Hafer that in the NECC case the reports were prepared by the expert him or herself. But in the other two examples rather than have expert reports, basically you have [unintelligible] reports. Assuming that's so, what accounts for the difference?

Mr. Hafer responded that the practical thing is cost, though he did not want to make it seem like that is absolutely a practical decision. If the expert has to write a report, the goal post is that it costs $15,000- 20,000. Beyond that, it really turns on whether it is helpful. In the NECC case it was clearly necessary and was going to be very deep in the weeds. So the AUSA made a determination that they should write a report and lay all this out. He thought that the ISIS thing is a little more common, in terms of the government does national security cases fairly regularly providing some type of background and context on terrorist groups. It is a little more common, so he actually talked to the AUSA in that case before he came down here and she said, "It never even entered my mind to ask him to write a report, I didn't think that we needed one, I made the disclosure, I passed his prior testimony, I turned all that over." So the discussion is framed now as whether we should require the report or default to Rule 16(a)(1)(G). And day-to-day confronting this, it is not really a seminal decision in the case, should I get a report here, or should I not get a report here. It evolves much more organically based on the facts of what it is the expert is going to opine on or provide.

A member commented that there is some interaction with the expert just for the prosecutor to be able to write the report that you're seeing in the other cases, and Mr. Hafer agreed. So the member asked what change is involved for experts to just write out what seems to be a relatively simple report in those cases, as opposed to the lawyer doing so.

Mr. Hafer said it is really a time thing. The Department does not have a principled objection to signed expert reports. There is a place for them in a lot of instances.

Members pressed for a sense of how much more time it would take to prepare an expert report in for example, the case of the anti-aircraft missiles. You are just reciting some very basic points about the nature of those missile systems.

Mr. Hafer said that the expert in that case did prepare a report and summary. The only cases he described that did not include reports were Zelin and ISIS. The ISIS expert Doughty actually wrote a report analyzing the specific military equipment that particular defendant had tried to get out of the country. So it is the time, how much work would it have been for Zelin to write a report. Probably somewhere between 10 and 20 hours, as opposed to several.

A member expressed surprise, asking whether it is really a 10-hour project to just to recite some of those terms and say I'm going to talk about some guy who got killed in an airstrike and how he recruited people, and so forth.

Mr. Hafer said experts will not form an opinion until they have reviewed the actual evidence in the case even if it is consistent with evidence they have seen in a lot of cases. Once they look at what was taken from the search warrant, if there are intercepted phone calls, they'll want to listen to the phone calls so that they can talk about those particular terms in the context of that case. So there is lead time. Really it is reviewing the discovery, and we don't want to put someone on the witness stand with his pedigree and then we ask well did you listen to any of the recorded phone calls in this case, and have him say no. So that's less so than the actual drafting is the review of the discovery.

A member pressed Mr. Hafer, noting that he had said he could not possibly put an expert on unless he did all of this preparation that the witness is going to do anyhow. So it is just when he writes the report, and whether the defense gets it.

Mr. Hafer said given how many criminal cases we have it is really a matter of where you post the requirements. Does it make sense that early in the litigation given the very, very high likelihood there is going to be a plea (and the expert is not going to testify) to require that level of analysis? But yes, point very well taken ultimately. But I think that is where the nature of criminal cases and the percentage of resolutions to plea deals need to factor into this.

The member said it seems there is some real value to having the expert look at the record and confirming that he or she is actually going to say things that the lawyers are assuming he or she would say. The other question is at what point are you making these decisions about expert reports as opposed to lawyer reports, and I gather it is tied to whether the case is going to trial.

Mr. Hafer said, that is a very big part of it. For example, in the NECC case it was so clear to the AUSA that just to get to probable cause on their fraud theory, they needed expert testimony on the standard of care in these labs. So that was a very early determination that they needed a report. In something like the ISIS case, after indictment for example, within the first 28-30 days before there would be an expert disclosure requirement, if there are conversations and its clear the defendant is looking to plead guilty, then in the government's view it would not be a good use of its resources, taxpayer resources. It is perhaps unsatisfying, but it depends on the case.

Judge Campbell observed that Mr. Goldsmith had addressed the Department's policies on disclosure forensic expert information, and Mr. Hafer had described detailed disclosures where there is a retained expert in a complex case. But in Judge Campbell's experience, the far more common expert in a criminal case is the agent on the language or the IRS employee who is describing IRS procedures and why, in a tax fraud case, something was misleading to the IRS. Is there any department policy to the level of detail that those kinds of experts, or the AUSAs using them, must include in the Rule 16 disclosure?

Mr. Hafer responded that he did not think that was in the 2017 Memo, and Mr. Wroblewski responded that the 2017 memo was specifically addressed to forensic experts. Mr. Hafer noted that the case law deals with Rule 16, and what does it mean to have a basis, or opinions, so there's plenty of case law about these reports, and how extensive they have to be. He wished it could be as simple as writing 2-3 single space pages and the expert signs them. But there is a lot of case law holding that is not an acceptable Rule 26 report in many, many circumstances. So the short answer is that he did not think there is any guidance beyond the rules themselves and the case law about the rules, about how detailed it has to be. He reminded the Committee that Rule 16 says you have to lay out the opinions and the basis and methodology anyway, and there is case law surrounding that.

Mr. Hafer added that the guidance we get in Massachusetts is that increasingly specific disclosure is better than a less specific one. As he read Mr. Harrison's proposal, it would only apply to the team, which he thought would include the DEA/IRS agent types. So he did not focus on that. But what we do and what we encourage is to make it as specific, and to tailor to the case, as much as possible.

Judge Molloy thanked Mr. Hafer for the presentation, and broke for lunch. After a lunch break, the Department presentations turned to forensics, beginning with a short discussion by Ted Hunt, and then an FBI presentation on a forensic examination and about what is in a case file.

Mr. Hunt introduced himself as Senior Advisor on Forensic Science at the Department of Justice, since his appointment by the Attorney General in April of 2017. He relocated from Kansas City where he was a prosecuting attorney for about 26 years, focusing on the investigative use, disclosure, and presentation of forensic science. He was also a member of the National Commission on Forensic Science that concluded in April of 2017. He was tasked by

the Attorney General with reviewing the Department's forensic practices, policies, and what needed to happen to improve the science and quality assurance measures to ensure things are done the right way all the time. He reports to the DAG and, like Andrew Goldsmith, he has direct access to Department leadership.

Mr. Hunt said that DAG Rosenstein is very involved in this topic of forensic science and improving forensic science. Mr. Hunt stressed the Department's total commitment to the integrity of what we do. He said the DAG emphasizes to his staff every day: "to get it right and to do whatever it takes to get it right." Mr. Hunt's colleague Kira Antell is Senior Counsel, Office of Legal Policy, and most of her portfolio is with forensic science. So in essence the Department has two people (Hunt and Antell) devoted full time to the improvement and advancement of forensic science, including transparency. Hunt's job involves interacting with leadership and meeting with stakeholders in many different realms to work on internal departmental policies, practices, and procedures, and to constantly look for ways to increase the reliability of what the Department does. He met with DAG Rosenstein at least once a week about forensics, and there is an in-depth meeting every month about forensics. Hunt also leads a standing departmental working group on forensic science, which is a high-level group of people who are laboratory heads or laboratory system heads – the very top of the food chain at these laboratory systems within the various component agencies like the FBI, DEA, ATF, Criminal Division, and others. They are at the table twice a month, hammering through issues some of which really go down pretty far into the weeds.

Mr. Hunt said that the Department believes that the best way to prevent potential mishaps with forensic science is to have a robust quality assurance system and to improve measures in that field. Public dissemination has also been a focus, as well as the continual promotion and advancement of the Department's methods.

The Department's techniques and quality assurance systems are particularly important. Mr. Hunt emphasized five key DOJ is doing right now to improve forensic science.

First, the Department is discontinuing the use of the phrase "reasonable degree of scientific certainty," a topic that was originally brought up at the National Commission on Forensic Science. DAG Yates issued a memo directing the Department's prosecutors and laboratory examiners not to use that phrase unless required to do so by a part of a judge's ruling or a legal precedent. This began in a previous administration and has been continued by the current administration. The policy is about two years old now. Unless directed otherwise, the Department does not use that terminology.

Mr. Hunt's second topic was the creation of something called uniform language for testimony and reports. He noted that on the Department website there is a page (displayed onscreen), and a menu bar at the top of the page. You can click and find various document. The page that was just displayed showed the uniform language for testimony and reports. These are the Department's quality assurance measures for forensic disciplines practiced in their laboratories. And, basically they amount to this. This is mandatory terminology used by

examiners within and across labs for expert testimony and reports. It is present in both the report itself and in the subsequent testimony should it occur. There is uniform language for those terms and statements of conclusions. Each uniform language document covers a different discipline. There are 13 published and online, each of which has several elements.

First, there is a list of approved conclusions that the examiner may use to articulate his or her opinion. Second, there is a definition of that term. It is very difficult to encapsulate in a single term and the richness and the fullness of what an examiner is trying to say. So there is a definition of that term. Third, there is a concise statement of the scientific or technical basis for the conclusion. And fourth, there is a list of qualifications and limitations for the approved conclusions and statements for that type of examination. The qualifications and limitations element relates to things an expert should say to round off or give context to the opinion, and things that an expert should not say or should not go too far in overstating. This is geared to trying to appropriately calibrate the probative value of that statement. This information is available online and in discovery. It is turned over once these documents are constructed, they are approved and they are published.

The Department now has 13 qualifications and limitations, which will go out in discovery. They have to be appended to the report, incorporated by reference, or included in every case file so that the prosecutor or the defense attorney and the judge will all see with this particular type of analysis or this method, these are the things that I'm relying on, and here's what this means, here's what I'm saying in terms of a single word or phrase, and here's a fuller statement, and here is the basis for that. So that's going to be included in discovery. They are also available online at the top of the page. You can click on uniform language for testimony reports and look at the 13 that have already been published.

Mr. Hunt's third topic was the creation of a testimony monitoring program. Before Mr. Hunt joined the Department, the DAG announced there would be a testimony monitoring program. This program will be a routine way that examiners and digital analysis experts will have their testimony observed and reviewed by a colleague. Mr. Hunt could not say categorically that the Department would monitor every expert's testimony, but the goal is to get as many as possible. This going to be a substantive review. The criteria that the Department is looking at have to do with things like did you follow the laboratory policies and procedures that are mandatory for the evaluation of evidence? Did you correctly state and not oversell the basis for your opinion? Did you add qualifications to your opinions, so that you properly stated the probative value, neither over nor underselling, but rather hitting the sweet spot, getting it just right? And did you follow the approved language for testimony and reports, if there is a document applicable. This is going to be something that is routinely done. It is another quality assurance measure so that we catch any missteps before this becomes a systemic problem.

A member asked whether this has been implemented.

Mr. Hunt confirmed that it has been. The new framework for testimony monitoring is publicly available on this website as well. You can go to the document online. And this is a

framework for the different agencies and components with laboratory systems and digital analysis entities. They are going to create – some of them have already created – their own internal policies to fit their particular situation in-house, their laboratory ecology if you will. They are using these criteria here as a guideline. And there are a few mandatory components ("a few shalls") that need to be incorporated into those individual policies. So again, this is a substantive review but it is not a cursory review or a request that the litigants send in their impressions about how they did. They do that as well, but this is a significant change in that the Department is trying to get up to 100% compliance with a testimony review by an in-person observation or a transcript review. This is going to be done, either in real time, or within 30 days, as fast as we can get the transcript and review it in a substantive way with that examiner to make sure they got it right in that case. The FBI has already preceded the mandatory program that came from the DAG's office. They started testimony monitoring before that became required, and they have had great success. Some minor misstatements were caught and reported out to both the prosecutor and defense in one or two cases. It was a defense attorney who called one of our witnesses, and the parties were notified as well as the court in those cases. So, it is already paid dividends and we are catching things quickly. Mr. Hunt did not think any of the misstatements made any difference in any of those cases, but again it gets back to the Department's commitment to make sure there is not a substantive problem when we're reporting that out and we're getting it right. And so we're really excited about this program, it is being built up now. He did not have any data to report back about it yet. With the ULTRs, the uniform language, there will be feedback in the next year as we gather information. But he thinks this is a really good improvement in quality assurance and real-time catching of issues or misstatements.

In response to a question, Mr. Hunt said that these documents will be provided in discovery in every case, depending on what the specialty is. When asked if the production will be paper or digital, Mr. Hunt said that the labs will have a choice on format of disclosure. obviously if you know about it, it is online and publicly available. The labs can make reference to it, incorporate it by reference, print it off in paper, or dump it onto a disc that is disclosed in discovery, in any event it is going to be there. We are not dictating how it will be disclosed, just that it be disclosed with the balance of the discovery. So we think this is a good idea because it's going to make sure that testimony reports are consistent with those laboratory policies that are mandatory, again a proper qualification not exceeding the scientific and epistemic limitations of the discipline and the conformity with our uniform language documents.

Mr. Hunt emphasized the online posting of internal laboratory documents at all of our labs across the Department. These have been available as part of discovery for a good while, but recently all our components labs have completed the process of posting these internal documents online. And you can go again to the menu, up there and we have a link to the quality management system documents for the FBI, DEA, and ATF. So, if a litigant, a judge, or any member of the public chooses to do so, they can go to the internet, click on these documents and go through them in detail and read step-by-step how the evidence in each case was processed, the criteria by which the expert's conclusions in that case were formulated and expressed – it is all

there. These are the same documents that our laboratory folks, our examiners, have to follow, that they get trained to follow, and they are there for anybody to read. Again, available at justice.gov/forensics.

Mr. Hunt emphasized that all of the Department's quality assurance measures – lab policies, protocols, procedures, standard operating procedures – are online. Before any methodology goes online it has to be scientifically validated. Summaries of all those reports are online for any litigant to read, to cross examine on, and to use however they choose. They are assessed using procedures based on international standards. He noted that there is an international standard for calibration and testing laboratories whether it is for forensic labs, labs that test groundwater, do clinical work, or diagnose diseases. All testing laboratories have to follow a particular document. If the lab is accredited, like all of the Department's labs, they must follow ISO (International Organization for Standardization is the acronym) ISO-17025.

The Department's laboratories follow ISO-17025 just like any other laboratory does and they get assessed to the requirements of those international standards at regular intervals. What they do is not only in compliance with what they believe is appropriate internally but is also based on international standards for testing laboratories, whatever the subject matter may be. Mr. Hunt emphasized that it is believed more than 90% of forensic laboratories in the country are now accredited. In the last 10 years, tremendous progress has been made, and the Department is approaching the point of getting the vast majority of labs accredited in the United States. He noted that all documents are available online for anybody to look at, read, download, or use during cross examination on the basis for a conclusion. He explained that these are not case specific bases because they are standard operating procedures ("SOPs"), but if anyone wants to look at the steps an expert had to take to reach a conclusion in a particular case, it's all spelled out.

The Department sees several benefits from these postings. First, it is consistent with the scientific value of transparency, which is very important in science because if you say that you can prove something, you have to show us, and another scientist will take what you show and kick the tires to see if it withstands their scrutiny. Second, it is enhancing the efficiencies of the Department's discovery and disclosure obligations. The information is freely available online, and anyone could use it case-to-case-to-case. They can go back, create a new copy, and put it in a case file for the current case. Mr. Hunt noted that this is somewhat duplicative because the quality assurance SOPs that were in place at the time that the test occurred are going to be disclosed in discovery anyway. Third, the Department believes that sharing what it deems are high quality policies and procedures with other labs is a very good thing for them; they can look and assess our standards against what they use. The hope is that this will raise the bar. The SOPs are also there for academics, lawyers, and judges to peruse, critique, and read all the way through.

Finally, Mr. Hunt turned to ongoing research in the field of forensic science within the Department. He reiterated that quality assurance measures are the best way to try to prevent any missteps, along with accountability that comes with testimonial review and the requirements to

follow uniform language. Hand in glove with that is to make sure that the statements that we are making on the witness stand are consistent with good science.

Mr. Hunt described current research in the field of forensic science, specifically at the FBI laboratory. The FBI lab is currently involved in the planning and execution of a number of important studies. These involve commonly used feature comparison methods. They are large-scale, discipline wide studies. They are both internal and external to the Department. The Department is not just testing in house, it will be sending tests out to state and local labs, anywhere across the country, to get a larger population. Having more people involved makes the study more reliable.

The studies will involve hundreds of examiners, thousands of samples, and tens of thousands of collective decisions. There will be an open experimental design, and the test taker will not know if the answer is included somewhere in that set. The set will be biased hard in order to identify the baseline for when experts start to fail and where they get it right most of the time. To identify these outer limits, experts will be given really hard comparisons. This will be a multi-year project that will generate a tremendous amount of data that is all going to be collated and published in publicly available, leading scientific journals.

These types of studies take a long, long time to plan for, to prepare, to execute, and then to crunch the data. But this is all in process, and not only inside the Department; there is an extraordinary amount of on-going NIJ funded research outside the Department. Those studies have provided a better focus and understanding of where forensics gets it right and where it gets it wrong compared to 10 years ago. Mr. Hunt noted that the Department has advanced enormously and cautioned that sometimes people read things that are very dated; many of the cases where bad things happened are a decade or more old. He also cautioned against using those cases as the benchmark against which forensic science is judged, because a lot has changed since then.

In conclusion, the Department's current focus is coordination and collaboration with all of the stakeholders, state, local, tribal, and on both sides of the bench and across the table. On a regular basis, the Department talks to defense attorneys, innocence folks, and brings in all the stakeholders who have something to say, such as academics and researchers, to get their input. It is also trying to increase the capacity of forensic services so that they can promptly and properly analyze evidence and get answers out to defendants, investigators, and prosecutors in a timely manner, and to continually enhance the quality, reliability, and transparency of what is being done inside the Department.

Professor Beale commented that this is all very interesting and encouraging, but she was puzzled about how it related to the National Commission headed by Judge Rakoff, who wrote to the Committee suggesting an amendment. She heard him make a presentation last summer, and he said that the Commission had asked to be extended. It had reached the end of its two-year period and asked to be extended to continue its work. Judge Rakoff said that request was rejected. Given the extensive outreach and effort to move forward, why was the Commission not

a useful vehicle, particularly since it had proposed approaches that were adopted by this administration?

Mr. Hunt noted that he was not yet at the Department when the decision was made not to extend the Commission, but he provided his perspective as a member of the Commission. The Commission met four times a year, and moved at an extraordinarily slow pace. He thought it was very inefficient in the way that the work products were developed. A lot of what concerned him as a commissioner was that the underlying bases for many recommendations were highly controversial. Though members of the Commission agreed much of the time with the recommendations, there were lots of disagreements about the bases for those recommendations and what justified them. So, he thought that was a part of the process that was very inefficient, a very, very slow-moving process.

In contrast, the Department has the flexibility to bring people in at any time. They do not have to wait for four months to do things and need not make recommendations that the attorney general has to consider. Mr. Hunt emphasized his direct access to leadership and direct access to the community. He tries to get input from lots of different sources both written and expertise that he has personal access to, and to weigh it all and come up with the best products. He noted, the Commission had some strengths, but was terribly inefficient and slow moving. The Department can now address things more quickly, more efficiently and effectively with the mechanisms they have in place now.

Professor King asked what percentage of forensic experts who testify in federal criminal cases are from unaccredited state labs.

Mr. Hunt did not know, but guessed that now, in 2018, it is very few. If they are from a laboratory, he thinks we are north of 90% of all laboratories being accredited now. That gap is going to get further closed as time goes on, because the Department has a directive to use accredited forensic laboratories whenever possible. That's the Department's goal. Everything in house is accredited that we use in terms of a traditional forensic laboratory. So we have those layers and layers and layers of quality control before anything ever goes out from the report.

Professor King asked whether there are specific types of science or states that have a higher percentage of unaccredited labs.

Mr. Hunt identified digital evidence, relatively new on the scene, as an area where things are having to catch up. Digital evidence was traditionally something that was in an investigative unit of a police department. It was not a traditional laboratory setting, and there is a lot of work underway about considering the right fit for an accreditation scheme. If you have a testing calibration lab, you take those requirements and overlay that on a digital analysis entity, it is not a good fit. But a number of organizations are now working on this. One is called the scientific working group on digital evidence. Another is the organization of scientific areas committees, which has a digital evidence subcommittee. They are actively looking at trying to do this. There is a lot of work that is underway. It is his impression that digital has a lot of catching up to do because they are not a traditional forensic discipline.

The next Department speaker was Erich Smith, who is a firearms and tool marks examiner at the FBI laboratory. He noted that usually he appeared briefly in the courtroom as a witness, and was pleased to have a chance to talk to the committee.

He wanted to return to Mr. Hunt's comments about the quality assurance. As far as review of testimony, he said I am the technical leader in my unit, so it is my responsibility to look at all the transcripts that come in. I am checking them for accuracy, and whether they are within the confines of the science. Within the laboratory manual operation system, there is a document that spells it out exactly what I am to do, and how to record that. It is all maintained for a long period of time through the Department's accreditation process as well.

Mr. Smith walked the Committee through the case file. He noted that he is often asked what the difference is between firearms and tool marks, which seem like two different things. But a firearm is just a specialized tool to create work. So when we are looking at bullets or cartridge cases, we are looking at the tool marks that are left behind in the production of that firearm to try to identify. This is typically what I am going to see at the laboratory for communication. We call them electronic communications in the FBI, but it could come from the state laboratory or state agency that is sent to the FBI lab for analysis. Basically, we want to examine these items, and they give us some information about the case as well. Looking at the material displayed on the screen, he noted P1700006 was a laboratory number that's been assigned to it, and then we have some information about who sent it in as well. There will be some synopsis about the case, a generic synopsis of what's going on, where the evidence was collected, maybe something about the case itself, and then typically at the end the contributor will have a request to examine the items for their forensic value. That initiates it in the lab. We have a separate unit that is going to take in the evidence, and everything gets a unique identifier. Item 1 through whatever. They are introduced into the chain of custody, so they are tracked continuously in the lab. There will be some communication with the contributor to say I received the evidence in this case. This is the report that is generated at the end. you can see in this particular case five cartridge cases were submitted. There was a pistol, that is the item 6. And then the secondary evidence is evidence that was generated in house. We test fired this gun and produced samples.

The first thing you get is the result of the examination. What did the examiner conclude? In this particular case, the examiner identified the gun, said it functioned properly, and he was able to identify three cartridge cases as having been fired from that particular gun. The other two cartridge cases were identified as having been fired from a separate gun. In this case, although he has one gun present, the evidence represents two different guns.

Laboratory reports contain a lot of information because the examiner may not be in the courtroom when the trial happens. The Department felt it was necessary to have information on the methods and limitations included in the report. For each exam that was conducted in this case, the report describes the firearm's function, and explains what was done in that case. The report then will move through each exam.

NCIC stands for the National Criminal Information Center. This is a database search to see if the gun was stolen, then we're going to talk about the cartridge case in that examination, how they were compared and how they were identified or not identified to a particular firearm. Then we are going to do another national database search which is called the National Integrated Ballistic Information Network. Next, we are going to see if there are any open cases out there that are unsolved that these guns might have been involved with and we are going to search that. Then we are going to spell out the limitations of each one of these examinations.

A member noted the Committee was just talking about uniform language in the reporting as well as testimony. There is language in this report on "identifying." The member asked for clarification, noting an understanding with forensics that an examiner could say it is consistent or it is similar to, but "identifying" is like excluding evidence absolutely from this gun. Is that one of the problems in terms of testimony?

