ADVISORY COMMITTEE
ON
CRIMINAL RULES

May 5, 2020

AGENDA

Meeting of the Advisory Committee on Criminal Rules
May 5, 2020
(via videoconference)

1. Opening Business

A. Chair's Remarks and Administrative Announcements (Oral Report)

B. **ACTION: Review and Approval of Minutes**
- Draft Minutes of the September 24, 2019 Meeting of the Advisory Committee on Criminal Rules.....19

C. Report of the Rules Committee Staff

- Report on the January 2020 Meeting of the Committee on Rules of Practice and Procedure
  - Draft Minutes of the January 28, 2020 Meeting of the Committee on Rules of Practice and Procedure.....47

- Report on the March 2020 Session of the Judicial Conference of the United States
  - March 2020 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States.....67

- Rules and Projects Pending Before Congress, the Supreme Court, the Judicial Conference, and the Rules Committees
  - Chart Tracking Proposed Rules Amendments 83

- Legislative Update
  - Legislation That Directly or Effectively Amends the Federal Rules (116th Congress) 87

2. ACTION: Proposed Amendment to Rule 16 (for Publication)

A. Reporters' Memorandum (April 9, 2020)..95

B. Reporters' Memorandum to the Subcommittee (March 17, 2020).....101

C. Clean Version of Proposed Amendment to Rule 16 with Committee Note.....117

D. Redline Version of Proposed Amendment to Rule 16.....131

3. Permanent Rules for Emergencies

4. New Suggestion: Erroneous Statutory Reference to Rule 41

5. New Suggestion: Rule 6 (Grand Jury Secrecy)

6. New Suggestion: "Waiver" in Rules 49.1 and 59

7. Next Meeting: October 6, 2020, New Orleans, LA

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Raymond M. Kethledge Chair	C	Sixth Circuit	Member: 2013 Chair: 2019	---- 2022
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James C. Dever III	D	North Carolina (Eastern)	2014	2020
Roger A. Fairfax, Jr.	ACAD	Washington, DC	2019	2022
Gary Feinerman	D	Illinois (Northern)	2014	2020
Michael J. Garcia	JUST	New York	2018	2021
Denise Page Hood	D	Michigan (Eastern)	2015	2021
Lewis A. Kaplan	D	New York (Southern)	2015	2021
Bruce J. McGiverin	M	Puerto Rico	2017	2020
Jacqueline H. Nguyen	C	Ninth Circuit	2019	2022
Catherine M. Recker	ESQ	Pennsylvania	2018	2021
Susan M. Robinson	ESQ	West Virginia	2018	2021
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

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

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TAB 1A

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ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
September 24, 2019
Philadelphia, PA

I. Attendance and preliminary matters

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

And the following persons were present to support the Committee:

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

Judge Molloy called the meeting to order. After thanking the Constitution Center staff for hosting, he recognized Professor Kerr, whose term was ending, and thanked him for his service on the Committee. He also noted his own term was ending and that Judge Ray Kethledge would be taking over in October as Chair.

Turning to the minutes of the last meeting, Judge Molloy asked if there were any changes. Professor Beale stated that the inadvertent omission of a member's name would be corrected. Judge Molloy asked for clarification of a quote, which was confirmed as accurate. A motion to approve the minutes was unanimously approved.

Ms. Womeldorf reported that Judge Molloy had provided a report of the Criminal Rules Committee's actions at the Standing Committee. She noted that the report to the Judicial Conference also

included information about the committee's ongoing work. Regarding new Rule 16.1 and amendments to Rules 5 of the 2254 and 2255 Rules, she said that absent action by Congress, which they do not expect, the amendments should become law in December. The Department of Justice (DOJ) commented that joint training is being conducted with defenders on Rule 16.1.

