ADVISORY COMMITTEE
ON
CRIMINAL RULES

April 20, 2023

AGENDA
Meeting of the Advisory Committee on Criminal Rules
April 20, 2023 / Washington, D.C.

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8. Next Meeting: October 26, 2023

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
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Secretary to the Standing Committee

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Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Civil Rules

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	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

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

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON CRIMINAL RULES

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

Members

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Honorable Timothy Burgess United States District Court Anchorage, AK	Honorable Robert J. Conrad, Jr. United States District Court Charlotte, NC
Dean Roger A. Fairfax, Jr. American University Washington College of Law Washington, DC	Honorable Michael J. Garcia New York State Court of Appeals Albany, NY
Lisa Hay, Esq. Federal Public Defender Portland, OR	Honorable Bruce J. McGiverin United States District Court San Juan, PR
Honorable Jacqueline H. Nguyen United States Court of Appeals Pasadena, CA	Hon. Kenneth A. Polite, Jr. Assistant Attorney General (ex officio) United States Department of Justice Washington, DC
Catherine M. Recker, Esq. Welsh & Recker PC Philadelphia, PA	Susan M. Robinson, Esq. Thomas Combs & Spann PLLC Charleston, WV

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Honorable Paul J. Barbadoro
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Clerk of Court Representative

Angela E. Noble, Esq.
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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
James C. Dever III Chair	D	North Carolina (Eastern)	Member: 2022 Chair: 2022	---- 2025
Andre Birotte, Jr.	D	California (Central)	2021	2024
Jane Boyle	D	Texas (Northern)	2021	2024
Timothy Burgess	D	Alaska	2021	2023
Robert J. Conrad, Jr.	D	North Carolina (Western)	2021	2024
Roger A. Fairfax, Jr.	ACAD	Washington, DC	2019	2025
Michael J. Garcia	JUST	New York	2018	2024
Lisa Hay	FPD	Oregon	2020	2025
Bruce J. McGiverin	M	Puerto Rico	2017	2023
Jacqueline H. Nguyen	C	Ninth Circuit	2019	2025
Kenneth A. Polite*	DOJ	Washington, DC	----	Open
Catherine M. Recker	ESQ	Pennsylvania	2018	2024
Susan M. Robinson	ESQ	West Virginia	2018	2024
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

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ADVISORY COMMITTEE ON CRIMINAL RULES
SUBCOMMITTEES
(2022–2023)

E-Filing Deadline Joint Subcommittee Judge Jay Bybee, Chair Judge Catherine McEwen Judge Cathy Bissoon Judge Carl Nichols Catherine Recker, Esq. Jeremy Retherford, Esq. Joshua Gardner, Esq.	**Pro Se Filing Subcommittee** Judge Timothy Burgess, Chair Lisa Hay, Esq. Judge Bruce McGiverin Angela Noble, Clerk Susan Robinson, Esq. Judge James Dever
Rule 17 Subpoenas Subcommittee Judge Jacqueline Nguyen, Chair Judge Jane Boyle Lisa Hay, Esq. Catherine Recker, Esq. Jonathan Wroblewski, Esq. Judge James Dever	**Rule 49.1 Subcommittee** Judge André Birotte, Chair Judge Jane Boyle Lisa Hay, Esq. Judge Bruce McGiverin Susan Robinson, Esq. Judge James Dever

Updated March 16, 2023

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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TAB 1

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 27, 2022
Phoenix, Arizona

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on October 27, 2022, in Phoenix, Arizona. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr. (via Microsoft Teams)
Judge Michael J. Garcia
Lisa Hay, Esq. (via Microsoft Teams)
Judge Bruce J. McGiverin
Angela E. Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq. (via Microsoft Teams)
Susan M. Robinson, Esq.
Michelle Morales, Esq.
Judge John D. Bates, Chair, Standing Committee
Judge Gary S. Feinerman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine T. Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

H. Thomas Byron III, Esq., Secretary to the Standing Committee
Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Christopher I. Pryby, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
Shelly Cox, Management Analyst, Rules Committee Staff (via Microsoft Teams)
Nicole Y. Teo, Intern, Rules Committee Staff (via Microsoft Teams)

Additional persons attended, at the request of the Committee, to discuss a proposal to amend Rule 17. They are listed on page 15 of these minutes, when they introduced themselves to the Committee.

Opening Business

Judge Dever opened the meeting with administrative announcements, noting it was his first meeting as chair after one year off the Committee. He thanked the staff at the Administrative Office for making all of the arrangements and Judges Bates and Feinerman for attending on behalf of the Standing Committee. Noting that Judge Feinerman had served as a member of the Committee for seven years, Judge Dever said it was terrific that he has returned as our liaison to the Standing Committee.

Ms. Morales attended to represent the Department of Justice, and Judge Dever welcomed her, noting that she had represented the Department at several prior meetings.

Judge Dever noted that several members would be participating via Microsoft Teams: Dean Roger Fairfax, Ms. Hay, Ms. Recker, and Ms. Noble. Professors Struve and Coquillette were also participating on Teams.

Judge Dever also noted that Judge McGiverin had experienced multiple travel delays, but would arrive as soon as he could.

Finally, Judge Dever welcomed and introduced several new members of the Rules Committee Staff Office. Tom Byron is the new Secretary to the Standing Committee and head of the Rules Support Office. Allison Bruff is our new counsel, assigned to both the Civil and Criminal Rules Committees. The new Rules Law Clerk is Chris Pryby, and the new Rules Committee intern is Nicole Teo. Judge Dever concluded by welcoming the members of the public who were viewing the meeting on Microsoft Teams.

After covering some housekeeping details, Judge Dever asked Ms. Bruff to provide an update on the status of the various rules amendments. She directed the Committee's attention to the table beginning on page 216 of the agenda book, which tracked the various proposed amendments, new rules, and official forms. She noted that the proposed amendments to Rule 16 are scheduled to go into effect December 1 of this year absent congressional action, and the status of other rules in process was listed.

Mr. Pryby then gave a brief update on legislation affecting the Criminal Rules. He noted that the most significant pending legislation was the yearly National Defense Authorization Act, page 140 of the agenda book, which typically passes at or near the end of December. It includes a retroactive reduction in sentences for certain cocaine-related crimes, and it provides that court can reduce these sentences without having the defendant present in person, notwithstanding Rule 43. It also provides that notwithstanding Rule 41 the district court in the District of Columbia may issue a warrant for the seizure of certain assets anywhere in the United States, instead of requiring the warrant to be obtained in the district where the assets are located. Although other bills were noted in the chart, Mr. Pryby observed that it was unlikely that they would be passed soon.

Judge Dever then opened the floor to any comments, additions, or corrections moved to consideration to the Minutes from the April 2022, beginning at page 15 of the agenda book.

Professor Beale noted that Ms. Bruff had brought a few typos to the attention of the reporters, who requested permission to make those corrections. A motion was made and seconded to approve the minutes, including the corrections noted by the reporters.

Judge Dever asked Professor Beale to introduce the next agenda item, a report from the Rule 49.1 Subcommittee chaired by Judge Birotte. She explained that the proposal referred to the Subcommittee came from the Committee's former Standing Committee liaison, Judge Jesse Furman. In the *Avenatti* case[1] Judge Furman had occasion to look closely at Rule 49.1 (Privacy Protections for Filings) and particularly the committee note. As a result of his research, Judge Furman concluded that it would be very desirable to amend the committee note, which cannot be done without a change to the text. His proposal to amend the text and add a new note was referred to Judge Birotte's Rule 49.1 Subcommittee.

Judge Birotte explained that the Subcommittee considered several issues. The first question was whether the note was causing a sufficient problem that an amendment to the text was needed to address that problem. If so, then what would an amendment look like? Judge Furman had proposed the addition of an introductory phrase, "Subject to any applicable right of public access." But if the Committee were to amend the rule adopting that language, it would need to consider an issue of consistency with other rules. To assist the Subcommittee, the prior Committee chair, Judge Kethledge, had reached out to the Committee on Court Administration and Case Management (CACM) to determine its view regarding a possible amendment. CACM was amenable to the Committee's consideration of an amendment, but it was not prepared to take a position without getting input from the stakeholders, particularly the defense bar. Coincidentally, at that time an article by a member of the defense bar was published, raising their concerns about and opposition to the proposed amendment.

The Subcommittee, Judge Birotte said, had extensive discussions about whether there should be an amendment, as well as possible language. It also reviewed the case law, and an analysis of how different judges had interpreted Rule 49.1.

Ultimately, Judge Birotte said, the Subcommittee was not convinced that an amendment was warranted. Members thought it was important that the rule currently does not say that the court "shall" seal the forms. Instead, it says that the court "may" order that a filing be made under seal without redaction. That gives the court discretion and flexibility, and the case law demonstrates that is how different judges have interpreted the rule. The Subcommittee agreed with the old saying "if it ain't broke, don't fix it."

Professor Beale added that the Subcommittee also discussed the difference between procedure (which is within the Committee's jurisdiction) and substance (which is not). The question whether these submissions are judicial documents subject to disclosure under the First Amendment or the common law right of access is a matter of substantive law, and accordingly it does not fall within the Committee's authority. The Subcommittee recognized it was important

[1] *United States v. Avenatti*, 550 F.Supp.3d 36 (S.D.N.Y. 2021).

not to take a position on something that isn't within the Committee's proper ambit. On the other hand, Judge Furman thought that the note does exactly that by putting a thumb on the scale. So the Subcommittee tried to determine whether it would be possible to take that thumb off the scale without somehow signaling the Committee's own views on the substantive issue. It concluded that making any change would be read as taking a position. The Subcommittee concluded it was not necessary to make any change because the note is not having a significant effect. Judges are looking at this issue independently, analyzing the substantive issues, not just following the note.

The Subcommittee also considered the harm that might be done by an amendment. The defense bar has read the proposed amendment as taking a position, either signaling that we think these affidavits are judicial documents and there is a right to disclosure, or at least distancing ourselves from the view in the note. The Subcommittee saw no way around that problem, and no compelling need to weigh in on the issue. The Committee, Professor Beale said, generally tries to avoid doing something controversial that would generate widespread opposition. The recently published article suggested that there would be opposition from the defense bar. So in the absence of a clear need to take action, the Subcommittee concluded that the better position was to leave things where they were. Clearly, the *Avenatti* opinion itself demonstrated that the rule did not prevent Judge Furman from reaching what he thought was the correct result. And now his published opinion is available, and it lays out his analysis for the next judge.

Judge Dever asked if the members of the Subcommittee would like to add their views.

A member who stated she agreed that no change should be made added the observation that the committee note does seem to recommend that the affidavits be confidential, whether that is fortunate or unfortunate.

Another Subcommittee member said that she had been very much influenced by the reporters' memorandum that surveyed all of the court decisions, which showed that the courts were considering all of numerous factors and not resting on the language in the rule or the committee note. So there just was not a pressing need to make any changes.

Another member commented that the defense bar feels the financial privacy of indigent defendants should be protected just as it is for those who retain counsel. The Subcommittee recognized that the rules don't ordinarily include an admonition to follow the Constitution or to follow common law, but we were considering an amendment that would say "Subject to any right of public access." That would have been a departure from how the rules ordinarily are written, omitting any reminders to follow the common law or the Constitution. That was a key reason the Subcommittee felt it wasn't a needed amendment.

Professor Beale noted that Professor Coquillette has often reminded the Committee that if we put this in one rule, then every other rule would have to start with "and consistent with the Constitution." Otherwise writing it into one rule could create a negative inference regarding other rules. Professor Coquillette agreed.

Judge Dever then opened the floor for comments or observations from other members of the Committee or others with observations. A member commented that for him the problem of a negative implication was a particularly persuasive point.

Judge Bates said it seemed like a very thoughtful resolution, but he posed a hypothetical question: if Judge Furman were to convince CACM to change the guidance quoted in the committee note to delete the reference to the financial affidavits for assigned counsel, would the Subcommittee feel that would require action by the Committee?

Professor Beale responded that there is no way to eliminate a bad committee note. So the note quoting the prior CACM guidance would remain even if the Committee amended the rule and accompanied it with a new note. On the other hand, if CACM does change its guidance, the new guidance would be promulgated and presumably have its own effect. So the Subcommittee did not think that an amendment—which could not eliminate the old note—would be that important in that scenario.

Professor Coquillette and Professor King said it is possible for West Publishing and LexisNexis to add a footnote stating there had been a change in the rules. That might be an option in the hypothetical situation Judge Bates raised.

The Standing Committee's liaison expressed agreement with what had been said so far. He wished there were an eraser to allow the deletion of the note's reference to financial affidavits. But without such an eraser, he thought any cure would be worse than the disease.

Ms. Morales noted for the record that Department of Justice agreed with the Subcommittee's recommendation.

A motion to adopt the recommendation of the Subcommittee not to move forward with Judge Furman's proposal passed unanimously, and Judge Dever thanked all the members of the Subcommittee, especially the Chair, for their hard work. He stated he would communicate the Committee's decision to Judge Furman.

Judge Dever then directed the Committee's attention to Tab 3, beginning at page 162, which deals with the topic of pro se access to electronic filing. He said Professor King would introduce the topic and then turn it over to Judge Burgess, who chaired the Subcommittee. The other members of the Subcommittee were Judge McGiverin, Ms. Hay, Ms. Robinson, and the clerk representative, Ms. Noble. Finally, Judge Dever noted that the Committee was privileged to have Professor Cathie Struve, who is chairing the working group, available to provide additional information.

Professor King said the item on pro se filing was on the agenda to get the Committee's feedback on topics that had been identified for discussion by all the advisory committees affected by this proposal. Currently Criminal Rule 49 (reprinted at the top of page 169) states that a party not represented by an attorney must file nonelectronically unless allowed to file electronically by the court, by court order, or by local rule. The presumption is that unrepresented parties in

criminal cases must use paper filing. The other advisory committees' rules also deal with filing by unrepresented parties.

In 2021, the Rules Office received a proposal to expand access to electronic filing for unrepresented parties in all proceedings. To facilitate consideration by all of the relevant advisory committees, the Standing Committee established a working group, chaired by Professor Cathie Struve, who was participating in the meetings of each of the relevant committees. Professor King noted that Professor Struve's memo in the agenda book identified several issues, based on the Federal Judicial Center's comprehensive study. Professor King encouraged members to focus on pages 200 to 231, which described what the various district courts had reported was happening in those districts with criminal cases and prisoners. That would be the focus of the Committee's attention.

Professor King then identified three issues for discussion. First, does the current rule, which presumes that unrepresented parties in criminal cases must use paper filing, state the correct default rule, or should the default rule be changed? She noted that the Federal Judicial Center study found that several districts have already allowed unrepresented criminal defendants to use some sort of electronic filing. A few of them had approved the use of CM/ECF by unrepresented criminal defendants. There were not many, she noted, but the existing rule gave them the flexibility to do so. It states that unrepresented parties may file using the court's electronic-filing system "only if allowed by court order or local rule." And that has been permitted in a few districts.

The second issue, Professor King stated, is allowing alternative electronic access in a format such as e-mail or fax. This expanded quite a bit during COVID when there was less access in person to the court and many more districts in the study allowed some sort of electronic filing by prisoners in particular. That was facilitated by scanners provided by the federal court to mostly state institutions. One of the issues that the working group will be discussing is whether we should be encouraging expansion of that type of alternative electronic access outside the CM/ECF system.

Professor King described the final issue, which had surfaced in several different committees, as the requirement that unrepresented parties serve others who are already on CM/ECF in person or by paper non-electronically. If parties are on CM/ECF, they get an electronic notice when the clerk scans in whatever filing is delivered by the unrepresented party to the Clerk's Office. But the duty to serve remains, and is regarded by some as burdensome and duplicative.

Professor King noted that the Subcommittee had discussed these issues, and the memo in the agenda book described its reactions. Now the Subcommittee wanted to get input from the Committee and to hear about members' issues and experiences.

Judge Burgess thanked Professor King for a great summary, noting the variety of practices in different districts. Turning to the first issue, the possibility of changing the default position that requires unrepresented defendants to file in paper, he said the Subcommittee

discussed the burden that would place on the clerk's office if unrepresented parties were allowed to file in CM/ECF or by other electronic means (like email). Some districts have tried this and found it wasn't as hard as they thought it was going to be. But one of the Subcommittee's concerns had been the burden on clerks' offices. He also noted that in his experience, as a practical matter in most criminal cases with pro se defendants, they have standby counsel that can handle the electronic filing. So the number of unrepresented defendants without access to electronic filing is very small. But that did not mean the Subcommittee should not consider whether the default should be changed. However, as drafted the rule does allow the courts to permit pro se defendants who are capable of doing so to file electronically. He summed up the Subcommittee's general consensus: the opportunity is there now without requiring a change in the rule.

As to the third issue, regarding service of process, he acknowledged it is a problem in the sense that the rule requires an unrepresented party to make paper service. But there was some concern that a change would place a burden on the clerk's office and it would raise questions about when something was filed. He hoped to hear more from Professor Struve about the discussions in the other advisory committees as they considered these issues, including the possibility of changing their own default rules.

Overall, the Subcommittee recognized the need going forward to take advantage of electronic filing, but that is already available in most districts if an unrepresented defendant can establish the ability to do it.

Judge Burgess noted that another problem the Subcommittee discussed was the difficulties faced by pro se litigants in custody in facilities that don't have the ability to allow them to file electronically. We have prisoners in state and local facilities that do not have the wherewithal for them to file electronically. The Subcommittee recognized the value of increasing electronic filing, but the general consensus was that we just are not there yet. Judge Burgess and Judge Dever then invited other Subcommittee members to make any additional comments.

A Subcommittee member stated that her initial reaction had been that all litigants should have equal access to electronic filing and we should move towards allowing pro se individuals to utilize the electronic-filing system. But it would not be logistically feasible to move from the current rule that pro se parties cannot file electronically without a judge's permission to requiring them to file electronically. That would be unworkable because persons who are incarcerated don't have access to computers. She noted some of the disadvantages of not being able to file electronically. For example, in many jurisdictions an electronic filing can be submitted until midnight, but pro se filers who must file hard copies must be at the courthouse earlier, by 4:00 o'clock or whenever it closes. And it's easier not having to deal with things like making copies. So she felt that we definitely should work toward increasing access to electronic filing.

The member raised the possibility of seeking a middle ground between the current position of the rule (no access unless approved by the court) and the requirement that all litigants must file electronically (i.e., a rule that it's permissible: unrepresented parties may file electronically if they can demonstrate the ability to do so, without requiring the permission of the

court). She thought that a pro se litigant could establish this capacity in the same manner that attorneys do so now: they must sign up for and take training, and then demonstrate that they know how to use the system and the governing rules. Some jurisdictions, she noted, have local rules requiring attorneys to take a test online to show that they are competent to receive ECF credentials. A member responded wryly that his court sometimes had trouble with attorneys being able to use the electronic filing system correctly.

Another Subcommittee member commented that she had not been able to join the most recent Subcommittee call, but she commented that in her jurisdiction, Oregon, they put scanners in two of the biggest state prisons so that prisoners could scan their materials and electronically file that way. That has worked fairly well. The prisoners don't need an Internet connection, and they don't need CM/ECF filing, but they have a way to create a document that the clerk's office receives. The problem is that it's very expensive. They had been able to include only two prisons in a pilot project, though there are 14 or 15 other prisons. Extending this would require access to the libraries within each prison and access to the scanner for each prisoner. That would be logistically complex, and Oregon had not come up with a method that she could recommend would work for the rules.

The member stated the hope that even if there is no amendment to Rule 49 now, it would be possible to preserve the benefit of the work and analysis done by the Subcommittee and the Federal Judicial Center (FJC). It seems fair for prisoners to have access electronically rather than by the ordinary paper mail method. Since the Subcommittee surveyed the various problems that come up, we apparently still need to have the laboratory of experimentation in all of the district courts. She hoped we could encourage that experimentation.

Judge Burgess responded that the member had largely summed up the Subcommittee's views.

Noting that the Committee's clerk representative had been a critical member of the Subcommittee given her experience as the clerk in the Southern District of Florida, Judge Dever asked her to share her thoughts. She responded that the discussion so far had analyzed the issues very well. She said we want to expand electronic filing, and we all understand the importance of equal justice and having everyone have access. But logistically it is very complicated, particularly in larger districts. Her district has five locations and six different jails, some state and some federal. So logistically, it's expensive and difficult to organize. Changing the default would make it impossible for many courts to comply with the rule. The issue is really logistics, because we all have the same goal. It's just a matter of how do we get there, and how do we do it evenly across the country.

Judge Dever then asked Professor Struve to explain the larger project. She began by thanking the Subcommittee, its chair, and the reporters for their valuable insights. Noting that the working group was convened at Judge Bates's suggestion to consider some proposals with respect to pro se access to CM/ECF, she wanted to clarify where those discussions have been with respect to access to CM/ECF, and foreground the questions with respect to service mentioned earlier. With regard to access to electronic filing, she emphasized that no one was

suggesting that the rules should *require* CM/ECF filing by self-represented litigants. The various proposals would either increase access by making it a presumptive option for self-represented litigants, or in the absence of such a change would address the practice of a minority of districts around the country that flatly forbid the use of CM/ECF by any self-represented litigant. She noted that about 15% of the districts, by the FJC's count, provide that no self-represented litigants can ever access CM/ECF in their own cases. But that is a minority position, as is the position of those other courts that presumptively permit CM/ECF access for pro se litigants. Those positions are the outliers on each side, with the larger middle ground being to allow litigants to seek permission. She also emphasized that in our discussions there had been no momentum in favor of extending CM/ECF access even on a permissive basis to incarcerated self-represented litigants.

She thought that the Subcommittee had made an excellent point: the universe of litigants to whom any such proposal might apply in the criminal rule context is very small. According to one study, perhaps 0.3% of felony defendants in the federal system are self-represented, and among those, not all are incarcerated (though some are). So we have a very small N to think about. And even if you say, under the § 2255 rules, which do permit the application of either the criminal or the civil rules to the § 2255 motion, among those litigants, Professor Struve thought the vast bulk would be incarcerated, though she recognized that custody can extend beyond incarceration for § 2255 purposes. But the relevant point is the N is very, very small as far as the criminal rules are concerned.

So Professor Struve agreed with the Subcommittee that both the benefits and the downsides of the access to e-filing proposal are much less pronounced with respect to the criminal rules. It is more of an issue for the other sets of rules—Civil, Bankruptcy, and Appellate—and she offered to provide an overview of those committees' discussions, with the caveat that the service provision is far different in this respect. The service provision would build on the insight that any paper filings by a self-represented litigant are ultimately scanned and uploaded by the clerk's office into CM/ECF. Because all participants in CM/ECF are going to receive notice of those filings and access to them through CM/ECF in the notice of electronic filing, the question arises whether it's necessary to additionally require that paper copies be served on those parties who are registered in CM/ECF. She emphasized this proposal would not ask that the clerk's office do anything different than what we understand it already does. At present, the clerk's office takes paper filings, scans them, and puts them in CM/ECF. The proposal builds on that, saying once they file in CM/ECF, why do CM/ECF participants in the case need to receive a paper filing as well?

Because this issue concerns service, not filing, the self-represented litigants who might possibly be affected by a rules change would include both incarcerated and non-incarcerated litigants. Assuming that the § 2255 rules are currently deemed to incorporate Criminal Rule 49's approaches, she thought the affected population would include incarcerated people moving under § 2255. And especially as to that population, she asked, why should they use the limited funds in their prison account on stamps to send paper copies to the U.S. Attorney's Office, which will have to check them for anthrax and which already has an electronic copy via CM/ECF? She

suggested that the service question would be the place where the Committee might most profitably direct its attention. That was where she thought a rule change in the Criminal Rules might actually have real world effects.

Next, Professor Struve asked for more information about some points raised on page 165 in the agenda book memorandum. The memorandum mentions that the service proposal could interact with the prison mailbox rule. She expressed confusion about that because the prison mailbox rule, as she understood it, concerns how to tell whether an incarcerated litigant's filing is timely. The proposal to eliminate a requirement of separate paper service—which is what was on the table—did not really relate in any way to the timeliness of the *filing*. It would simply absolve the litigant from separately *serving* the papers they are filing. She asked how the prison mailbox rule related to this service provision. Another question referred to in the memo is determining the date of filing: when delivered to the clerk's office, or when scanned in? She wondered again whether the concern here really is about the date of *filing*, because that would not be affected by the removal of the separate service requirement. The date of filing would still be whatever it would have been without the rule change: when it's delivered to the clerk's office if it's someone not incarcerated, or when delivered to prison officials in compliance with any of any applicable prison mailbox rule. But Professor Struve said flagging the issue of timing had been helpful because it had spurred her to think about how the change would interact with the three-day rule in Rule 45(c). The time period is counted from the date of service, and if there were a change in the service requirement we should think more about how to draft the rule to take account of any possible delays between receipt by the clerk's office of a hard copy and subsequent uploading into CM/ECF. But if there are other ways in which this would interact with the date of filing, she would like to know about them.

Finally, the memo mentioned the potential for increased burdens on the clerk's office. Professor Struve said she was having trouble figuring out what those burdens would be. She found it hard to imagine a Criminal Rules situation in which there could even be a potential problem. Presumably the other litigant in a § 2255 proceeding is the U.S. government, which presumably is always on CM/ECF. Accordingly, the government would receive any filing that the litigant makes in hard copy once it's put into CM/ECF. She recognized that in civil cases there may be other parties who are not CM/ECF participants. The districts that have adopted the proposed approach to service (which included the district in which the Committee was meeting, as well as the Southern District of New York and at least one other district) do not seem to have experienced problems operationalizing it. But in order to be able to ask them whether they have encountered particular problems, it would be very valuable to know exactly what burdens would fall on the clerk's office as a result of a provision that would merely absolve the litigant from serving participants who are on CM/ECF. The proposal, she noted, would still require separate paper service on any litigants who do not participate in CM/ECF.

Professor King thanked Professor Struve and replied quickly to one part of her question on service, pointing out that there are often codefendants in criminal cases who do not receive service through CM/ECF. In thinking about the rules governing service, it is important to keep in

mind that it's not just the government. She agreed with Judge Bates that only unrepresented codefendants would not be on CM/ECF, so the number would not be large.

Judge Dever invited comments from other Subcommittee members and asked the Committee's clerk representative for her perspective. He recalled that in the Subcommittee discussion she had spoken about the logistics of monitoring emails and all the different ways communications come to the clerk's office, and the resource constraints and logistical reality of dealing with them.

The Committee's clerk representative responded that the Subcommittee's discussion of the service issue included not only CM/ECF but also alternative means, such as filings by email. Her district experienced issues during COVID receiving documents via email, not just by pro se filers, but also by the attorneys who sent emails to the box and assumed because they were sent to the email box that they didn't have to serve anyone else. And one of the issues specifically was with sealed documents. When they sent sealed documents, they didn't serve the parties and folks didn't show up for hearings and things of that nature. But that was with regard to email filings, not specifically with regard to CM/ECF. As to service, she agreed that if you file something in CM/ECF you should only have to serve individuals who are not registered for CM/ECF, not all of the people that are already receiving electronic filings. She favored changing that rule if possible. With regard to filing, her concerns focused on registration and getting pro se filers registered for CM/ECF. Professor Struve said she would follow up via email with the clerk representative.

Another member observed that at the outset of a case a litigant might not accurately identify the opposing party, which then puts a burden on the clerk's office to determine who should be served. That had been addressed with regard to civil pleadings in Oregon, which has a standing order that the Attorney General's Office has agreed to accept electronic service from the clerk's office whenever a § 2254 is filed. With that agreement, the clerk's office does serve the Attorney General's office. That might be a model to consider. But their U.S. Attorney's Office has not agreed to accept service of § 2241 petitions. When a § 2241 petition is filed by somebody who says they're being held unconstitutionally by the federal government, the clerk's office can't serve that because the U.S. Attorney's Office is not yet a party. They are not on CM/ECF for that pleading. Usually the party that's the opponent would be the custodian. The warden, usually of the federal prison, would be the opposing party. She thought that was probably one of the burdens on the clerk's office, having to determine how to serve that warden. That was one of the problems with service.

The clerk liaison added a concern about burden shifting where the burden is on the party to file the document and to serve it, not on the clerk's office. She was concerned that there would be claims that the clerk didn't serve the document on the correct party, though ultimately it is really the filer's responsibility to perfect service.

Judge Burgess commented that the Committee might want the Subcommittee to take a harder look at this service issue. He asked for an update on whether the other Committees are contemplating reversing the presumption concerning pro se access to electronic filing. If so, he

wondered whether it would it be a problem to have a different procedure under the Criminal Rules.

Professor Struve said the other three committees had already met, and most of their discussion concerned e-filing rather than service. However, when the service proposal came up, it was always to approbation. Members had made comments such as "that seems like an easy lift" and "that sounds like a good idea." So service seems to be kind of ticking along in the other committees as something to work on as a potential rule amendment.

On the question of access to e-filing, she noted that Mr. Reagan and his colleagues at the FJC have been phenomenal in studying this question. Their study found that for presumptive access to electronic filing for self-represented litigants the level of court makes a huge difference.

In the courts of appeals there is almost an even split between circuits that presumptively permit CM/ECF access for non-incarcerated, self-represented litigants and those that do not. She emphasized this referred only to non-incarcerated litigants. No circuit is presumptively permitting access for incarcerated litigants, though the Ninth Circuit had experiments in some particular facilities. With regard to non-incarcerated pro se litigants, six of the courts of appeals presumptively permit them to file electronically, and six will allow them only with permission in the case. The final court, the Sixth Circuit, has not permitted self-represented parties to file electronically. Professor Struve expressed her personal hope that circuit would reconsider its position. Leaving the Sixth Circuit aside, it is a six-to-six split between presumptive access and access with permission.

In the district courts, in contrast, the majority of districts allow unrepresented parties to file electronically with permission. But in slightly less than 10% of districts, if pro se litigants are not incarcerated, they don't need special permission, though they may need training. And 15% of courts appear to say that pro se litigants can never file electronically.

The bankruptcy courts are furthest along the spectrum because they basically do not allow self-represented litigants to access CM/ECF. But in the Bankruptcy Rules Committee, a majority of the participants were strongly in favor of increasing access. They viewed it as an access to court issue and were not perceiving particular problems. They thought that the arguments advanced against access to CM/ECF were not particularly persuasive, and the clerk of court representative strongly supported the idea that it would alleviate burdens on his office.

Professor Struve said none of the Committees had reached any concrete decisions. She described the Appellate Rules Committee as intrigued, given the fact that the appellate courts are by and large further along in potentially adopting this greater access position. In that Committee, the question might be whether they are going to try to shift the default to presumptive permission, from which a court could opt out in a case. Or would the Committee say the courts of appeal are already moving in that direction, so there's no need for a rule change? In the Civil Rules Committee meeting the views of skeptics on increasing access were quite well represented, although in some instances voiced by participants who are not members of the committee. But

there were also questions raised about whether this is in fact a rules issue. One Civil Rules Committee member suggested CACM should take the lead on email access to e-filing.

In summary, Professor Struve said the discussions spanned a range of degrees of enthusiasm for shifting the default with respect to e-filing. Bankruptcy has been the most enthusiastic, Civil much more doubtful and rather skeptical about whether this is for the Rules Committees at this point, and Appellate considering whether to go their own way or just allow things to evolve.

Mr. Byron, who also attended the other committee meetings, added an additional issue. One of the comments he thought might be worth further inquiry and discussion is whether there's a benefit to providing notice to pro se litigants by electronic means, especially for court orders. This might be less significant for Criminal Rules than for Civil and Bankruptcy. But in Bankruptcy, in particular, he had been struck by the observation that many of the unrepresented litigants in the bankruptcy courts and in civil cases too have no regular fixed addresses. Because they change their address from time to time, mail service is often ineffective at providing notice when the court orders a party to file or appear. Electronic notice could be really beneficial to those parties, and he thought that was an issue to add to the list.

After thanking Professor Struve for her efforts, Judge Bates commented that he agreed that the service issue is one that is right for continued coordinated action. It is more difficult to decide exactly what the next steps should be with respect to the access to CM/ECF issue more generally, but he and Professor Struve would continue talking about that.

Professor King asked for other comments in response to the question about concerns regarding a change in the service requirement. A member asked how a pro se litigant would know who is and is not on CM/ECF if we eliminate paper service for those on CM/ECF. How does that work in practice?

Professor Struve responded that question could be pursued with the districts that have implemented this procedure. These districts have a large docket of self-represented litigants, and there must be an answer. And she emphasized we are only considering service with respect to filings after the initiation of the case, and not service of case-initiating documents like complaints or petitions.

Judge Bates commented that it is a very small group where there is a self-represented criminal defendant and there are other parties in the case that will not see CM/ECF. He had never seen such a case, where there is more than one pro se defendant in the case without standby counsel.

There was agreement that the Committee should learn more about the experience in the districts, including the Southern District of New York and the District of Arizona, where they have already eliminated paper service on parties who are on CM/ECF. Professor Struve commented that the idea of eliminating paper service in this context had been prompted by an early conversation with a person who had been instrumental in bringing this change to the Southern District of New York.

With regard to the general issue of increasing CM/ECF access for self-represented parties, Ms. Morales stated that the Department of Justice supports any measures taken to increase and provide equal access to all our tools. But in looking to expand access to defendants the Committee should also consider the safety concerns that that may raise. She reminded the Committee of the report from the Task Force on protecting cooperators and the risk that any access from prison to these files could potentially cause some harm to the defendant. She put this on the record as the Department's only concern about expanding access.

Judge Nguyen thanked the Subcommittee members for their work, and she endorsed the view that we should be cognizant of the risks and technological challenges but move in the direction of equal access to CM/ECF. But in the meantime, she said, the Subcommittee had discussed some districts that are providing alternative means of electronic access, such as providing portals and allowing filing by email. Though each would carry its own challenges as discussed, she thought from a technological standpoint it would be fairly easy to provide portals where documents can be uploaded. One of the lessons her court had learned during the pandemic was the need to move aggressively to take advantage of technology. During the height of the pandemic, they had to rotate staff coming in just to scan the tremendous volume of filings through the drop boxes. They were thinking about how they could move this to some electronic format that would be safer. She asked whether there would be a means of providing encouragement of these alternative means of electronic submissions.

Mr. Reagan responded that one of the frustrations the FJC researchers had encountered was the ambiguity of the phrase "electronic filing." It can mean filing using CM/ECF, but it can also mean emailing something to the court for filing or using some kind of web portal upload. He also commented that "rules are not always rules." The FJC researchers found that many courts were not enforcing the paper service rule, and there was no incentive to enforce it. The other side wasn't enforcing it because they were already getting service. So there was nobody enforcing the rule. That, he said, was another part of that dynamic: the rule is not being followed because nobody thinks in their particular circumstance that the rule is particularly useful.

Judges Burgess and Dever asked whether there was anything else the Committee wanted the Subcommittee to look at in addition to the service issue. Judge Dever stated that the reporters would follow up with Professor Struve and monitor developments with respect to the other Rules Committees. The Committee will also continue to gather information about what is actually happening on the ground in the districts that are technologically ahead to learn what they are doing, and whether the rule is serving as an impediment, suggesting the need for an amendment.

Professor Beale noted there were references in the FJC report to the additional difficulties that NextGen seems to be posing for pro se parties. She was uncertain where that NextGen process is and how it is being coordinated with what the Committee has been considering. As Judge Nguyen and others said, one of the Committee's overriding goals is access and if there are technical issues concerning software that would scan for malware and so forth. She asked whether NextGen is coming, or is it here? And is there a formal way of bringing these projects together?

Judge Bates responded that CM/ECF is always evolving through NextGen, and it is both here and coming. He characterized it as a process rather than a single thing. He did not think it would be beneficial to wait for something to happen with NextGen, though we should be aware of it, and may be able in some instances to work in coordination with it. Professor Beale expressed the hope that the information that the FJC was collecting in this massive study is somehow being fed back to the people who are working continually on CM/ECF NextGen.

Mr. Reagan said NextGen is mostly here. For the past few years, courts have been transitioning to NextGen first a few at a time and then a very large number, many of them fairly recently. So NextGen is not something in the future, but very much in the present.

Mr. Byron noted, as a matter of terminology, that NextGen CM/ECF is the process that was just completed of transitioning all of the courts to that system. There is, however, an additional conversation, without a specific timeline, to replace CM/ECF with an entirely different platform. He thought that was at least several years away from full adoption and implementation. He thought that in the process of replacing CM/ECF with a different platform, there may be opportunities for the Rules Committees to work with the people at the AO who are working on that process to help ensure that that new products take account of the concerns that we're identifying. But we should not wait for that to be fully developed. There are still things we can do in the rules process in the meantime to address what is possible under what we now live with, which is NextGen CM/ECF (itself subject to constant evolution and tweaking).

The Standing Committee liaison encouraged the Subcommittee also to reach out to the clerk's office in the Northern District of Illinois, particularly as it pertains to CM/ECF electronic filing by pro se litigants, the procedures that clerk's office put in place to prevent malware from being introduced into the CM/ECF system, and how it handles service on CM/ECF users by pro se filers. He thought they had worked things out pretty well and might have some good lessons to impart.

Judge Dever thanked him for that suggestion. Noting this had been a very helpful discussion, he said that the reporters would continue to communicate with Professor Struve, and the Subcommittee would focus on the service issue as Judge Bates had requested, not wait for potential CM/ECF or NextGen solutions, and provide a report at our next Committee meeting.

After a short break, Judge Dever opened the discussion of Rule 17. He introduced himself, noting he is a district judge in the Eastern District of North Carolina and chair of the Committee. After introducing reporters Professors Nancy King and Sara Beale, he asked the other Committee members and participants in the Rule 17 discussion to introduce themselves. Judge Dever noted that Judge McGiverin, a United States Magistrate Judge from the District of Puerto Rico, was experiencing travel issues but would join the Committee as soon as possible.

The Committee members and staff introduced themselves, and the following participants, who attended at the invitation of the Committee, introduced themselves:

Michael Carter, Executive Director, Federal Community Defender's Office, Eastern District of Michigan

Robert (Rob) Cary, Williams & Connolly, Washington, D.C.

Mary Ellen Coleman, Assistant Federal Public Defender and Branch Supervisor for the Federal Public Defender for the Western District of North Carolina, Asheville Division

Donna Elm, Criminal Justice Act panel attorney for appeals and habeas cases for the District of Arizona, the Middle District of Florida, and the Ninth and Eleventh Circuits

James E. (Jim) Felman, Kynes, Markman & Felman, P.A., Tampa

Mike Gill, Criminal Chief, Eastern District of Virginia and chair, Criminal Chiefs Working Group

Angie Halim, criminal-defense trial attorney representing indigent federal criminal defendants, Philadelphia

Ellen Leonida, BraunHagey & Borden, San Francisco

Lisa Miller, Deputy Assistant Attorney General, U.S. Department of Justice's Criminal Division

Dimitra Sampson, Assistant United States Attorney, District of Arizona

Stephen (Steve) Wallin, Criminal Justice Act panel attorney, Phoenix

Judge Dever turned the meeting over to Judge Nguyen, the Rule 17 Subcommittee chair, who expressed appreciation for allocating the Committee's time at the meeting to study the Rule 17 issue. She explained that, in its preliminary review of the proposal to amend Rule 17, the Subcommittee concluded that it did not have a sufficient understanding of how the process worked on the ground and how it varied among districts. So the day's purpose was to gain a greater understanding of the rule's functioning. She thanked the participants for attending to share their experiences and explained how the Committee would proceed. She noted that the Subcommittee had planned several panels and set time frames and issues for each. She asked each participant to speak for six minutes, after which she would invite Subcommittee members to ask a single question before she opened the floor to questions and comments from the whole Committee.

The first panelist, Robert Cary, said he practices in Washington, D.C., but handles cases in other districts as well. Mr. Cary said that in his experience courts enforce the *Nixon* three-part test of relevancy, specificity, and admissibility, and he had identified only a handful of reported decisions in federal district courts in New York and the Northern District of California that seemed to depart from the standard. He had found the *Nixon* standard is very hard to meet, so much so that in his last two criminal federal criminal trials, he sought no subpoenas because he did not think in good faith he could meet that standard. For example, in a case in the District of Columbia, he sought to subpoena a company for records concerning its cooperation with the government. This was an important line of inquiry for the defense because the company was

subject to debarment, the government had not debarred it, and the government's chief witness had been able to sell the company for hundreds of millions of dollars. So the defense issued a subpoena. The company moved to quash, and Judge Emmet Sullivan (who has been known to be relatively generous in providing discovery) quashed the subpoena, finding it did not meet the *Nixon* test. Mr. Cary said the defense was unable to identify with specificity precisely what documents it was looking for, much less demonstrate that those documents were admissible. But in the same case, the government issued a trial subpoena for emails from one of the defense witnesses to the witness's employer. The employer, for whatever reason, decided not to move to quash, and the government got all those emails. Mr. Cary characterized this as unfair.

Mr. Cary said it was difficult to provide examples of things that he should have been able to obtain by a subpoena that would have made a difference, because you don't know about what you don't get. But he provided one example from a pro bono drug distribution case he had in the Maryland state courts. A subpoena for phone records provided evidence that defendant was in fact innocent, and the charges were dropped on the first day of trial. But if there had been a motion to quash under *Nixon*, Mr. Cary thought they would have been unable to satisfy the *Nixon* test. His takeaway was that the *Nixon* test is very hard to meet in practice. In most districts, as he reads the law, you have to describe with specificity and demonstrate that that the material sought will be admissible. It's a very hard standard to meet, and clients are aghast and cannot understand why they do not have the same ability as the government has to issue subpoenas. Mr. Cary endorsed the proposal of the New York City Bar Association ("New York Bar"), commenting that that he thought it would go a long way towards not only increasing fairness, but also the perception of fairness.

James Felman, the next speaker, said this is a big issue in white collar cases. In the big fraud cases, we are in a data-driven era. In his current case, for example, the discovery provided by the government was the equivalent of 30% of the Library of Congress, or 3,000 copies of the new Encyclopedia Britannica. This is an enormous amount of information, a "document dump." He called the design of federal criminal litigation trial by one-sided ambush. The government does not necessarily want to obtain the same information that the defense wants. So the defense gets a lot of information, but it is what the government wanted and obtained using a grand jury. But the defense may need different information, and Rule 17(c) is the only way the defense can get what it needs in time to review and use it.

Mr. Felman said his experience was a little different than Mr. Cary's. In many cases the prosecutors did not oppose the sorts of subpoenas that he has asked to be issued, which obviously sought important information. And many times the government concedes the subpoena can issue, though the recipient of the subpoena might move to quash it. That means there are now two rounds of litigation. In round one, the defense has to satisfy the government. And then if they can get through that, in round two, the defense is opposed by the recipient of the subpoena.

Mr. Felman noted that if the government has not agreed to his subpoena, he was probably not going to be successful. He agreed with Mr. Cary that he has to show that he already knows

what he is looking for, and even though he already knows what he is looking for, somehow he cannot prepare for trial without getting it. It's almost an impossible standard to meet. The reality is the defense does not really know with that specificity. It only knows that there is likely to be highly relevant information in the hands of this third party, and they need to get it. So it is almost impossible ever to meet the *Nixon* standard. But most of the time he has not been required to meet the standard, because it would be embarrassing and an obvious due process violation to take the position that the defense cannot get those documents—though sometimes that happens.

And so basically, he said, we are practicing law despite the rule and despite the *Nixon* standard. He described some of the workarounds. Sometimes the clerk's office gives him a blank subpoena, and with the prosecutors' consent, he just fills in the date. We issue the subpoena and it does not even go through the court. When he first started practicing, they would get a trial subpoena, serve it, and sometimes the party would just give us the documents early. But many of the people he is serving are sophisticated, and they will not voluntarily give the defense something early. And he needs pretrial production. He acknowledged that there can be budgetary issues because filing and litigating these motions is expensive. He also expressed concern that in some circumstances, there may be disclosure to the government of a defense theory. Unless he can move ex parte, the government will be able to see what the defense is seeking and then get a copy of the documents when they come in—even if he would not have been required to disclose them to the government under Rule 16. So he urged the Committee to look at this issue, which he characterized as critically important to the modern practice of white collar criminal defense law, saying that practitioners are hobbling along by working around the rule, and it would be much worse if the prosecutors that he worked with were not so professional.

The next speaker was Mr. Wallin, who said that he frequently uses Rule 17 subpoenas before trial in the District of Arizona, he always does so ex parte, and he requests authorization from the judge in advance. He always makes that motion ex parte, and he had never gotten any pushback in various kinds of cases. Mr. Wallin commented on the high quality of the bench in the district, as well as the federal prosecutors.

Mr. Wallin agreed with the previous speakers that the defense needs to obtain material to prepare for trial. He noted that the cases talk about a distinction between discovery and production, which he characterized as semantic, noting that in his motions he always states he is seeking production not discovery. He also reminds the judge that he could also issue a subpoena duces tecum for trial, but that would delay the trial. He surmised that makes a difference to some of the judges.

Mr. Wallin thought that it would have been a real problem if he had the judges that other speakers had described and had to meet those difficult standards. He briefly described a number of cases in which he had been able to subpoena materials. There were many entities in a white collar case, and none were in his client's name—there were nominee family members and so forth. The government had not gotten the bank records from any of these entities, and he needed them for his forensic accountant. In a rape case arising on a reservation, his expert needed the photos of the victim's vaginal and anal areas to determine whether there had been an anal rape.

With the photos he was able to secure a much more favorable plea bargain that did not include sexual assault.

Mr. Wallin urged that Rule 17 be revised to make it clear that, under the judge's supervision, the defense can obtain a subpoena duces tecum as pretrial discovery. Although he thought he was very lucky that the judges in Phoenix seemed to understand that, he emphasized that a revision is really needed.

Judge Nguyen invited questions, first from members of the Subcommittee.

A member asked if subpoenas from retained attorneys and those appointed to represent indigents are treated the same way. She said the public defender in her district said that under 17(a)(1)—which is just about witnesses—retained attorneys can go to the clerk's office and get subpoenas willy nilly. He told her that 17(b) is then primarily for indigents. She did not think that was clear in the rule.

Mr. Cary responded that he believed he could get a trial subpoena simply by going to the clerk's office in any district court in the country without court intervention. But the *Nixon* test is still going to apply if it's a subpoena for documents. But if it's for witnesses, no, but if it's for documents in any way, you have to go through the *Nixon* standard. That was his understanding of law and what his research indicated.

Mr. Felman emphasized the distinction between pretrial and trial subpoenas. He said that, in the case of a subpoena for documents for use at trial, he could go to any clerk's office and get that subpoena with no difficulty. The issue we have been focusing on, in contrast, is a subpoena that would require the third party to provide the documents in advance of trial so that the defense can study them and use them to prepare for trial. He said most courthouses will not issue the defense a subpoena with a blank date. They will only issue a subpoena with the trial date. He can get a pretrial subpoena with an earlier return date only if he has prevailed in litigation and obtained a court order. Now, that's how his courthouse works.

A member asked if 17(a) is solely for witnesses and 17(b) is for both indigent and retained defense counsel, and if both have to satisfy the *Nixon* standards. Mr. Felman responded that Rule 17(a) governs trial subpoenas for everyone. But 17(c) is what you use to get something that's returnable in advance of trial. He thought that was the part of the rule under consideration. But, the member asked, do both (a) and (b) require court intervention?

Another member clarified that 17(a) and (b) are both about trial subpoenas, but they treat indigent defendants differently, because indigent defendants have to name the people they're going to be subpoenaing, whereas those who have retained an attorney can get blank subpoenas at the courthouse. Rule 17(b) in theory requires the defense to name their witnesses and get the court to approve the subpoena, whereas the Committee just heard that if you have a retained counsel under 17(a), you don't have to do that. That seems like a good issue for the Committee to address as well. The member also noted that some defense attorneys get documents by using a witness subpoena under 17(a), and they subpoena the witness to bring the documents. And then the witness might bring the documents earlier.

A member stated that she had always read 17(c) as the only part of the rule that applied to documents, but she thought it was confusing. Some speakers indicated they used 17(a) to get documents. They shouldn't be doing so, but they are. She thought 17(c) was for obtaining documents under court supervision.

Mr. Wallin said that was how he had always read it, and that was the reason he always filed a motion for a Rule 17(c) subpoena in advance to get the authority under Rule 17(c). The first sentence of Rule 17(c)(1) does not refer to court intervention. The second sentence says "The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence." So if you want the items before trial, you have to go to the court, and he had always done that.

Judge Nguyen commented that this was part of the Committee's investigative process, and what the Committee was hearing is that the practices really do vary, including how district judges are interpreting the various provisions. She noted that the next panel would focus on judicial oversight.

Ms. Morales commented that Mr. Wallin's experience was very different from those of Mr. Felman and Mr. Cary. She wanted to understand the source of the difference. Was it a difference between the approaches in different districts, or a difference in the types of cases handled by the speakers, or a combination?

Two speakers responded. Mr. Wallin said he had not done any federal court practice outside the District of Arizona, so he could not say. He assumed it was a matter of the culture. Mr. Cary thought it was a matter of who objects, whether it's the subpoena recipient, who undoubtedly has standing, or sometimes the government. He noted he has not experienced objections, but when you get objections you must meet the *Nixon* standard, which is very tough. A member commented that either way there is court supervision for document subpoenas. Mr. Wallin responded that he dealt with this on the front end, including a judge's order when he issues subpoenas. He thought the court order short circuited any objections, though he thought he had once received a call from the recipient of a subpoena.

Mr. Cary said that until hearing the day's discussion he had thought he did not need judicial authority to get a subpoena and serve it returnable for the first day of trial—though when he got an objection, then the *Nixon* standard would apply. He thought he would need to be more careful going forward.

Another Subcommittee member asked Mr. Cary to provide more detail on the state case in which he had successfully subpoenaed documents that resulted in the case being dropped. Mr. Cary said it was a drug-distribution case where the drugs were dropped off by an undercover Federal Express delivery to a specific address. By subpoenaing telephone records of somebody they suspected might have been involved, the defense was able to establish the drugs were intended for that other suspect. He emphasized that if the telephone company had objected he could not have met the *Nixon* standard for a broad subpoena seeking many phone records.

Another member asked if Mr. Cary or other speakers had a suggestion on what you think would be a better standard. His point was that the *Nixon* standard was too high because it would have required him to know in advance what is in the documents are that you haven't seen yet. In Mr. Cary's case, he thought the phone records would be useful, but he would not have been able to show the court that the records would specifically show that the other suspect was present at the delivery site. So what should the standard for subpoenaing documents from third parties be? The member asked the speakers what standard would allow them to get the documents they needed but still have room for people to object that it's too burdensome.

Mr. Cary responded that the material and relevant standard is a good start, but the burden was another issue he thought was not addressed sufficiently in the New York Bar proposal. He noted that Rule 16 uses the word "material," and he thought it was appropriate for Rule 17 as well.

Mr. Felman stated that he thought there should be no limit on the issuance of pretrial subpoenas. The defense should be able to issue such a subpoena without court involvement. If a recipient thinks it is unduly burdensome, then the recipient would move to quash, and that is where he thought the standard would come in. He noted that he did not seek to subpoena material he did not need and that the process should not be any different than in a civil case. He did not think many civil litigants issue abusive subpoenas, and he saw no reason to believe that criminal litigants would abuse this. So Mr. Felman agreed with the New York Bar proposal, which would eliminate prior judicial approval for the issuance of subpoenas, and, if the recipient thinks it is unduly burdensome and oppressive, they could move to quash.

Judge Nguyen had a follow-up question for Mr. Felman and Mr. Wallin. Although they had described working cooperatively with the U.S. Attorney's Office on the front end, she wanted to know what standards the courts apply when there is an objection from the US Attorney's office or a motion to quash. Is it *Nixon* or something closer to material and relevant?

Mr. Felman responded that if there is an objection, the courts apply the *Nixon* standard, and he is almost certainly going to lose. Mr. Wallin emphasized that he always makes his motions ex parte, and he had never had a judge question that, and never had an objection from the prosecution because they don't know about it. And the judges said fine with that. And he'd never had a motion to quash. That supported Mr. Felman's point that the defense has no interest in abusing the subpoena authority. Mr. Wallin acknowledged that litigants in some civil cases pursue a scorched earth policy, but that just doesn't work for criminal defense lawyers. He thought that some of the concerns and fears that motivated the current design of Rule 17 are just not very persuasive.

Mr. Felman added another point. Sometimes in round one the government doesn't object and the subpoena issues. But he has to file the motion, which articulates the *Nixon* standard, which is then granted. But at the second stage, if the recipient of the subpoena objects that the subpoena is overbroad, burdensome, and does not meet the *Nixon* standard, he will respond that he has already met the standard. But there's some ambiguity at that point because the recipient was not a party to the litigation where he met *Nixon*.

Judge Nguyen then invited questions from members of the Committee who were not on the Subcommittee.

A member asked about the concern that meeting the standard for a subpoena would reveal the theory of the defense. She noted that it requires a great deal of work to obtain judicial approval of a pretrial subpoena, and when you do receive documents they are immediately disclosed to the government. But these may be documents that you don't want to use in your case in chief. You thought they would be relevant and that actually ended up hurting you. So those are decisions that you make early on. She asked the panelists to describe their experiences. Did it reveal the theories of your case? How does it hinder you in order to get documents produced prior to trial to determine whether they are beneficial and helpful? Does it hurt preparation of the defense because subpoenaed documents will be disclosed at the same time to the prosecution?

Mr. Cary began by saying it was his general practice to be "sort of an open book when it comes to discovery." He thought he would not get good discovery from the government unless he disclosed quite a bit of his own defense theories. That is his premise, though he was aware many other defense lawyers did not agree. He noted the contrast with Mr. Wallin, who had described his general practice of using ex parte motions.

Mr. Wallin noted that he generally took the same approach on discovery, but he does file his motions ex parte. And in his motion and proposed order, he includes a statement that the defense must comply with Rule 16 with respect to whatever material is produced in response to the subpoena. He described a case in which his client was in custody and made multiple calls from jail to a defense expert who had evaluated him. Mr. Wallin wanted the jail to provide the calls, so he subpoenaed them, but he did not want to alert prosecutor to the calls. He said that almost by definition, if he is at the point where he thought he needed something to help prepare his case, then he would be revealing defense theory by asking for it and explaining to the judge why it meets the *Nixon* standard. But he noted that typically he did end up disclosing what he got from the subpoena to the government. And, as he said, it might help him get a better plea agreement.

Mr. Felman added that it was very difficult to have a one-size-fits-all answer because it depends on the type of situation at issue. There are times where he wants to get information in the hands of a third party that he thinks might be helpful, but does not think the government knows about and does not want to alert them to. It might or might not be helpful, and he would move for the subpoena ex parte. But most of the time, he was in Mr. Cary's school of thought, and usually talking with the prosecutor. He views a trial as sort of a failure to communicate. He wants the government to see the documents almost as much as he wants to see them himself if he thinks they are helpful to the defense. So usually revealing the defense strategy is not an issue. But it can be. Under the rule, the documents are to be produced at the courthouse, and that means that both parties get a copy. But as a practical matter, it isn't done that way. Usually, arrangements are made that the court will give the defense the response, but the defense has to give it to the government. That's what the rule requires. He noted the asymmetry there. The government gets to investigate and only give us what it wants to, although they do have the

Brady obligation. Ordinarily the defense would only have to hand over what it intends to use in its case in chief. But instead it is gathering new information by subpoena and giving it to the government. On balance, however, he thought it better to get the information even if the government gets it, than be unable to obtain it.

A defense member noted that some people would disagree with Mr. Felman's reading of Rule 17. The requirement that the subpoenaed items be returned at the courthouse doesn't necessarily mean that they also go to the government. The member noted that her own survey of defender offices revealed that in many places, including Oregon, they file everything ex parte, and they would not expect the government to object to the subpoena request because they're not a party to it. Rather, they expect the person who received the subpoena request to do the objecting, and the rule doesn't say that the return should go to the government. The rule says it goes to the court. That gives the court the chance to review it and address any concerns. The court might know, for example, that somebody is objecting and just hasn't gotten their motion onto the docket quickly enough. The member asked if Mr. Felman agreed that just because the subpoenaed material goes to the court that did not necessarily mean it goes to the government.

Mr. Felman said that was absolutely right. This had become routine in his own practice, based on the kinds of subpoenas he was issuing, which the courts were granting with the understanding that both parties are going to get the documents. But he agreed it doesn't have to be that way. And particularly in the ex parte scenario, you would not want it to be that way.

The member then suggested that the Committee look more into the inclusion of the words ex parte in Rule 17(b), which says that the defendant can file an ex parte application to bring their witnesses to court. She suggested that the same reasoning would apply to the defense getting their documents ex parte: the concern about revealing your trial strategy. She noted the speakers had highlighted again different practices around the country. Different courts treat ex parte motions in different ways.

Another member asked if the problem is that the *Nixon* standard is too difficult to meet, why the solution would be to change Rule 17. If the objection is to the way the courts are applying *Nixon*, shouldn't the solution come through litigation involving the standard?

Mr. Cary said the *Nixon* standard comes from the government's subpoena for the Watergate tapes, not a defense subpoena for information from a third party. But as he read the cases and encountered the issue on the ground, many trial judges and circuit judges feel bound by the *Nixon* case even though it's not perfectly analogous to third-party subpoenas. He did not know how you can correct the situation unless you can get a case to the Supreme Court. The chances of getting cert granted are only 4%, and it could take decades to get an issue like this before the Court.