Mr. Smith said if he were testifying he would state that the cartridge cases were identified as having been fired from this gun. Now in the straight context of that sentence, yes, you would attribute that as being absolute, but I would have to give context that that is based on my certitude of practical certainty based on the sureness of my opinion because this is an opinion-based discipline. Based on all of the training and all of the validation work and science that precedes it, there is an understanding that an examiner can identify a particular item to a common source by looking at individual characteristics. It would be improper to say that it was identified as having been fired in that gun. But the hearer of that information be it the jury needs to understand what the certitude of that decision is.

There are two stages of the examination: class characteristics and then the individual characteristics. There are standard forms within the Department's quality system that outline the minimal things that the examiner has to record. It is imperative so that if I am a technical reviewer; I can look at these documents and I can understand the process and what occurred in the examination. If it is sent out for review by another entity, they will understand what I was doing and how I was examining these items. On this particular one, we have the firearm. This whole sheet talks about Item 6. The class characteristics, that is something that is predetermined before manufacturing. In this case, the company, Ruger, decided to make a 9mm pistol. Accordingly, I have determined the class. I also know the diameter of the bullet, and the length of the cartridge case. Of all pistols, I am only talking about 9mm. Along the way, the examiner test fired the gun; so if you look under examinations and rifling, it tells you 6 right. Ruger decided that when they make this barrel, they will put 6 lands and grooves inside the barrel. And that is specific to that brand of manufacturer. If I had a whole array of guns here, I can now whittle it down to being Ruger by class characteristics. That is before I even get to looking at the individual weapon. So the examiner is required to record all this information up front. It is at this level where I can make my first decision. If there is a divergence in class characteristics, the pistol is 10mm, and this is 9mm – that is an elimination. There is a difference in class characteristics.

This just represents the record for the NCIC search. Was this gun stolen? It was not stolen. It came from the Department's collection, so I know it was not stolen. Next, he discussed the cartridge cases. These were submitted to the examiner to determine, were they fired from this particular firearm. And you can see the tech review that took place at the time. So the examiner, he recorded the shape of the firing pin, which is hemispherical. Think of a bowl. If I took a bowl and dropped it into some sand, it would make a hemispherical shape. If it was a cylinder and I dropped it in, it would make a flat bottom. So that's a class characteristic. If there was a difference there, I could eliminate. But in this situation, all the cartridge cases are hemispherical, they have the same class characteristics. In tech review, which Smith did for this case, the examiner was asked to make some corrections so part of the Department's quality assurance. He has to strike it out. We have to have an awareness about what he corrected, and he initialed it as well.

This is a spread sheet of all the class characteristics for each one of the cartridge cases. So we can understand the brand, the Remington federal, the material the case is made from, some are nickel some are brass some are copper, the firing pin shape. So he has consistency with the firing pin shape, he cannot eliminate, but then he can eliminate right here. The breach face marks. The breach face is that part of the firearm that supports the cartridge case when it's fired and when that tool cuts it, if it moves east to west, it's going to make parallel lines. In this situation, this tool was spinning and it made arching lines. At this point he could eliminate this cartridge case as having been fired from these two.

Mr. Smith commented that the documents he had provided are very typical of what the Department turns over in discovery. This is the NIBIN [National Integrated Ballistic Information Network] report, so he is put into NIBIN "Item 1: Cartridge Case." He wants to see if there is a gun out there, or a shooting out there, that this cartridge case may have been involved with. And with this system, you have to think of it as a Google search. You put an image in, you ping it against the database, and it gives you a list of choices. And in this case, the examiner has to sit at a terminal that is got tile screens and starts looking at the different images to see if any of these might match to his case. If they do, then the evidence must be brought into the lab and we do a microscopic comparison at that point, if we recognize anything.

A member asked do you do this when you do not know the firearm that the cartridge is from, or do you do it every time?

Mr. Smith said they do it every time with a gun, because we want to know, "was this gun involved in any other shooting?" In this case he has two cartridge cases that identify as having come from another gun. So, he needs to know is there another gun still out there involved in another shooting. So it depends on the examination if you are going to put all of them or just a select few into the database. Further, there is a lot of detail because of putting three items in there. And he searched different regions of the country. The database is partitioned based on regions, so if the contributor is in Milwaukee you're going to search Milwaukee but you're also going to search the FBI database to make sure that it hasn't been put into that database as well.

So everything that we talked about first was about the level one, the class characteristics. And you can see that there were two cartridge cases that had similar class characteristics. So at this point we are going to move to level two, which is the actual the comparison of the individual characteristics.

Mr. Smith explained that individual characteristics are formed when the tool is actually cutting the metal. The metal is going to break randomly, fracture, crack, and in the process the tool that is cutting is under a constant state of wear. It is changing, and debris that is falling away is interrupting, creating more individual characteristics. So now this is where we move to the comparison microscope, which is an instrument that allows us to look at two specimens side by side. And we are going to look at what may appear as small scratches, small impressions, and see if they repeat between the pistol and the test-fired cartridges.

And so, Mr. Smith continued, this is Cartridge Case 1, 3, and 4 that he is identified as having been fired from the pistol. This is tough to look at because it is been photographed, scanned, and you have lost a lot of the detail. But what does stand out is the firing pin impression right here. That defect is on the firing pin. It has a chip, a notch in it, and it is reproduced. There is a dividing line right here. Item 3 is right here, and a test fire from the Item 6 pistol is on this side. He is comparing the two firing pin impressions and he is trying to illustrate this defect that repeated between the two. Over here, this particular firearm has a dropping breech.

Part of the quality control system, Mr. Smith explained, is that the examiner must indicate the areas that he used for his identification. What was it that he compared? For example, these are cartridge cases so think of them as a small little can, and the powder's going to be inside. Well, the breech face is going to hit one end, and that is what you are seeing right here. And you have the firing pin impression. And then you have chamber marks. So you've got one, two, three, four independent surfaces that were manufactured independently that he can use for identification. This just represents a bookmark of what he did in his examination. It does not share the totality of everything that he did.

The quality system also requires verification that all identifications include some eliminations. And in this block here, you can see this person signed to verify that these are the items he looked at, and this is the date he verified that the decision was made. So this is the second examiner's agreement with the first examiner's opinion.

A member asked for clarification. This is not Mr. Smith's signature as the reviewer? There were three then, two initially and then you reviewed? Mr. Smith answered affirmatively, and continued. You have the verifier, who is just verifying the opinion. And then the packet's turned over. In this case, it was turned over to Mr. Smith to do the technical review. Did this person follow all the proper procedures? Did they document everything correctly? That is my purpose. That goes on the report as the technical reviewer. Finally, there is an administrative reviewer that is just going to read the report and look at the information to make sure the report reads accurately. So essentially there's three checks along the way.

In response to the question whether everything being shown will be in the file that is going to be disclosed to the defense, Mr. Smith responded that was correct. They will see everything, who did it, at what time. It is all turned over.

Mr. Smith then continued, noting the other two cartridge cases with the gun that is not present. He is identified these as well. This is the firing pin impression. Item 2 and Item 5…here's the center line and he is homing on this defect in the firing pin as well. We cannot see the shearing here that is represented, but he also includes the magnification and what he used for making his decision. And here is the verifier on this one as well.

Mr. Smith reminded the Committee that they began talking about the chart, and were pointing out the examiner can eliminate here. There is a difference in class characteristics. Well, that is what he is trying to illustrate: that these two cartridge cases were excluded as having been fired from the Item 6 pistol.

Next, Mr. Smith pointed out the test fire from the pistol. There is that defect, and then here is the other two cartridge cases. If you look closely…see these lines right here? Those are the arcing lines. Those represent the milling tool that cut this surface. They are different than what is on this side over here. These actually were cut with a broaching tool that made parallel lines.

Mr. Smith drew the Committee's attention to a series of other forms. The secondary evidence form records the number of times, or the quantity of test fires, that he made in-house. And these become evidence and they are returned to the contributor. The tech and administrative review forms include certain things that we want to make the reviewers pay attention to when they are doing the review. In this case, you either affirm, or point out things that might be incorrect. In this situation, I had some issues with the report language, how he was phrasing things, I sent it back to him, he changed them, and it is recorded. At the bottom of this there is the administrative reviewer. Their information is recorded as well.

This is the laboratory information management system. So back at the front end when the evidence came into the lab, this initiated the forms that fall under the case record report. So, in this particular case, we are going to see who did the review, and who did the administrative review at the end.

Mr. Smith pointed out the listing of the items that were produced. Here is the chain of custody. You can see where it is initiated, a description of what the items might be, how the packaging was. And when there's a transfer, even if I'm finished for the night and I need to put it away, there's storage containers I can put them in and I can designate it on the chain of custody as well. So at the end, when we turn this over in discovery, the defense can see who handled it, at what time, and where the evidence was in the laboratory.

This is the communication log. We record everything we talk to the contributor about, including if there is something administratively that we need to record about the case, we can put it into the com log. There will be a record of communications, what might have been spoken

about. At the end we actually send out a form to the contributor to find out feedback from them (how was the laboratory?). And you can see they recorded it right here, that it was emailed out on this date.

And then they have all the other information that came in, so you can see the EC (electronic communication) is here as well, shipping information, and then a copy of the secondary evidence. So, that is all turned in.

Mr. Smith then drew the Committee's attention to a typical CV that would go out for him to explain where he works, how long he has been there, his duties as a program manager, prior work experience (working at the Virginia Division of Forensic Science) and then his educational background, as well as any military background.

This actually is a [unintelligible] that we might turn over to the court. Because we are going to talk about terms; people watch television so they think they have an idea about what certain things are called, and they are usually incorrect. Typically, and I am going to pick on the attorneys here, they call this a bullet, but for us that is a cartridge. So we want the jury to have a complete understanding about the terms we are going to talk about, so they are not thinking about one item when it's actually a different item.

This is a good example, walking through, just simple terms. Here is a cartridge case. Here's the cartridge, the bullet is at the front, here is the powder, this is the breech end, and there is the primer. So, the little donut, or little compression, is going to be in that silver section right back here. So the jury understands what it looks like when it is fired as opposed to not being fired. So you can see we have a hemispherical firing pin shape, this is the bottom of the cartridge, the primary [tongue?] fired. This is what it should look like after being fired.

Here's the breech face. That is called the firing pin aperture. That is the hole that the firing pin protrudes through, to create that impression that you see right there. So you can imagine this silver area is resting right here. You can see an outline of where, from previous shootings, that it is starting to leave some residue behind, right around the opening of the hole.

These are the cartridge cases from the actual notes. There is the defect in the firing pin impression. This is the elimination photo that he had.

A member asked whether this PowerPoint file is given to the defense, with all the notes. Mr. Smith said that it was in this situation, but not always. The member asked if you are doing demonstration evidence, what does the defense get?

Mr. Smith said there are two hurdles. It is up to the prosecution. It is their case, and how they want it to be presented in court. But the judge may not allow it. The defense may make a motion that, hey, this does not pertain to this case, we do not want this evidence, so it may not even get into court. But we do turn it over if the prosecution wants us to give some sort of story, or explanation of what it is that we are going to talk about.

This was the elimination. Now you can clearly see the marking lines here, difference in aperture size. That was the elimination. You can clearly see the defect, but he is also looked at the aperture sheer. So I highlighted that little hole that the firing pin protruded through. While this is very malleable foil, it will go into that opening, and when the firing opens up it creates all these individual characteristics that can be used for identification. So he has two really nice areas to look at for an ID. And here is the defect in the firing pin for Item 295. This is the gun that we do not have in this case. He is also found some detail in the breech face.

Mr. Smith highlighted one of the SOPs. He was in charge of developing this SOP and has presented it to a professional organization. Some laboratories have adopted it.

He turned to verification. In the Department's laboratory we do blind verification. If the original examiner collected all that information, and if this case was going to be blind verified, he would not be allowed to get somebody to come in and sit down and offer an opinion on his decision. So all the notes that you saw there, minus the verifier, would be turned over to the unit chief. The unit chief acts as a referee in the situation.

Now, say I am assigned to be the blind verifier. Now I have to get the evidence and do the same comparison and generate the same results, and they're turned over to the unit chief. It is the unit chief's responsibility to look at the two examiners' notes to see if they are congruent. In that situation, if I had agreed with him, I would essentially be the verifier. I did it independently and they matched the original. But say I did not agree. Let us say on one of those identifications I said, no, it is inconclusive. That is going to initiate another quality assurance component where we are going to have a dispute resolution.

I am going to sit with the unit chief as well as the other examiner and we are going to talk about the examination. The minutes from that meeting will be recorded and they will be included into the 1A.

It will go through dispute where another examiner will come in, take another look at the evidence, and try offer opinions. If it continually goes up and there is no agreement it functionally ends up in the laboratory director's wheelhouse and they are going to make a decision in the end. But that whole process is cataloged, and it will be turned over into 1A. The defense would have a record and be able to see what took place.

Mr. Smith was asked to quickly summarize or go through the rest of the quality assurance documents.

Mr. Smith turned to how we produce a report. In discovery you will get everything that we do, including the report-writing language, whether we did it or not. This document tells us how to write a report, so you will get that information as well.

Mr. Hunt talked about validating new techniques, and Mr. Smith said he was very proud of his unit because there is no other unit in the world that has the instruments we have in-house. We are looking at those individual characteristics to see if we can quantify the decision. in doing that I have to follow this procedure. I have to come up with a plan. How am I going to validate

this? I have to keep all the information that is done along the way. And in one particular case in which we validated one instrument for virtual comparison microscopy…all those documents are available if needed for discovery.

Estimation of uncertainty primarily deals with the quality system, things that are driven are by statute. That would be like barrel length, overall length, things where there is a criminal charge based on that. So, we have to figure out the uncertainty that would be applied to any measurement, be it for a barrel or for overall length for a firearm. If I have to report out-of-measurement, I am still going to have to figure out the uncertainty behind that measurement, and this tells you how to do it.

Proficiency testing. I take four proficiency tests a year. It is going to be in the core disciplines: gunshot residue; so that's distance determination; how far was the firearm from the victim; tool marks; serial number restoration, as well as firearms. this outlines the interval and the deadlines that have to be met when doing a proficiency test. And, if you are unsuccessful in the proficiency test, what is the outcome and what is the mitigation?

This is the FBI laboratory's scientific testimony report language. This is the document I use when I do a review of testimony, or the opinion offered by the examiner. It is going to explain what we can and cannot say. I am going to testify next week in Alabama. So, this is what is going to happen. When I get back to the lab tomorrow, hopefully, I'm going to have to go in and record that I've read the [aster?] before I leave, and that goes into a database and a case record so that the quality assurance will understand I'm going to Alabama. What is the case record, so they can pull the transcript, and I have also read this to make sure that I am [compliant?] with the testimony? So this talks about the conclusion of identification and then exclusion and inconclusive. Those are the three decisions that I can make with my opinion. At the end, these are statements that I cannot say. I cannot say to an absolute certainly about an identification. The reason being is that I am not going to see every firearm made, or has been made. But I do have a trueness and an understanding of individual characteristics that are produced, and when there's sufficiency in their agreement for making that identification. Nor can I offer any numerical certainty. "I'm 99% sure." We do not do that. That is not appropriate. So that is a responsibility that I have to take, when I go to testify its part of the quality system. That is what I have been doing for a few years now.

You saw the end product for the cartridge case examination. This is the SOP that the examiner has to follow and that will also be used to evaluate his work during a technical review. So it lays out how the process takes place, what is used, and are there any standards of controls. There actually are standards in this situation for the virtual comparison microscopy. We do use standards for that. Performance checks for the instruments as well. And then the workflow. How will you perform the examination, and what to require?

A member asked if all these procedures and regulations are part of the quality assurance system. Is that turned over, is that put on the web? Discovery is the focus here.

Mr. Smith responded that everything that he is showing is turned over. Now that we have it on the web that makes it a lot easier. I can point somebody directly to the website, but we're still burning them to a CD so they will have access to all of the SOP's that we use including the LOM (the laboratory operations manual) and quality manual.

Mr. Smith said they work with two manuals. One is the quality manual, which outlines everything in laboratory, responsibilities, and directing certain tasks. You can just see by the outline that there is document control, organization, and reviews. That is the quality manual. It is easy to talk about technical requirements as far as education, competency testing, but the LOM (laboratory operating manual) is going to go into the detail of each one of these elements and how it is achieved because this is just the framework.

A member commented that although Mr. Smith said that all this material is turned over; the member did not see anything about bench notes when they are doing things.

Mr. Smith said the bench notes were there and pointed them out again. The ones with the photographs that were dark. In response to a question whether there are things examiners produce that are not turned over to the prosecution, Mr. Smith said that everything involved in a case is turned over if it would impact the case. There might be elements of the LOM that have no bearing on what I did in the exam. The LOM is going to be turned over to the defense, or rather to the prosecution, and his understanding is that the prosecution decides whether to turn material over to the defense.

A member asked Mr. Smith about his quality control review of prior testimony. What happens if it discloses an individual case where somebody overstated something valid forensics matter?

Mr. Smith said that in one case he was involved with a technical review they informed the court. We found an inconsistency or something that was stated not appropriately, and then the court and then OPEC is notified. That's the practice. I cannot speak for other directorates but that is what we did.

The final presenter was Jeannette Vargas, Deputy Chief of the Civil Division in the U.S. Attorney's Office for the Southern District of New York. Her focus was Federal Rule of Civil Procedure 26(a)'s disclosure requirements for expert witnesses and DOJ's experiences with expert disclosures in civil cases. She supervises approximately 50 line AUSAs. This work runs the gamut of both affirmative and defensive litigation, including tort cases, medical malpractice, car accidents, slip-and-falls, employment defense, and civil rights defense. On the affirmative side their work is also quite varied, including claims concerning fraud and healthcare, mortgage industry and financial institutions, procurement, federal grants, and civil rights. They enforce the civil-rights statutes, the Americans with Disabilities Act, fair-lending for housing, environmental, and shelter litigation.

In their experience, the majority of federal civil cases that enter discovery involve some level of expert discovery. Ms. Vargas said that, excluding programmatic litigation (cases that are

confined to administrative records), in cases that go into discovery regardless of subject matter, whether affirmative or defensive, they regularly use retained expert witnesses.

When in the process do we retain experts in the majority of cases? Assuming the case is not likely to be resolved at the pleading stage, she said it is generally their practice to identify experts at the outset of the case. In affirmative cases, they may even obtain experts in the investigatory stage before bringing a complaint. Their routine experts play a very critical role in determining what is going to be needed in fact-discovery going forward. So what documents do we need to obtain, where those documents are likely to be found? What witnesses should be deposed? Generally speaking, civil litigators are not subject matter experts. They are litigation expertss and our experts are the subject matter experts who educate us on whatever it is that the case concerns. So that allows us to go forward with the case and help us to formulate what questions should we even be asking very early on.

Federal Rule of Civil Procedure 26(a)(2) imposes robust disclosure requirements for retained experts in civil cases. First, Rule 26(a)(2) states that a party must disclose the identity of any witness it may use at trial to present evidence under Federal Rules of Evidence 702, 703 or 705. And in addition to disclosing the identity of the witness, of course, there are additional disclosures regarding the substance of the witness's testimony, and the extent of those disclosures depends upon the type of expert witness that you're talking about. Essentially, Rule 26 divides experts into three categories.

The first is the retained expert. The second is the employee whose duties regularly involve giving expert testimony. Third is the catch-all of all others who are going to be providing 702 opinion testimony. A retained expert, for purposes of the rule, is one who is paid for the specific purpose of giving expert opinion in litigation. They do not have prior knowledge of the facts at issue. They were not personally involved in the events giving rise to the litigation. And in the case of government-retained experts, they are not federal employees. They are typically retained pursuant to a contract. They are paid either a flat-flat fee or an hourly-rate. More usually the hourly-rate for the specific purpose of examining the record in the case, consulting with the attorneys and providing their opinion which will be embodied eventually in a report and giving a deposition regarding that opinion.

In contrast, a retained expert is not a percipient witness. That is one whose knowledge obviously is premised on their personal knowledge or involvement in the case, they are not considered a retained expert even though it may be the case. For example, the treating physician is usually considered the exception to that retained expert rule, where a party pays them. Usually for example the treating physicians for the plaintiff are paid. But they have come by their knowledge not because they have been specifically retained for litigation, but because they were involved in the course of treatment. That kind of witness is not considered a retained expert for purposes of the rules. In almost every case in which the government uses an expert witness in a civil case, the expert we are talking about is a retained expert.

The expert disclosure requirements for retained experts are set forth and Rule 26(a)(2). They include an expert report that contains the following elements:

- a complete statement of all opinions the witness will express and the basis and reasons for them, all the facts and data considered in forming those opinion, any exhibits used to summarize those opinions;
- the CV or otherwise a summary of qualifications that needs to include a list of all publications for the prior ten years;
- a list of cases in which the expert has provided deposition or trial testimony in the prior four years, and;
- a statement of the compensation to be paid usually up to that date, or you can provide the hourly-rate with some evidence regarding how much work has been done and how much work is estimated to be done.

The length of an expert report can vary. At a minimum, I do not think I have ever seen one that is less than five pages. Typically, it is at 10 to 20 pages in a very garden-variety case, like a tour case or something like that. A medical opinion in the range of 10 to 20 pages is fairly standard. In complex cases, expert reports easily exceed that length, particularly in affirmative cases where the government has the burden of proof, for which the cases tend to be more complex. The expert reports can run quite a bit longer. It is not at all uncommon for such reports to run between 50 to 100 pages, including appendices and worksheets.

Ms. Vargas showed a sample of an expert report on a false-claims-act case. It involves claims that were allegedly tainted by the unlawful kickbacks. This report was prepared by a Nobel Prize winning economist who worked with the Department for several years doing data-analytics and preparing this report. It took quite a long time. He had a team working with him under his supervision who did the analysis of the claims submitted to various federal health-care programs, in order to demonstrate a causal link between the payment of kickbacks and changes in prescribing behavior. This report, with appendices and various calculations, was 119 pages in length, of which 35 pages are substance and the remaining pages provide various calculations and data analytics. There was also a separate production of the work papers that included all the actual analysis broken down, which numbers several hundred pages more. Files were also produced at the same time as this disclosure was made.

Ms. Vargas turned to the other types of experts on the Rule 26(a)(2). The second category of experts are those whose regular duties include providing expert testimony – those who are a party's employees. These expert employees are subject to the same disclosure requirements as retained experts. It bears emphasis that as a matter of practice, and across subject-matter-areas, this provision really does not have much relevance for government civil litigation because the Department does not typically use its employees, or agency employees, as expert witnesses in civil trials. It would be a very rare circumstance where we would produce an expert report from a federal employee. Ms. Vargas noted that she had never done it, and to her knowledge no one in her office has. She could not, however, eliminate the possibility that it has been done somewhere across the DOJ, though it would be a very rare circumstance.

That is not to say, Ms. Vargas noted, that the Department does not have employees with in-house expertise in various practice areas. They have in-house architects, in-house auditors and accountants, economists. But as a matter of practice, they do not use those employees as expert witnesses. They do not call on them to provide testimony. They do not ask them to prepare expert reports. If there is a litigation need for an expert to provide testimony in trial, they retain an outside expert to do that work. This is their practice for a variety of reasons, but a primary reason is the burden of asking employees to regularly produce expert reports. It would take those employees away from doing other mission-critical tasks. When it comes down to it, and the Department sees a litigation need for an expert, they go outside.

Ms. Vargas drew the Committee's attention to a slide providing an example of a situation on which there was relevant in-house expertise, but the Department nonetheless retained an outside expert when it came time to prepare for trial. A case from the Southern District of Texas required a forensic analysis of a computer to determine if certain information had been deliberately wiped. At the outset, the Department had the computer examined by someone from the FBI who gave them an in-house analysis of that computer. But, when it was time for trial, the Department does not generally in civil cases have employees do expert reports. Therefore, the analysis was redone by an outside expert who then produced a report which was approximately 30-odd pages in length and the Department used him as the testifying expert for that civil case.