Ms. Wilson drew attention to the chart in the agenda book showing the pending bills that might affect the Criminal Rules Committee's work, or be of interest to committee members. A bill regarding electronic court records including eliminating costs for PACER had been referred to the Judiciary Committee, and the Rules Committee Staff had been preparing for an upcoming congressional hearing regarding PACER, cameras in the courtroom, and sealed filings. Ms. Womeldorf noted that there was no specific legislation attached to this hearing, except the existing bills on PACER, one to make it free, another to extend it to state courts so they could get their filings on line as well. Judge Fleissig, chair of the Committee on Court Administration and Case Management (the CACM Committee), will address PACER as well as cameras in the courtroom, although the legislative focus on the latter may be the Supreme Court. On the sealing issue, Judge Story will be testifying. The interest appears to be sealing motions in civil cases, not getting into the issues of concern to the Task Force on Protecting Cooperators.

The committee received an update on the Task Force on Protecting Cooperators. Judge St. Eve was meeting with the new Deputy AG to help move the Bureau of Prisons (BOP) along. One problem for the BOP is providing prisoners access to their own sentencing-related material in a secure area with no copies permitted out into the population. Presently, the BOP neither has the space nor the money to create all of these secure areas, so they are exploring with the CACM Committee's staff using kiosks where these materials can be viewed. Mr. Wroblewski reported that most of the many BOP recommendations have been completed or are underway. The big-ticket item was ensuring secure areas for viewing, which they estimated would cost 500 million dollars to build. The BOP would prefer to use electronic kiosks and is investigating that option.

Ms. Womeldorf added that the CACM Committee is working on implementation of the CM/ECF proposal, trying to coordinate with "Next Gen." It is very complicated.

II. Rule 16

Judge Molloy opened the discussion of Rule 16. He noted that this was his eleventh year with the committee, and Rule 16 has been on the agenda for at least eight of those years.

Judge Kethledge, chair of the Rule 16 Subcommittee, reviewed the Subcommittee's work on the amendments. At the miniconference we identified two problems: vagueness in what is disclosed and the lack of a clear deadline. At the spring committee meeting (after the miniconference), there was a consensus that there ought to be some sort of timing requirement. But opinions differed as to whether it should be a numerical standard (*e.g.*, "45 days before trial") or a functional rule (*e.g.*, "reasonably in advance in order to allow adequate preparation for trial"). The committee also agreed that the rule ought to require a complete statement of the expert's opinions, the expert's qualifications, and a list of the expert's testimony for the last four years. And we agreed that the expert should sign the disclosure, but the government did not agree that the expert must prepare it.

The reporters prepared an excellent draft for the subcommittee, which discussed the draft in July and then discussed a revised draft in August. After some further revisions, the subcommittee unanimously approved the proposal that is before the committee now, in the agenda book.

Judge Kethledge summarized the issues the subcommittee had discussed.

Summary. The first issue was what to call this disclosure. The current rule calls it a "summary," but the subcommittee thought we need a break from that word. Some liked the word "report" but to others that suggested a lot of production, binders, and shiny covers. In the end, the subcommittee restructured the sentence to eliminate the word summary and not to try to replace it with another label that might be divisive. Instead, the proposal simply says each party must "disclose" the following information, and lets those substantive requirements speak for themselves. The disclosure must be provided in writing.

Time for disclosure. The subcommittee chose a functional standard: each party should get the information early enough to have adequate time to prepare for trial, which is the core goal of this project. This is not a great issue for a national one-size-fits-all approach. Different districts have very different caseloads and individual cases are different. The person with the most information to decide when the disclosure should be made in a particular case is the district judge in that case. In addition to the functional standard, the subcommittee added the requirement that the district court or a local rule MUST set a deadline. Presumably this will become part of the Rule 16.1 process. The parties will probably talk about it first when they meet and confer, then they will probably go to the court with whatever they worked out. The rule is unequivocal: the court must impose a deadline.

Complete statement. The rule requires "a complete statement" of "all opinions." That is not redundant, because you could have an incomplete statement of all opinions or a complete statement of some.