Judge Nguyen asked Mr. Cary about Judge Sullivan's decision, and whether he was objecting to Judge Sullivan's decision, or were the courts applying this standard across the board? Mr. Cary responded that in his experience the *Nixon* standard was generally being applied

in the District of Columbia. In addition to Judge Sullivan's ruling in his case, another leading case was Judge Walton's decision in the *Libby* case, which also applied the *Nixon* standard.

Judge Bates commented that most of the district court's docket is not cases that give rise to Rule 17 subpoenas, and Mr. Cary said he had been dissuaded from filing subpoenas in many circumstances because he thought he would be unable to meet the *Nixon* standard. That too reduces the opportunities district judges have to grapple with the issues. He asked exactly what it is about the standard the speakers thought was so difficult to meet. The first part of the *Nixon* standard is the evidentiary and relevant—as opposed to the material and relevant standard articulated a few minutes ago. Is that where the problem lies? Or is it in the other parts of the *Nixon* standard? What causes defense counsel like Mr. Cary to be dissuaded from even seeking the Rule 17 subpoenas, or makes judges decline the Rule 17 subpoena because it doesn't meet the *Nixon* standard?

Mr. Cary said it is the requirement of specificity which Judge Walton ruled, quoting another opinion, doesn't require explicit specificity but does nevertheless require specificity. Judge Bates commented that specificity is not in the *Nixon* opinion, but is a word that the courts have put into the test. Mr. Cary agreed, saying that he views the *Nixon* test as reduced to three things: relevancy (which is not a hard standard to meet), admissibility, and specificity. Specificity, he said, is the hardest gate keeper. The defense may know what type of document it wants, but many people read the *Nixon* standard to require you to describe the documents with super precision. He can rarely do that.

Mr. Felman focused on each element of the four-part test. The documents have to be evidentiary and relevant. Some courts define evidentiary as admissible. He said it was a mystery to him how he could know something was admissible when he had not yet seen it. You must show you cannot otherwise get them without due diligence, and he accepted that he should probably have to ask for them first. And he must show he cannot prepare for trial without them. How, he asked, can he show that without seeing the documents? And he must show it's not a fishing expedition, whatever that means. He said you could describe many of his subpoenas as fishing expeditions because he did not know yet what he didn't know. So the problem is a combination of all of those factors.

Mr. Felman described the case that brought him to the Committee's attention. He was representing a man under indictment for conduct that had been worked on by a number of major law firms. The government was aware of that work but did not issue grand jury subpoenas to those law firms. Accordingly, the discovery from the government to the defense did not include any of the law firms' work. Mr. Felman said he was currently litigating with law firms over their files, relying on Rule 17(c). He described the difficulty of meeting the *Nixon* standard in that context, concluding that each of the elements posed a challenge in that context.

Judge Bates asked whether the courts are rejecting these subpoenas based on all of those things, or was Mr. Felman concerned that they might be rejected? Mr. Felman said he never withheld efforts to seek subpoenas, and he found generally reasonable prosecutors won't stand up in court and tell the judge the defense should not have those files—though that can happen.

But Mr. Felman said he did not think he should be at the mercy of the prosecutor's good graces, but instead should have a rule that entitles him to what he needs. He concluded that when *Nixon* is the reality of how this rule is being applied, he doesn't have much.

Mr. Cary added that a leading case from the Fourth Circuit, *Rand,* was an accounting fraud case, in which the defendant sought accounting records. Mr. Cary thought it was a reasonable request for accounting records that would be admissible as business records, but he noted that the Fourth Circuit rejected that argument under the *Nixon* standard.

Mr. Wallin commented that the meta problem with the *Nixon* standard is that judges are told that Rule 17 subpoenas are not for discovery. That creates the potential for serious problems because realistically to do their job defense attorneys need to do some discovery, whether it's called a Rule 17(c) subpoena or something else. They can say it's production rather than discovery, but the meta problem is that we do not have a rule that says you can use subpoenas duces tecum for discovery.

A member suggested that it might be preferable to place this in Rule 16, and Mr. Wallin agreed. He thought Rule 16 would be a better site to state a specific standard for discovery. The main thing is we have to look at it as a discovery technique and to write the rule so that judges know they are applying a discovery rule. Otherwise there's just too much potential to take away the defense right to prepare for trial.

Mr. Cary provided some context for the language often cited from the Supreme Court's opinion in *Bowman.* He said the defendant was trying to use a subpoena to the government to do an end run around Rule 16 to get material from the government that was not available under Rule 16. In that situation, the Court said Rule 17(c) is not a substitute for discovery. Courts don't recognize that was a case where there was an effort to use Rule 17 to get discovery that was not available under Rule 16.

A member asked about the difference between Mr. Cary's description of his practice and that of the member who had said she always files ex parte. Mr. Cary said that he thought he could make his motions ex parte, though it was not his practice to do so. He generally thought he was more successful "in sunshine."

A member was asked to elaborate on her statement that the rule did not require material subpoenaed by the defense to be provided to the government. The member said that her office interpreted the rules as requiring them to disclose subpoenaed material to the government only when required to do so by Rule 16. For example, the defense might subpoena the guest register at a hotel. If your theory is that your client was there for only one night, and the register shows the client was there for five nights, the defense may not want to use that evidence at trial and also does not want to it over to the government, which can do its own investigation. But if you subpoena the hotel register and find that someone else who is an alternative suspect was there and your client wasn't there, that might not be evidentiary, i.e., not something the defense can introduce into evidence in court, but it might lead to a witness that you bring to court. So she agreed with earlier comments that the evidentiary standard is hard. But on that that question

about disclosing to the government, she thought it was important to not interfere with the defense investigative work and not to give the government everything that the defense looks into. The defense tries to look at all the facts and get a broader context than what the government might have looked at. And if you end up having to do the government's work for them essentially, that would really put a terrible burden on the defense. She characterized this as a pretty important issue, and she urged that the rule be revised to state clearly that the defense is permitted to file ex parte and that the subpoenaed material does not have to be given to the opposing party. Of course, Mr. Cary would still have the option to disclose the material. But she stressed the importance of making it clear that there should be no interference with defense strategy, noting case law supporting that point. The inclusion of ex parte in Rule 17(b) indicates the Committee noted this concern previously, though it was not added to 17(c).

A member asked Mr. Cary and Mr. Felman to respond to questions that arise in internal investigations. The first articulation by a witness of a false statement or the beginning of the inconsistent statements is often made to the outside counsel conducting an internal investigation, a lot of which gets ironed out by the time the witness hits the grand jury. She asked whether either had been successful in subpoenaing the law firm that has done the internal investigation for these interviews or for other material from their internal investigation. She noted counsel's declination pitch or its negotiations with the government may identify someone other than the client who might have been responsible.

Mr. Felman commented that he had generally sought to get documents and information from the time period of the offense and felt he was on thinner ice seeking to essentially get the work product of a law firm that has done such an investigation. But he thought there might be circumstances in which he would try to do that, though he had not done so. He had subpoenaed law firms for their communications with the prosecution but not their internal witness interviews. He noted there is a circuit split over whether or not the firms can maintain a work-product privilege over documents if they have given them to the prosecution. It has been very case-specific litigation. He wanted the Committee to understand that he did not think the explicit authority he was advocating would create a Wild West scenario in which everyone was subpoenaing each other's work product. What he seeks is almost exclusively historical information.

Mr. Cary noted he had experienced a little success subpoenaing an internal investigation but only because there was parallel civil litigation at the same time and the evidence in question was being produced in the civil litigation.

Mr. Wallin said he had not had white collar cases at this level, though he had some experience with work product and attorney client issues.

In the hypothetical about internal investigations, a member asked why this information would not be available in discovery from the government. Wouldn't the government have possession of that information and have to turn it over to the defense if someone came in on a pitch and said somebody else might have done this or has possession of the prior witness statements from internal investigation? The member who provided the hypothetical said that

often the government refrains from asking for those witness interviews so that they don't have to confront this problem. At one level, she said, it is work product. But it's also a witness making a statement, and often their response the first time they're asked about alleged criminal behavior is not completely truthful. So it gets memorialized in some fashion, but it also has substantive value.

Judge Dever said that, in more typical drug and gun cases the defense often argues that it does not have the burden of proof, and if a doorbell camera would have shown something, the government should have gotten that evidence. He asked all the members of the panel whether outside the white collar cases, they had examples of situations in which they were aggressively investigating and trying to use 17(c) subpoenas to do that. And can you give us some examples of that?

Mr. Wallin recalled a case in which he sought the repair records on his client's girlfriend's vehicle. Because his client was not the car's owner, the repair shop refused to produce the records without a subpoena. So he filed a motion for a subpoena that explained what he thought was in the repair records and how they would help his client. The judge issued the subpoena and he got the materials. Mr. Wallin noted that he generally tries to do some investigation his own, and when he runs into a wall he goes to the judge, explains what he found, and why he can't go any further without the subpoena. So far he had not gotten any pushback. He thought was because of the judges in his district.

Judge Dever observed there was also a distinction between someone issuing a subpoena for all the text messages of all the codefendants from the phone company for the last three years versus asking for these specific records. Mr. Wallin asked why he would ask for a lot of material he did not need. He acknowledged wryly that he was paid by the hour on the Criminal Justice Act (CJA) panel but it was not that much. So it was all about what he needed for the defense.

Judge Bates asked if Mr. Wallin had any concern with the examples that he had in mind that if forced to, he would not be able to meet the *Nixon* standard. He thought in his example Mr. Wallin would probably have been able to meet specificity, which has been raised as the greatest concern, and probably admissibility as well. Mr. Wallin responded that sometimes he would, but other times he would not. His problem, as said earlier, was because he had never gotten any pushback he really did not know what would happen if the judge set his motion for a contested hearing. He thought it was important to have done some work that up front so you can explain to the judge why you need this. But he asked again: how is this not serving as a discovery tool? When he gives this information to the judge, he is really making a discovery kind of argument—though under *Nixon* dressing up as production, not discovery. But what he has established shows that it is a discovery request.

Judge Nguyen thanked Mr. Cary, Mr. Felman, and Mr. Wallin for their very informative comments, and then she said it was time to move on to the next panel.

Ms. Coleman opened the next panel, noting that she was an assistant federal public defender in Judge Conrad's district, the Western District of North Carolina. Noting that her

remarks would overlap to some extent with what had already been said, she offered to also provide real world examples. She also thought it was important to set the base level starting point of the ethical obligations of defense attorneys. It is her ethical obligation as a defense attorney to investigate the charges against her client, wholly independent of the government, and to investigate mitigating evidence. She noted her belief that Rule 17 applies to sentencing as well as the guilt innocence phase, and that is wholly independent of a presentence investigation report. These are obligations under licensing boards, from the ABA, from the NLDA, and from precedents regarding what constitutes ineffective assistance of counsel. Moreover, her clients have a constitutional right to compulsory process, and Rule 17 is the mechanism by which they are able to effectuate that Sixth Amendment right. Often her investigation leads to documents and objects that are not in the custody and control of the government. Accordingly she will not get them through Rule 16, and the government may have no *Brady* obligation to provide them. So this is the problem: someone else has this information and Rule 17 is the only way for the defense to get it.

Noting the panel's topic is judicial oversight of these subpoenas, she observed that whether or not the judicial oversight is good or bad is not straightforward. In her district, the problem is inconsistency in whether the judges are going to give you a subpoena. There is an older standing order specific to the federal public defenders, and it is ambiguous as to whether we even need to file a motion requesting these subpoenas. And she has found that it's used quite differently in the Asheville and the Charlotte Divisions. She got the same response from a survey of the local CJA panel attorneys. The requirement of a written motion is unclear and inconsistent. Some judges require it; some judges have gone back and forth multiple times. Because of the inconsistency, she errs on the side of caution and always requests her subpoenas by a motion. But the standards applied in reviewing her motions vary from judge to judge. Some judges take a very broad approach, and like Mr. Wallin she had been very fortunate in the granting of her motions. Some judges take a very strict approach and deny motions, which has in fact produced a chilling effect. Some attorneys whose cases are before particular judges have said they won't bother asking for that subpoena because they know they will not be successful. This removes a very important tool for defense attorneys and places the defendants in those particular courts at a severe disadvantage.

She described the denials. Some simply stated Rule 17 is not for discovery but provided no explanation for why the justification for the subpoena was insufficient. Subpoenas have also been denied because they were seeking documents for sentencing purposes and not for trial. Her office has also had subpoenas denied seeking documents for use in pretrial negotiations. Everyone knows the percentage of cases that actually go to trial in federal court is very small, so plea negotiations are critical as well as sentencing. She emphasized that the majority of clients in federal court will end up in sentencing at some point. Ms. Coleman noted that her office was able to get a renewed motion granted in some of these cases seeking information for sentencing and pretrial negotiations after briefing on the defense role and why it's important for us to get this information. The denials stating simply subpoenas are not for discovery are particularly

problematic, leaving no avenue for recourse. Interlocutory appeal on these issues is not available, and counsel is stuck trying to navigate the case without this piece of information.

Ms. Coleman's other major concern regarding judicial oversight was the need to be able to make motions both ex parte and under seal. If that cannot be done, a particular subpoena request can be very problematic and damaging. For example, in a sexual assault the defense investigation uncovered from its own witness interviews that the alleged victim, instead of immediately reporting the assault or immediately going to a hospital and Medical Center, instead went to a casino and spent considerable time there. Ms. Coleman knew that casino had and retained excellent surveillance video. The videos would show that what happened was inconsistent with the victim's statement. The government had not turned over this information, which wasn't in its control. This evidence, which was critical to their theory of defense, was in the hands of a third party. Disclosing the request for this information would have tipped the hand of what their defense theory was and identified the witnesses they were talking to. So her office very much wanted to file this request for information from the casino ex parte and under seal. The trial ended in an acquittal, and the information obtained by subpoena was very important.

Ms. Coleman noted that there are also situations when she needs to review documentary evidence that contains both inculpatory and exculpatory information about her client. One of the best examples is cell phone records. In many drug cases the government now turns over cell phone records that can have not only the call and text data, but also cell site location information showing where a particular individual lives. She had a serious fentanyl death results case where the government provided cell site location information from the victim's cell phone, but not for the defendant's cell phone. She wanted to obtain her client's own cell phone records, which you cannot typically obtain with only a release from your client. Usually the cell phone companies require a subpoena. Ms. Coleman was concerned that the cell phone records would not show the exculpatory information of where she was at the time of this drug deal, but might also include a host of other inculpatory information regarding previous drug transactions that the government could use for a variety of purposes, including 404(b) at trial. So the defense needed to be able to get this information ex parte and under seal, so as not to tip off the government, which could have done their own investigation and gotten a search warrant. The defense needed to weigh how important the information was to their case, and whether they would need to inculpate their client on other crimes to defend the more serious charge. She offered this as an example for the need to have discretion. She acknowledged that there is case law allowing this, and she has been filing her motions ex parte and under seal. But the rule itself is ambiguous and doesn't provide for this explicitly. She advocated revising and improving it.

As an aside, Ms. Coleman noted that cell phone records can be voluminous, and there are charts and tables. An expert is needed to extrapolate the cell site information. It is not practical to have this information brought to court at the time of trial and reviewed at that time, and it is critical to obtain this information ahead of time.

Finally, Ms. Coleman argued that Rule 17 applies to sentencing. Sentencing is a critical stage of the case, and defense counsel has an obligation to investigate information for it. She

provided two examples of Rule 17 subpoenas that bore on sentencing. In one drug case, $8,000 in cash had been seized from her client at the time of arrest. The Presentence Report converted that to drug weight and increased the sentencing guideline based on the extrapolated drug weight. But her client told Ms. Coleman that he had been at the casino less than 30 minutes before his car was stopped and that he had won the money. A casino video showed him playing Black Jack and winning one $5000 and three $1000 chips. In that case she did not seek the subpoena ex parte. Although the government didn't care about the information, they were not going to seek it. It was up to the defense to establish that this wasn't the proceeds of drug trafficking, but instead money won legally at the casino. The judge granted the subpoena, and the video showed her client at the Black Jack table, turning in the chips, and the money being counted out to him. This resulted in a lower sentence, and there was no other way to obtain the video. Ms. Coleman noted that it took time to go through the casino's videos, and it would not have been feasible to use Rule 17(a) and have someone bring the video to the courthouse at the beginning of the trial.

Ms. Coleman turned next to the use of subpoenas seeking sentencing material going to mitigation based on the defendant's background and personal history, which she noted is relevant to the court's responsibility to make an individualized assessment of each defendant. But it can be very difficult for defense counsel to get information about their clients, who are often in custody and unable to ask the Department of Children's Services or social services for the records of abuse and neglect they suffered. She had used Rule 17 to seek that information and asked the court for a sealed and ex parte subpoena because the records are so private and confidential. Records of a juvenile's psychological assessments may be critical to sentencing arguments about their abuse as a child, but the same information could also be detrimental as far as future dangerousness. So it is important for counsel to make the assessment to determine what is going to be beneficial for their client.

Ms. Coleman closed by stating she agreed that the concerns regarding the misuse of the subpoenas are misplaced. Defense counsel come to this from an ethical place, and there are protections built into this practice against the abuse. The subpoenaed person or entity may move to quash a subpoena, especially if it is overly burdensome, there are constitutional protections against the government seeking to use the rule to gain information about the defendant, and there are reciprocal discovery rules. If the defense intends to use this information, the government will not be sandbagged. If the information would be in her case in chief, she would turn it over to the government. If she intends to use it in sentencing, it will be in a sentencing memorandum. So the government will get that information. Ms. Coleman also noted that Rule 17 already has specific protections built in regarding personal and confidential information. She was interested in the New York Bar's suggestion, which would expand that protection beyond victims and require some type of judicial approval whenever you are seeking information that is personal and confidential. She thought that was where the line should be drawn, because judicial oversight has often been cumbersome. The courts treat her with suspicion, and she often has to explain her role. She characterized the *Nixon* standard as completely ambiguous, and she advocated more clarity in Rule 17.

Mr. Gill said he had surveyed the criminal chiefs working group to get a feel for how Rule 17 is being applied across the country. In the opinion of the criminal chiefs, judicial oversight and approval are critical, and the case law bears that out. It is very important to have judicial oversight with respect to how these subpoenas are issued. It works very well in connection with the discovery rules. The key is that judges have oversight over what's going on in particular cases. They know what's at stake and what has already been produced in a case. Often when a case is going to trial there has also been briefing. So the judges know what's going on, and they are able to dig down and find out what makes sense for the case. He noted that Rule 17 already gives the judges the authority and flexibility to do the things that they think make sense. For example, do the records need to be produced before trial? Do the parties need to inspect the material beforehand to make sure that they are prepared and neither side is ambushed? With regard to ex parte practice, he said there were several examples in which it had been used effectively to make sure that the defense is able to get the records that they need. He also noted that Rule 17 has another very important function in connection with the Crime Victims' Rights Act (CVRA). If subpoenas are levied with respect to victims, seeking personal and confidential information, a judge needs to be involved to make sure the subpoena is appropriate and that victim has notice unless there are exceptional circumstances.

On the whole, Mr. Gill said, the bottom line is that the system works: judges are engaged and doing what they need to do based on what they know about the case. Prosecutors agree with what the defense lawyers had been saying. If the defense needs to obtain records, counsel needs to be able to go to a court and get them. And in his experience, the judges in the Northern District of Texas and Eastern District of Virginia, and the experience relayed by the criminal chiefs across the country, judges are granting those subpoenas. And the key is parties are able to come forward, based on what they know about the case, that they need certain records. In the case, for example, of the phone records example, he honestly could not think of either a federal judge or prosecutor who would oppose a defense subpoena. Similarly, he couldn't imagine any prosecutor would not want to get to the bottom of that, or would want to stand in front of a judge and say the defense should not be able to obtain those records. He thought it was perfectly fine if the defense wants to use the ex parte process, because the courts are able to get the details they need for the production.

Mr. Gill provided several real world examples. The 2020 Jason Penn case in the District of Colorado was a very complex, ten-defendant bid rigging and price rigging scheme, an excellent example of how judges can drill down. All ten defendants filed requests for subpoenas in specific areas. Judge Brimmer carefully sifted through in that case and parsed those out. He agreed they needed communications related to the bid rigging scheme and talking about the negotiations at issue in this case. But Judge Brimmer denied requests that were overly broad, seeking any and all documents. He was in the best position to make those determinations.

In another white collar case from April 2022, in the Middle District of Florida, in front of Judge Marsha Howard, the defendants moved for subpoenas, and they filed very detailed ex parte submissions. It was litigated before a magistrate judge who very carefully went through, denied some, made some tweaks, and ordered some subpoenas issued. Then the third parties

moved to quash, and the case went back to the magistrate judge. There was more tweaking involved, but ultimately the magistrate judge ordered production on these areas, not production in other areas because they were not specific enough. The parties appealed to Judge Howard, who carefully reviewed the magistrate judge and upheld the magistrate judge's order in a published opinion.

Mr. Gill called another case from the Northern District of Ohio a perfect example of how the process works without the government being involved. In this case, before Judge Sara Lioi, the charges were sex trafficking of children, drug trafficking, and witness tampering. The defense filed four ex parte motions for subpoenas, and the government had no knowledge of the motions. The process worked, and the only reason the government found out is that Judge Lioi entered a very detailed order afterwards in which she stated she carefully reviewed this and was not granting the subpoena. In a footnote, however, she stated she was not going to reveal the reasons for her decision because she didn't want to tip the government off to the defense strategy.

Mr. Gill noted another case from the Eastern District of Virginia, his district, from earlier in 2022, in which the defense filed numerous pretrial requests for subpoenas. Judge Brinkema carefully went through granting some and denying others. Because the case involved an assault on a plane, she granted subpoenas for information about the specific flight attendants and complaints about them. She also said the defense was entitled to information about the rules that apply to the flight attendants, and the responsibilities on this route. But she denied subpoenas seeking information about how the airline tries to solicit customer complaints in general. The case ended in an acquittal, and he thought the defense attorneys would say they had gotten what they needed for that case.

Summing up, Mr. Gill said it is very important to have judicial oversight, and with that oversight the system works well. The judge is kind of like a referee. The judge knows, based on the case, how to handle it, and the rule allows the defense the flexibility they need to reveal information to the court to make determinations about whether subpoenas should issue.

Noting the variety of interesting experiences in other districts, Ms. Halim said that her district—the Eastern District of Pennsylvania, in Philadelphia—absolutely adheres to the *Nixon* standard. There is no mechanism to obtain an enforceable subpoena for documents pretrial absent judicial authority. The defense does have to go to the court to get the approval to even issue a subpoena that would be enforceable and available pretrial. She echoed everything that prior speakers Mr. Cary, Mr. Felman, and Ms. Coleman had said, but she tried not to repeat points already made. Although she had a bit of white collar criminal defense experience, the bulk of her work as a solo practitioner was privately retained or court appointed pursuant to the Criminal Justice Act.

Ms. Halim began by noting workload concerns. A solo practitioner or an assistant federal defender, with a caseload of 35 to 40 federal criminal cases, barely has time to issue a subpoena and follow it up, much less review whatever she obtained from it. The extra step of applying to the court for a court order—and perhaps having to litigate whether or not you're even entitled to

a subpoena—takes critical time that could be put towards other issues in that particular defendant's cases or work on other defendants' cases. She also agreed with Ms. Coleman and other prior speakers that frequently the defense is looking for investigative materials, and most of the time it cannot satisfy the *Nixon* standard. She is unable to satisfy *Nixon* when she is doing follow-up investigations that the government didn't do, and she has to get the materials to know what they say.

And in her district (unlike Mr. Wallin's), Ms. Halim said there was not an across-the-board acceptance of ex parte filings, and it could be a risk to file something ex parte. She stressed how important it is to protect defense work product. She noted that when she might have a shot at satisfying the *Nixon* standard, it's because she had either done her own investigation that has provided useful information or it's part of her defense theory. To get the court order, she would have to spell that out, compromising the defense theory and work product.

As to real world examples, Ms. Halim observed that there is relatively little litigation regarding Rule 17(c) subpoenas in her district because the Third Circuit adheres so closely and strictly to the *Nixon* standard. This definitely produces a chilling effect, and it is discouraging for defendants to gear up for a fight that you're likely to lose. It is not always an option to file ex parte.

Ms. Halim described various forms of evidence the defense may wish to subpoena in non-white-collar cases. Phone records are a big source of information, and often the defense is still investigating when it seeks them and cannot be certain that they will yield evidence that it will admit it trial. But a subpoena might produce evidence the defense will want to introduce, and it's unlikely to get those records without a court order. Another major source of investigative information in her district arises in federal prosecutions that have been adopted from the City of Philadelphia. Often the state prosecution continues against other defendants, and the federal prosecutors obtain limited information very specific to her client. But there may be material that is relevant and potentially exculpatory in the hands of various state agencies, such as the local DA's office, local jails, other local law enforcement agencies, and the Department of Human Services.

In federal prosecutions, Ms. Halim concluded, the defense has to litigate and request permission from the court to investigate its own case. Under the best case scenario, it can be litigated ex parte. But that still takes valuable time, which is a critical factor. Often the defense lacks the time to do that, and is discouraged from filing a motion for a Rule 17(c) subpoena.

Ms. Sampson, an AUSA in the District of Arizona, was the last speaker on this panel. Her work has primarily been prosecuting violent crimes in Indian country, but she also sought information from her colleagues in the district. She had not been aware of how frequently Rule 17 was being used in the district. She thought that showed the system was working because so few of the ex parte applications had come to their attention, and noted her experience was limited to the Rule 17(c) that had been brought to the government's attention. In her district, like many others, the government has an open file policy, and the discovery framework is constantly expanding. From her perspective, Rule 17 subpoenas are just a small part of the discovery

process. She said prosecutors recognize the need to obtain records that are not in its control, and the Rule 17(c) subpoena process is absolutely an appropriate avenue for getting them. In her district and her own experience working violent crimes there had been examples where the prosecutor and defense have worked together very well with requests for records. Perhaps the government was able to assist in obtaining them, so there was no need for a subpoena.

She had also seen examples where the parties agree a subpoena is appropriate even for a confidential and private records—perhaps with a protective order to protect those records in violent crime cases. Often the subpoenas do request information and materials that implicate privacy, but that does not mean they are not discoverable. Often the government is producing those records, in their case in chief or in the discovery process. But when the defense requests records that implicate those concerns, Ms. Sampson said she had also seen their district judges grant them in part and deny them in part after giving the government and the victims a right to object or speak on the issue, which is a requirement of not only the rule but also the CVRA. She thought this is how the rule is intended to work, and that is how she had seen it play out in her district. The only ex parte motions that had been brought to the government's attention sought private and confidential information, which requires the victims to get notice. The government has to be involved and receive notice so that there is an opportunity to be heard. But that did not mean that those subpoenas were denied outright. Most examples Ms. Sampson had seen of subpoenas denied outright or quashed by the district court in Arizona involved defense requests for unrelated, confidential and privileged records where the defense is unable to articulate why they are relevant to the case.

Ms. Sampson said that the government operates on the assumption that defense counsel have good motives and intentions. It recognizes—as earlier speakers had emphasized—that the defense may want information that the government doesn't want and may not understand why the defense wants it. But she thought the rule in its current form, with judicial oversight and gatekeeping, provides safeguards without impeding the defense from getting the records that it needs. She had seen a subpoena narrowed or denied on the basis of the undue burden only once or twice in federal court. She noted that in Indian country, tribal agencies are often subpoenaed in their cases for massive amounts of records, and they either don't know where to get them or they don't have the resources to compile and duplicate those records as part of the discovery process. She had seen courts narrow and perhaps be a little more stringent in applying the standard to avoid putting an undue burden on those agencies. But she had never seen that as the sole basis for denying a defense subpoena for actually relevant and material records.

With regard to the *Nixon* standard, in Ms. Sampson's experience in their district judges have been very thoughtful in their approach to Rule 17(c) subpoenas. She had not seen them deny outright any subpoena strictly citing *Nixon* without additional concerns for privacy and confidentiality or concerns that the subpoena goes beyond some of those standards. Typically, the courts are operating their gatekeeping function by making sure that Rule 17(c) subpoenas aren't being used strictly for what we call fishing expeditions. She recognized there are questions about what that means, again operating under the presumption that most defense attorneys are looking for relevant and useful information and have no ill intent.

With regard to the records being turned over to the court, Ms. Sampson noted that the rule now gives the court discretion to order the records to be disclosed to the parties, and the documents can be returned to the court directly. She had one example from her district where a subpoena was denied because the defense attorney asked for private and confidential information to be turned directly over to him or her. It was not litigated any further, but had it been, she thought some of the subpoena would have been denied anyway because of the nature of the request. So in practice, while the rule is not always strictly followed in some of these regards, at least the court is exercising its gatekeeping function and determining whether the records can appropriately be sought under Rule 17(c). That is why she felt so strongly that judicial oversight is a key and crucial function of the rule—to make sure that subpoenas are being properly requested and utilized, and that the process is not being abused.

Ms. Sampson also provided an example showing the problems that can arise in cases involving pro se defendants. One of her colleagues had provided an example involving a pro se defendant in a human trafficking case who requested all kinds of records to vindicate a certain "mission" on his or her part, rather than actually seeking records that were relevant to the criminal case. The court quashed that subpoena. But without that judicial oversight, she noted, a pro se criminal defendant would have the same access to these subpoenas without the advice of counsel. But a pro se defendant cannot be expected to understand the parameters of the rule that govern when a subpoena is appropriate or not, when to provide notice to the other party, and when to provide notice to victims when they're seeking confidential and privileged information. She noted that was a particular concern for her, given her work on violent crimes in Indian country. She noted that, as Mr. Wallin had explained, the District of Arizona does allow defense counsel to apply ex parte applications for subpoenas. That process seems to be working, and the only time the government hears about it is when there is a request under the rule that requires the government or victims to be notified. The biggest value of that judicial oversight in her cases is protection of victims, protection of witnesses, and potentially protection of law enforcement.

Ms. Sampson noted that amending the rule would implicate the CVRA. Recognizing the dignity and privacy rights of victims, Rule 17(c)(3) was created to make sure that victims would be notified when somebody is requesting private and confidential information about them. The CVRA gives the government the right to assert those rights on behalf of victims. So the rule with that judicial oversight then ensures that the CVRA is also being followed. Many types of records are implicated beyond just health and mental health records. There are all kinds of other private and confidential records, including the social service records that are used regularly in the types of cases she handles. And because of the wide variety of confidential and private records, she thought it was not practical to carve out the requirement of judicial oversight. In her experience working with the tribes, court oversight ensures that the third party recipients of subpoenas have an ability to vindicate their own rights. Recipients are not always savvy corporations that have counsel that can file motions to quash. They may not know how to file a motion to quash and may not know that they do not have to comply under sanctions because the subpoena has a stamp of the United States District Court. So without judicial oversight, the court or opposing counsel would never know that an overreaching subpoena has been filed on a third party because that

third party might not have the wherewithal or the ability, knowledge, or resources to make a motion to quash. And that deprives the court of the ability to supervise the subpoena process and ensure that there's a fair discovery and trial process, which is part of the court's responsibility.

In summary, based on her own experience and the poll she took of her colleagues at the U.S. Attorney's Office, Rule 17 seems to be working in the District of Arizona. The judges seemed to be providing proper and effective oversight over the rule, and she had not personally observed a detriment to either party, though she recognized that colleagues on the defense side might disagree.

Judge Nguyen invited Subcommittee members to question the panel, and Ms. Morales directed a question to Ms. Coleman and Ms. Halim. She noted that Ms. Coleman had described the problem of getting insufficient responses from their judges, whereas Ms. Halim focused on the fact that it's a very time consuming process. She asked each to say more about what they thought was the right role for judicial oversight in this context. What would you want it to look like? Would you want less of it, or would you want it to be more expansive and perhaps have clearer standards or something like that?

Ms. Coleman said she definitely wanted less judicial oversight and clearer standards, characterizing the current situation as very unfair. In some districts judicial oversight is working quite well. But we are a large country with many districts, and she thought that one could find as many examples where Rule 17 is not working as you could where it is. The lack of clarity in the standard is not fair to defendants, who should not be adversely affected by where their charges are brought. She liked the New York Bar's recommendations. She understood and reluctantly agreed that it is important (and already in the rule) that we need to protect personal and confidential information, and that could go through the court. It had been her long standing practice to do that through something like a *Pennsylvania v. Ritchie* motion where you're asking the court to review the confidential information of the victim. But in a mine-run case, she thought the procedure was too burdensome, and the standards are applied inconsistently. It is time consuming to file motions for reconsideration with 15-page explanations of your role as a defense attorney, trying to articulate the application better, especially when you don't know the particular rationale for denying your subpoena. She liked the suggestion that in the mine-run case judicial oversight is not necessary. She liked very much the New York Bar's proposal for Rule 17(i) allowing the court itself to require the parties in a specific case to get court approval for subpoenas. Because there was no requirement for court approval in the mine-run case, the proposed rule would no longer put defense attorneys at a disadvantage because they don't have the same investigative tools as the government. But it would allow specific requirements in cases where there is a potential issue, and force the parties to address why judicial oversight is needed in a particular case.

Ms. Halim said that at a minimum the rule needs to make clear that an ex parte application is not only appropriate, but also necessary to protect defense theory and defense work product. She endorsed Mr. Felman's suggestion that you get to issue your subpoena for documents without the requirement of meeting a standard, and the standard comes in if the

recipient of the subpoena moves to quash, to restrict, or to narrow the subpoena. It should be clear the standard allows the use of subpoenas for seeking discovery and investigative materials, not just evidentiary material as the *Nixon* standard requires.

A member, who noted that she would prefer to practice in Arizona than in her own district, asked the Assistant United States Attorneys who did not experience such a liberal granting of 17(c) subpoenas what their reaction would be to ex parte or under seal as a default. Did they experience litigation over 17(c) subpoenas filed ex parte or under seal?

Mr. Gill responded that in the Eastern District of Virginia and Northern District of Texas, where he practiced he saw it go both ways. He knew several attorneys follow Mr. Cary's approach of transparency where the parties are discussing it, which he thought worked very well. That was the way he handled it. He believed that giving the defense attorney the choice is the way to go. If they want to go ex parte, he was completely in favor of that. He understood that if you are trying to get records, you need to lay it out for the court so the judge can make a good decision. You should not be inhibited and worried the government will see your strategy. That is an excellent idea. He thought it was happening in practice, but it could be important to clarify the rule to make sure some people aren't missing the strategic point. In response to a member's question, Mr. Gill said he thought there should always be court oversight.

A member asked Ms. Sampson, who had mentioned a concern about pro se defendants, whether she thought that the rule should distinguish between pro se and those represented by counsel, rather than the way Rule 17(b) now distinguishes between defendants unable to pay and other defendants. The member noted that many indigent defendants are represented by public defenders who are following the same ethical rules Ms. Coleman spoke about. Did she agree that that would be the right distinction?

Ms. Sampson was not sure she had thought enough about that issue to comment. When she used the example of pro se defendants, it was an example of the potential to run afoul of those rules because of somebody's lack of legal knowledge without judicial oversight. She was really focusing on judicial oversight. Also, pro se defendants are just an example of a small sliver of the population where the process could be abused. It's also entirely possible that well-intentioned defense attorneys ask for records and they don't understand what private and confidential information could be included within those records. That sometimes happens with some of the tribal agency records. Some are more obviously private or confidential in nature, and that is where judicial oversight is so crucial because it does not rely on bad intentions.

Judge Nguyen wanted to clarify whether there had been no instance of a judge who disallowed a defense attorney from utilizing the ex parte and the sealed processes. Mr. Gill said he was not comfortable answering that question. Things could happen with judges in particular cases, and there could be a judge out there who would not allow it. In his communication with the criminal chiefs working group, nothing like that that came up. When courts receive ex parte applications, a lot of times they split them up. The judge looked at issues that he or she believed should be considered independently without the government, and the ones that could be found in

the open court, with the government weighing in, they did that. That was done in the Florida case he described. The judge divided it up and did it both ways.

Ms. Coleman said that she thought the first time she filed a subpoena with a new magistrate, it was denied. She had to refile and explain it better, essentially briefing it. That was part of the problem she and other witnesses had been describing, the time consuming process. And at that point she thought the court had permitted her to proceed ex parte. But she could definitely see the situation where the ex parte and under seal process would not be allowed and was judge dependent.

A member asked for clarification: did the judge disallow it without an analysis? Or did the court announce they denied it, and then you made a motion to reconsider, explaining and trying to shed more light for the judge? Ms. Coleman thought that in that particular situation he denied it under seal and without prejudice, giving her the ability to refile.

Ms. Halim said she had contemplated filing a motion for a 17(c) subpoena and then decided not to because it was too much of a risk that it wouldn't be kept under seal or ex parte. So she has made the decision to forego it completely because the risk exists.

Judge Dever noted that *Rand* is the leading Fourth Circuit case, and it applies *Nixon* and *Bowman Dairy*. He asked Ms. Coleman whether, in all the examples that she gave, she got the information she wanted. She responded that sometimes she had to try more than once, but at the end of the day she got the information. But she had colleagues who were not successful. Judge Dever asked if she thought the problem had been with the specificity standard. She responded it was hard to tell because our denials had often been just a simple statement that Rule 17 is not for discovery. She thought that had really chilled the use of Rule 17, and that she had been invited to participate because she has been more aggressive about using it. But she thought in practice it had really chilled the use because people anticipate being denied.

Judge Dever asked all the panelists to respond to the issue Ms. Sampson raised about pro se defendants with no judicial oversight. Google has an army of lawyers that respond to subpoenas all day, every day. But many people who receive a court order would think they have to bring everything requested to whoever sent it to them.

Mr. Wallin said the subpoena form includes instructions stating the recipient can move to quash if it's too burdensome, and so forth. Ms. Coleman said that the third page of the subpoena tells you how to do that. And in her experience, most agencies that hold personal confidential information like tribal services and DSS have attorneys, and they have had motions to quash from those types of agencies. But it's a different situation when you're dealing more with the mom and pop business.

Judge Dever commented that in his experience it was very common to get ex parte motions under seal from each side. For example, as in the *Pennsylvania v. Ritchie* case the government might say we don't think this is *Giglio* material, but you might disagree with us. Here's our argument. And the judge deals with it. He asked to hear from the judges about their experience with getting motions in criminal cases with respect to subpoenas or discovery issues,

ex parte under seal. He was interested to hear what the judges' experiences are across the districts in thinking about these issues.

A judge from the Northern District of Illinois said the practice there was for the prosecutors and defense counsel to submit an agreed motion, which they call a motion for early return of trial subpoenas. He had never really looked into it, because the motions are always agreed and are always granted. The agreement is that both sides can serve subpoenas for the production of documents, and then they share whatever they get. He had never had an issue. But now looking at Rule 17, it seemed like either a bastardized version of 17(a) or some sort of version of 17(c). But the criminal bar in Chicago is just very cooperative and it's never an issue.

A member commented that the rule did not provide for ex parte applications for documents. Judge Dever responded that was why the discussion was so helpful. The Committee has the text that says what it says, and it is trying to understand what is actually happening in the real world in some subset of the 94 federal judicial districts. So that's a very helpful thing to know.

Judge Bates commented that he did see ex parte motions, and they are routinely granted, including for documents. They are part of the defense investigation and development of their theory of the case. He could not recall a case in which he had required that it not be ex parte. But if he were to deny it, he did not think he would have to disclose that to the government.

Another judge member commented that this was an interesting discussion because it raises broader issues than the text of the rule. The rule is really not saying this is discovery or not discovery. But these are much more philosophical questions than what the text of the rule gives. It is helpful in thinking about what Rule 17 does, and if it doesn't do enough, is something else needed.

Another member added a historical comment connecting the Chicago practice to an earlier practice in the District of Oregon. She said that in the past the Administrative Office had a single form for subpoenas for both trial witnesses and documents. You could use one form for both, so in many districts the practice was to use that trial subpoena and just subpoena documents to an earlier date. In Oregon for many years they essentially used Rule 17(a) and subpoenaed people to come to court with the documents, but gave them the option of not coming in person but just providing the documents. They did that ex parte without the government's involvement. They asked the court to set a court date for these subpoenas to be returned. On that date the person could choose to come and contest the subpoena if they wished to do so with a motion to quash. But if they didn't want to quash, they would just turn over the documents. Then the Administrative Office issued two different forms, one for subpoenaing a witness for trial, and another for documents. She did not remember when that change occurred, but the practice in her district changed, and they now file 17(c) subpoenas for documents.

Although they do not use the trial form anymore in the District of Oregon, the member said they still get the subpoena pretty easily. It's the same process: asking the judge ex parte to subpoena this video or these records. They had been able to obtain telephone records as long as

they had a basis for explaining why they were relevant to the defense case. They only got a motion to quash when seeking confidential information or when they tried to subpoena the police video system at the police station. There was a hearing, but the police, not the government, was their opponent.

The member concluded that she thought there are districts around the country that are exactly like what was being described in Chicago, where the parties use 17(a) trial subpoenas as a way to get documents, and the practice was based on the old forms. Based on what she had heard from different districts, that is not an unusual practice. But most districts didn't really want to talk about it because it is not really clear whether it is permissible. It works really well, and it is a way to get things really quickly without a problem. But it is not clear that it's allowed under the rules anymore.

Judge Dever had a follow-up question for all the defense lawyers as the Committee thought about how Rule 17 is written and then how it is really applied. He noted that he never had a request that included a declaration from the defendant. Rather, it was a representation by counsel, an officer of the court, stating counsel needs this information. The member noted that had been sufficient for him. But he wondered if any of the other defense lawyers had encountered any hindrance or hesitancy to make this representation, if for example judges in their district were saying that what a lawyer says is not evidence, and you need a declaration from your investigator. Or was that not an issue? He invited comments from the panelists as well as the defense members of the Subcommittee.

A member responded that in her district the CJA panel members do not often make a request for production of documents prior to trial. At least one judge's practice in the district is similar to a probable cause type motion. In a case before that judge she had to say she believed that there was evidence that would be relevant and important to her case, explaining her defense theories and how she would use the documents. She had had a form rejected and been told she needed to use the form being used by the Public Defender's Office. In the case she referenced, the court ordered the subpoena, but provided that the documents must be immediately produced to the government. This was ex parte. She was subpoenaing the Department of Motor Vehicles, and she felt the weight of what she was requesting was being evaluated. Like Ms. Coleman, the member's client told her that he had a certain defense, and she had a good faith basis to ask for the subpoenaed material. She did not believe it would be sufficient for an acquittal, but it was actually a document that she had used in the Fourth Circuit on appeal regarding a search warrant issue. So while she did not think it would ultimately prevail, she did think it was a good faith argument. She characterized it as an argument that could change the direction of her client's case, but she also felt that the court was prejudging the value of that evidence before issuing the subpoena. Although ultimately she got the evidence, which was important, there was a burden of having to go through those hoops. She had been in the United States Attorney's Office for many years, and there she could issue a subpoena and get whatever she wanted from whomever she wanted to establish her case. Now, coming to the other side she essentially has to do a search warrant affidavit to get a piece of evidence, even from a state agency such as the DMV. That's very onerous and burdensome on the front end.

Mr. Wallin commented that there might be a sequencing issue. As a CJA attorney, he had had cases in which he knew fairly quickly that he would run over the statutory fee limit and would have to file a budget request. By the time he sought a subpoena, the judge had already seen and approved the request in which he had explained why he would need additional funds, including things he would need to get, review, and have an expert review. Because the judge had already seen and approved his request, he thought it kind of primed the pump.

Mr. Cary said he had never submitted a declaration. But he could not imagine any defense lawyer would have his or her client submit a declaration. Judge Dever agreed there were some self-evident reasons why no defense lawyer would ever want to do that, but said he had concerns if some judges somewhere were actually requiring that. He noted nothing in the rule that suggests that.

Mr. Gill brought up an experience years ago in Texas. He stated his opinion that it is very important for the defense to be able to make these requests ex parte without fear of revealing their strategy. But it is equally important to the government when the defense comes across evidence that they are going to use in the trial that they reveal it to the government. It is in the interest of justice, and ferreting issues out also leads to right decisions when prosecutors know things. Holding things back just creates problems. The case he noted involved the second in charge of Dallas Police Department, who was involved in an arrest. Mr. Gill wondered why the case was going to trial. It was clean and this was an excellent witness. And on cross examination, the defense attorney cross examined the witness about something he had gotten from internal affairs about his involvement and supposedly mishandling evidence. He was shocked. But his witness explained that he had challenged the accusation, and they found that somebody had improperly levied that against him from within the department. It was unfortunate that it came out in front of the jury. It was a very fast verdict for the government. It didn't work, and if it had been revealed beforehand he would have worked it through with the defense attorney. He wanted to get to the bottom of it. He thought that if you are going to use something as evidence, it should be revealed. So it's back to them by both sides. But if it's something that hurts the defense, the defense should not have to reveal it to the government because that would chill their ability to look for evidence. In response to a query about the Texas case, Mr. Gill said this was used for impeachment. He thought that the judge in that case was determined not to let that happen again. It should have come out earlier, and it was crazy when it happened in front of the jury.

Judge Dever announced there would be a 45 minute lunch break.

Following lunch, Judge Nguyen introduced the next set of speakers.

Mr. Carter's comments focused on the contrast between state and federal subpoena practice, the difficulty of meeting the *Nixon* standard for admissibility and specificity, the inability to predict whether the judge would share the request or documents produced with the government, the harm that could cause, and the varied interpretations of the rule by different judges. He said that more experienced judges recognize some of the hurdles that Rule 17 presents to the defense, and they don't follow the rule as rigorously as some of the younger judges. Ex parte requests are rarely denied, and many of the judges will allow the defenders to

subpoena documents to their office without giving the government a chance to review them. Some of the newer judges, however, follow the rule more closely, and that creates what some of the panelists had called a chilling effect that really affects how they investigate their cases.

Mr. Carter stated that when he moved from state practice to the federal defender's office, he had been surprised how difficult it was to get a subpoena. In the Michigan state courts, he said, when investigating a case the defense can subpoena whatever it wishes. For example, if there has been a shooting outside a liquor store where there is a security camera, the defense can issue a subpoena to the liquor store. If the store's owners believe it is overly burdensome, they can file a motion to quash. Similarly, the defense can subpoena documents needed in a child sex or carjacking case.

Mr. Carter explained that Rule 17's relatively strict requirements can hinder investigation. When he has to meet the *Nixon* standard, he said, he prays that the judge will allow him to file ex parte because he will have to disclose some of his trial strategy. The investigation may be seeking information that is not admissible but may lead to something else. But he cannot pass the *Nixon* standard unless he knows "exactly what this camera is going to show or exactly what the phone records will say."

It was a struggle, Mr. Carter said, to investigate a case without having to file an ex parte motion and running the risk of a judge not granting the motion ex parte or unsealing his document and putting it on the public docket. This risk, he said, "discourages creative investigation" and seeking investigative leads that may not fall into Rule 16 but may help build the defense.

Mr. Carter gave an example of judicial oversight that could hurt defendants. His office took one of the *McGirt* cases in Oklahoma. The client had significant mental health issues that could have led to a verdict of not guilty by reason of insanity. The defense needed the client's records from the Child Protective Service Department, which requires a court order and a release. To get those records, they filed a Rule 17(c) motion. The motion was granted, but the court issued an order requiring the defense to turn over to the U.S. Attorney's Office the documents they had not yet reviewed, Although the defense lawyers had no idea what was in that sensitive information, the judge "wouldn't budge." So they called the U.S. Attorney, explained why they asked for the documents ex parte, that they had not yet reviewed them, could not turn them over now, but would provide them if they were going to be used for trial. His office literally begged the U.S. Attorney's Office not to press the matter and require them to provide the documents, and fortunately the prosecutors agreed.

Mr. Carter said it was "somewhat terrifying … that a rule exists that can result in us actually not following or adhering to our ethical duties as defense attorneys. It should not depend on how liberal the judge is in terms of his or her reading of the statute." Although Rule 17 seems pretty straightforward on its face, the way it is interpreted from circuit courts and the district courts is "all over the place." This creates obstacles that prevent defense attorneys from really digging in and investigating cases.

The next speaker, Ms. Elm, argued that Rule 17 adds little benefit while imposing high costs. She explained why there is so little benefit. She said that the rule is made for a very small number of attorneys who are truly abusing subpoenas. She estimated that 15% of lawyers get in trouble at some time, and of those two thirds can get some treatment or help and need not be disbarred. But 5% are bad actors who abuse the system. She estimated that fewer than 1% are defense attorneys who are likely to abuse subpoenas duces tecum. But this rule, she said, was made to control that small group. Other attorneys subpoena only things that are relevant. They do not have time to seek other material. As a CJA lawyer, she is subject to funding caps and has to be watchful to be sure she will be compensated for her work. Moreover, the rule is not likely to stop abuse. Bad actors can just issue trial subpoenas and fake them. She had once had an attorney in her office whom she discovered "was truly abusing this system" and not following Rule 17. After learning the attorney had issued 51 subpoenas duces tecum in a single case, Ms. Elm fired her, went to the chief judge, and got her removed from the CJA panel.

Ms. Elm concluded that if people are not following the current rule they could still escape detection. But there are ways to identify abuses. If an attorney is serving 51 subpoenas for one case, the recipients or the U.S. Attorney could complain. The judge might also notice if the returns for 51 subpoenas are coming in for an immigration case and ask what is going on. Or the judge might notice the subpoenas include no court date.

As to the cost of the rule, Ms. Elm emphasized that "the chilling effect is real." She had been told that other lawyers do not seek Rule 17 subpoenas because it is too difficult and costly. In her experience, an attorney's first Rule 17(c) motion takes 20 hours, which is close to $3,000 of taxpayer money. Subsequent ones now take her three hours, which is $500.00 of taxpayer money. Additionally, there will be a hearing, which adds to the cost. All of this cost is imposed on many people who are not bad actors. She explained that even putting in three hours plus court time and then potentially fighting with the recipient means she will hit her funding cap really early as a CJA lawyer, requiring her to apply to exceed the cap. It requires her to explain things more and raises a worry about voucher cutting. If she did a lot of investigative work, but the subpoenas don't pan out, she worries that the judge may not want to approve funds to compensate her for her work.

Ms. Elm noted another cost is exposing defense work product to the government and to the judge who will be sentencing the client. Getting the judge's approval before issuing the subpoena means the judge learns things about the case that she may later regret revealing, and that too hinders robust defense investigations. That concern was another reason, she said, that she used subpoenas more in state than federal court. She concluded that there are very real worries when she has to obtain her client's records, doesn't admit them at trial, and the judge who will be sentencing the defendant is aware of the situation.

Ms. Elm advocated amending the rule to specify what is required to get a subpoena duces tecum. She favored changing the "tough" *Nixon* standard, and allowing subpoenas for material that "might" or "has some potential of producing relevant admissible evidence." Alternatively, the rule could adopt the phrase in Civil Rule 26: "could lead to discovery of other admissible evidence." She recommended mentioning fishing expeditions in the note, but interpreting them

narrowly. She commented that almost any time she seeks a subpoena duces tecum, it might be called a fishing expedition because she is unable to say exactly what is in a document. But if she already knew what was in the document, she would not need to obtain it.

The second change Ms. Elm recommended was spelling out sanctions, as Rule 16(d) now does. She thought that could be powerful for attorneys. Although it would probably not affect pro se defendants, it would make her think about those standards when issuing a subpoena.

Like other defense practitioners, Ms. Elm pointed out that her experience with subpoenas in federal court was "very uneven." She had practiced in Arizona and the Middle District of Florida. In both districts judges had turned down some subpoenas while granting others that she thought were much closer to fishing.

Regarding judicial oversight, Ms. Elm drew attention to limitations on the defense versus the government's ability to issue subpoenas without judicial oversight. She suggested that the Committee ask the DOJ how many grand jury subpoenas and administrative subpoenas had been issued during a specified time period. She said that in a report to Congress on administrative subpoenas about twenty years ago, the DOJ had reported there were 2,000-3,000 administrative subpoenas on health fraud and about 1,300 on child exploitation. That was just two areas, and nearly 100 agencies have that power. She concluded that "if you look at what they need for investigation, and then how many Rule 17(c) motions you've seen, you will see a vast disparity, and the disparity has to do with everything a person has to go through to try to get it for the defense."

Ms. Leonida said she had been a public defender in California state court, a federal public defender in the Northern District of California, and was now in private practice at BraunHagey & Borden. She began by noting that the rules in California state court are very similar to the proposed amendment the Committee is considering, and she had considerable experience with both. She focused her remarks on three concerns raised by judicial oversight under current Rule 17, particularly in cases with more than one defendant. She also noted that given the recipient's ability to file a motion to quash, her experience with more generous subpoena power in state court did not support claims that reforming Rule 17 would result in "an unfettered fishing expedition."

In cases in which there are two defendants whose interests are obviously at odds with each other, Ms. Leonida expressed concern about the risk that one defendant's ex parte application under Rule 17(c) could provide the judge with prejudicial information about the other defendant, whose counsel would be unaware of it. She related a case where her client's defense was based on a codefendant's coercion and intimidation. She had obtained multiple ex parte subpoenas for information as permitted in the Northern District of California. That necessarily brought in front of the judge information about what a bad actor the codefendant was. In that case, she got reliable information that benefited her client. But if she had been the codefendant's lawyer she would have been justifiably angry that the judge was receiving this ex parte information that would cast her client in a very negative light.

A different concern, Ms. Leonida said, was the possibility that disclosure of a defendant's ex parte application to a codefendant could place the defendant in danger. She described a murder case she had when she was with the Federal Defender in the Northern District of California. She submitted more than ten affidavits ex parte in support of Rule 17 subpoenas, and her client cooperated with the government and testified against his codefendant. The codefendant was convicted of murder and sentenced to effectively spend the rest of his life in prison. His new lawyer on appeal sought the affidavits Ms. Leonida had submitted ex parte, and the records produced that had exculpated her client and helped him to be in a position to testify against the codefendant. The Ninth Circuit denied the codefendant access to the affidavits, holding that he had not established that there was anything exculpatory in them. But that situation had raised a number of concerns for her and her whole office. One concern was the chilling effect that people have been talking about—not just the potential that the court might expose your ex parte application to the prosecution or the public, but also the possibility that the court might expose it to a codefendant. That could potentially be very dangerous to a client's safety.

Ms. Leonida's third concern was the possibility that a codefendant's application for a subpoena or the documents produced by a subpoena might contain information that exculpated someone else. There might be exculpatory information about a codefendant in an affidavit that was in the court's possession. As a defense attorney, she has no *Brady* obligation to help a codefendant. But if the court in the course of reviewing ex parte applications under Rule 17 sees something that is exculpatory for a codefendant, there will be a real tension between preserving the strategy and the work product of the defendant applying for the subpoena, but withholding documents that could be exculpatory to another defendant who has no idea that that they exist.

Ms. Leonida concluded by stating that in her years of practicing in California she had not seen unfettered fishing expeditions, and that was the experience of attorneys who practiced in other states as well. If defense attorneys are not forced to apply to the court for subpoenas, the recipients can still move to quash. Notice to victims or the complaining witnesses can prevent abuses on that front, and she thought the proposed amendments were "very workable."

The next speaker, Ms. Miller, said she based her remarks on her experience as a Deputy Assistant Attorney General in the Criminal Division, where she supervised the Fraud and Appellate Sections, her supervisory and line experience in the Fraud Section, her prior experience as an AUSA in Miami, and her discussions with economic crimes chiefs and major crimes chiefs across the country. She focused on the limited purpose of Rule 17—expediting proceedings, not granting discovery—and gave multiple examples to illustrate her position that the risk of delay, harassment, and abuse in the use of Rule 17(c) subpoenas require judicial oversight.

The purpose of the rule was not to provide a means of discovery for criminal cases, Ms. Miller stated, but to expedite the trial by providing a time and place before trial for inspection of subpoenaed materials. In practice, Rule 17 is used not only for trial preparation but to prepare for any hearing—a sentencing, a restitution hearing, even an evidentiary hearing. Because the rule is

for evidentiary and relevant materials, it has to be tethered to some hearing before the court. She emphasized that "Rule 17 is not intended as a general discovery device."

Ms. Miller defended this limited purpose, reflected in the current language of Rule 17, the limits on the rule articulated in *Nixon*, *Bowman Dairy*, and other relevant precedent, as appropriately reflecting the differences in criminal and civil discovery as well as the fact that prosecutors have heavy ethical burdens (not just *Brady*, *Giglio*, and the *Jencks* Act), and must also abide by grand jury secrecy and prove their cases beyond a reasonable doubt. Prosecutors, she said, protect public safety, and they have to protect the integrity of ongoing covert investigations so that targets don't flee or obstruct justice. She said it was important to remember those considerations when evaluating the purpose of Rule 17 as opposed to Rule 16.

Ms. Miller argued that it was not intended that Rule 16 would provide a limited right of discovery and then that Rule 17 would provide broader discovery. Instead, she said, "circuit after circuit has held that *Nixon* does apply to defense subpoenas for third parties because the rule itself doesn't distinguish between the parties, other than 17(b), which is directed at payment of costs for indigent defendants who want to seek process."