Finally, we get to the third category of experts under the federal rules. This is essentially, a catch-all of everyone who does not fall within the category of a retained expert or an employee whose regular duties include giving expert testimony. The disclosure requirements for this third category are much more abbreviated than those of retained experts. They do not have to provide an expert report or other expert disclosures. In 2010, Rule 26 was amended to include a requirement for summary disclosure of opinions to be offered by all expert witnesses not otherwise required to provide a report. Prior to that there was no such requirement, and there was some confusion about whether those individuals needed to provide any kind of disclosure or not.

Adopting this rule, requiring summary disclosure for non-retained experts, the advisory committee made clear that these disclosures for non-retained experts are considerably less extensive than the report required under Rule 26(a)(2)(B) for retained experts. Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

Ms. Vargas explained that occasionally a federal employee may be used as a summary-expert in this way. They are not retained and are not someone whose job regularly involves giving testimony, but in a particular case, they might have a relevant opinion. They are not subject to the report requirements, because they are not normally in court giving testimony (that is not part of their job duties), but in a one-off case we may need them to provide an opinion.

For example, there was an employee at one of the Department's VA buildings, who was chief of engineering services. This case involved a slip and fall at the VA, and the issue was whether there was a water-leak in one of the pipes. The employee worked at the VA and was there to provide expert-opinion about the piping system and how it worked. His testimony falls within the summary disclosure requirements because he does not normally give testimony. That is not part of his job duties. He is not a forensic analyst, he does not do this for a living, but in this particular case the Department needed him to provide opinion testimony and provided a summary disclosure. The disclosure is about two pages in length and briefly states the subject-matters on which he is expected to provide evidence and a little summary of his opinions.

Judge Campbell observed that the two most common experts in civil cases are treating physicians and police officers in cases that involve car accidents. Neither is specially retained, so neither has to produce a report. Thus, Rule 26(a)(2) requires the lawyer to give a summary of what those witnesses would say.

Ms. Vargas stated that the summary expert report provision is often called the treating physician exception for that very reason. The treating physician is not considered a retained expert because he has personal knowledge based upon his treating history with the party, usually the plaintiff. And it is considered unfair to make that kind of witness produce a report in civil litigation because typically they are not within a party's control. They are outside the case. The disclosure rules for these types of catch-all experts require that the subject matter on which the expert is expected to present evidence be disclosed, in addition to a summary of the facts and opinions to which the expert is expected to testify.

Ms. Vargas turned to the sequence and timing for expert disclosures in civil cases. In most cases, the timing and sequence is dictated by a scheduling order that is issued by the district court at the outset of the case. Typically, discovery in civil cases proceeds in two phases: fact-discovery followed by expert-discovery. The need to proceed in this kind of dual phases is fairly self-evident. The experts are going to rely very heavily on the information that is gathered during the fact discovery phase.

In the first phase you have the process of document requests, interrogatories, maybe contention-interrogatories, fact-witness depositions, to create the record in the case. At that point, the parties really hone in on the issues to be tried., *i.e.*, what is really going to be in dispute. In the second phase, which is expert discovery, expert disclosures are made. Typically, although not always, the plaintiff's expert disclosures come first followed by the defendant's disclosures. If the court does not set a date, the Federal Rule presumptively says expert disclosures are due 90 days before the date set for trial or the trial ready date. And again, if there is no court order, or the court has not ordered otherwise, parties can produce rebuttal reports within 30 days of the other party's disclosures. In the final stage of civil expert discovery are expert depositions, which follow expert disclosures. Depending upon the number of experts and the complexity of the case, courts typically designate a certain amount of time for expert depositions to take place after all the expert disclosures have been made. Rule 26 provides that depositions of retained experts cannot take place until after the disclosure.

To sum up, Ms. Vargas said, their experience in civil cases is that working with retained experts is really an intensive and sustained process. It can take many months, and sometimes years depending upon the nature of the experts, the nature of the case, and the complexity of the expert disclosures including expert depositions. Even a simple case can take time and impose a burden. Accordingly, the Department primarily relies on retained experts because they are employed for that specific purpose. It is not imposing a burden on them, they are paid to do this. In contrast, the Department is reluctant to take employees away from their mission-critical work to have them serve as experts in civil cases, given the process and procedures that really require a sustained and systematic disclosure, requirements that really do impose a burden on those employees.

Judge Campbell explained the development of the civil rule, and the distinction between retained experts and others. In 1993, the Civil Rules Committee decided that robust disclosures were needed. In deciding who should be required to give reports, the Committee concluded that it should be limited to retained experts because it is hard to get a doctor who treated the patient after an accident, or a police officer investigating an accident, to produce a report.

In 1993, the expert report requirement was adopted which said the report has to set forth a complete statement of what the expert will say in trial. Some judges view that as a virtually verbatim statement of what would be said by experts during testimony. Those who were not specially retained, such as treating physicians or police officers, did not have to produce anything and the lawyers did not have to disclose anything. As a result, there was a gap in the rules for about fifteen years. If you were on one side, you did not know what the other side was going to ask the treating physician or the police officer. To plug that gap in 2010, the Civil Rules Committee adopted this summary idea. We are still not going to require the treating physician to write a report, but we will require the lawyer to tell the other side what that lawyer intends to call them to testify about, what the subject is, and what the reason and basis for the opinions will be. It is much less detailed than the expert report, but at least it gave the other side notice of what the treating physician would say and then the other side could choose to oppose the treating physician if they wanted to. That is how the dichotomy came about, and how the rule was developed over time.

Discussion turned briefly to a comparison of the development of the Civil and Criminal Rules. There was agreement that in the 1990s the parallel provisions for discovery in civil and criminal cases were advanced.

Judge Campbell noted that the summary that was added in 2010 for non-retained experts is very close to what is in Criminal Rule 16. The wording is a little different, but very close. In a civil context, this is permitted for a non-retained expert. But a retained expert required the production of a detailed report. Another speaker interjected, however, that in the civil context the non-retained expert could be deposed. Judge Campbell agreed, and noted that the parties could also get all medical records.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2019 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee" or "Committee") held its winter meeting in Phoenix, Arizona, on January 3, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Judge William Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve (by telephone)
Elizabeth J. Shapiro, Esq.[1]
Judge Srikanth Srinivasan

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Providing support to the Committee were:

Professor Catherine T. Struve (by telephone)
Reporter, Standing Committee
Rebecca A. Womeldorf
Secretary, Standing Committee
Professor Daniel R. Coquillette
Consultant, Standing Committee
Professor Bryan A. Garner
Style Consultant, Standing Committee
Professor Joseph Kimble
Style Consultant, Standing Committee
Ahmad Al Dajani
Law Clerk, Standing Committee

Rules Committee Staff
Bridget Healy (by telephone)
Scott Myers
Julie Wilson

Federal Judicial Center
John S. Cooke, Director
Dr. Tim Reagan, Senior Research Associate

[1] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. He recognized the newest member of the Standing Committee, Judge William J. Kayatta, Jr., who sits on the U.S. Court of Appeals for the First Circuit. An attorney for many years in Maine, Judge Kayatta served in various capacities with the Maine Bar and the American Bar Association. Judge Campbell next welcomed Judge Kent A. Jordan, a new member of the Advisory Committee on Civil Rules who sits on the U.S. Court of Appeals for the Third Circuit.

Judge Campbell also recognized participants who are serving in new capacities including: Judge Dennis Dow – who began his tenure as Chair of the Advisory Committee on Bankruptcy Rules last October; Director John Cooke – who recently replaced Judge Fogel as Director of the Federal Judicial Center (FJC); and Professor Catherine Struve, who became the Standing Committee's Reporter as of the first of the year. Judge Campbell thanked Professor Dan Coquillette for his service as Reporter and announced that Professor Coquillette would continue to serve the Standing Committee in a consulting capacity. He presented a framed certificate of appreciation to Professor Coquillette on behalf of the Judicial Conference of the United States and signed by the Chief Justice.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process. The chart includes three-and-a-half pages of rules that went into effect on December 1, 2018. Also included are changes (to the Appellate and Bankruptcy Rules) that continue the rules committees' joint project of accommodating electronic filing and service. The Judicial Conference approved these rules in September 2018 and transmitted them to the Supreme Court the following month. The Court will consider the package and transmit any approved rules to Congress no later than May 1, 2019. Provided Congress takes no action, these rules will go into effect on December 1, 2019.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 12, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 26, 2018, in Washington, DC. The Advisory Committee presented five information items.

Information Items

Rules 35 & 40 – Petitions for Panel and En Banc Rehearing, and Initial Hearing En Banc. At the June 2019 Standing Committee meeting, the Advisory Committee plans to seek the Standing Committee's final approval to amend Rules 35 and 40. These amendments, which concern length

limits applicable to responses to a petition for rehearing, are currently published for public comment.

The Advisory Committee is also considering additional changes to Rules 35 and 40 aimed at reconciling discrepancies between the two rules. These discrepancies trace back to a time when parties could petition for panel rehearing but only "suggest" rehearing en banc. The Advisory Committee has identified three possible approaches that further revisions might take. One approach would be to align Rules 35 and 40 more closely with each other. A second approach would use Rule 21 (extraordinary writs) as a model for revising both Rules 35 and 40. A third approach would be to consolidate the provisions governing both types of rehearing (panel and en banc) in a revised Rule 40, leaving revised Rule 35 to cover only initial hearing en banc.

Rule 3 – Notices of Appeal and the Merger Rule. At the next Standing Committee meeting, the Advisory Committee will seek approval to publish amendments to Rule 3 for public comment. These amendments would address the relationship between the contents of the notice of appeal and the scope of the appeal. The Advisory Committee's research revealed that when a notice of appeal from a final judgment also designates a specific interlocutory order, some courts (invoking the "expressio unius" canon) take the view that the additional specification limits the scope of appellate review to the designated interlocutory order.

Judge Chagares explained how the proposed amendments would address this issue. First, because the merger rule provides that interlocutory orders become appealable once they merge into a final judgment, adding the term "appealable" to Rule 3(c)(1)(B) would indicate that a party need only specify the judgment or order that grants an appellate court jurisdiction over the matter. Second, the amendments would add two rules of construction for notices of appeal. The first rule of construction rejects the *expressio unius* approach that some courts use to limit the scope of appellate review. The second clarifies, for purposes of civil appeals, that courts should construe a notice designating an order resolving all remaining claims as designating the final judgment, whether or not the final judgment is set out in a separate document.

Judge Chagares asked members of the Standing Committee for their views on two issues: whether the text of Rule 3 should explicitly discuss the merger rule, and whether removing the phrase "part thereof" from Rule 3(c)(1)(B) would help to avoid encouraging undue specificity in notices of appeal.

A judge member asked whether framing the proposals as rules of construction undermines their binding effect. Why say that additional specificity in the notice "must not be construed to limit" the notice's scope rather than simply saying that such specificity "does not limit" the notice's scope? Another participant asked whether such phrasing would remove an appellant's ability to intentionally limit the scope of the appeal. Professor Hartnett agreed that the goal is not to foreclose intentional limitations, but rather to protect an appellant from *unintentionally* limiting the appeal's scope through the inclusion of superfluous detail in the notice.

A judge member stated that courts should interpret the notice of appeal so as to bring up for review as much as possible; the parties' appellate briefing suffices to narrow the issues. A different member noted that allowing appellants to curtail their appeal in the notice can conserve

resources for the parties because it alerts the opposing party to the narrowed scope of the appeal. The member expressed support for a rule change to displace the *expressio unius* approach, and also suggested that framing the amendments as rules of construction would leave an appellant with the option to limit the notice's scope if the appellant desires.

The same member asked whether the Advisory Committee considered citing in the Committee Note the cases that the amendment would overrule. Professor Coquillette noted that citing cases in a Committee Note is a risky endeavor because case law continues to develop, and one cannot amend the Committee Note without a corresponding rule change. Sometimes, though, a Committee Note cites cases in order to illustrate the problems that a rule or amendment is addressing. Another judge member asked whether it might be worthwhile to incorporate the merger rule into the Rule 3 text. Judge Chagares explained that the Advisory Committee did not want to risk freezing the merger rule's development by explicitly defining it in rule text.

A style consultant suggested revising the second rule of construction to use "is" rather than "must be construed as." Judge Campbell asked whether the second rule of construction is inconsistent with Civil Rule 58 since it refers to "a designation of the final judgment" even in instances when Civil Rule 58 requires that the judgment be set out in a separate document and this requirement has been disregarded. Professor Cooper said that a court's failure to enter a Civil Rule 58 judgment in a separate document does not defeat finality, and therefore, the clause's directive to treat a reference to an order adjudicating all remaining claims as a reference to the final judgment is not a problem. He also remarked that the phrase "an appealable order" is fraught with the potential for confusion that could create a host of problems, and noted his support for referring to the merger rule without attempting to define it in the rule text. This approach, he suggested, would make clear that the merger rule applies without constraining its development.

Finally, Professor Coquillette reflected on a suggestion to reorder and renumber Rule 3's subparts. He noted that renumbering a rule can raise practical legal research problems which is why the traditional practice has been to maintain the same numbering. Even when abrogating a rule, he observed, the practice is to state that the rule is abrogated rather than remove it and renumber the set. Professor Cooper recalled that, in restyling the Civil Rules, the rule makers made sure to leave untouched the "iconic" subdivision numbers – for example, Civil Rule 12(b)(6) – but Appellate Rule 3's subdivisions, he suggested, were not in that "iconic" category.

Rule 42(b) – Voluntary Dismissals and Judicial Discretion. The Advisory Committee is considering whether granting voluntary dismissals should be mandatory under Rule 42(b). Rule 42(b) provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. Under this formulation, attorneys have noted that they cannot guarantee their clients that the court will dismiss the appeal if the parties file a dismissal agreement. Judge Chagares noted that one argument in favor of mandating dismissals is that prior to restyling, Rule 42(b) stated that the clerk "shall" dismiss the appeal – a term that arguably did not leave the courts any discretion. On the other hand, some have argued that requiring a court to grant a stipulated dismissal when an opinion has already been prepared and is ready for filing would waste judicial resources.

A judge member expressed support for making the rule mandatory to provide clarity for the parties. Another judge member stated that it would be improper to allow a court to file an opinion once the dispute is no longer justiciable. But the member distinguished stipulated dismissals that do not require any further action by the court from those that do. Some types of cases – such as Fair Labor Standards Act cases – require court review of settlements. Where an action by the court is needed, such as a remand for the district court to review a proposed settlement, courts should have the discretion to decide whether to take the action proposed in the parties' agreement. But when no further action (other than dismissing the appeal) is needed, mandatory dismissal is appropriate.

A style consultant noted that the choice between mandatory and permissive terms is a substance issue, not a style issue. Professor Gibson pointed out that in Part VIII of the Bankruptcy Rules – a subset of the Bankruptcy Rules modeled after the Appellate Rules – Bankruptcy Rule 8023 mandates dismissal of an appeal to a district court or bankruptcy appellate panel if the parties file a signed dismissal agreement, specify allocation of costs, and pay any fees.

Potential Amendment to Rule 36 – Effect of Votes Cast by Former Judges. Also under consideration is an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office. Judge Chagares noted that a case pending before the Supreme Court raises the issue, and the Advisory Committee will refrain from further action pending resolution of that case.

Other Matters Under Consideration. Judge Chagares noted that the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), distinguished time limits imposed by rule from those imposed by statute. The Court characterized time limits set only by court-made rules as non-jurisdictional procedural limits. The Advisory Committee is considering whether this decision raises practical issues for the rules but will refrain from acting on any issues until the Court decides *Nutraceutical Corp. v. Lambert*, No. 17-1094, which asks the Court to address whether Civil Rule 23(f)'s 14-day deadline for filing a petition for permission to appeal is subject to equitable exceptions.

Finally, Judge Chagares noted that the Advisory Committee received a letter from the Committee on Court Administration and Case Management (CACM Committee) requesting that all Rules Committees ensure that the rules provide privacy safeguards in social security and immigration matters. The Advisory Committee concluded that this request did not require action to amend the Appellate Rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 13, 2018, in Washington, DC. The Advisory Committee sought approval of one action item and presented two information items.

Action Item

Restyling the Federal Rules of Bankruptcy Procedure. Professor Bartell reported the results of a spring 2018 survey that was both posted on the internet and sent to judges, court clerks, and stakeholder organizations. The survey responses revealed widespread support for restyling the Federal Rules of Bankruptcy Procedure to make them clearer and easier to understand. The Advisory Committee accordingly sought the Standing Committee's approval to begin the restyling process.

She explained that the unique nature of bankruptcy procedure means that restyling poses a risk of unintended consequences resulting from inadvertent changes to the substance of the rules. As a result, the Advisory Committee recommended that the restyling process go forward on the condition that the Advisory Committee, not the Style Consultants, retains final authority to recommend any modifications to the Standing Committee for final approval.

Judge Dow noted that the Advisory Committee, in collaboration with the Style Consultants, drafted a restyling protocol. The protocol outlines the timing, grouping, and phasing of the restyling process, identifies methods for tracking comments and revisions to the rules, and establishes policies to ensure that the style consultants can meaningfully participate in the restyling process.

The protocol also addresses the style consultants' concerns regarding the use of statutory terms. Judge Dow explained that statutory terms are used throughout the rules because the rules are closely tied to the Bankruptcy Code. That said, the Advisory Committee pledged not to reject a proposed change solely because existing language tracked statutory language, unless the change would have an adverse effect on daily bankruptcy practice.

The Style Consultants expressed their satisfaction with the restyling protocol that the Advisory Committee continues to develop. Judge Dow further noted that the Advisory Committee is not seeking the Standing Committee's approval of the draft protocol because it is subject to ongoing revisions.

Judge Campbell expressed his view that the Advisory Committee should have final say on what to recommend to the Standing Committee. He explained that the Standing Committee generally would not overrule the Advisory Committee's recommendations on matters of substance within bankruptcy expertise. That said, Judge Campbell noted that the Standing Committee retains its authority to review, discuss, and modify any recommendations made by the Advisory Committee. Judge Dow agreed with Judge Campbell's views on this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the commencement of the effort to restyle the Federal Rules of Bankruptcy Procedure with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval.**

Judge Campbell mentioned how helpful it had been to obtain the guidance of a number of current and former rulemaking colleagues who had participated in the restyling of other sets of rules. That guidance had stressed, inter alia, the desirability of keeping members of Congress apprised of the restyling project, and had suggested that this would be particularly important with respect to the Bankruptcy Rules. It was noted that, in contrast to the other sets of rules, the Rules Enabling Act framework does not provide that Bankruptcy Rules amendments supersede contrary statutory provisions.

Judge Campbell also suggested that a primer on bankruptcy law for the stylists and members of the Standing Committee might be helpful to the restyling process. A judge member noted that it would be helpful to have the primer before the next meeting at which restyled bankruptcy rules will be considered.

Information Items

Expansion of Electronic Notice and Service. Professor Gibson noted that the Advisory Committee has been considering ways to increase the use of electronic notice and service in bankruptcy courts. In addition to adversary proceedings, notice is often required in other aspects of a bankruptcy case, and notice by mail has proven costly for the judicial system as well as the parties. The Advisory Committee is considering ways to reduce costs (while still meeting the requirements of due process) by shifting to electronic noticing and service.

One suggestion from the CACM Committee is to mandate electronic notice for certain high-volume notice recipients. Professor Gibson explained that the Advisory Committee declined to act on an earlier version of this suggestion because the Bankruptcy Code provides some parties with the right to insist upon mail delivery at a particular mailing address. The current CACM Committee suggestion, however, explicitly recognizes that such parties retain the statutory right to opt for delivery at a stated physical address. Accordingly, the Advisory Committee is reexamining the idea and may have a proposal for publication this summer.

Suggested Amendment to Bankruptcy Official Form 113 – Chapter 13 National Plan. Another suggestion under consideration concerns instructions provided on the national form for chapter 13 plans. The form currently asks debtors to indicate whether the plan includes certain important provisions using two alternative checkbox answers to three questions on the front page. The instructions state that if the debtor marks the "Not Included" checkbox or marks both "Not Included" and "Included" checkboxes, then the relevant provision will not be effective.

The suggestion points out that the instructions do not address what happens if the debtor marks neither box. Professor Gibson explained that if one of the listed provisions is included in the plan, but the debtor fails to check the box stating that it is included in the plan, then the provision should be ineffective because the blank checkbox failed to alert creditors to the provision's presence. She noted that while the Advisory Committee agrees with the suggestion, the form is relatively new. The Advisory Committee thus will defer proceeding with the proposed amendment in order to see whether experience under the new form and related rules suggests the need for additional adjustments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met on November 1, 2018, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Multidistrict Litigation (MDL) and Social Security Disability Review subcommittees.

Information Items

Rule 30(b)(6) – Deposition Notices or Subpoenas Directed to an Organization. Judge Bates reported that the Advisory Committee received comments regarding its proposed changes to Rule 30(b)(6), and twenty-five witnesses will testify on the matter at a hearing scheduled for January 4, 2019. The subcommittee will hold the hearing at the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona.

Judge Bates noted that most comments focus on proposed language requiring the party taking the deposition and the organization to confer about the identity of the witness(es) the organization will designate to testify on behalf of the corporation. Some submissions raised concerns that this will cause an unwarranted intrusion into the corporation's prerogative to designate who will testify. The Advisory Committee looks forward to hearing further input from stakeholders regarding the matter.

Judge Campbell invited those at the meeting to attend the hearing.

Rule 73(b)(1) – Consent to Magistrate Judge. The Advisory Committee's Report details three issues that have been raised about the procedure for consenting to referral for trial before a magistrate judge. One issue – concerning a question of consent by late-added parties – has been set aside. Another issue – relating to the means for obtaining consent after an initial random referral of a case to a magistrate judge – is still being considered. A third issue relates to the lack of anonymity, under the CM/ECF system, concerning consents to trial before a magistrate judge.

Judge Bates explained that the CM/ECF system currently notifies the judge assigned to the case whenever a party files its individual consent. This automatic notification defeats the anonymity provision of Rule 73(b)(1) that allows a district judge or magistrate judge to be informed of a party's consent only if all parties consent. During its April 2019 meeting, the Advisory Committee will review options for preserving anonymity in this process.

Rule 7.1 –Disclosure Statements. Also under consideration are changes to Rule 7.1 that would require a non-governmental corporation that seeks to intervene to file a corporate disclosure statement. These changes parallel pending proposals to amend the Appellate and Bankruptcy Rules.

The Advisory Committee is also considering a proposal relating to the disclosure of the names and citizenship of members in a limited liability company (LLC) or similar entity. Judge

Bates explained that the citizenship of LLCs, partnerships, and similar entities depends on the citizenship of their members. As a result, disclosing the citizenship of an entity's members is necessary for determining the existence of a federal court's subject matter jurisdiction in diversity cases. But, Judge Bates noted, in some cases a member of a partnership or LLC is itself a partnership or an LLC. The Advisory Committee is considering the extent to which citizenship disclosures should extend up the chain of ownership in such cases. Judge Bates noted that, in considering whether to propose requiring additional disclosures, the Advisory Committee is taking into consideration the underlying reason for the disclosure. It is important to know whether the goal is to demonstrate the court's subject matter jurisdiction or to provide judges with information necessary to make recusal decisions.

A judge member noted that a rule alerting judges and parties to the necessity of pleading citizenship in diversity cases would be helpful, so long as it accounts for the variation in entity types. Judge Campbell agreed. He noted that standing orders are often used to remind parties pleading diversity jurisdiction that they need to take into consideration the citizenship of members in an LLC or partnership. He also noted that lawyers representing such entities often miss this crucial step.