Signature. The expert must sign the disclosure. This provides a basis for impeachment of the expert should the expert get crosswise with the disclosure; it is less concerned with providing information to prepare for trial. The expert has to "approve" and "sign" the disclosure. But the expert does not have to "prepare" it, which would be very costly for the party presenting the expert. Requiring the expert to approve and sign gives counsel a basis for cross examination if an expert is veering from the scope of disclosure.

Reciprocity. Judge Kethledge said there has been a concern from the defense side that they want to get these disclosures from the government but to some extent they do not want to give them to the government. There has been a sense that the defense should only have to provide reports for experts who would be responsive to an expert for whom the government has made a disclosure. But if the defense has an expert on an altogether different subject as to which the government has not made a disclosure, then they should not have to provide it.

But, Judge Kethledge emphasized, that is not the way discovery works under the current rule, which provides for full reciprocity. If the defense asks for expert reports, the government has to give all their experts' information. And then, if the government asks, the defense has to give over all of their expert reports.

The subcommittee chose not to depart from the current rule. Amending Rule 16 is difficult. Adding an unprecedented change in reciprocity would make the project radically harder. In the absence of a very strong showing of the need to do that now, the Subcommittee decided not to pursue any change in reciprocity.

Historical context. There have been several attempts to amend Rule 16 over the past many years. Judge Kethledge urged the committee to be mindful it was walking past a graveyard of failed Rule 16

amendments. Both sides had to make compromises in this process. The defense would have preferred less reciprocity, and wanted the word "report." They did not get those. The government was fine with the status quo, and did not want any changes in Rule 16; however, it was open minded, heard the problems with the current rule, and has tried to find ways to fix them. The government has worked in good faith, very constructively ever since the miniconference. They made compromises. For example, they did not want a "complete statement" of all opinions.

Judge Kethledge concluded that there have been many failed attempts to amend Rule 16, and those failures happen when the committee is divided. Each member of this committee will have to make a choice. The question is not whether this is a perfect rule and whether you got everything you want. The question, in this very difficult area, is whether the proposal is better than the current rule. That is the choice, and he expressed hope that the committee could be united. This would be a significant improvement for discovery in criminal cases. He urged everyone to look at the big picture and ask if the proposal is a net improvement.

Judge Molloy agreed that DOJ has been remarkably open minded in dealing with proposed changes and said he was encouraged.

The reporters led the committee through the proposed amendment section by section, working off the redlined version.

Eliminating the term "summary." Professor Beale explained the subcommittee eliminated the word "summary," which the subcommittee thought had been at least partially responsible for the very cursory information sometimes provided about experts. The specific requirements for the content to be disclosed are listed in the proposed amendment. The current structure of the rule is not changed, nor is the requirement that the government provide information about any expert testimony the government intends to present during its case-in-chief. It is triggered by a defense request; a parallel provision requires disclosure where the defendant's mental condition is in issue.

Cross references. The reporters noted that there is one correction to the version in the agenda book: the cross reference to romanette (ii) is wrong. The reporters would work with the style consultants to make sure all cross references are correct. In response to a comment by Judge Campbell, the reporters noted that the use of "subparagraph" or "subsection" would be worked out with the style consultants as well.

One rule for all experts. Mr. Wroblewski thanked Judge Kethledge for his leadership. He noted this effort started with concerns about forensic experts. The miniconference revealed that to the extent that there are problems with this rule, it really does not have anything to do with forensic experts. The two major issues that the committee wants to address are timing and completeness. Mostly, the DOJ does not think there is a problem, but it is prepared to do what it can to come to a resolution on those particular issues. The proposal does eliminate the word "summary." In contrast, the civil rule uses the word summary, and it bifurcates discovery between two types of experts. Mr. Wroblewski noted that the proposal does not bifurcate, and instead tries in one rule to cover both. The civil rule talks about experts retained by a party. For them it requires a signed report and it includes variety of additional requirements. But for other experts the civil rule requires only a "summary," and it recognizes that those experts are not under the control of either of the litigants. There are a huge variety of experts brought in on criminal cases by the prosecutor or by defendant. Some are retained, some are not. Some are friendly, some are hostile. We should recognize that we are trying to do something very different than the civil rule.