She warned that without judicial oversight "a high volume of subpoenas" might be "issued without any standards," with numerous adverse consequences for criminal cases, including delay. Delay could harm not only the government's case, as witness memories become stale, but also the interest of the defendant and the public in a speedy trial. Other harms include the "potential for harassment of corporate and individual victims and witnesses," and the use of discovery by defendants and conspirators "to advance agendas other than defending the criminal case." Ms. Miller related several examples that she said demonstrate these potential dangers, illustrate why judicial oversight is important, and why the standard matters. Some of the examples illustrated potential harms to victims. Ms. Miller also noted that the proposal to change Rule 17 would require litigation and development in practice to define "private and confidential." A system where the onus is on the recipient of the subpoena to litigate will sometimes be hard for victims. For example, a dead victim's family may not have money to litigate, and may not know that they can litigate to quash a subpoena for very sensitive records. So a regime where the onus is on the recipient of the subpoena has to be policed carefully in cases where private, confidential information is being sought.

In other cases, Ms. Miller said, the defense sought information that was not relevant or evidentiary, or information that was protected by privilege or work product. In still other examples, the subpoena was overly burdensome in some respect, threatened an active investigation, or involved an attempt to use criminal subpoenas for discovery in civil cases. She also suggested that the percentage of cases where there are instances of improper materials being sought through Rule 17 subpoenas exceeds 1%. She summarized ten case examples.

(1) *United States v. Ford*. A defendant charged with being a felon in possession of a firearm subpoenaed the Los Angeles Police Department for 40 categories of documents and demanded production of the entire file for an ongoing murder investigation. The defendant seeking the information had previously been a suspect in the murder. The LAPD moved to quash

on grounds that the subpoena violated state law, would be burdensome, and would inhibit the ability of the state to effectively conclude the homicide investigation. Because the defendant in the felon in possession case was affiliated with the suspects in the murder case, granting the subpoena would have disrupted an ongoing homicide investigation. Those materials may very well have been useful to the defense, she said. But the defense was unable to establish that because it was a § 922 possession case, and the firearm in the murder wasn't the firearm in the § 922 case. Ms. Miller said this demonstrated that even when something could be relevant for investigatory purposes for the defense, there are other interests, such as public safety, to consider.

(2) *United States v. Stone*. A retired FBI agent was charged with trying to get money and other benefits from a woman after falsely stating that she was on probation. The defense sent a Rule 17 subpoena directly to the victim without permission and sought personal information such as cell phone records. The victim told the prosecutor about this and then told defense counsel that he intended to file a motion to quash. It was the threat of judicial intervention that caused the defendant to withdraw the subpoena. And if that threat had not been present, the victim would have been affected. That subpoena was also improper because no hearing date in the case had yet been set.

(3) *United States v. Gallo*. This case involved a securities and commodities fraud scheme. A parallel civil case against the defendant, involving a receiver who had been tasked by the SEC with preventing dissipation of assets and recovering fraud proceeds, was stayed pending the criminal case. In the criminal case, the defendant sought to subpoena the receiver and notes of the receiver's interviews with the cooperating witnesses in the criminal case. The court held that information was protected as attorney work product of the receiver and the receiver's team. Ms. Miller characterized this as an attempt by the defendant to use the criminal process to get information relevant to defending the civil case which had been stayed.

(4) *United States v. Javat*. The defendant's scheme was falsely representing to ten victim companies that he intended to purchase certain goods for export. He did this because these companies offered massively discounted rates to buyers who were going to export the goods to, for example, Afghanistan. He could generate a steep profit if he sold the goods domestically. Defense counsel sent Rule 17 subpoenas to the victim companies before trial and before the sentencing and restitution hearings. All were quashed, in part because they were directed at things other than what was at issue in these proceedings, i.e., the defendant's intent. The subpoena sought information from the victim companies about their pricing strategy, all of their buyers, and any prior criminal investigations. The court found the subpoenas were overbroad and improper. Even if the victim companies were not diligent in looking at what was going on in this case, as a matter of law in the Eleventh Circuit the contributory negligence of a defendant could not be a proper defense. So the information sought couldn't have possibly yielded evidence that was "evidentiary."

(5) Defense counsel used Rule 17 to subpoena not only a cooperating witness, but their counsel for "information that would be Rule 16 or Jencks, if it were in the possession of the

government." Counsel argued that it put him in an ethical bind to supply impeachment information about his own client to his adversary, and moreover, the information being sought was privileged (the defense counsel's own notes). After an in camera review, the subpoena was quashed.

(6) In *United States v. Sing* (E.D.N.Y.), another subpoena seeking information from counsel for a cooperating witness was quashed. There the defense counsel even acknowledged in part they were seeking privileged information and withdrew the subpoena.

(7) *United States v. Holmes* (N.D. Cal.) was a recent instance of a Rule 17 subpoena's being used in connection with a hearing on a motion for a new trial based upon what occurred after trial. One of the witnesses at the trial of Elizabeth Holmes was Dr. Rosendorff. After the trial he went to the defendant's home. The hearing was limited in scope to discussing what happened at that visit after the trial. Yet the defense sent a Rule 17 subpoena to Dr. Rosendorff seeking all his communications with the prosecution team, and all of his communications regarding the witness's trial testimony for the prior year, and correspondence with friends and family after the trial about a variety of things. The court quashed the subpoena because it was unrelated to the limited scope of the hearing, which was that one visit to the defendant's house, not an entire year of communications. And since this occurred after trial, impeachment of the witness would not be a proper basis for seeking a new trial.

(8) In *United States v. Coleman* (D. Mass), a kidnapping resulting in death case, the defense sought to subpoena the mental health records of the deceased victim. This was litigated under seal. Over the government's objection, the defense was allowed to obtain these records, and hundreds of pages of private information went directly to the defense. The prosecutors would have preferred that this information go first to the court. Ultimately at trial only a limited portion of those documents were admitted in heavily redacted form, and the prosecutors were able to notify the deceased defendant's family at the time of trial. This case showed other interests at stake: privacy interests in victims' mental health records.

(9) In an example from the Northern District of Illinois, a prosecution for spoofing and wire fraud, the defense subpoenaed the spoofing victims. There were subpoenas to proprietary trading firms and hedge funds seeking what they viewed as very sensitive information, such as their algorithmic trading formulas. Obviously these firms didn't want to provide that information, and they received subpoenas for voluminous records covering a decade. In one of the cases, the defense lawyers worked out a stipulation with the proprietary trading firms and hedge funds, so they were able to submit an affidavit in lieu of complying with the subpoena, which would have been overly burdensome.

(10) In another case, Ms. Miller said, the judge quashed a subpoena that was directed not to the victims, but to the Commodities Futures Trading Commission because it was "seeking deliberative process privileged materials."

To conclude, Ms. Miller quoted the opinion in *United States v. Layfield*, (C.D. Cal. March 2021) on the topic whether the returns from these subpoenas should be shared:

> [T]he defendant's main argument against sharing is simply mistaken. Defendant argues the government got to use the grand jury to acquire numerous documents. It only needs to provide those intended for use at trial or which constitute *Brady* or *Giglio*. Therefore, defendant now should be able to conduct his own investigation and produce those documents that are helpful and ignore those that are perhaps inculpatory.
>
> This entire line of reasoning is unpersuasive. The grand jury is a unique institution with its own powers and its own rules. Once an indictment is returned, the parties are on a more equal playing field. The government cannot now use the grand jury to conduct discovery or plug holes in the investigation.
>
> Furthermore, sharing the documents is a salutary check on the in camera process. Yes, this court either has or will, as the case may be, declined to rubber stamp any requested subpoenas. But inevitably the court either has been or will be sympathetic to requests from the defendant that appear meritorious. But if the defendant knows the documents will be shared, you'll be less likely to make requests that are essentially discovery requests camouflaged as requests for exculpatory trial exhibits.

She said that the judge in *Layfield* noted that early production and document sharing allowed for effective trial preparation. That's the key, she said, especially where voluminous or sensitive records are being sought. It serves the interest of judicial economy and the interest of all the parties to address some of these issues pretrial through sharing information not only under reciprocal discovery and Rule 16, but having protocols perhaps like the practice in the Northern District of Illinois, where the parties agree that there will be some pretrial sharing. This promotes the efficient administration of justice that serves everyone's interest.

Judge Nguyen invited questions from the members of the Rule 17 Subcommittee.

One member objected to the statement that the grand jury cannot be used once indictments are returned, noting that the government uses the grand jury after an indictment is returned if it is investigating other potential charges or bringing a superseding indictment. She asked Ms. Miller if she had any information about how often the government uses Rule 17(c) subpoenas to get information after an indictment has been returned. Also how often does the government use Rule 17(c) subpoenas?

Ms. Miller responded that in reading the *Layfield* opinion she did not mean to suggest that the government never uses the grand jury after indictment. What the judge might have meant is that there is a more equal footing after indictment because the proper purpose of using a grand jury subpoena after indictment is to investigate new conduct or new targets, and it would be an abuse of the grand jury to investigate the pending charges. Presumably there would be new indictments returned based on those grand jury subpoenas post trial or new charges. She noted that an unreported decision from the Northern District of California, *United States v. Pacific Gas and Electric Company*, involved a government request for Rule 17 subpoenas, and the court

modified the magistrate judge's order allowing in part some of the subpoenas, because some of the information sought was for impeachment, which would not be allowed. She said she did not have statistics on how often the government uses Rule 17 subpoenas after indictment, but she acknowledged that it does sometimes, particularly in reactive cases, or cases where the arrest occurs earlier than anticipated. For example, that might occur when prosecutors learn a defendant is about to flee the country and is at the airport. An arrest can be made on information that is not in admissible form. So they might may need the records custodian to certify that these are business records and use a Rule 17 subpoena to get the admissible form of the same evidence for trial.

A member asked Ms. Leonida if she had come across published opinions that addressed something similar to the codefendant issues she described. Ms. Leonida replied she had not. The first situation was just something that bothered her personally because the codefendant's attorney had no idea that that she was filing these applications. As for the case in the Ninth Circuit, she hadn't found much authority. She said one of the things that concerned her was that much of this happens behind the scenes and the codefendant's attorney never knows there is an issue.

Ms. Morales remarked that the defense comments had been pretty unanimous about reducing judicial oversight, and the prosecutors have raised some issues about the different safeguards that need to be in place to ensure that these subpoenas don't ask for records that violate privacy and other concerns. She asked the defense attorney participants what safeguards they proposed or envisioned as possible. Or did they think that there should be nothing and the Committee should just trust the 99%? How did they see it playing out, considering that not every recipient of a subpoena has the resources, knowledge, time, or inclination to move to quash a subpoena that may be improper?

Mr. Wallin responded that in a situation where the victim had been notified under Rule 17, the first thing that victims want to do is call the U.S. Attorney. As a practical matter, that is the first thing that they do. To some extent, that ameliorates problems. He said, however, that he was not per se opposed to judicial oversight. He added that he had not heard much support for maintaining the distinction between discovery versus production, and how judges should have to remember that this is not a discovery tool. He thought the provisions in question should be moved to Rule 16, so it is clear to the judges that third-party subpoenas are a legitimate discovery tool and they should analyze the factors through that lens. He thought Ms. Miller's examples would have ended up the same if there were a Rule 16 discovery type of subpoena, because they all sounded pretty egregious.

Ms. Miller responded that the victim did contact the AUSA in the Texas example. But in other cases, especially in Miami, the victims do not speak English as the first language, or they're otherwise scared because it was a violent crime and they were victimized, or they're just focused on doing their job every day, or they don't quite understand the AO form. So sometimes it is difficult for subpoena recipients to call the AUSA or to go to the court. In one case a victim in a tax fraud case denied at trial that he had met with the government, though he had met with the prosecutors and been told repeatedly that they were government. The prosecutors had to

intervene and remind the witness that they represented the government. She emphasized the importance of making the process accessible for lay people who do not understand the system when they are involved and impacted by crime.

Ms. Elm said she favored judicial oversight at the back end, rather than the front end. She appreciated that not everyone will object to subpoenas, but the Committee cannot address 100% of the problems. In her view, if the rule spelled out the expectations and the possibility of real sanctions, and judicial oversight was available when there were objections or complaints, that would address many of the problems. And, she noted, the Victims' Rights Act requires oversight at the beginning for anything dealing with the victim.

A member asked Ms. Miller two questions: whether she was in favor of judicial oversight across the board under 17(c), and whether she believed that oversight for document subpoenas should always be ex parte. Ms. Miller replied she did favor judicial oversight across the board for documentary evidence. Judicial oversight of documentary evidence, and perhaps even deadlines for exchange of information, serve the same goals as the parties' exchange of exhibit lists. On the second question, she replied that oversight needn't always be ex parte. Recognizing that the government's interests are distinct from those of the victims, some courts allow government standing to challenge Rule 17 subpoenas. Victims may not know, for example, what the charges are and thus what conceivably might be relevant in the case. She gave the hypothetical of a rule that removed any time limitation, allowing a defense attorney, one day after the indictment's returned, to submit a subpoena to return documents five days later. In that system, she thought it would be too hard to go ex parte because the court had just received the case off the wheel, and it might be important to hear from the government, for example, what the case is about.

Ms. Miller acknowledged that, in practice, many lawyers do submit ex parte subpoena requests under Rule 17(c). But the words of the rule say only:

> A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

She noted that the text doesn't say anything about ex parte, and it doesn't say you must go to the court. But Rule 17(a), which speaks to content, says a subpoena must state the court's name and the title of the proceeding. And she thought that a little bit of judicial oversight was implicit in the fact that it's coming from the AO.

The member followed up, asking whether Ms. Miller liked the rule as it is now, and preferred that it not be "automatically ex parte." Ms. Miller responded that the sound discretion of the district court should govern whether an ex parte application is granted in the context of Rule 17 and other contexts. Committing to the sound discretion of the district court whether any given item should be filed ex parte, she said, allows flexibility based on the facts and the issues.

In response to another question seeking clarification, Ms. Miller said she always preferred judicial oversight.

Judge Nguyen asked for questions from Committee members who were not on the Subcommittee.

A member raised a question triggered by Ms. Elm's description of her experience of trying to get Rule 17 subpoenas as a practicing CJA panel attorney representing indigent defendants. The proposal from the New York Bar included a hypothetical with a much different situation, where an apparently very well-heeled defendant and defense counsel with huge resources wanted sophisticated financial information to give to their financial forensic expert and consultant. The member asked whether defendants and attorneys with significantly fewer resources have different experiences and challenges getting these subpoenas. And, if so, is there something baked into Rule 17 as we have it now that exacerbates that situation? Is there something in the proposal that would help alleviate that situation?

Ms. Elm replied that well-heeled defendants represented by major law firms tended to do better than she has done representing small drug dealers. That may have been because of resources, or political ties, or more respect. But when she had gone in on 17(c) and explained it well, she said she had almost always been well treated by judges. As a CJA attorney, she tries to winnow down her requests because it will cost her a lot of time to get five subpoenas duces tecum on five different things that she might really need for her defense. Now doing habeas work, looking at ineffective assistance of counsel issues, she asks what subpoenas did they not issue that now, in habeas, they might be able to find out could have helped? And why did they not issue or try and get those subpoenas? She acknowledged that if you have the resources, you can do more. You can hire investigators to do all kinds of things. She is much more limited with a small drug client, and she did not think that Rule 17 speaks to that issue.

Mr. Carter added that he'd worked in both white collar and indigent defense, and often the relationship with a white collar client is completely different than the relationship a public defender or CJA lawyer has with their client. Usually the white collar client has selected the attorney, and they inherently trust the attorney, who comes with a great reputation. But public defenders are not quote unquote "paid" lawyers, as his clients always remind him. What that means is his client does not trust him and may not be as forthright as the white collar client. So when he asks his client if he should get the video surveillance camera outside of the liquor store where there was a shooting, he does not know whether to trust the client's response knowing that the client does not trust him. That puts him in a very difficult position. Perhaps he can file under Rule 17, but he cannot definitively state why he needs the video because he does not know if his client is telling the truth. That's baked into the indigent defense relationship.

Second, Mr. Carter agreed with other speakers about the importance of the time component. A lawyer who works at a silk stocking law firm and represents Exxon, which is his major client, can devote a lot of time to a case. For a big white collar indictment the lawyer would have the help of 100 partners and associates. But as a public defender, he has a big RICO case, a street gang, and 35 of these cases. It is difficult for him to sit down, draft motion after

motion, and think about trying to meet the *Nixon* standard each time. It stalls the process, but judges resist adjournments. A simple gun case may not be that simple in terms of the investigation. But a district court judge might think this is just a felon in possession case, so why are you asking for all these subpoenas. Judicial oversight sometimes creates this tension, and defense attorneys feel time pressure from the judges. They feel the judge will be angry if they file another Rule 17(c), when they should really do so. All of this, he said, is baked in when you're talking about indigent defense.

A member commented that the distinction between discovery and production kept coming back as an inflection point. The member appreciated the way that Ms. Leonida and Mr. Carter grounded their views on the ethical obligations of defense attorneys to conduct investigations. The duty to investigate was at the heart of *Strickland*, the case that erected the framework for ineffective assistance of counsel. The member commented that there seemed to be some common ground, perhaps around safeguards, protection of victims, and ensuring some ex parte procedure.

Judge Bates asked Ms. Leonida about the examples of situations with codefendants. Was she suggesting that some rule change was needed to address that? For at least one of those examples, he said, it seemed she might be arguing for less judicial oversight, so that the judge would not be aware of certain things. Did she think there is a rule change that would be needed to address those types of codefendant problems?

Ms. Leonida replied reduced judicial oversight would solve the problems that she had encountered in codefendant cases without resulting in fishing expeditions or jeopardizing victims or the pursuit of justice in any way. In both situations, she said, the issue was the judge getting secret information about a defendant through the Rule 17 application process. Codefendants frequently have secrets from each other. It is not a problem if one defense attorney knows something that another defense attorney wished they knew. But it does become a problem when the court has that information, putting the court in a bind in terms of which defendant's interests get priority. It is one defendant's right to exculpatory information versus another defendant's right to pursue their defense. And it is even more dangerous where a judge of necessity has a lot of information that's negative about a defendant when they are presiding over that defendant's trial, and perhaps even more significantly sentencing that defendant—and defendant's lawyer doesn't even know there is information that they need to contest or address in any way. She commented that it is not possible to unring a bell, once something is in front of anyone, even a judge.

Ms. Leonida thought that all of Ms. Miller's examples had included the word "quash." So they seemed to be situations where a subpoena was issued under the current regime, presumably approved by a judicial officer. She noted even without judicial oversight at the front end, the courts are involved. The proposed amendment requires notice to victims, and there is always built-in judicial oversight.

Judge Bates posed a second question for the prosecutors, Ms. Miller and Ms. Sampson. He said that they had raised many examples of why judicial oversight is good and necessary, and

some indication that it is desirable to have judicial discretion whether to make it ex parte. He asked whether they thought the rule as written creates any problem that needs to be fixed. Or does it allow the kind of judicial oversight and discretion they thought advisable?

Ms. Miller responded first to the question that had been directed to Ms. Leonida. She admitted she had focused on examples where there had been motions to quash, but one of them was a threatened motion to quash. She said that she thought that if the proposal were adopted, it would reduce the ability to quash improper subpoenas before records have been provided. There are some instances where parties don't know they can quash or they just start providing records because it's close to the due date. She thought that would be an issue if the Committee changed the system.

On Judge Bates's question, Ms. Miller thought the language of the rule could be sharpened. It could expressly require that there be a scheduled hearing before the court, including sentencing, restitution, trial, and so forth. But she did not think there was a problem that needed to be fixed, because the courts are currently providing appropriate case-by-case oversight. Although there are examples where sometimes a court's paying more attention or less attention, and there is district by district variation, that happens across all of the rules of criminal procedure. The variation in Rule 17 practice is similar to the variation that occurs in practice across criminal issues. She thought the variation in the Rule 17 subpoena context is not so different or much greater than the variation in, for example, the use of Rule 35s versus 5K motions in some districts. The key, she said, is the involvement of judges who know the facts and the law and can appropriately weigh in.

Another member asked Ms. Miller about her comment that in some instances early on in case judges can't know enough about the case to make decisions, which is why the Justice Department should be involved. Ms. Miller responded that her comments on this point had referred to the situation if the rule were amended. If the rule were amended to sever the link between subpoenas and scheduled hearings, and people want extremely early returns, which she thought the defense might under the new proposal, then it would be difficult given the court's limited information.

But what if a defense lawyer needs a subpoena before they even get the Rule 16 discovery? Is that reasonable? Ms. Miller said this might pose an issue in terms of managing the court's docket, but that the judges would be more knowledgeable about that. She thought as a practical matter it could be difficult to weigh these things extremely early in the case.

Judge Dever asked whether tying the Rule 17(c) request to a hearing was somewhat artificial. A defense lawyer could always say there is an upcoming initial appearance, a detention hearing, or an arraignment, and counsel needs to advise whether to plead guilty or not guilty, and that is why counsel needs this information. Mr. Wallin noted that in his district they set a trial at the arraignment, and he just sets the date of return at the first trial date. If the date later gets pushes back, that's not his problem.

Judge Dever said he would like to hear from both prosecutors and defense attorneys to get a better sense of the practice. He said that under 16(b) if a defense investigator finds inculpatory information the defendant has no obligation to turn that over. The text of the rule covers that. And yet some speakers mentioned the subpoena return is being made to the court. He noted Ms. Coleman's example where defense counsel is not sure what they will get. It might be a mix of inculpatory and exculpatory. He also asked for more information on the practice experience of those in districts where these orders are being issued. Were judges telling the defense they will only get a subpoena if the U.S. Attorney gets the information too, even when the judges realize the defense doesn't know what will be in there? Some of it might be evidence that will be introduced in the government's case in chief.

Mr. Felman responded that he had not yet had a case where he was trying to get something from a third party that he felt he needed to hide from the government. But other speakers at the meeting had given examples where that was definitely the case. So there is no one-size-fits-all scenario. There must be opportunities to go ex parte. He had come away from the day's discussion thinking that many thorny technical questions could come up. But the big one is the philosophical question: "do you want me to find out what happened or not? Or is this about limiting discovery?" That, he said, is the question the Committee has to answer. We are having a debate about whether discovery should be limited, whether defendants should basically get what the government gives them, and nothing more unless it can make a pretty compelling case on targeted matters.

Mr. Felman said he also practices criminal law in state court where he can subpoena anybody anytime. When he has gathered all the documents, he takes a deposition of each of the state's witnesses. And when he has seen the evidence the government will use at trial, he explains to his client why they need to plead guilty. He had never had a problem getting depositions in criminal cases for 30 years, and we have several places in this country where people issue subpoenas freely. Some of them are indigent, some pro se. He was sure some subpoenas get quashed. He invited the Committee to envision the reaction of civil practitioners hearing a proposal to remove their subpoena authority because some subpoenas had been quashed. He thought they would say that of course some would be quashed. He thought there was no basis to believe that if you let the defense issue subpoenas it would abuse them.

Mr. Felman returned to the foundational question. Do you want the defense to be able to learn what happened in this digital age where the evidence is not necessarily stagnant, it's not small, it's not who shot who at the 7-11? These are mountains of papers and files and digital records and emails that are not necessarily the ones the government wants the defense to get. The government is not going to seek them out. So if he cannot get them under Rule 17(c), he never will. What the Committee is really challenged by, he said, is the philosophical question of whether discovery should be limited to what the government wants to give the defense, or whether the defense should be allowed to go out and discover what happened. He urged the Committee to bend toward justice, to bend toward letting the defense find out, and let the truth shine.

A member noted that on Judge Dever's question, Mr. Carter, for example, had given the example of subpoenaing his client's health records in the *McGirt* case, and the judge ordering the records to be turned over to the prosecution. We heard some other examples as well where the defense wants to file ex parte, believing that would be possible, but then that was not the case. She thought the common ground the Committee had heard was that the rule isn't clear, and how your subpoena will be treated really depends on the judge. She thought that is a pretty significant problem, and that the Committee should fix the rule. She noted Mr. Gill said he thought a defense attorney should be able to file ex parte whenever they want to do so. But the lack of clarity described by many speakers does have a chilling effect, and it is something the Committee should try to clarify. The Northern District of California has a standing order where their court has said they are ex parte. So perhaps some courts have taken the extra step to actually write something into a rule. But Rule 17 doesn't say anything, and the member thought the Committee should at least correct that uncertainty.

The member also commented that Judge Dever had raised a good question about whether it makes sense to retain the words "hearing" or "trial" in the rule. This rule predated Rule 16, and it was not intended for discovery. We could update Rule 17 to show that you can use it for some discovery, taking out the idea that it's for a hearing and modifying the language to show it allows the defense to get discovery. But the Committee needs to agree on the standard, whether there is judicial oversight, and when judicial oversight would take place. She had been unaware that so many states don't seem to have judicial oversight at the front end, and she suggested the Committee look into that. She said it is a problem if defendants are being treated differently depending on where they live or what judge has the case. Everyone would benefit from making it clear, to show the ex parte nature of that defense investigation, and that the defense doesn't have to turn it over.

Ms. Elm added she'd had a few instances where the judge granted her motion but added she must give it to the government. In those instances, where it goes wrong, she has an ethical obligation to move to withdraw because she just harmed her client. That adds another issue.

A member asked Ms. Miller in the situations where subpoenas were withdrawn under threat of being quashed, had there been judicial approval before they were issued and served? Ms. Miller replied she would have to review the cases and supply that information to the Committee.

Ms. Miller also responded to Judge Dever's questions, noting that in a case before Judge Matsumoto in the Eastern District of New York the defense filed 35 ex parte subpoenas with the court and sought four years of records. The subpoenas originally were made out for the return to the defense. But the court ultimately ordered that the materials be turned over. She said she would follow up with the details. She noted that in *Layfield*, the case she had quoted from earlier, the court discussed why sharing the returns is beneficial for the system. So there have been instances where courts order sharing. She thought the best arguments for sharing are those given by Mr. Gill. i.e., not to invade defense strategy, but to ensure that the truth comes to light and the parties efficiently share large volumes of information, especially in white collar cases. If, for

example, the defense seeks voluminous records before arraignment to assess how to plead in a white collar case involving ten years of conduct, that could postpone the arraignment for a year and a half. So there are practical reasons why there have to be some limits. It gets to question posed by others: what should discovery be for criminal defendants? She thought it should be a different than the civil system because of the different purposes of the criminal justice system.

A member asked Ms. Miller whether she could review the cases she had described to answer some questions. Had the judges been aware of the subpoenas and had they approved them under the *Nixon* standard before the motions to quash were filed? And for those situations where judicial approval was not obtained before issuance, did the judge at the quashing stage ask why this was not brought to the court beforehand? Ms. Miller said she would review the cases, and she added that in the example from the Northern District of Texas where the former FBI agent was committing fraud there had been no advance court approval of that improper subpoena. Professor Beale asked Ms. Miller to send any additional material to Shelly Cox and copy the reporters.

Judge Nguyen invited the morning's panelists to make short additional comments in the time remaining.

Mr. Cary said he seldom used ex parte applications but had found six reported cases where ex parte applications were held to be improper. He would provide those to the Committee. He also agreed this is a philosophical question. The big question arises from the *Nixon* case, which he noted was decided in a completely different context. But now he must tell his clients he cannot satisfy the *Nixon* test even though he believes in good faith that there's information out there that would be helpful to the client, who in theory has a right to compulsory process.

Mr. Cary also responded to the question whether we should let the courts decide this thorough litigation rather than amending Rule 17. He said it would be necessary to get the Supreme Court to take a case presenting this issue if this Committee is unable to deal with what he called the basic issue: "Is the defense going to get what we defense lawyers think we need." He added that to the extent there is a concern about abuse, he agreed with Ms. Elm about sanctions and would not object to including a sanction mechanism for abuse. For personal and confidential information, he noted that the New York Bar proposal expands the protection of the Crime Victims' Rights Act, requiring advance court approval for subpoenas for personal confidential information from both victims and people other than victims. He thought that was a good balance.

Mr. Cary's final comment concerned cost and funding. He observed that we are in a data-driven world, and evidence is in data. It could often cost money to get it. In most of his white collar cases his client will gladly pay if he has to go to some company and search their computers. But Mr. Wallin's clients may not be able to pay. Our system needs to come to grips with the question how we are going to pay for it. He thought cost shifting, which was not addressed by the New York Bar, would be appropriate. He understood there may be an issue with getting funding. But if defense counsel has a good faith belief, on a good basis, that

evidence exists that would be helpful or reveal the truth, we need to find the money to allow the defense to get it.

Ms. Coleman said there is a problem with the rule. The rule regarding judicial oversight needs to be fixed, and we have to address the standard. She brought the focus back to her client: a person, a defendant with constitutional rights, including rights to compulsory process. Like a doctor, she wanted first to do no harm to her client. That is the importance of the ex parte process. She did not agree that subpoenaed materials must be shared, unless that was required by the rules governing reciprocal discovery. There must be, she argued, some capacity for her to investigate her case—as she is ethically obligated to do—and not harm her client.

Ms. Sampson said she had trouble thinking of a time when she had actually received disclosure from a defense 17(c) subpoena, though we all know that occurs. Unless we're actually going to trial and the records are going to be used in Arizona, they don't have that issue. So, in the District of Arizona, she thought they might be "in the position of what doesn't seem to be broken, doesn't need to be fixed, because it's actually working." She said the government doesn't want to keep the defense from seeking information or seeking the truth, because they are obligated to find the truth. That is absolutely something that that they want to do. But she did not know how you could have a system where the judiciary does not get an opportunity to ensure that the process of trial and discovery are going well. She knew of no other way. She said that judicial oversight is the key. She said we could talk about expanding the standard, but she thought it was not being strictly applied in her district.

Mr. Carter said indigent defense is about human beings, not two corporations fighting it out, or a big corporation being charged for some sort of fraud. These are real human beings facing a lot of time. In many state cases the unrestricted use of subpoenas had really changed the course of the litigation, whether it be getting a client to see the light and accept a good plea, or finding exculpatory evidence leading to the dismissal of the case or a not guilty verdict. The rule as written really does chill litigation. Many things are left in the dark because, as a defense attorney, you don't want to run the risk of disclosing information that can end up harming your client. Mr. Carter strongly encouraged the Committee to adopt the amendments proposed by the New York Bar.

Ms. Elm reiterated that we are really talking about trying to control a very small number of bad actors and having a very significant impact on the defense. She advocated a cost benefit analysis weighing the significant negative impacts: a rule that chills defense advocacy, imposing a difficult and expensive process, but can affect only a small number of bad actors. We should presume, she argued, that most defense attorneys are not acting inappropriately, and not impose these hardships on the good practitioners, many of whom are doing their work pro bono or for $158.00 an hour, serving the court and protecting constitutional rights of thousands of people. But the rule as written creates hardships, including realistic possibilities of denial and exposing inculpatory material. Exposing that material to the judge, even if it's not revealed to the prosecution, can affect sentencing. That is something we should to try to avoid, because it creates "a fundamental procedural due process sort of problem." The procedural burden imposed on the

defense is much more onerous and difficult than that faced by the prosecution. She agreed with the speakers who had said the issue was about allowing the defense to try to get the truth.

Ms. Miller said it was important to consider cost not just with respect to Rule 17, but also with regard to other rules. With a large volume of subpoena returns it is important to consider who will review them. She also expressed concern about federal public defenders lacking the resources to review those materials and keep up with the caseload. Would it really help defendants if it is too burdensome, given the volume of materials? That was something to consider with all of the rules, and she suggested advocating for more funds in Congress.

Judge Nguyen thanked the speakers for the robust and informative discussion. She said the Subcommittee would continue to gather information from various stakeholders, and she requested that the speakers email any additional information they think would be helpful to Shelly Cox and copy the reporters.

Judge Dever thanked everyone and stated the next meeting would be in Washington, D.C., on April 20, 2023.

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Fort Lauderdale, Florida, on January 4, 2023. The following members attended:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.[*]
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge D. Brooks Smith
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

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

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

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

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

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Brittany Bunting–Eminoglu and Shelly Cox, Rules Committee Staff; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

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

OPENING BUSINESS

Judge Bates called the meeting to order. He welcomed new Standing Committee members Judge D. Brooks Smith and Andrew Pincus; the new chairs of the Advisory Committees on Bankruptcy and Civil Rules, Judge Rebecca Connelly and Judge Robin Rosenberg; and the new Associate Reporter for the Civil Rules Committee, Professor Andrew Bradt. Judge Bates noted the departures of Judge Gary Feinerman from the Standing Committee and former Civil Rules Committee Chair Judge Robert Dow. He stated that he would work to find new members to fill the vacancies on the Standing and Civil Rules Committees. In addition, Judge Bates welcomed the members of the public who were attending remotely or in person.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the minutes of the June 7, 2022, meeting.**

Judge Bates highlighted pending rules amendments, including new emergency rules arising out of the CARES Act and amendments to Evidence Rules 106, 615, and 702. These amendments will take effect on December 1, 2023, assuming that the Supreme Court approves them and absent any contrary action by Congress.

For the legislative update, Judge Bates observed that with the end of the 117th Congress, all pending legislation had expired. Law clerk Christopher Pryby noted that, of the Fiscal Year 2023 National Defense Authorization Act provisions that he had highlighted at earlier Advisory Committee meetings, none remained in the enacted version of the bill.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. He thanked Professor Struve for her leadership on this project and her coordination among the Advisory Committees, and he invited her to provide an update on those discussions.

Professor Struve began by acknowledging the group effort that had gone into the project so far, especially from the FJC team, including Tim Reagan, Carly Giffin, and Roy Germano, who had done phenomenal work that culminated in a study released in 2022.

This project originated from several proposals about electronic filing for self-represented litigants. The current rules provide for electronic filing as a matter of course by those who are represented by lawyers, but self-represented litigants must file nonelectronically unless allowed to file electronically by court order or local rule. The proposals take two main forms: one advocates a national rule presumptively allowing self-represented litigants to file electronically, while the other advocates disallowing categorical bans on, and setting a standard for granting permission for, electronic filing by self-represented litigants.

Recounting the FJC's findings, Professor Struve noted that, in the courts of appeals, there is a close split between the circuits that presumptively give self-represented litigants access to the Case Management/Electronic Case Filing system ("CM/ECF") and those that allow that access

with permission; one outlier circuit currently has a local provision prohibiting self-represented litigants from filing electronically. In the district courts, the picture is more mixed—the bulk of districts allow self-represented litigants to file electronically with permission, a bit less than 10% presumptively permit self-represented litigants to file electronically, and about 15% do not allow it at all. And in the bankruptcy courts, it is rare for self-represented litigants to have access to CM/ECF.

The fall Advisory Committee meetings provided an opportunity to get members' senses about the current situation and their reactions to the possibility of adopting a default rule of presumptive access to CM/ECF for self-represented litigants. Those discussions also considered potential alternate means of electronic access for self-represented litigants, like those that courts experimented with during the COVID-19 pandemic. The discussions also included the possibility of policy changes not based on rules amendments as well as the need for coordination with other committees of the Judicial Conference.

A second question concerns the rules governing service of papers during a lawsuit. As between any pair of litigants who are both users of CM/ECF, service is simple, because the notice of electronic filing produced when the paper is filed in CM/ECF constitutes service. By contrast, a form of service other than the notice of electronic filing is necessary when the party to be served is not a CM/ECF user. But when a party that is not a CM/ECF user files a paper by some other means, must that party separately serve the parties who *are* users of CM/ECF? Those parties will receive the notice of electronic filing after the court clerk scans and uploads the nonelectronic filing to CM/ECF. The rules nevertheless appear to require the non-CM/ECF user to serve these parties. The questions before the committees were: Why? Is this burden on self-represented litigants necessary? Should the rules be amended to eliminate this requirement? Some districts have eliminated the requirement for service on parties who are CM/ECF users, and those districts have generally reported positive experiences with that change.

Professor Struve reported a fair amount of interest in investigating the possibility of eliminating that requirement. But there are still some details to be worked out: (1) How does the court make clear to a nonelectronic filer which parties are, and which are not, on CM/ECF—and, thus, who does and does not need separate service? (2) Would the three-day rule work seamlessly with this change, or would it need some wording adjustments? For example, the time calculation might need to be clarified or adjusted to ensure no unfairness to a party if there is some delay between when the clerk receives a filing and when the clerk dockets it in CM/ECF. Professor Struve believes this proposal contains the germ of an idea that may be appropriate for a possible rule amendment, and she expressed her hope that the Advisory Committees would continue working on the project in the spring.

Returning to whether there should be a change in the default rule governing self-represented litigants' access to CM/ECF, Professor Struve surveyed the reactions of the Advisory Committees on that proposal. The Bankruptcy Rules Committee took a positive view of the overall idea, viewing it as a matter of access to the courts. Notably, the court-clerk representative on that committee supported the proposal, saying that it is helpful for filings to be electronic whenever possible. But there was some division of views on the committee, with a couple of members expressing the need for caution and raising important questions that are detailed in the committee's minutes and reports.

The Appellate Rules Committee took a somewhat positive view of the overall concept of access to CM/ECF for self-represented litigants, in line with the current policies of the courts of appeals. Professor Struve thought that the interesting question for this committee was whether the Appellate Rules should be amended to reflect or encourage that outcome, given that the courts of appeals are already increasing CM/ECF access for self-represented litigants (with greater celerity than the lower courts). A default rule of access to CM/ECF for self-represented litigants might be easiest to adopt in the Appellate Rules, given the movement in that direction in the courts of appeals. A question for the Appellate Rules Committee may be how to balance that consideration against the value of uniformity across the national sets of rules.

Professor Struve reported that there were more skeptical voices in the Civil Rules Committee on the proposal relating to CM/ECF access. Some members wondered whether the matter might be more appropriately treated by another Judicial Conference actor such as the Committee on Court Administration and Case Management ("CACM"). Overall, there was much less momentum on the Civil Rules Committee for a rule change.

Turning to the Criminal Rules Committee, Professor Struve first noted that this committee's interest was different from that of the other Advisory Committees. There are very few nonincarcerated, self-represented litigants appearing in situations covered by the Criminal Rules. (Professor Struve noted that, even in the districts that presumptively allow self-represented litigants CM/ECF access, that presumption of access typically excludes incarcerated litigants because of the logistical particulars of carceral settings. So, at least in the near future, even the most expansive grant of electronic-filing permission to self-represented litigants would likely not encompass incarcerated self-represented litigants.) But the committee had an excellent discussion of the service issue, and the committee would be open to exploring that question further.

Professor Struve concluded by welcoming the input of the Standing Committee members on any of these topics. She noted that the project continues to operate in an information-gathering mode, especially on the service issue and the various ways by which electronic-filing access could be expanded for self-represented litigants, including by working in tandem with other Judicial Conference actors.

Judge Bates thanked Professor Struve and opened the floor to comments and questions.

A practitioner member suggested that greater access for self-represented litigants is a good thing, but also that some fraction of self-represented litigants would abuse electronic-filing access. This member asked which would be easier for courts to administer: a rule requiring courts to deal with requests for permission, or a rule granting access by default and leaving the courts to deal with the task of revoking that access in particular cases? Professor Struve noted that Dr. Reagan and his colleagues at the FJC had talked with clerk's offices around the country and would be in a good position to answer that question. Dr. Reagan reported that, in speaking with personnel in several districts that had recently expanded self-represented litigants' access to CM/ECF, he and his colleagues heard that court personnel's fears were not particularly realized. He also observed that self-represented litigants can disrupt the work of the court regardless of their filing method. In fact, some courts appreciated receiving documents electronically because they did not have to receive things in physical form that would be unpleasant to handle. And every court is quite capable of limiting improper litigant behavior.

A judge member appreciated the thoroughness of the FJC report in obtaining input from clerk's offices and considering the pros and cons of a change in the rules and other issues that would arise. The member thought that the primary focus of this project ought to be learning about the experiences of clerk's offices. The clerk's office of the member's court had strong views on this matter, especially on who should bear the burden of the work generated by noncompliant self-represented litigants.

Ms. Shapiro asked whether the FJC report looked at whether self-represented litigants complied with redaction and privacy-protection rules. Dr. Reagan responded that the report did not get into the weeds with this question, but he did note that this same problem occurs with represented litigants as well. One appellate clerk had mentioned locking a document and later posting a corrected version; he was not sure whether that had to do with redaction problems. He stated that there is a way to configure CM/ECF so that the court must "turn the switch" before a submitted filing is made available in the record.

Judge Rosenberg reiterated her comments from the October Civil Rules Committee meeting, which reflected feedback from her court's clerk: Most courts are not equipped to accept self-represented litigants' filings through CM/ECF. So, while it is a good idea to expand electronic filing to all litigants, until all courts can comply, it is not advisable to amend the federal rules to establish a presumption in favor of allowing electronic filing. Additionally, different courts use different versions of CM/ECF, and the version used affects both the court and the filer. Further, there is not a unique identifier for many self-represented litigants. By contrast, attorneys have unique bar numbers.

Professor Struve responded that, if a court would not be able to function with a presumption in favor of electronic access for self-represented litigants, then that court could adopt a local rule to opt out of the presumption. It is true that, if the bulk of districts opted out, that might lead one to question the wisdom of the rule. As to the point about identifiers, Professor Struve suggested that the districts currently allowing presumptive or permissive electronic access by self-represented litigants would have had to solve that problem, so it would be helpful to ask those districts for their experiences with that issue.

Judge Bates concluded by recognizing that cases involving self-represented litigants make up a large part of the civil and bankruptcy dockets in federal court, and this is a project that the committees will continue to work on. He hoped that the committees and reporters would continue to provide a high level of participation, and he thanked Professor Struve and everyone else who had worked on the project with her so far.

Presumptive Deadline for Electronic Filing

Judge Bates reported on a joint committee project that arose from a suggestion by Chief Judge Chagares of the Third Circuit, the former chair of the Appellate Rules Committee, that the committees consider changing the presumptive deadline for electronic filing from midnight to an earlier time. Judge Bates observed that the FJC had done excellent research for this project, and that one of the relevant FJC reports was included in the agenda book. The status of the project is uncertain. The Civil Rules Committee has recommended that the project be dropped. But the Appellate Rules Committee recommended that the question of how to proceed be posed, in the

first instance, to the Joint Subcommittee on E-filing Deadlines, because that Subcommittee has not convened recently. Judge Bates agreed that the Joint Subcommittee should be asked to undertake a careful review of the project, and he noted that he would also continue to seek Chief Judge Chagares's input.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in Washington, D.C., on October 13, 2022. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 134.

Information Items

Amicus Disclosures. Judge Bybee reported on this item. He described it as perhaps the highest-profile matter before the Advisory Committee. There has been a long exchange of correspondence between the Clerk of the Supreme Court and the chairs of the Senate and House Judiciary Committees over amicus practice, and, during the previous Congress, legislation was introduced in each house that would regulate amicus practice. The Supreme Court and its Clerk referred the matter to the Advisory Committee. The Advisory Committee has made some progress, but it seeks input from the Standing Committee on some important policy questions.

Judge Bybee directed the Standing Committee's attention to draft Rules 29(c)(3) and (c)(4) as set out in the agenda book; he noted that this was a working draft, not yet a proposal. Draft Rule 29(c)(3) would require an amicus to disclose any party that has a majority interest in or control of the amicus. Draft Rule 29(c)(4) would require the amicus to disclose any party that has contributed 25% or more of the amicus's gross annual revenue over the last 12 months. The Advisory Committee sought input on two questions: (1) Is 25% the right number? (2) Is the last 12 months the right lookback period, or should it be the previous calendar year? As to question (1), at the October 2022 Advisory Committee meeting, some members had expressed concern that, if the rule set one particular percentage—such as 25%—as the trigger for disclosure, then where a party's contributions were anywhere above that single threshold the amicus might not file a brief out of concern that the court would assign the brief little weight. An alternative suggestion was to require an amicus to disclose that the contribution percentage lay within some "band" of amounts—such as from 20% to 30%, 30% to 40%, and so on.

A practitioner member wondered whether there was a need to regulate this area. However, given that Congress has expressed an interest in the topic, the member suggested that perhaps it did make sense for the committees to consider possible rule amendments. The member thought 25% was a reasonable number because, in the member's experience, that contribution level would be highly unusual and could indicate that the amicus is acting as a front for a party. The member also thought it more administratively feasible to use the last calendar year than the last 12 months.

Judge Bates asked whether the current draft Rule 29(c)(3) would capture a situation in which a party and the party's counsel each had a one-third interest in the amicus. Should the rule capture that situation? The draft wording—"whether a party or its counsel has (or two or more

parties or their counsel collectively have) a majority ownership interest"—addresses a situation in which "two or more parties or their counsel" have a collective interest, but it is not clear if it captures situations in which a single party and its counsel have a collective interest. Should "a party or its counsel has" be "a party and/or its counsel have"?

Professor Garner opined that a hard contribution threshold might encourage parties to structure their contributions in such a way as to avoid meeting the threshold. He suggested that the Advisory Committee instead consider a rule requiring disclosure of "the extent to which" a party has contributed to the amicus. The court could decide for itself what contribution amount was de minimis. And an organization that goes to the trouble of preparing an amicus brief would be able to answer the contribution question with a fair degree of certainty.

Professor Hartnett responded that the Advisory Committee had some concern about requiring that amount of precision. Instead, requiring disclosure within a band of contribution percentages tried to address the structuring issue. The Advisory Committee also wanted to build into the rule a floor beneath which amici need not worry about having to make a disclosure.

Judge Bates noted that the rule could also be tweaked to require disclosure of a precise percentage above a floor. Those below that floor would not have to make a disclosure.

A practitioner member commented on the general view of practitioners in this area: If an amicus must make a disclosure, then its brief will probably not get much attention. A rule that requires a disclosure suggests that a brief containing that disclosure is tainted in some way. In many of these situations, an amicus would likely choose not to file a brief rather than to make a disclosure. So there should almost certainly be a floor before disclosures are required. There is also a First Amendment interest in this area (the member noted the decision in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021))—and whatever rule is adopted must be examined through that lens. That interest further weighs in favor of a floor below which no disclosure is required. Because the disclosure requirement will change the dynamics of amicus filings, the calculus on whether and how to amend the rule should consider whether the benefits of disclosure outweigh the harm of deterring amicus filings.

Judge Bates agreed that the goal is not to dissuade the filing of amicus briefs but rather to provide information to the courts and public with respect to those who file these briefs.

A judge member had difficulty recalling any amicus briefs as to which it was not obvious who was filing the brief and as to which more information about the amicus would have made a difference. It is the brief's contents that matter, not its author. If other appellate judges feel similarly, then the member would not worry about trying to craft a rule that would require complete disclosure of all details about the amicus.

Judge Bybee noted that one concern is that parties are evading their own page limits by inserting their arguments into amicus filings. The judge member suggested skepticism about the gravity of that particular concern. He conceded that Congress's interest in the amicus-disclosure issue weighs in favor of careful consideration of a possible rule amendment. But, he suggested, if the courts of appeals generally feel that they are not being hoodwinked by amici or deluded into believing something about which they otherwise would have been more suspicious had amici's

relationships with the parties been apparent, that should temper the rulemakers' zeal for pursuing an all-encompassing, exhaustive disclosure requirement.

Another judge member disclaimed knowledge as to whether the 25% figure was "right," but stated that this figure was "not wrong." The member suggested that searching for the precisely "right" number was not worthwhile. Responding to Professor Garner's prior suggestion, this member warned against building into the rule any subjectivity that would allow a court to decide whether to require disclosure based on who the participants are. If a proposal is adopted, it should use an objective number rather than a moving target. As to the lookback period, the member suggested that the prior fiscal or calendar year would be more administrable than a moving 12-month period; the latter would require a lot of research and calculation.

A practitioner member acknowledged the focus on drawing a line between helpful disclosure requirements and unhelpful, unwarranted disclosure requirements. But the member also wondered whether a lower threshold might normalize disclosure, making it not such a negative thing. A lower threshold like 5% or 10% would generate a lot more disclosures, but such a disclosure would not necessarily discredit a brief as much as a disclosure in response to a higher threshold that is only infrequently met.

A judge member thought that a threshold above 25% would be too high. And if the threshold were set higher than 25%, a disclosure would really mark the amicus brief because it would be extremely unusual. The member also suggested that judges' views on the optimal level of disclosure are not the only consideration. Members of the public may not have the same information or reactions that judges do. Part of the value of the disclosures was to let the public know who is responsible for filing amicus briefs. This transparency concern is particularly strong when amicus filings are cited by judges as persuasive in their decisionmaking.

A practitioner member expressed doubt about the idea of normalizing disclosures. The purpose of a disclosure is to flag something relevant about a brief. The member questioned whether lowering the threshold would serve that purpose. Instead, the goal should be to identify a category of briefs to treat with caution.

Another practitioner member thought that more regulation of amicus briefs was not a good idea. If a relevant industry group files an amicus brief in a case on appeal, that tells the court that the industry is concerned about some issue—it does not matter only to the parties. The rule should encourage filing amicus briefs. Judges can pay attention to what they want to in those briefs. The member thought that 25% was the right threshold because it is objective and because, if a party is paying for 25% or more of the amicus organization's cost, it is largely a party-controlled organization. As to most big organizations that routinely file amicus briefs, the number would probably be 5% or less. The member also agreed that required disclosures may chill the filing of amicus briefs.

Professor Garner suggested that a rule requiring disclosure of "the extent to which" a party has contributed to the amicus could be combined with a provision stating a presumption that any contribution over 25% would be excessive. Judge Bates noted that this presumption would change the thrust of the rule by expressly stating how the court would view the brief. Judge Bybee did not think the Advisory Committee had been going in that direction; he could not remember a judge

having said anything like, "if the party contributes over 50%, I won't consider the brief." Instead, some judges have suggested that it is important to have more information, not less. Professor Hartnett agreed that the rule has governed only when disclosure is required; discounting a brief's weight has not been addressed in the rule's text. This kind of modification would significantly change how the rule operates.

Professor Hartnett sought more comment on the banding idea. He thought it might mitigate the risk of using a single number—if that number is too high, it works like an on–off switch; if too low, it does not give enough information because a court cannot tell how far the contribution amount is above the threshold. Banding would provide more information than a single threshold, while not requiring the same degree of precise calculation as the "extent to which" option. Would this idea work as a compromise?

Judge Bates agreed that using banding would require more information from an amicus than would a single percent threshold above which disclosure is required.

A practitioner member stressed that the disclosure requirement would need to include a floor beneath which disclosure is not required. This member suggested that, once there is a floor, having banding in addition would not do much work, especially if the floor is as high as 25%.

Another practitioner member liked the banding approach because it would provide more information to the courts and public. The question would then be where to start and end each band. More disclosure is better, and so long as it remains up to the judges to decide at what level a disclosure matters, then the rule introduces no presumption of taint.

A third practitioner member remarked that a member of a big amicus organization generally must undergo a rigorous application process before the organization will sign onto an amicus brief for that member. That process is useful because courts can then take that organization's reputation as a signal—if it signs a brief, then the issue is one that matters to more than just the litigants. The member liked the 25% threshold because it indicates that the amicus is not really a broad-based group that represents the industry. Lowering the threshold defeats the purpose of having amicus briefs and introduces a false perception of taint if there is a disclosure of a low percentage. The lower threshold would lead to too much micromanaging of amici. The member also expressed concern that a lower threshold could disadvantage plaintiff-side amici because bigger organizations tend to be on the defense side. And one can look at the website of a large organization to see if a party is a member.

An academic member expressed a preference for keeping the rule as simple as possible. That militates in favor of a single number. The member liked 25%—it is high enough that if an amicus is above that threshold, it will raise eyebrows. The difficulty with banding is that compliance could be complicated, particularly if there is no lower bound. Without a lower bound, if a party had bought a single table at a fundraiser for the amicus, the amicus would then have to divide the value of the contribution associated with buying that table by the amicus's overall revenue in order to determine the percentage value of its contribution. A disclosure requirement without a lower bound would discourage potential amici from filing. It would signal that courts do not want to hear their voices.

The conversation then turned to draft Rule 29(e). Judge Bybee introduced this draft rule, which appeared on page 137 of the agenda book. The draft rule would require an amicus to disclose any nonparty that contributed over $1,000 to the amicus with the intent to fund the amicus brief. Judge Bybee asked two questions: (1) Is the $1,000 figure the right threshold? This figure was meant to exclude disclosures for crowdfunded briefs. (2) Should the draft rule contain provisions like those in draft Rules 29(c)(3) and (c)(4), requiring disclosures of contributions even if they are not earmarked for funding an amicus brief?

Judge Bates remarked that a $1,000 cutoff, although high enough to address the crowdfunding issue, seems very low.

A judge member thought that this draft rule would require amici to make greater disclosures than parties themselves must. Parties may obtain funding from undisclosed sources, raising issues about third-party litigation funding. The draft rule overemphasizes the importance of amicus briefs and mistakenly suggests that courts are more concerned with who is speaking than with the merits of the argument. The member also thought that this is a policy question that should be deferred until the discussion of third-party litigation funding of parties; in the meantime, this member suggested, subpart (e) should be deleted from the draft. Professor Hartnett observed that the current rule requires disclosure if someone other than the amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The member acknowledged that fact, but argued that proposed subdivision (e) would heighten the issue.

Judge Bates remarked that there may be greater First Amendment issues in requiring disclosure of nonparty contributions than in requiring disclosure of party contributions.

A practitioner member stated that adopting draft Rule 29(e) would be a mistake. It would open up a hornet's nest concerning intentionality. How can you determine whether someone intended to fund a brief? Suppose an organization told potential donors the topics of ten amicus briefs it intended to file over the coming year. Or suppose that a donor bought a ticket to a dinner at which a representative of the organization discussed some of its amicus filings. The member also thought that $1,000 was a low threshold.

Another practitioner member commented that the innovation in draft Rule 29(e) is really about contributions by members of amicus organizations—there is already a disclosure requirement as to contributions by nonmembers. The member differentiated two types of amicus organizations: larger organizations with annual budgets that include a chunk of money for amicus briefs, and organizations (typically smaller) that "pass the hat" to fund a particular amicus brief. Draft Rule 29(e), this member suggested, would unfairly burden such smaller organizations by requiring them to make disclosures, whereas dues payments probably would not have to be disclosed. Draft Rule 29(e) would make it harder for those smaller amici to file briefs.

A judge member thought that the draft rule could lead to an escalation of corporate screens and shielding to evade required disclosures. A would-be funder might set up an LLC to make the donation; would the rule also have to require disclosure of the LLC's funding? This judge sees briefs from a number of amici for which the funding is unknown. The draft rule aims for more disclosure than is currently required for dark-money contributions to political campaigns. There is a public interest in disclosure, but there are practical limitations on what the committees can do.

The member cautioned against increasing the complexity of the disclosure scheme (for example, with banding)—such new hurdles could be leapt over as easily as the current ones.

A practitioner member supported omitting draft Rule 29(e). Congress, this member suggested, is concerned about parties, not nonparties. Nonparties do not implicate the same concerns. The member also noted that, under the current Rule (as well as under draft Rule 29(c)(2)), if a party contributes any money intended to fund an amicus brief, the fact of the contribution must be disclosed.

Judge Bates asked why, in draft Rule 29(d), the language is limited to only a *party*'s awareness. Draft Rule 29(c) is worded in terms of *party or counsel*; why should 29(d) be different? Judge Bybee agreed with that wording change and, more generally, thanked the Standing Committee for its input.

Rule 39 (Costs). Judge Bybee briefly covered this and the remaining items. The Supreme Court suggested in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628, 1638 (2021), that "the current Rules . . . could specify more clearly the procedure that . . . a party should follow" to bring its arguments about costs to the court of appeals. The real problem in this situation is a narrow one that is nevertheless important in some big cases. It involves the disclosure to parties of the consequences for costs on appeal if a supersedeas bond is filed or another means of preserving rights pending appeal is used. A subcommittee is currently working on this issue. It may be useful for the Appellate Rules Committee to coordinate with the Civil Rules Committee to see whether the Civil Rules might also require changes.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis ("IFP")). Form 4 concerns the disclosures required of a party seeking IFP status on appeal. The Advisory Committee has tried to simplify the form. Many of the circuits have ignored the form for years and have their own forms. The Advisory Committee is not purporting to change that fact, only to simplify the current national form. Also, the Supreme Court has incorporated the form by reference in Supreme Court Rule 39.1, so it would be advisable to ask if the Court has any input on changing the form.

Appellate Rule 6 (Appeal in a Bankruptcy Case) and Direct Appeals in Bankruptcy. Judge Bybee adverted briefly to this project, which dovetails with the Bankruptcy Rules Committee's project (discussed later in the meeting) to amend Bankruptcy Rule 8006(g) to clarify that any party may request permission to appeal directly from the bankruptcy court to the court of appeals. He noted that the Appellate and Bankruptcy Rules Committees are coordinating their work on Bankruptcy Rule 8006(g) and Appellate Rule 6.

Striking Amicus Briefs; Identifying Triggering Person. Rule 29(a)(2) allows a court to refuse to file or to strike an amicus brief that would lead to a judge's disqualification. A suggestion was made to modify this rule to require the court to identify the amicus or counsel who would have triggered a disqualification. After extensive discussion, the Advisory Committee removed this item from its agenda.

Appeals in Consolidated Cases. A suggestion to amend Rule 42 arose following *Hall v. Hall*, 138 S. Ct. 1118 (2018). After thorough discussion, the Advisory Committee removed this item from its agenda.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report. Hearing none, he invited the Bankruptcy Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in Washington, D.C., on September 15, 2022. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 175.