Judge Bates noted, as well, a third type of disclosure issue that has come to the Advisory Committee's attention. This third issue has to do with third-party litigation funding (TPLF). Here a concern might be that judges need information concerning TPLF in order to know whether they have a recusal issue. Though it is very unlikely that judges would invest in well-known third-party litigation funders, the dynamic nature of the field raises the possibility that a company not known for engaging in such funding might in fact turn out to do so. Judge Bates noted that the Advisory Committee could look into the TPLF disclosure issue or could wait for practice to evolve further.

Judge Campbell suggested that the Advisory Committee might initially train its focus on the question of disclosures relevant to diversity jurisdiction, while also continuing to study TPLF. An inter-committee project on recusal-related disclosures, though, might not be warranted at this time.

Timing of Final Judgments in Cases Consolidated under Rule 42(a). Judge Bates said that the Advisory Committee has taken up consideration of the effect of consolidation under Civil Rule 42(a) on final judgment appeal jurisdiction. In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court held that an individual case consolidated under Rule 42(a) maintains its independent character, such that a judgment resolving all claims as to all parties in that case is an appealable final judgment, regardless of whether proceedings are ongoing in the other consolidated cases. Chief Justice Roberts, writing for the Court, noted that the appropriate Rules Committees could address any practical problems resulting from this holding.

Professor Cooper noted that the salient rules are Rule 42(a), which provides for consolidation, and Rule 54(b), which governs the entry of a partial final judgment. In considering whether and how to amend these rules in light of *Hall v. Hall*, the goal should be to minimize the risk that parties to a consolidated case might unwittingly forfeit their appeal rights out of confusion as to the effect of the consolidation.

Judge Bates noted that a subcommittee would be formed to consider these matters and that the subcommittee would benefit from the involvement of Judges Jordan and Chagares.

MDL Subcommittee. Judge Bates stated that the MDL Subcommittee, chaired by Judge Dow, has consulted various stakeholders and narrowed the subjects on which it will consider possible rulemaking. While some advocate rulemaking to govern MDL proceedings others stress the need to retain judicial flexibility and innovation in this area. The subcommittee has yet to reach any conclusions.

There are six topics under the subcommittee's consideration. These are:

1) Early procedures to winnow out unsupportable claims;
2) Interlocutory appeals;
3) Formation and funding of plaintiffs' steering committees (PSCs);
4) Trial issues;
5) Settlement promotion and review; and
6) TPLF.

1) *Winnowing Unsupportable Claims*. Judge Bates noted that certain laws require companies to report claims made against them, including unsupportable claims made in MDLs. Judge Bates explained that a number of MDL judges currently winnow unsupportable claims by requiring the submission of plaintiff fact sheets. These sheets are specific to the MDL under consideration and lack uniformity. He also noted that using these sheets to eliminate unsupportable claims early in the proceeding is difficult and requires that the court and parties expend substantial time and effort. Other suggestions under consideration include expanded initial disclosure requirements, Rule 11 sanctions, master complaints, requiring each plaintiff in an MDL to pay a filing fee, and/or requiring early consideration of screening tools.

2) *Interlocutory Appellate Review*. Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*. Judge Bates noted that the scope of this problem is not yet apparent and that the input received by the subcommittee imparts a healthy skepticism regarding this topic.

The subcommittee needs further information to resolve crucial questions including, but not limited to, whether appellate review should be mandatory or discretionary, what role trial courts should have in certifying issues for appellate review, and how to determine which orders will be subject to interlocutory appellate review. If the subcommittee decides to move forward, Judge Bates explained that it would do so in coordination with the Advisory Committee on Appellate Rules.

A judge member expressed support for an interlocutory appeal mechanism, to the extent that the avenue currently provided by 28 U.S.C. § 1292(b) is inadequate. That said, the member opposed expedited review because the timing of appellate decision making is affected by many variables that are difficult to control. One such variable is determining which cases to delay in

exchange for expediting review of an MDL ruling. Judge Bates noted that not expediting the appeal would cause further delay, and that delay impairs the MDL's efficiency and harms the parties. Judge Campbell agreed, stating that each interlocutory appeal in an MDL could take several years to resolve, and that if more than one such appeal occurs they could add up to many years of delay. Another member observed that key rulings may occur at different stages of the litigation; perhaps it would be possible to identify a single time when an interlocutory appeal might bring such rulings up for review. A different member suggested that the parties could brief questions of timing, so as to inform the courts' determinations about the proper balance between the need for appellate review and the risk of delay.

Another member expressed strong support for interlocutory appeals in MDLs, reasoning that, by definition, MDLs are important. Legal issues such as preemption or failure to state a claim can give rise to critical rulings with huge settlement values. The goal, this member suggested, is to reach the right result. And some courts of appeals, he reported, have been known to refuse to take up an issue that the district court has certified for interlocutory review under 28 U.S.C. § 1292(b).

A judge member, citing his experience presiding over an MDL, expressed skepticism that the challenges of MDL management are susceptible to rulemaking reforms. MDL judges, he stressed, need flexibility because every MDL is different. He suggested that sorting issues into dispositive and non-dispositive categories would help the subcommittee determine which issues are suitable for interlocutory appellate review, and he noted that more use could be made of the Section 1292(b) mechanism.

3) *Plaintiff Steering Committees.* A member suggested that the subcommittee should consider providing guidance for the appointment of lead counsel and PSCs. It might be helpful to examine the lead-plaintiff-appointment provisions in the Private Securities Litigation Reform Act (PSLRA). By analogy to the PSLRA's rebuttable presumption in favor of appointing the plaintiff with largest financial interest, he suggested, perhaps there should be a presumption in favor of appointing the lawyer with the largest number of cases in the MDL. The member stated that if the judge appoints too many law firms to the PSC, this may increase the complexity and expense of managing the MDL.

A judge member disagreed with the proposed presumption in favor of appointing to the PSC the lawyer with the largest number of cases; such a presumption, he argued, could exacerbate the problem of unsupported claims. This member said that he would not oppose possible amendments to Civil Rules 16 and/or 26 to require early discussion of screening tools such as plaintiff fact sheets (though he is not sure that such amendments are necessary).

Another judge member suggested that California state-court practice with PSC selection may be instructive. In California, she explained, the plaintiffs' lawyers organize themselves, subject to court approval; this approach relies on the plaintiffs' bar's knowledge concerning which lawyers conduct themselves fairly.

4) *Trial Issues*. Judge Bates noted several trial issues that are currently being considered by the subcommittee. One issue is whether MDL judges should have the authority to require party

witnesses to appear at trial to testify live. Another issue is whether a transferee court should only hold bellwether trials with the consent of all parties.

5) *Settlement Promotion, Review, and Approval*. The subcommittee is also evaluating whether it could provide a structure for courts to review settlements in MDL proceedings. Judge Bates distinguished MDL settlements from class action settlements (which are subject to court review and approval under Civil Rule 23(e)): whereas each plaintiff in an MDL is represented by his or her own counsel and can consult that counsel about a settlement's advisability, that is not the case in a class action. The subcommittee is considering whether any aspects of MDL settlement are suitable topics for rulemaking, or whether other measures, such as updates to the Manual on Complex Litigation, would be more appropriate.

A judge member suggested that an apparent lack of interest from stakeholders does not provide a reason to drop the topic of settlement from the subcommittee's agenda. This member observed that the ALI's Principles of the Law of Aggregate Litigation reflect concern for the lack of voice that individual plaintiffs may have in nonclass aggregate settlements.

6) *TPLF*. TPLF is a growing field with varied subparts. Funders might finance the prosecution of a case by a plaintiffs' firm, might finance individual plaintiffs' claims, or might finance the defense of a lawsuit. Some funding arrangements may raise concerns about who has control over the litigation.

Judge Bates noted that the Advisory Committee is looking at this issue through the MDL prism, though it is not a discrete MDL issue. One approach would be to focus on what disclosures may be necessary for purposes of judges' assessment of recusal issues. A question facing the subcommittee is whether the scope of the disclosure should be limited to the fact of funding and identity of the funder, or should include terms of the finance agreement as well. Another question is whether discovery in this area should be permissible.

Professor Coquillette cautioned that these issues are closely interwoven with the laws regulating lawyers. For example, this past fall the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 484, "A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee." This opinion addresses the financing of individual plaintiffs' claims and explains that when the plaintiff's counsel becomes involved in such financing, a great many of the ABA's Model Rules of Professional Conduct come into play. Professor Coquillette said that the Rules Committees' last foray into areas affecting the rules of professional conduct united every state bar association against them.

Subcommittee on Social Security Disability Review. A suggestion from the Administrative Conference of the United States asked the Advisory Committee to create rules governing cases in which an individual seeks district court review of a final decision of the Commissioner of Social Security. A subcommittee, chaired by Judge Lioi, created to address this suggestion has not yet concluded its work. Judge Bates noted that the most significant issues arising in these cases concern considerable administrative delay within the Social Security Administration as well as variation among districts in both local practices and rates of remand. The Social Security

Administration strongly supports the proposal for national rules, while the Department of Justice appears neutral on this topic. Claimants' attorneys generally oppose the idea of national rules, but if such rules are to be adopted they have views on what the rules' content should be. There is a real question whether any proposed rules would reduce the government's staffing burdens. And there is a question whether reducing the government's staffing burdens is an appropriate goal for the rulemakers. Judge Bates further noted that whatever rules the subcommittee might recommend, if any, still need to be considered by the Advisory Committee.

Professor Cooper reported that the subcommittee is approaching consensus on what the rules would look like if they were to be proposed. The subcommittee currently envisions (for discussion purposes) a narrow set of rules focused on pleading, briefing, and timing. There is a lingering tension between two possible models for the pleading rules. One, patterned after the appellate process, would cast the complaint as a limited document with the simplicity of a notice of appeal and would provide that the government's answer is to consist of the administrative record. In this model, further particulars would develop during briefing. The other model would provide for additional detail in both the complaint and the answer. As to briefing, one question is whether the plaintiff should be required to submit a motion for the relief requested in the complaint along with the brief.

A judge member reported that magistrate judges in his district were concerned about a uniform rule because approaches vary depending on the facts and circumstances of the individual case – such as whether the plaintiff has a lawyer or not. These circumstances may affect the judge's approach to (for example) the order and timing of briefing. In this member's view, flexibility is necessary to ensure adequate representation for parties proceeding pro se. Participants observed that there are variations both across and within districts concerning the extent to which these cases are referred to magistrate judges.

Judge Bates noted that the subcommittee is close to reaching a recommendation whether to abandon the effort or move forward. It will continue to include various stakeholders in the process and will ask for feedback and suggestions.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on October 10, 2018, in Nashville, Tennessee. The Advisory Committee presented five information items.

Information Items

Rule 16 – Expert Disclosures. The subcommittee, chaired by Judge Kethledge, is currently considering whether Rule 16 should be amended to expand pretrial discovery of expert testimony in criminal cases – a change that would bring Rule 16 closer to the more robust expert discovery requirements in Civil Rule 26. Judge Molloy announced plans for a mini-conference. This conference presents an opportunity for the Rule 16 Subcommittee to receive input from

prosecutors, private practitioners, and federal defenders around the country about whether an amendment is warranted and, if so, what its content should be.

Task Force on Protecting Cooperators. Judge Amy St. Eve provided an update on the progress of the task force. The task force's work is complete, and its reports and recommendations were finalized and delivered to Director Duff. These reports recommended practices to be implemented by the Bureau of Prisons (BOP) in ensuring the safety of cooperators. One recommendation asks the government to start tracking whether assaults on prisoners are related to the victim's status as a cooperator. The BOP wishes to avoid collecting this information within correctional institutions, so the information would instead be collected by the DOJ into an anonymized database that would be securely stored within the DOJ.

Another recommendation is that courts should store plea and sentencing documents in separate case subfolders with public access restricted to those physically present at the courthouse. Doing so allows the Clerk of Court to maintain an access log that would be useful in any investigations arising from retaliation against cooperators. Director Duff has referred this recommendation to the CACM Committee.

Judge Molloy noted that there continue to be concerns about the balance between protecting cooperators, on one hand, and government transparency and the public's right to information, on the other.

Rule 43(a) – Defendant's Presence at Plea and Sentencing. The Advisory Committee received a suggestion concerning the Rule 43(a) requirement that a defendant be physically present in court at plea and sentencing. In *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), the Seventh Circuit vacated a judgment of conviction due to the district court's decision to conduct the plea and sentencing proceeding with the defendant appearing by videoconference; the defendant's serious health issues made him susceptible to injury from even limited physical contact. The Seventh Circuit determined that Rule 43(a) by its terms permits no exceptions to the requirement of physical presence in the courtroom at sentencing and suggested that "it would be sensible" to amend Rule 43(a). In considering whether to propose an explicit exception in the rule, the Advisory Committee is investigating the frequency with which such extenuating circumstances occur.

Time for Ruling on Habeas Motions (Suggestion 18-CR-D). The Advisory Committee received a suggestion to require that judges decide habeas motions within 60-90 days. Judge Molloy explained the Advisory Committee's view that this is more of a systemic problem resulting from the fact that habeas petitions and Section 2255 motions are exempt from the reporting requirements of the Civil Justice Reform Act (CJRA). The Advisory Committee discussed the impact of these delays and decided to refer the suggestion to the CACM Committee to evaluate whether this exemption from the CJRA's reporting requirements should be reconsidered.

Disclosure of Defendants' Full Name and Date of Birth. The Advisory Committee received a suggestion to revise applicable rules and the PACER search structure so that users could search PACER using a defendant's full name and/or date of birth. The suggestion argues that providing this search capacity would enable background screening services to perform their

functions accurately and efficiently. A similar suggestion was rejected in 2006, and the Advisory Committee likewise decided not to pursue the current proposal.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which last met on October 19, 2018, in Denver, Colorado. The Advisory Committee presented four information items.

Information Items

Rule 702 – Admission of Expert Testimony. A September 2016 report issued by the President's Council of Advisors on Science and Technology contained a host of recommendations for federal agencies, DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee's consideration of changes to Rule 702.

In fall 2017, the Advisory Committee held a conference on Rule 702 and forensic feature-comparison evidence. Subsequently a subcommittee was formed to study what the Advisory Committee might do to address concerns relating to forensic evidence; Judge Schroeder chairs the subcommittee. The subcommittee recommended against attempting to draft a freestanding rule governing forensic expert testimony, because such a rule would overlap problematically with Rule 702. The subcommittee also advised against trying to craft Rule or Note language setting out detailed requirements for forensic evidence, and it concluded that a "best practices manual" could not be issued as a formal product of the Advisory Committee. The Advisory Committee concurred in these assessments, but it will explore judicial education measures to undertake in collaboration with the FJC.

The subcommittee did suggest considering whether to amend Rule 702 to address the problem of expert witnesses overstating their conclusions, and the Advisory Committee is proceeding with that suggestion. A roundtable discussion held during the last Advisory Committee meeting asked for input from practitioners on an amendment that would target the overstatement problem. The debate produced a variety of diverging views among civil and criminal practitioners. As a result, the Advisory Committee is carefully weighing the effects such an amendment would have for expert evidence across the spectrum of legal practice.

Another amendment under consideration would emphasize that Rule 702's admissibility requirements of sufficient basis and reliable application present Rule 104(a) questions that must be determined by the court using a preponderance standard.

One member raised a concern with the feasibility of creating a rule addressing the accuracy of expert opinion because it would be difficult to craft a rule that would tell experts how to present a test's error rate. Judge Livingston explained that black-box studies provide an error rate associated with some types of expert evidence. She noted that studies had not considered every aspect of expert evidence, and it would be difficult to determine standards for evaluating expert opinions where the data are murky.

Judge Campbell noted that it is a real challenge to articulate in a rule what constitutes an overstated opinion, and the Advisory Committee is working on fleshing out its definition of the term "overstatement." Another participant noted that the DOJ has been strongly opposed to such a rule and asked whether the DOJ changed its position. The DOJ's representative noted that the word "overstatement" was fraught with confusion. She explained that the DOJ is working with the subcommittee to craft a rule addressing this issue. The DOJ is also implementing a set of internal directives, targeting overstatement, that regulate how Department scientists can phrase their opinions when testifying at trial.

Finally, Professor Capra noted that the Advisory Committee is considering several approaches, some of which were suggested by Judge Campbell. One suggestion is to state that experts may not overstate the conclusion that can be drawn from the methodology they employ. Another suggestion is to state that the expert's conclusion should accurately relate the methods used. Articulating the standard in a rule remains a challenge that the Advisory Committee continues to study.

Rule 106 – The Rule of Completeness. Judge Livingston said that the Advisory Committee is considering a suggestion to amend Rule 106 to provide that oral statements, in addition to written or recorded statements, fall within the rule's scope. Another change would provide that a completing statement is admissible under this Rule notwithstanding hearsay objections. Judge Livingston noted that this is not the first time the Advisory Committee has considered amending Rule 106, and it previously declined to act on a similar suggestion.

She also noted a few additional concerns including that a cure might have the unintended consequence of creating another hearsay exception permitting parties to introduce an out of court statement whenever a party can persuade the court that a statement should, in fairness, be considered given the admission of another statement. Another concern is that an amendment adding oral statements to Rule 106 risks disrupting the presentation of evidence with side litigation on whether a completing oral statement was actually made.

Proposed Amendment to Rule 404(b) – Bad-Act Evidence. Professor Capra stated that the Advisory Committee received two comments so far on the proposed amendment to Rule 404(b). The proposed amendment would require that prosecutors in a criminal case provide more notice of their intent to offer bad-act evidence and would require the notice to articulate support for the non-propensity purpose of the evidence. Professor Capra predicted that the Advisory Committee would replace the term 'non-propensity' with 'non-character' since 'character' is used throughout the rule.

Proposed Amendment to Rule 615 – Excluding Witnesses from Court. Professor Capra said that the Advisory Committee decided against acting on some suggestions, but other suggestions for amending Rule 615 remain pending. The Advisory Committee decided against acting on a suggestion proposing that the rule provide for judicial discretion in determining whether a witness should be excluded, reasoning that the purpose of exclusion is to prevent witnesses from tailoring their testimony according to what other witnesses testified. Accordingly, the parties are in the best position to determine whether a witness should be excluded. The

Advisory Committee also decided against acting on another suggestion concerning issues of timing and dealing with experts under this rule because case law research did not reveal any significant problems.

In studying these suggestions, however, the Advisory Committee came to consider a few other changes. The original purpose for excluding witnesses from trial was to prevent witnesses from tailoring their testimony according to the testimony of prior witnesses. However, technological developments have made mere exclusion from trial less than completely effective because the testimony of prior witnesses is now accessible beyond the courtroom. Professor Capra noted that most courts hold that a Rule 615 order extends to an excluded witness's access to trial testimony outside the courtroom. However, some courts have held that such orders do not extend beyond the courtroom unless the parties specifically ask the judge to extend the order. One change would clarify how courts should determine the extent of a Rule 615 order and provide judges with discretion to extend orders beyond the courtroom.

Judge Campbell asked whether a rule amendment would have the effect of overruling circuits who have held otherwise. Professor Capra said it would and, for this reason, the Advisory Committee is carefully considering this amendment.

Finally, Judge Campbell noted that the Advisory Committee at its October meeting considered but decided against recommending a rule that would provide a roadmap for impeachment and rehabilitation of witnesses, similar to a rule adopted by the State of Maryland.

OTHER COMMITTEE BUSINESS

Procedure for Handling Comments Made Outside the Ordinary Process. Professor Struve noted a recurring issue regarding public submissions outside the formal public comment period, including submissions addressed directly to the Standing Committee.

There are instances when the Standing Committee receives submissions that discuss a proposal that an advisory committee will be presenting at an upcoming Standing Committee meeting. The context might be a proposal of an amendment for publication, or it might be a proposal of an amendment for final approval after the public comment period has expired. It would be desirable to publish a policy for handling such comments.

Professor Struve asked Standing Committee members and other participants for feedback on the memo and tentative draft included in the agenda materials. One judge member observed that it is useful to be transparent about the process, but that it would be better to require off-cycle submitters to show cause why their input is off-cycle. Judge Campbell responded by pointing out proposed language in the agenda book that listed examples of reasons that might suffice to show such cause. The participant responded that it would be preferable to make more explicit that a person wishing to make an off-cycle submission must make a showing of why their submission is off-cycle. When the discussion later returned to the language in that paragraph, one participant observed that if someone at the last minute spots a glitch in a proposal, the rulemakers would want to take account of that insight. Professor Struve observed that the language in the agenda book did not account for that scenario. Another participant questioned that paragraph's use of the term

"extraordinary circumstances," and pointed out that it is not extraordinary for a proposal's language to be amended after the publication of the advisory committee's agenda book. A participant wondered if "good cause" would be a better term than "extraordinary circumstances." One participant argued that it would be better if the paragraph did not provide examples of instances that could justify an off-cycle submission.

Another thread in the discussion related to the norms for Committee members in settings where discussion turns to a matter that is currently before the Committee. A judge member asked what level of formality Committee members should undertake; when does a communication with an outsider to the Committee process trigger the constraints outlined in the materials (e.g., forwarding comments to the Standing Committee's Secretary)? Professor Struve suggested distinguishing between communications made to a Committee member qua Committee member and communications that are part of a more general discussion (e.g., on a listserve or at a conference). Professor Coquillette observed that there is a distinction between someone lobbying a Committee member and someone engaging in a general discussion. Subsequently, a participant proposed defining the term "submission" in the proposed website language; such a definition, this participant suggested, could help to address this issue. Professor King noted that her practice, after receiving a comment on a rule amendment, was to provide the sender with a link to the rules committee website and to explain the submission process. She suggested that members can use this technique to educate the public on how to participate in the process.

Judge Campbell thanked participants for their input, which will be incorporated into any proposal put forward at the June meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019. Any legislation introduced in the last Congress will have to be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 25, 2019, in Washington, DC. He reminded members that at this next meeting the Committee would resume its discussion (noted in the preceding section of these minutes) regarding submissions made outside the public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
March 2019

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 3, 2019. All members were present.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC); and Judge Kent A. Jordan, member of the Advisory Committee on Civil

Rules. Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Deputy Attorney General Rod J. Rosenstein.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and engaged in discussion of three information items.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

Possible Amendment to Rule 3 – the Content of Notices of Appeal

At its fall 2018 meeting, the Advisory Committee continued discussion of possible amendments to clarify the content of notices of appeal under Rule 3. Some cases apply an *expressio unius* rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order. Other courts treat a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment, even if the notice of appeal also references a specific interlocutory order in addition to the judgment.

The Advisory Committee is considering whether Rule 3 should contain some statement of the merger rule – the rule that earlier interlocutory orders merge into the final judgment. The Advisory Committee is also considering whether the phrase "or part thereof" should be deleted from Rule 3(c)(1)(B)'s directive that an appellant "designate the judgment, order, or part thereof being appealed" because the phrase has been read to require the designation of each order sought to be reviewed. The Advisory Committee is mindful that any amendment to Rule 3 would

require an amendment to Form 1 (the form notice of appeal). Finally, as part of its consideration of Rule 3, the Advisory Committee is considering whether to address problems in appeals from orders denying reconsideration.

Proposal to Amend Rule 42(b) – Agreed Dismissals

The Advisory Committee is considering a proposal to amend Rule 42(b). The current rule provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due." Some have suggested that a dismissal in these circumstances should be mandatory. Prior to the 1998 restyling of the rules that intended no substantive change, Rule 42(b) used the word "shall" instead of "may" dismiss. Rule 42(b) also provides that "no mandate or other process may issue without a court order." The Advisory Committee believes that the key distinction is between situations in which the parties seek nothing but a dismissal of the appeal, and situations in which the parties seek some judicial action in addition to dismissal.