Professor Beale stated that the rule currently takes this approach in having one rule for all types of experts, and the draft does not change that approach going forward.

Time for disclosure. Moving to lines 21-25, Judge Kethledge noted this was one of the crucial compromises. The defense bar really wanted a set time for disclosure. He recalled Judge Campbell's memorable question at the miniconference: "Where are the judges in these cases where someone receives the disclosure on Friday before a Monday trial, or the night before trial?" As the defense participants explained, there is no relief available to them in these types of situations because disclosures made so close to trial do not violate the text of the current rule.

The subcommittee agreed there was a need for a rule that can be enforced. It tried to draft a rule specifying times for disclosure for both prosecution and defense, but could not come up with something that would fit every case and comply with the Speedy Trial Act. After the government persuaded the subcommittee to adopt a more flexible standard, the subcommittee's goal was to drive home the notion that in each case there has to be a deadline. The court or local rule could set a default, and the parties could always come in and ask for a change. Or the date can be set and adjusted, case by case. That is why the proposal says that the court or a local rule must set a date. And the rule states the standard for when that date must be set: sufficiently ahead of trial for the party to prepare for trial. This is a functional standard. As the committee note states, it includes taking account of the need for a CJA lawyer to get approval to hire their own expert. The timing will have to be adjusted based on the complexity of the case and the type of expert involved.

Judge Molloy reminded the committee that Judge Campbell had drawn its attention to similar language in the proposed amendment to Rule 404(b).

Judge Campbell said that judges who manage cases are used to doing this all the time in civil cases. He expected that once this rule is in place those judges will start bringing their civil experience into criminal cases when they are setting schedules. Many judges will not only set a deadline for disclosure in a civil case, but they will also say that the disclosure must be full and complete or set a date for supplementation. He asked whether the proposed rule would affect those practices. Does it mean a judge will set an initial disclosure date and then a later supplementation deadline? Or that there is no supplementation, so get the work done now?

Professor King noted there is a provision in the proposed amendment for supplementation to be made in accordance with the continuing duty to disclose under subsection (c). Rule 16(c) now requires supplementation even into trial. So an attempt to cut off the duty to supplement under a court order or local rule would conflict with existing Rule 16(c), as well as the proposed amendment, which incorporates Rule 16(c). Thus, there could be some tension between the new rule and supplementation practices in civil cases.

No defense request to set a time for disclosure. A member asked whether the court's duty to set the time, like the government's duty to disclose, is conditioned upon the defendant's request. Judge Kethledge responded that the rule as written is a mandate: the court must set a time. But perhaps the court could take into account whether the defendant had asked.

Professor Beale asked how often defense attorneys do not ask for disclosure of the government's experts. The member said he had seen it in practice, and usually it is negligence on the part of the defense attorney. Another member reported that in her district the defense always asks. But she had asked colleagues in other districts and was surprised to learn how common it was in other districts not to ask.

The member (who said she had been through the 2255 process) could not imagine failing to ask, which opens a defense lawyer up to a lot of risk down the road.

Professor King was not sure that the rule as proposed requires the court to set a date unless there is a duty to disclose. She noted that the use of the word "the" may make the court's duty conditional, because it refers back to (iii), the duty to disclose. Lines 6 -7 begin "at the defendant's request," and then the rest of that follows, "the disclosure" is referring to the disclosure required under (iii).