After Judge Connelly recognized the work of Judge Dennis Dow, the Advisory Committee's previous chair, the committee began its report.

Action Item

Publication of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The Advisory Committee sought the Standing Committee's approval to publish for public comment an amendment to Official Form 410. A creditor must file this form for the creditor's claim to be recognized in a bankruptcy case. Official Form 410 contains a field for a uniform claim identifier ("UCI"), which a creditor may fill in for electronic payments in Chapter 13 cases. The Advisory Committee has proposed a revision to remove both the specification of electronic payments and the reference to Chapter 13 cases, allowing a creditor to list a UCI for paper checks or electronic payments in any bankruptcy case.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the publication for public comment of the proposed amendment to Official Form 410.**

Information Items

Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Professor Bartell reported on this item. As amended in 2005, 28 U.S.C. § 158 provides for direct appeals of final judgments, orders, or decrees from the bankruptcy court directly to the court of appeals upon appropriate certification and subject to the court of appeals' discretion to hear the appeal. Bankruptcy Rule 8006(g) requires that, within 30 days after certification, "a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with" Appellate Rule 6(c). The bankruptcy rule is in the passive voice and does not specify who may file that request for permission. Bankruptcy Judge A. Benjamin Goldgar proposed an amendment to clarify what he—and the Advisory Committee—believed to be the meaning of the rule: any party, not just the appellant, may file the request for permission.

At Professor Struve's request, the Bankruptcy and Appellate Rules Committees have worked together to draft amendments to ensure that Rule 8006(g) is compatible with Appellate

Rule 6(c). The Bankruptcy Rules Committee has approved an amendment to Rule 8006(g) that was the product of that collaborative effort. Because the Appellate Rules Committee has created a subcommittee to consider related amendments to Appellate Rule 6(c), the Bankruptcy Rules Committee will wait to seek approval for publication of amended Rule 8006(g) until publication is also sought for an amendment to the appellate rule.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Professor Gibson reported on this item. Bankruptcy Rule 3002.1 requires the holder of a mortgage claim against a Chapter 13 debtor to provide certain information during the bankruptcy case. This information lets the debtor and the trustee stay up-to-date on mortgage payments. Significant proposed amendments to Rule 3002.1 were published in August 2021, and the Advisory Committee received very valuable comments. The Advisory Committee has improved the proposal in response to those comments. Because the post-publication changes are substantial, re-publication would be helpful. The Advisory Committee still needs to review comments on proposed amendments to related forms. The committee will likely seek approval to republish the amended rule and related forms at the Standing Committee's June 2023 meeting.

Electronic Filing by Self-Represented Litigants. Professor Gibson reported on this item as well. She agreed with Professor Struve that the Advisory Committee had a positive response to the prospect of expanding electronic filing by self-represented litigants. Professor Gibson noted her surprise at this response, given that bankruptcy courts are currently the least likely to allow self-represented litigants to file electronically. She concurred with Professor Struve that there were a couple of committee members who raised concerns, particularly about improper filings. Other committee members noted that self-represented litigants could make improper filings even in paper form. The Advisory Committee needs to think about the serious privacy concerns raised earlier. But, overall, the Advisory Committee supported looking at how to extend electronic-filing access to self-represented litigants in coordination with the other Advisory Committees.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Civil Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus, Bradt, and Cooper presented the report of the Advisory Committee on Civil Rules, which last met in Washington, D.C., on October 12, 2022. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 203.

After Judge Rosenberg recognized the work of Judge Robert Dow, the Advisory Committee's previous chair, and welcomed Professor Bradt as the new Associate Reporter, the committee began its report.

Action Items

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

Discovery). Judge Rosenberg reported on this item. The Advisory Committee sought the Standing Committee's approval of proposed amendments to Rules 16(b)(3) and 26(f) for publication for public comment. These amendments would require the parties to focus at the outset of litigation on the best timing and method for compliance with Rule 26(b)(5)(A)'s privilege-log requirement and to apprise the court of the proposed timing and method. It can be onerous to create and produce a privilege log that identifies each individual document withheld on privilege grounds. The original submissions advocated revising the rule to call for the identification of withheld materials by category rather than identifying individual documents. The Advisory Committee examined that proposal as well as competing arguments for logging individual documents. Judge Rosenberg noted that there is a divide between the views of "requesting" and "producing" parties. The Advisory Committee concluded that the best resolution was to direct the parties to address the question in their Rule 26(f) conference, which would give the parties the greatest flexibility to tailor a privilege-log solution appropriate for their case. Thus, the proposed amendment to Rule 26(f)(3)(D) would add "the timing and method for complying with Rule 26(b)(5)(A)" to the list of topics to be covered in the proposed discovery plan. The proposed amendment to Rule 16(b)(3)(B)(iv) would make a similar addition to the list of permitted contents of a Rule 16(b) scheduling order. The proposed committee notes to the amendments stress the importance of requiring discussion early in the litigation in order to avoid later problems. The committee note to the Rule 26 amendment also references the discussion (in the 1993 committee note to Rule 26(b)(5)(A)) of the Rule's flexible approach.

Professor Cooper added that the privilege-log problem stems from Rule 26(b)(5)(A)'s text, which requires the withholding party to "describe the nature of" the items withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." That is a beautiful statement of the rule's purpose but it gives no guidance on how to comply. The Civil Rules Committee's Discovery Subcommittee acknowledged the complex policy concerns at play and it consulted widely and at length. The picture that emerged is one in which the producing parties can face significant compliance costs, while the receiving parties are concerned about overdesignation and that the descriptions they receive do not enable them to make informed choices about whether to challenge an assertion of privilege. In addition, problems may surface belatedly because the privilege log is provided late in the discovery process. The subcommittee realized that there would be no easy prescription for every case, and it concluded that parties are in the best position to solve the problem by working together in good faith. The proposed amendment adds only a few words, but it is intended to start a very important process.

Professor Marcus noted that the Advisory Committee has heard from many commenters. The amendment had evolved quite a bit and was now ready for public comment.

Judge Bates observed that, although the changes to the rules' text are modest, the proposed amendments are accompanied by three or four pages of committee notes. Some of that note discussion is historical, and some is explanatory, but some looks like best-practices guidance. He wondered whether this was unusual or a matter of concern.

Professor Marcus acknowledged the importance of that concern. He noted that this is a concise change to a rule that has a large body of contention surrounding it. Because the proposed amendment asks parties to discuss something that is not defined in the rule with great precision, it seems helpful for the committee note to provide some prompts for that discussion. Public comment

often focuses on the committee notes, and such comment might prompt the Advisory Committee to revise the note language after publication. But it seems more desirable to put some guidance into the proposed note rather than to provide a Delphic rule with no guidance.

Professor Cooper added that this issue was considered at the Advisory Committee meeting. The practice on committee notes has varied over time. For example, the 1970 committee notes to the discovery-rule amendments would put a treatise to modest shame, and served a good purpose at the time. And courts of appeals have said that committee notes can provide useful guidance for interpreting the rules. The note is subject to polishing, and public reaction may stimulate and help focus that polishing. It is challenging at best to improve on the present text of Rule 26(b)(5)(A)—how does one express in rule text that what may work in one case may not work in another? The note grew to these proportions in order to capture how the parties might try to alleviate problems that have emerged in practice but that are too varied and complex to incorporate into the rule's text.

Judge Bates expressed concern that, even if the note spurs more comments, because this is a contentious issue, the comments would reflect competing views of what the note should contain. Would the Advisory Committee then intend to resolve those competing views in deciding what goes in the committee note in terms of what is or isn't the best practice? Publication could make this process more complex, especially with so many bits of best-practice advice offered on a subject that is important to many litigants and counsel.

A practitioner member thought that the rule text was elegant and salutary and also noted appreciation of the existing rule's cross-reference to Evidence Rule 502. The long committee note would create the attention that the Advisory Committee wants, would focus practitioners on how to make the process work, and would address the existing problem of privilege logs coming late in the discovery process.

A judge member agreed with Judge Bates and stated that his initial reaction had been that the Standing Committee was being asked to approve a committee note, not a rule change. But then, the member said, he perceived a linkage between the rule text and the committee note. Because the rule was intended to be flexible, not one-size-fits-all, that is why it should be on the agenda early in the case. But the committee note could be greatly reduced to something like: "This was not intended to be an inflexible, one-size-fits-all rule. *See* the 1993 committee notes. This issue should be discussed early on in litigation, hence the proposed change." That might more appropriately focus the public comments.

Another practitioner member thought that the proposed amendment to the rule's text was an excellent addition that would treat both plaintiffs and defendants fairly. The committee note serves a purpose and is evenhandedly written. The note would help parties in privilege-log negotiations to push back against a view that all communications must be logged. A short note runs the risk of accomplishing little. This longer note would allow for good discussion between parties in order to alleviate costs and burdens.

A third practitioner member liked the rule change itself but agreed that the committee note was on the long side. The note is evenhanded but reads like something that would be better found in a treatise, not a committee note. There would be some benefit to stripping some examples out

of the note and allowing litigants and courts to develop the practice. Over time, a treatise would capture the best practices.

Professor Coquillette congratulated the Advisory Committee on an excellent rule, but agreed that the notes were too long and contained too much practical advice. The point is often made that lawyers look to treatises for practical advice. But those sources are behind paywalls, and some lawyers do not even read committee notes. So substantive changes should be in the rule text. Professor Coquillette observed that the committee notes could be revised after public comment.

A judge member suggested striking language in the draft committee note to the amendment to Rule 16(b)(3). Specifically, the clause "these amendments permit the court to provide constructive involvement early in the case" (agenda book page 211, lines 265–66) is inaccurate because a court does not need the rule's permission to be involved in discussions about complying with the privilege-log requirement. Professor Marcus asked the member whether the word "enable" would be better than "permit." The member thought that "enable" might still carry the implication that the court does not otherwise have the authority to manage the case by talking to counsel about what should be in a privilege log. Another judge member suggested replacing "permit" with "acknowledge the ability of."

A practitioner member offered suggestions for shortening the committee note to the Rule 26(f) amendment. The initial paragraphs were background. The paragraph starting on page 209 at line 200 recounted privilege-log practice. The next paragraph listed some examples that were probably worth having in the note. The paragraph discussing technology was useful to have in the note. Then there were the paragraphs about timing of privilege logs. The current draft's ten to twelve paragraphs, this member suggested, could probably be reduced to about four.

Judge Bates asked the representatives of the Advisory Committee whether they wanted to proceed with seeking the Standing Committee's approval for publication or to return to the Advisory Committee with the Standing Committee's feedback first. After conferring, Judge Rosenberg announced that she and the reporters would return to the Advisory Committee and the appropriate subcommittee with the Standing Committee's comments. The Advisory Committee would bring the proposed amendment back to the Standing Committee, with any warranted changes, at its June meeting. **No further action was taken on this item at this time.**

Appeals in Consolidated Cases. Judge Rosenberg reported on this item. This suggestion arose from *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018), in which the Supreme Court observed that if its holding regarding finality of judgments in actions consolidated under Rule 42(a) "were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." After extensive discussion and a thorough FJC study by Dr. Emery Lee, a joint subcommittee of the Appellate and Civil Rules Committees found that there was not a sufficient problem to warrant a rule amendment—that is, litigants were not missing the deadline by which to appeal a final judgment in a consolidated action. The item was therefore removed from the joint subcommittee's and the Civil Rules Committee's agenda.

Judge Rosenberg recommended that the joint subcommittee be dissolved. The Appellate Rules Committee's representatives concurred. Judge Bates noted that he was unsure whether the

joint subcommittee had been formed by a vote of the Standing Committee. Hearing no questions or comments about this item from the Standing Committee, Judge Bates asked whether anyone objected to removing the *Hall v. Hall* issue from ongoing review by the joint subcommittee and the Advisory Committees and dissolving the joint subcommittee. **Without objection, the joint subcommittee was dissolved.**

Presumptive Deadline for Electronic Filing. Judge Rosenberg briefly addressed this item, noting that the Advisory Committee had recommended that the proposal be removed from its agenda. But, based on Judge Bates's comments from earlier in the meeting, the joint subcommittee would reconsider the suggestion. **No further action was taken on this item at this time.**

Information Items

Multidistrict Litigation ("MDL"). Judge Rosenberg introduced this item by remarking that the MDL Subcommittee had first been formed in 2018 in response to comments about how important MDLs had become. No decision has yet been made on whether to recommend a rule change addressing MDLs. The subcommittee has instead focused on the question: if there *were* a rule change, what would the best possible rule be? Every MDL is different, and that has been the guiding principle throughout the iteration of different proposals. The subcommittee has been mindful of the importance of flexibility and of the many factors that bear on MDLs. The subcommittee explored putting MDL provisions into Rules 16 and 26 before ultimately developing the idea for a new Rule 16.1.

There are two versions of the draft rule, currently called Alternatives 1 and 2. The Advisory Committee has not yet considered and discussed the feedback of participants at the transferee judges' conference. Alternative 1 was well-received at the transferee judges' conference by many of the same judges who did not support an MDL-specific rule change four years ago.

MDLs make up anywhere from one-third to one-half of the federal docket. There are many new transferee judges who need to be educated about these cases. These judges also appoint new attorneys to leadership in MDLs, and these attorneys need to have proper direction and expertise. The *Manual for Complex Litigation* is being updated, but even if it were already up-to-date, people always begin by looking at the rules. So there needs to be something about MDLs in the rules.

The draft rule is designed to maintain flexibility. It has a series of guiding principles or prompts. Some prompts will apply in a specific MDL, but others may not. A judge need not go through every point listed in the draft rule. The goal is to put these points on the radar of the judges and counsel so that they start active case management early on.

Professor Marcus remarked that input from the Standing Committee would be extremely valuable to the subcommittee, especially as to the list of topics set out in Alternative 1 on page 219 of the agenda book. Judge Rosenberg agreed that the subcommittee would welcome comments on both Alternative 1 and Alternative 2. The goal is to have a more refined version to take to the full Advisory Committee meeting in March and potentially to the Standing Committee for approval for publication in June.

Judge Bates opened the floor for comments and questions.

An academic member noted that the Standing Committee had previously debated whether guidance on MDLs should go in a rule or in some other resource. This member queried whether it might make sense to wait to see the update of the *Manual for Complex Litigation*. The member suggested that Alternative 1's long list looked more like something that would go in the *Manual* than like rule text. Alternative 2 looked more rule-like, but this member would be more comfortable adopting Alternative 2's more spare approach if more detailed guidance could be found elsewhere, such as in the *Manual*. The academic member also noted others' suggestions that the rulemakers address the question of authority for some of the things that judges have done in managing MDLs, and the member questioned whether either alternative draft tackled that issue.

Judge Bates remarked that the next edition of the *Manual* would be a substantial update and would take a long time to complete. Judge Cooke estimated that it would take two to three years, probably closer to three years. Judge Bates noted that, given the three-year timeline for rule changes, it would take about six years for anything like draft Rule 16.1 to come into effect if the committees awaited the new *Manual*.

Judge Rosenberg observed that the *Manual* is not a quick read, and not every judge has or needs to have a desk copy. But as to whether this is a best-practices or a rules issue, she agreed with former chair Judge Dow's emphasis on making sure to put things in the rules—not every lawyer or judge reads the *Manual* or other resources, but everyone looks at the rules.

A judge member stated that a rule along the lines of Rule 16.1 would be helpful to judges and expressed a preference for Alternative 1 because it provides the information a court would need without having to read through a whole manual. It gives the court a lot of ideas and factors to consider in managing the case. Alternative 2 is too broad and vague to be helpful for a first-time MDL judge. Addressing the bracketed items in Alternative 1, such as the reference to a common benefit fund, the member expressed support for including those items in order to spark thought about what needs to be discussed.

Regarding Alternative 1, another judge member asked how the report called for by the rule would address items 6 through 14 if items 1 through 5 had not yet been resolved. If it is unknown who is leadership counsel or what leadership counsel's authority is, who engages in the discussion of items 6 through 14? Judge Rosenberg responded that draft Rule 16.1(b) discusses the designation of coordinating counsel for the preconference meet-and-confer. Coordinating counsel will not necessarily become permanent leadership counsel. Interim coordinating counsel and the judge can identify issues on which the judge needs feedback. These decisions can be changed, perhaps when leadership counsel is appointed or there is a major development in the MDL. This is not uncommon, that decisions made by leadership counsel need to be changed along the way. The rule contemplates that court-appointed coordinating counsel will help with the meet-and-confer and reporting to the court at the first conference on the first 14 issues or any additional issues the court deems necessary. The judge member asked what happens if there is dissension on the plaintiff side. Can coordinating counsel commit to anything in items 6 through 14? What if plaintiffs' counsel is split 50/50 on those issues?

To answer this question, Judge Rosenberg asked a practitioner member to talk about that member's experience with the issue. The member commented that there have been several large MDLs in which the court has appointed interim coordinating counsel to get the lawyers talking to

each other and resolve or narrow the issues. In situations where there is not unanimity on one side on some procedural priority, coordinating counsel presents the differing views to the court in an organized fashion at the initial conference. That doesn't give coordinating counsel absolute authority to make decisions unless there is a consensus. The emphasis is on the organizational and coordinating functions—to let the court see the range of views and make decisions in an orderly way.

Professor Marcus commented that the rule lets the judge direct counsel to report about the topics listed on page 219 of the agenda book. That would help orient the judge to the case and focus the lawyers on things that matter, even if they do not agree. That is better than a free-for-all. And requiring the lawyers to address relevant issues early on could help to avoid situations where the judge makes decisions based on incomplete information and later comes to question them, as Judge Chhabria described concerning his experience with the *Roundup* case. It may also be sensible to soften the language in proposed Rule 16.1(d) on page 220 to make clear that the management order after the initial conference is subject to revision. Overall, the point is to give the judge guidance in overseeing the case.

A judge member expressed continuing skepticism. There is some merit to the question about the court's authority. But the member asked how often transferee courts are reversed for acting without authority. If there is not a problem, perhaps not so much work needs to be done on a solution. This judge noted that the choice between the two alternative drafts only arises if one is first persuaded that a rule is needed at all.

Judge Bates observed that there might have been an authority question in *In re Nat'l Prescription Opiate Litigation*, 976 F.3d 664 (6th Cir. 2020).

A practitioner member stated that he has a bias because his firm litigates many MDLs on the defense side. The member's sense is that the plaintiffs' bar thinks that the MDL system basically works okay, while the defense bar does not think it is working, at least not in the big pharmaceutical MDLs. Rather, the system leads to settlements of meritless cases for billions of dollars. It is difficult for the rulemakers to work in an environment like that, where some people are relatively happy with the system and some are not. Both alternatives, especially the longer Alternative 1, are really about the plaintiffs' side. They may be potentially helpful, but they do not speak to defense concerns. The primary defense concern is that large MDLs are not vehicles for consolidating existing cases so much as encouraging more cases to be filed. The language coming closest to speaking to defense-side concerns is on page 219 of the agenda book, lines 568–69, about creating an avenue for vetting. But the proposed language ("*[w]hether the parties should be directed to* exchange information about their claims and defenses at an early point in the proceedings") was too agnostic. The member suggested considering deleting "whether the parties should be directed to" and starting with "exchange of information about". At least from an efficiency standpoint and from the defense bar's perspective, vetting is important.

The member also commented that, in previous versions, there had been debate about whether the exchange should be of "information" or "information and evidence." The member agreed that "evidence" seems awkward. But "information" is amorphous and may not be enough to determine whether cases in an MDL are meritorious. One suggestion is "exchange information

about the factual bases of their claims and defenses." That gets at the "evidence" concept without using the word "evidence."

Another practitioner member endorsed the idea of separating items 1 through 5 from items 6 through 13 in Alternative 1. This member expressed concern about the application of Alternative 1 before lead counsel is appointed, because then it would become an opportunity for would-be lead counsel to pontificate about the issues in items 6 through 13—that puts the cart before the horse. One of the most important things in an MDL is the appointment of lead counsel. The rules do not limit a judge's considerations in making that appointment. Does the judge consider the size of the claim? Counsel's experience level? The member has a bias toward the Private Securities Litigation Reform Act because it sets a process and criteria for appointing lead counsel. The member thought that transferee judges like that they can pick whom they want for lead counsel. The member predicted that this would become a controversy one day in a big MDL because there are no standards for that appointment. Perhaps a future Advisory Committee will add meat to that bone, but many of the topics listed in the current draft rule are obvious things that any competent MDL judge or defense counsel would want to consider.

A judge member thought that Alternative 1 is a particularly good framework to organize an MDL and indeed any complex case. The member suggested two big-picture additions. First, direct the parties in preparing their report and discussing the case to adhere to the principles of Civil Rule 1—just, speedy, and inexpensive dispositions. Counsel are not always aware of that rule. Second, there should be an emphasis on early determination of core factual issues—this might be early vetting—and core legal issues. Not necessarily dispositive legal issues, but core issues like a *Daubert* motion, an early motion in limine, or an early motion for summary judgment that will shape the law applicable to the case. Civil Rule 16(c)(2) concludes its long list of matters for consideration at a pretrial conference with "facilitating . . . the just, speedy, and inexpensive disposition of the action," thus referencing Rule 1. But because that is so important in a complex case, the reference to Rule 1 should be at the outset of the new rule, followed by a direction to focus on core issues of fact and law.

Judge Bates asked what the Advisory Committee thinks about the issue of settlement. There are questions concerning the court's role and authority, and settlement is a big issue in MDLs. Transferee judges historically have had different levels of involvement. Some think they have no authority to get involved. That is unlike class actions, where Rule 23 sets forth the judge's very involved oversight role. For normal civil cases, Rule 16(c)(2) tells the judge to focus on settlement and to use special procedures to assist in settlements. The question is what the proposed rule says about settlements in MDLs. In Alternative 1 on page 219, at lines 557–58, there is a reference to addressing a possible resolution. In Alternative 2 on page 220, line 598, there is also a reference to possible resolution. What is the message being sent to the bar and bench if that is where settlement winds up in the rule, especially compared to the more fulsome requirement in Rule 23? It is important to write these rules for the less-experienced judges and practitioners.

A practitioner member thought that another provision could be added to deal specifically with settlement—assessing whether there is a method for a prompt resolution of the claims. Over the years, more would probably be added to the rule, but something specifically dealing with considerations of early resolution, and settlement generally, would certainly be worth listing. But the problem of attorney jousting before the appointment of leadership counsel will still arise.

Another practitioner member thought that different language could solve the sequencing issue. The language would state that not all the considerations should be considered or decided at one initial conference; rather, they should be addressed in a series of conferences. Experienced MDL judges know that case management is an ongoing, iterative process; a single pretrial order is not enough. This language could avoid some confusion about how many of the considerations in the rule need to be addressed at one time. It would tell the court that this is a menu of items and let the court determine which are the priority items for the first conference and which to address in an ongoing fashion.

The previous practitioner member reiterated that, unless leadership counsel is appointed early, it makes no sense to deal with the other topics. It would be helpful, especially to inexperienced judges, to make clear in the rule that the appointment of leadership counsel should be dealt with up front.

Judge Rosenberg remarked that the subcommittee spent a lot of time on the settlement issue. Transferee judges thought that—unlike class actions, which have unrepresented parties—judges did not and should not manage, oversee, or approve settlements in MDLs. Some lawyers who looked at the draft rule may have had similar reactions. The subcommittee ultimately decided to take out that language. Still, it is important for the MDL process to have integrity and transparency, and so the subcommittee considered how a judge could ensure the process has those qualities without having the authority to approve a settlement. The solution was to give the judge a more proactive role in all aspects of case management, including appointing leadership counsel, determining leadership counsel's responsibilities, and having a regular reappointment process. Ensuring that the process is fair can promote trust in the outcome.

Judge Bates acknowledged the distinction between managing the process and reviewing the outcome, but suggested that the draft rule did not contain much guidance about what the judge should consider in appointing leadership counsel or about what other parties and counsel should be doing to create a process that will lead to a fair and just resolution of the claims.

Professor Marcus added that, with respect to settling individual claims asserted by claimants represented by other lawyers, appointment of leadership counsel is dicey. The subcommittee has given that scenario a lot of thought and discussion, including whether there could be a process by which a judge could "approve" the negotiation process for any settlements that come about. That is also dicey. On page 219 of the agenda book, in item 13, in brackets, another possibility is mentioned, which is to use a master to assist with possible resolution. Another question is: what happens if leadership counsel's own cases are settled—must different leadership counsel be appointed? MDLs involve different situations from Rule 23(e), and there is a "third-rail" aspect to this subject, so it is very valuable to have the Standing Committee's feedback while addressing it.

Judge Bates asked whether special masters have been widely used in managing and reaching settlements in MDLs. A practitioner member said yes, absolutely. In some of the biggest cases, special masters run the whole settlement process. Judge Bates asked if such a master reports to the court. A practitioner member gave an affirmative answer to this question, but remarked that these masters are not typically Rule 53 special masters. They are called "settlement masters" or "court-appointed mediators." It is an ad hoc appointment in terms of the roles and duties, but those

duties do typically include reporting to the court. The extent to which the master can report to the court on the substance of the negotiations is usually worked out among the parties. In the *Opiate* MDL, there were Rule 53 appointments of special masters who ultimately became involved in mediation and settlement. In the *Volkswagen* MDL, Judge Breyer invented a position called "settlement master," which was not based on Rule 53 but had many but not all of the same responsibilities and roles. Judge Breyer made the appointments after requesting input from the parties on whether to appoint a master and, if so, whom. The court need not follow the parties' recommendations, but in the member's experience, this topic is discussed with the parties and the court's determinations do not come as a surprise.

Judge Bates thought that judges who appoint masters would communicate with them. Should the master's reporting duty to the judge be one of the considerations under the rule?

Judge Rosenberg mentioned that the subcommittee had received feedback from some groups that did not like having the words "special master" in the draft rule. It might create a presumption that there should be a special master, even if not everyone wants one. This led to some discussion, and some thought it might be better to have the words "special master" in the rule so that the parties will talk about it, even if they disagree.

Judge Bates asked whether the rulemakers should be careful about referring to the appointment of a "special master." Might the reference be viewed as authorizing something outside of Rule 53? He intended no criticism of what any judge has done in the MDL process, but he asked whether the rulemakers want to give, through a casual reference in item 13 of a laundry list, an imprimatur to the idea that a judge can say, "I want a settlement master. Rule 53 doesn't fit, so I'm just going to create this role on my own."

Judge Rosenberg responded that the subcommittee has discussed this topic but has not yet brought it to the full Advisory Committee. The subcommittee is working on tweaking the language in response to feedback on that issue and others. As another example, in line 570 of the report in the agenda book, there is a reference to a "master complaint." The rules do not provide for a master complaint, but the Supreme Court has referred to master complaints, and so has the subcommittee. One piece of feedback was that the term should not be used. Does using it somehow give credibility to a form of complaint that the rules otherwise do not mention?

Judge Bates commented that one could go pretty far back in this line of thought. The rules do not authorize the appointment of leadership counsel, for example. There are a lot of things that may not have a specific basis in the existing rules.

A judge member noted that the draft rule does not make any reference to the transferor court. It rarely happens that the case is sent back, but the MDL framework does contemplate that the work of the transferee court ends at some point. An item could be added to suggest that the transferee court and lawyers should consider when a case should be sent back to the transferor court.

Professor Cooper commented that a suggestion had arisen that the rule should address remand. But it was unclear whether the suggestion meant addressing motions to remand to state court, in cases plaintiffs thought improperly removed, or remand to transferor courts.

The judge member thought that it sounds like there is a never-ending list of items that could be considered or called into question. At what point do we return to the concept of "first do no harm"? Is there a need for this rule? What is its usefulness?

Professor Marcus commented that there has been a decades-long debate about whether the transferor court, if a case goes back, can simply start from scratch and throw out what the transferee judge did with the case. Putting a time limit on transferee activities might produce some behaviors that should not be encouraged. Also, as Professor Cooper said, remand means two different things here. Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") has authority to remand to the transferor court, but the JPML usually awaits a suggestion from the transferee judge that this would be desirable. The transferee judge cannot do this unilaterally.

Judge Bates commented that there are some things, not listed in the draft rules, that might occur later on before the transferee judge, particularly bellwether trials. If the draft rule is viewed as a continuing conference obligation, should it address other items, such as how to manage and sequence any bellwether proceedings?

Judge Rosenberg responded that bellwether management was not included because it is far along in the MDL process and might be outside the realistic scope of what can and should be discussed in the early conferences.

Professor Marcus added that there are also various views about whether bellwethers are useful. It is probably unwise to urge the judge to map out possible use of bellwethers at the start of an MDL. He predicted that any rule will say that, except for extremely simple and small MDLs, one conference is not enough, and the management plan must be revisited as things move forward. So the rule's focus will probably be on the initial exercise, and the expectation will be that judges continue to oversee other events as they become timely. Bellwethers might be in that latter category.

Judge Rosenberg thanked the Standing Committee for its feedback.

Rule 41(a) (Dismissal of Actions). Judge Rosenberg reported on this item. The Advisory Committee formed a subcommittee to address a conflict about the scope of Rule 41(a)(1)(A), which allows a plaintiff to voluntarily dismiss without prejudice an "action" without obtaining a court order or the defendants' consent. The subcommittee's research showed that courts approach Rule 41 dismissals in different ways. The primary disagreement is whether Rule 41(a)(1)(A) requires dismissal of an entire action against all parties or whether it may be used to dismiss only certain claims or only claims against certain parties. The subcommittee has not reached a consensus on whether to pursue an amendment or what amendment to propose. An additional wrinkle is Rule 15, through which a plaintiff can amend a complaint to remove certain claims or defendants. The subcommittee is considering whether Rule 15 should be the vehicle by which a party should dismiss something short of the entire action.

Judge Bates remarked that this is a complex issue, and he solicited comments or feedback from the Standing Committee. Hearing none, Judge Rosenberg turned to the remainder of the report, and invited Professor Cooper to present the next item.

Rule 7.1 (Disclosure Statement). Professor Cooper addressed two suggestions made to the Advisory Committee about recusal disclosures. One suggestion, about "grandparent corporations," contemplates a company that owns a stake in a second company, which in turn has a stake in a third company. If, say, Orange Julius is a party to an action, then the current rule requires it to disclose that Dairy Queen is its owner. But the rule does not require Orange Julius to disclose that Berkshire Hathaway owns Dairy Queen. So if the judge in the action owns shares of Berkshire Hathaway, that judge may not have notice of a potential financial interest in the case's outcome. Should something be done to address this in the rule?

The other suggestion proposed a rule directing all parties and their counsel to consult the assigned judge's publicly available financial disclosures. The parties would either flag any interests that may raise a recusal issue or certify that they have checked and do not know of any. The Advisory Committee has not really dived into this. Rule 7.1 covers only nongovernmental corporate parties. There are all sorts of business organizations with complicated ownership structures that may involve interests a judge is not aware of. Should the Advisory Committee just say it is too complicated to try to go further than corporations?

In response to a question posed by Professor Cooper, Judge Bates suggested that, unless the Appellate or Bankruptcy Rules Committees feel otherwise, it makes sense for the Civil Rules Committee to take the lead in considering proposed amendments to Rule 7.1.

Other Items Considered. At this point, Judge Bates opened the floor for any remaining issues raised in the Civil Rules Committee's report. He asked a question about service awards for class-action representatives. Does the Advisory Committee view this issue as a matter of procedure or of substantive law? Judge Rosenberg responded that the issue was not a subject of much discussion at the last Advisory Committee meeting. Professor Marcus thought that there was no need to worry about the issue yet. There was a pending certiorari petition on the issue, so there might be more to learn by waiting.

Professor Marcus turned to Rule 45, about which a question had arisen: what does it mean to "deliver" a subpoena? By hand? By email? It may be that, in civil litigation, counsel can work this out. Is it worth trying to devise specifics on a method of delivery?

A judge member drew attention to the information item on standards and procedures for deciding in forma pauperis ("IFP") status, and suggested that that item warranted action. The member remarked that a *Yale Law Journal* article had described disparate practices on IFP status, which raised important issues of access to justice. The Appellate Rules Committee is looking at a standardized form for IFP status on appeal. The member suggested that someone should review this—if not the rulemakers, then a different committee of the Judicial Conference.

Judge Bates commented that the current view of the Advisory Committee was that it was not going to take any specific action on standards for IFP status. If the Rules Committees are not going to look further at this, should they encourage another Judicial Conference committee to do so? The only other logical Judicial Conference committee is CACM. Judge Rosenberg remarked that there is an Administrative Office pro se working group that may also be appropriate. Judge Bates suggested that perhaps the rulemakers could communicate to these entities that the Advisory Committee is not going to do anything with the topic for now but views it as an important question.

Another judge member informally asked the Advisory Committee to consider whether there is a need to address the Supreme Court decision in *Kemp v. United States*, 142 S. Ct. 1856 (2022), which held that a judge's error of law is a "mistake" under Rule 60(b).

Items Removed from Agenda. Judge Rosenberg concluded by noting items removed from the Advisory Committee's agenda. These included proposed amendments to Rule 63 (Successor Judge), Rule 17(a) (Real Party in Interest) and Rule 17(c) (Minor or Incompetent Person). There were no questions or comments from the Standing Committee on these items.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met in Phoenix, Arizona, on October 27, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

Information Items

Rule 49.1 (Privacy Protection for Filings Made with the Court). Judge Dever reported on this item. He explained that the Advisory Committee had considered and decided to remove from its agenda a proposal by Judge Furman regarding Rule 49.1. The rule's committee note refers to 2004 guidance from CACM that certain documents should remain confidential and not be made part of the public record. In *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), Judge Furman held that the common law and the First Amendment required appropriate disclosure of a defendant's CJA Form 23 and accompanying affidavit. Judge Furman suggested amending Rule 49.1(d) and removing the committee note's reference to the CACM guidance. The Advisory Committee concluded that the original committee note did not produce confusion about the constitutional or common-law rights of access, and it also hesitated to venture into potentially substantive issues through rule amendments.

Rule 17 (Subpoena). Judge Dever reported on this item as well. The Advisory Committee is analyzing a proposal by the New York City Bar to amend Rule 17 to allow defendants to more easily subpoena third parties for documents. As part of this process, the Advisory Committee has appointed a subcommittee, chaired by Judge Nguyen, to gather information about how federal courts apply the rule and how states handle these kinds of subpoenas. The goal is to determine whether there is a problem that warrants a rule change. There have been two Supreme Court cases interpreting the rule, both fairly atypical. The subcommittee has heard from a wide variety of experienced practitioners from the defense bar and the Department of Justice. The process is still in its early stages, and the Advisory Committee will continue to study these issues.

Judge Bates commented that the miniconference on the Rule 17 issue at the most recent Advisory Committee meeting had been very informative and had elicited several different perspectives that should be useful in the committee's ongoing study.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Evidence Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met in Phoenix, Arizona, on October 28, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 365.

Information Items

Rule 611 (Juror Questions for Witnesses). Judge Schiltz reported on this item. This proposal would add a new subsection (e) to Rule 611 to create safeguards if jurors are permitted to ask questions at trial. The proposed amendment was presented to the Standing Committee at the June 2022 meeting. Most comments then had been about whether jury questioning is a good thing at all; some members thought that it was not and that putting safeguards in the rule would only encourage judges to allow jurors to ask questions. The proposed amendment was returned to the Advisory Committee for further study on the pros and cons of juror questioning.

The Advisory Committee held a miniconference on the issue at its fall 2022 meeting in Phoenix, Arizona, which was coincidental but fortunate in that Arizona is a pioneer among the states in allowing juror questioning. The panel included federal and state judges and civil and criminal practitioners, all with a great deal of experience with juror questioning. All of them expressed the view that juror questioning was a positive thing with many benefits and few risks. They all supported the proposed rule. It was difficult to find opponents—one whom Professor Capra did find could not attend the miniconference. Afterward, the Advisory Committee thoroughly discussed the proposal. It will continue to discuss the proposal at its spring 2023 meeting and decide whether to pursue it.

Judge Bates thought the miniconference was a helpful exercise. Although it was one-sided—as it necessarily would be in Arizona—it gave the committee many issues to consider.

Professor Capra reiterated that it was difficult to find someone in Arizona who had anything critical to say about the practice. There were a couple of comments—one from a judge at the miniconference who said that juror questioning sometimes took too much time, and another from a prosecutor who said that sometimes there is a risk that questioning can get out of hand because the lawyers cannot control the witness. But there was a swarm of positive factors indicating that juror questioning is not the problem that some think it would be. Most juror questions are only for clarification, not attempts to take over the case or to pick or fill holes in one party's case.

Judge Bates raised a concern about juror questions in criminal cases. The criminal process is not a pure search for the truth—the prosecutor has the burden to prove guilt. He suggested that a juror question may unfairly help the prosecution by revealing a problem in the case that the prosecutor can then address or cure.

A judge member asked whether there was anecdotal information from actual jurors, such as information from a questionnaire asking whether they liked being able to ask questions. Professor Capra said that the judges reported that they generally discuss the process with jurors

and that reviews had been positive. One juror told a judge that he was glad he could ask questions so that he did not have to look up answers on the internet. Another juror said that it was nice to be able to ask questions; even if the juror did not do so, the juror still became more involved in the process. Judge Schiltz also commented that there have been studies showing that jurors give overwhelmingly positive feedback about the ability to ask questions.

A practitioner member asked whether a 50-state (and multidistrict) survey had been done to learn about the prevalence of the practice. Professor Capra responded that there are some data on that question. The state of Washington has a juror-questioning practice. About 15% to 20% of trials in federal courts allow juror questioning. The member commented that it would be a good idea to identify federal district judges who allow the practice and to get their feedback. Judge Bates observed that it is a judge-by-judge question, not a court-by-court question. The practitioner member reiterated that the Advisory Committee should try to determine the frequency of the practice outside of Arizona and to talk with federal judges who have done juror questioning and find out its pros and cons. Judge Schiltz noted that the Advisory Committee had the same questions and had asked Professor Capra to gather more data on them. Professor King commented that the National Center for State Courts has collected and published data about juror questioning in the states.

Judge Bates asked whether the Advisory Committee had considered whether there is a difference between the civil and criminal contexts and whether a rule might address one but not the other. Professor Capra responded that any safeguard that applies in the civil context would have to apply to the criminal context as well. Perhaps criminal cases could have additional safeguards, but no safeguards would apply only to the civil context.

Judge Schiltz commented that there had been a study in the Ninth Circuit that recommended permitting juror questioning in civil cases but not criminal cases. Judge Bates suggested, however, that there was more recent work in the Ninth Circuit that was more positive about juror questions. And Professor Capra noted that the Ninth Circuit pattern criminal instructions now address juror questions.

Rule 611 (Illustrative Aids). Judge Schiltz reported on this item as well. The Advisory Committee held a second miniconference in Phoenix on illustrative aids. Despite the fact that illustrative aids are used in virtually every trial, there is confusion over the difference between demonstrative evidence, which is admitted into evidence, and illustrative aids, which are not admitted into evidence and are used only to help the jury understand evidence that has been admitted. There are variations among judges' practices about notice requirements to opposing counsel, whether illustrative aids can go to the jury room, and whether the aids become part of the record.

This amendment would add a new subsection (d) to govern the use of illustrative aids. It would clarify the distinction between illustrative aids and demonstrative evidence, require notice, prohibit illustrative aids from going to the jury room absent a court ruling and proper instruction, and require they be made part of the record so that they would be available to the appellate court.

The miniconference featured a large panel of judges, professors, and practitioners, most of whom opposed the proposed rule. Since then, the Advisory Committee has also received about 40

comments on the rule. Most opposition is to the notice requirement. Practitioners adamantly opposed having to show their illustrative aids to their opponents, especially aids they wanted to use at closing. There were also practical concerns. The category of illustrative aids spans a wide variety. For example, if an attorney writes something on a chart as a witness is testifying, how does the attorney give prior notice to opposing counsel of that contemporaneously created illustrative aid? The Advisory Committee did receive a comment in support of the rule—including the notice requirement—from the Federal Magistrate Judges Association. At its spring 2023 meeting, the Advisory Committee will review the comments and decide whether to move forward, perhaps after excising the notice requirement.

Judge Bates, noting that this miniconference had also been very helpful to the Advisory Committee, opened the floor for comment.

A practitioner member raised concerns about the notice requirement from the member's colleagues in trial practice. Attorneys persuade juries in two ways: by words and by visuals. When both are aligned, people retain far more information than when only one method is used. An attorney would never show the outline of an opening statement or witness exam to an opponent—it puts the attorney at a strategic disadvantage because opponents can change what they will say in response. Sharing an illustrative aid is similar. And the effect of taking the notice requirement out would be that there is a transcript, an objection, and a discussion—the rule would treat illustrative aids the same as attorneys' oral statements. Requiring notice would put more disclosure obligation on the visual than the oral. Professor Capra responded that he thinks the Advisory Committee was comfortable with deleting the notice requirement, and it is likely that that is what will happen.

The member also commented that, as illustrative aids are defined—helping the factfinder understand admitted evidence—a strict reading would mean that a PowerPoint presentation could not be used in an opening because no evidence will have been admitted yet. Professor Capra responded that the Advisory Committee needs to decide whether the rule applies to openings and closings. If the rule were to apply to openings and closings, one could revise proposed Rule 611(d)(1)'s "understand admitted evidence" to read "understand admitted evidence or argument."

A judge member mentioned that, as a trial judge, the member would customarily make illustrative aids a part of the record. Now, after 20 years on the court of appeals, the member has had very little occasion to see an illustrative aid that is part of the trial record. The member continues to think that putting aids in the record is the better practice. The appellate courts are so far removed from the trial process that anything that gives them a better feel of what has been before the trier of fact is of great assistance.

A second practitioner member expressed support for rulemaking on this topic and commented on the centrality of slides in modern trials. The member is often concerned that the other side will do something crazy with illustrative aids in openings and closings. The member can sometimes work out an arrangement with the other side to mutually disclose trial materials. But sometimes things like closing slides are made the night before the closing argument—when is it practical to give notice for these aids? Putting aids in the record is an easy decision, as is making it clear that they do not go to jury deliberations. Notice might bother the member less than it does other lawyers because the member has seen people do crazy things at trial, and the damage is done even if the judge says something after the fact. The standard in proposed Rule 611(d)(1)(A)

("[substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time") gives a judge enormous power over what can be done—that might be good or bad. The member does not know what the standard should be; maybe it should be the same as applies to oral advocacy in a closing argument.

A third practitioner member largely agreed with the previous member's comments. The solution is probably not one-size-fits-all, so the member is not sure what to do about a notice requirement. The second practitioner member suggested that you do not want to show aids to opposing counsel so far in advance that they can change what they will do in response, but you do want to make sure that there are not any slides that are so outrageous that the judge should know about them in advance.

Professor Capra asked whether the solution might be to take out the notice requirement from the text but to put in language that summarizes the two previous members' comments—there is no one-size-fits-all notice requirement, but notice is preferred because it allows judges to decide in advance rather than after the fact. But the rule would leave the determination for the judge to make.

The second practitioner member agreed with Professor Capra's suggestion. The "Wild West" view of trials is dangerous, so having some notice is a good idea. But it should not be so much notice that each side can redo its slides in response to the other's.

The third practitioner member noted that it is much harder to unsee than unhear something. That is a qualitative difference between what is said and shown. Judge Bates observed that it would be valuable for the Advisory Committee to consider preserving judges' discretion to deal with the notice issue.

The first practitioner member reiterated opposition to a notice requirement. Leaving the notice requirement out of the rule does not strip a federal judge of inherent authority. Also, some slides' power comes from not disclosing them in advance. If this rule applies to openings and closings, notice disincentivizes parties from using powerful slides during those key parts of trial.

Professor Capra responded that many judges already use Rule 611(a) to control visual demonstrations in openings and closings. It did not make sense to him to exclude openings and closings from a rule specific to illustrative aids because there would then be two rules covering essentially the same thing, one during trial and one during openings and closings.

Updates on Other Rules Published for Public Comment.

Judge Schiltz briefly mentioned that there are several other proposed rules that are published for comment. The Advisory Committee has received almost no comments on those rules.

Judge Bates called for any further comments from the Standing Committee. Hearing none, Judge Bates thanked the Advisory Committees, their members, reporters, and chairs for their hard work.

OTHER COMMITTEE BUSINESS

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to give its recommendations to the Judicial Conference's Executive Committee about the contents of the strategic plan and what should receive priority attention over the next two years. The recommendations were due within a week after the meeting. Judge Bates requested comment on the priorities in the strategic-planning memorandum beginning on page 402 of the agenda book. No comments were offered.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff to give comments to the Executive Committee, on behalf of the Rules Committees, about the strategies and goals for the next two years. This procedure had been followed in the past, but he wanted to be sure that no one had any problem with it. **Without objection, the Standing Committee gave Judge Bates that authorization.**

New Business

Judge Bates then opened the floor to new business. No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their valuable contributions and insights. The committee will next convene on June 6, 2023, in Washington, D.C.

Agenda E-19 (Summary)
Rules
March 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

- Federal Rules of Appellate Procedure ..... p. 2
- Federal Rules of Bankruptcy Procedure ..... p. 3
- Federal Rules of Civil Procedure ..... pp. 4-5
- Federal Rules of Criminal Procedure ..... pp. 5-6
- Federal Rules of Evidence ..... pp. 6-7
- Judiciary Strategic Planning ..... p. 7

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2023. All members participated.

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

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

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider suggestions to allow expanded access to electronic filing by pro se litigants and an update on a suggestion to change the presumptive deadline for electronic filing.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 13, 2022. The Advisory Committee discussed possible amendments to Rule 29 (Brief of an Amicus Curiae), Rule 39 (Costs), and Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).

The Advisory Committee has been considering potential amendments to Rule 29 for several years and received helpful feedback from the Standing Committee regarding the need for and scope of any potential additional requirements for disclosures by amici curiae, including disclosure requirements related to ownership, control, or funding by the parties or non-parties. In addition, the Advisory Committee is considering possible amendments to Rule 39 in the light of *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), regarding the allocation of costs on appeal, specifically related to supersedeas bonds. The Advisory Committee is also considering possible amendments to Form 4 in response to a suggestion highlighting issues with the current

form, and has consulted clerks and senior staff attorneys in the circuits to determine the most relevant information on the form.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Official Form 410 (Proof of Claim) with a recommendation that it be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Official Form 410 (Proof of Claim)

The proposed amendment eliminates the language on the proof-of-claim form that restricts use of a uniform claim identifier ("UCI") to electronic payments in chapter 13, and thereby allows the UCI to be used in cases filed under all chapters of the Bankruptcy Code and for all payments whether or not electronic. Use of the UCI is entirely voluntary on the part of the creditor. The amended language allows a creditor to list a UCI on the proof-of-claim form in any case.

Information Items

The Advisory Committee met on September 15, 2022. In addition to the recommendation discussed above, the Advisory Committee continued consideration of proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and related forms. A version of the amended rule published for comment in 2021 received a number of comments on proposed provisions designed to enhance the likelihood that chapter 13 debtors will emerge from bankruptcy current on their home mortgages. In light of the comments, the Advisory Committee is considering changes that would likely require republication in August 2023.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 12, 2022. The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) regarding privilege logs with a recommendation that they be published for public comment in August 2023. The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order. During the Standing Committee meeting, members expressed differing views concerning the length of and level of detail in the committee notes that would accompany the proposed amendments. The Advisory Committee was asked to reexamine the notes in light of that discussion, and to present the proposed amendments to the Standing Committee at its June 2023 meeting.

In addition, the Advisory Committee continues to consider a potential new rule concerning judicial management of multidistrict litigation proceedings. The MDL subcommittee has developed a sketch for a new Rule 16.1 directed to MDL proceedings. The new rule would prompt a meet-and-confer session among counsel before the initial case management conference with the transferee court. In two alternatives, the sketch of the rule provides various topics for discussion by counsel. The Advisory Committee continues to discuss the possibility of proposing a new Rule 16.1.

The Advisory Committee also discussed potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 55 (Default; Default Judgment) regarding the directive that in some circumstances the clerk "must" enter a default or a default judgment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 27, 2022. The Advisory Committee removed from its agenda a suggestion regarding Rule 49.1 (Privacy Protection For Filings Made with the Court) and considered a suggestion to amend Rule 17 (Subpoena).

The Advisory Committee considered a suggestion to amend Rule 49.1 by adding the phrase "subject to any applicable right of public access" before Rule 49.1(d)'s authorization permitting the court to order that filings be made under seal. This change had been proposed to address certain language in an earlier committee note that included a reference to the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the Committee on Court Administration and Case Management (CACM). As quoted in the committee note, the CACM guidance provides that certain documents—including "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act"—"shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access." Several reasons factored into the Advisory Committee's decision not to pursue the proposed amendment. One was the concern that the amendment would be perceived as taking a position on an issue of substantive law (that is, whether such financial affidavits are judicial documents subject to disclosure under the First Amendment or a common law right of access). Another was the

observation that such an amendment would not remove the earlier committee note's reference to the CACM guidance.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17. The Advisory Committee formed a subcommittee to study the issue and, to gather more information about Rule 17 in practice, invited a number of experienced attorneys to participate in its fall meeting. The participants included defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. The participants spoke about their experience with Rule 17 subpoena practice, and answered questions regarding the standards for securing third-party subpoenas and the role of judicial oversight in the process.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on October 28, 2022. In connection with the meeting, the Advisory Committee held panel discussions on two suggestions concerning Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence). The first panel discussion related to a possible new Rule 611(e) regarding the practice of allowing jurors to pose questions for witnesses. The Advisory Committee will continue its research into juror questions, including how often the practice is used in federal courts and potential safeguards for the practice. The second panel discussion related to proposed new Rule 611(d) regarding illustrative aids, which was published for public comment in August 2022. Proposed Rule 611(d) would state the permitted uses of illustrative aids and would set procedures for their use. Finally, the Advisory Committee provided updates on other rules published for public comment, including Rule 613(b) (Witness's Prior Statement) regarding prior inconsistent statements, Rule 801(d)(2) (Definitions That Apply to This Article; Exclusions from Hearsay) related to hearsay statements by predecessors in interest, Rule 804(b)(3) (Exceptions to the Rule Against Hearsay—When the

Declarant Is Unavailable as a Witness) regarding the corroborating circumstances requirement, and Rule 1006 (Summaries to Prove Content) regarding summaries of voluminous records.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations to the Executive Committee regarding the prioritization of goals and strategies in the 2020 *Strategic Plan for the Federal Judiciary* (*Plan*) to determine which strategies and goals from the *Plan* should receive priority attention over the next two years. The Committee's views were communicated to Chief Judge L. Scott Coogler, the judiciary planning coordinator, by letter dated January 10, 2023.

Respectfully submitted,

John D. Bates, Chair

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

Effective December 1, 2022

Current Step in REA Process:

- Effective December 1, 2022

REA History:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)
- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	BK 8023
BK 3002	The amendment allows an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The changes allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition.	

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REA History:

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- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The amendment to Rule 7.1(a)(1) requires the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change conforms the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The amendment to Rule 7.1(a)(2) creates a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Set of 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).	
CR 16	Amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

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

(Ordered by most recent legislative action; bills with more recent actions first.)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
A bill to amend title 5, United States Code, to establish St. Patrick's Day as a Federal holiday	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA)	AP 26, 45; BK 9006; CV 6; CR 45, 56	Bill text not currently available	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
A bill to provide for media coverage of Federal court proceedings	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	Bill text not currently available	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee
Facial Recognition and Biometric Technology Moratorium Act of 2023	**H.R. 1404** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 10 Democratic cosponsors **S. 681** *Sponsor:* Markey (D-MA) *Cosponsors:* Merkley (D-OR) Warrant (D-MA) Sanders (I-VT) Wyden (D-OR)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1404/BILLS-118hr1404ih.pdf https://www.congress.gov/118/bills/s681/BILLS-118s681is.pdf **Summary:** Bars admission by federal government of information obtained in violation of bill in criminal, civil, administrative, or other investigations or proceedings (except in those alleging a violation of the bill itself)	• 03/07/2023: H.R. 1404 introduced in House; referred to Judiciary and Oversight & Accountability Committees • 03/07/2023: S. 681 introduced in Senate; referred to Judiciary Committee
Asylum and Border Protection Act of 2023	**H.R. 1183** *Sponsor:* Johnson (R-LA)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1183/BILLS-118hr1183ih.pdf **Summary:** Requires "an audio or audio visual recording of interviews of aliens subject to expedited removal" and requires the recording's consideration "as evidence in any further proceedings involving the alien"	• 02/24/2023: Introduced in House; referred to Judiciary Committee

Last updated March 24, 2023

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* Buck (R-CO)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Requires rulemaking under 28 U.S.C. § 2075 "to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel."	• 02/14/2023: Introduced in House; referred to Judiciary Committee
Write the Laws Act	**S. 329** *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* Nadler (D-NY) Quigley (D-IL) Cicilline (D-RI) **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359is.pdf **Summary:** Requires rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices' nomination, confirmation, or appointment. Requires expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge.	• 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Federal Police Camera and Accountability Act	**H.R. 843** *Sponsor:* Norton (D-DC) *Cosponsors:* Beyer (D-VA) Torres (D-NY)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf **Summary:** Among other things, bars use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; creates evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if recording or retention requirements not followed; bars use of federal body-cam footage from use as evidence if taken in violation of act or other law.	• 02/06/2023: Introduced in House; referred to Judiciary Committee
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Terminates the national emergency declared March 13, 2020, by President Trump. Would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House
Restoring Judicial Separation of Powers Act	**H.R. 642** *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal agency is a party" and cases "concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure.	• 01/31/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
No Vaccine Passports Act	**S. 181** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s181/BILLS-118s181is.pdf **Summary:** Prohibits disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Health, Education, Labor & Pensions Committee
No Vaccine Mandates Act of 2023	**S. 167** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s167/BILLS-118s167is.pdf **Summary:** Prohibits disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Judiciary Committee
See Something, Say Something Online Act of 2023	**S. 147** *Sponsor:* Manchin (D-WV) *Cosponsor:* Cornyn (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s147/BILLS-118s147is.pdf **Summary:** Prohibits disclosure by providers of interactive computer services of certain orders related to reporting of suspicious transmission activity; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings	• 01/30/2023: Introduced in Senate; referred to Commerce, Science & Transportation Committee
Protecting Individuals with Down Syndrome Act	**H.R. 461** *Sponsor:* Estes (R-KS) *Cosponsors:* 19 Republican cosponsors **S. 18** *Sponsor:* Daines (R-MT) *Cosponsors:* 24 Republican cosponsors	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr461/BILLS-118hr461ih.pdf https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed.	• 01/24/2023: H.R. 461 introduced in House; referred to Judiciary Committee • 01/23/2023: S. 18 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 57 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 17 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j).	• 01/13/2023: Introduced in House; referred to Judiciary Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 31 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
Fourth Amendment Restoration Act	**H.R. 237** *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue. Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen.	• 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Limiting Emergency Powers Act of 2023	**H.R. 121** *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees
Kalief's Law	**H.R. 44** *Sponsor:* Jackson Lee (D-TX)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr44/BILLS-118hr44ih.pdf **Summary:** Imposes strict requirements on the admission of statements by youth during custodial interrogations into evidence in criminal or juvenile-delinquency proceedings against the youth	• 01/09/2023: Introduced in House; referred to Judiciary Committee

TAB 2

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

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

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

DATE: **March 27, 2023**

This memo begins with a brief summary of the presentations the Committee heard at its October meeting and then provides an update on the activities of the Rule 17 Subcommittee. We also note briefly our perspective on two of the issues raised at the meeting. The memo concludes with two questions for discussion.

I. The presentations at the October Committee meeting

The participants were asked to focus first on the fundamental question the Committee must answer to determine whether to move forward with any amendment to Rule 17: whether there is a significant problem (or problems) with Rule 17 that could be addressed by an amendment. We summarize below some of the key points they made. The minutes contain a full description of each participant's comments as well as the questions and comments of Committee members.

A. The *Nixon* standard

Though some defense participants stressed that the *Nixon* Court was focused on the unusual case before it (in which the government was seeking to use a subpoena to get evidence from the defense that was not available under Rule 16), both government and defense participants agreed that the lower courts generally apply *Nixon* in ruling on the availability of pretrial defense subpoenas. They disagreed on the key question whether the *Nixon* standard should be expanded.

With the caveat (discussed below) that there is considerable variation from district to district, there was strong support from all of the defense participants for expanding and clarifying Rule 17. Mr. Cary, Mr. Carter, Ms. Elm, Mr. Felman, and Ms. Halim all stated that the *Nixon* standard is too narrow to provide a basis for the discovery of material the defense needs from third parties. See Draft Minutes, October 27, 2022, at 16-17 (Cary), 17-18 (Felman), 42 (Carter), 43-44 (Elm), 32-33 (Halim). Mr. Wallin stated that although he personally had been successful in obtaining discovery, he was unsure whether that would have been the case if he had not been able to file his motions ex parte and there had been opposition from the prosecution. Id. at 27. Mr. Wallin urged the Committee to clarify the rule to expressly provide for pretrial discovery. Id. at 19. Ms. Coleman said that although she had generally been successful in her Rule 17 motions (sometimes after refiling them), her colleagues had not been successful. Id. at 38.

