MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. James C. Dever III, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 9, 2023

I. Introduction

The Advisory Committee on Criminal Rules met in Washington, D.C., on April 20, 2023. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents several information items. The Committee heard an interim report from the Rule 17 Subcommittee, and it discussed and provided input on several cross-committee projects. It also had a preliminary discussion of a proposal to allow bench trials under some circumstances without the government's consent. Finally, it removed two items from its study agenda.

II. Information Items

A. Rule 17 and pretrial subpoena authority (22-CR-A)

At the October meeting the Committee heard multiple speakers, both defense attorneys and prosecutors, describe their experiences with efforts to employ Rule 17 to obtain material held by third parties before trial. The defense speakers described the need for subpoena authority in different kinds of cases and for different types of material they felt they needed to be able to access in order to properly research possible defenses and lines of investigation. The speakers described very different experiences in different districts, ranging from narrow readings of Rule 17 under the Nixon case to much more generous readings in other districts.

Judge Nguyen, chair of the Rule 17 Subcommittee, and the reporters provided an update on the Subcommittee's continued information gathering following that meeting. The Subcommittee received valuable assistance from several experts in two virtual meetings. Professor Orin Kerr and Richard Salgado spoke to the Subcommittee about the Stored Communications Act and other issues relating to materials held online, and other experts provided information on issues affecting banks and other financial service entities. Additionally, the reporters interviewed other experts concerning the issues that might be raised by subpoenas for school, medical, and hospital records, and they provided reports from those interviews to the Subcommittee.

Judge Nguyen said the Subcommittee had nearly completed the information-gathering stage, and it would meet to decide whether to move forward with any amendment. She emphasized that if the Subcommittee decided to proceed, its recommendation might differ from the proposal submitted by the New York Bar group. She noted that the reporters had compiled a list of issues for discussion during the drafting process, and she invited members to suggest any other areas of enquiry they wished the Subcommittee to pursue. One member stressed the confusion generated by the current text, advocating that the Subcommittee focus on clarifying Rule 17. The reporters confirmed that the Subcommittee was aware of the need for clarification.

B. Access to Electronic Filing By Self-Represented Litigants

The Committee received and discussed a report from Professor Catherine Struve describing the interviews she and Dr. Timothy Reagan had conducted. The discussion focused first on the potential for eliminating the requirement that a non-CM/ECF user who files a paper with the court must serve that paper on all other parties, including those who already receive the document through a notice of electronic filing. Professor Struve said interviews in districts that had eliminated the separate service requirement revealed that the process was working well.

The interviews also revealed information about the benefits and burdens of allowing self-represented litigants access to CM/ECF, and the experience with alternative means of electronic access, such as filing by email uploads. Committee members expressed particular interest in more information about the potential for additional filings on CM/ECF to clog court dockets or increase the workload of the clerk's office.

The Pro Se Filing Subcommittee, chaired by Judge Burgess, will continue to coordinate with Professor Struve, the reporters, and other members of the working group.

C. Unified National Bar Admission to the District Courts (23-CR-A)

The Committee had an initial discussion of the proposal to create a system of admission to a unified national bar for the federal district courts. Because the proposal was addressed to the Civil and Bankruptcy Committees as well as the Criminal Rules Committee, Judge Bates said he planned to create a joint subcommittee with representation from these committees to consider the proposal. Professor Coquillette provided background information concerning an earlier proposal to create a unified federal bar and unified federal disciplinary rules. That effort was very controversial and was eventually abandoned. As several speakers noted, however, that controversial proposal was advanced many years ago and in a very different context. Accordingly, it should be no bar to consideration of the current proposal.

D. Rule 49.1 and Privacy Protections for Social Security Numbers (22-CR-B)

Portions of a letter from Senator Wyden to the Chief Justice have been logged as suggestions to the Bankruptcy, Civil, and Criminal Rules Committees. Because many provisions of the Bankruptcy Rules require the last four numbers of individual Society Security or taxpayer ID numbers, that Committee has taken the lead. Mr. Byron advised, however, that it was not yet clear whether the Criminal and Civil Rules Committees should wait for the Bankruptcy Rules Committee to complete its consideration of this proposal and related issues. The next steps will be orchestrated by Judge Bates, Professor Struve, and the other reporters and chairs.