A member stated her view that the obligation of the parties and the obligations of the court are separate. The court could say, for example, disclose any expert 60 days before trial. Then, as the parties go along, suddenly one decides it needs an expert, and it knows disclosure must be made sixty days before trial absent an extension from the court. The court can set appropriate dates without knowing exactly which experts will be required. The member also noted that she had started out this process really wanting a stated date, such as forty-five days before trial. But she talked with many defense colleagues, and they decided this flexible standard was a good idea. In many cases, the government has had months or years of preparation, and with reciprocal discovery the defense needs to have that flexibility—not set times—because it may be trying to play catch up. If there were firm deadlines, the defense might be the ones who would be hamstrung. She noted that many of her colleagues eventually came around to this flexible idea.

Method of announcing the deadline: by court, local rule, standing orders, practices. A member questioned the phrasing of the proposed rule. It seems odd to say "court *or* local rule," because a local rule is the court speaking. So it seems odd to distinguish the two. He preferred to refer only to "the court," omitting "or local rule," and then just mention local rules in the committee note. The member also asked if the proposed language would affect existing individual practices, which many judges in his district have adopted.

Professor Beale explained that the language was modeled on Rule 5, which says the judge must set a time, unless the time is set by local rule, and that under Rule 1, "court means a federal judge …" Professor King added that the subcommittee meant to include both district judges and magistrate judges.

A discussion of options for rephrasing this language followed. Judge Campbell suggested it could say "the court, by order or local rule, …" Judge Kethledge preferred the mandatory nature of the existing proposed language, and agreed that if a local rule is something that only the court does, referring to both would be redundant. The reporters noted that the existing phrase conveyed that either the judge could issue an order or there may be a local rule and that the subcommittee thought it would be a good idea for the text to convey the idea that local rules would work. A member noted that there are individual rules of practice that are not quite standing orders, but the parties must comply with them, so that taking out the reference to "local rule" would provide more flexibility. Judge Kethledge added that the note could talk about the different means for the court to do that.

Judge Campbell said that if it is important to flag the idea of local rules then it should be in the text, because so few people read the committee note.

Two other members endorsed the suggestion that the text read "the court must, by order or local rule," one stating it would encompass individual judges' personal standing orders, an order on the judge's webpage, and the other agreeing it is important for people who do not read the committee notes. After Professor Beale noted that Civil Rule 26 has "by order or local rule, the court may also" and that to preserve the mandate, this rule could read "by order or local rule, the court must," a motion was made and

seconded to change line 21 on p. 128 and the parallel provision on the defense side to read "By order or local rule, the court must."

Discussing the motion, Judge Kethledge wondered if putting "by order or local rule" as an introductory clause might cause confusion about whether that introductory clause is a condition of the mandate. Placing this phrase between "court" and "must" will be clear: the court must do it every time. But if you begin the sentence with that phrase, someone somewhere is going to think we do not have a local rule that says we have to do that, so we are cool. Although he did not suggest that would be a reasonable reading, he recalled Judge Campbell's advice that we have to write rules for the weaker players.

Professor Beale stated she was not aware that the language has caused problems under the civil rule, but that the style consultants may also have a preference. If it were really a matter of style, their preference would govern. Professor King agreed she liked placing the phrase after "the court" and not in the beginning.

Professor Beale suggested this could be a friendly amendment to the motion, so that the motion would be "the court, by order or local rule, must…." The friendly amendment was accepted, and the motion passed.

Department of Justice concerns. After thanking Judge Kethledge for his leadership, Mr. Goldsmith made some preliminary comments before turning to two issues of concern to the DOJ. He noted there were many leadership changes in the DOJ, and as a result it had been unable to come forward with the type of clear approach and clear recommendations that it wanted to provide. He noted that the DOJ's leadership had been incredibly accommodating. It had been a high wire act, where Mr. Wroblewski participated, but has had to say: "this is not our formal-formal position." Mr. Goldsmith appreciated that in the effort to reach compromise you adjust one thing and new issues arise. But Judge Kethledge had done a masterful job hitting those sweet spots when the DOJ had a different view of where things should end up.