Mr. Cary, Mr. Carter, Ms. Coleman, Ms. Elm, and Ms. Halim all stated that the *Nixon* standard is so strict that it chills the defense, discouraging counsel from even seeking subpoenas. Id. at 16 (Cary), 42, 58 (Carter), 28, 38 (Coleman), 33 (Halim), and 43 (Elm). Ms. Leonida was not asked this question

directly, but (as noted below) she practices in a district in which third party subpoenas are recognized in local rules and generally available. She stressed that the expanded authority in her district and in state practice was valuable and had not caused problems. Id. at 44-45.

Mr. Felman said the policy question for the Committee was whether the Rule should permit the defense to investigate to determine what happened and to seek information that is not in the government's hands and hence not available under Rule 16.[1] Ms. Coleman stressed defense counsel's obligation under the standards of ethics and professional responsibility to investigate the facts that might support the defendant's account and might provide a basis for a defense. Id. at 28. Mr. Cary, Mr. Carter, Mr. Felman, and Ms. Leonida all described the vast difference between the *Nixon* standard and the more liberal state discovery procedures in Maryland, Michigan, Florida, and California, and the importance of material discoverable in state cases under those more liberal rules. Id. at 17 (Cary), 41-42 (Carter), 55 (Felman), 44-45 (Leonida). In addition to documents in white collar cases, defense participants noted the importance of access to material possessed by third parties in a wide variety of cases involving, for example, hotel and telephone records, and video surveillance at a variety of businesses.

Several of the defense participants also emphasized the burdensome cost of trying to meet the *Nixon* standard. Id. at 32-33 (Halim), 36 (Coleman), 43, 58 (Elm).

On the other hand, the participants from the Department of Justice thought that the current Rule is working well, and they especially stressed the critical role played by judicial oversight. Mr. Gill said the system works: judges are engaged and doing what they need to do based on what they know about the case. Id. at 31. He said prosecutors agree that if the defense needs to obtain records, counsel needs to be able to go to a court and get them. But in his experience and that relayed by the criminal chiefs across the country, judges are granting those subpoenas. Id. Ms. Sampson said the process was working well in the District of Arizona, and the judges had been very thoughtful in applying *Nixon,* not denying subpoenas without additional concerns for privacy and confidentiality or concerns that the subpoena goes beyond some of the standards. Id. at 33-35. She also provided the example of the court quashing subpoenas filed by an unrepresented defendant who was trying to use them for purposes other than discovery. Id. at 35. Ms. Miller described and defended the limited purpose of Rule 17, which is only to expedite the trial by providing a time and place for inspection of subpoenaed materials before trial or a hearing, and not for discovery. Id. at 45-46. She argued that this limited purpose is appropriate given the differences between civil and criminal cases, the prosecution's special ethical responsibilities under *Brady* et al., grand jury secrecy, and the burden of proving guilt beyond a reasonable doubt. Id. at 46. She described several cases in which the defense sought information that was not relevant or evidentiary, or that was protected by privilege or work product.[2] Id. at 46-48.

[1] "What the Committee is really challenged by, he said, is the philosophical question of whether discovery should be limited to what the government wants to give the defense, or whether the defense should be allowed to go out and discover what happened." Id. at 55.

[2] The protection of confidential and victim information would be a significant issue for any proposal that the Subcommittee might bring to the Committee. As we reported to the Subcommittee, after the meeting, we interviewed two experienced DOJ attorneys who represent victims. They expressed strong support for the need for continuing judicial oversight, and they made suggestions for additional protections for victims if Rule 17 is amended. They noted that information about victims is often held by third parties, such as schools, tribes, etc.

B. Rule 17 makes no provision for ex parte applications

The defense participants agreed that the ability to seek subpoenas by an ex parte motion is essential to allow the defense to review material to determine whether it does—as they hope—support the defense. They described the rule's failure to provide for ex parte applications as a very serious problem. Mr. Cary noted that he had identified six reported cases holding that the rule does not permit ex parte applications.[3] Ms. Elm stated that on occasion courts had not permitted her to make her motions ex parte, which created a situation in which some of the material she sought might have been inculpatory, creating an ethical situation that might have required her to move to withdraw if the material injured her client. Mr. Carter described a case in which the court ordered the mental health records he sought—and had not yet seen—to be delivered to the U.S. Attorney's Office as well as to him. This created a very serious problem, he said, and he had to call and plead with the prosecutors not to review the material they had received. Id. at 42.

C. There are substantial variations district to district (and judge to judge)

Ms. Coleman described inconsistency in the application of Rule 17 from judge to judge, and between the two divisions within the same district. Id. at 28. Mr. Carter said the interpretations of Rule 17 in the courts are "all over the place." Id. at 42.

Mr. Cary said that in light of very strict applications of *Nixon* in the District of Columbia and other districts he no longer files Rule 17 motions. Id. at 16. Similarly, Ms. Halim said that many defense lawyers in the Eastern District of Pennsylvania do not file Rule 17 motions because *Nixon* is applied so strictly in the Third Circuit. Id. at 33. Ms. Elm called her experience with subpoenas before different judges in two districts "very uneven," and she also commented that defense counsel have been discouraged from seeking subpoenas under Rule 17. Id. at 43, 44.

Mr. Felman agreed that if *Nixon* is applied strictly it prevents the defense from obtaining information it needs, but he noted that in many cases the prosecution does not insist upon a strict application of *Nixon*. Id. at 17-18. In essence, he said, "we are practicing law despite the rule and despite the *Nixon* standard," with a variety of "workarounds." Id. at 18. Mr. Felman said he did not think he should be at the mercy of the prosecutor's good graces, but instead should have a rule that entitles the defense to get what it needs. He concluded that when *Nixon* is the reality of how this rule is being applied, he doesn't have a right to much. Id.

[3] Following the meeting, Mr. Cary provided these citations of courts finding ex parte Rule 17(c) motions "generally improper":

> See United States v. Finn, 919 F. Supp. 1305 (D. Minn. 1995); United States v. Najarian, 164 F.R.D. 484 (D. Minn. 1995); United States v. Hart, 826 F. Supp. 380 (D. Colo. 1993), aff'd, 61 F.3d 917 (10th Cir. 1995) (unpublished table decision); United States v. Urlacher, 136 F.R.D. 550 (W.D.N.Y. 1991); United States v. Bradley, No. 09-40068-GPM, 2011 U.S. Dist. LEXIS 30105 (S.D. Ill. Mar. 23, 2011). The court in United States v. Mack, No. 1:13CR278, 2013 U.S. Dist. LEXIS 199795, at *6 (N.D. Ohio Sept. 10, 2013), identified three lines of cases: those finding ex parte subpoenas improper, those finding ex parte subpoenas "freely permitted," and those finding them available only in "exceptional circumstances."

In contrast, some speakers described districts that are much more hospitable to Rule 17 motions. Ms. Leonida noted that the local rules in the Northern District of California make express provision for Rule 17 motions, including ex parte motions. Id. at 44. Mr. Wallin said that he had been very successful in filing ex parte motions, which had always been granted in the District of Arizona; he attributed this, at least in part, to the culture and attitude of the judges in his district. Id. at 18, 20. Judge Feinerman commented that in the Northern District of Illinois counsel generally agree on the scope of discovery and the courts rarely have to rule on the application of *Nixon*. Id. at 39.

Ms. Hay commented that her survey of Federal Defenders found very wide variations. Id. at 23. In some districts, the clerk still provides subpoenas upon request and no judicial approval is required. In others, as noted, judicial approval is required and *Nixon* is read narrowly.

The defense participants generally saw the wide variation from district to district (and judge to judge) as problematic, and they also pointed to the practice in some districts—and several states—where pretrial subpoenas are readily available as evidence that a liberalizing amendment to Rule 17 would not cause significant problems. Id. at 44-45 (Leonida) and 55 (Felman).

But Ms. Miller thought the variation from district to district was not problematic. She compared it to the variation in the use of Rule 35 motions for sentence reductions rather than 5K1.1 motions for downward departures in some districts (though of course those are variations in prosecutorial, rather than judicial practices). Id. at 54.

D. Litigation versus a Rules amendment

Several members questioned whether it was appropriate to consider an amendment to Rule 17 if the problems cited by the defense stem from interpretations of the Supreme Court's decision in *Nixon*. The speakers who supported an amendment pointed out that the Court takes only a very small number of cases each year, and it was unlikely that it would grant certiorari on this issue in the near future. More fundamentally, the Court in *Nixon* interpreted only the current rule. In one of the passages frequently quoted by courts denying defense subpoenas, the Court said Rule 17 was not designed to provide for pretrial discovery in criminal cases. *United States v. Nixon*, 418 U.S. 683, 698 (1974).

Rule 17 has remained largely unchanged since 1944, and the Court's interpretation of the current rule's text is no bar to consideration of the question now before the Committee: whether, as a policy matter, the text of the rules should be amended to provide the defense with pretrial access to a greater range of material held by third parties.

II. The Subcommittee's work

The Subcommittee held two teleconference meetings to gather additional information on some of the competing concerns and interests that the Subcommittee would need to weigh in making the decision whether to propose any amendment to Rule 17. The reporters also contacted other experienced practitioners and provided summaries of their comments to the Subcommittee. These questions the Subcommittee has been exploring include:

- How would expanded subpoena authority interact with various bodies of law limiting disclosure or protecting privacy (e.g., laws governing medical and educational records, laws limiting disclosure of law enforcement personnel records, and laws governing stored communications)?

- What effect would expanded subpoena authority have on various entities likely to receive such subpoenas (e.g., financial institutions, telephone and internet service providers, law enforcement agencies, schools, hospitals and medical providers)?

- What effect would expanded subpoena authority have on victims and witnesses?

To begin to answer these questions, the Subcommittee heard presentations by the several individuals. Two speakers focused on the impact of expanded subpoena authority on technology and telecommunications companies and limits on access to information under the Stored Communications Act:

- Orin Kerr, the William G. Simon Professor of Law at Berkeley Law, served as a member of the Criminal Rules Committee from 2013-19. He helped found the field of computer crime law, which studies how traditional legal doctrines must adapt to digital crime and digital evidence.

- Richard Salgado is a lecturer at Stanford Law School and a partner and founder of Salgado Strategies. Salgado served as Google's Director of Law Enforcement & Information Security for over 13 years. He oversaw Google's response worldwide to national security and law enforcement demands for data and assistance, and legal matters relating to cyber and physical security, information sharing and investigations involving serious crime on the platforms, among other duties.

Two other speakers focused principally on the impact of expanded subpoena authority on banks, financial services entities, and other large business entities that hold large volumes of data and documents:

- Peter Hardy is a partner at Ballard Spahr, a former Assistant United States Attorney for the Eastern District of Pennsylvania, and former trial lawyer for the Tax Division of the Department of Justice. He represents financial institutions and other businesses that have obligations under the Bank Secrecy Act and other compliance requirements, including issues involving money transmission, digital assets and cryptocurrency, cannabis and anti-corruption. He also handles complex criminal and civil litigation relating to allegations of fraud.

- John Hemann, a partner at Cooley LLP and former Assistant United States Attorney for the Northern District of California, has had more than 25 years of experience overseeing high-profile white collar, criminal, anti-corruption, FCPA, national security, trade secret, cybersecurity and antitrust cases and prosecutions in the public and private sectors. His clients now include public figures, business executives, global companies, and others involved in white collar and commercial disputes of all sizes.

In addition, the reporters had extended conversations with (1) individuals who represent medical providers, hospitals, and schools that might receive a significant number of subpoenas if Rule 17 were expanded, and (2) attorneys from the Department of Justice who work on victim and witness issues in the Executive Office of U.S. Attorneys. The reporters provided summaries of these conversations to the Subcommittee.

Although this memo will not attempt a full description of the various presentations and conversations, one important point emerged from all of these discussions: broadening pretrial subpoena

authority under Rule 17(c) would have no effect on the various statutory provisions that protect privacy (e.g., in the content of private communications or medical records). In other words, under the Rules Enabling Act, the amendment could not and would not override the statutory provisions that provide protections for substantive rights, such as privacy rights in medical records, school records, or stored electronic communications. That said, if the Committee moves forward with an amendment, it will be critical to be clear on this point.

III. The Subcommittee's next steps

After the Committee's April 20th meeting, the Rule 17 Subcommittee will convene to discuss next steps. It will focus on the fundamental threshold question: has a sufficient case now been made to warrant the Subcommittee moving forward with an effort to draft an amendment expanding and/or clarifying Rule 17?

If the Subcommittee concludes that an initial showing has been made, then it will move on to the next stage of the process, focusing on issues regarding the scope of a proposed amendment. We have identified the following issues:

1. Should judicial review be required before the issuance of all subpoenas, or only those seeking personal or confidential information?
2. What showing (other than *Nixon*) would be appropriate to require for issuing a subpoena?
3. When can parties seek subpoenas ex parte?
4. Must subpoenaed material be provided to the opposing party if it would not be subject to disclosure under Rule 16?
5. Should the government have standing to challenge subpoenas to victims? To other third parties?
6. What additional procedures, if any, are needed to protect victims?
7. Should the rule explicitly provide for protective orders?
8. Should (b), which requires court approval for trial subpoenas for defendants who are unable to pay witness fees, be deleted because this requirement is not applicable to defendants who are able to pay?
9. Should new provisions intended to allow the use of pretrial subpoenas for discovery be placed in Rule 16, Rule 17, or perhaps a new Rule 16.2 or 17.2?

We note that additional information gathering may be necessary if the Subcommittee decides to proceed with these issues.

IV. Questions for Committee Discussion

Because the Subcommittee has yet to decide whether to continue its investigation of potential amendments to Rule 17, and has not yet presented the Committee with its recommendation about what to do with the pending proposal, it would be premature to seek Committee feedback on that issue at this April meeting.

However, if the Committee members feel that additional research or outreach to particular groups or industries would be beneficial, it would be helpful to identify those now.

It would also be helpful to know if Committee members would like to suggest other drafting issues for the Subcommittee's consideration, should the Subcommittee decide to move forward with potential revisions regarding access to third-party information.

TAB 3

MEMORANDUM

DATE: March 3, 2023

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

Thank you for the illuminating discussions of this project during the fall 2022 advisory committee meetings. Those discussions generated further topics for investigation. By the time of the spring 2023 advisory committee meetings, I hope to have conducted further interviews that may shed light on some of the factual questions that came up during the fall meetings. Part I of this memo briefly summarizes a number of those questions, which concern increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and service by self-represented litigants on CM/ECF participants. The latter topic – namely, whether it may be desirable to eliminate the rules' requirement for paper service on CM/ECF participants by litigants who lack CM/ECF access – also generated a technical question about how such a change might affect the operation of the "three-day rule" in the rules' time-computation provisions. That query is a facet of a more general question: whether such a change would affect the operation of time periods that are measured after service of a paper. Part II of this memo addresses that question.

A fuller discussion of the self-represented litigants' filing and service project can be found in my August 2022 memo, which was included in the fall 2022 advisory committee agenda books. Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule.[1] In late 2021, in response to a number of proposals

1 *See* Civil Rule 5(d)(3); Appellate Rule 25(a)(2)(B); Bankruptcy Rules 5005(a)(2) and 8011(a)(2)(B); and Criminal Rule 49(b)(3). The Civil, Bankruptcy, and Appellate Rules permit courts – by order or "by a local rule that includes reasonable exceptions" to *require* self-represented litigants to file electronically. By contrast, the Criminal Rule does not authorize a court to *require* electronic filing by a self-represented litigant. *See* Part I.A.1 of my August 2022 memo.

submitted to the advisory committees,[2] a cross-committee working group was formed to study whether developments since 2018 provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Support Office and researchers from the Federal Judicial Center (FJC). The working group's efforts have been informed by a study conducted by Tim Reagan, Carly Giffin, and Roy Germano of the FJC. The final version of the FJC report became available in May 2022.[3]

I. Topics currently under investigation

Through inquiries between now and the time of the spring meetings, I hope to gather some answers to questions that surfaced during the fall 2022 discussions. Those questions concern three principal topics: access to CM/ECF for self-represented litigants; exempting self-represented litigants from the requirement of separate service on CM/ECF participants; and alternative (non-CM/ECF) modes of electronic access and notice for self-represented litigants.

A. Access to CM/ECF for self-represented litigants

The advisory committees have had varying discussions, so far, concerning the possibility of amending one or more of the national sets of rules to broaden self-represented litigants' access to CM/ECF. The types of potential amendments under discussion would not require the use of CM/ECF by self-represented litigants, but could switch the default rule (that is, provide a presumption of voluntary access to CM/ECF – for non-incarcerated litigants[4] – unless a court acted to deny such access) or could set a standard for a court's consideration of whether to grant such access.[5] Participants in the discussions raised a number of concerns that could usefully be investigated by inquiries with selected courts that currently provide broader access to CM/ECF for self-represented litigants.

The inquiries in this regard will focus on how self-represented litigants' access to

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2 *See, e.g.*, Suggestion No. 21-CV-J (Sai) (proposing adoption of nationwide presumptive permission for self-represented litigants to file electronically); Suggestion No. 20-CV-EE (John Hawkinson) (proposing that if the requirement of permission by court order or local rule is retained, then the national rules could be amended to address the standard for granting permission).

3 See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants ("FJC Study").

4 I will inquire about the courts' approach to incarcerated self-represented filers as well. Based on our study so far, I expect to hear that the courts that grant CM/ECF access to non-incarcerated self-represented litigants typically do not extend that access to incarcerated self-represented litigants.

5 As to the latter question, it is worth noting that in a minority of district courts CM/ECF access appears to be flatly unavailable to self-represented litigants – an approach that seems out of step with a majority of the district courts around the country. See FJC Study, supra note 3, at 7.

CM/ECF works in the districts that offer it, and perhaps also how it could work in future. For example, how are self-represented litigants identified for CM/ECF purposes, given that they lack attorney ID numbers? How do courts handle CM/ECF docketing errors (e.g., wrong event or wrong case) by self-represented litigants? Does the court require training on use of CM/ECF, and how is that training provided?[6] Has the clerk's office experienced burdens and/or benefits as a result of CM/ECF access by self-represented litigants? Are inappropriate filings more troublesome when made by a CM/ECF user, especially as compared to paper filings by similarly situated users? Have self-represented litigants inappropriately shared their CM/ECF credentials? Does the version of CM/ECF matter? Is there a possibility for CM/ECF to be set so that a filing could be "gated," that is held for clerk's office review after it is uploaded into CM/ECF and before it is placed into the electronic docket?[7] What are the options and approaches for handling case-initiating filings (as distinct from filings in a case that has already been opened)? What resources would a court find necessary or useful if it were to permit or expand CM/ECF access for self-represented litigants?

B. Exempting litigants from separate service on CM/ECF participants

As discussed in Part II, a separate question concerns whether to repeal the current rules' requirement that non-CM/ECF users serve CM/ECF users separately from the notice of electronic filing generated after a filing is scanned and uploaded into CM/ECF. Inquiries relating to that topic will focus on the logistics in districts[8] that have exempted self-represented litigants[9] from serving CM/ECF participants.

Relevant questions include: How do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still required)?[10] Does the exemption only concern service on CM/ECF participants, or

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6 It would be useful to inquire about training both for self-represented litigants and for attorneys. See, e.g., http://www.cod.uscourts.gov/Portals/0/Documents/CMECF/Required_Reading_for_Electronic_Filing.pdf.

7 The FJC Study reports a practice that is somewhat analogous, albeit with respect to case-initiating filings. A number of courts permit attorneys to file complaints via CM/ECF without opening a new case file; the filing goes into a shell case, and the clerk's office then (if appropriate) opens the new case file and transfers the filing into it. See FJC Study, supra note 3, at 6.

8 Local provisions indicate that these districts include the District of Arizona and the Southern District of New York.

9 On this set of issues, the inquiry should focus on both incarcerated and non-incarcerated litigants. Indeed, relief from the burden of making paper service may be particularly important for a litigant who must pay for postage out of a prison account.

10 Litigants who file via CM/ECF receive a system-generated notice of electronic filing that

does it also extend to service on non-CM/ECF participants who have opted into an electronic-noticing program? Have the courts experienced any downsides to exempting litigants from the separate service requirement? (For example, has the clerk's office experienced any new or additional burden as a result of the change?) Does the fact that a filing is sealed make any difference? Are there any paper filings that do *not* get scanned and uploaded into CM/ECF? (Also, for purposes of comparison, how are filing and service handled when a CM/ECF user files a document under seal?)

A discrete set of questions, for these districts, concerns how they treat time periods measured from service when the service is effected through CM/ECF but the filing was filed other than through CM/ECF. (This, of course, is the topic discussed in Part II of this memo.) Questions include: What is the typical time interval between the time the clerk's office receives a paper filing and the time that the clerk's office (having scanned it) uploads it into CM/ECF? For time periods measured after service, what date is treated as the date of service – the date a paper filing is received by the clerk's office, or the date that the filing is later uploaded into CM/ECF by the clerk's office? If the date of receipt by the clerk's office is used, then (1) how does the recipient know the date of receipt and (2) are an extra three days added to the relevant time period?

C. Alternative (non-CM/ECF) modes of electronic access

This inquiry will seek further data on alternative methods of access for self-represented litigants – both for filing their own papers and for receiving others' filings in the case. Alternative modes of filing include email or portal submissions. A court could also provide a non-CM/ECF user with an alternative means of access to electronic noticing of other litigants' filings.

Inquiries on these topics will include: How have courts used portals or email submissions, and how have they handled virus scanning, file size, and other technical problems? What are the benefits and burdens to the clerk's office of an email or portal submission option for self-represented litigants? Does a litigant who files by email or by uploading to a portal qualify for the timing treatment accorded to electronic filing?[11] If the court provides access to

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says who is being automatically served and who is not. Paper filers will not receive the notice of electronic filing (unless, perhaps, they are registered for electronic noticing). We have speculated that such filers might instead draw inferences from a party's status as counseled or self-represented, or from the contact information listed on the docket sheet; or they might ask the clerk's office.

11 Under the time-computation rules, those using "electronic filing" presumptively may file up to midnight in the court's time zone, whereas those using "other means" of filing must file before the scheduled closing of the clerk's office. See Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); Criminal Rule 45(a)(4). Appellate Rule 26(a)(4) includes a few more tailored approaches for

electronic noticing, what benefits and challenges has the court encountered with that program?[12]

II. The application of time periods measured from service, when a paper is filed by a non-CM/ECF participant

The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their filings[13] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even those that are CM/ECF users.

A review of Civil Rule 5 illustrates the general approach.[14] Civil Rule 5(a)(1) sets the general requirement that litigation papers "must be served on every party."[15] Civil Rule 5(b)(2)(E) provides that one way to serve a paper is by "sending it to a registered user by filing it with the court's electronic-filing system."[16] Civil Rule 5(d)(1)(B) requires a certificate of service for every filing, except that "[n]o certificate of service is required when a paper is served by filing it with the court's electronic-filing system."[17]

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particular filing scenarios, but adopts the same basic idea that electronic filers get the latest deadline – midnight in the relevant time zone.

This feature of the time-computation rules is currently under study. See generally Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts .

12 Questions could include whether the electronic noticing also provides a means of electronic access to the document that is the subject of the notice, and whether the electronic noticing encompasses both other parties' filings and also court orders.

13 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). The discussion here focuses on filings subsequent to the initiation of a case.

14 Bankruptcy Rule 7005 expressly applies Civil Rule 5 to adversary proceedings in a bankruptcy. The footnotes that follow cite provisions in Appellate Rule 25, Bankruptcy Rule 8011 (concerning appeals in bankruptcy cases), and Criminal Rule 49 that are similar to those in Civil Rule 5.

15 See also Appellate Rule 25(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review."); Bankruptcy Rule 8011(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal."); Criminal Rule 49(a)(1) ("Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.").

16 See also Appellate Rule 25(c)(2)(A); Criminal Rule 49(a)(3)(A).

17 See also Appellate Rule 25(d)(1); Criminal Rule 49(b)(1).

In a case where all parties are represented by counsel,[18] these provisions combine to exempt the litigants from any requirement that they separately serve other litigants; their filings via CM/ECF automatically effect service on all parties. In a case that involves one or more self-represented litigants, however, the situation is more complicated. Service on a self-represented litigant can only be made via CM/ECF if the self-represented litigant is a registered user of CM/ECF – which occurs only if the litigant receives permission (to use CM/ECF) by court order or local rule.[19]

As for service by a self-represented, non-CM/ECF-using, litigant on a registered user of CM/ECF, one might argue – as a policy matter – that separate service is just as unnecessary as it is when the filer is a registered user of CM/ECF. Because clerk's offices routinely scan paper filings and upload them into CM/ECF, registered users will receive a CM/ECF-generated notice of electronic filing each time a paper filing (or a filing submitted by email or via a portal) is uploaded into CM/ECF in one of their cases. However, a number of courts appear to interpret the current rules to require that a person filing by means other than CM/ECF must separately serve the filing, even when the recipient of the filing is a registered user of CM/ECF.[20]

Accordingly, if the policy judgment is made that non-CM/ECF users should not be required to serve CM/ECF users, it may be desirable to amend the national rules to clarify that they impose no such requirement. My August 2022 memo sketched one possible amendment, using Civil Rule 5 as the illustration.

But during the fall 2022 discussions, we realized that it is necessary to consider how such an amendment would interact with the "three-day rule" in the rules' time-computation provisions. The "three-day rule" provides a cushion of extra time for deadlines measured after

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18 Civil Rule 5(b)(1) presumptively requires that service on a represented party "must be made on the attorney." See also Appellate Rule 25(b); Criminal Rule 49(a)(2). And Civil Rule 5(d)(3)(A)'s presumptive requirement that "[a] person represented by an attorney must file electronically" guarantees, in practice, that any attorney appearing as counsel of record will be a registered user of CM/ECF. See also Appellate Rule 25(a)(2)(B)(i); Criminal Rule 49(b)(3)(A).

19 See footnote 1 and accompanying text.

20 See, e.g., Pro Se Handbook for Civil Suits, U.S. District Court, Northern District of Texas, § 6 ("If you and the opposing side are both ECF users, the ECF system will complete the service for you, and a Certificate of Service is not required. If either of you is not an ECF user, or if you learn that service sent through ECF did not reach the person, you must serve the document by other means …."), available at https://www.txnd.uscourts.gov/sites/default/files/documents/handbook.pdf; Electronic Submission For Pro Se Filers, U.S. District Court, Western District of Texas ("Service of pleadings filed in the drop box must be performed by the filing party."), available at https://www.txwd.uscourts.gov/filing-without-an-attorney/electronic-filing-for-pro-se/ .

service,[21] where the service is accomplished through a means that the rulemakers expected to include a time delay. Civil Rule 6(d) illustrates the mechanism:

> **Rule 6. Computing and Extending Time; Time for Motion Papers**
>
> * * *
>
> **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

The Rule 5 sketch in the fall 2022 agenda books would not have worked properly with the three-day rule, due to the interaction of two features in that sketch: First, proposed Rule 5(b)(3) would have defined service on a CM/ECF user as "filing" without accounting for the possibility of delay between the paper's filing[22] and its uploading into CM/ECF. And second, Rule 6(d)'s three-day rule would not have applied to service under proposed Rule 5(b)(3), because by Rule 6(d)'s terms the extra three days apply only when service is made under Rules 5(b)(2)(C), (D), or (F). A different way of putting the problem is that, when adjusting what is considered "service," we need to be aware of how that adjustment affects the operation of time periods measured from the date of service.

Fortunately, there are ways to ensure that a proposed amendment accounts for the timing concerns reflected in the three-day rule. One simple way to do so is to adjust proposed Rule 5(b)(3) so that service via CM/ECF is not complete until the paper is actually in CM/ECF. The sketch that follows takes that approach.

In the course of preparing this memo, I became aware of one other consideration. The fall 2022 Rule 5(b) sketch sought to streamline the rule by redefining service on a CM/ECF user as filing. That still strikes me as the cleanest and simplest approach. But that approach needs to be

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21 For such deadlines in the Civil Rules, see, e.g., Rule 11(c)(2) (time for correcting a litigation paper after service of Rule 11 motion); Rule 15(a)(1)(B) (time to amend pleading as of right); Rule 15(a)(3) (time to respond to amended pleading); Rule 33(b)(2) (time to respond to interrogatories); Rule 34(b)(2)(A) (time to respond to request for documents or ESI); Rule 36(a)(3) (time to respond to requests for admission); Rules 38(b)(1) & (c) (time for making jury demand); Rule 59(c) (time to file affidavits in opposition to new trial motion); Rule 68(a) (time to respond to offer of judgment). (This is an illustrative, not exhaustive, list.)

22 Civil Rule 5(d)(2) provides that "[a] paper not filed electronically is filed by *delivering* it: (A) *to the clerk*; or (B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk" (emphasis added). Thus, the clerk's receipt of the filing, not the clerk's later upload of the document into CM/ECF, would seem to be defined as the time of "filing" under the current rule.

nuanced to account for the fact that certain papers (such as disclosures and discovery requests and responses) are served without being filed.[23] The sketch that follows accounts for this possibility by providing that, where a paper is not filed, service is governed by Rule 5(b)(2).

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service <u>on non-users of electronic-filing [and electronic-noticing] system[s]</u> ~~in General~~. A paper is served under this rule <u>on [one who has not registered for the court's electronic-filing system] [one who has not registered for either the court's electronic-filing system or a court-provided electronic-noticing system]</u> by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by ~~other~~ electronic means that the person consented to in writing--in ~~either of~~ which

23 See Civil Rule 5(d)(1)(A).

events service is complete upon ~~filing or~~ sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ~~Using Court Facilities. [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]~~ **Service on users of the court's electronic-filing [or electronic-noticing] system**.

(A) A paper that must be filed is served under this rule on a registered user of [either] the court's electronic-filing system [or a court-provided electronic-noticing system] by filing it.
(B) If the paper is filed via the court's electronic-filing system, service under Rule 5(b)(3)(A) is complete upon filing.
(C) If the paper is filed other than via the court's electronic-filing system, service under Rule 5(b)(3)(A) is complete when the paper is uploaded into[24] the court's electronic-filing system.[25]
(D) Service under Rule 5(b)(3)(A) is not effective if the filer learns that it did not reach the person to be served.
(E) Rule 5(b)(2) governs service of a paper that is not filed.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

* * *

(B) Certificate of Service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ under subdivision (b)(3)(A). When a paper

24 "Uploaded into" is used here as a placeholder for the concept, which is that the relevant demarcation should be the point in time when the CM/ECF system generates the notice of electronic filing. It may be useful to consider other possible formulations; "entered in" has been suggested as an alternative.
25 This new provision would remove any need to include this type of service within Rule 6(d)'s three-day rule.

that is required to be served is served by other means:

> (i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and
>
> (ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

* * *

The sketch above presents one way to lift the requirement of service on CM/ECF users. Other ways doubtless exist, but I present this sketch to illustrate that it is feasible to account for the timing concern that arose during the committees' fall 2022 discussions.

III. Conclusion

This memo presents an interim report. I hope to have further information to share with the advisory committees by the spring meetings. If Part I's list of questions strikes you as incomplete, I welcome suggestions concerning additional questions that we should be asking.

TAB 4

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

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

RE: **Unified Bar Admission for All Federal District Courts (23-CR-A)**

DATE: **March 19, 2023**

A group of six individual attorneys and fourteen law firms and organizations have submitted suggestions to the Advisory Committees for Civil and Criminal Rules seeking a new rule that would provide for unified bar admission to all federal district courts. The proponents include law firms that represent both plaintiffs and defendants, as well as non-profit organizations that the suggestion describes as ideologically diverse. The organizations include the CATO Institute, EarthJustice, the Pacific Legal Foundation, and Public Citizen Litigation Group. Members of one organization are spouses of military personnel who must move frequently.

The suggestion states that separate bar admission is especially problematic in the several districts that require admission to the local state bar, including districts that insist that even attorneys with many years of experience must take and pass the state bar exam to be admitted to practice in the federal district court. The suggestion states that 60 districts currently require that an applicant must be a member of the local state bar. It argues that this requirement is unnecessary because the federal courts apply the Federal Rules of Civil, Criminal, and Bankruptcy Procedure, as well as the Federal Rules of Evidence.

The suggestion describes the significant benefits of a single admissions rule, and the proponents' unsuccessful efforts to obtain changes in the local rules in the Northern District of California (2018) and the Eastern District of Virginia (2022).

The suggestion proposes a single unified admissions rule to be administered by the Administrative Office of the United States Courts, which would set the fees for admission and renewal, and administer a disciplinary system for admitted attorneys. The suggestion recognizes that under the current system each district now receives fees from regular admissions, renewals, and pro hac vice admissions. It argues that the loss of revenue would be somewhat offset by reductions in expenses and staff time now borne by each district. In any event, it urges, the goal of the attorney admissions system should not be the generation of revenues for the courts.

The question for discussion is whether this suggestion should be referred to a subcommittee for further consideration.

By Federal Express

February 23, 2023

H. Thomas Byron III, Secretary,
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Submission of a Proposal to Adopt a Rule for
Unified Bar Admission for All Federal District Courts

Dear Secretary Byron:

Enclosed is a Proposal, with three Exhibits, asking the Committee on Rules of Practice and Procedure to adopt a rule for the unified bar admission to all federal district courts. Under this Proposal, once a lawyer was admitted to one district court, the lawyer could practice in all 94 districts. The text of the proposed rule, as well as two alternatives, are set forth at the end of the Proposal, which is also posted here: https://www.lawhq.com/file/federal-court-admission-proposal.pdf.

The Proponents are fourteen law firms and non-profit organizations and six individual attorneys; they are identified in the Addendum to the Proposal. These include law firms that represent both plaintiffs and defendants, as well as non-profit organizations that lie along the ideological spectrum. Members of one of the organizations are spouses of military personnel who move frequently and for whom admission to each new district court where they live is a substantial barrier to their practicing law. Separate bar admission is especially problematic in the many districts that require admission to the local state bar, including those that insist that even attorneys with many years of practice must take the state bar exam to be admitted.

The undersigned and Thomas Alvord of the law firm LawHQ are the principal drafters of the Proposal. The Proponents would like to be notified when the Committee considers this matter in open session so that we might attend. For the convenience of the Committee, all communications can be directed to the undersigned at abmorrison@law.gwu. or 202 994 7120.

Respectfully Submitted,

Alan B. Morrison

Alan B. Morrison

The George Washington University Law School
2000 H Street, NW | Washington, DC 20052

February 23, 2023

BEFORE THE COMMITTEE ON

RULES OF PRACTICE AND PROCEDURE

PROPOSAL TO ADOPT A RULE FOR UNIFIED BAR ADMISSION TO ALL FEDERAL DISTRICT COURTS

The individual attorneys and organizations that are listed in the Addendum to this request (the Proponents) ask the Committee on Rules of Practice and Procedure to consider and then adopt a rule under which there would be a single application for admission to the bar of all United States District Courts. Under that rule, an attorney would apply for admission to practice in all the United States District Courts, and once admitted, the attorney could practice in all 94 districts. A draft of the proposed rule is set forth below, as are two alternative proposals that would achieve most, but not all, of the benefits of the unified rule.

Introduction & Summary of Rationale for the Rule

The question of whether local or national rules should govern admission to the bars of the district courts was raised shortly after the Federal Rules of Civil Procedure became effective in 1938. A committee of Federal District Judges, chaired by Judge John Knox of the Southern District of New York, prepared a report about local rules generally, FED. JUDICIAL CONFERENCE, REPORT ON LOCAL DIST. COURT RULES (1940), *reprinted* in 4 Fed. R. Serv. 969 (1941) (the "Knox Report"). The Report sets forth the circumstances in which the committee thought local rules might appropriately supplement the uniform civil rules. In concluding that bar admission rules were appropriate for local adoption, this was the committee's entire rationale: "[C]onsiderations of local policy and conditions play a controlling role. Calendar practice and

assignment of cases for trial is another of those subjects on which nearly every district has rules but with wide variations of detail. The necessity for these variations is readily apparent." *Id.*

There is no need to debate whether the Report's conclusion as to the desirability of having local rules for bar admission was correct in 1940. Rather, the question before this Committee is whether a uniform rule would best serve the federal courts, the attorneys who practice there, and their clients. For the reasons that follow, the answer to that question is that the time has arrived for a unified admission rule for the district courts.

The principal reason why a unified rule should be adopted is that the similarities among the practices in the district courts vastly exceed their differences. Both civil and criminal cases are now predominately governed by federal substantive law, and all procedural and evidentiary rules are federal. On the other side, multiple admissions and renewals impose significant burdens of time and expense on the federal courts, the attorneys who must obtain individual admission to numerous different districts, including pro hac vice admission, and the clients that they serve.

In 2015, the United States District Court for the District of Maryland undertook a comprehensive survey of the admission rules of the 94 district courts (the Maryland Report).[1] Although that Report is eight years old, our analysis indicates that it remains an overall accurate reflection of the status of admission rules in the district courts today. The Report is very detailed, but two significant conclusions are apparent. First, there are major differences among the districts in their requirements for admission to what is, in essence, a single court system. Second, many of the requirements are burdensome and appear to be mainly relics from a different era. This welter of requirements, and the lack of any apparent reason for these

[1] https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/USDCTMDSurvey0115.pdf.

variances, should prompt the Committee to seek a more sensible alternative to the current situation. This proposal for a one-time admission rule for all district courts is that alternative.

For the Proponents there is one particular aspect of the current situation that has impelled them to undertake prior efforts with individual district courts and to support this proposal. *See* Exhibits 1 & 2 attached. As shown in the Maryland Report, 60 of the 94 districts include in their admission rule a requirement that members of their bars be admitted to the local state court bar. That requirement is unnecessary in today's federal court litigation world, and, more importantly, it imposes on attorneys the additional annual cost of another state bar membership and/or multiple discretionary pro hac vice admissions. Moreover, the state bars in the district courts in California, Florida, Hawaii, and Delaware, all of which impose this requirement, also require even lawyers already admitted to practice elsewhere to pass their state bar exam, which is a further barrier to district court admission. *See* Exhibit 1 at 14, note 6. Prior to filing this request, many of the Proponents joined petitions to a number of district courts, asking them to eliminate the local bar requirement, but in every case their requests were rejected (without explanation) or no response was given. *See* Exhibits 1 & 2. It is therefore apparent that, if change is to occur within the federal judiciary, it can only come from this Committee.

In the sections below, we explain why a unified admission rule is desirable, and why a state bar admission requirement is unnecessary. Then we explain our main and alternative proposals. Although our request is for the adoption of a final rule, we recognize that the Committee has a process that must be followed. Accordingly, our immediate request is that the Committee consider this proposal at a forthcoming meeting and begin the process of gathering additional information that will bear on this Proposal.

The Benefits of a Single Admission Rule

Before discussing the advantages of a single admission rule, we decided to deal upfront with the issue of how the financial impact of a decision to create a unified bar admission rule should be factored into the decision. Although we do not have access to the data on how much money is received by all 94 districts from fees for regular admissions, renewals, and pro hac vice admissions, we assume it is significant, although probably not in terms of the overall budget for the federal judiciary.[2] But whatever the order of magnitude, a significant part of the revenue raised is offset by the costs incurred by the court system in administering the multiple admission system. Those include direct out of pocket expenses for printing and mailing certificates, as well as the time spent by staff in each district processing applications, reminding attorneys to renew when they fail to do so in a timely fashion, and handling situations in which an attorney has been disciplined in another jurisdiction. By contrast, a system in which an attorney will be admitted once for all district courts, and in which renewals and any disciplinary matters will be done centrally, will cut down dramatically on both out of pocket expenses and staff time. And to the extent that the current system provides additional revenue beyond the costs, we do not believe that bar admissions should be a profit center for the judiciary. In our view, a unified admission system should assure that its costs are covered, but not otherwise generate any significant net revenue.

The most obvious reason for having a unified admission system for all federal district courts is that they all operate under the same rules of civil, criminal, and bankruptcy procedure,

[2] The minimal charge for admission for all district courts is set by the Judicial Conference (28 U.S.C. § 1914). The current minimum is $188, but some courts charge more than $300. *See* Exhibit 3 at 1-2. There are also renewal fees that must be paid at various times in various amounts. *Id.* at 2.

all trials use the same federal rules of evidence, and all appeals are governed by the Federal Rules of Appellate Procedure (FRAP). Indeed, the admission rules for all the courts of appeals are governed by FRAP 46, although they are administered by the individual circuits. Under FRAP, there is one admission rule, just as the courts of the States of New York, California, Texas, and Florida, have one bar admission, even though those systems are divided in several geographic subdivisions. Under FRAP 46, as well as United States Supreme Court Rule 5.1, the sole admission requirement is that an applicant be admitted to the highest court of any state. A unified admission system for the district courts would eliminate the need for each district court to have its own staff doing admissions and renewals, handling the paperwork, and properly depositing the money received. A lawyer would have only one certificate of admission to all the federal district courts, and if an attorney were disciplined by any court, there would only have to be one federal office/court to resolve the matter.

From the perspective of attorneys, the change would simplify their lives greatly and save them significant amounts of money and time. Once admitted to one federal district court, the attorney would never have to apply to another district. The savings would be monetary – the cost of the application, plus the cost of obtaining a certificate of good standing from their principal bar – and equally important, they would not have to spend time obtaining the additional information now required in some districts as part of the application. They would also avoid the delay in their practice until their application is approved. Finally, state courts will be relieved of being asked for certificates of good standing so that attorneys can be admitted to additional federal district courts.

Because of the limitations on district court admission discussed below, lawyers often must move for admission pro hac vice in each case in which they wish to appear. The Supreme

Court has recognized the inadequacy of pro hac vice admissions because they do "not allow the nonresident attorney to practice on the same terms as a resident member of the bar. An attorney not licensed by a district court must repeatedly file motions for each appearance on a pro hac vice basis…. [T]he availability of appearance pro hac vice is not a reasonable alternative for an out-of-state attorney who seeks general admission." *Frazier v. Heebe*, 482 U.S. 641, 650-51 (1987). In addition, there is generally a fee for each case, up to $500 in one district, and some districts include annual or lifetime limits on pro hac vice admissions as well as other restrictions. *See* Exhibit 3 at 3-4. [3]

Under our proposal, a lawyer would only have to make a single application to be admitted to all federal district courts. The applicant would only have to have been admitted to practice in a single state bar (defined to include the District of Columbia and the territories of the United States). We also do not see the need for a sponsor who is admitted to the district courts, but would not oppose such a requirement.

We think it would be appropriate to require that applicants state in their application that they are familiar with the federal rules of the subject areas in which they expect to practice (*i.e.*, civil, criminal, or bankruptcy). It would also be reasonable to require applicants to affirm in their application that they recognize that most districts have local rules and that it is their responsibility to familiarize themselves with them when practicing in a new district. Our proposed rule would not preclude a district court from requiring an attorney to meet certain additional experience requirements before the attorney can be lead attorney in a civil or criminal

3 For a case in which a local rule forbids an attorney not admitted to practice before the district court from being permitted to appear in more than three unrelated cases in any twelve-month period, or in more than three active unrelated cases at any one time, where there are expected to be thousands of cases filed under a statute that requires that they all be filed in that district, see *Malafronte v. United States*, Docket No. 7:22-cv-00168 (E.D.N.C).

trial. But it would preclude a district from requiring that one of the attorneys in a case reside in or maintain an office in the district. That kind of requirement may once have been appropriate, but in the world of the Internet and videoconferencing, it cannot be justified.[4]

The Need to Eliminate Local Bar Admission Requirements

The reasons for adopting a unified rule are not what has primarily motivated the Proponents to submit their proposal. Instead, it is the requirement in sixty districts that to be admitted to practice, the applicant must be a member of the local state bar. Because that requirement is both unjustified and burdensome, and it will not be changed by the district courts that impose it, the Proponents ask this Committee to forbid district courts from requiring it, whether by issuing a unified admission rule that does not contain it, or by directing districts to remove it from their existing rules.[5]

Attached as Exhibits 1 and 2 are copies of petitions filed with various district courts seeking the elimination of the local state bar requirement and the responses to them. The local courts could not, of course, issue a unified rule, although they could have asked this Committee to do so. Exhibit 1 was filed in the Northern District of California in February 2018, and although it asked for a rule change, its immediate request was that the court publish the proposal

[4] There is also considerable academic support for reducing barriers to district court admission standards. *See e.g., The Case for a Federally Created National Bar by Rule or by Legislation*, 55 Temp. L. Q. 945, 960-964 (1982); *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 Fordham Urb. L.J. 969, 978 (1992); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 Tex. L. Rev. 335, 379 (1994); *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?* 30 Geo. J. Legal Ethics 125 (2017).

[5] Most district courts with this requirement mandate that attorneys continue their state bar membership as a condition of their district court bar membership, whereas others make exceptions. For example, the Northern District of California has a grandfathered exception in local rule 11-1. "For any attorney admitted to the bar of this court before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility." If the local state bar requirement serves any purpose at all for the federal courts, the courts that make exceptions seem particularly irrational, although less burdensome.

for public comment. Instead, less than two months later, the Chief Judge of the District advised the petitioners that their proposal had been rejected, but with no reasons given for the refusal to seek public comment. Petitioners then asked the Judicial Council of the Ninth Circuit to exercise its authority under 28 U.S.C.§ 2071(c)(1), to review and order changes to the Northern District's local bar rule. That request went unanswered for almost four years, and when a response came, it was a rejection, again without any explanation. *See* Exhibit 1.

Exhibit 2 was filed in the Eastern District of Virginia on July 5, 2022, along with similar petitions filed in fifty-nine districts that currently do not admit attorneys without a local state bar license. While some districts have responded that they will review the proposal in upcoming committee meetings, the only definitive responses so far have been rejections of the proposal, again without explanation (sample attached with Exhibit 2). Even if some, or even all, of these districts amend their rules to permit attorneys with out-of-state licenses to be admitted, that still would not achieve the simplicity and efficiency of a unified rule for district court admission.

Before the Federal Rules of Civil Procedure became effective in 1938, the district courts followed the procedural rules of the state courts in which they were located, and so it made sense to require that those who practiced in federal court be knowledgeable about the local state rules. The adoption of federal civil rules was followed by the Federal Rules of Criminal Procedure (1946) and the Federal Rules of Evidence (1975). The bankruptcy courts have always had their own rules, and their current Rules became effective in 1983. With all district court procedures federalized, that leaves only the argument that membership in the local state bar is needed

because the governing substantive law is that of the state where the district court sits. But even if true in some cases, that possibility cannot justify the local bar requirement. [6]

First, the governing law can be state law only in civil cases and only in those in which the basis for subject matter jurisdiction is diversity of citizenship. For fiscal year 2022 among the private civil cases filed, about two-thirds were diversity cases (including the large numbers in MDLs discussed below).[7] By definition, in diversity cases, with citizens from more than one state as parties, there is, generally speaking, a substantial chance that the applicable law will be that of a state other than the one in which the case was filed. As the Supreme Court noted thirty-five years ago, in a case in which it set aside a district court's residence requirement as an undue barrier to admission to its bar, "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." *Frazier v. Heebe,* 482 U.S. 641, 648 n.7 (1987).

Second, as the data in Exhibit 1, pp 7-8, shows, the vast majority of diversity cases involve tort and contract claims. [8] In the experience of the Proponents, the outcomes in most of those cases depend heavily on the facts, with the substantive state law playing a smaller role. And to the extent that there are issues of local state law to be resolved, there is no reason to suppose that competent lawyers on both sides will need local lawyers to assist them in making

[6] Given the increasing number of cases that are subject to MDLs, where the cases are transferred to a single district, even if a client in such cases wanted a local lawyer, that desire would be thwarted in those situations.

[7] https://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2022.pdf. There were 105,212 diversity cases filed and 131,131 federal question cases. In addition, there were 38,428 civil cases involving the United States. If those are included, fewer than half of all civil cases filed were diversity actions.

[8] The data in Exhibit 1 are from the fiscal year ending June 30, 2016. Because this proposal only asks the Committee to begin consideration of this matter, and because the Committee has access to much more up-to-date and more refined data than do the Proponents, we have not updated our data set at this time, but could do so if that would assist the Committee.

the legal arguments. Indeed, federal law already allows one group of lawyers who are admitted to a single bar to practice in every federal (and state) court. Under 28 U.S.C. § 517, "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Although many cases involving the United States raise only issue of federal law, suits under the Federal Tort Claims Act are specifically based on state law under 28 U.S.C. § 2674.

Third, a local bar requirement cannot be justified on a paternalistic theory that such a rule is in the best interest of the clients. Diversity cases in federal court require a controversy of at least $75,000, and generally the amount is much larger. There is no reason to assume that the clients in those cases are unsophisticated and cannot make rational determinations about their choice of counsel, taking into account all the relevant factors, not just the governing law (if it can be known when counsel are selected). There are many ways in which clients may make unwise selections of their counsel, but except in limited situations like class actions, the federal courts do not supervise those choices. There is no reason for the district courts to do that by means of the local state bar admission rule that is found in the rules of sixty district courts.

Fourth, the trend towards states adopting the Uniform Bar Examination (UBE) has continued to accelerate. As of the time of this filing, thirty-nine of the fifty states and the District of Columbia accept the UBE, including fourteen that did not do so when the petition to the Northern District of California was filed in February 2018.[9] If most state bars now accept the

[9] https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F196.

UBE, which covers procedure as well as substance, there can be no reason why district courts should insist on local state bar admission.

Among the holdouts from the UBE are California, Delaware, Florida and Hawaii, which have traditionally been the most restrictive in terms of bar admission generally by requiring a local state bar examination even for experienced attorneys. Each of the district courts in those states has a local state bar requirement for admission to their courts. *See* Exhibit 1 at 14, note 6. As Justice Kennedy observed in *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 68 (1988), "[a] bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise." For lawyers who have been practicing elsewhere for a number of years, the examination requirement is particularly burdensome. The bar exam is a general test, and most lawyers specialize, and hence have no regular contact with many areas that the exam tests. Taking a bar exam also entails expenses for the exam, a prep course, and travel to the exam's location, not to mention the time away from the lawyer's practice. We do not argue that these burdens alone warrant the elimination of the local bar admission requirement, but they surely must be taken into account in determining whether that requirement should be maintained.[10]

Last, there is a trend that is significant for this proposal, which was underway when the Northern District petition was filed and has greatly accelerated in recent years: the massive increase in Multi-District Litigation (MDL) cases. Most of those cases are based on state law tort claims, mainly those involving unsafe drugs or other products. As of November 15, 2022, there were 397,845 cases pending in MDL proceedings, which were sent from all over the country under 28 U.S.C. § 1407 to a single district judge for all pre-trial matters, including

[10] Attorneys with their primary practice area in another state must pay bar dues to other states if they wish to be admitted to the federal court there. Those dues add up. The 2023 bar dues for California are $510 annually. https://www.calbar.ca.gov/Attorneys/For-Attorneys/About-Your-State-Bar-Profile/Fees-Payment.

settlements, and in some cases trials.[11] These proceedings routinely involve hundreds or thousands of cases, whose lawyers are not members of the bar of the state or federal court where the proceedings take place. Indeed, in the 3M earplug case, there are upwards of 300,000 plaintiffs. Quite sensibly, most judges in those cases do not require counsel to be admitted to the district court bar, or even require pro hac vice applications, even though almost all of those claims are based on state tort laws. If they did, their clerks' offices would be overwhelmed with processing pro hac vice paperwork.

The MDL cases are important for another reason. To our knowledge, the federal judges who handle them have never suggested that there are problems of any kind, let alone serious ones, because the lawyers are not members of the state bar of the district to which the case happens to be sent. If cases of such monetary and social significance can be litigated successfully by attorneys who are not members of the local state bar, there is no reason for that requirement to apply to any other case. In short, as the American Law Institute observed, the requirement of local bar membership "is inconsistent with the federal nature of the court's business." RESTATEMENT OF LAW, THIRD, THE LAW GOVERNING LAWYERS § 3 comment *g* (AM. LAW INST. 2000). Support for eliminating local bar admission requirements for district courts also comes from the American Bar Association (ABA). At its Midyear Meeting on February 13-14, 1995, the ABA approved a resolution stating that it "supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules."

[11] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-15-2022.pdf. As of September 30, 2022, there were a total of 596,136 civil actions including those in MDLs, which means that about two-thirds of all civil cases are now in MDL proceedings.

Finally, although the 1940 Knox Report supported local bar admission rules, the model rule that it proposed did not require membership in the local state bar. Admission to another bar was an acceptable alternative to the Knox Committee as long as "the requirements for admission to that bar were not lower than those that were at the same time in force for admission to the bar of this state." *See* Exhibit 1, Addendum at 7. If that option were satisfactory in 1940, it surely should suffice today.

The Federal Courts Today Have the Infrastructure for a Unified Admission Rule

Even if it made sense in the past to create a single admission to all federal district courts, it would have been impracticable to implement, but not today. Until recently, every federal district court maintained its own system for attorney filings, and it would have been a herculean task to enable every district court to use the same attorney registration, account management, and now, e-filing, but the situation has been changing. As of August 2022, all federal district courts now use the same system to handle all these functions.

Since 1988, each district court has managed its documents, dockets, e-filing, and its use of the PACER system which is overseen by the Administrative Office of the United States Courts. PACER has evolved and improved over time. In August 2014, the Administrative Office activated PACER NextGen. The change from PACER to PACER NextGen provided "users with several new benefits. One of these benefits is Central Sign-On, a login process which allows e-filing attorneys to use one PACER login and password to access any NextGen court (district, appellate and bankruptcy) in which they practice."[12] It took eight years for all the district courts

[12] https://www.mow.uscourts.gov/attorney/nextgen-cmecf

to make the transition to PACER NextGen, but today all federal district and appellate courts (except the Supreme Court) use PACER NextGen.

While some code changes would be necessary to update PACER NextGen to allow for a single, uniform admission to all federal district courts, these changes would be small. The PACER NextGen system is already set up for a Central Sign-On with access to all federal district courts. Attorneys already have just one username for maintaining their Pacer NextGen account, for accessing every federal district court, and for e-filing in every court. All district courts are using this same system. A change to a single admission would impose little burden, if any, on the system.

Text of Proposed Unified Admission Rule

There is hereby created a Bar of the District Court for the United States. Admission to the bar shall be governed by the provisions below and shall be administered by the Administrative Office of the United States Courts. Subject to the direction of the Judicial Conference of the United States, that Office shall set the fees for admission and renewals and shall administer a disciplinary system for admitted attorneys.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, and who is currently a member of the bar of any United States District Court, shall automatically be a member of the Bar of the District Court of the United States and shall be entitled to practice before any United States District Court.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, but who is not currently a member of the bar of any United States District Court, may become a member of the Bar of the District Court of the

United States by filing an application with the Administrative Office of the United States Courts showing such good standing membership.

Comment: This proposal will eliminate any role for the individual district courts in the admission, renewal, and disciplinary processes, and it will shift all those responsibilities to the Administrative Office of the United States Courts. It will also eliminate any current requirement for admission to the District Court bar beyond being a member in good standing of a state bar (broadly defined). This alternative should also drastically reduce the need for pro hac vice admissions because admission to the District Court Bar will be simple to obtain.

Reciprocal Practice Rule (First Alternative)

An attorney who is admitted to practice before any District Court of the United States shall be entitled to practice before any other District Court of the United States without being specifically admitted to the bar of that court.

Comment: This alternative would have almost the same substantive impact as the unified rule, but it would not centralize the admission, renewal, and disciplinary processes. It would still enable district courts to utilize restrictive admission requirements, but their impact would be limited to attorneys who first seek admission to those courts, and it could not prevent out-of-district attorneys from practicing in a restrictive-admission court.

Elimination of Local State Bar Admission Requirement (Second Alternative)

Rule to be issued under 28 U.S.C. § 2071.

No district court may enact a rule requiring that an attorney seeking admission to the bar of that court, including for pro hac vice admissions, must be a member of the bar, or a resident of

the state in which that court is located. Any existing rule requiring local state bar admission or in-state residence is invalid and unenforceable.

Comment: This alternative eliminates existing requirements that an applicant must be a member of the local state bar of that district or a resident of that state. The existing structures for admission, renewal, and discipline, under which those matters are handled by each district, are retained. In that respect, this alternative would be similar to FRAP 46, which eliminated prior local rules that imposed additional requirements for admission to the circuit court bars, but did not create a central admissions process.

ADDENDUM - PROPONENTS

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Alexander Dubose & Jefferson LLP, www.adjtlaw.com

CATO Institute, www.CATO.org

Clausen Miller P.C., www.clausen.com

EarthJustice, www.earthjustice.org

GuptaWessler PLLC, www.guptawessler.com,

Hamilton Lincoln Law Institute, www.hlli.org

LawHQ, P.C., www.lawhq.com

Military Spouse JD Network, www.msjdn.org

Pacific Legal Foundation, www.PacificLegal.org

Public Citizen Litigation Group, www.citizen.org

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EXHIBIT 1

February 6, 2018

PETITION OF PUBLIC CITIZEN LITIGATION GROUP & 12 OTHERS PURSUANT TO LOCAL RULE 83-2 TO AMEND LOCAL RULE 11-1(b)

This Court and the three other federal district courts in California have promulgated rules under which attorneys may not be admitted to practice in those courts unless they are active Members of the Bar of the State of California. This Petition asks this Court to amend Local Rule 11-1(b) to delete the requirement that applicants for admission to the bar of this Court must be members of the California bar. Copies of this Petition are being sent to the Clerk of each of the District Courts in the Ninth Circuit. All of those courts require that members of their bars be admitted to the state court in which the district is located. However, within the Ninth Circuit, only three States require that all applicants for admission take the bar exam for that jurisdiction (California, Nevada, and Hawaii, plus the Territories of Guam and North Marianas). NAT'L CONFERENCE OF BAR EXAM'RS AND AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 36 (2017*)* ("Nat'l Conf Report") http://www.ncbex.org/pubs/bar-admissions-guide/2017/mobile/index.html#p=48

SUMMARY OF PROPOSAL

Pursuant to Local Rule 83-2 and 28 U.S.C. § 2071(c), this Petition asks the Court to amend Rule 11-1(b), after providing notice and an opportunity to submit comments, to delete the requirement for California Bar admission, with the proposed text appearing on page 5. As more fully explained below, three reasons support this change.