E. Jury Trial Waiver Without Government Consent (23-CR-B)

At present, Rule 23(a) allows a bench trial only if the defendant waives trial by jury in writing, the government consents, and the court approves. The Federal Criminal Procedure Committee of the American College of Trial Lawyers (FCPC) proposed an amendment that would allow a bench trial without government consent if the defendant presents reasons in writing and the court, after allowing the government to comment, finds that reasons provided by the defendant are sufficient to overcome the presumption of jury trial. The FCPC suggested two principal reasons for the change: providing a mechanism to respond to trial backlogs arising from the Covid pandemic, and responding to frequent government refusals to consent. Indeed, the proposal presented the result of an informal survey finding that in a significant number of districts the government seldom if ever consents to a bench trial. Additionally, as the FCPC noted, although the majority of states follow the federal practice, approximately one third of the states allow bench trials without the government's consent, and no problems have arisen in these states.

After an extended discussion, the Committee agreed that it would be helpful to gather additional information before making a decision whether to appoint a subcommittee. If there is a Covid trial backlog, members were not persuaded that it could or should be addressed by an amendment that could not take effect for four years or more. Accordingly, discussion focused on two issues: the need for more information about current practices, and the difficulty of formulating a standard for appropriate versus inappropriate reasons for withholding consent.

Although the federal courts publish the number of bench and jury trials held each year, many members thought it would be useful to have more data. They expressed interest in information about the number and kinds of cases in which the government has declined to consent, as well as the frequency and circumstances in which no request is made because the defense believes the government will not consent. The Committee decided to seek information about these questions from the Federal Defenders as well as Criminal Justice Act practitioners regarding their experiences.

Members also wanted more information about government practices and policies. Discussion confirmed that the practices regarding consent vary from district to district, and Mr. Wroblewski agreed to gather information from the U.S. Attorneys and from units within Main Justice about their policies and practices.

The Committee also recognized, however, that the data and information it would receive would not answer the fundamental questions raised by the proposal. Those questions concerned the reasons the defense might seek a bench trial as well as the reasons the government might withhold consent. For example, were there particular kinds of cases in which a defendant might believe a jury could not be fair? What reasons for refusing to consent would be appropriate and which inappropriate? Was it appropriate to refuse consent across the board because of a belief in the importance of the jury? In an adversarial system, was it appropriate for the government or the defense to consider whether a jury would be more favorable to it than the judge would? Assuming Article III reflects a public interest in trial by jury, should the government or the court be the arbiter of that interest?

Discussion also focused on the standard for pursuing any amendment: is there a significant problem, and, if so, could an amendment to a Federal Rule of Criminal Procedure address that problem? After receiving additional data and information, the Committee will focus on those standards in deciding whether to move forward with a subcommittee.

F. Removal of Items from Study Agenda

The Committee voted to remove two items from its study agenda.

1. Conditional pleas

The Committee decided not to pursue a suggestion to clarify Rule 11(a)(2), which governs conditional pleas. There are only a small number of conditional pleas, and the 2016 case that generated the suggestion appeared to be a garden variety disagreement between two members of a Ninth Circuit panel about the interpretation of the rule. There have been no calls for the Committee to address the issue and no additional indications since that decision that there was a sufficient problem to warrant an amendment. Accordingly, the Committee voted unanimously to remove this item from its study agenda.

2. Insanity pleas

The Committee also voted unanimously to remove from its study agenda the suggestion that it amend Rule 11(a)(1) to provide for a plea of not guilty by reason of insanity. Rule 11 and

the Insanity Defense Reform Act of 1984 work together to create the current landscape. The Act calls for a special verdict if the issue of insanity is properly raised by notice to the government under Rule 12.2. The Act provides that the jury shall be instructed to find—or in the event of a non-jury trial, the court shall find—the defendant guilty, not guilty, or not guilty by reason of insanity. This channels the insanity defense through a verdict in either a bench trial or jury trial, and the Act makes no provision for a plea.

The Committee was advised that an informal practice has developed for cases in which the prosecution and defense agree that the proper resolution of a particular case is a verdict of not guilty by reason of insanity. The parties agree to the relevant facts, which are submitted to the court—usually by stipulations—for a bench trial. This process can be a bit cumbersome, and it takes a little longer than a plea proceeding. But it is workable, and the Committee determined that it has been employed by many district courts and acknowledged and accepted by many courts of appeals.

The Committee concluded that the informal practice is working well enough, and it is consistent with the Congressional decision in the Insanity Defense Reform Act to narrow the defense and channel it through certain procedures. Accordingly, the Committee decided that there was no need for an amendment, and it removed the item from the study agenda.