Where the parties seek additional judicial action, the parties cannot control that judicial action. However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal might be appropriate, if not constitutionally compelled.

The Advisory Committee will continue to discuss whether the rule should mandate dismissal upon presentation to the clerk of an agreed dismissal request. If it decides to recommend that dismissal be made mandatory in some or all such circumstances, one approach would be simply to change the existing word "may" in Rule 42(b) to "must" or "will." Another option would be to revise the rule more thoroughly to mirror Supreme Court Rule 46, which provides more detailed guidance than current Rule 42(b) on the appropriate treatment of dismissal agreements or motions, including the circumstances under which dismissal is mandatory.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

The proposed amendments to Rules 35 and 40 that were published for public comment in August 2018 would create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider the significant disparities between Rules 35 and 40. The disparities are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could "suggest" rehearing en banc. The Advisory Committee continues to consider different approaches to harmonize the two rules.

Given that many local rules address the relationship between panel rehearing and rehearing en banc, the Advisory Committee will consider whether there are local practices that should be adopted in Rules 35 and 40.

Counting of Votes by Departed Judges

Finally, the Advisory Committee has started considering how to handle the vote of a judge who leaves the bench, whether by death, resignation, impeachment, or expiration of a recess appointment. The question arises when an opinion has been drafted or a judge has voted in conference, and the judge leaves the bench before the opinion is filed by the court. This is a recurrent issue, and one treated differently across the circuits. One possibility is to amend Rule 36 to provide that an opinion may issue if it has been delivered to the clerk for filing before the judge leaves the bench. A subcommittee has been formed to consider this issue. The Committee recognizes that a case currently pending before the Supreme Court may affect this issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented one action item for the Standing Committee regarding restyling of the Federal Rules of Bankruptcy Procedure, but no action is needed by the Judicial Conference at this time.

Information Items

Restyling of the Federal Rules of Bankruptcy Procedure

At its fall 2017 meeting, the Advisory Committee established a Restyling Subcommittee to consider restyling the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The proposed project follows similar restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. To inform its decision, the Restyling Subcommittee worked with the FJC and the Standing Committee's style consultants to solicit feedback from the bankruptcy community. A survey, along with a restyled version of Rule 4001(a) offered as an exemplar of the final product, was sent to all bankruptcy judges and clerks of court, as well as leaders of interested organizations. A link to the survey was also posted on the federal judiciary's website.

The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks, 19 respondents from organizations, and 109 members of the public. Over two-thirds of all respondents in every category supported restyling of the Bankruptcy Rules. Some respondents expressed concern that restyling could introduce unintended consequences, and that project members should take great care to avoid changes in a rule's meaning. Given the positive response to the survey, the Restyling Subcommittee recommended going forward with the project, consistent with the unique features of the Bankruptcy Rules.

The Bankruptcy Rules have not previously been restyled because bankruptcy is particularly statute-driven, and many rules echo statutory language. Bankruptcy is a highly technical area of practice, and one particularly prone to terms of art as well as generally understood terms, concepts, and procedures. To ensure consistency and clarity in the revised rules, the Restyling Subcommittee recommended, and the Advisory Committee agreed, that the linkage between the Bankruptcy Code and the Bankruptcy Rules should presumptively be retained, even if application of restyling guidelines might arguably improve or simplify existing statutory language.

The Advisory Committee recommended that the Standing Committee authorize commencement of the restyling process with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval. The Standing Committee discussed the considerable deference due to the Advisory Committee in restyling and accepted the Advisory Committee's recommendation, noting that final approval of the Advisory Committee's recommendation rests, as always, with the Standing Committee.

The Advisory Committee provided a tentative timeline for restyling the rules, which anticipates publishing the restyled rules for public comment in three batches beginning in August 2020 as follows:

Parts I and II of the Rules	August 2020 – February 2021
Parts III, IV, V, and VI of the Rules	August 2021 – February 2022
Parts VII, VIII, and IX of the Rules	August 2022 – February 2023

Although the Advisory Committee expects to restyle the rules in batches and obtain public comment on each group as it is restyled, none of the restyled rules would become effective until all groups have been approved. Absent delays and assuming approvals by the

Conference and the Supreme Court, and no contrary action by Congress, the full set of restyled rules would go into effect December 1, 2024. These dates are aspirational, however, and may change as the project develops.

Expansion of the Use of Electronic Noticing and Service

In August 2017, proposed amendments to two rules and one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts were published for public comment. Rule 2002(g) (Addressing Notices) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and Official Form 410 would be amended to add a checkbox for opting into email service and noticing. As published, the amendments to Rule 9036 (Notice or Service Generally) would allow clerks and parties to provide notices or serve most documents through the court's electronic-filing system on registered users of that system. It also would allow service or noticing on any person by any electronic means consented to in writing by that person.

In response to publication, several comments raised substantial issues about the proposed amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions. Based on consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee voted at its spring 2018 meeting to hold back the amendments to Rule 2002(g) and Official Form 410, but to move forward with the amendments to Rule 9036, with minor revisions. The Standing Committee recommended and the Judicial Conference approved the proposed amendments to Rule 9036 in September 2018, and that revised rule is on track to go into effect December 1, 2019.

After the spring 2018 Advisory Committee meeting, the Committee on Court Administration and Case Management (CACM Committee) submitted a suggestion for a further

amendment to Rule 9036 that would require mandatory electronic service on most "high volume notice recipients," a category that would initially be composed of entities that receive more than 100 court-generated paper notices from one or more courts in a calendar month. The CACM Committee's suggestion built upon a 2015 suggestion submitted by the Administrative Office's (AO) Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The prior suggestion was rejected as being inconsistent with § 342(e) and (f) of the Bankruptcy Code, which allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. The CACM Committee's version of the proposed mandatory electronic service requirement would be "subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code."

The CACM Committee strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. The AO has estimated that the savings could reach $3 million or more a year.

The Advisory Committee's Subcommittee on Business Issues is evaluating the CACM Committee's suggestion as well as revisions to proposed Rule 2002(g) and Official Form 410 that address the concerns raised in the comments. The subcommittee hopes to present drafts for Advisory Committee review at its spring 2019 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on November 1, 2018. Discussion focused primarily on reports from two subcommittees tasked with long-term projects, as well as consideration of new suggestions related to expanding the scope of disclosure statements in Rule 7.1.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over the past year, the subcommittee has engaged in a substantial amount of fact gathering, in part with valuable assistance from the Judicial Panel on Multidistrict Litigation (JPML). The outreach has included participating in several conferences hosted by different constituencies, including transferee judges. The purpose of the fact gathering is to identify issues on which rules changes might focus. While the subcommittee's work remains in an early stage, the information gathered thus far has allowed it to identify six issues for consideration: (1) early procedures to winnow out unsupportable claims; (2) interlocutory appellate review; (3) formation and funding of plaintiff steering committees; (4) trial issues (e.g., bellwether trials); (5) settlement promotion, review, and approval; and (6) third party litigation funding. Going forward, the subcommittee will continue to gather information with the assistance of the JPML and the FJC.

Social Security Disability Review Subcommittee

As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules to assist in focusing the discussion. While the subcommittee has not determined whether to recommend new rules, there is a growing consensus that the scope of any such rules would be limited to cases seeking review of a single administrative record, and would focus on pleading, briefing, and timing.

Disclosure Statements

Expanding the scope of the disclosure statements required by Civil Rule 7.1 and the analogous provisions in Appellate Rule 26.1, Bankruptcy Rule 8012, and Criminal Rule 12.4 has been the subject of several suggestions in recent years. The Advisory Committee has determined to move forward with a suggestion that it amend Rule 7.1 to include a nongovernmental corporation that seeks to intervene, a change that will parallel the proposed amendments to Appellate Rule 26.1 (approved by the Conference at its September 2018 session and forwarded to the Supreme Court on October 24, 2018) and Bankruptcy Rule 8012 (published for public comment on August 15, 2018). At its November 2018 meeting, the Advisory Committee also kept on its agenda a suggestion to address the problem of determining the citizenship of a limited liability company (or similar entity) in diversity cases by requiring that the names and citizenship of any member or owner of such an entity be disclosed.

Proposed Amendment to Rule 30(b)(6) Published for Public Comment

On August 15, 2018, a proposed amendment to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, was published for public comment. The proposed amendment requires the parties to confer about the number and descriptions of the matters for examination, and the identity of each witness the organization will designate to testify. The comment period closes on February 15, 2019. A public hearing was held in Phoenix, Arizona on January 4, 2019. Twenty-five witnesses presented testimony. A second hearing is scheduled to be held in Washington, DC on February 8, 2019. Fifty-five witnesses have asked to testify.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

The Advisory Committee met on October 24, 2018. A large portion of the meeting was devoted to discussion of the work of the Rule 16 Subcommittee. The Advisory Committee also determined to retain on its agenda a suggestion to amend Rule 43.

Expert Disclosures

As previously reported, the Advisory Committee added to its agenda two suggestions from district judges that pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the more robust expert disclosure requirements in Civil Rule 26. The Advisory Committee devoted a portion of its October 2018 meeting to a presentation by the Department of Justice on its development and implementation of new policies governing disclosure of forensic and non-forensic evidence.

The Rule 16 Subcommittee will consider whether an amendment is warranted and, if so, what features any recommended amendment should contain. To assist in its work, the subcommittee is planning to hold a mini-conference this spring. Participants will include prosecutors, private practitioners, and federal defenders.

Defendant's Presence at Plea and Sentencing

At its October 2018 meeting, the Advisory Committee created a subcommittee to consider the panel's suggestion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentencing.

Although the Advisory Committee has twice rejected suggestions that it expand the use of video conferencing for pleas or sentencing, members concluded the issue should be revisited

given the explicit invitation in *Bethea*. The subcommittee is tasked with assessing the need for a narrow exception to the requirement of physical presence, how such an exception could be defined, what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and how to accommodate the right to counsel when the defendant and counsel are in different locations.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 19, 2018. At that meeting, the Advisory Committee conducted a roundtable discussion with a panel of invited judges, practitioners, and academics regarding four agenda items, including two proposed amendments to Rule 702, proposed amendments to Rule 106, and proposed amendments to Rule 615. Each is discussed below. The roundtable discussion provided the Advisory Committee with helpful insight, background, and suggestions.

Possible Amendments to Rule 702

Addressing Forensics. The Advisory Committee has been exploring the appropriate response to the recent scientific studies regarding the potential unreliability of certain forensic evidence. A subcommittee was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. After extensive discussion, the subcommittee concluded that it would be difficult to draft a new freestanding rule on forensic expert testimony because any such rule would have an inevitable and problematic overlap with Rule 702. Further, the subcommittee concluded it would not be advisable to set forth detailed requirements

regarding forensic evidence in rule text because substantial debate exists in the scientific community as to appropriate requirements.

The Advisory Committee agreed with the subcommittee's recommendations and is considering ways other than rule changes to assist courts and litigants in meeting the challenges of forensic evidence. These include assisting the FJC with judicial education. The Advisory Committee continues to consider a proposal to amend Rule 702 to focus on one important aspect of expert testimony: the problem of overstating results (for example, by stating an opinion as having a "zero error rate" when that conclusion is not supportable by the methodology).

Admissibility/Weight. The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence. Extensive case law research suggests confusion on whether courts should apply the admissibility requirements of a preponderance of evidence under Rule 104(a), or the lower standard of prima facie proof under Rule 104(b). Based on the roundtable discussion and other information, the Advisory Committee will continue to consider whether an amendment to Rule 702 is necessary to clarify that the court must find these admissibility requirements met by a preponderance of the evidence.

<u>Possible Amendment to Rule 106</u>

Over its last three meetings, the Advisory Committee has been considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement to correct the misimpression. The Advisory Committee has focused on whether Rule 106 should be amended to provide: (1) that a

completing statement is admissible over a hearsay objection; (2) that the rule covers oral as well as written or recorded statements; and (3) more specific language about when the rule is triggered (i.e., by a "misleading" statement) and when a completing portion must be admitted (i.e., when it corrects the misleading impression). The roundtable discussion provided important input on these questions.

Possible Amendments to Rule 615

The Advisory Committee considered a suggestion to amend Rule 615, the rule on sequestering witnesses. The suggestion noted three concerns: (1) the rule provides no discretion for a court to deny a motion to sequester; (2) there is no timing requirement for when a party must invoke the rule, so it would be possible for a party to make a mid-trial request for exclusion of witnesses from the courtroom after some witnesses had already testified; and (3) there should be an explicit exemption from exclusion for expert witnesses to substitute for the current vague exemption for witnesses who are "essential to presenting the party's claim or defense." These proposed changes were raised at the roundtable discussion, and the Advisory Committee obtained valuable information, especially from the participating judges.

The Advisory Committee rejected the proposal to make sequestration discretionary. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware of the risks of tailoring trial testimony. Also, discretion still exists in the rule given the exceptions to exclusion provided. Similarly, the Advisory Committee determined that the concerns regarding timing and an explicit exemption from exclusion for expert witnesses were not pervasive or significant issues.

In researching the operation of Rule 615, the Advisory Committee found another issue that has produced a conflict among the courts. The issue involves the scope of a Rule 615 order

and whether it applies only to exclude witnesses from the courtroom, as stated in the text of the rule, or extends outside the confines of the courtroom to prevent prospective witnesses from being advised of trial testimony. The Advisory Committee has agreed to further consider an amendment that would clarify the extent of an order under Rule 615.

Proposed Amendment to Rule 404(b) Published for Public Comment

On August 15, 2018, the Advisory Committee published for public comment a proposed amendment to Rule 404(b), the rule that addresses character evidence of other crimes, wrongs, or acts. The proposal would expand the prosecutor's notice obligations by requiring that the prosecutor "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Three comments have been submitted thus far.

OTHER ITEMS

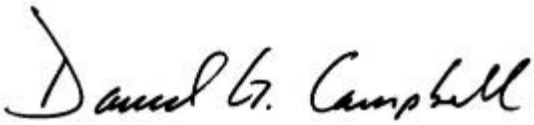
The Standing Committee's agenda also included three information items. First, the Committee was briefed on the status of legislation introduced in the 115th Congress that would directly or effectively amend a federal rule of procedure.

Second, the Committee engaged in a discussion of whether to develop procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. Based on that discussion, the Reporter to the Committee will draft proposed procedures to be discussed at the June 2019 meeting.

Third, Committee members were provided with materials summarizing the September 12, 2018 long-range planning meeting of Conference committee chairs and members of the Executive Committee, as well as the status of the strategic initiatives meant to support

implementation of the *Strategic Plan for the Federal Judiciary* that have been identified by each Judicial Conference committee.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Rod J. Rosenstein
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

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Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the "three day rule."	
AP 29	An exception added to Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using "bond or other security."	CV 62, 65.1
BK 8002(a)(5)	Adds a provison to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Revised March 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	Amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	Adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorized the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	Authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Revised March 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 23	Amendments (1) require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond"; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	Amendments to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

Revised March 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Revised March 2019

Effective (no earlier than) December 1, 2019 Current Step in REA Process: transmitted to Supreme Court (Oct 2018) REA History: approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised March 2019

Effective (no earlier than) December 1, 2020 Current Step in REA Process: published for public comment (Aug 2018-Feb 2019) REA History: approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendments clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
CV 30	Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.	
EV 404	Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised March 2019

TAB 1C.4

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	· 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	· 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Federal Courts Access Act of 2019	**S. 297** *Sponsor:* Lee (R-UT)	CV	**Bill Text:** https://www.congress.gov/116/bills/s297/BILLS-116s297is.pdf **Summary:** Amends 28 U.S.C. § 1332 to modify amount in controversy and remove complete diversity requirement. **Report:** None.	· 1/31/19: Introduced in the Senate; referred to Judiciary Committee.
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	· 2/13/19: Introduced in the Senate; referred to Judiciary Committee

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TAB 2

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TAB 2A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 43(a) (Video Conferencing for Plea and Sentencing)
Suggestion from Collins T. Fitzpatrick (18-CR-C)

DATE: April 15, 2019

The Rule 43 Subcommittee, chaired by Judge Denise Page Hood, met by conference call in February to discuss the reporters' memorandum (Tab B).

After discussion, subcommittee members unanimously agreed to recommend that the Committee not proceed further with an amendment to permit video conferencing 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 ability 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 slippery slope.

Following the subcommittee call, Judge Molloy received several comments about Rule 43(a). At the Judicial Conference, he described the issue at the session for district judges, and Judge Lee Rosenthal (S.D. Tex.) urged the Committee to reconsider. Judge Rosenthal is the chief judge of a very large border district in Texas that is dealing with a large criminal docket, including many reentry cases. She commented that a number of the judges in her district wanted to start using video conferencing for pleas and sentencing. Judge Rosenthal described the technology as almost as good as having the defendant there, it is two way and the lawyer is on the screen with the defendant. Judge Christopher Connor (M.D. Pa.) also raised the issue using video conferencing for supervised release, where the defendant does not want to give up a prison job to appear in court.

Judge Molloy also received a communication from Judge Walters (W.D. La.) renewing his suggestion that video conferencing be available, so that he could take pleas and sentence from his home rather than a distant courtroom. As you recall, the Committee previously rejected this suggestion.

Judge Hood and Judge Molloy polled the subcommittee to see if any member felt that another call was needed to discuss these comments, and no member requested a call.

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TAB 2B

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MEMO TO: Rule 43 Subcommittee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Video Conferencing for Plea and Sentencing Proceedings

DATE: February 18, 2019

In its opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), the Seventh Circuit suggested that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence to allow for appearance via video conference when the defendant is too ill to appear in person. After the Committee discussed this issue at its October meeting, a new Subcommittee, chaired by Judge Hood, was formed to address the question.

This memorandum was prepared to aid the Subcommittee in preparing for its teleconference on February 26. We have organized the memo to address the questions before the Subcommittee. Part I discusses whether there is a problem caused by the text of the Rules. Part II addresses whether, if there is a problem, it warrants a rules amendment. Part III summarizes potential issues to be addressed by an amendment if one is advisable.

I. Is there a problem caused by the existing rule?

As currently written, Rule 43 does not permit a gravely ill defendant to waive physical presence for *plea* even with the consent of the government and the court. And it is arguable that Rule 43 also precludes such a defendant from appearing by video conference for *sentencing* even with the consent of the court and the government, though the language is not as clear. Because Rule 43(c)(1)(B) makes some provision for waiver of the right to be present for sentencing, the analysis differs slightly for plea and sentencing proceedings. Accordingly, we analyze plea and sentencing proceedings separately below.

A. The Rules do not allow guilty pleas without physical presence.

1. *Case law*.

In addition to *Bethea*, several district courts have addressed this issue and have held that under Rule 43, a defendant cannot consent to video conferencing instead of physical presence during a felony plea, even for medical[1] or financial hardship[2] reasons.

We did find three cases mentioning that a federal felony plea had been taken by video after waiver of presence by defendant, though none contain any sustained analysis of the issue posed by Rule 43. In *United States v. Melgoza*,[3] the judge in denying the defendant's motion for plea by video mentioned but distinguished an earlier case in which he had permitted a guilty plea by video. In that earlier case, the defendant's treating physicians had confirmed the defendant would never be able to travel to Ohio from his home in Atlanta because of his physical condition, but the defendant chose not to consent to transfer for the plea and sentencing. In *United States v. Jones*,[4] the judge noted in passing that the defendant had already entered his guilty plea via video before the U.S. Magistrate Judge after waiving his right to be personally present.[5] The judge did not address the validity of that plea, ruling only that the motion for sentencing via video must be denied.[6] Finally, in a trio of cases from South Dakota denying defendants' motions to participate in plea proceedings by video, the judge acknowledged that he "has previously allowed video conferences in hearings concerning felony child support cases when a defendant resides a

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[1] *See United States v. Brunner*, No. 14-CR-189, 2016 WL 6110457, at *3 (E.D. Wis. Sept. 23, 2016) (after initially granting the defendant's motion to appear for plea by video due to severe health problems and immobility and the estimated $3,000–$4,000 it would cost for transportation, the judge granted the government's motion for reconsideration, finding the plain language of Rule 43 does not allow a defendant to enter a plea by video conferencing); *United States v. Melgoza*, 248 F. Supp. 2d 691 (S.D. Ohio 2003) (denying defendant's motion seeking plea via video, noting that the inability of one defendant and codefendant's counsel to travel from Arizona because of surgery was only temporary). *See also United States v. Klos*, No. CR-11-233-PHX-DGC (LOA), 2013 WL 2237543 (D. Ariz. May 20, 2013) (denying defendant's motion to appear at plea hearing by video instead of traveling from Florida where he provided daily care for his disabled parents and alleged that the absence "would seriously risk their well-being"; also suggesting the parties consider transfer of this case to Florida or resolution of this case by a non-felony disposition); *United States v. Hertz*, 09-CR-00384-MSK, 2010 WL 447749 (D. Colo. Feb. 4, 2010) (finding proceeding by video barred by Rule, and rejecting transfer under Rule 21(b) after government objected to transfer under Rule 20(a)).

[2] *See United States v. Thompson*, 2014 U.S. Dist. Lexis 142323 (W.D. Tex. Oct 7, 2014) (denying motion by unemployed defendant living in California to participate in plea by video link from federal courthouse in Fresno, noting no authority in the Rules to do this and that technology did not allow defendant to confer privately with counsel, instead choosing to reschedule plea to facilitate "more reasonably priced travel arrangements").

In three cases decided on the same day – *United States v. Wise*, 489 F. Supp. 2d 968, 970–71 (D.S.D. 2007); *United States v. Deharo*, No. CR 06-40061, 2007 WL 1521547 (D.S.D. May 21, 2007); and *United States v. Thomas*, No. CR 06-40079, 2007 WL 1521531 (D.S.D. May 21, 2007) – the judge denied the defendants' motions to appear at their plea hearings via video. Each of the three defendants faced charges of felony failure to pay child support obligations, lived out of state, and sought to avoid the expense of traveling to South Dakota. The court held the waiver of presence, uncontested by the government in each case, would violate Rules 43 and Rule 11. The court stated that although there are valid arguments of convenience and prioritization of resources to support using video conferencing, "a judge needs to be certain that a defendant who is pleading guilty is presenting a voluntary and intelligent waiver of his constitutional rights."

[3] 248 F. Supp. 2d 691 (S.D. Ohio 2003).

[4] *United States v. Jones*, 410 F. Supp. 2d 1026, 1029–33 (D.N.M. 2005).

[5] *Id.* at 1027.

[6] *See id.* at 1027–32 (Jones' doctors caring for him at a BOP facility in South Carolina had advised that court proceedings in New Mexico be conducted by video, but that if he had to appear personally, "he should be 'med-evac'd'"; this suggested to the district judge that defendant's "health will not be in danger if the necessary precautions are taken").

substantial distance from South Dakota," but stated that those cases "preceded the Court conducting an analysis of the requirements of Rule 43."