The court's action setting the deadlines. Mr. Goldsmith said that the DOJ preferred saying the court "should" set a deadline, instead of "must"— though he recognized that ship may have sailed. But he had some concerns with "must" and no qualifiers. He suggested adding something like, "must, absent good cause." At the miniconference, he noted, Judge Campbell—one of the handful of people that have straddled both Criminal and Evidence Rules Committees—suggested that the 404(b) solution was arguably the perfect solution. It was an aha moment. That flexibility helps both prosecution and defense. But one part of 404(b) that is missing from this formulation: "unless the court excuses for good cause the lack of prior notice." He recognized that in the 404(b) context it is the government that would need to establish good cause. Here, it would be the court setting a deadline and the court would not need to give itself a rule on good cause. But a good cause reference is needed because of the one-size-fits-all issue. There are going to be a lot of reactive cases, cases where things are still in play, where maybe there is an arrest, or an indictment, and things are still being formulated, maybe the serology expert is engaged, or perhaps additional forensic works needs to be done, and the concern is that the court may feel compelled to set a time at that point when not every fact is available. This may be forcing deadlines not only for the prosecution but maybe for the defense. The DOJ's suggestion is to add a qualifier there to signal to the court and to the parties that if there is a legitimate reason to delay setting that time frame, the court should have that option.

Judge Kethledge responded that the proposed rule does not set any deadline for the court to set a deadline. It just says the court must set a deadline. Nor does it say, within some time period of the meet and confer under Rule 16.1 that the court must do this. If the situation is fluid regarding whether there are going to be experts or different experts, there is nothing here that would prevent the court from waiting to set the deadline. But what it does make clear is that the court must set a deadline. So this already has all the flexibility the court would want as to when it may set the deadlines.

Professor Beale agreed. She noted the absence of any language that says for example, ten days after arraignment, the judge must set a date. So if it is clear that the parties are talking under 16.1, and things are fluid, the court can wait to set that deadline until things are clearer. If the deadline is set and it does not work, the court can revise it.

Professor Struve suggested that Rule 45(b) might be of some use here. That is the extension of time provision that provides when an act must or may be done within a specified period. The court on its own may extend the time or may do so on a party's motion. That would provide flexibility.

Professor King responded that there is an even more specific provision that provides that flexibility right in Rule 16. Rule 16(d) says that the court may for good cause restrict or defer discovery or inspection or grant other appropriate relief. This was part of the subcommittee's deliberations about the "must." If there is a need to modify the timetable that has been set, there is an existing mechanism for doing that already in Rule 16. Unlike Rule 404(b), which sets a disclosure time with no overarching instruction about how to change disclosure time, this rule does have that instruction.

Addition to the committee note concerning timing of the court's action setting the deadlines. Mr. Goldsmith noted that there may be an inference that the court must act at a particular time, and he expressed support for adding something to the committee note making it clear that is not the case. Otherwise some district may interpret the new rule as saying this has to happen at the initial appearance, or a certain number of days later.

The committee then discussed what could be done to respond to this concern. Judge Kethledge suggested adding: "this provision leaves the district court discretion as to when the deadlines are entered." Professor King offered that a phrase like that—or "and leaves to the court when to set that deadline"—could be added at the end of the sentence that reads "if that time is not already set by local rule or standing order."

Judge Campbell suggested that even more explanation for judges would be beneficial after the language that says the rule leaves to the court when to set the deadline. The next sentence refers to Rule 16.1, which occurs fourteen days after the arraignment. The parties are going to be coming to the judge within a month of arraignment saying here is our proposed schedule, and it would be natural under this new rule for the judge to say, OK, I am going to set a deadline for experts. It might be helpful to add language explaining that when the need for experts is unclear the judge may wish to defer, so the judge does not feel compelled to set a deadline thirty days after the arraignment. Judge Campbell also suggested adding to the committee note that the disclosure obligation of the government is dependent upon the defendant's request. This would help avoid judges saying, as a blanket statement, the government shall disclose its experts by such a date, which the parties may view as a command, even if the defendant has not made a request.