(1) The requirement for California Bar admission does not bear any reasonable relationship to the actual practice in this Court because the procedures followed are established by federal rules and the issues in the vast majority of the cases in this Court arise under federal, not California law.

(2) Because the California Bar does not allow any attorney to be admitted on motion, having to take the California Bar exam imposes unjustified burdens of time and money for an attorney whose primary reason to obtain admission to that Bar is to be admitted to practice in this Court. In addition, once admitted, a lawyer must continue to be an active dues-paying member of the California Bar to remain a member of the Bar of this Court, even when a lawyer does not regularly practice in California. These burdens are wholly out of proportion to any possible benefit that might be realized for clients and the Court from imposing such a requirement.

(3) The requirements for pro hac vice admission — in particular the payment of $310 for each attorney in each case — are burdensome. The required payment must be made not only by attorneys who have a major role in a case, but also by those whose appearance is on behalf of an amicus or a class member objecting to a settlement of a class action, or in connection with motions pertaining to a subpoena issued in support of litigation pending in a different district.

THE PETITIONERS

The Addendum to this Petition describes each of the Petitioners and explains their interests in supporting the proposed rule change. The reasons for their support vary, because the petitioners represent a variety of affected persons, including non-profit organizations providing pro bono legal services; organizations of attorneys; and a

membership organization of for-profit businesses. Each Petitioner has concluded that the current requirement of membership in the California bar imposes unnecessary burdens on lawyers and clients alike, although in different ways and in different circumstances.

HISTORY OF RULE 11-1(b)

Shortly after the Federal Rules of Civil Procedure became effective in 1938, a committee of Federal District Judges, chaired by Judge John Knox of the Southern District of New York, prepared a report, FED. JUDICIAL CONFERENCE, REPORT ON LOCAL DISTRICT COURT RULES (1940), *reprinted* in 4 Fed R. Serv. 969 (1941) (hereinafter, the "Knox Report"). The Report sets forth the circumstances in which the committee thought local rules might appropriately supplement the uniform civil rules. The Report concluded that bar admission rules were appropriate for local adoption. The committee also included as an Appendix to the Report model rules for bar admission and other topics that it considered appropriate. A copy of the pages of that Appendix relating to attorney admission is included in the Addendum to this Petition.

The model rule on bar admission is noteworthy in that it did not suggest that the federal courts require admission to the bar of the state in which the federal court was located. Rather, it would have allowed admission for any attorney who was admitted by the highest court of "this state . . . or any other state" with one proviso: that the applicant "must show that at the time of his admission to the bar of that [other] court, the requirements for admission to that bar were not lower than those that were at the same time in force for admission to the bar of this state." Knox Report Appendix at 29. The committee described the proviso as "a step in the direction of higher standards for admission and will tend to make applicable to the Federal bar in any state at least the

standards which that state requires." *Id.* at 30. Thus, to the extent that the committee envisioned admission to a district court bar to exclude attorneys admitted in other states, it was solely because a particular state — not all other states — had lower standards for admission than the state where the district court was located.

This Court first enacted local rules in 1977 and amended them in 1988. On March 22, 1994, the Court appointed a committee to review all of the local rules and make suggestions for revisions. The committee issued its report on November 1, 1994, and on January 20, 1995, the Court published the report and requested comments on the proposed changes, which included a proposed change to Rule 11 on bar admission. The first ten pages of the notice and report, which include the material relevant to Rule 11, are attached (the "Notice").

At that time, this Court had no requirement that a member of the Bar of this Court be admitted to the California Bar. The committee proposed that change, among amendments that it designated "Policy Suggestions," as one that "it felt would be wise as a matter of policy." Notice at vii. In support of the change, the committee offered no studies or other evidence beyond its self-evident observations that the proposed rule "more closely restricts bar membership to members of the California bar" and that "the previous rule was less restrictive on this issue." The Rule was adopted, with no changes, but with one noteworthy feature: it allowed those attorneys who were admitted to this Court prior to the 1995 amendment to continue as members of the bar of this Court.

As a result, Rule 11-1 of this Court now provides as follows:

> **(b) Eligibility for Membership.** To be eligible for admission to and continuing membership in the bar of this Court an attorney must be an active member in good standing of the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other

> than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

PETITIONERS' PROPOSED RULE

Petitioners propose that the Rule be amended by deleting the following language:

> the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

In the place of the language limiting new admissions to members of the California Bar, the following language, eliminating that restriction, would be inserted: "the bar of any State, Territory, or the District of Columbia." Under this proposal, Rule 11-1(b) would read as follows:

> **(b) Eligibility for Membership.** To be eligible for admission to and continuing membership in the bar of this Court, an attorney must be an active member in good standing of the bar of any State, Territory, or the District of Columbia.[1]

REASONS TO GRANT THE PETITION

1. The Current Rule Is Not Reasonably Related to Any Legitimate Purpose.

The requirement of admission to the California Bar is a barrier to admission to the federal courts in California by out-of-state attorneys in good standing where they primarily practice, and, therefore, there should be a good reason for it. This Petition is not like a court challenge to a bar admission rule in which the Court would have to give deference to the entity that issued the rule and would have to determine the appropriate level of scrutiny to apply. Because this Court has the power to change the rule whenever it finds cause to do so, the Petition need only show that the California Bar requirement is not reasonably necessary to serve a legitimate purpose.

[1] The full text of current Local Rule 11 is included in the Addendum.

(a) Federal Law Dominates the Cases in this Court.

The only possible justification for requiring licensed attorneys who wish to become members of the Bar of this Court to be admitted to the State Bar of California would be that many of the cases in this Court involve questions of California law. Yet because so many do not involve California law, that argument does not justify the rule. To begin with, federal courts apply federal procedural rules — civil, criminal, bankruptcy, and evidence, as well as the Court's local rules — to the proceedings before them. Before 1938, federal courts applied local procedural rules, and so knowing California state procedures might have made sense then, but that is no longer the case. To the extent that California Bar admission is a proxy for a lawyer being available to be in court, the increased use of electronic filing and teleconferencing has reduced the need for counsel who live and regularly practice in California. Moreover, even when motions are not decided on the papers alone, many judges hold hearings by telephone even for lawyers who have offices in the District. *See* Civ. L. R. 7-1(b).

On the substantive side, criminal cases are governed by federal criminal statutes and the Federal Rules of Criminal Procedure and the United States Constitution. Most laws at issue in bankruptcy and admiralty proceedings are federal, although issues of state law arise regarding claims in bankruptcies and may arise in other cases as well. Even then, for reasons discussed below for civil cases generally, the applicable state law may not be that of California. In short, as the American Law Institute observed, the requirement of local bar membership "is inconsistent with the federal nature of the court's business." RESTATEMENT OF LAW, THIRD, THE LAW GOVERNING LAWYERS § 3 comment *g* (AM. LAW INST. 2000).

On the civil side, cases fall into two major categories: cases arising under federal law, for which California state law is only rarely even a small part of the governing authority, and diversity cases, in which state law is the basis for the underlying claim. During the year ending June 30, 2016, 6,925 civil cases were commenced in the Northern District of California. *Statistical Tables for the Federal Judiciary*, ADMIN. OFFICE OF THE U.S. COURTS Table C-3 at 5 (June 30, 2016), http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2016. In addition, 591 criminal cases and 10,777 bankruptcy cases were filed, for a total of 18,293 cases. *Id.* Tables D at 3; Table F at 3. Among the civil actions, the United States was a party in 651, *id.* Table C-3 at 5, and pursuant to 28 U.S.C. § 517, its attorneys may appear in any court, federal or state. Of the 6,274 private cases, 1,084 were prisoner petitions, 590 were intellectual property cases, 502 were labor suits, and 963 were civil rights suits. *Id.* at 6. Complaints in these categories all appear to be based on federal substantive law, although some cases may also include closely related state-law claims under supplemental jurisdiction. Even in those "mixed" cases, the lawyer's expertise in employment, securities, or antitrust law, for example, is far more important to the client than whether the lawyer is admitted to the state court where the federal court is situated.

Of the 3,135 remaining private civil cases, 722 were contract cases, 273 were real property cases, 411 were personal injury cases, and 662 were "other tort cases," which may well include federal admiralty cases. *Id.* The remaining 1,067 cases were not categorized, but, based on their placement in the table, and the absence of any category for securities and antitrust cases, some of them are certainly cases based on federal substantive law. The Administrative Office does not publish statistics on the basis of

subject matter jurisdiction by District for *filed* cases, but from its data set on case *closings*, assisted by a researcher at the Federal Judicial Center, Petitioners were advised that there were 1,038 civil cases, based on diversity of citizenship, terminated in fiscal year 2016 in the Northern District of California. On the assumption that terminations and filings were approximately the same, diversity cases represented 16.5% of the private civil cases, but only 5.6% of the total of all cases.[2]

(b) Even Cases in This Court Involving State Substantive Law Do Not Require California Expertise.

Moreover, even when state law is significant in a particular case, the state law at issue is by no means certain to be the law of California. In diversity cases, the parties will always be from at least two jurisdictions, one of which is not California. With the laws of two or more jurisdictions a possibility, there is no particular reason to think that California law would apply even in a diversity case in federal court in California, using the applicable conflicts of laws principles (which will be decided based on the choice of law principles of the State in which the district court is located) or the choice of law provision in a contract. Moreover, a number of MDL diversity cases, including nationwide class actions, end up in California, where the judge will have to decide which state law(s) to apply to the claims. In one substantive area of law in which California is different from that of most states — it has community property — the exclusion of matrimonial cases from the scope of diversity jurisdiction, *Ankenbrandt v. Richards*, 504

[2] The Northern District's caseload is in line with the national numbers. Thus, of the 1,187,854 cases filed in all district courts for the 12 months ending March 31, 2016, 833,515 were bankruptcy cases, 79,787 were criminal cases and 274,552 were civil cases of which only 82,990 (7.0% of total filings and 30.2% of civil filings) were diversity cases. *Federal Judicial Caseload Statistics*, ADMIN. OFFICE OF THE U.S. COURTS (Mar. 31, 2016), http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016.

U.S. 689 (1992), makes it unlikely that community property issues will arise with any frequency in this Court. To be sure, some cases in this Court involve questions of California law. But even in that subset of cases, there is no reason to presume that private lawyers who practice primarily outside of California are not fully qualified to represent their clients in those cases.

Two other reasons show that close familiarity with the substantive law of a particular state is not likely to be a significant factor in most federal court litigation. First, advising a client in advance about state law is quite different from handling a lawsuit after the claim has arisen. In the former situation, knowledge of the law can help avoid problems by careful planning, but that is no longer an option once the breach of contract or harm constituting a tort or a violation of another law has occurred. At that point, the role of the lawyer is to research existing law and apply it to the facts of the case, rather than predict what problems might arise and anticipate how to avoid them. Second, good litigators, which describes most of the lawyers who handle civil cases in federal courts, are used to venturing into new areas of substantive law; indeed, that is one of the skills that makes them good litigators. Thus, even if there are nuances of California law at issue in a given case, that is a common aspect of practice for a federal court litigator.

(c) Other Aspects of the Current Rule Show that the California Bar Admission Requirement is Unnecessarily Burdensome.

Two features of the current rule undermine any purported basis for the requirement of California Bar admission. First, the rule makes an exception for attorneys who were admitted to the Bar of this Court prior to September 1, 1995, based on admission to the bar of another State, even if they still are not admitted in California.

That exception shows that the Court recognizes that litigants, opposing counsel, and the judges of this Court are able to conduct litigation with lawyers who have been admitted to the Bar of the Court, but not the California Bar.[3]

Second, the current rule requires that attorneys must continue to be "active" members of the California Bar. As a result, if a California attorney moves his or her primary practice to another jurisdiction, the right to practice in this Court will depend on whether the attorney continues to pay the $410 that is currently charged active California lawyers, as well as the costs to comply with the CLE requirement of the California Bar (25 hours of CLE every three years, http://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements). The CLE requirement may not dovetail with any CLE requirements of the lawyer's primary bar, and may require the lawyer to incur substantial additional costs.

Moreover, the requirement for admission to the local state court as a condition of admission to the federal court inevitably restricts clients' choices of who their attorneys will be. That limitation is unjustified because there is no reason to assume that clients with cases in this Court will not be able to make a proper assessment as to whether the case is one in which knowledge of local law is important or whether their preferred lawyer is able to handle the matter, even with local law issues as part of the mix. Federal court diversity contract or property claims typically involve significant matters, for which the client is either sophisticated or has advice of in-house counsel. As for plaintiffs in tort actions, there is no reason to think that the market for cases in the federal courts is so

[3] The fact that former members of the California Bar admitted to this Court after September 1995 are removed from the Court's bar if they retire from the California bar, even while maintaining active status in the bar of another state, further shows the arbitrariness of the current rule.

imperfect that this Court needs to require that the plaintiff hire a lawyer who is a member of the California Bar for cases in this Court, regardless of how insignificant issues of California law may be to the outcome. The argument to allow client choice is even stronger, and the local law rationale even less weighty, in federal question, criminal, and bankruptcy cases, yet the California Bar admission requirement applies to those lawyers who only handle cases arising under federal law.

In addition, the rules of professional responsibility and the legal malpractice laws protect clients from unqualified and unethical lawyers, far more effectively than the rule requiring California Bar admission. Local Rule 11-4(a)(1) of this Court incorporates the State Bar of California's Rules of Professional Conduct, including Rule 3-110 which states:

> (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
>
> (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
>
> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Finally, under the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some judges, to appear in court. *See* Civil L.R. 11-3(a)(3), (e). Unless there is some reason to believe that clients cannot make appropriate decisions about which lawyer they

want to represent them in federal court litigation, a local rule insisting that clients prefer California lawyers, no matter what the legal and factual issues may be, is very hard to justify.

2. California Bar Admission Is Burdensome.

Because California does not allow admission on motion and does not provide for admission on a reciprocity basis, the burden imposed by this Court's admission rule is even greater. Even if California allowed admission on motion or through reciprocity, Petitioners would nonetheless urge this Court's to revise its rule for the reasons set forth in the prior section. Nonetheless, the requirements for admission to the California State Bar exacerbate the problem.

Everyone, no matter how long they have practiced law, no matter if their work specializes in a single subject, even one dominated by federal law, must pass the California Bar exam to be admitted to the State Bar, and thus to be eligible for admission to the Bar of this Court. As Justice Kennedy observed in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 68 (1988), "[a] bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise." For lawyers who have been practicing elsewhere for a number of years, the exam requirement is particularly burdensome. The bar exam is a general test, and most lawyers specialize, and hence have no regular contact with many areas that the exam tests. As a result, a practicing lawyer will probably have to take a not-inexpensive California Bar prep course,[4] especially given the low pass rate for the California bar (35.3% for the February 2017 exam),

[4] Kaplan's discounted courses currently are priced between $1699 and $2399. *California Bar Review Course*, KAPLAN (last visited Jan. 31, 2018), https://www.kaptest.com/bar-exam/courses/california-bar-review-course?state=california.

including the attorneys-only exam (44.5% for the same exam). *General Statistics Report, February 2017 California Bar Examination*, THE STATE BAR OF CAL. (Mar. 26, 2017), http://www.calbar.ca.gov/Portals/0/documents/admissions/Statistics/FEB2017STATS.052617_R.pdf.

In contrast to an experienced lawyer who decides to live and work in California, it is very hard for litigating lawyers practicing elsewhere to justify taking the time away from pending matters, which may result in a substantial loss of income, to take a state bar exam that is needed only to be admitted to the federal district courts of that state in order to handle an occasional matter there. Finally, the attorney exam itself costs $983, and once admitted, the lawyer must pay $410 per year to the California Bar, which the lawyer would not pay except to continue to be a member of the bar of this Court.[5]

Whether California Supreme Court is justified in continuing to insist that all applicants must take the California Bar exam is not the question that this Court must decide. Rather, given the admitted difficulty in obtaining bar admission in California, the question is whether this Court is justified in insisting that applicants for admission satisfy that requirement in addition to being in good standing in another State or the District of Columbia. And on that question, the answer is decidedly "No."

The four district courts in California that require admission in the State court are not unique among the federal district courts. However, the combination of State court bar admission and requiring all bar applicants to take the bar exam places those courts in a distinct minority. A majority of district courts nationwide require admission to the local

[5] There is also a $153 laptop charge for the exam. *Schedule of Fees*, THE STATE BAR OF CAL. (last visited Jan. 31, 2018), https://www.calbarxap.com/applications/CalBar/info/fees.html.

State Bar, but only eight of the States comprising those districts require all applicants to take their state's bar exam.[6] As petitioners explain above, we see no connection between being admitted to the bar of the state where a federal district court is located, and the ability to provide quality legal services in that court. We therefore oppose all such requirements as unnecessary anywhere. The requirement is also unduly burdensome for the additional reasons that admission to the California Bar requires every applicant to pass the California Bar exam and continue to be an active dues-paying member of that bar.

3. Pro Hac Vice Admission Is Not A Feasible Alternative.

The third factor compounding the problem for lawyers and clients with cases in this Courts is that admission on a pro hac vice basis is not a feasible option for several reasons. First, it is available only with the cost and burden of having local counsel in the case. N.D. Cal. Civ. R. 11-3(a)(3). Second, pro hac vice admission is not automatic, although most pro hac vice motions are granted, with no apparent requirement that the Court determine whether there are any issues of California state law in the case and whether the attorney seeking admission is qualified to handle them. Far from supporting the current practice, the ease of admission suggests that there is no real reason to have the California Bar admission requirement in the first place.

[6] The other state bars that do not allow admission on motion are Delaware, Florida, Hawaii, Louisiana, Nevada, Rhode Island and South Carolina, plus Guam and the Northern Mariana Islands. Of these, Rhode Island requires that attorneys admitted elsewhere only have to take the essay portion of the Rhode Island Bar Exam. In February 2017, South Carolina began using the Uniform Bar Exam, which will make it easier to gain admission to its bar, but not eliminate the cost of application and annual dues. NAT'L CONF REPORT, *supra* note 1, at 21-22, 27, 32, 36-37, http://www.ncbex.org/pubs/bar-admissions-guide/2017/mobile/index.html.

Third, the charge of $310 is for *each* individual attorney's pro hac vice admission in *each* case, and is presently the second highest pro hac vice admissions fee in the United States. The charge is the same as the fee for permanent admission to the bar of this Court, and payment is required even if it the lawyer is simply objecting to a class action settlement or seeking to file an amicus brief. In this respect the fee operates like a toll on access to justice and is particularly harmful where a lawyer is handling a matter on a pro bono basis. For these reasons, pro hac vice admission is not a substitute for full admission, and the pro hac vice rule does not create a feasible alternative.[7]

4. State Bar Admission Is Not Needed to Discipline Unethical Attorneys.

Courts have a legitimate interest in being able to assure that Members of their Bar are subject to discipline by them. Eliminating the requirement that a lawyer be admitted to the State Bar in the district in which the federal court sits would not present a problem in this regard, especially when compared with the situation in which a lawyer is admitted pro hac vice. First, a Member of the bar of this Court who acts contrary to court rules may permanently lose the right to practice in this Court, whereas an attorney admitted pro hac vice will mainly lose the opportunity to participate in one case.

Second, if a lawyer is disciplined in one jurisdiction, that information is generally forwarded to all other jurisdictions in which the lawyer is admitted, which may not include places in which the lawyer is admitted for one case on a pro hac vice basis.

Third, the best proof that discipline is not a problem is the fact that many districts do not require admission to the local state bar, and there is no evidence of which we are

[7] Rule 11-3(b) imposes additional restrictions on pro hac vice admission. With certain limited exceptions, an applicant is not eligible for pro hac vice admission if she or he "**(1)** Resides in the State of California; or **(2)** Is regularly engaged in the practice of law in the State of California."

aware that those districts are having any discipline problems with out of state attorneys who are Members of their Bar.

Finally, the Court has, unintentionally, conducted a limited experiment on whether there would be any discipline or other problems from an attorney's lack of admission to the California bar, and so far as Petitioners can determine, there are no reports of such problems. The experiment arose from the express exception created in 1995 for attorneys who are not members of the California Bar, but who had previously been admitted to the Bar of this Court. If any problems arose from that general exception, they surely would have surfaced in the intervening 23 years, and the fact that they have not provides further support for the conclusion that the requirement of membership in the California Bar to be eligible for membership in the Bar of this Court should be deleted, and the Petition granted.

CONCLUSION

For the foregoing reasons, the Court should institute a notice and comment rulemaking proceeding that would eliminate the requirement that an attorney must be a member of the State Bar of California to be a member of the Bar of this Court from Rule 11-(b), which would then read as follows:

> **(b) Eligibility for Membership.** To be eligible for admission to and continuing membership in the bar of this Court, an attorney must be an active member in good standing of the bar of any State, Territory, or the District of Columbia .

Respectfully Submitted

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ADDENDUM

DESCRIPTIONS OF PETITIONERS

Public Citizen Litigation Group is a public-interest law firm within the non-profit consumer advocacy organization Public Citizen Foundation. Our lawyers are located in the District of Columbia, but regularly appear in cases in federal courts across the country, including in the Northern District of California. At times during the firm's 45 years, we have represented in the Northern District clients litigating as parties, clients filing as amicus curiae, clients appearing as objectors to proposed class action settlements, and "John Does" challenging subpoenas to Internet Service Providers seeking information to identify the Does. In each case, we represent the client on a pro bono basis, although where we represent a plaintiff we may seek an award of attorney fees when we prevail. Currently, none of our attorneys is admitted to practice in the Northern District. Therefore, to appear in the Northern District, we must find local counsel, generally also pro bono, and the attorney from our office with primary responsibility must apply for pro hac vice admission and pay a fee, currently $310. The requirement of paying a pro hac fee applies even to our staff attorney who is a member of the California Bar but on inactive status, because the Northern District of California deems a lawyer "inactive" who is on inactive status with the California Bar. Another of our attorneys was previously admitted to the Northern District but lost her admission after approximately 15 years, when she voluntarily retired from the California Bar (but retained her membership in the Bar of the District of Columbia).

American Civil Liberties Union is a national civil liberties and civil rights organization founded in 1920 with affiliates or chapters in every state. It often litigates cases in California federal courts, and the rule as it stands is an impediment to its doing so, and to its working with attorneys who are not members of the California state bar, even if those attorneys are fully capable of and deeply versed in litigating in federal court. For the reasons elaborated in the petition, it supports the requested rule change.

Association of Corporate Counsel, is a global bar association of over 40,000 in-house attorneys who practice in the legal departments of more than 10,000 organizations located in at least 85 nations. It strongly supports the amendment by this court of Local Rule 11.1(b) to delete the requirement of membership in the California bar in order to be admitted to the bar of this Court. Our members' companies may be involved in litigation in this district and wish to use the expertise of our members, as well as outside counsel, who may not be California bar members but who would be the most knowledgeable and efficient choices for their legal work. These in-house and outside counsel, admitted in other jurisdictions, perform for sophisticated corporate clients and should be allowed to practice in federal court without the unnecessary burden of gaining admission to the California bar.

Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato files *amicus* briefs in cases arising around the country, and thus has an interest in

ensuring reasonable admission rules in all jurisdictions that permit the filing of *amicus* briefs, including the Northern District of California. *See, e.g.*, *Google LLC v. Equustek Solutions, Inc.*, No. 5:17-cv-04207-EJD, Dkt. 27 & 40 (N.D. Cal.). As a non-profit organization, Cato is especially sensitive to litigation costs, and high pro hac admission fees may preclude us from filing. Cato also has a larger institutional interest in vindicating the right to choice of counsel, both as a general means of securing access to justice for all litigants, and also as a component of criminal defendants' Sixth Amendment right to the assistance of counsel. Cato supports the petition because the proposed rule change would enable parties to choose from a wider range of qualified counsel and secure representation at lower cost.

Center for Constitutional Litigation, P.C. (CCL) is a law firm located in New York, NY with a nationwide practice, that occasionally has cases and currently has one case pending in the Northern District of California, though no lawyer in the firm is admitted to that court's bar or the bar of the State of California. In that case, CCL lawyers represent the City of Oakland in *City of Oakland v. Wells Fargo & Co.*, Case No. 3:15-cv-04321-EMC, having been admitted *pro hac vice*. Because our practice takes our lawyers into federal and state courts throughout the nation, CCL is keenly interested in the rules that govern its admission to the bar of this Court. When lawyers in the firm have cases in the Northern District, they must associate with (and pay) local counsel, whether that is in the best interests of their clients and they must apply for and pay for pro hac vice admission in each case in which they are counsel.

Competitive Enterprise Institute's Center for Class Action Fairness represents class members pro bono against unfair class action procedures and settlements. With a high volume of class actions filed in the Northern District, we regularly appear in the Northern District on behalf of individual class members objecting to unfair class action settlements. We handle all of these cases pro bono, although we may seek attorneys' fees where our work substantially improves a settlement. Only one of our five attorneys is admitted to the Northern District and is a member of the California bar. Because a large percentage of our caseload is in the Northern District, it is impractical for that single attorney to handle all of our work in the Court. As a result, our other attorneys often must apply for pro hac vice admission and pay the $310 fee, instead of paying the identical Northern District bar admission fee only once. We also are required to retain local counsel who are physically present in the district in such cases, even though those local counsel add nothing to our understanding of the local rules or the underlying law. This adds thousands of dollars a case to our expenses. Combined with the expense of litigating across the country and our limited budget, it has affirmatively deterred us from participating in meritorious litigation.

Consumers for a Responsive Legal System ("Responsive Law") is a non-profit organization located in Washington, D.C. Responsive Law seeks to make the legal system more affordable, accessible and accountable to ordinary Americans. Responsive Law believes that requiring state bar membership for an appearance in federal court provides no benefit to individuals and small businesses seeking counsel for matters before a federal court. It does, however, limit the number and variety of lawyers from

whom a litigant can select its counsel, thereby restricting consumer choice and artificially raising costs for parties in federal litigation. Unchecked protectionism of this sort is one of the reasons why the United States currently ranks 94th out of 113 countries in "affordable and accessible civil justice" according to the most recent Rule of Law Index issued by the World Justice Project.

Earthjustice is a non-profit public interest law firm. Earthjustice is headquartered in San Francisco, has an office in Los Angeles, and maintains additional offices in Alaska, Hawaii, Washington, Colorado, Montana, Pennsylvania, Florida, New York and Washington D.C. Although a number of attorneys in Earthjustices's California offices are admitted to and practice in the Northern District, some of Earthjustices's litigation in this District is handled by attorneys who are not based or barred in California, and sometimes these non-California attorneys co-counsel a case in this District with an attorney who is admitted here. If these non-California attorneys were admitted to the Northern District bar, they would not need local counsel and would not have to pay the $310 pro hac vice filing fee for each case on which they worked.

Natural Resources Defense Council is a non-profit advocacy organization with members throughout the United States. NRDC is headquartered in New York, and maintains non-California offices in Illinois, Montana, and Washington, DC, as well as in San Francisco and Santa Monica, California. Although a number of attorneys in NRDC's California offices are admitted to and practice in the Northern District, some of NRDC's litigation in this District is handled by attorneys who are not based or barred in California, and sometimes these non-California attorneys co-counsel a case in this District with an attorney who is admitted here. If these non-California attorneys were admitted to the Northern District bar, they would not need local counsel and would not have to pay the $310 pro hac vice filing fee for each case on which they worked.

Pacific Legal Foundation (PLF) is a national pro bono public interest litigation firm with offices in California, Washington, Florida, and Virginia. A number of PLF attorneys are members of the bar associations of states other than California, although most PLF attorneys are also members of the California State Bar. PLF litigates constitutional and other claims on behalf of its clients in federal courts across the nation. PLF attorneys are experts in several areas of federal law, including property rights and permit exactions, federal environmental law (particularly the Clean Water Act and Endangered Species Act), race and sex preferences and discrimination, and freedom of speech and association. These legal fields employ a more or less unified national body of federal case law that is applicable in all federal courts. In litigating claims grounded in these fields, PLF attorneys' credentialing by the state bar association for the state in which the federal district court sits is not germane to their ability to represent clients and serve as officers of the federal district court. These attorneys' original credentialing as lawyers by any state bar adequately serves these purposes. The Northern District's rule requiring members of the Northern District Bar to first be members of the California State Bar serves no purpose that membership in another state bar association does not serve, and impedes PLF attorneys who are not California State Bar members from carrying out their

public interest mission in representing clients with federal law claims that are properly venued in the Northern District of California.

Robert S. Peck is president of the Center for Constitutional Litigation, P.C. (CCL), a law firm located in New York, NY, and is admitted to practice in the State of New York and the District of Columbia. He is admitted to practice and has handled cases in the Supreme Court of the United States, six federal circuit courts of appeal, and five U.S. District Courts, while also having appeared pro hac vice in four other federal circuit courts and 13 other U.S. District Courts. In addition, he has litigated cases in state court in 25 states. Because his practice occasionally takes him to various federal district courts in California, including a current matter pending in the Northern District of California, he is keenly interested in the rules that govern admission to practice in the Northern District. Currently, when litigating in that court, he must associate with (and pay) local counsel, whether that is in the best interests of his clients and must apply for and pay for pro hac vice admission in each case in which he is counsel.

Public Justice is a national public interest advocacy organization headquartered in Washington D.C. with a branch office in Oakland, California. Our in-house staff attorneys team with private attorneys around the country to fight injustice and preserve access to the courts for ordinary people. The bulk of our litigation is in the federal courts. Public Justice is supported by the membership contributions of thousands of attorneys nationwide, many of whom are not members of the California bar and hence are not eligible to be members of the Northern District bar. Instead, when they have cases in the Northern District, they must associate with (and pay) local counsel, whether or not that is in the best interests of their clients, and they must apply for and pay for pro hac vice admission in each case in which they are counsel. We support the petition because we believe that the current admissions rules in this District are unduly restrictive and burdensome. In addition, we believe that the choice of whether to have a lawyer admitted to the state court in which the federal court sits is one that should be left to the client and the client's counsel, not imposed on the client by the Northern District rules.

John Vail is the principal of John Vail Law PLLC, a law firm located in Washington, DC, and devoted to appellate and motions practice throughout the United States. Mr. Vail is admitted to the bars of Tennessee, New Mexico, North Carolina, and the District of Columbia, and to numerous federal district and appellate courts, including the Supreme Court. He has served as counsel in cases in state and federal courts in California. He has expended significant time and effort being admitted pro hac vice in courts around the country. He has been consulted about appearing in cases pending in the Northern District. The current rules regarding admission impede him from appearing there.

LOCAL RULE 11-1 (Current Version)

11-1. The Bar of this Court.

(a) Members of the Bar. Except as provided in Civil L.R. 11-2, 11-3, 11-9 and Fed. R. Civ. P. 45(f), an attorney must be a member of the bar of this Court to practice in this Court and in the Bankruptcy Court of this District.

(b) Eligibility for Membership. To be eligible for admission to and continuing membership in the bar of this Court an attorney must be an active member in good standing of the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

(c) Procedure for Admission. Each applicant for admission must present to the Clerk a sworn petition for admission in the form prescribed by the Court. Prior to admission to the bar of this Court, an attorney must certify:

(1) Knowledge of the contents of the Federal Rules of Civil and Criminal Procedure and Evidence, the Rules of the United States Court of Appeals for the Ninth Circuit and the Local Rules of this Court;

(2) Familiarity with the Alternative Dispute Resolution Programs of this Court;

(3) Understanding and commitment to abide by the Standards of Professional Conduct of this Court set forth in Civil L.R. 11-4; and

Familiarity with the Guidelines for Professional Conduct in the Northern District of California.

(d) Admission Fees. Each attorney admitted to practice before this Court under this Local Rule must pay to the Clerk the fee fixed by the Judicial Conference of the United States, together with an assessment in an amount to be set by the Court. The assessment will be placed in the Court Non-Appropriated Fund for library, educational and other appropriate uses.

(e) Admission. Upon signing the prescribed oath and paying the prescribed fees, the applicant may be admitted to the bar of the Court by the Clerk or a Judge, upon verification of the applicant's qualifications.

(f) Certificate of Good Standing. A member of the bar of this Court, who is in good standing, may obtain a Certificate of Good Standing by presenting a written request to the Clerk and paying the prescribed fee.

(g) Reciprocal Administrative Change in Attorney Status. Upon being notified by the State Bar of California (or of another jurisdiction that is the basis for membership in the bar of this Court) that an attorney is deceased, has been placed on "voluntary inactive" status or has resigned for reasons not relating to discipline, the Clerk will note "deceased," "resigned" or "voluntary inactive," as appropriate, on the attorney's admission record. An attorney on "voluntary inactive" status will remain inactive on the roll of this Court until such time as the State Bar or the attorney has notified the Court that the attorney has been restored to "active" status. An attorney who has resigned and wishes to be readmitted must petition the Court for admission in accordance with subparagraphs (c) and (d) of this Rule.

(1) The following procedure will apply to actions taken in response to information provided by the State Bar of California (or of another jurisdiction or other jurisdiction that is the basis for membership in the bar of this Court) of a suspension for **(a)** a period of less than 30 days for any reason or **(b)** a change in an attorney's status that is temporary in nature and may be reversed solely by the attorney's execution of one or more administrative actions. Upon receipt of notification from the State Bar that an attorney has been suspended for any of the following, the Clerk will note the suspension on the attorney's admission record:

(A) Noncompliance with Rule 9.22 child and family support;

(B) Failure to pass PRE;

(C) Failure to pay bar dues;

(D) Failure to submit documentation of compliance with continuing education requirements.

While suspended, an attorney is not eligible to practice in this Court or in the Bankruptcy Court of this District. In the event that an attorney files papers or otherwise practices law in this Court or in the Bankruptcy Court while an administrative notation of suspension is pending on the attorney's admission record, the Clerk will verify the attorney's disciplinary status with the State Bar (or other jurisdiction, if applicable). If the attorney is not then active and in good standing, the Chief District Judge will issue an order to show cause to the attorney in accordance with Civil L.R. 11-7(b)(1).

Upon receipt by the Court of notification from the State Bar that the attorney's active status has been restored, the reinstatement will be noted on the attorney's admission record.

(2) In response to information provided by the State Bar of California (or other jurisdiction that is the basis for membership in the bar of this Court) that an attorney has been placed on disciplinary probation but is still allowed to practice, the Clerk will note the status change on the attorney's admission record. An attorney with that status must, in addition to providing the notice to the Clerk required by Civil L.R. 11-7(a)(1), report to the Clerk all significant developments related to the probationary status. Upon receipt by the Court of notification from the State Bar that the attorney's good standing has been restored, the change will be noted on the attorney's admission record.

KNOX REPORT RULES APPENDIX
ATTORNEYS' PORTION

SUGGESTED LOCAL RULES FOR THE UNITED STATES DISTRICT COURTS

Rule 1. Attorneys.

(a) ***Roll of Attorneys.*** **The bar of this court consists of those heretofore and those hereafter admitted to practice before this court, who have taken the oath prescribed by the rules in force when they were admitted or that prescribed by this rule, and have signed the roll of attorneys of this district.**

(b) ***Eligibility.*** **Any person who is a member in good standing of the bar of (1) the highest court of this state or of (2) the highest court of any other state, is eligible for admission to the bar of this court, but any person who may apply for admission to the bar of this court on the basis of his admission, after the effective date of this rule, to the bar of the highest court of any other state must show that at the time of his admission to the bar of that court, the requirements for admission to that bar were not lower than those that were at the same time in force for admission to the bar of this state.**

Note. **It is stated elsewhere in this report that nation-wide uniformity regarding eligibility for admission to practice in the various district courts is neither feasible nor desirable. However, since nearly every district has rules on this subject, and since some of those rules seem to make possible the infiltration of unfit persons into the Federal bar, and since some are couched in archaic and obscure language, this draft is presented for the consideration of those judges who may feel that the substance of the practice which it states would fit the needs of their respective districts. It will be noted that the draft contains a proviso that will be a step in the direction of higher standards for admission and will tend to make applicable to the Federal bar in any state at least the standards which that state requires.**

(c) *Procedure for Admission.* Each applicant for admission to the bar of this court shall file with the clerk a written petition setting forth his residence and office addresses, his general and legal education, and by what courts he has been admitted to practice. If he is not a resident of this [district] [state] [and] [or] does not maintain an office in this [district] [state] for the practice of law, he shall designate in his petition a member of the bar of this court who maintains an office in this [district] [state] for the practice of law with whom the court and opposing counsel may readily communicate regarding the conduct of cases in which he is concerned, and he shall append to his petition the written consent of the person so designated. The petition shall be accompanied by certificates from two reputable persons who are either members of the bar of this court or known to the court, stating how long and under what circumstances they have known the petitioner and what they know of the petitioner's character. If a certificate is presented by a member of the bar of this court, it shall also

state when and where he was admitted to practice in this court. The clerk will examine the petitions and certificates and if in compliance with this rule, the petitions for admission will be presented to the court at the opening of the first ensuing session which convenes not earlier than _ days after the filing of the petition. When a petition is called, one of the members of the bar of this court shall move the admission of the petitioner. If admitted the petitioner shall in open court take an oath to support the Constitution and laws of the United States, to discharge faithfully the duties of a lawyer, and to demean himself uprightly and according to law and the recognized standards of ethics of the profession, and he shall, under the direction of the clerk, sign the roll of attorneys and pay the fee required by law.

***Note.* It has been suggested that the rule should**

provide for the appointment of a committee of the bar to pass upon applications and, if necessary, examine the applicants personally. Rules of this character have long been in force in the district court of Massachusetts and have been incorporated into new rules in Arkansas and Oklahoma. Although the committee recognizes the desirability of such a procedure for some courts, it does not feel that it is necessary in the majority of districts and, therefore, it has not incorporated the provision into this rule. For judges who desire to inaugurate such a practice, the Arkansas, Massachusetts, and Oklahoma rules will serve as helpful guides.
It will be noted that the proposed rule provides that the petitions and certificates are to be presented to the court by the clerk "at the opening of the first ensuing session which convenes not earlier than — days after

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the filing of the petition." This, of course, is a routine matter for the clerk and the provision must be varied to conform to the custom of the particular district concerned.
The alternative bracketed words "[district] [state]" in lines 28,29,30 and 33 are presented in consequence of the fact that in states where there are more than one district, the situations differ so that choice is essential.
For example, in New York there is no valid or practical distinction so far as the New York City bar is concerned between the Southern and Eastern districts of New York, and opinion, therefore, supports a requirement not measured by the district. In general, the word "state" should be used except where special reasons exist for limiting the rule to the "district."

(d) ***Permission to Participate in a Particular Case.*** **Any member in good standing of the bar of any court of the United States or of the highest court of any state, who is not eligible for admission to the bar of this district under subdivision (b) of this rule, may be permitted to appear and participate in a particular case. In his application so to appear he shall make the designation and append thereto the consent which are required by subdivision (c) of this rule from non-resident applicants for admission to the bar of this court.**

(e) ***Disbarment and Discipline.*** **Any member of the bar of this court may for good cause shown and after an opportunity has been given him to**

be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

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Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within_ days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix.
Any person who before his admission to the bar of this court or during his disbarment or suspension, exercises in this district in any action or proceeding pending in this court any of the privileges of a member of the bar or who pretends to be entitled so to do, is guilty of contempt of court and subjects himself to appropriate punishment therefor.

Note. **This subdivision is in accord with Rule 2 (5) of the Rules of the Supreme Court of the United States and the decision of that Court in *Selling* v. *Radford* (243 U. S. 46).**

RULES COMMITTEE
OF THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 Golden Gate Avenue
San Francisco, California 94102

January 20, 1995

TO: MEMBERS OF THE PUBLIC

FROM: JUDGE JAMES WARE, CHAIR

The United States District Court for the Northern District of California proposes to revise its Local Rules and has authorized circulation of the proposed revisions to the public generally for comment. The proposed revisions are intended to accomplish three primary objectives: (1) to conform the Local Rules to amendments to the national rules; (2) to renumber the local rules to correspond to the numbering of the national rules; and (3) to incorporate procedures which were tested under a pilot program pursuant to the Civil Justice Reform Act and which have been shown to be effective to secure the just, speedy and inexpensive determination of matters before the Court.

Enacted in 1977, the Local Rules of the Court are intended to supplement the national rules. They were last revised on November 1, 1988. Since 1988 amendments have been made to the national rules without corresponding amendments to applicable Local Rules. Effective December 1, 1993, a major amendment was made to the Federal Rules of Civil Procedure. In addition, over the course of time, the Court received numerous suggestions for modifications to its Local Rules from the bench and bar.

In 1993, Chief Judge Thelton E. Henderson requested the Rules Committee of the Court to undertake a major revision of the Local Rules. On March 22, 1994, pursuant to 28 U.S.C. § 2077, Chief Judge Henderson appointed an Advisory Committee on Civil Rules. The Advisory Committee was requested to review the Local Rules of the Court and to issue a report and recommendation to the Court.

On November 1, 1994, the Advisory Committee issued its report and recommendations, which were referred to the Rules Committee of the Court. The Rules committee considered the report and recommendations of the Advisory Committee, as well as suggestions from other sources. On January 10, 1995, the Rules Committee presented its proposed revisions of the Local Rules to the Court, which approved their publication for public comment.

The proposed revisions include modifications to the Bankruptcy Local Rules. October 22, 1994, the Bankruptcy Reform Act of 1994 became effective. It made comprehensive changes in the Federal Rules of Bankruptcy Procedure. The Bankruptcy Court for this District proposes to amend its Local Rules to reflect those amendments and to coordinate the numbering of the proposed Bankruptcy Local Rules with the proposed revisions of the Civil Local Rules.

The Court has not approved these proposed revisions but submits them for public comment. We request that all comments and suggestions be sent as soon as convenient and, in any event, no later than **April 20, 1995** to:

Judge James Ware
Chair of the Rules Committee
280 South First Street
San Jose, California 95113

At the conclusion of the comment period, the Rules Committee will consider the proposed revisions in light of any comments and will make recommendations to the Court. If adopted, the Revised Local Rules would become effective on July 1, 1995.

RULES COMMITTEE
OF THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

District Judge, James Ware, Chair
United States Courthouse
280 South First Street
San Jose, California 95113

District Judge William H. Orrick, Jr.
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

District Judge Marilyn Hall Patel
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

Magistrate Judge Joan S. Brennan
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

Bankruptcy Judge Randall Newsome
United States Bankruptcy Court
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Oakland, California 94612

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450 Golden Gate Avenue
San Francisco, CA 94102

MEMORANDUM

TO: Rules Committee, United States District Court
Northern District of California

FROM: Local Rules Advisory Committee

DATE: November 1, 1994

RE: Draft of Proposed New Local Rules

The Local Rules Advisory Committee hereby transmits to the Rules Committee its proposal for new civil Local Rules. This memorandum is intended to introduce the draft by explaining the method by which it was prepared and the animating goals behind some of the proposals.

This Committee was appointed by Chief Judge Henderson pursuant to 28 U.S.C. § 2077(b) in March, 1994. Working closely with Judge Ware, the Committee has undertaken a comprehensive revision of the Court's Local Rules. In general, this revision was designed to accomplish several objectives:

(1) to remove provisions that were no longer applicable or appeared to conflict with pertinent provisions of the Federal Rules of Civil Procedure;

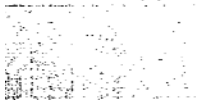
(2) to remove provisions that appeared unnecessary because the matters involved are now covered by the Federal Rules of Civil Procedure;

(3) to move into the Local Rules provisions currently in the Court's General Orders that seemed more appropriately included in the Local Rules;

(4) to arrange the provisions of the Local Rules so that they correspond to the Federal Rules of Civil Procedure;

(5) to integrate the provisions of General Order 34 into the Local Rules; and

(6) to consider possible changes in the rules on grounds of policy.



To accomplish these objectives, the Committee began with a rearrangement of the current local rules already done by Judge Ware that corresponded to the Federal Rules of Civil Procedure. Throughout the process, the Committee has worked closely with Judge Ware in fashioning the draft. Members of the Committee surveyed the current local rules to be sure that their provisions were properly re-designated to correspond to pertinent Federal Rules. In addition, the Court's General Orders and the standing orders of each Judge were reviewed to identify measures that might profitably be included in the Local Rules. The local rules of the other three districts in California were also reviewed to identify measures that might profitably be included in the Local Rules in this District.

Based on these various review processes, the Committee reached the conclusion that a number of matters presently covered in the local rules or General Orders should be in local rules but do not fit into civil Local Rules. Indeed, as to some of these matters other committees are drafting proposed rules. Accordingly, the attached draft contains a general set of civil Local Rules. As explained in proposed Local Rule 1-2(a), it contemplates adoption of additional local rules governing the following areas:

(1) Admiralty and Maritime Cases

(2) Alternative Dispute Resolution

(3) Bankruptcy Proceedings

(4) Criminal Proceedings

(5) Habeas Corpus Proceedings

Based on existing rules, the Committee is preparing proposals for the first and last of the above additional areas. Our intention is not to make any substantive change in the rules governing these areas. We understand that others are drafting rules for Bankruptcy and Criminal proceedings. A draft set of rules regarding Alternative Dispute Resolution incorporating provisions regarding arbitration from the Court's present local rules and from General Order 35 is under way but has not been completed for review by the Court.

Accordingly, the draft civil Local Rules follow the format of the Federal Rules of Civil Procedure. The final editing was delegated to a subcommittee, and there may be the occasion for the committee to suggest some additional modifications of language in some proposed rules. The draft includes cross-references to the current local rules and also occasional committee notes regarding the purpose of the provisions. It is likely that a reading of the entire document is the most effective way to appreciate its provisions, but we thought it would be worthwhile to point out certain features in the cover memorandum.

The remainder of this memorandum will highlight certain of the changes in light of the various objectives the drafting committee was pursuing. These might most easily be organized as uniformity, adjusting the local rules to the national rules and taking account of the CJRA experience, simplification and policy changes. The references to specific provisions will therefore be presented in that manner.

Uniformity

Some proposals reflect the committee's conclusion that uniformity is an important objective. Although specific standards are sometimes included, the committee was more concerned with having a uniform standard than with the specific content of the standard in question.

Local Rule 1-2 (Standing Orders): This rule establishes that the goal of the entire package of rules is to provide a comprehensive and uniform set of procedures so that individual orders will not be necessary with regard to matters covered by the local rules. The committee expected that matters relating to the conduct of the trial would still be tailored by individual judges.

Local Rule 7-2(a) (Motions): This rule provides that the notice period for motions be 35 days. The committee found that different judges had different notice requirements, but that several had directed 35 days' notice by standing orders, and the committee adopted that standard. The committee felt that the actual number of days was less important than that one uniform standard be employed by all judges.

Form A (Case Management Conference Statement and Proposed Order): Having surveyed the diverse requirements of different judges, the committee developed one form for such statements. The committee hopes not so much that this form be adopted unaltered as that it be used by all judges so that there would not be individual variations.

Adjusting to the national rules and CJRA experience

Several members of the committee have also served in the CJRA Advisory Group and had experience in the drafting of General Order 34. As the Court is aware, the December, 1993, amendments to Rules 16 and 26 altered provisions covering similar matters. Having reflected on the experience under General Order 34 and the new provisions of the national rules, the committee attempted to develop a coherent and effective case management system for civil cases in the district.

Local Rule 16 (case management): This rule incorporates the recent changes in Federal Rules 16 and 26 as well as building on the experience of General Order 34. Except for cases excluded under Local rule 16-1, all cases will involve a

tailored version of the initial disclosure requirements of Federal Rules 26(a)(1). Rule 16-2 sets out the basic case management schedule providing that most specified events occur during the first 120 days after commencement of the case. Although early discovery by consent is allowed, Local Rule 16-3 directs that non-consensual discovery occur only after the Court has considered the needs of the case in light of the disclosures made. parties who would suffer prejudice from waiting could obtain relief from the court to permit earlier initiation of formal discovery. Some features of General Order 34 that foreshadowed changes made in the national rules (e.g., early production of core documents) have been retained.

Largely invisible on the enclosed draft is another category of adjustments to take account of provisions of the Federal Rules. On occasion the committee eliminated provisions now in the local rules on the basis that the national rules adequately deal with the issue. For example, the draft does not include current rule 120-4 concerning calculation of time because it is inconsistent with Federal Rule 6(d). In this instance, the committee was aware that the existing rule is simple to use, but felt that it would be dubious to deviate from the Federal Rules on this point. Similarly, the committee is recommending considerable editing of current local rule 400, so that there is no repetition of the applicable Federal Rules or statutes, and the provisions regarding handling of appeals from decisions of Magistrate Judges have been trimmed on the theory that the Federal Rules provide substantial guidance. Other changes of this sort involved the local rules concerning the civil jury.

Simplification

In conjunction with reorganizing the rules to correspond to the arrangement in the Federal Rules, the committee tried to simplify the text of the current rules. Examples include:

Proposed Local Rules 3-4 and 3-5 on the form of papers filed would therefore cover all the materials appearing in current rules 120-1, 120-2, 200-1 and 200-2.

Proposed Local Rule 7-8 restates current local rule 220-9 so that it is easier to follow.

Policy Suggestions

The committee also included some changes that it felt would be wise as a matter of policy.

Local Rule 11 more closely restricts bar membership to members of the California bar; the previous local rule was less restrictive on this issue. It also requires lawyers admitted to practice before the Court to notify the Court of any change in their status in other courts that might bear on their status as members of the bar of this Court. In addition, Local Rule 11-11 spells out requirements for

student practice before the Court.

Local Rule 37 sets out a new means of resolving discovery disputes involving an informal chambers conference or an expedited motion. Some judges have experimented with such alternative devices, and the committee is recommending that the Court make them generally available to streamline and reduce the cost of discovery.

The committee has also recommended that chambers copies may be lodged at any branch of the clerk's office (Local Rule 3-7), as well as a mechanism for receipt of sealed documents (Local Rule 79-6). In addition, it has amplified the related case procedures to take advantage of economies that might result from coordination of cases (Local Rule 3-13).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
(415) 522-4100

CHAMBERS OF
PHYLLIS J. HAMILTON
CHIEF JUDGE

April 3, 2018

Alan B. Morrison
Lerner Family Associate Dean for Public
Interest & Public Service
George Washington University
School of Law
2000 H Street, NW
Washington, DC 20052

Dear Mr. Morrison

I write in response to your letter of February 6, 2018, and accompanying petition to amend the Northern District of California's Civil Local Rule 11-1(b). As per our Civil Local Rule 83-1, your petition and supporting materials have been fully vetted first by the court's Local Rules Committee and then by the entire court. We have voted to deny your petition.

Thank you for your interest in our local rules.

Sincerely,

Phyllis Hamilton
Chief Judge

cc: Hon. Richard Seeborg,
Chair, Local Rules Committee

Susan Y. Soong, Clerk of Court

May 23, 2018

BEFORE THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT

PETITION TO MODIFY OR ABROGATE LOCAL RULE

Pursuant to 28 U.S.C. § 2071(b), the District Courts of the United States are authorized to promulgate Local Rules. Those Rules remain in effect unless "modified or abrogated by the judicial council of the relevant circuit." 28 U.S.C. § 2071(c)(1). On February 6, 2018, petitioner Public Citizen Litigation Group, joined by 12 other organizations and individuals, petitioned the United States District Court for the Northern District of California to amend its Local Rule 11-1(b), which limits admission to that Court to attorneys who are active members of the State Bar of California. The Court denied the Petition, without explanation. Petitioners now ask the Judicial Council of the Ninth Circuit to review that denial.

The Petition, a copy of which is attached, did not contend that the Local Rule was unlawful. Rather, it asked that the Rule be amended to delete the requirement that applicants must be active members of the Bar of the State of California for three basic reasons:

(1) The requirement for California Bar admission does not bear any reasonable relationship to the actual practice in that Court because the procedures followed are established by federal rules and because the legal issues in the majority of the cases in that Court arise under federal, not California law.

(2) Because the California Bar does not allow attorneys admitted in other jurisdictions to be admitted on motion, every applicant must take the California Bar exam. That requirement imposes unjustified burdens of time and money attorneys whose primary reason to obtain admission to that Bar is to be admitted to practice in the Northern District. In addition, once admitted, an attorney must continue to be an active dues-

paying member of the California Bar to remain a member of the Bar of the Northern District, even when the attorney does not regularly practice in California. These burdens are wholly out of proportion to any possible benefit that might be realized for clients and the District Court from imposing such a requirement.

(3) The requirements for pro hac vice admission — in particular the payment of $310 for each attorney in each case — are burdensome, making pro hac vice admission an inadequate alternative to full admission.

An Addendum to the Petition described the eleven non-profit organizations and two attorneys that joined the Petition and identified their interests in the proposed change in Rule 11-1(b). Except for the American Civil Liberties Union, all of the original petitioners are petitioners before the Judicial Council.

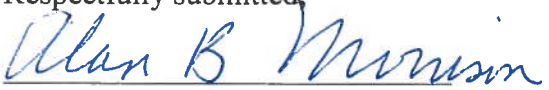
The Petition noted that, pursuant to Local Rule 83-2, all amendments to Local Rules require public notice and an opportunity to submit comments, and it requested that such a public rulemaking process be commenced. Because all of the District Courts in the Ninth Circuit have similar requirements, copies of the Petition were sent to the Clerks of the other District Courts, as set forth in the attached cover letter to the Chief Judge of the Northern District.

Instead of commencing a public rulemaking proceeding, the Local Rules Committee of the Court and then the entire Court voted to deny the Petition. The attached letter dated April 3, 2018 from Chief Judge Phyllis Hamilton gave no reasons why public comments were not sought, and offered no reason for denying the Petition.

Because the Court gave no reason why the Petition was denied, petitioners have nothing to add to what is in the Petition. Petitioners are not aware of any procedural requirements applicable to a review of a Local Rule by the Circuit Council, but suggest that the public

comment procedure in 28 U.S.C. § 2071(b), applicable to amendments to other rules, would be appropriate in connection with the Council's review of Local Rule 11-1(b) of the Northern District. Petitioners request that, after receiving comments from interested persons, the Council direct the District Court for the Northern District of California to amend Local Rule 11-1(b) to provide as specified on page 5 of the Petition.

Respectfully submitted,



Alan B. Morrison
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Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu

Attorney for the Petitioners

May 23, 2018

OFFICE OF THE CIRCUIT EXECUTIVE
UNITED STATES COURTS FOR THE NINTH CIRCUIT

JAMES R. BROWNING UNITED STATES COURTHOUSE
95 SEVENTH STREET
POST OFFICE BOX 193939
SAN FRANCISCO, CA 94119-3939

SUSAN Y. SOONG
CIRCUIT EXECUTIVE

TEL: 415-355-8960

February 24, 2022

Mr. Alan B. Morrison
The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

Re: Petition to Modify or Abrogate Local Rule

Dear Mr. Morrison

Thank you for your submission for review to the Judicial Council for the Ninth Circuit, concerning the Northern District of California's Civil Local Rule 11-1(b). You requested the Judicial Council modify or abrogate the rule. The Judicial Council considered your request at its February 2022 meeting. On February 24, 2022, the Judicial Council denied the request from Alan B. Morrison to direct the District Court for the Northern District of California to amend the Local Rules related to state bar admission requirement.

Sincerely,

/s/ Lucy H. Carrillo
Assistant Circuit Executive
Court Operations, Policy, and Legal Affairs Unit

EXHIBIT 2

Thomas Alvord
LawHQ, P.C.
299 S. Main St. #1300
Salt Lake City, UT 84111
385-285-1090 Ext 30002
thomasalvord@lawhq.com

July 5, 2022

United States District Court
Eastern District of Virginia
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Proposed Amendments to the Local Rule Regarding Admission of Out-Of-State Attorneys

To Whom It May Concern,

We would like to propose the following amendments to Local Civil Rule 83.1(A) and (C):

(A) **Eligibility:** Any person who is an Active Member of the bar of the highest court of any state, territory, the District of Columbia, or any federal court ~~the Virginia State Bar~~ in good standing is eligible to practice before this Court upon admission.

* * *

(C) **Procedure for Admission:** Every person desiring admission to practice in this Court shall file with the Clerk written application therefor accompanied by an endorsement by two (2) qualified members of the bar of the highest court of any state, territory, the District of Columbia, or any federal court ~~the bar of this Court~~ stating that the applicant is of good moral character and professional reputation. The form for such application may be obtained from the Clerk's Office.

As a part of the application, the applicant shall certify that applicant has within ninety (90) days prior to submission of the application read or reread (a) the Federal Rules of Civil Procedure, (b) the Federal Rules of Evidence, and (c) the Local Rules of the United States District Court for the Eastern District of Virginia.