2. Text, legislative history, and policy.

Multiple arguments support the conclusion that Rule 43 as written does not allow video conferencing to substitute for physical presence at a plea, even with an express waiver by defendant and consent of the government.

a. The language of Rule 43 does not create a right to presence that is waivable; it mandates presence. A specific reference to presence at the plea was added to Rule 43 in 1974. The 1974 Committee Note states, "The phrase 'at the time of the plea,' is added to subdivision (a) to make perfectly clear that defendant must be present at the time of the plea." As restyled, Rule 43(a) continues to mandate presence. It now states:

> **(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 impanelment and the return of the verdict; and
> (3) sentencing.

b. Presence under Rule 43 means physical presence, not virtual presence. As several circuits have recognized, participation by video conference does not satisfy the requirement of physical presence under Rule 43.[7] The text makes the distinction between physical presence and participation by video clear by providing in (b)(1)(2) that in *misdemeanor* cases (with the defendant's written consent and the court's permission) plea, trial or sentencing may "occur by video teleconferencing *or* in the defendant's absence." (emphasis added)

Also, the amendments to Rule 10 in 2002 allowing waiver of presence at the arraignment under 10(b) and use of video teleconferencing under 10(c) adopted different standards for each departure from physical presence. To waive presence entirely under 10(b), the court must obtain a written waiver signed by both the defendant and defense counsel, and affirming that the defendant received a copy of the charge and that the plea is "not guilty." By contrast, to substitute videoconferencing for presence, the defendant need only "consent." The Committee Note explains that the written waiver required to waive a personal appearance is not required for videoconferencing, and states "It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference."

[7] *See, e.g., United States v. Williams*, 641 F.3d 758, 764–65 (6th Cir. 2011); *United States v. Torres–Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 305 (4th Cir.2001); *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir.1999). *See also United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012) (assuming but not deciding defendant's right to be present requires physical presence and is not satisfied by participation through videoconference). For an opposing view, authored before the amendments to Rule 43 regulating the use of videoconferencing, *see Navarro*, 169 F.3d at 241 (Politz, J., dissenting).

c. In 2002 the Committee considered and rejected the option of allowing videoconferencing for the plea. In 2002, Rules 43, 5, and 10 were amended to allow for video conferencing for first appearance and arraignment, if the defendant consents. The Committee Note to the Rule 10 amendment allowing for either written waiver of presence at arraignment or videoconferencing upon consent made it clear neither waiver of presence[8] nor video conferencing[9] was allowed for a guilty plea. Although the same package of amendments in 2002 included several substantive changes to Rule 11, the requirement that the court "address the defendant personally in open court," (emphasis added) was not amended.

d. In 2011 the Committee amended Rule 43 to allow waiver of presence or video conferencing for misdemeanor pleas, but not felony pleas. The 2011 amendment authorizing video pleas in misdemeanor cases, quoted above, would have been unnecessary if the Rule already allowed for waiver of presence by consent in all cases.

e. None of the other exceptions cover waiver of presence for felony pleas. The other exceptions to presence in Rule 43 do not apply to felony pleas (correction or reduction of a sentence; voluntarily absence during sentencing in a noncapital case after initially attending the trial or pleading guilty or no contest; disruptive behavior after initially attending trial or pleading guilty or no contest). The Supreme Court has interpreted Rule 43's exceptions to preclude general waivability. In *Crosby v. United States*,[10] the Court stated:

> The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the "expression of one" circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.[11]

The limiting phrase to which the Court referred – "except as otherwise provided by this rule" – remains in Rule 43, though slightly rephrased during restyling. Rule 43(a) now states "Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at," inter alia, plea and sentencing proceedings.

Subsequently, in *United States v. Mezzanatto*,[12] when holding that Rule 11(e)(6) and FRE 410 could be waived, the Supreme Court distinguished Rule 43. It stated:

> The provisions of [the Federal Rules of Criminal Procedure] are presumptively waivable, though an express waiver clause may suggest that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances. . . . In

[8] "Nor does the amendment permit a waiver of appearance when the defendant is standing mute (*see* Rule 11(a)(4)), or entering a conditional plea (*see* Rule 11(a)(2)), a nolo contendere plea (*see* Rule 11(a)(3)), or a guilty plea (*see* Rule 11(a)(1)). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court." FED. R. CRIM. P. 10 committee note to 2002 amendments (emphasis added).
[9] The Committee Note states, after setting out the costs and benefits of videoconferencing in lieu of physical presence, "on balance and in appropriate circumstances, the court and the defendant should have the option of using video teleconferencing for arraignments, as long as the defendant consents to that procedure." *Id.* (emphasis added).

[11] *Id.* at 258–59.
[12] 513 U.S. 196, 201–02 (1995).

> *Crosby*, for example, we held that a defendant's failure to appear for any part of his trial did not constitute a valid waiver of his right to be present under Federal Rule of Criminal Procedure 43. We noted that the specific right codified in Rule 43 "was considered unwaivable in felony cases" at common law, and that Rule 43 expressly recognized only one exception to the common-law rule. 506 U.S. at 259. In light of the specific common-law history behind Rule 43 and the express waiver provision in the Rule, we declined to conclude that "the drafters intended the Rule to go further."[13]

f. There are valid policy reasons for the Rule to insist on the physical presence of the defendant and judge together at the plea and to ban video conferencing. As the court in *Bethea* noted, "[b]eing physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference," and that presence "permits the judge to experience 'those impressions gleaned through . . . any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.' "[14] The Committee Notes accompanying the 2002 amendments to Rule 5 and 10 also explain:

> Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public's confidence in the integrity and solemnity of a federal criminal proceeding; that is the view of some who have witnessed the use of such proceedings in some state jurisdictions. While 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. A related consideration is that the defendant may be located in a room that bears no resemblance whatsoever to a judicial forum and the equipment may be inadequate for high-quality transmissions. Second, using video teleconferencing can interfere with counsel's ability to meet personally with his or her client at what, at least in that jurisdiction, might be an important appearance before a magistrate judge. Third, the defendant may miss an opportunity to meet with family or friends, and others who might be able to assist the defendant, especially in any attempts to obtain bail. Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of a defendant – a factor that may weigh on pretrial decisions, such as release from detention.[15]

Assuring that the judge and defendant converse face-to-face is even more important at a plea proceeding than it is at a first appearance or arraignment. The stakes are higher, as the plea is not a preliminary proceeding, but instead results in the waiver of multiple trial rights and ultimately in conviction, and it may address aspects of the sentence as well. The information is

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[13] *Id.*

[14] *Bethea*, 888 at 867 (; s*ee also* Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1151 (2004) ("The court has a specific obligation to ensure that the defendant is advised of all the relevant information, including the nature of the charges, the potential punishment, and the rights being waived. It is difficult to comprehend how the court can discharge its obligation when the defendant is present only through videoconferencing.").

[15] FED. R. CRIM. P. 5 & 10, committee notes to 2002 amendments.

more complex. The defendant must be informed of and understand a long list of items included in the Rule 11 colloquy. The defendant's private, interactive access with his counsel for questions and concerns is essential. And, above all, the defendant's many waivers must be voluntary as well as knowing. A judge looking at the defendant on a screen may not notice signs that would be perceptible were the two meeting in person, signs that might steer the conversation in one direction or the other or raise doubts about competency, such as a strong smell of alcohol from the defendant, or a subtle variation in the defendant's voice. Physical proximity offers the judge an important additional tool for the difficult task of gauging the sincerity and voluntariness of what a defendant is saying out loud.[16] Nor would the judge be able to communicate with the defendant in the same way as if she were in front of the defendant on the bench, to "connect" with the defendant and encourage a candid exchange, or to convey the solemnity of what is going on.[17]

C. The Rules may not allow sentencing without physical presence.

1. Case law

Unlike the plea context, where only one federal court has defended taking a plea via video,[18] sentencing via video after voluntary waiver has received a more mixed reception, with some courts finding it forbidden by Rule 43, and others leaving open the possibility under some conditions, at least where the defendant previously appeared for trial or guilty plea.

In addition to *Bethea,* two district courts have held that under Rule 43, a defendant cannot consent to video conferencing for *sentencing* for medical or financial hardship reasons, even with the government's consent and even after being present for a guilty plea or trial. In *United States v. Jones*[19] the district judge denied the defendant's motion to be sentenced by video conferencing because of his health problems, concluding that Rule 43 forbade it. The judge noted that the Tenth Circuit decision (*Torres-Palma)* rejecting sentencing by videoconference under Rule 43 did not involve efforts by the defendant to waive physical presence with the government's consent.[20] But the judge stated that *Torres-Palma* was not based on consent, but on the construction of the word "present" in Rule 43. "While no one might appeal a sentence done by video conferencing if everyone consents, there is always the possibility of a collateral

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[16] *E.g.*, Shari Seidman Diamond, et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 879 (2010) ("Where the defendant is 'present' for a proceeding as no more than an image on a video monitor, there is a diminution of the court's ability to gauge such matters as the defendant's credibility, his competence, his physical and psychological wellbeing, his ability to understand the proceedings, and the voluntariness of any waivers of rights that the defendant may be called upon to make--all of which raise serious procedural due process concerns."). *See also* People v. Guttendorf, 309 Ill. App. 3d 1044, 1047 (2000) ("In a televised appearance, crucial aspects of a defendant's physical presence may be lost or misinterpreted, such as the participants' demeanor, facial expressions and vocal inflections, the ability for immediate and unmediated contact with counsel, and the solemnity of a court proceeding. . . . a televised guilty plea is not permitted under either the United States or the Illinois Constitution.").

[17] We are aware of no empirical studies testing whether using video conferencing for either plea or sentence makes any particular difference. However, there is at least one study finding that the use of videoconferencing for first appearance is associated with higher bonds compared to in person hearings. *See* Diamond, et al., *supra* note 16.

[18] *See Melgoza, supra* note 3.

[19] 410 F. Supp. 2d 1026, 1032–33 (D.N.M. 2005).

[20] *Jones*, 410 F. Supp. 2d at 1030.

challenge."[21] The judge also rejected the argument that voluntary waiver of all presence at sentencing was possible under Rule 43, noting that the Rule contemplates written consent to waiver for misdemeanors, but not felonies.[22] And the judge construed the exception for being "voluntarily absent" after trial or plea as not including written waivers or consent, finding it is limited to absconding defendants.[23] In the other case, *United States v. Walker*, the court rejected an unopposed request for sentencing via video by defendant who noted medical and hardship reasons.[24]

But other courts have read Rule 43 to permit voluntary waiver of presence at sentencing under circumstances other than instances of absconding or refusal to leave one's cell, at least where the defendant had appeared for plea or trial.[25] Many of these decisions have suggested, however, that such a waiver would be allowed only under limited circumstances, or with additional procedural protections.

Some courts have suggested that waiver of presence at sentencing after some showing of "good cause" might be prudent policy. In *United States v. Brown*, the Fifth Circuit suggested a sentence in absentia might be appropriate "only in the most extraordinary circumstances, and where it would otherwise work an injustice."[26] A 2004 decision from the District of Alabama also rejected a defendant's request to hold her sentencing by videoconferencing, and indicated the waiver exception in rule 43(c)(2) required good cause.[27] The district court stated: "While danger to one's medical health would clearly constitute 'good cause' justifying a defendant's absence for sentencing, the defendant had not produced any evidence that the condition surrounding her sentencing would endanger her medical health."[28]

Other courts have suggested that waiver of presence for sentencing under Rule 43(a)(3) requires more than written consent, which is all that is required for misdemeanor sentencing, but would be possible if waiver is knowing and voluntary. For example, in *United States v. Rivera-Rangel*, a decision from the District of Puerto Rico, the court concluded that it "must probe into the voluntariness of defendant's waiver" before allowing the waiver of presence for sentencing.[29] In *United States v. Dhafir*, the court noted that "questions concer[n]ing waiver of the right to be present at sentencing typically arise in cases where the defendant has absconded," but that

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[21] *Id.*
[22] *Id.* at 1031–32.
[23] FED. R. CRIM. P. 43(c)(1).
[24] Cr. No. 15-2846 JCH, 2016 WL 9776580, at *6 (D.N.M. Oct. 2, 2016).
[25] For examples of a finding of waiver of presence at sentencing under Rule 43, see United States v. Perkins, 787 F.3d 1329, 1337–38 (11th Cir. 2015) (defendant refused to leave his cell); United States v. Velazquez, 772 F.3d 788, 799–800 (7th Cir. 2014) (defendant failed to appear).
[26] 456 F.2d 1112, 1114 (5th Cir. 1972).
[27] United States v. Wright, 342 F. Supp. 2d 1068, 1070 (M.D. Ala. 2004) (diabetes, congenital heart failure, and asthma).
[28] *Id.* at 1070 (citation omitted); *see also In re* United States, 597 F.2d 27, 27–28 (2d Cir. 1979) ("Normally a judge can and should compel a defendant to be present at all stages of a felony trial pursuant to Rule 43(a). We think, however, that there is a residue of judicial discretion in unusual circumstances where good cause is shown such as physical endangerment of the defendant to permit temporary absence. We hold that a judge may in those exceptional circumstances exercise his discretion to accept a waiver of appearance from a defendant in a criminal trial where the choice of absence, a long continuance, or severance is exigent.").
[29] No. CRIM. 02-0098CCC, 2007 WL 486357, at *1–2 (D.P.R. Feb. 9, 2007).

"courts have occasionally granted a defendant's explicit request to waive the right." [30] The defendant requested not to appear because "[h]is medical conditions as well as his religious commitments make travel in custody—even for relatively short distances—extremely painful."[31] The court suggested that the defendant could participate via electronic connection, and detailed the affidavit the defendant would have to file before it could determine that his waiver is knowing and voluntary, and "whether there is a controlling public interest in resentencing him in his absence."[32]

2. Text, legislative history, and policy

These differing interpretations turn on Rule 43's provision for "voluntary absence" from sentencing. Standing alone, the language of Rule 43(c)(1)(B) seems broad enough to encompass defendants who seek voluntarily to waive presence at sentencing for any reason—health or hardship reasons included—so long as they were previously present for trial or plea. But the courts in *Jones* and *Walker* construed the words "voluntary absence" to be limited to cases in which the defendant becomes a fugitive before sentencing, and not to extend to other situations such as a request to waive presence or substitute videoconferencing.[33]

The legislative history of this provision suggests this narrower reading may be appropriate. It appears that the "voluntarily absent" provision in (c)(1)(B) was added by a 1995 amendment to address defendants who flee or abscond. The Committee Note accompanying the amendments states that the changes were

> intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. . . . The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. . . .

Subsequent legislative history also supports this reading. Later amendments permitting videoconferencing did not extend to sentencing proceedings. Sentencing proceedings—like plea proceedings—were not among those addressed by the videoconferencing and waiver amendments of 2002 and 2011. In 2002, when Rules 43, 5, and 10 were amended to allow for video conferencing at first appearances and arraignment, no change was made in Rule 32(i)(4)(A)(ii), which requires the court to "address the defendant personally." In 2011, Rule 43 was amended to allow video for misdemeanor sentencing with consent, but no parallel provision was made for waiving presence at felony sentencing by consent.

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[30] No. 5:03-CR-64, 2011 WL 13289915, at *3 (N.D.N.Y. Mar. 15, 2011).
[31] *Id.* at *1.
[32] *Id.* at *3. The *Dhafir* court cited United States v. Harris, 60 F. Supp. 2d 169, 175–76 (S.D.N.Y. 1999), in which the judge held the defendant had validly waived presence for resentencing, collected other cases where waivers were upheld, and stated "I can discern no controlling public interest-requiring Harris to be returned to court for the resentencing; on the contrary, transporting defendant from his present place of incarceration, contrary to defendant's own wishes, would achieve no public purpose and would needlessly consume the resources of the Marshals Service." *See Dhafir*, 2011 WL 13289915, at *3.
[33] *Jones*, 410 F. Supp. 2d at 1029-1033.

Finally, a rule barring the substitution of video presence for physical presence at sentencing can be defended as a policy matter. The physical presence of the defendant at sentencing is desirable for many of the same reasons that physical proximity between the judge and the defendant is important during a plea proceeding. Presence ensures that the defendant has an opportunity to challenge the accuracy of information on which the sentencing judge may rely, to present any evidence in mitigation he may have, and to make a personal statement in allocution.[34] "Because criminal punishment 'affects the most fundamental human rights ... [s]entencing should be conducted with the judge and defendant facing one another and not in secret.'"[35]

But even assuming arguendo that Rule 43(c)(1)(B) is indeed broad enough to cover hardship cases and permit courts to sentence via videoconference in appropriate cases, that provision does not address situations like *Bethea,* where the defendant never appeared for trial or plea.[36]

II. If there is a problem caused by the existing rules, does the problem warrant an amendment?

A. Arguments that the problem does warrant amendment.

We have identified several potential arguments favoring amendment: (1) the number of cases potentially affected, (2) the general practice of addressing problems created by the rules, (3) the feasibility of developing a solution, and (4) the lack of any constitutional impediment.

1. The number of cases potentially affected.

There is no reason to believe *Bethea* is an isolated incident. We describe several similar cases above. Moreover, the U.S. population is aging, and many federal crimes can be committed without leaving home and without physical exertion (*e.g.*, by using the Internet to commit fraud or to obtain or distribute child pornography). It is reasonable to assume that defendants plagued by serious health problems will be charged and will seek to participate in their pleas or sentencings remotely.

Rule 43 will continue to pose a problem in such cases. If courts allow such defendants to plead and be sentenced by video conference, some may, like Bethea, later seek to challenge that

[34] United States v. Brown, 879 F.3d 1231, 1236–37 (11th Cir. 2018) (quoting United States v. Prouty, 303 F.3d 1249, 1251 (11th Cir. 2002)).
[35] United States v. Penson, 526 F.3d 331, 334 (6th Cir. 2008) (quoting United States v. Villano, 816 F.2d 1448, 1452 (10th Cir. 1987) (en banc)). *See also* United States v. Faulks, 201 F.3d 208, 211 (3d Cir. 2000) ("'Even if he has spoken earlier, a defendant has no assurance that when the time comes for final sentence the district judge will remember the defendant's words in his absence and give them due weight. Moreover, only at the final sentencing can the defendant respond to a definitive decision of the judge.'") (quoting United States v. Behrens, 375 U.S. 162, 167–68 (1963) (Harlan, J., concurring in the result)); Morales v. United States, 651 F. App'x 1, 4–5 (2d Cir. 2016) (unpublished summary order) (finding that exclusion from in camera hearing where judge made sentencing offer violated due process right to be present at sentencing, and rejecting government's argument that the defendant's presence would not have contributed to the fairness of the procedure).
[36] United States v. Bethea, 888 F.3d 864, 865 (7th Cir. 2018).

sentence. Alternatively, if courts decline to allow video participation because it is not permitted by Rule 43, when ill defendants are not able to appear for an extended period of time, the government may be forced to delay conviction and sentence and the restitution that goes with it, or else to reduce felony charges to misdemeanor charges so that a guilty plea and sentence without the defendant's physical presence would comply with the Rules.

We note also that video technology is likely to improve over time, and the trend has been for more widespread use in the criminal process.

2. Committee precedent.

In general, when the Committee has become aware that a rule is creating a problem, it has addressed that problem with an amendment. Multiple courts have recognized that it is the Rule that has caused the problem, and that videoconferencing for pleas and sentencings will continue to be barred unless the Rule is amended.[37]

In Part II.B.2 of this memo, below, we note there do exist a number of workarounds to this problem, such as transfer under Rule 20 or plea agreements that bar appellate and post-conviction review of what may be a violation of Rule 43. However, if the Subcommittee views these workarounds as essentially evasions of a policy-based directive in the rules, the Subcommittee may conclude that the rule itself should be amended.

3. The feasibility of a rules solution.

It is possible to develop a workable exception with safeguards to address the problem vividly presented in *Bethea.* Some states permit videoconferencing for pleas and sentences with agreement from both parties under certain circumstances. Absent evidence that these state experiments have produced the sort of prejudice or harm feared from substituting virtual for actual presence, or evidence that a carefully limited exception will expand uncontrollably, these state systems may provide useful guidance for federal policy.

4. No constitutional barrier.

Finally, there appears to be no constitutional barrier to an amendment allowing videoconferencing instead of physical presence when presence is voluntarily waived by the defendant and agreed to by the prosecutor and judge. A defendant has a constitutional right to be present at his felony plea and sentencing hearings, even where confrontation is not at stake.[38]

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[37] *E.g.*, United States v. Williams, 641 F.3d 758, 764–65 (6th Cir. 2011) ("Until such time as the drafters of the Rule instruct us otherwise, district courts may not conduct sentencing hearings by video conference."); United States v. Brunner, No. 14-CR-189, 2016 WL 6110457, at *3 (E.D. Wis. Sept. 23, 2016) (finding the defendant's argument "appealing," and stating that it "would make sense for Rule 43 to allow discretion and flexibility under the circumstances presented here.").

[38] The constitutional right to be present is based in both the Sixth Amendment right to confrontation and the Due Process Clause. Kentucky v. Stincer, 482 U.S. 730, 745 (1987). As there is no right to confrontation in the plea context (where the defendant waives that right) or the non-capital sentencing context, the constitutional right to be present at these proceedings is based in Due Process. The Due Process Clause guarantees a defendant's "right to be

However, a defendant may waive or forfeit that right, by either choosing not to appear or engaging in misconduct that warrants expulsion from the courtroom.[39] Lower courts have upheld state plea[40] and sentencing[41] proceedings conducted by video after finding the constitutional right to presence was knowingly and voluntarily waived.

B. Arguments that the problem does *not* warrant amendment at this time.

Below we present three potential reasons to oppose amendment at this time: (1) slippery slope; (2) alternative coping mechanisms including transfer and plain error review; and (3) collateral effects on other rules.

1. *Slippery slope.*

There is a risk that the recognition of an exception for video presence in a limited context will invite the expansion of its use over time. Videoconference sentencing is happening in the federal courts, we just can't be sure how frequently. There are strong efficiency incentives to dispense with presence, reasons that may overtake any carefully crafted exception for health or safety, and that will inevitably put pressure on a more general "good cause" or "exceptional circumstances" exception. More than one judge has indicated a preference for avoiding the cost and delay involved in transporting incarcerated prisoners to courthouses. Without strict regulations, what starts as a rarely used, last resort for life-threatening situations may become routine.

2. Workarounds: transfer, plea agreement terms, diversion, and plain error rules.

Given the numerous alternative approaches to addressing this problem discussed below, the Subcommittee may conclude this particular problem does not warrant amendment.

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present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Id.*

[39] *See* Illinois v. Allen, 397 U.S. 337, 347 (1970); Taylor v. United States, 414 U.S. 17, 18–20 (1973) (per curiam) (finding that a defendant had waived his right to be present by failing to appear after the first day of trial, and affirming the district court's denial or a motion for mistrial due to the defendant's absence); Diaz v. United States, 223 U.S. 442, 455–58 (1912) (noting that the voluntary absence of a defendant who was present at the start of trial "operates as a waiver of his right to be present"); United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972) (holding that absence can be considered a knowing waiver).

[40] *See, e.g.*, Scott v. State, 618 So. 2d 1386, 1387–88 (Fla. Dist. Ct. App. 1993) (videotaped, closed-circuit television plea proceeding upheld when waiver of the right to attend the plea hearing was valid); *see also* MISS. CODE ANN. § 99-1-23(1)(d) (2005) (defendant in custody may enter plea of guilty at arraignment or be sentenced by appearing via video upon waiver or right to be present); MO. REV. STAT. § 561.031 (2005) (defendant may enter plea of guilty and be sentenced via video upon waiver of right to be physically present); TEX. CODE CRIM. PROC. ANN. art. 27.18(a) (Vernon 2005) (court may accept a guilty plea or a waiver by closed-circuit video if defendant executes a written consent to the procedure and prosecution consents). *Compare* People v. Stroud, 208 Ill. 2d 398, 407–10 (2004) (plea of pro se defendant via closed-circuit television who did not object was invalid, no valid waiver of right to be present).

[41] *See e.g.*, Golden v. State, 667 So. 2d 933, 934 (Fla. Dist. Ct. App. 1996) (sentencing via closed-circuit video hookup valid given written waiver of right to presence); Williams v. State, 578 So.2d 846, 847 (Fla. Dist. Ct. App. 1991) (holding a defendant may voluntarily waive his right to be present at his sentencing).

a. Use of Rule 20(a) or Rule 21(b) to transfer for plea and sentence. The court in *Klos* suggested that to address the inability to conduct a guilty plea proceeding via video, the parties might consider agreeing to a transfer under Rule 20(a),[42] which permits transfer for plea and sentence if the defendant consents in writing, and the government and court in both districts approve the transfer. Also possible is transfer under Rule 21(b), allowing the court, on defendant's motion, to "transfer the proceeding . . . against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interests of justice." We found only one decision considering a request for transfer, made in part because videoconferencing the plea and sentence was not possible under Rule 43.[43] The government had objected to transfer under Rule 20(a). The court rejected the defendant's motion for transfer under Rule 21(b) after finding that the submissions of the defendant and his health care providers had not demonstrated that traveling to his plea and sentencing "would pose a significant risk to his health." The court also rejected travel costs as an alternative justification for transfer.[44] The judge noted that travel to the original venue would be feasible, even if the defendant had limited means, and would be preferable for the victims.[45]

b. Plea agreement terms. In an appropriate case in which the defendant prefers to enter a guilty plea and be sentenced by videoconference because of grave health concerns, the parties may be able to work around the problems posed by Rule 43 in a plea agreement. Such an agreement might include an appeal waiver to ensure that it would not later be invalidated as in *Bethea*. Moreover, to the extent that the defendant would be reluctant to agree to an appeal waiver because of uncertainty concerning the sentence—which likely generated the appeal in *Bethea*—the parties might agree to a Rule 11(c)(1)(C) agreement that included a specific sentence (subject, of course, to the court's approval). For a defendant with health problems as serious as Bethea's, this might be a sentence of home confinement. Bethea's plea agreement included neither feature.

c. Diversion. It appears that the most difficult cases, like *Bethea,* concern defendants whose permanent health conditions are so serious that it would be difficult or impossible safely to transport them to the courtroom (or in some cases, for them even to be present in a courtroom). Defendants for whom travel to the courthouse poses grave health risks may face similar risks if sentenced to any period of imprisonment (though the court in *Bethea* did sentence the defendant to 21 months imprisonment, noting that his criminal conduct had continued as his health worsened). In such cases, the parties might agree to a diversion from the criminal process similar to a corporate deferred prosecution agreement (DPA). In DPAs, the parties agree that the criminal charges will be deferred for a specified period (such as 3-5 years) while the defendant carries out a variety of obligations. In this context, a defendant might agree to some form of monitored home confinement, restitution to any victims, and payments to the government in lieu of criminal fines. The agreement (like many of the corporate DPAs) might also include the defendant's admission of the conduct charged by the government. If the

[42] United States v. Klos, No. CR-11-233-PHX-DGC, 2013 WL 2237543, at *4 (D. Ariz. May 20, 2013).
[43] *See* United States v. Hertz, Criminal No. 09-cr-00384-MSK, 2010 WL 447749, at *3 (D. Colo. Feb. 4, 2010).
[44] *Id.* at *2–3.
[45] The defendant could seek appointment of counsel at no cost under the Criminal Justice Act, which would relieve him of the burden of providing for his counsel's travel, and if he were unable to provide for his own travel expenses, the Court could direct the U.S. Marshal to take him into custody and transport him for the scheduled hearing, and that the victims in the case had an interest in preserving the original venue. *Id.*

defendant carried out the agreement, the charges would be dismissed at the end of the specified period, but if he did not then the government would proceed with the prosecution.

An agreement of this kind (like a corporate DPA) would be subject to judicial approval, but because it would not involve either a guilty plea or a sentence, it would not be subject to Rule 43. Although DPAs have principally been used for corporate defendants, we note that the Securities and Exchange Commission has expanded its DPA program to include individuals. Moreover, there are many state precedents for diversion programs for individuals, such as those for first offenders.

c. Plain error review. The *Bethea* case held that the erroneous use of video conferencing at plea and sentence was per se error, but this aspect of the opinion is debatable. The defendant's claim could have been rejected under plain error review.

i. None of the cases cited by the court in Bethea squarely raised the plain error issue.

Bethea cited four cases to support its holding.[46] None are squarely on point. In three of the four, rather than waiving the right to be present, the defendants objected. In one, the Tenth Circuit refused to apply harmless error when a visiting judge from outside the district had tried the case and then, *over the defendant's objection*, opted for video sentencing rather than traveling back to New Mexico.[47] In another case, the Fourth Circuit refused to apply harmless error when, *over the defendant's multiple objections*, the trial judge, worried about the danger defendant posed if transported based on prior disruptive behavior, refused to allow him to be present at sentencing and conducted sentencing via video, without giving the defendant any opportunity prior to sentencing to show that he was not disruptive.[48] The third case, from the Fifth Circuit, also involved a defendant who *objected* to sentencing via video, and stated that he wanted to be sentenced in person.[49] The court vacated the sentence with no discussion of harmless error.[50] To the extent the Seventh Circuit relied on this case to conclude that the Fifth Circuit believes it is per se reversible error to *sentence* using video when the defendant *requests* it, statements in a later decision of the Fifth Circuit may undercut that assumption.[51]

[46] United States v. Bethea, 888 F.3d 864, 867 (7th Cir. 2018).
[47] United States v. Torres-Palma, 290 F.3d 1244, 1245 (10th Cir. 2002) ("We believe the only relief from this result is a redrafting of the language of Rule 43. Until that time, video conferencing for sentencing is not within the scope of a district court's discretion. Furthermore, Rule 43 vindicates a central principle of the criminal justice system, violation of which is per se prejudicial. In that light, presence or absence of prejudice is not a factor in judging the violation.").
[48] United States v. Lawrence, 248 F.3d 300, 302, (4th Cir. 2001).
[49] United States v. Navarro, 169 F.3d 228, 230 (5th Cir. 1999).
[50] *Id.* at 235.
[51] *See* United States v. Ramos-Gonzales, 857 F.3d 727, 733–34 (5th Cir. 2017) (Jones, J. concurring) (agreeing with footnote in the majority opinion there is no authority for the district court's conducting resentencing by *telephone* conference, distinguishing that process from ""the practice of conducting sentencing by videoconferences," which, she notes "has been practiced, when the defendant consents, as a measure of necessity in courts that are understaffed or confront a high volume of criminal cases. In a videoconference, at least, the judge wears a robe in a court-like room, and all parties behave as in an ordinary courtroom setting," noting also that "we have held that the defendant must first consent before the court may conduct sentencing by videoconference").

United States v. Williams,[52] was the closest to *Bethea*, but the Sixth Circuit did not reach the question whether plain error applied because of the government's failure to raise the issues properly. After the Marshals Service informed the district court that if the defendant were brought to court he would need to be in full restraints and accompanied by three or four officers instead of the normal one or two, the district court determined that it would be best to conduct the sentencing hearing using video conferencing technology.[53] Neither Williams nor his counsel objected.[54] The Sixth Circuit noted "because the United States failed to request that we apply plain-error review, it has forfeited any argument that we should apply that standard, and we will review Williams's claim de novo."[55] It found that the government "has failed to . . . 'demonstrate to the Court *with certainty* that the error at sentencing did not cause the defendant to receive a more severe sentence.'"[56] Judge Thapar concurred, but noted disagreement with circuit precedent that parties could waive plain error review by failing to request it.[57]

ii. Videoconferencing and Harmless error.

It is not entirely clear that an improper use of video conferencing for either plea or sentencing is structural error that precludes harmless error review under Rule 52(a), as *Bethea* suggests. After all, at least some violations of the *constitutional* right to presence can be evaluated under harmless error review,[58] and there is nothing in Rule 43 itself that indicates that harmless or plain error review including an assessment of prejudice would be inappropriate.[59] Other violations of Rule 43 have been assessed using harmless error analysis.[60] Query whether

[52] *See* United States v. Williams, 641 F.3d 758, 764–65 (6th Cir. 2011).
[53] *Id.* at 763.
[54] *Id.*
[55] *Id.* at 764.
[56] *Id.* at 765.
[57] *Id.* at 773 (Thapar, D.J., concurring) (discussing the circuit split and siding with the Eighth Circuit that does not recognize waiver).
[58] Rushen v. Spain, 464 U.S. 114, 117 n.2 (1983), explained (somewhat elliptically) that violations of the right to be present, like violations of the right to counsel, are subject to harmless error analysis, "unless the deprivation, by its very nature, cannot be harmless," a comment it followed with a citation to *Gideon*, 372 U.S. 335 (1963). *See also* Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015) ("The exclusion of Ayala's attorney from part of the *Batson* hearing was harmless error. There is no basis for finding that Ayala suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent.").
[59] *See* United States v. Vonn, 535 U.S. 55, 64–65 (2002) (express mention of harmless error but not plain error review in Rule 11 did not repeal by implication the application of Rule 52(b) to violations of Rule 11).
[60] *See, e.g.*, United States v. Novaton, 271 F.3d 968, 1000 (11th Cir. 2001) (collecting cases where violations were harmless and finding continuation of the trial over defendant's protests while he was involuntarily absent during critical stages of the trial was not harmless beyond a reasonable doubt).

The Seventh Circuit held in *United States v. Benabe*, 654 F.3d 753, 771–74 (7th Cir. 2011), that the failure of the judge to ask defendants on the day trial began rather than the day before whether they would agree to behave before removing them was harmless error, noting "To require automatic reversal . . . would only reward these defendants for their obstructionist campaign. [Defendants] knowingly and voluntarily waived their right to be present. They maintained that waiver over the course of the entire trial. . . . A per se rule would invite future defendants to attempt similar obstructionist tactics . . . . We see no reason to expand the limited list of structural rights whose violation constitutes per se error by adding the defendants' Rule 43 right to be present at the inception of trial. The timing of the trial court's decision to remove the defendants from the courtroom, although a technical violation of Rule 43, was harmless." It distinguished *Benabe* in *Bethea*, stating *Benabe* dealt with Rule 43(c), which unlike Rule 43(a), does permit waiver of presence in limited circumstances, and noting the error in *Bethea* "was

substitution of video presence for physical presence poses significantly greater risks to the interests underlying the right to presence than other violations considered to be potentially harmless.

iii. Applying Plain Error.

Even if this particular violation of Rule 43 is structural error requiring relief when timely raised and reviewed under Rule 52(a), it does not necessarily follow that the same error when *not* objected to by the defendant in the trial court obviates any inquiry into prejudice under Rule 52(b). In *Bethea*, it appears that the defendant requested and did not object to the use of video in lieu of presence, so that plain error review under Rule 52(b)—not harmless error review under Rule 52(a)—should have applied. Indeed, the government argued plain error in its brief, and the defense brief conceded that was the correct standard.[61]

Rule 52(b) review includes three features that may have precluded relief in *Bethea.* Under the first prong of the Court's four-part test, relief for plain error requires that the error must not have "been intentionally relinquished or abandoned."[62] That may describe what happened in *Bethea.* The government in *Bethea* conceded that there was "error" that was "plain," however, and instead arguing that relief was barred because the error was "invited." (It declined to argue that the defendant's waiver was "knowing and voluntary."[63])

Second, the error must "affec[t] substantial rights," in that the error "must have been prejudicial" in the sense of "affect[ing] the outcome" of the proceedings.[64] It isn't clear that the defendant in *Bethea* could show prejudice; the court of appeals did not address this although the

more than the mere timing of an order; indeed, the defendant was never present." United States v. Bethea, 888 F.3d 864, 868 (7th Cir. 2018).

[61] Brief of Plaintiff-Appellee at 17–19, United States v. Bethea, 888 F.3d 864 (7th Cir. 2018), (No. 17-3468), 2018 WL 1414305 (C.A.7), at *17–19 (also citing United States v. Anderson, 881 F.3d 568 (7th Cir. 2018), which recognizes "the contemporaneous objection rule prevents a litigant from 'sandbagging' the court"); Reply Brief of Defendant-Appellant at 6, United States v. Bethea, 888 F.3d 864 (7th Cir. 2018), (No. 17-3468), 2018 WL 1378427 (C.A.7), at *6 ("Having invoked plain error review, the Government is entitled to the benefits of that standard. . . .").

[62] Rosales-Mireles v. United States, 138 S.Ct. 1897, 1904–05 (2018); *see also* Puckett v. United States, 556 U.S. 129, 138 (2009) ("Nobody contends that Puckett's counsel has waived—that is, intentionally relinquished or abandoned—Puckett's right to seek relief form the Government's breach (If he had, there would be no error at all and plain-error analysis would add nothing.)"); United States v. Olano, 507 U.S. 725, 733 (1993) ("Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.").

[63] Brief of Plaintiff-Appellee at 19, United States v. Bethea, 888 F.3d 864 (7th Cir. 2018), (No. 17-3468), 2018 WL 1414305 (C.A.7), at *19. The defendant's brief argued it was the government that suggested the technological accommodation. Reply Brief of Defendant-Appellant at 3, United States v. Bethea, 888 F.3d 864 (7th Cir. 2018), (No. 17-3468), 2018 WL 1378427 (C.A.7), at *3. The court of appeals did not address this factual dispute. *See* United States v. Bethea, 888 F.3d 864 (7th Cir. 2018).

[64] *See, e.g.*, United States v. Salim, 690 F.3d 115, 124 (2d Cir. 2012) (rejecting relief on plain error for defendant whose waiver of presence in favor of videoconferencing for resentencing was invalid, stating, "Even assuming that Salim has satisfied the first two prongs of plain error review—by showing that there was an error and that it was clear or obvious—he has not met the third or fourth. Salim has not proven that his presence would have affected the outcome of his resentencing."); United States v. Rhodes, 32 F.3d 867, 874 (4th Cir. 1994) (applying plain error review requiring a showing of prejudice when defendant did not object to in-chambers discussion with counsel about a substantive question with respect to its instructions sent out by a deliberating jury, finding no prejudice).

parties debated this point in their briefs.[65] The Supreme Court has so far declined to address whether prejudice should be presumed under the third prong of *Olano* for "structural" errors that require relief without regard to prejudice if adequately preserved for appeal.[66] Lower courts have divided on this question.[67]

Finally, the Court in *Olano* explained that Rule 52(b) is "permissive, not mandatory," allowing rather than requiring correction when an error is found to be "plain" and "affecting substantial rights."[68] An appellate court should, in addition, "correct a plain forfeited error affecting substantial rights if the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'"[69] This determination, the Court later explained in *Johnson v. United States*,[70] was to be made on an analysis of the facts of the individual case. In *Johnson*, the record showed that the error in question—failure to submit the element of materiality to the jury—did not seriously affect either the outcome, or the "fairness, integrity, or public reputation of judicial proceedings" because the evidence supporting materiality was "overwhelming."[71] "Indeed," the Court ventured, "it would be the reversal of a conviction such as this which would have that effect." The same might be said of *Bethea* if one is of the view that any prejudice the defendant suffered was not unfair given his consent to the erroneous procedure.

3. An amendment may raise other issues.

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[65] *See, e.g.*, Reply Brief of Defendant-Appellant at 10, United States v. Bethea, 888 F.3d 864 (7th Cir. 2018), (No. 17-3468), 2018 WL 1378427 (C.A.7), at *10 ("The judge never saw the extremely sick defendant struggle his way into court, ache with each movement, and labor with each breath in his courtroom. If Mr. Bethea was standing when the judge entered, the judge didn't see the effort it took Mr. Bethea just to rise in respect. An intensely worried, remorseful Mr. Bethea may have had sweat beading from his head, but from a camera in a far-off building, the judge may not have noticed the human frailty that should be personally observed at every sentencing."); Brief of Plaintiff-Appellee at 21–22, United States v. Bethea, 888 F.3d 864 (7th Cir. 2018), (No. 17-3468), 2018 WL 1414305 (C.A.7), at *21–22 ("Nor can he show a reasonable probability that his appearance by video conference affected his sentence. . . . Defendant had a full opportunity to present his mitigating argument for a sentence of probation based on his health conditions, . . . and he exercised his right to speak before sentence was imposed.").

[66] *See* United States v. Marcus, 560 U.S. 258, 264–66 (2010); Puckett v. United States, 556 U.S. 129, 140 (2009) (listing cases in which Court has declined to answer this question). As noted in LaFave, Israel, King, & Kerr, Criminal Procedure § 27.5 (2015 & Supp. 2018), the Court's reasoning in Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), may have laid the groundwork for a later holding that prejudice would not be presumed from a public trial violation when reviewed for plain error. The same rationale might apply to a "structural" violations of Rule 43. *Weaver* addressed not plain error but instead whether defense counsel's failure to raise a public trial violation under the Sixth Amendment automatically constituted "prejudice" necessary for relief for ineffective assistance of counsel under *Strickland*. Weaver, 137 S. Ct. at 1910–11. Although there is support in *Weaver* for presuming prejudice from public trial violations under the plain-error test, namely its emphasis on collateral rather than direct review, several aspects of the Court's rationale suggest that an unpreserved public trial right claim raised on direct appeal would not automatically establish the "prejudice" required for plain error relief. *See id.* In justifying its decision to require a defendant to show prejudice for a *Strickland* claim, the Court explained that the public-trial right is not absolute, and is subject to exceptions, so that closure is not always unconstitutional. *Id.* at 1909–10. In addition, the Court concluded that a public-trial violation was not always prejudicial or unfair to the defendant. *Id.* at 1910. It also emphasized that the failure to raise the error at trial deprives the trial court "of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure." *Id.* at 1912. The right to presence, too, has exceptions so that physical absence is not always unconstitutional or prejudicial.

[67] LAFAVE, ISRAEL, KING, & KERR, CRIMINAL PROCEDURE § 27.5 (2015 & Supp. 2018) (collecting cases).

[68] 507 U.S. at 735 (1993).

[69] *Id.* at 736.

[70] 520 U.S. 461 (1997).

[71] *Id.* at 469–70.

a. An exception for sentencing or for plea via video raises the question whether the Committee should consider other proceedings too. Does it make sense to allow this exception for plea and sentencing, but not also for preliminary examination,[72] detention hearings under the Bail Reform Act, or other pretrial hearings?

b. Would this require an amendment to those aspects of Rule 11 and 32 assuming presence? (Rules 5 and 10 were amended directly).

c. Could the exception have an unintended impact on the meaning of Civil Rule's "good cause" exception permitting video as a substitute for presence? Would specifying the circumstances under which video conferencing would be permitted jeopardize settled law under Civil Rule 43?

III. If an amendment is warranted, what should be included in that amendment?

Given the early stage of the Subcommittee's deliberations on these issues, we thought it prudent to present a list of issues that we anticipate may require attention should it decide to develop an amendment permitting the waiver of physical presence and consent to plea or sentence via videoconferencing. If the Subcommittee decides that an amendment is warranted, we can present more detailed options for consideration in a later conference call.

A. Sentence only, or plea as well?

It is possible that stipulated requests for video sentencing (and resentencings) arise more frequently than similar requests for guilty pleas. Or the Subcommittee might conclude that the harm from allowing pleas via video far exceeds the harm from allowing video sentencing. If so, an amendment might address only the circumstances under which video sentencing can take place, perhaps focusing on the phrase "voluntarily absent," and leaving in place the existing prerequisite of appearance at trial or guilty plea. Such a change would not address the specific problem in *Bethea*, which involved a request to be present via video at the guilty plea (as well as sentencing), but it could address part of the problem.

B. Specific prerequisites for knowing and waiver?

Statutes and cases considering the use of videoconferencing for plea or sentence employ varying standards for a knowing and voluntary waiver.[73] For example, must the waiver be in writing? Must the judge conduct a waiver colloquy?[74] Must counsel be appointed, and video barred for pro se defendants?[75] Can the government attorney or judge "suggest" this option to a

[72] *See, e.g.*, MICH. COMP. LAWS ANN. § 766.11a (West 2018) (permitting testimony at preliminary hearing via video conferencing and noting testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law); State v. Sargent, 128 P.3d 1052, 1055–56 (Nev. 2006) (holding judge has no authority to compel defendant's presence at a preliminary hearing once the defendant waives).
[73] State v. Soto, 343 Wis. 2d 43 (2012); State v. Anderson, 374 Wis. 2d 372 (2017).
[74] *See id.*
[75] *See* Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1151 (2004); *see also* People v. Stroud, 208 Ill. 2d 398, 403 (2004).

defendant? If so, should the Rule attempt to prevent implicit coercion by the judge who will be sentencing?

C. Limiting the circumstances warranting accommodation.

Should the use of video be limited to a danger or risk to health, or also extend to other extenuating circumstances? If a risk to health is sufficient, how much risk? Should it be limited to "life threatening" risks? Must the condition be permanent, or would video be available whenever health concerns prevent travel for more than a year, say? Must the risk be to the defendant, or could it be to someone dependent upon the defendant for care? Should financial hardship be included, or specifically excluded? If excluded, would that exclusion apply only when the defendant does not qualify as indigent?

D. Regulations for remote presence?

Although the Committee chose earlier not to impose specific restraints on video teleconferencing under Rules 5 and 10,[76] greater caution and specific safeguards may be desirable for plea and sentencing proceedings. Local rules, as well as state authority, could provide useful guidance.

E. Non-capital cases only?

As a policy matter, it is not clear whether the rule regarding waiver of presence should differ in capital and noncapital cases.[77] *Diaz v. United States*,[78] cited in *Crosby*, seems to suggest a different rule should apply in capital and noncapital cases. Conceivably, an exception for videoconferencing upon a certain showing might be limited to noncapital cases.

F. Would there be limits on a court's discretion to reject a knowing and voluntary waiver joined by the government?

Would a district judge have the option of rejecting such a stipulation? On what basis? Should the rule specify what a judge must consider in exercising discretion?

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[76] *See* FED. R. CRIM. P. 5 advisory committee's note to 2002 amendments:

> In deciding whether to use such procedures, a court may wish to consider establishing clearly articulated standards and procedures. For example, the court would normally want to insure that the location used for televising the video teleconferencing is conducive to the solemnity of a federal criminal proceeding. That might require additional coordination, for example, with the detention facility to insure that the room, furniture, and furnishings reflect the dignity associated with a federal courtroom. Provision should also be made to insure that the judge, or a surrogate, is in a position to carefully assess the defendant's condition. And the court should also consider establishing procedures for insuring that counsel and the defendant (and even the defendant's immediate family) are provided an ample opportunity to confer in private.")

[77] For a discussion of this issue, see United States v. Mitchell, 502 F.3d 931, 988 (9th Cir. 2007).

[78] 223 U.S. 442, 455 (1912) ("But, where the offense is *not capital* and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial . . . ." (emphasis added)).

TAB 2C

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JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

18-CR-C

COLLINS T. FITZPATRICK
CIRCUIT EXECUTIVE

PHONE (312) 435-5803

May 3, 2018

District Judge Donald W. Molloy
United States District Court
Post Office Box 7309
Missoula, MT 59807-7309

Dear Judge Molloy:

I have enclosed the opinion of the United States Court of Appeals for the Seventh Circuit, in *U.S. v. Bethea*, No. 17-3468. It deals with the requirement of Federal Rule of Criminal Procedure 43(a) that the defendant be physically present for the judge to accept a plea. The defendant had consented to having the plea and sentence by videoconference but the Court of Appeals concluded that Rule 43(a) required his presence. Your committee may want to consider this issue.