The applicant shall thereafter be presented by a qualified practitioner of the bar of the highest court of any state, territory, the District of Columbia, or any federal court ~~the Court~~ who shall in open Court by oral motion, and upon giving assurance to the Court that the practitioner has examined the credentials of the applicant and is satisfied the applicant possesses the necessary qualifications, move the applicant's admission to practice.

The applicant shall in open Court take the oath required for admission, subscribe the roll of the Court, and pay to the Clerk the required fee. For such payment, the applicant shall be issued a certificate of qualification by the Clerk. For good cause shown, the Court may waive payment of the fee.

Federal government attorneys, whether they are Department of Justice attorneys, or assistant United States attorneys, or employed by any other federal agency, are not required to pay the admission fee if they are appearing on behalf of the United States.

The practice of law in federal courts is a nationwide practice in many circumstances. Cases are decided based upon federal, not state, law principles. Often cases are heard in jurisdictions removed from where the filing party resides. We believe this Court should implement this amendment for four reasons: (i) It best serves the people of this district by providing broader access to legal services, (ii) There is precedence for admitting out-of-state

attorneys, (iii) For decades the federal courts have been encouraged to remove barriers to admission, and (iv) It is the purview of this Court to set its admission rules.

First, we believe this Court should allow admission to out-of-state attorneys because it best serves those who reside within the jurisdiction of this Court. Over 34 years ago the United States Supreme Court noted "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." *Frazier v. Heebe*, 482 U.S. 641, 648 n.7 (1987). This is even more true today!

At LawHQ, we have found there is indeed a demand for specialized legal services regardless of state boundary. LawHQ has clients in 47 states who have asked us to help them with legal issues. Yet, LawHQ is limited in how we can serve clients because our attorneys are not admitted in every state. We practice federal law, in federal courts, before federal judges, but we can only be admitted in certain U.S. District Courts and not others, even though we are practicing the same federal law in the federal court system. While there are *pro hac vice* admissions, it has additional financial and administrative costs and is "not on the same terms" as general admission.[1] The residents in this district should be allowed to select an attorney with the "specialized federal law" experience of their choosing. In many cases, denying parties the attorney of their choosing who specialize in a particular area will also deny that person representation. For instance, most FDCPA cases go to default judgment because the defendant

[1] In striking down a provision for federal bar admission that required attorneys to maintain a local residence in the State, the United State Supreme Court commented that the *pro hac* vice "alternative does not allow the nonresident attorney to practice on the same terms as a resident member of the bar. An attorney not licensed by a district court must repeatedly file motions for each appearance on a *pro hac vice* basis…. [T]he availability of appearance pro hac vice is not a reasonable alternative for an out-of-state attorney who seeks general admission." *Frazier v. Heebe*, 482 U.S. 641, 650-51 (1987).

has inadequate access to representation. Allowing broader admission of out-of-state attorneys will provide broader access to legal services to residents in this district.

Restricting admission to only in-state attorneys puts the people and businesses within this district at a disadvantage compared to those residing in other districts that do allow admission to out-of-state attorneys. Given the "more mobile federal bar" and "increased demand for specialized legal services regardless of state boundaries" that the Supreme Court noted, we believe this proposed amendment best serves the individuals and businesses in this district.

Second, many districts admit out-of-state attorneys and these admissions have not caused any issues in the administration of justice. Currently 34 of the 94 federal district courts admit attorneys licensed out-of-state, making this the local rule in over a third of the U.S. District Courts.[2] All United States courts of appeals admit attorneys if they are admitted to practice before "the highest court of a state." *Fed. R. App. P. 46(a)(1)*. And the United States Supreme Court admits attorneys who have been "admitted to practice in the highest court of a State." *United States Supreme Court Rule 5.1.* If the United States Supreme Court, all United States courts of appeals, and 34 district courts only require admission to "the highest court of a state," there is no good reason to limit admission in this district to in-state attorneys.

[2] The following U.S. District Courts admit attorneys licensed out-of-state: Arkansas Eastern, Arkansas Western, Colorado, D.C., Connecticut, Illinois Central, Illinois Northern, Illinois Southern, Indiana Northern, Indiana Southern, Maryland, Michigan Eastern, Michigan Western, Missouri Eastern, Nebraska, New Mexico, New York Northern, New York Western, North Dakota, Ohio Northern, Oklahoma Eastern, Oklahoma Northern, Oklahoma Western, Pennsylvania Western, Tennessee Eastern, Tennessee Middle, Tennessee Western, Texas Eastern, Texas Northern, Texas Southern, Texas Western, Vermont, Wisconsin Eastern, Wisconsin Western

Third, for decades the federal courts have been encouraged to remove barriers to admission. In 1995 the American Bar Association House of Delegates passed the following resolution:[3]

> RESOLVED, That the American Bar Association supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating state bar membership requirements in cases of U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules.

For 30 years the National Association for the Advancement of Multijurisdiction Practice has sought to remove local rules of practice that limits those who may appear before federal courts.[4] Four years ago, Public Citizen Litigation Group submitted a petition asking the Northern District of California to remove the requirement that attorneys be admitted to the California bar.[5] This petition was signed by the American Civil Liberties Union, Association of Corporate Counsel, Cato Institute, Center for Constitutional Litigation, Competitive Enterprise Institute's Center for Class Action Fairness, Consumers for a Responsive Legal System, Earthjustice, Natural Resources Defense Council, Pacific Legal Foundation, Public Justice, and John Vail Law. There is a chorus of many other professors, commentators, and attorneys who have sought to modernize the federal court admission requirements by removing specific state bar requirements for admission to the federal courts.[6]

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[3] *Attorney Admission Practices in the U.S. Federal Courts*, The Federal Lawyer, (Sept 2016).

[4] See e.g. *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Howell*, 851 F.3d 12, 16 (D.C. Cir. 2017).

[5] *Petition of Public Citizen Litigation Group*; see also *Press Release of Public Citizen*.

[6] See e.g. *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 Temp. L. Q. 945, 960-964 (1982); *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 Fordham Urb. L.J. 969, 978 (1992); *Fred C. Zacharias, Federalizing Legal Ethics*, 73 Tex. L.Rev. 335, 379 (1994); *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?* 30 Geo. J. Legal Ethics 125 (2017).

Fourth, it is the purview of this Court to set the admission rules of this Court. "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367, 63 S. Ct. 573, 575, 87 L. Ed. 838 (1943). Each U.S. District Court has the power to regulate its admission criteria, independent of state laws or state bar licensing requirements:

> Although federal courts often reference state rules in their [admission] requirements… they need not do so…. [F]ederal courts have the right to control the membership of the federal bar…. The power to admit and regulate attorneys is not… the sole bailiwick of the states. Since both the federal courts and state bars have the ability to regulate attorneys, the question becomes which has the greater power to regulate admission to the federal bar…. When state licensing laws purport to prohibit lawyers from doing that which federal law expressly entitles them to do, the state law must give way.

In re Desilets, 291 F.3d 925, 929-30 (6th Cir. 2002) (internal citations omitted).

> Admission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included…. In short, a federal court has the power to control admission to its bar and to discipline attorneys who appear before it…. As we have discussed, and as nearly a century of Supreme Court precedent makes clear, practice before federal courts is not governed by state court rules. Further, and more importantly, suspension from federal practice is not dictated by state rules.

In re Poole, 222 F.3d 618, 620-22 (9th Cir. 2000) (internal citations omitted); see also, *Spanos v. Skouras Theatres Co*., 364 F.2d 161 (2d Cir. 1966).

To conclude, we would ask this Court to implement the proposed amendment for the benefit of this district's residents. This change allows the people and businesses in this district to receive the "specialized federal law" expertise they need and want "regardless of state boundaries." It is a small change with a big impact on both access to justice and access to legal representation. Many U.S. District Courts, and all appellate courts, already admit out-of-state

attorneys and have done so without issue. Your thoughtful consideration and response to this proposed amendment is much appreciated.

Thank you,

Thomas Alvord
Managing Attorney
LawHQ, P.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
600 GRANBY STREET
NORFOLK, VIRGINIA 23510

CHAMBERS OF
MARK S. DAVIS
CHIEF JUDGE

TELEPHONE: (757) 222-7014
FACSIMILE: (757) 222-7179

October 24, 2022

Thomas Alvord, Esq.
LawHQ, P.C.
299 S. Main Street #1300
Salt Lake City, UT 84111

Re: Proposed Amendments to the Local Rule Regarding Admission of Out-Of-State Attorneys

Dear Mr. Alvord:

Thank you for your letter of July 5, 2022, regarding proposed changes to the Court's Local Civil Rule 83.1 to allow non-Virginia licensed attorneys admission to the Bar of the Eastern District of Virginia. The judges of the Court have considered the matter and have decided to retain the existing rule.

The Court appreciates your input and interest in the Court's local rules. With best regards, I am

Sincerely yours,

Mark S. Davis
Chief Judge, United States District Court for the Eastern District of Virginia

MSD:rsk

EXHIBIT 3
SAMPLE OF EXISTING BAR ADMISSION REQUIREMENTS

Each federal district sets its own bar admission requirements. Listed below are a sample of some of these requirements in various categories beyond the local state bar admission requirement. They illustrate the costs and burdens imposed by restrictive bar admission requirements that would be mitigated by a unified rule.

I. Limitations on Reciprocity

Most districts do not have reciprocal admission, and some that do are limited. For example, the District of Kansas and the Western District of Missouri allow only automatic reciprocal admission to their bars[1] The reciprocity between Southern and Eastern Districts of New York extends only to attorneys admitted in the District of Vermont or the District of Connecticut, and to the state bar in those states..[2]

Reciprocity may also be limited to attorneys who are members of the bar of the state where they maintain their principal law office, as in the District of Columbia,[3] or to members of the bars of certain circuit courts, as in the District of Vermont.[4]

II. Admission Fees

All federal districts charge admission fees. Federal law requires the courts to collect fees as prescribed by the Judicial Conference of the United States (JCUS).[5] JCUS has set the fee for the admission of an attorney to a district court bar at $188, although courts may charge more.[6] The Western District of North Carolina charges a $288, and the Eastern District of Michigan

[1] *See, e.g.*, *Rules of Practice*, United States District Court for the District of Kansas (Nov. 25, 2021), https://ksd.uscourts.gov/sites/ksd/files/11-25-21-KSD-Local-Rules-Master-Copy.pdf.
[2] *See Local Rules of United States District Courts for the Southern and Eastern Districts of New York*, United States District Court for the Southern District of New York (Oct. 15, 2021), https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf.
[3] *See Rules of the United States District Court for the District of Columbia*, United States District Court for the District of Columbia (May 2022), https://www.dcd.uscourts.gov/sites/dcd/files/local_rules/Local%20Rules%20May_2022_0.pdf.
[4] *See Local Rules of Procedure*, United States District Court for the District of Vermont (Mar. 1, 2017), https://www.vtd.uscourts.gov/sites/vtd/files/LocalRules.pdf.
[5] 28 U.S.C. § 1914.
[6] *See District Court Miscellaneous Fee Schedule*, United States Courts (Dec. 1, 2020), https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule.

charges $307.[7] The Northern District of California charges $317, and the Central District of California increases the fee to $331 for attorneys admitted for more than three years.[8]

III. Renewal Requirements and Fees

Districts often require attorneys to pay regular renewal fees. For example in the Northern District of Alabama, every 5 years attorneys must submit a certification of continued good standing, along with a renewal fee of $50.[9] In the Southern District of Illinois, attorneys must pay a $100 renewal fee every two years, and in the Northern District of New York the fee is $50 every two years.[10] In the District of Kansas and the Northern District of Iowa, attorneys must renew their registration each year and pay a $25 fee.[11]

Even more burdensome, the Southern District of Texas requires attorneys to re-apply every five years and pay the full $188 admission fee each time.[12] In the Eastern District of Louisiana a renewal fee of $188 is required every three years, along with a comprehensive re-registration statement.[13]

IV. Pro Hac Vice Admission Fees

For those districts permitting pro hac vice admissions, many impose separate fees. There is no applicable federal law for these fees, and so districts have great discretion in setting fees.

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[7] *See Court Fees*, United States District Court for the Western District of North Carolina (Dec. 1, 2020), https://www.ncwd.uscourts.gov/court-fees; *Fee Schedule*, United States District Court for the Eastern District of Michigan (2022), https://www.mied.uscourts.gov/index.cfm?pageFunction=coFeeSchedule.

[8] *See Court Fee Schedule Summary*, United States District Court for the Northern District of California (Oct. 1, 2022), https://www.cand.uscourts.gov/about/clerks-office/court-fees/; *Schedule of Fees*, United States District Court for the Central District of California (2022), https://www.cacd.uscourts.gov/sites/default/files/forms/G-072/G-72.pdf.

[9] *See Schedule of Fees*, United States District Court for the Northern District of Alabama (Dec. 1, 2020), https://www.alnd.uscourts.gov/sites/alnd/files/NDAL%20Fee%20Schedule%20Effective%2012-01-2020.pdf.

[10] *See Fee Schedule*, United States District Court for the Southern District of Illinois (2022), https://www.ilsd.uscourts.gov/AttyFeeSchedule.aspx; *Court Fees & Rates*, United States District Court for the Northern District of New York (2022), https://www.nynd.uscourts.gov/court-fees-rates.

[11] *See Rules of Practice*, United States District Court for the District of Kansas (Nov. 25, 2021), https://ksd.uscourts.gov/sites/ksd/files/11-25-21-KSD-Local-Rules-Master-Copy.pdf; *Schedule of Fees*, United States District Court for the Northern District of Iowa (Dec. 1, 2020), https://www.iand.uscourts.gov/sites/iand/files/Fee%20Schedule_revised%20Oct2019.pdf.

[12] *See Local Rules of the United States District Court for the Southern District of Texas*, United States District Court for the Southern District of Texas (May 1, 2000), https://www.txs.uscourts.gov/sites/txs/files/LR%20May%202020%20Reprint.pdf; https://www.laed.uscourts.gov/sites/default/files/local_rules/2022%20CIVIL%20RULES%20LAED%20w%20Amendments%203.1.22.pdf.

[13] *Fee Schedule*, United States District Court for the Eastern District of Louisiana (2022), https://www.laed.uscourts.gov/CASES/fee.htm; *Local Civil Rules of the United States District Court for the Eastern District of Louisiana*, United States District Court for the Eastern District of Louisiana (Mar. 1, 2022),

In the District of Montana, the pro hac vice admission fee is $262, and in the Western District of North Carolina the fee is $288.[14] In the District of Hawaii, the fee is $300.[15] California courts impose some of the most burdensome pro hac vice admission fees, with the Northern District of California charging $317, and the Central District charging $500 per case.[16]

V. Limitations on Pro Hac Vice Admissions

Many districts impose significant restrictions on pro hac vice admissions, such as limiting the number of times an applicant can be admitted pro hac vice or requiring supervision by local counsel.

A. Caps on Pro Hac Vice Admissions

Some federal districts limit the number of appearances a pro hac vice attorney can make in a given time period. For example, in the District of Maryland, "no attorney may be admitted pro hac vice in more than three (3) unrelated cases in any twelve (12) month period, nor may any attorney be admitted pro hac vice in more than three (3) active unrelated cases at any one time."[17]

A similar limitation is imposed in the Southern District of Florida and the Eastern District of North Carolina.[18] In the Northern and Southern Districts of Mississippi the cap is five unrelated pro hac vice admissions within one year.[19]

B. Local Counsel Requirements

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[14] *See Fee Schedule*, United States District Court for the District of Montana (Dec. 1, 2020), https://www.mtd.uscourts.gov/fee-schedule; *Court Fees*, United States District Court for the Western District of North Carolina (Dec. 1, 2020), https://www.ncwd.uscourts.gov/court-fees.

[15] *See Fee Schedule*, United States District Court for the District of Hawaii (Dec. 1, 2020), https://www.hid.uscourts.gov/court-resources/schedule-of-fees.

[16] *See Court Fee Schedule Summary*, United States District Court for the Northern District of California (Oct. 1, 2022), https://www.cand.uscourts.gov/about/clerks-office/court-fees/; *Schedule of Fees*, United States District Court for the Central District of California (2022), https://www.cacd.uscourts.gov/sites/default/files/forms/G-072/G-72.pdf.

[17] *Local Rules*, United States District Court for the District of Maryland (July 1, 2021), https://www.mdd.uscourts.gov/local-rules.

[18] *See Local Rules*, United States District Court for the Southern District of Florida (Dec. 1, 2021), https://www.flsd.uscourts.gov/sites/flsd/files/Local_Rules_Effective_120121_FINAL.pdf; *Local Rules*, United States District Court for the Eastern District of North Carolina (Dec. 2019), https://www.nced.uscourts.gov/pdfs/LocalCivilRulesDecember2019.pdf.

[19] *See Local Uniform Civil Rules*, United States District Court for the Northern District of Mississippi and the Southern District of Mississippi (Dec. 1, 2021), https://www.msnd.uscourts.gov/sites/msnd/files/forms/2021-%20MASTER%20COPY%20-%20CIVIL%20FINAL.pdf.

Many districts strictly limit what pro hac vice attorneys can do, requiring the pro hac vice attorney to designate an attorney already admitted to the district bar–local counsel–to sign all papers and filings submitted to the court and/or to "participate meaningfully" in the case.[20]

For example, in the Northern District of Alabama an attorney can only be admitted pro hac vice if an attorney already admitted to the district bar is also representing the same client in that case, and the local counsel must review and sign all pleadings and other papers submitted to the court by the pro hac vice attorney.[21] In the District of Delaware, local counsel must file all papers and attend all court proceedings, as is the case in many districts.[22]

VI. Miscellaneous Restrictions

In the District of Massachusetts, the United States Attorney for the district has an opportunity to review an attorney's application to the district bar and recommend rejection of the application.[23]

In the Northern District of Indiana, the court may require any attorney residing outside of the district, even one already admitted to the district court bar, to retain local counsel in a case.[24]

In some districts, like the Eastern District of Oklahoma, the eligibility criteria for admission pro hac vice in a case are not clearly defined but rather left entirely to the discretion of the court in each case.[25]

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[20] *See, e.g.*, *Rules of Practice*, United States District Court for the District of Kansas (Nov. 25, 2021), https://ksd.uscourts.gov/sites/ksd/files/11-25-21-KSD-Local-Rules-Master-Copy.pdf.

[21] *See Local Rules*, United States District Court for the Northern District of Alabama (Dec. 4, 2019), https://www.alnd.uscourts.gov/sites/alnd/files/ALND%20Local%20Rules%20Revised%2012-04-2019.pdf.

[22] *See Local Rules of Civil Practice and Procedure for the United States District Court for the District of Delaware*, United States District Court for the District of Delaware (Aug. 1, 2016), https://www.ded.uscourts.gov/sites/ded/files/local-rules/District%20of%20Delaware%20LOCAL%20RULES%202016.pdf; *see also Local Uniform Civil Rules*, United States District Court for the Northern District of Mississippi and the Southern District of Mississippi (Dec. 1, 2021), https://www.msnd.uscourts.gov/sites/msnd/files/forms/2021-%20MASTER%20COPY%20-%20CIVIL%20FINAL.pdf.

[23] *See Local Rules of the United States District Court for the District of Massachusetts*, United States District Court for the District of Massachusetts (June 17, 2022), https://www.mad.uscourts.gov/general/pdf/local-rules/Combined%20Local%20Rules.pdf.

[24] *See Local Rules*, United States District Court for the Northern District of Indiana (Feb. 25, 2022), https://www.innd.uscourts.gov/sites/innd/files/CurrentLocalRules.pdf.

[25] *See Local Civil Rules*, United States District Court for the Eastern District of Oklahoma (July 5, 2016), https://www.oked.uscourts.gov/sites/oked/files/Local_Civil_Rules.pdf.

TAB 5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

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

DATE: March 20, 2023

The Federal Criminal Procedure Committee of the American College of Trial Lawyers (the FCP Committee) has suggested amending Rule 23(a) "to eliminate the need for governmental consent, and to authorize a court to approve a defendant's waiver of a jury trial based on the court's review of the totality of the circumstances." Suggestion 23-CR-B, Exhibit C, page 2. The language of the proposed amendment is as follows:

> **(a) (1) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless:
>
> (1A) the defendant waives a jury trial in writing;
>
> (2B) the government consents; and
>
> (3C) the court approves.
>
> **(2) Nonjury Trial Without Government Consent.** If the government does not consent, the court may permit a defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant's waiver of a jury trial without the government's consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.

A proposed comment to accompany the amendment is also included in the proposal.

The question for discussion at this meeting is whether to refer the proposal to a subcommittee for further consideration. The Committee has previously considered similar proposals, which we discuss below to provide a basis for discussion of this issue.

A. The reasons advanced for the proposal

Exhibit C of the proposal details its rationale. The proposal was prompted by the "prolonged pretrial detentions and systematic burdens on their rights to speedy trials" that defendants endured during the pandemic when the government declined to consent to bench trials.

To emphasize that there is a problem that requires attention, the proposal reports the results of an informal survey of colleagues in what appear to be at least twelve districts (some

responses are noted in the footnotes as states rather than districts). "Although anecdotal and not comprehensive, the responses we received suggest that federal prosecutors rarely consent to a defendant's request for a bench trial." Exhibit C, page 6.

The FCP Committee urges the need for judicial review of the prosecutor's decision to withhold consent, stating "[I]t is reasonable both to require the government to articulate a basis for its contrary view and to empower trial courts to authorize a bench trial without the government's consent." *Id.* page 1. It notes that there is precedent for allowing a bench trial over the government's objection and details one of the cases in which district courts have done this. (Additional cases can be found in the research memo described in the next section.) The proponents focus on one of those cases, *United States v. Cohn*, 481 F. Supp. 3d 122 (E.D.N.Y. 2020), where the district judge allowed a bench trial without the government's consent after weighing several factors. Proponents of the amendment suggest the analysis in *Cohn* offers "a possible template for an amended Rule 23." *Id.* page 9.

The FCP Committee notes the backlog of cases created by the pandemic, *Id.* page 6, and suggests that bench trials can help to address this problem. It states that jury trials can be longer and more expensive than bench trials, noting issues that complicate and lengthen jury trials, such as evidentiary objections, jury instructions, sidebars, shackling, and sequestration. *Id.* page 1. "When Rule 23(a) was promulgated, cases were much less complex, media was less of an issue, and dockets were less crowded," the proposal states. *Id.* page 5. The proponents also argue "If the defendant can plead guilty and thus waive a jury trial if it is in his best interest, he should be permitted to waive a jury for trial, if the defendant similarly concludes that a bench trial is in his best interest." *Id.*

The FCP Committee points to the number of states that already permit a defendant to waive a jury trial, and presents a survey of state law on this issue (footnotes omitted):

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

Id.

B. Prior consideration of related proposals

The attached memorandum from October 7, 2020, by Kevin Crenny, the Rules Law Clerk at the time, was prepared when our Committee was considering the emergency rules subcommittee's recommendation that a provision permitting a bench trial without government consent be included in the emergency rule (Rule 62). The Crenny memo contains a helpful summary of the history of the requirement of government consent in Rule 23, as well as prior Committee consideration of other suggestions to dispense that requirement.

The latest Committee action on this general subject was in 2021, when the Committee decided not to recommend a provision allowing a bench trial without the government's consent as part of the emergency rule.[1] The rationale for that decision is important background for Committee members considering whether to pursue the present proposal.

1. The debate over the provision regarding bench trials in the emergency rule

At its first discussion of a proposed emergency rule during its fall 2020 meeting, the Committee opted to include the provision after a lengthy discussion. Members discussed conflicting perceptions of how often the government rejected a jury waiver. Some expressed the view that government opposition to a bench trial was uncommon. Advisory Committee on Criminal Rules, Draft Minutes November 2, 2020, page 18. Others termed it "a particularly acute problem for defendants in those districts that aren't holding criminal jury trials," *id.* pages 15-16, or noted that in some districts the government does not agree to bench trials before certain judges and "a defendant whose case is assigned to one of those judges is detained and wants a trial because it is the only way to get out, that defendant can't get a trial and is basically stuck in a netherworld." *Id.* pages 24-25. Representing the Department of Justice, Mr. Wroblewski argued the provision was unnecessary as it was applicable only upon a finding that insisting on a jury trial would violate the constitutional rights of the defendant. *Id.* page 24. Two other members expressed similar views. *Id.* pages 18, 21. The vote was 8 to 3 to include the provision in the emergency rule. *Id.* page 25.

Reviewing the draft emergency rule in January of 2021, Standing Committee members were also divided whether to include the bench trial provision. Five speakers, including Mr. Wroblewski, expressed support for the inclusion of the provision, and some suggested adding a reference to statutory speedy trial rights. Mr. Wroblewski noted the Department had been

[1] The text of this proposed provision read:

> **Bench Trial.** If a defendant waives a jury trial in writing, the court may conduct a bench trial without government consent if, after providing an opportunity for the parties to be heard, the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights.

The draft committee note read: "Paragraph (c)(4) creates an emergency exception to Rule 23(a)(2), which requires the consent of the government before the court may conduct a bench trial. The amendment provides authority to hold a bench trial without the consent of the government, if the defendant waives the right to trial by jury in writing, and, after providing an opportunity for the parties to be heard, the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights. The Committee recognizes that the public's interest in a jury trial continues even in an emergency, and this provision should be invoked only when no alternative venue or other mechanism to hold a jury trial is feasible."

encouraging agreement to bench trials, though not in all cases, and said the Department supported including the provision. Even though it would affect only a small number of cases, he said that it could be important in those instances. Three other speakers either opposed inclusion as unnecessary or expressed concern about the consequences of including it. Two thought that cases falling within the provision would be so rare that it was not worth writing a rule. Professor Coquillette, who had served for many years as the Reporter to the Standing Committee, warned that this was just the kind of proposal the Supreme Court would focus on when the proposed rule reached the Court. January 2021 Standing Committee Minutes, pages 13-14.

The emergency rule subcommittee then took up the provision again. A majority of members voted to remove the provision from the emergency rule after considering the concerns that it could hold up the emergency rule at the Supreme Court and that the provision was not needed because the judge has the ability to handle constitutional issues without it. Reporters' Memo to Members, Criminal Rules Advisory Committee, April 21, 2021, in the Agenda Book for the Advisory Committee on Criminal Rules, May 11, 2021, at page 133.

2. Our views on the relevance of that debate

Arguably, the Committee's decision in 2021 not to include the provision that would have dispensed with government agreement to a jury waiver in the emergency rule counsels against opening this issue again so soon. Ordinarily, the Committee does not reconsider a proposal after only two years. In this case, however, the reasons for rejection do not necessarily preclude present consideration of this most recent proposal.

First, strong views were expressed that such a provision would be a "poison pill" that would hold up the progress of the emergency rule, which was on a particularly fast track to be presented to the Court as a package with emergency rules from the Civil, Appellate, and Bankruptcy Rules Committees. That concern is not relevant to this proposal. It need not be coordinated with other sets of rules, nor is there a pressing need to address it within a certain time frame.

Second, the FCP Committee's proposal is different from that rejected as an element of the emergency rule. Some opponents to the provision in the emergency rule expressed that the narrow provision under consideration, which was limited only to cases in which a court first finds that "a bench trial is necessary to avoid violating the defendant's constitutional rights," was unnecessary because courts could handle constitutional issues without it. The current proposal, by contrast, is not similarly limited. It proposes a different standard that would permit bench trials over the government's objection even when there is no judicial finding that waiting for or insisting upon a jury trial would violate a defendant's *constitutional* rights: a presumption in favor of a jury trial if the government objects to a bench trial, unless the defendant presents reasons "sufficient to overcome" that presumption. Thus the proposed provision would have broader application.

Third, the view that adding the provision to Rule 62 was "not needed" also appeared to be based on the belief that the instances of the government opposing a request for a bench trial during the pandemic were rare. There were then, and still are today, competing views about

whether that is an accurate description of government policy, either during the pandemic or today (e.g., Exhibit C, page 6, "federal prosecutors rarely consent to a defendant's request for a bench trial"). This proposal would not be limited to pandemic or emergency conditions, so that even if government opposition to bench trials was rare during the pandemic, the frequency of its opposition in non-emergency conditions remains an open empirical question.

C. A policy, not a constitutional, question

As the variation in state practice suggests, the decision whether to require government consent for a jury waiver by the defendant is a policy question. The government does not have a constitutional right to insist on a jury trial, see the Crenny memo, and the defendant does not have a constitutional right to insist on a bench trial.

As summarized in the Reporters' Memorandum to the Advisory Committee Regarding Draft Rule 62, October 14, 2020, in the Agenda Book for the Meeting of the Advisory Committee on Criminal Rules, November 2, 2020, at page 130:

> In *Singer v. United States*, 380 U.S. 24 (1965), the Supreme Court addressed the constitutional status of Rule 23(a), holding that a defendant has no constitutional right to waive trial by jury, and rejecting the argument that "to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process." *Id*. at 36. The Court stated:
>
> > A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. This recognition of the Government's interest as a litigant has an analogy in Rule 24(b) of the federal rules, which permits the Government to challenge jurors peremptorily.
>
> *Id*. The Court found it unnecessary to decide in the case before it "whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Id*. at 37. It also had no occasion to address the situation that might arise if the delay in conducting jury trials due to emergency conditions would result in a violation of the defendant's speedy trial rights.

MEMORANDUM

To: Professor Sara Sun Beale, Professor Nancy King, Rebecca Womeldorf

From: Kevin Crenny, Rules Law Clerk

Date: October 7, 2020

Re: Constitutionality of bench trial without prosecution's consent

This memo is primarily aimed at addressing the constitutionality of paragraph (c)(4) of Draft Rule 62, which would allow a court to conduct a bench trial without the government's consent if the defendant has waived a jury trial and the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights. The memo is divided into four parts. Part One addresses the history of Rule 23(a), the existing rule concerning nonjury trials, which does require the government's consent before a bench trial can be held. Part Two surveys the history of the jury requirement over time and reviews some of the major Supreme Court precedents that might relate to the constitutionality of Draft Rule 62(c)(4). Part Three directly addresses the constitutionality of the Draft Rule's bench trial provision, concluding that it is unlikely to be struck down. Part Four reviews arguments that have been made by the Department of Justice concerning the constitutionality of a bench trial being held over the government's objection.

I. History of Rule 23(a)

From its earliest drafts in 1941, the procedural rule that would become Fed. R. Crim. P. 23(a) recognized a right to waive trial by jury but also required the consent or approval of the government and the Court.[1] When the Supreme Court first reviewed the draft rules in 1942, it asked whether parties could consent to trial by less than twelve jurors, but raised no questions concerning the government consent requirement.[2] The preliminary drafts that were circulated more widely in 1942 and 1943 did prompt criticisms of the government consent requirement.[3] Commenters suggested:

> The Constitution ought not to be construed as guaranteeing trial by jury to the Government, for the right to such a trial is exclusively in the defendant. Moreover, the defendant may waive the right to counsel, to a speedy trial, to compulsory process, and to confrontation of witnesses. Since all these safeguards are

[1] *See* Lester B. Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 DUKE L. J. 29, 66–68 (describing early drafts, the first of which "provided that the right to a jury trial as declared by the Constitution or as given or recognized by a statute was to be preserved to the defendant and to the Government," *id.* at 67).
[2] *Id.* at 68.
[3] *Id.* at 69–70.

> enumerated in the same section of the Constitution as the right to jury trial, why require consent of the Government as to the latter and not as to the former?[4]

Others noted that "[a]n Illinois statute requiring consent of the prosecutor was repealed after some experience with the statute" and that " the absolute right of a defendant to waive jury trial had worked very well in the state courts of Maryland."[5] No changes were made in response to these comments and the rule was enacted in roughly its current form.

The Committee has considered the issue of government consent to bench trials one time since then, in the 1960s. In 1963, the Advisory Committee on Criminal Rules received a suggestion that government consent should not be required for a defendant to waive a jury trial.[6] One member of the Committee argued that government represents the public interest in a jury trial, while another member suggested that the judge could adequately represent that interest.[7] The Committee's vote on the issue was tied and it was left for discussion at their next meeting.[8] Again, views were mixed, with one committee member arguing that the government's power to refuse a bench trial was only exercised sparingly but was important.[9] The Committee ultimately voted not to make any change.[10] The Committee reviewed further comments to the same effect the following year—around the time *Singer* was decided—but nothing came of this.[11]

II. Status of the Jury Requirement Over Time

Justice Scalia's partial concurrence in *Neder v. United States*,[12] calls the right to trial by jury "the spinal column of American democracy" and notes the right's origins at the time of the founding and earlier, in English law.[13] The jury requirement was not particularly flexible during the nineteenth century.[14] Examples of a strict application of the jury requirement (or strong protection of the right to a jury) include an 1882 Circuit case "holding that a directed verdict of

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[4] *Id.* at 69 (citing I COMMENTS, RECOMMENDATIONS, AND SUGGESTIONS RECEIVED CONCERNING THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE 137, 473 (1943)).
[5] *Id.* at 69 n. 249, 70.
[6] Minutes of Advisory Committee on the Rules of Criminal Procedure 21 (Oct. 16, 1963), https://www.uscourts.gov/file/15214/download.
[7] *Id.*
[8] Minutes of Advisory Committee on the Rules of Criminal Procedure 15 (Jan. 15, 1964), https://www.uscourts.gov/file/15167/download.
[9] *Id.*
[10] *Id.*
[11] Minutes of Advisory Committee on the Rules of Criminal Procedure 11 (May 4, 1965), https://www.uscourts.gov/file/15186/download.
[12] 527 U.S. 1 (1999).
[13] *Id.* at 30–31 ("The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter." (citing Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. CHI. L. REV. 867, 870, 875, n. 44 (1994))) (Scalia, J., concurring in part and dissenting in part)
[14] *See* Orfield, *supra* n. 1 at 56–60.

guilty violated the right to trial by jury" because "[t]his [was] a right which cannot be waived,"[15] and another Circuit case in which the judge noted "very grave doubts about the constitutionality of [a statute concerning petty offenses committed at sea] which provides for trial by the court."[16]

It was not until 1904 in *Schick v. United States*[17] that the Supreme Court held that a bench trial could be permitted for petty offenses.[18] As Professor Lester Orfield noted in a 1962 article, "[t]he decision was not a radical one," because nothing in the Constitution and no act of Congress required trial by jury for this kind of offense."[19] The Court reasoned that since "a defendant can plead guilty . . . and thus dispense with all inquiry by a jury," or waive his right "to be confronted with the witnesses against him," there was no reason he could not consent to trial by the Court.[20] The caselaw was somewhat mixed in the first few decades of the twentieth century, but the general trend up until *Patton* appears to have been that waiver of the jury requirement was sometimes permitted but only in cases involving misdemeanors or petty offenses.[21]

In 1930, *Patton v. United States*[22] established that the Article III jury requirement "is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election."[23] The facts of the case concerned a felony trial in which one of the twelve jurors suffered "severe illness" and could not continue on.[24] The defendant and the government stipulated that they would proceed with only eleven jurors, and the Court consented to this plan.[25] After a guilty verdict, the defendant appealed, arguing that he should not have been permitted to waive his constitutional right to trial by a jury of twelve.[26] Because a common law jury was a jury of twelve, the Court rejected any "distinction . . . between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve."[27] If the defendant had the ability to waive one juror's presence, he necessarily had the ability to waive all of them.

Based on a review of historical materials relating to jury trial, the Court found it "reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused," rather than "as an integral

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[15] *Id.* (quoting *United States v. Taylor*, 11 Fed. 470, 471 (C.C.D. Kan. 1882))
[16] *Id.* at 58 (quoting *In re Smith*, 13 F. 25, 26 (C.C.D. Mass. 1882)).
[17] 195 U.S. 65 (1904).
[18] *Id.* at 71–72.
[19] Orfield, *supra* n. 1 at 60.
[20] *Schick*, 195 U.S. at 71–72 ("When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.").
[21] *See* Orfield *supra* n. 1 at 61–63.
[22] 281 U.S. 278 (1930),
[23] *Id.* at 298.
[24] *Id.* at 286.
[25] *Id.*
[26] *Id.* at 287.
[27] *Id.* at 290.

and inseparable part of the court"—"nothing to [the latter] effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time."[28] The Sixth Amendment, the Court observed, "deals with trial by jury clearly in terms of privilege" and this framing of the purpose of the jury "may be regarded as reflecting the meaning of" the Article III jury requirement given the Amendment's close temporal proximity to ratification.[29] The jury requirement was not jurisdictional.

Following this conclusion, *Patton* then turned to "whether the court is empowered to try the case without a jury," and concluded that courts are so empowered.[30] The Court's reasoning was that Article III and the statutes establishing the federal courts amount to a "broad and comprehensive grant" of authority "to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution."[31] Because the jury can be waived "it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case."[32] The Court noted this was consistent with *Schick*. *Id.* It was also consistent with historical practice, as "in the Colonies . . . a waiver and trial by the court without a jury was by no means unknown," as established by the Solicitor General's brief.[33] The Court saw no public policy reason against allowing waiver, and concluded that the jury could be waived even in felony cases.[34]

Especially relevant to the Draft Rule are the limitations the Court placed on its holding in *Patton*. It wrote that it "d[id] not meant to hold that the waiver must be put into effect at all events."[35] Specifically, "the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, *the consent of government counsel* and the sanction of the court *must be had*, in addition to the express and intelligent consent of the defendant."[36]

Singer v. U.S. followed *Patton* and confirmed the constitutionality of Rule 23(a)'s requirement that the prosecution and court must consent to a criminal bench trial.[37] The Court noted that *Patton* had not suggested any affirmative right to a bench trial, and that *Patton*'s holding had since been reaffirmed.[38] The question boiled down to what restrictions could be

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[28] *Id.* at 297
[29] *Id.* at 298 (quoting *Callan v. Wilson*, 127 U.S. 540, 549 (1888) ("[W]e do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them."))
[30] *Id.*
[31] *Id.* at 299.
[32] *Id.*
[33] *Id.* at 306. This brief was drafted in part by Erwin Griswold. His extensive research on the topic appears to have made it into an article published in the Virginia Law Review a few years later. Erwin N. Griswold, *Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934).
[34] *Patton*, 281 U.S. at 307.
[35] *Id.* at 312.
[36] *Id.* (emphasis added).
[37] 380 U.S. 24 (1965).
[38] *Id.* at 34 (citing *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277–78 (1942)).

placed on the defendant's right to waive the jury.[39] As the Court saw it, requiring approval from the court and the prosecution was permissible because there was no precedent suggesting otherwise and because "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."[40] The Court recognized "that the States ha[d] adopted a variety of procedures," and that some did not require the consent of the prosecutor, but the Court reasoned that the framers of the federal rules were aware of these alternative and chose not to follow them.[41]

Near the end of *Singer* the Court referenced in dicta and left open the issue currently before the Committee:

> We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" . . . or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.[42]

This issue was not meaningfully discussed at oral argument in *Singer*.[43]

III. Constitutionality of the Draft Rule

It is unlikely that the government could successfully challenge the proposed emergency rule on the ground that it would be unconstitutional for a court to hold a bench trial over the opposition of the government. The current draft emergency rule concerning bench trials states that "[i]f a defendant waives a jury trial in writing, the court may conduct a bench trial without government consent if, after providing an opportunity for the parties to be heard, the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights." The dicta in *Singer* concerning "passion, prejudice [or] public feeling" is the closest the Court has come to explicitly stating that there might be some circumstances under which a bench trial might be required notwithstanding the government's opposition. Even without an explicit ruling, there is nothing in the doctrine that suggests the government has any constitutional right to prevent the defendant's waiver of jury trial rights. Further, the draft rule is consistent with the doctrinal logic that applies in the analogous context of peremptory challenges and is also consistent with the reasoning of courts that have allowed bench trials over government objections in the past.

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[39] *See id.*
[40] *Id.* at 34–35.
[41] *Id.* at 36–37 (citing Orfield, *supra* n.1 at 69–72).
[42] *Id.* at 37–38.
[43] *See* Oral Argument, *Singer v. United States* (1964) (No. 64-42), https://www.oyez.org/cases/1964/42.

The draft rule is consistent with Supreme Court doctrine concerning the right to trial by jury and the defendant's right to waive it. *Patton* established that the right to trial by jury, founded in Article III as well as in the Sixth Amendment, is a right belonging to the defendant and which the defendant may choose to waive.[44] The jury requirement is not jurisdictional, so the Court does not need to use a jury in order to exercise its power to hear and decide a case.[45] Nothing in *Patton* or *Singer* suggests that the jury trial exists for the benefit of the prosecution or that it protects the public (through the prosecution). Needless to say it is not a right held by the prosecutor as an individual. Nor is there any suggestion that victims hold any aspect of the right.

Further, the circumstances under which the draft rule would allow a court to disregard a prosecutor's opposition to a bench trial mirror the circumstances under which a court would find the prosecutor exercised peremptory challenges in an unlawful manner. Peremptory challenges make for a useful point of comparison because, like the prosecutor's veto of a jury trial waiver, the exercise of peremptory challenges is a privilege in the trial process to which the prosecution is ordinarily entitled but which is not founded in constitutional protections and which can be exercised in a way that works against the defendant.[46] In *Batson*, the Court said that "[a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[47] *Batson*'s progeny expanded this protection from race to include gender and national origin.[48] These cases can be characterized as establishing limits on the exercise of peremptory challenges very similar to the draft emergency rule's limits on the exercise of the prosecutor's veto of a jury waiver—the prosecution is entitled to exercise this power, so long as doing so does not trample on other constitutional protections.

Courts that have decided to hold a bench trial over the government's objection or opposition have reasoned along these same lines, even in the absence of an emergency rule explicitly permitting them to do so. For instance, this past summer, a court in the Eastern District of New York identified "Conflicting Constitutional Rights" as a factor to be considered when weighing whether to hold a bench trial over the government's objection.[49] In another recent case,

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[44] *See Patton*, 281 U.S. at 298.
[45] *Id.* at 299 ("[S]ince . . . the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case.").
[46] *See Swain v. Alabama*, 380 U.S. 202, 212–13 (1965) (noting that "[t]he peremptory challenge has very old credentials" and discussing its origins in the common law period).
[47] *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (quotation marks and citation omitted); *see also, e.g.*, (reaffirming a "commitment to jury selection procedures that are fair and nondiscriminatory" and holding "that gender, like race, is an unconstitutional proxy for juror competence and impartiality").
[48] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352 (1991) (national origin).
[49] *U.S. v. Cohn*, No. 19-cr-97, 2020 WL 5050945, at *8 (E.D.N.Y. Aug. 26, 2020). The *Cohn* court's analysis of this factor is not particularly compelling. It identifies first the right to a speedy trial, which the court acknowledged was not a sufficient basis under *Singer* for overriding the

a court in the Western District of Wisconsin expressed concern over whether any jury could remain impartial in a particularly challenging child pornography case.[50] Earlier cases relied on similar rationales. In *United States v. Panteleakis* and *United States v. Braunstein*, district courts in Rhode Island and New Jersey allowed bench trials based in part on the fact that inflammatory and prejudicial articles in local newspapers led the lower courts to believe that it would be impossible to draw an impartial jury.[51] In *United States v. Lewis*, a court in the Western District of Michigan held a bench trial in a case concerning defendants with religious beliefs that forbid their being judged by members of the general public rather than by judges, reasoning that I twas necessary to overrule the prosecutor's usual veto in order to protect the defendants' First Amendment rights.[52]

It is thus unlikely that the draft rule would be found unconstitutional. It would encourage courts to hold bench trials without the government's consent under the same sorts of circumstances courts have already been finding it appropriate to do so. That could be an argument against including the rule—if courts are already doing this, why bother?—but it also suggests that the rationale behind the rule is compelling, and that at least some courts are likely to embrace it.

IV. Government Arguments

As far as I was able to determine, federal and state prosecutors have not taken the position that it would be unconstitutional for a court to hold a bench trial in a criminal case without the prosecution's consent—with one slight exception from 2006. I was able to identify nine criminal cases post-*Singer* in which a Court either decided that it would hold a bench trial without the government's consent or came very close to doing so.[53] Of these, six are over thirty years old. There is nothing in these six opinions that suggest the federal or state governments involved made any constitutional argument regarding their prerogative to veto the choice of a bench trial. I was not able to locate any briefing for these older cases, so it's possible that such an argument was raised but somehow not addressed in an opinion. Of the remaining three cases,

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government veto, *see id.* (citing *Singer*, 380 U.S. at 38), and second the tension between defendant's right to testify in his own defense and his right against self-incrimination, *id.* This tension is implicated by every case that might be tried before a jury, and therefore does not seem like a compelling basis for going against the usual rule.

[50] *U.S. v. Donoho*, No. 19-cr-149, 2020 WL 5350429, at *1–2 (W.D. Wis. Sept. 4, 2020).

[51] *Panteleakis*, 422 F. Supp. at 248; *Braunstein*, 474 F. Supp. at 13 ("All the circumstances involved in [*Panteleakis*] are involved here").

[52] *Lewis*, 638 F. Supp. at 581.

[53] *U.S. v. Donoho*, No. 19-cr-149, 2020 WL 5350429 (W.D. Wis. Sept. 4, 2020); *U.S. v. Cohn*, No. 19-cr-97, 2020 WL 5050945 (E.D.N.Y. Aug. 26, 2020); *U.S. v. U.S. District Court for Eastern District of California*, 464 F.3d 1065 (9th Cir. 2006); *State v. Cruz*, 517 A.2d 237, 244 (R.I. 1986); *United States v. Panteleakis*, 422 F. Supp. 247, 248 (D.R.I. 1976); *U.S. v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968); *United States v. Lewis*, 638 F. Supp. 573, 575, 581 (W.D. Mich. 1986); *Commonwealth v. Wharton*, 435 A.2d 158 (Pa. 1981); *U.S. v. Braunstein*, 474 F. Supp. 1 (D.N.J. 1978).

two are from the past several months and one is from 2006. Each of these warrants further discussion

A. *U.S. v. U.S. District Court for Eastern District of California*, 464 F.3d 1065 (9th Cir. 2006)

I was not able to find the briefs from this case, but I listened to the oral argument recording.[54] In it, the government attorney opened by arguing that the Constitution does not allow a court to hold a bench trial without the prosecution's consent, but he seemed to back away from this claim when pressed on it.

The government characterized *Singer* as having concluded that it was not necessary to evaluate whether a future case might present a set of facts allowing for a bench trial without the government's consent. The government suggested that it was improper for the district court judge to have undertaken a balancing analysis in which he weighed his own ability to judge fairly against the ability of hypothetical jurors to do so. The government's argument was that voir dire and other safeguards like 404(b) were the means by which the defendant can make sure the jury evaluates the case fairly.

One of the judges asked: "What if the court goes through days and days of voir dire and determines it will not be possible to find a fair jury, could the court then overrule the lack of government consent?" (quotation paraphrased). Counsel for the government speculated that the government would probably consent at that point. Pressed on the issue ("What if you didn't?"), he acknowledged that maybe "if it went that far" the court could make a finding that it was *impossible* to find an impartial jury. Government counsel emphasized that this was not what the lower court here had did; the lower court had done an improper balancing test. Nonetheless, the government appears to have agreed when pressed that the court *could* make a finding that an impartial jury was impossible and that in such a case the it could then hold a bench trial without the government's consent.

B. *U.S. v. Cohn*, No. 19-cr-97, 2020 WL 5050945 (E.D.N.Y. Aug. 26, 2020)

In letter briefing in *Cohn*, the U.S. Attorney's Office for the Eastern District of New York took the following position:

> Where, as here, the government does not consent to a nonjury trial, it is not required to "articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver." *Singer*, 380 U.S. at 37. The only exception to the government's right to a jury trial is that its exercise "may not be conditioned or later revoked for a reason that infringes on an individual's constitutional rights," such as to "punish" the defendant for exercising his First Amendment rights. [*United States v. Sun Myung Moon*, 718 F.2d 1210, 1218 (2d Cir. 1983)]. In order

[54] Oral Argument, *U.S. v. U.S. District Court for E.D. Cal.*, 464 F.3d 1065 (9th Cir. 2006), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000024802.

> to override the government's consent under this limited exception, a defendant must provide a "factual predicate" to support an allegation that the government's refusal to consent was designed to violate the defendant's constitutional rights. *See id.* [55]

The court did not address this argument in deciding to hold a bench trial over the government's objections. This is perhaps because it is not a strong argument. The government here conflates two different discussions in *Sun Myung Moon* and its description should not be regarded as accurately reflecting the law even in the Second Circuit.

In *Sun Myung Moon*, the Reverend Sun Myung Moon and another defendant faced charges related to false tax returns fired by the Reverend.[56] Defendants requested a bench trial, which the government opposed, and the issue of the denial was raised on appeal.[57] First, the defense argued "that the government's reason for opposing the defendants' request for a bench trial [was] unconstitutional, so that the judge's acceptance of it was error of constitutional dimension mandating reversal."[58] The Reverend had made public statements to the effect that he was being prosecuted because of his religious beliefs, and according to the defense the prosecution had insisted on a jury trial to "defuse the public criticism that had been leveled by Moon."[59] The defense charged that the insistence on a jury trial "had the effect of punishing Moon for exercising his First Amendment right of free speech."[60] In this context the Second Circuit held that a defendant needed a "factual predicate"—in order to demonstrate that the government's *opposition* was itself unconstitutional.[61]

After this discussion of whether the government's insistence on jury trial was punitive, the Second Circuit turned to Moon's second and separate argument, which concerned the *Singer* issue—the "denial of the right to a fair trial."[62] In this discussion the Court stated the rule from *Singer*—that "[o]rdinarily, insisting that a defendant undergo a jury trial against his will does not run afoul of a defendant's right to due process and a fair trial" but that "there might be cases where the circumstances are so compelling" that this would change," and that Moon's was not such a case.[63] The Court suggested that "[t]he validity of" a claim that a fair jury trial is impossible "is properly shown upon a voir dire of prospective jurors,"[64] but said nothing about a "factual predicate" requirement in this context, as the government's characterization in its *Cohn* letter seems to suggest.

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[55] *Cohn*, Letter, ECF No. 95. No. 19-cr-97 (Aug. 13, 2020).
[56] *See Moon*, 718 F.2d at 1215–16.
[57] *See id.* at 1217–19.
[58] *Id.*
[59] *Id.* at 1217.
[60] *Id.*
[61] *Id.* at 1218.
[62] *Id.*
[63] *Id.* (citing *Singer*, 380 U.S. at 34–37).
[64] *Id.*

C. *U.S. v. Donoho*, No. 19-cr-149, 2020 WL 5350429 (W.D. Wis. Sept. 4, 2020)

In this most recent case, the government's brief collected a number of circuit court cases that, it said, "uniformly upheld a trial court's refusal to grant such waivers without governmental consent."[65] At the same time, the government acknowledged that "a few district courts have compelled bench trials after finding 'potential juror prejudice so pervasive or the issues so complicated that the due process clause required a bench trial.'"[66]

Thus, though the government leads with the fact that all these courts of appeals have upheld refusals to grant waivers, the government again conceded in this case that it is not unconstitutional for a court to proceed with a bench trial over the government's objection under certain circumstances. Regarding the collection of cases where that has happened, the government argued not that those courts were wrong but that "[t]his case [*Donoho*] does not present any of the circumstances that other district courts have found compelling enough to warrant a bench trial."[67]

[65] Gov't Supp. Br. at 4–5, *Donoho*, No. 19-cr-149, 2020 WL 535429 (Aug. 21, 2020), ECF No. 78. The cases collected were: *United States v. Jackson*, 278 F.3d 769, 771 (8th Cir. 2002); *DeLisle v. Rivers*, 161 F.3d 370, 389 (6th Cir. 1998); *United States v. Van Metre*, 150 F.3d 339, 353 (4th Cir. 1998); *United States v. Gabriel*, 125 F.3d 89, 94–95 (2d Cir 1997) (overruled on other grounds by *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705–06 (2005)); *United States v. Clark*, 943 F.2d 775, 784 (7th Cir. 1991); and *Moon*, 718 F.2d 1210.
[66] Br. at 5 (quoting *U.S. v. Lewis*, 638 F. Supp. 573, 576 (W.D. Mich. 1986) and also citing *United States v. Braunstein*, 474 F. Supp. 1 (D.N.J. 1978); *United States v. Panteleakis*, 422 F. Supp. 247, 248 (D.R.I. 1976); and *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968).
[67] *Id.* at 5.

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23-CR-B

March 10, 2023

By Electronic Mail

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

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

Dear Mr. Byron:

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

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

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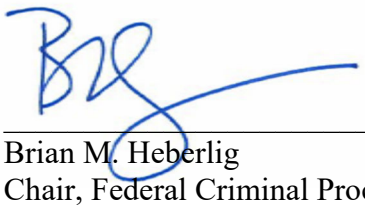
The mission statement of the American College of Trial Lawyers provides:

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

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

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

Respectfully submitted,



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

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

EXHIBIT A

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

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

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

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

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

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

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

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

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

EXHIBIT B

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

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

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

(B) the government consents; and

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

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

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

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

EXHIBIT C

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

Federal Criminal Procedure Committee

Approved by the Board of Regents
February 2023

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

I. INTRODUCTION

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

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

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

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

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

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

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

II. THE BACKGROUND OF RULE 23(A)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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38 *Id.*

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

40 AR.

41 FL, MT.

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

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

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

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

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

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

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

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

Criminal defendants pending

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

Criminal cases terminated

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After weighing all of these factors, the Court overruled the government's objection and ordered that the case proceed to a nonjury trial, provided that the defendant submit a written jury trial waiver and confirm the waiver in open court.[74] This exercise of the Court's discretion to grant a defendant's request for a bench trial after careful consideration of several competing factors suggests to the Committee a possible template for an amended Rule 23.

VII. RECOMMENDATION

The Committee recommends amendment of Rule 23(a) to remove the automatic veto power of the government without impairing the defendant's constitutional right to a fair trial or the government's interest in the integrity of the judicial process. Specifically, the Committee recommends that the rule be amended as follows:

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

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

(B) the government consents; and

(C) the court approves.

(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit a defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant's waiver of a jury trial without the government's consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.[75]

In evaluating possible amendments, the Committee considered recommending an amendment eliminating both the need for government consent and the requirement of court approval. Such an

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72 *Id.*

73 *Id*. at 134-35.

74 *Id*. at 135. There was no trial and no review of the Court's decision in *Cohn* on the defendant's jury trial waiver. That is because, one week after the Court's decision, the defendant pled guilty to one-count Misdemeanor Information and was sentenced to time served.

75 *See* Appendix B for a full draft of the proposed amendment to Rule 23(a), including a proposed comment.

amendment, in the Committee's opinion, has little chance of adoption by the Judicial Conference given the absence of authority for that proposal.[76]

The Committee also considered, but rejected, a potential amendment that would require random selection of a new trial judge where a defendant's request for a bench trial is granted. The Committee concluded that the uncertainty introduced by this requirement would discourage many defendants from requesting bench trials. A further difficulty enforcing such a rule concerns a defendant's potential withdrawal of a jury trial waiver after reassignment to a new judge.

Instead, the Committee recommends removing the need for government consent to a defendant's waiver of a jury trial. The court's approval would still be required, and the court, at its discretion, could require the defendant and the government to submit reasons (*ex parte* if appropriate) supporting their positions. The court would be free to consider a variety of factors, like those set forth by the court in *Cohn*, in deciding whether to grant a bench trial. The court could also *voir dire* the defendant to ensure the defendant freely and knowingly waives the right to a jury trial.

The Committee submits that its proposed amendment to Rule 23(a) would promote both fairness and efficiency, and would ultimately lead more defendants to exercise their constitutional right to trial.

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76 As noted in *United States v. Armbruster*, 2021 WL 2322566 (E.D. Wis. 2021), a case after *Cohn*, "no United States Court of Appeals appears to have approved a defendant's waiver of a jury over the government's objection. Indeed, the circuits that have considered this issue have uniformly upheld the trial court's refusal to grant such waivers without governmental consent." *United States v. United States Dist. Court*, 464 F.3d 1065, 1070 (9th Cir. 2006); *see also United States v. Clark*, 943 F.2d 775, 784 (7th Cir. 1991) (affirming denial of bench trial); *United States v. Alpern*, 564 F.2d 755, 758 (7th Cir. 1977) (same).

State Survey on Jury Trial Waivers

APPENDIX A

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Alabama	In writing or in open court on record AL R RCRP Rule 18.1	Ala.Code 1975 § 15-14-30	No constitutional right for accused to waive trial by jury, Ala.Const. Art. I, § 11, Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979)	Yes, prosecution must consent to waiver (Rule 18)	Court must approve, Rule 18, Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979)	Verdict will stand unless the judge's factual findings are "clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence." Baily v. City v. Ragland, 136 So.3d 498 (Ala. Ct. Crim. App. 2013). A presumption of correctness applies.	An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989). Presumption of correctness applies.	N/A. Same level of deference given to both. Messelt v. State, 351 So.2d 640 (Ala. Ct. Crim. App. 1977) ("[O]n appeal, the judgment of a trial court upon evidence taken ore tenus is to be treated like the verdict of a jury, and will not be disturbed unless plainly contrary to the weight of the evidence.").
Alaska	In writing for felony cases; for misdemeanor cases waiver may be in writing or made on the record in open court AK R RCRP Rule 23	None	No constitutional right for accused to waive trial by jury, AK CONST. Art. I, § 11	Yes, prosecution must consent to waiver (Rule 23)	Court must approve, Rule 23	Substantial Evidence Standard: The substantial evidence test governs appellate review of verdicts in judge-tried cases. Y.J. v. State, 130 P.3d 954 (Alaska 2006). Verdict will stand as long as "evidence exists to support the judge's conclusion." Id.	Substantial Evidence Standard: The "same test that an appellate court applies to jury verdicts" also applies to judge-tried cases. Shayen v. State, 373 P.3d 532 (Alaska 2015).	N/A. Same level of deference given to both. Shayen v. State, 373 P.3d 532 (Alaska 2015) (recognizing that the "same test that an appellate court applies to jury verdicts" also applies to judge-tried cases).
Arizona	In writing or on the record in open court on record; the court must address the defendant personally, inform the defendant of the defendant's right to a jury trial, and determine that the defendant's waiver is knowing, voluntary, and intelligent AZ ST RCRP Rule 18.1	None	AZ CONST Art. 6 § 17: a jury may be wived by the parties in a criminal case with the court's consent	Yes, State must consent to waiver (Rule 18.1)	Court must approve, Rule 23	Substantial Evidence Standard. State v. Natzke, 25 Ariz. App. 520 (1976).	Substantial Evidence Standard. State v. Flowers, 110 Ariz. 566 (1974)	N/A. Same level of deference given to both.
Arkansas	In writing or in open court or through counsel in open court in presence of defendant AR R RCRP Rule 31.2; In fine only misdemeanor case trial may be waived by attorney, corporation by waive through attorney or corporate officer AR R RCRP Rule 31.3	AR ST § 16-89-108 Waivers in certain cases	AR CONST Art. 2, § 7 Jury trials; rights	Yes, except in capital cases	In capital cases, the court must determine that the defendant's waiver is voluntary	Substantial Evidence Standard. Colen v. State, 2022 Ark. App. 148	Substantial Evidence. See Harjo v. State, 2017 Ark. App. 337.	N/A. Same level of deference given to both. Cook v. State, 878 S.W.2d 765 (Ark. App. 1994) (en banc) ("If the decision of the court or jury is supported by substantial evidence, we will affirm.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
California	CA PENAL § 1167 Waiver of jury trial; announcement of findings; form; entry	None	CA CONST Art. 1, § 16 Jury trial; in open court by defendant and defendant's counsel	Yes, "by consent of both parties," See CA CONST Art. 1	"[T]he court retains the right to require a jury trial." People v. Kipnis, 85 Cal. Rptr. 547 (Ca. Ct. App. 1970).	Substantial Evidence Standard: In reviewing a judgment based upon a statement of decision following a bench trial, Court of Appeal applies substantial evidence standard of review to the trial court's findings of fact, and under this deferential standard of review, findings of fact are liberally construed to support the judgment and Court considers evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. Thompson v. Asimos, 6 Cal. App. 5th 970, 212 Cal. Rptr. 3d 158 (2016). We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. People v. Perryman, No. B265183, 2016 WL 7217187, at *5 (Cal. Ct. App. Dec. 12, 2016). A reversal for insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" the trial court's verdict. Id.	Substantial Evidence Standard: To prevail on a sufficiency of the evidence argument on appeal, defendant must present his case to appellate court consistently with the substantial evidence standard of review. People v. Paredes, 61 Cal. App. 5th 858, 276 Cal. Rptr. 3d 165 (2021), review denied (May 26, 2021). To prevail on a sufficiency of the evidence argument on appeal, defendant must set forth in his opening brief all of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade appellate court that evidence cannot reasonably support the jury's verdict. Id.	N/A. Same level of deference given to both.
Colorado	CO ST RCRP Rule 23	CO ST § 16-10-101	No. People v. Dist. Ct. of Colorado's Seventeenth Jud. Dist., 843 P.2d 6, 8 (Colo. 1992).	YES. Prosecution has right to refuse to consent to waiver in all cases in which the accused has the right to request a trial by jury. CO ST § 16-10-101	Where the prosecution objects to defendant's waiver of trial by jury, and the defendant contends that trial by jury would result in a due process violation, the decision as to waiver rests with the trial court. People v. Dist. Ct. of Colorado's Seventeenth Jud. Dist., 843 P.2d 6, 11 (Colo. 1992).	Manifestly Erroneous Standard. Vigil v. Lamm, 190 Colo. 180 (1976).	Manifestly Erroneous standard.	N/A. Same level of deference given to both. People v. Tomaske, 2022 WL 1573059 (Colo. Ct. App. May 19, 2022), reh'g denied (June 2, 2022) ("[S]ufficiency challenges after a bench trial are no different than those after a jury trial.").
Connecticut	None (see statute)	Conn. Gen. Stat. Ann. § 54-82b	Ct. Const. art. 1, § 8	Not specified. CT ST § 54-82b, CT R SUPER CT CR § 42-1.	Court examines totality of the circumstances surrounding the waiver to determine if defendant intentionally relinquished or abandonded defendant's constitutional right to jury. State v. Ells (1995) 667 A.2d 556, 39 Conn.App. 702.	. Same standard applies to both. State v. Weathers, 339 Conn. 187 (Conn. 2021).	Same standard applies to both. State v. Weathers, 339 Conn. 187 (Conn. 2021).	N/A. Same level of deference given to both. State v. Weathers, 260 A.3d 440 (Conn. 2021) (recognizing that in bench trials "the normal rules for appellate review of factual determinations apply and the evidence must be givena construction favorable to the court's verdict").
Delaware	DE R SUPER CT RCRP Rule 23	None. See state rule.	None. See state rule.	YES. DE R SUPER CT RCRP Rule 23	Court must consent to waiver for it to be valid. DE R SUPER CT RCRP Rule 23.	Clear Error Standard: A deferential standard of review is applied to factual findings by a trial judge: those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous. Burrell v. State, 953 A.2d 957 (Del. 2008).	Clear Error Standard. Banther v. State, 823 A.2d 467 (Del. 2003).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Florida	FL ST RCRP Rule 3.260 Waiver of jury trial	None. See state rule.	None. See state rule.	YES. FL ST RCRP Rule 3.260	No. Trial by judge is mandatory when both parties agree. Warren v. State, 632 So.2d 204 (Fla. Dist. Ct. App. 1994).	"Competent Substantial Evidence" Standard: When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence because the trial judge is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses. Harrington v. State, 238 So. 3d 294, 297 (Fla. Dist. Ct. App. 2018).	Same standard applies to both.	N/A. Same level of deference given to both. Siewert v. Casey, 80 So. 3d 1114 (Fla. Dist. Ct. App. 2012) ("It is the role of the finder of fact, whether a jury or a trial judge, to resolve conflicts in the evidence and great deference is afforded the finder of fact.").
Georgia	GA R UNIF SUPER CT Rule 33.8	GA ST § 15-10-61	None. See state rule/statute.	YES. Zigan v. State, 281 Ga. 415, 638 S.E.2d 322 (2006)	Court may deny request. See Zigan, 281 Ga. 416 (2006).	Clearly Erroneous Standard: In bench trials, the findings of the trial court will not be set aside unless clearly erroneous and regard must be given to the trial court's opportunity to assess the credibility of the witnesses. Brown v. State, 351 Ga. App. 808, 808, 833 S.E.2d 302, 303 (2019). When evaluating the sufficiency of evidence, the proper standard for review is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Hayes v. State, 292 Ga. 506, 506, 739 S.E.2d 313, 314 (2013). The clearly erroneous test is the same as the any-evidence rule, and, as a result, the Court of Appeals will not disturb fact findings of a trial court if there is any evidence to sustain them. Serdula v. State, 356 Ga. App. 94, 845 S.E.2d 362 (2020), cert. denied (Apr. 5, 2021)	Same standard applies. Moore v. State, 321 Ga. App. 813, 814, 743 S.E.2d 486, 487 (2013).	N/A. Same level of deference given to both. Moore v. State, 743 S.E.2d 486, 487 (Ga. 2013) ("The trial court sits as the trier of fact; its findings are akin to a jury verdict and will not be disturbed if there is any evidence to support them.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Hawaii	Haw. R. Penal P. 23; Haw. R. Penal P. 5(b)(3)	Haw. Rev. Stat. § 806-61	Haw. Const. art. I, § 14	NO. Only court consent required. Haw. Rev. Stat. § 806-61.	"Although the rule indicates the waiver may be given by written or oral consent, the rule does not relieve the court of its obligation to ensure, through an appropriate oral colloquy in court, that the waiver was knowingly, intelligently, and voluntarily given." State v. Gomez-Lobato, 312 P.3d 897, 901 (Haw. 2013).	Clearly Erroneous Standard: Trial court's findings of fact will not be disturbed unless clearly erroneous. State v. Kwong, 149 Haw. 106, 482 P.3d 1067 (2021). "A finding of fact is clearly erroneous when the record lacks substantial evidence to support the finding or, despite substantial evidence in support of the finding, we are nonetheless left with a definite and firm conviction that a mistake has been made." State v. Park, 495 P.3d 392 (Hawaii Court of Appeals 2021).	The Supreme Court reviews the sufficiency of the evidence under the following standard: evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury, and the test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. State v. Delos Santos, 124 Haw. 130, 238 P.3d 162 (2010).	N/A. Same level of deference given to both. State v. Matavale, 166 P.3d 322, 331 (Haw. 2007) ("Evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury.").
Idaho	I.C.R. 23	Idaho Code § 19-1902	Idaho Const. art. I, § 7	YES. Prosecutor's consent is required.	Level of discretion unclear, but Idaho Supreme Court held that trial court may deny accused's waiver of right to jury trial without violating constitutional rights. State v. Creech, 589 P.2d 114 (Idaho 1979).	Substantial Evidence Standard. State v. Clark, 168 Idaho 503, 506–07, 484 P.3d 187, 190–91 (2021).	Substantial Evidence Standard: The appropriate standard of review on an allegation of insufficiency of evidence "is whether there is substantial and competent evidence to support the jury's verdict. State v. Thomas, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999).	N/A. Same level of deference given to both.
Illinois	IL R 18 CIR Rule 30.13; IL R 22 CIR Rule 10.23	725 Ill. Comp. Stat. 5/103-6	Ill. Const. art. I, § 13	No.	No consent or approval required. Discretion limited to whether waiver is voluntary.	Beyond-a-reasonable-doubt standard of review: "A conviction will not be set aside on appeal unless the evidence is so unreasonable, improbable , or unsatisfactory that there remains a reasonable doubt of the defendant's guilt." People v. Walls, 2022 WL 2035719 (Ill. App.).	Beyond-a-reasonable-doubt standard. People v. Bush, 2022 IL App. (3d) 190283	N/A. Same level of deference given to both. People v. Belk, 326 Ill. App. 3d 290 (2001) (recognizing that the "same standard of review" governing sufficiency challenges applies "regardless of whether the defendant receives a bench or jury trial").
Indiana	Ind. R. Crim. P. 22	Ind. Code § 35-37-1-2	Ind. Const. art. I, § 13	NO. State does not have the right to demand a jury trial over an accused's objection. State v. Bonds, 94 N.E.3d 333, 338-39 (Ind. Ct. App. 2018).	Not specified but but court must determine if waiver is voluntarily, knowingly and intelligently made with sufficient awareness of relevant circumstances surrounding its entry and its consequences.	Substantial Evidence. Scott v. State, 895 N.E.2d 369 (Ind. Ct. App. 2008).	Substantial Evidence Standard.	N/A. Same level of deference given to both.
Iowa			Iowa Const. art. I, § 9	No. Defendant has absolute right to nonjury trial. State v. Henderson, 287 N.W.2d 583 (Iowa 1980).	No consent or approval required. Discretion limited to whether waiver is voluntary.	Substantial Evidence Standard: Trial court's verdict in jury-waived trial is binding on appellate court, and appellate court will uphold it unless the record lacks substantial evidence to support such a finding. State v. Fordyce, 940 N.W.2d 419 (Iowa 2020).	Appellate court reviews a trial court's findings in a jury-waived case as it would a jury verdict. State v. Kemp, 688 N.W.2d 785 (Iowa 2004).	N/A. Same level of deference given to both. State v. Kemp, 688 N.W.2d 785 (Iowa 2004) ("An appellate court reviews a trial court's findings in a jury-waived case as it would a jury verdict.")

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Kansas	N/A	KSA § 22-3403(1)	Kan. Const. pmbl. § 5	Yes. Prosecution consent required. State v. Mullen, 51 Kan.App.2d 514 (2015).	Court's consent is required by statute.	Substantial Evidence Standard	Substantial Evidence Standard	N/A. Same level of deference given to both. State v. Reichenberger, 495 P.2d 919 (1972) (recognizing that in a judge-tried case "the facts found, if supported by substantial competent evidence, must be accorded on appellate review the same weight as if found by a jury").
Kentucky	Ky. RCr. 9.26	K.R.S. § 29A. 270	Ky. Const. art. II § 2	Yes. Commonwealth's consent is required.	Court's consent is required.	Substantial Evidence Standard. Anderson v. Commonwealth, 352 S.W.3d 577 (Ky. 2011)	Same standard applies.	N/A. Same level of deference given to both. Simpson v. Commonwealth, 244 S.W. 65 (1922) (recognizing that upon review of a sufficiency challenge from a bench trial "the same effect should be given to the finding of the facts by the court as is given to the verdict of a properly instructed jury").
Louisiana	La. C. Cr. P. Art. 780, 782	None	La. Const. amd. § 17(A)	Yes, per statute.	Court has some discretion to approve defendant's request for trial by jury, separate and apart from deciding whether or not the waiver was voluntary. See State v. Guy, 16 So. 404 (La. 1894) (finding no abuse of discretion based on trial court's refusal to allow defendant to waive trial by jury, where the court had concurred with the jury in the verdict in a motion for new trial, giving the defendant the benefit of a trial by court as well as by jury).	Manifestly/Clearly Erroneous Standard: Trial judge's factual determination is given great weight and will not be disturbed upon appeal unless clearly erroneous. State v. Colomb, 261 La. 548, 260 So. 2d 619 (1972). Under standard for sufficiency of evidence, the pertinent appellate inquiry regarding the sufficiency of the evidence in judge trials must remain, as it does in jury trials, on the rationality of the result and not on the thought processes of the particular fact finder. State v. Marshall, 2004-3139 (La. 11/29/06), 943 So. 2d 362. The standard of appellate review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).	The appellate standard of review in jury and non-jury trials are the same and the appellate courts are to decide whether the trial court's judgment was manifestly erroneous or clearly wrong. The Court of Appeal's function on appellate review is to determine whether evidence was sufficient for the trial court's factual findings, and whether those findings were clearly wrong. Burkett v. Crescent City Connection Marine Div., 98-1237 (La. App. 4 Cir. 2/10/99), 730 So. 2d 479, 484, writ denied, 99-1416 (La. 9/3/99), 747 So. 2d 543.	N/A. Same level of deference given to both. State v. Marshall, 943 So.2d 362 (La. 2006) (explaining that on appellate review of a sufficiency challenge "the pertinent inquiry in judge trials must remain, as it does in jury trials, on the rationality of the result and not on the thought processes of the particular fact finder").
Maine	Me. R. U. Crim. P. 23	None	M.R.S.A. Const. Art. 1, § 6	No.	Court approval required by rule.	Clearly Erroneous Standard: Factual finding in criminal case in which jury has been waived is only clearly erroneous if there is no competent evidence in record to support it. State v. Bartlett, 661 A.2d 1107 (Me. 1995).	When reviewing challenge to sufficiency of evidence to support verdict in bench trial, standard of review is same as that for jury verdict. State v. Gorman, 648 A.2d 967 (Me. 1994).	N/A. Same level of deference given to both. State v. Gove, 379 A.2d 152 (Me. 1977) (rejecting argument that a different standard of appellate review applied to sufficiency challenge from a bench trial, and holding that the same standard applies in both bench trials and jury trials).

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Maryland	Rule 4-246	MD Crim Proc § 6-101	Md. Const. art. 21	No, per rule.	No consent or approval required. Discretion limited to whether waiver is voluntary.	Clearly Erroneous Standard: When reviewing bench trials, an appellate court will review findings of fact under the "clearly erroneous standard," meaning that a finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion. Scriber v. State, 236 Md. App. 332, 181 A.3d 946 (2018).	Court reviews a challenge to the sufficiency of the evidence in a jury trial by determining whether the evidence, viewed in a light most favorable to the prosecution, supported the conviction and whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Smith v. State, 415 Md. 174, 184, 999 A.2d 986, 991 (2010).	N/A. Same level of deference given to both. Chisum v. State, 132 A.3d 882 (Md. 2016) (holding that "the test of the legal sufficiency of the evidence to support the conviction is the same in a jury trial and in a bench trial").
Massachusetts	Mass. R. Crim. P. 19 (a)	Mass. Gen. Laws ch. 263, § 6	Mass. Const. art. XII	NO. Prosecutor has no say over the decision. See Mass. R. Crim. P. 19 (a); Mass. Gen. Laws ch. 263, § 6; Mass. Const. art. XII.	Court may deny defendant's waiver of trial by jury "for any good and sufficient reason provided that such refusal is given in open court and on the record." See Mass. R. Crim. P. 19 (a); Commonwealth v. Gebo, 188 N.E.3d 80, 90 (Mass. 2022).	Clearly Erroneous Standard: On review of a jury-waived trial, the Supreme Judicial Court generally accepts the trial judge's findings of fact unless they are clearly erroneous. Com. v. Pugh, 462 Mass. 482, 969 N.E.2d 672 (2012). "A finding is 'clearly erroneous' when althoguh there is evidence to support it, the reviewing court of the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id.	Appellate court reviews "the evidence presented at trial, otgether with reasonable inferences drawn therefrom, in the light most favorable to the Commonwealth to determine whether any rational jury could have found each element of the offense beyond a reasonable doubt." Commonwealth v. Morrison,, 150 N.E.3d 826 (Mass. App. 2020).	N/A. Same level of deference given to both.
Michigan	Mich. Ct. R. 6.401	Mich. Code Crim. P. 763.3	Mich. Const. art. I, § 20	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Mich. Code Crim. P. 763.3; People v. Kirby, 487 N.W.2d 404, 406 (Mich. 1992).	Court's approval is required. See Mich. Code Crim. P. 763.3; People v. Kirby, 487 N.W.2d 404, 406 (Mich. 1992).	Clear Error Standard: Trial court's factual findings in a bench trial are reviewed for clear error. People v. Anderson, No. 354860, 2022 WL 981299 (Mich. Ct. App. Mar. 31, 2022). Standard of review for sufficiency of evidence in bench trial is whether trial court clearly erred in its ruling, or viewing evidence in light most favorable to prosecution, whether rational trier of fact could find essential elements of crime were proven beyond reasonable doubt. People v. Gay, 149 Mich. App. 468, 386 N.W.2d 556 (1986).	Same standard applies as in bench trials. People v. Oros, 917 N.W.2d 559, 564 (2018).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Minnesota	Minn. R. Crim. P. 26.01	None (see State Procedural Rule)	Minn. Const. art. I, § 4	NO. Prosecutor has no say over the decision. See State v. Lessley, 779 N.W.2d 825 (Minn. 2010).	Yes. Court's approval is required	Clearly Erroneous Standard: A trial court's findings, as trier of fact in a criminal case, will not be set aside unless clearly erroneous. State v. Wiley, 348 N.W.2d 86 (Minn. Ct. App. 1984), aff'd, 366 N.W.2d 265 (Minn. 1985).	Where defendant waived his right to jury trial in criminal prosecution, trial court's findings will be given the same weight as a jury verdict. State v. Knowlton, 383 N.W.2d 665 (Minn. 1986). Findings of the district court, after waiver of a jury trial by a defendant, are entitled to the same weight on appeal as a jury verdict. State v. Tracy, 667 N.W.2d 141 (Minn. Ct. App. 2003).	N/A. Same level of deference given to both. State v. Holliday, 745 N.W.2d 556 (Minn. 2008) ("'The appellate court reviews criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions.").
Mississippi	Miss. R. Crim. P. 18.1	None (see State Procedural Rule)	Miss. Const. art. 3, § 31	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Miss. R. Crim. P. 18.1.	Court must consent to the waiver before it can be valid. See Miss. R. Crim. P. 18.1	Manifestly Erroneous/ Subtantial Evidence Standard: "For review of the findings of a trial judge sitting without a jury, this Court will reverse 'only where the findings of the trial judge are manifestly erroneous or clearly wrong.'" Amerson v. State, 648 So. 2d 58, 60 (Miss. 1994). Such error does not occur if there is substantial, credible, and reasonable evidence supporting the decision. Briggs v. State, 337 So. 716 (MIss. 2022). There must be substantial evidence showing that the trial judge was manifestly wrong. Solitro v. State, 246 So.3d 941 (Miss. Ct. App. 2018).	Appellate court "will not disturb a verdict when substantial evidence supports it." Bridges v. State, 716 So.2d 614, 617 (Miss. 1998).	N/A. Same level of deference given to both.
Missouri	Mo. R. RCRP Rule 27.01, in felony cases, waiver must be made in open court with the defendant present or present by video and entered on the record	None (other than an ordinance for traffic violations), MO R ORD AND TRAF VIOL Rule 37.61	Mo. Const. Art. 1, § 22a, in every criminal case, any defendant with the assent of the court may waive a jury trial and submit the trial of such case to the Court.	Not by statute, but the court has discretion and must assent in order for the defendant to have a bench trial.	Waiver may only be made "with the assent of the court." Mo. R. RCRP Rule 27.01(B). "There is no absolute right to be tried by court rather than jury." State v. Hornbuckle, 746 S.W.2d 580 (Mo. App. 1988).	The standard of review is the same for a bench trial as it is for a case tried before a jury. "This court's review of a court-tried case is the same as for a case tried by a jury." State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996). The court "view[s] all evidence in the light most favorable to the state and affirm the trial court's judgment if there is substantial evidence to support its findings." State v. Bledsoe, 920 S.W.2d 538 (Mo. App. 1996)	The standard of review is the same for a bench trial as it is for a case tried before a jury. "This court's review of a court-tried case is the same as for a case tried by a jury." State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996). The court "view[s] all evidence in the light most favorable to the state and affirm the trial court's judgment if there is substantial evidence to support its findings." State v. Bledsoe, 920 S.W.2d 538 (Mo. App. 1996)	N/A. Same level of deference given to both. State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996) ("This court's review of a court-tried case is the same as for a case tried by a jury.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Montana	None	Mont. Code Ann. § 46-16-110. Waiver may be made with the written consent of both parties.	Mont. Const. Art. 2 § 26	Written consent "of the parties" is required for the defendant to waive his/her right to a jury trial. Mont. Code Ann. § 46-16-110. This has been costrued as requiring written consent forom the prosecutor. State ex. Rel. Long v. Justice Court, Lake County, 156 P.3d 5, 8 (Mont. 2007).	Not clear. The statute requires court approval to try case to less jurors than the constitution guarantees, but the following provision allowing waiver by written consent of the parties does not contain similar language requiring court approval. Mont. Code Ann. 46-16-110.	"On appeal, we simply determine if there is substantial evidence to support the defendant's guilt beyond a reasonable doubt." State v. Longacre, 542 P.2d 1221, 1222 (Mont. 1975). "[I] n determining whether there is substantial evidence to support the verdict entered by the trial court, this Court will examine the evidence in the light most favorable to the state." State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979)."	Same standard as bench trial. "Thus, the substantial evidence test applies to appeals both from judge and jury convictions. Therefore, in determining whether there is substantial evidence to support the verdict entered by the trial court, this Court will examine the evidence in the light most favorable to the state." State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979).	N/A. Same level of deference given to both. State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979) ("'Thus, the substantial evidence test applies to appeals both from judge and jury convictions.")
Nebraska	None	There is no statute specific to waiver in criminal cases, except for waiver to as jury trial in cases involving obscenity. See Neb. Stat. Ann. § 28-814. Neb. Stat. Ann. § 25-1126 discusses waiver of jury trials but is not specific to criminal cases. The Nebraska Supreme Court has held that a written waiver of jury trial signed by defense counsel in a criminal case and acquiesed in by defendant is a valid waiver. State v. Klatt, 219 N.W.2d 761 (Neb. 1974).	None	No procesutor consent required. State v. Carpenter, 150 N.W.2d 129 (Neb. 1967)	Consent of court required, but courts should permit waiver "whenever it will promote the fair, reasonable, and efficient administration of justice." State v. Godfrey, 155 N.W.2d 438 (Neb. 1968).	"A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous." State v. Masters, 524 N.W.2d 342, 345 (Neb. 1994). "A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction." State v. Masters, 524 N.W.2d at 345.	"On review, criminal conviction must be sustained if the evidence, viewed and construed most favorably to the state, is sufficient to support the conviction; in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury, which are within the jury's province for disposition." State v. Larsen, 586 N.W. 2d 641, 646-647 (Neb. 1998).	N/A. Same level of deference given to both. State v. Masters, 524 N.W.2d 342, 345 (Neb. 1994) ("A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.")
Nevada	None	Procesutor consent is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1. Defendant can waive a trial by jury if done so in writing with the approval of the court and consent of the prosecutor not less than 30 days before trial except for capital cases, which much be tried by jury.	None	Procesutor consent is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1	Court approval is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1	"[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mitchell v. State, 192 P.3d 721, 727 (Nev. 2008).	"The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution." Morgan v. State, 416 P.3d 212 (Nev. 2018).	N/A. Same level of deference given to both.
New Hampshire	NH R. Crim. Rule 21	NH Rev. Stat. Ann. § 606:7. Defendant may waive the right in writing at the time of a plea or before the jury is impaneled, and file the written waiver with the clerk of court. Court or prosecutorial approval is not required.	None	Consent of the state is not required. NH R. Crim. Rule 21(b).	Court approval is not required. NH Rev. Stat. Ann. § 606:7	" A challenge to the sufficiency of the evidence raises a claim of legal error; therefore, our standard of review is de novo. To prevail upon a challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Vincelette, 214 A.3d 158 (N.H. 2019) (internal citations omitted).	Same as for bench trial. See State v. Morrill, 156 A.3d 1028, 1036 (N.H. 2017).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
New Jersey	N.J. Ct. R. 1:8-1	None	None	No; but notice must be given to the prosecuting attorney who shall have an opportunity to be heard. (Rule 1:8-1(a))	Court must approve waiver. (Rule 1:8-1(a)). A defendant must sign a jury waiver form which advises that (i) a jury is composed of 12 members of the community, (ii) the defendant may participate in the selection of jurors, (iii) all 12 jurors must unanimously vote to convict, and (iv) if a jury trial is waived, a judge a lone will decide guilt or innocence. If signed, the trial judge must engage in a colloquoy to address these four points and the voluntariness of the waiver). See State v. Blann, 217 N.J. 517, 519, 90 A.3d 1253, 1254 (2014) (NJ Supreme Court excercised its supervisory powers to establish these two mandates to ensure full understanding in waiver of jury trial).	Appellate court must have a definite conviction that the trial court went so wide of the mark that a mistake must have been made. State v. $36,560.00 in U.S. Currency, 673 A.2d 810 (N.J. App. Div. 1996).	Appellate court can only disturb jury findings if the jury could not have reasonably used the evidence to reach its verdict. State v. Morgan, 33 A.3d 527 (N.J. App. Div. 2011).	N/A. Same level of deference given to both.

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
New Mexico	N.M. R. Crim. P. Dist. Ct. 5-605; NM R MAG CT RCRP Rule 6-602; NM R METRO CT RCRP Rule 7-602	in metropolitan court: NM ST § 34-8A-5	N.M. Const., art. II, § 12.	In metropolitan court and magistrate court, jury trial for misdemeanors or offenses where the potential aggregate penalty includes imprisonment in excess of 6 months can be waived with court and prosecutor consent. NM R METRO CT RCRP Rule 7-602; NM R MAG CT RCRP Rule 6-602. In district court, may waive with court and prosecutor consent. NM R DIST CT RCRP Rule 5-605.	Same	"The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.... In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." State v. Knight, 2019-NMCA-060, ¶ 11, 450 P.3d 462, 465–66 (bench trial).	The standard by which an appellate court reviews a jury verdict for sufficiency of the evidence is well-established. "Evidence is viewed in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." State v. Garcia, 2011–NMSC–003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation marks and citations omitted). We then determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." Id. We have made clear that "[b]ecause an appellate tribunal does not enjoy the same exposure to the evidence and witnesses as the jury at trial, our review for sufficiency of the evidence is deferential to the jury's findings." Id. And we have explicitly said that: New Mexico appellate courts will not invade the jury's province as fact-finder by second-guess[ing] the jury's decision concerning the credibility of witnesses, reweigh[ing] the evidence, or substitut[ing] its judgment for that of the jury. So long as a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction, we will not upset a jury's conclusions. Id. (alterations in original) (internal quotation marks and citations omitted).	N/A. Same level of deference given to both. State v. Quintin C., 451 P.3d 901 (N.M.C.A. 2019) ("In a bench trial, the trial judge takes the place of the jury as the finder of fact, and in this respect, the situation in this appeal is similar to an appeal predicated upon an error in an instruction of law given to a jury." (quotation omitted) (cleaned up)).

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
New York	NY CRIM PRO § 320.10	None	NY CONST Art. 1, § 2	No.	Consent of court. NY CONST Art. 1, § 2	Although the defendant was convicted after a nonjury trial, the appropriate standard for evaluating his weight of the evidence argument is the same, regardless of whether the fact-finder was a judge or jury. People v. Zephyrin, 52 A.D.3d 543, 543, 860 N.Y.S.2d 149, 150 (2008). Thus, we must first determine, based upon the credible evidence, whether a different result would have been unreasonable, and if it would not have been, then we must " 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " Id.	In assessing whether a verdict is supported by the weight of the evidence, we must first determine whether, based upon all of the credible evidence, a different finding would have been unreasonable; if not, we must then "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" to determine whether the jury gave "the evidence the weight it should be accorded" People v. Wilder, 200 A.D.3d 1303, 158 N.Y.S.3d 422, 424 (2021). However, we also accord "[g]reat deference" to the jury's credibility determinations, given that the jurors have the "opportunity to view the witnesses, hear the testimony and observe demeanor" Id.	N/A. Same level of deference given to both. People v. O'Neill, 169 A.D.3d 1515 (N.Y. Supr. Ct. 2019) ("In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference.").
North Carolina		NC ST § 15A-1201	None	Opportunity to object. NC ST § 15A-1201	Consent of trial judge required; hearing required in open court for judicial consent; judge must address defendant personally to determine if defendant fully understands waiver, and determine if state objects to waiver. NC ST § 15A-1201	"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also Sisk v. Transylvania Cmty. Hosp., Inc., 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).	"There was sufficient evidence, in law, to support the finding of the jury, and when this is the case and it is claimed that the jury have given a verdict against the weight of all the evidence, the only remedy is an application to the trial judge to set aside the verdict for that reason." Pender v. North State Life Ins. Co., 163 N.C. 98, 101, 79 S.E. 293, 294 (1913). "We cannot interfere with the jury in finding facts upon evidence sufficient to warrant their verdict." West v. Atlantic Coast Line R.R. Co., 174 N.C. 125, 130, 93 S.E. 479, 481 (1917).	N/A. Same level of deference given to both. State v. Pavkovic, 833 S.E.2d 383 (N.C. App. 2019) ("When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
North Dakota	ND R RCRP Rule 23	ND ST 29-16-02	None	Consent of prosecutor. ND ST 29-16-02	Consent of court. ND RCRP Rule 23	"In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses." State v. Rufus, 2015 ND 212, ¶ 6, 868 N.W.2d 534, 538	Same standard applies.	N/A. Same level of deference given to both. State v. Rufus, 868 N.W.2d 534, 538 (N.D. 2015) ("[S]tandard of review for a criminal trial before the district court without a jury is the same as a trial with a jury.").
Ohio	Ohio Crim. R. 23(a)	R.C. 2945.17; R.C. 2945.05.	Ohio Const. art. I, § 10	No.	None. "[T]he trial court cannot reject a defendant's waiver of the right to a jury trial." State v. Van Sickle, 629 N.E.2d 39, 44 (Ohio App. 1993).	Same standard as jury trial, but in a bench trial there is a rebuttable presumption that that the court considered the relevant evidence. State v. Pepin-McCaffrey, 929 N.E.2d 476 (Ohio App. 2010).	"When reviewing sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in a light most favorbale to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Rucker, 113 N.E.3d 81, 91-92 (Ohio App. 2018) (quotation omitted).	N/A. Same level of deference given to both. State v. Webb, 1991 WL 253811, at *3 (Ohio Ct. App. Nov. 15, 1991) ("The same standard applies if the criminal conviction is the result of a bench trial, rather than a trial to a jury." (citing State v. Swiger, 214 N.E.2d 417 (Ohio 1966))).
Oklahoma	None	None	Okla. Const. art. II, §§ 19, 20	Yes. "[A] defendant cannot waive a jury trial without the consent of both the State and the trial court." Hinsley v. State, 280 P.3d 354, 356 (Okla. Ct. Crim. App. 2012).	Yes. The trial court must consent to the waiver.	"[W]here a jury is waived, and the case tried to the court, his findings, as to the guilt of the defendant, will not be reversed where there is any competent evidence in the record, together with reasonable inferences and deductions, to be drawn therefrom supporting the court's findings." Kinder v. State, 438 P.2d 302, 303 (Okla. Ct. Crim. App. 1968).	"[W]hether the evidence, taken in the light most favorable to the prosecution, permits any rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt." Thompson v. State, 429 P.3d 690, 694 (Okla. Ct. Cirim. App. 2018).	N/A. Same level of deference given to both. Martin v. State, 547 P.2d 396 (O.C.C.A. 1976) ("Where a jury is waived and the case is tried before the court, the weight and credibility of the evidence as determined by the court is the same as if determined by the jury and will be given the same force and effect.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Oregon	None (criminal procedural rules are statute-based only)	O.R.S. § 136.001	Or. Const. art. I, § 11	No. Oregon Supreme Court held that the statute granting prosecution right to veto defendant's waiver of jury trial was unconstitutional under Oregon Constitution.	Court has discretion to allow defendant to waive a jury trial, though not controlling, must consider the prosecutior's expressed preference for or against defendant's waiver	""This court reviews questions of the sufficiency of the evidence . . .by examining the evidence in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential element of the crime beyond a reasonable doubt. . . . This court's decision is not whether we believe that defendant is guilty beyond a reasonable doubt, but whether the evidence is sufficient for the jury to so find." State v. Moore, 927 P.2d 1073, 1094 (Or. 1996) (quoting State v. Cunningham, 880 P.2d 431 (Or. 1994)).	Same standard as bench trial	N/A. Same level of deference given to both. State v. Lammers, 562 P.2d 1223 (Ore. App. 1977) ("'The court's findings on factual matters are as binding as a jury verdict.").
Pennsylvania	Pa. R. Crim. P. 620	None (42 Pa.C.S. 5104 held unconstitutional)	Pa. Const. art. 1, § 6	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver)	Court's approval is reuqired. Commonwealth v. Giaccio, 457 A.2d 875 (Pa. Super. 1983).	"[W]hether, when viewed in a light most favorable to the verdict winner, the evidence at trial and all reasonable inferences therefrom are sufficient for the trier of fact to find that each element of the crimes charged is established beyond a reasonable doubt." Commonwealth v. Akhmedov, 216 A.3d 307, 322 (Pa. Super. 2019).	Same standard as bench trial. Commonwealth v. Lee, 956 A.2d 1024 (Pa. Super. 2008).	N/A. Same level of deference given to both. Commonwealth v. Lee, 956 A.2d 1024 (Pa. Super. 2008) (recognizing that the same "standard of deference" applies in bench trials and jury trials).
Rhode Island	R.I. Super. R. Crim. P. 23	Gen. Laws § 12-17-3.	R.I. Const. art. 1, §§ 10, 15	No.	No consent or approval required. Discretion limited to whether waiver is voluntary.	Same standard as jury trial with this additional qualification: The "appellate court will uphold the findings of a trial justice presiding over a criminal bench trial unless it can be shown that he overlooked or misconceived relevant and material evidence or was otherwise clearly wrong." State v. Berroa, 6 A.3d 1095, 1100 (R.I. 2010).	Whether, "viewing the light most favorable to the prosecution, no reasonable jury could have rendered [the guilty verdict]." State v. Gaffney, 63 A.2d 888, 893 (R.I. 2013).	Bench trial. State v. Gianquitti, 22 A.3d 1161, 1165 ("[F]actual findings of a trial justice sitting without a jury are granted an extremely deferential standard of review.")
South Carolina	SCRCrimP 14	S.C. Code Ann. § 22-2-150 (Applies to Magistrates only) S.C. Code Ann. § 14-25-125 (Applies to Municipal Courts only)	S.C. Const. art. I, § 14	Prosecution has veto power over defendant's ability to waive (i.e., A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.)	Yes. The trial court must consent to the waiver.	Clear Error Standard. State v. Black, 400 S.C. 10 (2012).	Same as bench trial.	N/A. Same level of deference given to both.
South Dakota	S.D. Codified Laws § 23A-18-1	S.D. Codified Laws § 23A	S.D. Const. art. VI, § 6 and § 7	Prosecution has veto power over defendant's ability to waive. (i.e., "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing or orally on the record with the approval of the court and the consent of the prosecuting attoney.")	Yes. The trial court must approve the waiver.	Clear Error: "Findings made pursuant to rule granting a criminal court authority to find facts specially in a case tried without a jury are not to be set aside unless clearly erroneous." State v. Catch the Bear, 352 N.W.2d 640 (S.D. 1984).	Same standard as bench trial.	N/A. Same level of deference given to both. State v. Nekolite, 851 N.W.2d 914 (S.D. 2014) ("A general finding of guilt by a judge [in a nonjury trial] may be analogized to a verdict of 'guilty' returned by a jury.").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Tennessee	Tenn. R. Crim. P. 23	Tenn. Code Ann. § 27-3-131 (Appeals in Misdemeanor cases) Tenn. Code Ann. § 39-13-205 (1st degree murder; jury trial; waiver) Tenn. Code Ann. § 39-13-204 (1st degree murder; sentencing factors) Tenn. Code Ann. § 40-1-109 (Misdemeanor cases in general session courts) Tenn. Code Ann. § 40-20-105 (Guilty pleas; waiver of jury trial) Tenn. Code Ann. § 40-35-203 (Imposition of sentence)	Tenn. Const. art. I, § 6 and § 9	Prosecution has veto power over defendant's ability to waive (i.e., A defendant may waive his right to a jury trial at any time before a jury is sworn. A waiver of jury trial must be: (A) in writing; (b) have the consent of the district attorney general; and (C) have the approval of the court.)	Yes. The trial court must approve the waiver.	Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the ssential elements of the crime beyond a reasonable doubt." State v. Van De Gejuchte, No. M201701173CCAR3CD, 2018 WL 5883972 (Tenn. Crim. App. Nov. 9, 2018)	Same standard as bench trial	N/A. Same level of deference given to both. State v. Hatchett, 560 S.W.2d 627 (Tenn. 1978) ("In a case tried without a jury, the verdict of the trial judge is entitled to the same weight on appeal as a jury verdict.").
Texas	Tex. Code Crim. Proc. Ann. art. 1.13 (Unwaivable in capital felony cases unless attorney representing the state informs court/defendant that it will not seek the death penalty) Tex. Code Crim. Proc. Ann. art. 45.025 (Bench trial)	None	Tex. Const. art. I, § 10 and § 15	Prosecution has veto power over defendant's ability to waive (i.e., A defendant's waiver of a jury is conditioned on the consent and apporval of the attorney representing the State. The consent and approval of the prosecutor must be in writing, signed by the prosecutor, and filed in the court of records before the defendant enters his or her pleas.)	Court has discretion to allow defendant to waive a jury trial subject to the prosecution's veto power (i.e., The consent and approval by the court shall be entered of record on the minutes of the court.).	"We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. Evidence is legally insufficient when the only proper verdict is acquittal. We give deference to the jury's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. We review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency." Infante v. State, 404 S.W.3d 656, 660 (Tex. App. 2012)	Same standard as bench trial	N/A. Same level of deference given to both. A.T.S. v. State, 694 S.W.2d 252 (Tex. Ct. App. 1985) ("Findings of fact entered in a case tried to the court are of the same force and dignity as a jury's verdict upon special issues.")
Utah	Utah R. Crim. P. 17	Utah Code Ann. § 76-3-207 (Capital felony-Sentencing proceeding)	Utah Const. art. I, § 10 and § 12	Prosecution has veto power over defendant's ability to waive (i.e., "All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution. All other cases shall be tried without a jury UNLESS the defendant makes written demand at least 14 dyas prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.")	Court has discretion to allow defendant to waive a jury trial subject to the prosecution's veto power.	Clear Error. State v. Finalayson, 362 P.3d 926 (Utah Ct. App. 2014). "When reviewing a bench trial for sufficiency of the evidence, our review is less deferential, and we sustain the district court's judgment unless it is against the clear weight of the evidence, or if we otherwise reach a definite and firm conviction that a mistake has been made." State v. Washington, 2021 UT App 114, ¶ 8, 501 P.3d 1160, 1163, cert. denied, 509 P.3d 198 (Utah 2022)	"When reviewing a jury verdict on an insufficiency of the evidence argument, we view the evidence and all inferences drawn therefrom in a light most favorable to the verdict. And we will reverse the verdict only when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, we find that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. So long as some evidence and reasonable inferences support the jury's findings, we will not disturb them." State v. Quintana, 2019 UT App 139, ¶ 16, 448 P.3d 742, 744–45	Jury Trials. State v. Walker, 743 P.2d 191 (Utah 1987) (holding that different standards of review apply to sufficiency challenges arising from bench trials versus jury trials); State v. Goodman, 763 P.2d 786 (Utah 1988) (recognizing that the standard of review for sufficiency challenges resulting from bench trials is "less deferential").

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Vermont	Vt. R. Crim. P. 23	None (see State Procedural Rule)	Vt. Const. Ch. 1, art. 10	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Vt. R. Crim. P. 23.	Court must consent to the waiver before it can be valid. State v. Ibey, 352 A.2d 691, 692 (Vt. 1976).	Clear Error. State v. Amdsen, 194 Vt. 128 (2013). "[W]hether the evidence, viewed in the light most favorable to the state and excluding modifying evidence, fairly and reasonably supports a finding beyond a reasonable doubt." State v. Amsden, 75 A.3d 612, 616 (Vt. 2013) (citations omitted).	Same standard applies. State v. Brochu, 949 A.2d 1035 (Vt. 2008)	N/A. Same level of deference given to both.
Virginia	Va. Sup. Ct. Rules, R. 3A:13	Va. Code. Ann. § 19.2-257;258	Va. Const. art. I, § 8	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - Pope v. Commonwealth, 360 S.E.2d 352, 358 (Va. 1987)	Court must consent to the waiver before it can be valid. Pope v. Commonwealth, 360 S.E.2d 352, 358 (Va. 1987)	"When a defendant is convicted by a circuit court sitting without a jury, the circuit court's judgment is entitled to the same weight as a jury verdict and will not be distributed on appeal unless it is plainly wrong or without evidence to support it." Caldwell v. Commonwealth, 298 Va. 517 (Va. 2020).	Same standard as bench trial.	N/A. Same level of deference given to both. Caldwell v. Commonwealth, 298 Va. 517 (Va. 2020) ("When a defendant is convicted by a circuit court sitting without a jury, the circuit court's judgment is entitled to the same weight as a jury verdict and will not be distributed on appeal unless it is plainly wrong or without evidence to support it.")
Washington	Wash. St. Super. Ct. Cr. CrR 6.1	Wash. Rev. Code § 10.01.060	Wash. Const. art. I, § 21	NO. Prosecutor has no say over the decision. See Wash St. Super. Ct. Cr. CrR 6.1; see Wash. Rev. Code § 10.01.060; see Wash Const. art. I, §§ 21, 22.	Court must consent to the waiver before it can be valid. State v. Wicke, 591 P.2d 452, 455 (Wash. 1979).	"Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." State v. Yallup, 416 P.3d 1250 (Wash. App. 2018).	Substantial evidence standard. State v. Green, 616 P.2d 628 (Wash. 1980).	N/A. Same level of deference given to both.
West Virginia	W. Va. R. Crim. P. 23(a)	W. Va. Code § 50-5-8	W. Va. Const. art. III, § 14	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - State v. Redden, 487 S.E.2d 318, 327 (W. Va. 1997)	Court must approve waiver before it can be valid. State v. Redden, 487 S.E.2d 318, 327 (W. Va. 1997)	Clear Error. State v. J.S., 233 W.Va. 198 (2014). "[W]hether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." State v. White, 722 S.E.2d 566, 576 (W. Va. 2011).	Same standard applies.	N/A. Same level of deference given to both.
Wisconsin	None (see statute)	Wis. Stat. Ann. § 972.02	Wis. Const. art. I, § 7	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - State v. Denson, 799 N.W.2d 831, 846 (Wis. 2011).	Court must approve waiver before it can be valid. State v. Denson, 799 N.W.2d 831, 846 (Wis. 2011).	"[W]hether, after viewing the evidence presented in the light most faborable to the prosecution, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. LaCount, 750 N.W.2d 780, 788 (Wis. 2008) (quoting State v. DeLain, 695 N.W.2d 484, 488 (Wis. 2005)).	Same standard applies.	N/A. Same level of deference given to both. State v. Bowden, 288 N.W.2d 139 (Wis. 1980) ("This court, like all appellate courts, accords substantial deference to the trier of fact in a criminal trial. Whether trial is before a jury or to the court, the question on appeals is not whether the reviewing court is convinced of the defendant's guilt beyond a reasonable doubt, but whether it is possible for the trier of fact, acting reasonably, to have been so convinced.")

State	Authority re: When and How Defendant Can Waive Right to Trial By Jury			Does the prosecutor have the ability to veto a defendant's request for a bench trial?	What measure of discretion does the Court have in the process?	Standards of Appellate Review (Sufficiency of Factual Findings)		
	State Procedural Rule	Statute	Constitutional Provision			Standard of Appellate Review from a Bench Trial	Standard of Appellate Review from Jury Trial	Which standard is given more deference?
Wyoming	Wyo. R. Crim. P. 23.	None (see State Procedural Rule)	Wyo. Const. art. I, § 9	YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - Taylor v. State, 612 P.2d 851, 854 (Wyo. 1980).	Court must approve waiver before it can be valid. Taylor v. State, 612 P.2d 851, 854 (Wyo. 1980).	"[W]hether, after viewing the evidence in the light most favorable to the prosecuion, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Willis v. State, 46 P.3d 890, 894 (Wyo. 2002).	Same standard as bench trial	N/A. Same level of deference given to both. Mathewson v. State, 431 P.3d 1121 (Wyo. 2018) (In reviewing a claim that the evidence was not sufficient to support a guilty verdict after a bench trial, we apply the same standards as for reviewing a verdict after a jury trial.").

Rule 23(a) Amendment Draft

APPENDIX B

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

(A the defendant waives a jury trial in writing;

(B) the government consents; and

(C) the court approves.

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

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

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

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

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TAB 6

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

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

RE: **Privacy Protection (Rule 49.1)**

DATE: **March 19, 2023**

Senator Ron Wyden of Oregon has expressed concern that the judiciary is not doing enough to protect Social Security numbers from appearing in court filings. An excerpt from his letter to the Chief Justice has been filed as a suggestion to all of the Advisory Committees. The Criminal Rules suggestion has been docketed as 23-CR-B.

The inclusion of portions of a debtor's Social Security number is of greatest concern to the Advisory Committee on the Federal Rules of Bankruptcy Procedure, and that Committee is giving the question close attention. We recommend that no action be taken on the suggestion until the Bankruptcy Rules Committee has had an opportunity to study it and provide guidance to the other Advisory Committees.

RON WYDEN
OREGON

CHAIRMAN OF COMMITTEE ON FINANCE

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COMMITTEES:
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COMMITTEE ON THE BUDGET
COMMITTEE ON ENERGY AND NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

August 4, 2022

The Honorable John G. Roberts, Jr
Chief Justice
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Dear Chief Justice Roberts:

* * *

Twenty years ago, when Congress required federal courts to publish court records online, it required the Supreme Court to establish rules to protect the privacy and security of Americans whose information was contained in public court records. Congress also required the courts to report back every two years to describe whether the rules were in fact protecting Americans' privacy and security. * * *

* * *

The most recent report, which was provided to my office in draft form, * * * describes how in 2015-2016, the Judicial Conference considered a proposal to redact the entire SSN from court filings, as federal court rules currently permit, and in some cases require, records to include the last four digits. * * *

* * *

Sincerely,

Ron Wyden
United States Senator

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TAB 7

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Removal of Two Items from Study Agenda

DATE: March 24, 2023

We recommend removal of two items now on the Committee's study agenda.

A. Conditional guilty pleas under Rule 11(a)(2)

In 2016 Judge Susan Graber sent an email suggestion (16-CR-C) to the Committee's reporters suggesting "[t]here may be room to clarify Rule 11(a)(2)." She drew the Committee's attention to the divided opinion in *United States v. Lustig*, 830 F.3d 1075 (9th Cir. 2016). After concluding that the district court erred in denying a motion to suppress, the majority in *Lustig* concluded that the error was not harmless because it could have affected the defendant's decision to plead guilty. The test in conditional plea cases, said the court, is whether there is "a 'reasonable possibility'" that the error contributed to the defendant's decision to plead guilty. *Id.* at 1088 (citations omitted). The court noted, *id.*, that this test will necessarily be hard for the government to meet, since the record will seldom contain enough information to permit the court to conclude beyond a reasonable doubt that the error did not contribute to the defendant's plea decision.

Judge Watford concurred, writing separately to highlight his view that the final sentence of Rule 11(a)(2) – "A defendant who prevails on appeal may then withdraw the plea." – leaves no room for harmless error analysis. *Id.* at 1093 (Watford, J., concurring). As long as a defendant has prevailed on appeal, Judge Watford argued, the Rule requires reversal. Under this view, when the defendant reserves the right to appeal a ruling under Rule 11(a)(2), the only question for the appellate court is whether the ruling in question was in error, and harmless error comes into play only in determining whether the district court's ruling could be affirmed.

Both the majority and the concurring opinions cited decisions from other circuits.

The Committee placed Judge Graber's suggestion on the study agenda to monitor whether there was a need to clarify the rule, and we recommend that it now be removed. This appears to be a garden variety disagreement about the interpretation of one of the Rules of Criminal Procedure. We have reviewed the cases as well as the scholarly and professional commentary regarding the *Lustig* decision and Rule 11(a)(2). We have found no indication that later cases have identified this issue as a serious problem, and no indication that any courts have called for a clarification of Rule 11. Moreover, we note that conditional pleas are relatively rare.

B. Plea of not guilty by reason of insanity (21-CR-D)

In 2021 Gerald Gleeson wrote to suggest that the Rules of Criminal Procedure be amended to address cases in which both the prosecution and the defense agree that that the defendant should be found not guilty by reason of insanity. He stated that in a recent case where he was representing the defendant both the government and the defense agreed that the proper outcome was a verdict of not guilty by reason of insanity, but the rules "do not provide for a plea-based outcome in this regard."

18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, Pub. L. 98–473, Tit. II, § 403(a), provides a procedure by which a defendant may be found not guilty by reason of insanity. It states:

> **(b) Special Verdict**.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—
>
> (1) guilty;
> (2) not guilty; or
> (3) not guilty only by reason of insanity.

At present neither the plea and nor the plea agreement provisions of Rule 11 provide expressly for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere." Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense."

At its May 2021 meeting, the Committee discussed the proposal briefly. The reporters explained that an informal practice has developed: the parties agree on the relevant facts, which are submitted to the court for decision in a bench trial. Mr. Crenny, then the Rules Law Clerk, had identified cases from seven circuits that apparently employed this procedure.[1] Mr.

---

1 Third Circuit: *United States v. Stewart*, 452 F.3d 266, 268 (3d Cir. 2006), as amended (July 19, 2006) ("On October 24, 2004, a stipulated fact trial was conducted by the District Court and Stewart was found not guilty by reason of insanity pursuant to 18 U.S.C. § 4242(b)(3).").

Fifth Circuit: *United States v. Brooks*, 33 F.4th 734, 736 (5th Cir.), cert. denied, 143 S.Ct. 242 (2022) ("With a general consensus as to Brooks's insanity in place, the district court accepted stipulated facts at a bench trial and found Brooks not guilty by reason of insanity."); *United States v. Ruston*, 565 F.3d 892, 895 (5th Cir. 2009) ("On October 2, 2006, a Joint Stipulation of Fact was submitted where all parties agreed that Ruston was not guilty by reason of insanity. On October 12, 2006, the district court found Ruston not guilty by reason of insanity . . . .").

Sixth Circuit: *United States v. Beatty*, 111 F. App'x 820, 821 (6th Cir. 2004) ("At a competency hearing held on August 16, 2002, counsel for the government as well as Beatty stipulated that Beatty was currently competent, and a trial date was set. Beatty later filed an unopposed motion to waive jury trial, and a bench trial was begun. After Beatty entered an unopposed plea of not guilty only by reason of insanity, the court entered an order finding Beatty not guilty by reason of insanity.")

Wroblewski informed the Committee that several lawyers in the Department of Justice Criminal Chiefs Working Group had experience with this kind of case. He reported their view that "[t]he workaround procedure of a bench trial on stipulated facts can be a bit cumbersome but is doable." Minutes, May 11, 2021, at 40. One member commented that this procedure also avoids the problem that a "defendant, because of his mental state, may be unable to appreciate his role in the offense or to enter a plea knowingly and voluntarily." Id. That member did not support having Rule 11 contain an NGRI plea provision instead of requiring the current statutory procedure.

The Committee decided to place the suggestion on its study agenda to permit further research. We have updated and expanded Mr. Crenny's research, finding numerous district court cases in which the courts used the stipulated bench trial procedure,[2] and no problems associated with or arising from its use.

We recommend that the Committee remove this suggestion from its agenda. We begin with the principle that the Committee generally does not amend rules unless it has identified a significant problem that can be best solved by an amendment. It is doubtful that this standard has been met here. The stipulated bench trial procedure appears to be an adequate solution. Additionally, it is arguable that that negotiated insanity defense pleas would not be consistent with the Insanity Defense Reform Act, which provides for a special verdict to determine insanity.

Eighth Circuit: *United States v. Mikawa*, 849 F.3d 445, 446 (8th Cir. 2017) ("[T]he parties filed a stipulation of facts in support of an insanity plea based on a doctor's conclusion that Mikawa was unable to appreciate the nature and quality or wrongfulness of his acts at the time of the offense. On November 27, 2012, the district court found Mikawa not guilty by reason of insanity and, per the stipulation, committed him[.]")

Ninth Circuit: *United States v. Carbullido*, 307 F.3d 957, 960 (9th Cir. 2002) ("On the day of trial, the prosecutor and defense counsel signed a 'Joint Statement of Stipulated Facts for Purposes of 18 U.S.C. § 4242,' which was drafted by the prosecutor."); *United States v. Murdoch*, 98 F.3d 472, 474 (9th Cir. 1996) ("The prosecution stipulated to Murdoch's insanity at the time of the shooting. The district court entered a verdict of not guilty by reason of insanity . . . .").

Tenth Circuit: *United States v. Crape*, 603 F.3d 1237, 1239–40 (11th Cir. 2010) ("[T]he Government agreed to the entry of a stipulated verdict of not guilty by reason of insanity. See [18 U.S.C.] §§ 17, 4242(b)(3). The court accepted the stipulation . . . ."); *United States v. Ambers*, 360 F. App'x 39, 41 (11th Cir. 2010) (per curiam) ("Based on the parties' stipulations, the district court found Ambers not guilty only by reason of insanity and ordered him committed."); *see also United States v. Archuleta*, 218 F. App'x 754, 755 (10th Cir. 2007) ("[T]he government and Archuleta entered into a stipulation that led to a finding of not guilty by reason of insanity."). The stipulation and finding mentioned in *Archuleta* was from an earlier prosecution of the same defendant, not the one being appealed here.

Eleventh Circuit: *United States v. Wilks*, 817 F. App'x 924, 925 (11th Cir. 2020) (per curiam) ("Wilks waived his right to a jury trial and proceeded to a bench trial on stipulated facts. Based on the parties' stipulations, the district court found Wilks not guilty by reason of insanity."); United States v. Clark, 893 F.2d 1277, 1278 (11th Cir. 1990) ("After a bench trial on stipulated facts, Clark was adjudicated not guilty only by reason of insanity on June 9, 1988.").

2 *See United States v. Husby*, 2021 WL 2533230, at *1 (W.D.N.C. June 21, 2021); *United States v. Conrad*, 2021 WL 4860752, at *1 (W.D. Va., Oct. 19, 2021); *United States v. Valencia-Mendoza*, 2020 WL 2198169, at *1 (W.D. Tex., May 6, 2020); *Nettles v. Jett*, 2016 WL 8732184 *1 (S.D. Ala., Mar. 11, 2016); *United States v. Smegal*, 2010 WL 4922694, at *1 (D. Mass. Nov. 29, 2010); *United States v. Evans*, 2010 WL 360540 (D.S.C. Jan. 22, 2010).

Negotiated insanity pleas were not discussed in the Senate report accompanying the Act, and it is not entirely clear that they are compatible with the statutory procedure.