Sincerely,

Collins T. Fitzpatrick

CTF/rma
Enclosure
cc w/encl.: Chief Judge Diane P. Wood
Circuit Judge Joel M. Flaum
District Judge Gary Feinerman
Sara Sun Beale, Reporter
Nancy J. King, Associate Reporter
Rebecca Womeldorf, Rules Committee Staff

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-3468

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GREGORY BETHEA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 3:17-cr-008 — **James D. Peterson**, *Chief Judge.*

ARGUED MARCH 29, 2018 — DECIDED APRIL 26, 2018

Before BAUER, FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Defendant-appellant Gregory Bethea pleaded guilty to possessing a counterfeit access device in violation of 18 U.S.C. § 1029(a)(1). Due to serious health issues, Bethea appeared via videoconference at his combined guilty plea and sentencing hearing where he was sentenced to twenty-one months' imprisonment. He now argues his sentence should be vacated because Federal Rule of Criminal Procedure 43(a) required him to be physically present during

his plea. We agree, and thus reverse and remand for further proceedings.

I. Background

In 2014, Bethea used fraudulently obtained credit cards to purchase merchandise at retailers in Wisconsin. A grand jury subsequently indicted him for possessing a counterfeit access device in violation of 18 U.S.C. § 1029(a)(1). Bethea agreed to plead guilty in May 2017.

On December 1, 2017, the district judge conducted a combined guilty plea and sentencing hearing. The judge presided from his Madison, Wisconsin courtroom, while Bethea appeared via videoconference from Milwaukee because of his health issues and limited mobility.[1] After conducting a plea colloquy, the judge accepted Bethea's guilty plea and moved to sentencing. Although the judge acknowledged Bethea's health as a complicating factor in imposing a sentence, he remained bothered that Bethea's illegal conduct allegedly continued well after his health issues supposedly worsened. Ultimately, the judge sentenced Bethea to twenty-one months' imprisonment, which fell at the bottom of the Guidelines range of twenty-one to twenty-seven months. Bethea timely appealed, arguing that the district court was not permitted to accept Bethea's guilty plea via videoconference.

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[1] Specifically, Bethea requires dialysis for ten hours a day, five days a week; suffers from pulmonary issues; recently had a heart stent implemented; is wheelchair-bound; and suffers from Charcot joint syndrome, which makes him highly susceptible to fractures and dislocations from even minor physical contact.

II. Discussion

We review legal questions, such as whether the use of videoconferencing at a sentencing hearing violates the Federal Rules of Criminal Procedure, de novo. *See United States v. Thompson*, 599 F.3d 595, 597 (7th Cir. 2010). Bethea argues that his combined guilty plea and sentencing via videoconference violated Federal Rule of Criminal Procedure 43(a) because he was not physically present in the courtroom during his plea. He argues this was an unwaivable obligation, and the court's failure to adhere to the requirement constitutes per se reversible error. Thus, he maintains that even if he consented to the form of proceeding, we must still vacate his plea and sentence.

Rule 43 of the Federal Rules of Criminal Procedure governs the circumstances under which a criminal defendant must be present in the courtroom. The Rule states that "the defendant must be present at ... the initial appearance, the initial arraignment, *and the plea*." Fed. R. Crim. P. 43(a) (emphasis added). The presence requirement is couched in mandatory language—"the defendant *must* be present." *Id.* (emphasis added); *see also In re United States*, 784 F.2d 1062, 1062–63 (11th Cir. 1986) ("The rule's language is clear; the rule does not establish the right of a defendant to be present, but rather affirmatively *requires* presence." (emphasis added))[2].

True, the Rule's presence requirement does contain several exceptions and waiver provisions. *See* Fed. R. Crim. P. 43(b), (c). These exceptions include, for example, when a proceeding involves the correction or reduction of a sentence, *see* Fed. R.

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[2] Earlier cases quote a prior version of the Rule which used the language "shall be present." The Rule was amended in 2002 to read "must be present." That change is immaterial to our analysis.

Crim. P. 43(b)(4), or when the defendant is voluntarily absent during sentencing in a noncapital case after initially attending the trial or plea, *see* Fed. R. Crim. P. 43(c)(1)(B). But none of these exceptions apply to the situation before us and are generally limited to the sentencing context.[3] Moreover, Rule 43 was amended in 2011 to permit videoconference pleas for *misdemeanor* offenses. *See* Fed. R. Crim. P. 43(b)(2) (stating that when 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 ... plea ... to occur by video teleconferencing or in the defendant's absence"). That the drafters did not include that option in the felony plea situation is telling.[4]

No other circuit has addressed whether a defendant can affirmatively consent to a plea by videoconferencing.[5] However, four circuits have addressed whether a district court can

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[3] For instance, a defendant can waive his absence at sentencing, but he must have been initially present either at the plea or the start of trial. *See, e.g., United States v. Benabe*, 654 F.3d 753, 771 (7th Cir. 2011) ("[T]he language of Rule 43 does not provide for waiver of the right to be present unless a defendant is 'initially present at trial.'") (quoting Fed. R. Crim. P. 43(c)(1)).

[4] Likewise, Federal Rules of Criminal Procedure 5 and 10 were amended in 2002 to permit initial appearances and arraignments to be conducted by videoconference if the defendant consents. Rule 11, however, which governs the taking of guilty pleas, was not amended to permit a defendant to agree to enter a guilty plea by videoconference.

[5] Several district courts have addressed this precise issue and held that a defendant *cannot* consent to video conferencing during a plea, even for medical or financial hardship reasons. *See, e.g., United States v. Brunner*, No. 14-CR-189, 2016 WL 6110457 (E.D. Wis. Sept. 23, 2016); *United States v. Klos*, No. CR–11–233, 2013 WL 2237543 (D. Ariz. May 20, 2013); *United States v. Thomas*, No. CR 06–40079, 2007 WL 1521531 (D.S.D. May 21, 2007);

require it. All have held that Rule 43 obligates both the defendant and the judge to be physically present; the outcome is the same whether it is the judge or defendant who appeared via videoconference. *See United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) ("The text of Rule 43 does not allow video conferencing" and the "structure of the Rule does not support it"); *United States v. Torres-Palma*, 290 F.3d 1244, 1246–48 (10th Cir. 2002) ("[V]ideo conferencing for sentencing is not within the scope of a district court's discretion."); *United States v. Lawrence*, 248 F.3d 300, 303–05 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 238–39 (5th Cir. 1999). We agree with our sister circuits' reasoning and extend it one step further. We thus hold 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.[6]

Our decision is supported by the unique benefits of physical presence. As the Sixth Circuit explained, "[b]eing physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference." *Williams*, 641 F.3d at 764–65. Likewise, the Fourth Circuit reasoned that "virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *Lawrence*, 248 F.3d at 304.

United States v. Jones, 410 F. Supp. 2d 1026 (D.N.M. 2005); *United States v. Melgoza*, 248 F. Supp. 2d 691 (S.D. Ohio 2003).

[6] Since we find Bethea's presence at a plea an unwaivable requirement, we need not address the government's contention that Bethea invited the error here or forfeited the claim.

This Court has also recognized the value of the defendant and judge both being physically present. In the context of revocation of supervised release via videoconferencing, we noted that "[t]he judge's absence from the courtroom materially changes the character of the proceeding." *Thompson*, 599 F.3d at 601. The same is true if the defendant is the person missing. "The important point is that the form and substantive quality of the hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of a cable or satellite link." *Id.* at 600. A "face-to-face meeting between the defendant and the judge permits the judge to experience 'those impressions gleaned through ... any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.'" *Id.* at 599 (alteration in original) (quoting *Del Piano v. United States*, 575 F.2d 1066, 1069 (3d Cir. 1978)). "Without this personal interaction between the judge and the defendant—which videoconferencing cannot fully replicate—the force of the other rights guaranteed" by Rule 43 is diminished. *See id.* at 600. Thus, while it might be convenient for a defendant or the judge to appear via videoconference, we conclude the district court has no discretion to conduct a guilty plea hearing by videoconference, even with the defendant's permission.

In so holding, we agree with the Tenth Circuit that a Rule 43(a) violation constitutes *per se* error. *Torres-Palma*, 290 F.3d at 1248; *see also Lawrence*, 248 F.3d at 305 (automatically reversing for Rule 43 error); *Navarro*, 169 F.3d at 238–39 (same). "Rule 43 vindicates a central principle of the criminal justice system, violation of which is *per se* prejudicial. In that light, presence or absence of prejudice is not a factor in judging the violation." *Torres-Palma*, 290 F.3d at 1248.

The government's reliance on our statement in *United States v. Benabe*, that "[w]e see no reason to expand the limited list of structural rights whose violation constitutes per se error by adding the defendants' Rule 43 right to be present at the inception of trial," 654 F.3d 753, 774 (7th Cir. 2011), is misplaced. First, in *Benabe*, the district court dealt with Rule 43(c), which unlike Rule 43(a), *does* permit waiver of presence in limited circumstances. *See* Fed. R. Crim. P. 43(c). Second, in declining to require automatic reversal, we stressed "[i]t is important ... to remember the precise error in question." *Id.* at 773. In *Benabe*, the court's error "was only the precise timing of the exclusion order." *Id.* As such, we held "[t]he timing of the trial court's decision to remove the defendants from the courtroom, although a technical violation of Rule 43, was harmless." *Id.* at 774. Here, the precise error was more than the mere timing of an order; indeed, the defendant was *never* present. As such, *Benabe* is unhelpful.

We are sympathetic to the government's concerns that a defendant on appeal can complain of an accommodation that was for his benefit below. 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. *See, e.g., United States v. Brunner*, No. 14-cr-189, 2016 WL 6110457, at *3 (E.D. Wis. Sept. 23, 2016). However, Rule 43(a) simply does not allow a defendant to enter a plea by videoconference. *See Lawrence*, 248 F.3d at 305 ("[T]he rule should indeed provide some flexibility. But it does not. We cannot travel where the rule does not go."). Accordingly, we remand

to the district court for the plea and resentencing of Bethea in the physical presence of a judge.[7]

III. Conclusion

For the foregoing reasons, we VACATE the judgment of the district court and REMAND in accordance with this opinion.

[7] Given that result, we need not address Bethea's claim that the district court erred in addressing Bethea's health issues at the sentencing hearing.

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TAB 3A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 40 (Arrest Violating Conditions of Release Set in Another District) Suggestion from Magistrate Judge Patricia Barksdale (18-CR-G)

DATE: April 16, 2019

The Committee received a suggestion from Magistrate Judge Patricia Barksdale (M.D. Fla.) expressing concern that several aspects of the Rule are not clear. As Judge Barksdale explained, the questions of concern arise in the following scenario:

> District A places a defendant on pretrial release under conditions, and – with the permission of District A – the defendant moves to District B, which agrees to supervise the defendant. While in District B, defendant commits alleged violation of release conditions. District A issues a warrant for Defendant's arrest. Based on that warrant, Defendant is arrested in District B and brought immediately to a Magistrate Judge in District B.

The questions that concern Judge Barksdale arise from the interaction of Rule 40 with 18 U.S.C. § 3148(b), and with Rule 5(c)(3), in the scenario above. Section 3148(b) governs the procedure for revocation of pretrial release, and it provides that the revocation proceedings will ordinarily take place in District A, and be heard by the judicial officer who ordered the release. When the violation occurs in District B, this raises several questions. Judge Barksdale identified the following issues:

1. Is the defendant entitled to an identity hearing/production of the warrant in District B?

2. Is the defendant entitled to a detention hearing in District B?

3. Is the defendant entitled to a preliminary hearing in District B?

4. What part of Rule 5(c)(3) applies in a Rule 40 proceeding?

5. Why does Rule 40(c) reference a "detention order"?

6. Should Rule 40 offer a the same detailed procedures as Rule 32.1 provides for initial appearance for an alleged violation of supervised release or probation conditions?

More broadly, Judge Barksdale's comments raise the question whether Rule 40 does or should allow the magistrate judge in District B to hold the revocation hearing.

In preparing this memorandum, the reporters were assisted by several individuals, each of whom the reporters would like to acknowledge and thank. Judge Bruce McGiverin provided invaluable assistance. He shared his own experiences and those of court personnel in his district, as well as other magistrate judges in the First Circuit. Judge McGiverin also reached out to members of the Federal Magistrate Judges Association, whose comments he provided to the reporters. Former U.S. Magistrate Judge Tommy E. Miller, who served as a member of the Advisory Committee on Criminal Rules during the restyling that affected Rule 40, provided background materials as well as his own analysis of Judge Barksdale's questions. This memorandum draws on all of these sources.

At this stage, the question for the Advisory Committee is whether the issues raised by Judge Barksdale warrant the creation of a new subcommittee to study Rule 40 (and the related provisions). Rule 40 is certainly not a model of clarity, and it could benefit from revision. On the other hand, based upon the consultation noted above it appears that issues do not arise frequently and are not regarded as a serious problem that urgently requires a revision of Rule 40.

The remainder of this memorandum first describes § 3148(b) and the relevant rules, and then turns to a discussion of each issue raised by Judge Barksdale.

A. Section 3148(b) and Rule 40.

The issues of concern to Judge Barksdale arise when a defendant has been released before trial in one district (District A) and permitted to go to a second district (District B), where it is alleged that the defendant violated the terms of release. As generally in interpreted,[1] § 3148(b) provides that the arrest warrant is to be issued in District A, and the revocation proceeding heard "[t]o the extent practicable" by the judicial officer who ordered the defendant's release. It states (emphasis added):

> **(b) Revocation of release**. –The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. 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

[1]This memorandum is based on the interpretation of the magistrate judges from whom we received advice. However, Judge McGiverin and the reporters noted that an alternative reading of § 3148(b) is possible. It could be read to permit a "judicial officer" in District B to issue the arrest warrant, subject to the limitation that "[t]o the extent practicable" the revocation hearing should be held before the judge in District A who set the conditions of release. Under the broadest interpretation, when that was not practicable a judge in District B could conduct the revocation hearing. One reported case, decided before restyling, supports the current–and more restrictive–view of § 3148(b). *See United States v. Zu Quan Zhu*, 215 F.R.D. 21 (D. Mass. 2003).

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.

Section 3148 was enacted in 1984 and amended in 1986.

Rule 40 establishes a general framework for proceedings when a defendant is accused of violating the conditions of release set in another district. Before restyling (which was completed in 2002) Rule 40 included additional material that was relocated to other rules. Provisions related to first appearance for criminal offenses were moved to Rules 5 and 5.1, and provisions dealing with probation violations were relocated in Rule 32.1. After restyling, Rule 40 dealt only with arrests for failure to appear in another district. It now provides:

> **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.

In the scenario of concern, a defendant under supervision in District B is alleged to have violated the terms of his pretrial release set in District A. Pursuant to § 3148(b), District A issues a warrant for his arrest, and he is arrested in District B. Rule 40(a) requires that he be brought without unnecessary delay before a magistrate judge in District B.

B. Judge Barksdale's questions.

1. Is the defendant entitled to an identity hearing/production of the warrant in District B?

Rule 40(b) directs the court to follow the procedures in Rule 5(c)(3) "as applicable," and Rule 5(c)(3)(D) provides:

> **(3)** ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(D) the magistrate judge must 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 . . . .

Although Judge Barksdale **s**uggests that production of the warrant and an identity hearing would not be necessary because the defendant is being supervised in District B, other magistrate judges report that unless the hearing has been waived by the defendant, they conduct such hearings. Waivers are said to be very common, presumably because the defendant is known to the personnel in District B and has been properly identified. However, we are informed that such hearings do occur, and the pretrial officer or a Deputy U.S. Marshal may testify.

Rules 40 and 5(c)(3)(D) seem to operate properly here. If there is any question about the identity of the defendant, such a hearing is important before the individual is ordered to the issuing district. If not, the hearing will likely be waived.

Judge McGiverin also informed us that at the initial appearance in his district the magistrate judge ordinarily tells the defendant why he was arrested, what the prosecution is alleging, the possible consequences, and his right to an attorney in District B. The judge may also order the defendant's temporary detention.

2. Is the defendant entitled to a detention hearing in District B? If so, what standards are applicable?

Judge McGiverin advised the reporters that he would hold an adversarial hearing for temporary detention (pending the final § 3148 revocation hearing in District A) if the defendant contests his temporary detention. Judge Miller did not remember discussing this issue in the Advisory Committee when Rule 40 was restyled. However, he commented that except in the circumstances where the defendant is charged with a crime, Rule 40(c) seems to provide the judge with the discretion to conduct a detention hearing in District B.

The rule does not address the applicable standards.

3. Is the defendant entitled to a preliminary hearing in District B?

Rule 5.1 requires a preliminary hearing only when a defendant "is charged with an offense," and not when a defendant charged with violating a condition of pretrial release. Rule 40(b) requires proceeding under Rule 5(c)(3) – but not Rule 5.1 – "as applicable."

There appears to be no basis for requiring a preliminary hearing in the situation under consideration, and the magistrate judges we consulted agreed with that assessment.

4. What part of Rule 5(c)(3) applies in a Rule 40 proceeding?

Judge Barksdale reviewed the various subsections of Rule 5(c)(3) and concluded that none apply in the situation in which a defendant under supervision in District B is alleged to have violated the terms of his pretrial release set in District A. Thus the direction in Rule 40(b) to "proceed under Rule 5(c)(3) as applicable" can serve no purpose.

We agree that subparts (c)(3)(A) and (C) do not apply to cases that fall under Rule 40. Rule 5(c)(3)(A) requires advice to the defendant concerning transfer under Rule 20 for plea and sentencing. Judge Barksdale commented that it would not be applicable to a Rule 40(b) situation, and Judges McGiverin and Miller agree. And Rule 5(c)(3)(C) requires a preliminary hearing if required by Rule 5.1. However, as noted in point 3 *supra*, Rule 5.1 concerns only criminal charges, and does not apply to violations of pretrial release conditions.

With the assistance of Judge McGiverin, the FMJA judges he consulted, and Judge Miller, we have concluded that (c)(3)(B) and (D) can apply in cases of this nature. Rule 5(c)(3)(B) governs cases in which the defendant was arrested without a warrant. Judges from the FMJA noted this might be applicable when the defendant was picked up in Districts C or D, not Districts A or B. And, as noted in point 1 *supra*, under (c)(3)(D) a defendant is entitled to an initial appearance at which the warrant will be produced and the defendant can challenge his identity as the person named in the warrant.

Assuming that Rule 5(c)(3)(A) and (C) would not apply, the question is whether it is necessary to revise Rule 40(b)'s directive to focus only on those subparts of (c)(3) that are applicable, directing magistrate judges to "proceed under Rule 5(c)(3)(B) or (D) as applicable." In the alternative, Rule 40(b) could be amended to provide for the relevant procedures, rather than directing the court to follow otehr rules "as applicable."

5. Why does Rule 40(c) reference a "detention order"?

Judge Barksdale commented that this reference seems unnecessary, since District A has issued an arrest warrant. But Judge McGiverin noted that this might apply if a defendant somehow absconded from a detention order. Judge Miller did not recall any discussion of this issue when Rule 40 was restyled.

Since we can envision at least one situation where a detention order might be appropriate, it seems unnecessary to move forward on an amendment.

6. Should Rule 40 offer the same detailed procedures as Rule 32.1 provides for the initial appearance for an alleged violation of supervised release or probation conditions?

As Judge Miller commented, the reference to the procedures in Rule 5(c)(3) ("as applicable") was intended to address this issue. Magistrate judges do have to consult various rules rather than having all of the relevant provisions in one place, as in Rule 32.1. On the other

hand, there does not seem to be a pressing need to activate the rule making process, since the issues arise infrequently and seem to be handled appropriately.

As noted above, at the initial appearance magistrate judges ordinarily tell the defendant why he was arrested, what the prosecution is alleging, the possible consequences, and if necessary appoint counsel (since defendant's lawyer is generally in District A).

C. Conclusion.

The question for discussion at the May meeting is whether a subcommittee should be appointed to consider revisions to Rule 40.

Although it would certainly be possible to clarify Rule 40, there seems to be no pressing need to do so. The magistrate judges who were consulted did not consider the current rule to be causing problems (though they certainly noted it could be clearer). Moreover, the situation upon which Judge Barksdale focused does not arise with great frequency. On the other hand, some magistrate judges suggested that the infrequency with which the issues arise may cut the other way, because it would be very helpful to have clear guidance set forth in a single rule.

More generally, Judge Barksdale's questions also raise a policy issue: should the determination whether the defendant violated the conditions of pretrial release be made in District A or District B? In some (and perhaps most) cases, the violation has occurred in District B. The witnesses would be present in District B, and U.S. Marshal transport from District A to District B can often take weeks. Accordingly, in at least some cases it may be more efficient to make the determination in District B. It appears, however, that this option is foreclosed by 18 U.S.C. § 3148(b) (quoted above), which seems to mandate that these proceedings occur in District A, when possible before the judge who set the conditions of release.[2]

[2] *But see supra* n.1 (noting that a broader interpretation of § 3148(b) may be possible).

TAB 3B

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From: Patricia Barksdale [redacted]
Date: December 10, 2018 at 5:34:58 PM EST
To: Rebecca Womeldorf [redacted]
Subject: Re: Federal Rules of Criminal Procedure

Thank you for your speedy response. In the interest of efficiency, I offer my suggestion to you in this email but will happily provide the suggestion in a more formal manner if you wish.

The suggestion concerns **Federal Rule of Criminal Procedure 40**.

The scenario is this. It comes up from time to time, but not often.

District A places Defendant on pretrial release under conditions.
With District A permission, Defendant moves to District B, and District B agrees to supervise Defendant.
While in District B, Defendant commits alleged violation of release conditions.
Per 18 U.S.C. 3148(b), District A issues warrant for Defendant's arrest.
Based on warrant, Defendant is arrested in District B.
Per Federal Rule of Criminal Procedure 40(a), Defendant is immediately brought to Magistrate Judge in District B.

Section 3148(b) provides,

> The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. 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) of this title, 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.

Rule 40 provides,

> **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.

Rule 5(c)(3) provides,

> **(c) Place of Initial Appearance; Transfer to Another District.**
> **(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed.** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:
> (A) the magistrate judge must inform the defendant about the provisions of Rule 20; [*Rule 20 is transfer for plea and sentence; 5(c)(3)(A) would not apply in a Rule 40(b) situation.]*
> (B) 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; [*Rule 40(b) contemplates a warrant; 5(c)(3)(B) would not apply in a Rule 40(b) situation.]*
> (C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1; [*Rule 5.1 concerns criminal charges, not alleged violations of release conditions; 5(c)(3)(C) would not apply in a Rule 40(b) situation.]*
> (D) the magistrate judge must 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; and

[Because Defendant is being supervised in District B, it would not make sense to have an identity hearing/production of the warrant. See, e.g., Rule 32.1.]

(E) 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.

Comments:

-The primary witness to the alleged violation will (almost always) be the supervising pretrial officer in District B.

-U.S. Marshal transport from District B to District A can take weeks.

-Is Defendant entitled to an identity hearing/production of the warrant in District B? (Those are required under Rule 32.1 only when the alleged violation did not occur in the district of arrest.)

-Is Defendant entitled to a detention hearing in District B? If so, what standards are used?

-Is Defendant entitled to a preliminary hearing in District B? If so, what standards are used?

-What part of Rule 5(c)(3) applies in a Rule 40 proceeding?

-Section 3148(b) provides Defendant "shall" be brought to District A, but Rule 40(c) seems to indicate District B can deal with the alleged violation.

-Why does Rule 40(c) reference a "detention order"? If District A issued a detention order, Defendant would not be on release and not subject to arrest in District B.

-Rule 32.1 specifies what happens at an initial appearance for an alleged violation of supervised release or probation conditions. Rule 40 does not offer the same specificity for an initial appearance for an alleged violation of pretrial release conditions.

Thank you for your consideration.

Patricia D. Barksdale