Judge Campbell suggested limiting the language to complex cases if the Speedy Trial Act is a concern, noting his experience is that cases never go to trial in seventy days. Most are six or seven

months, and the fastest is three or four months. If a case is really in flux, and unclear where it is going, but the party has been arraigned, we should signal to the judge, "You don't have to set a date on experts yet, just because this rule says 'must.' In a complex case you might want to defer that so you'd have a better sense of where that case is going."

Judge Kethledge suggested we might say something like "the court can exercise its discretion as to when to enter the order depending upon the complexity of the case and whether it is clear that the parties are going to have experts." The committee note could recite a few things that might affect when the order will be entered, but also make it clear the court on the timing. Judge Kaplan wanted to add "and to alter them," stating it was worth at least in the committee note alluding to the fact, that once set, the date is not cast forever in granite and can be extended. He noted this was Professor Struve's point, and it is worth an emphasis.

Speaking against adding to the committee note language on modifying times set or deferring setting the times, one member was concerned that if it is this flexible, then the defendant would have to choose between the right to a speedy trial and the right to have a firm date for expert disclosures. If the government believes it is a complex case and it cannot get the expert report prepared and to the defense within 20-25 days, it should ask for a continuance. Because the default is trial, the DOJ should be able to prepare the report in time for the defense to meet it. If the DOJ cannot do so, then the burden should be on it to establish to the court why not. The member argued that adding language that gives the court the discretion to delay necessarily pushes back the time for the defense to prepare. Functionally that will lead to going beyond the speedy trial time frame, when the defendant may actually want to push the government toward trial and be ready when they indict the case.

Another member noted that in his experience every single defendant waives speedy trial, and the judge sets whatever schedule is appropriate. The genius of this effort is that one size does not fit all in this country.

The committee discussed the following possible language to add to the committee note on p. 143, after the sentence ending "or standing order":

> and leaves to the court when to enter the order setting the deadline. The court also retains discretion to alter the deadlines to ensure adequate trial preparation under Rule 16 and the Speedy Trial Act.

A member asked if the reference to the Speedy Trial Act was needed. Professor King responded that the reference noted the possibility that the court would grant a continuance under the Speedy Trial Act, after finding it is in the interests of justice.

All but one member agreed the language should be added to the committee note. The dissenting member preferred the rule and the committee note as submitted by the subcommittee, and was concerned that what should be an exception would become a default. Essentially this is saying the court must set a deadline, but then it is saying when the court sets a deadline it is just this fluid state.

The contents of the disclosure; committee note language distinguishing Civil Rule 26. The provision on the contents of the disclosure, Professor Beale explained, was drawn largely from Civil Rule 26. The proposed amendment requires disclosure of a "complete statement" of all the expert opinions the government will present in its case. It retains the language from the existing rule about the bases and

reasons for the opinions and qualifications, but adds a requirement for publications over the past ten years, and a list of past cases where the expert provided trial or deposition testimony in the last four years.

Judge Campbell noted that "a complete statement of all opinions" is the same language that is in Rule 26, but in this proposal it is followed by slightly different language that says "that the government will elicit," whereas Rule 26 says "that the witness will express." But if district or appellate judges learn that this amendment arose out of suggestions that the criminal rule be more similar to the civil rule, and they see exactly the same phrase ("a complete statement of all opinions"), they may conclude that it means exactly the same thing in Criminal Rule 16 as it means in Civil Rule 26.

The committee note from the 1993 amendment to Civil Rule 26 says that the witness "must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor." Many trial judges take that to mean that what has to be in the expert report is what the expert is going say on direct examination. Their case management orders say we are going to hold you to that. You cannot go beyond this report on direct. Judge Campbell said that when he is in trial, if a party thinks that what an expert is being asked to say is not in the report they can object, and he turns to the other side and says "show me where it is in the report." If they cannot point it out to him, he sustains the objection. That is how he avoids an endless problem of additional undisclosed opinions. If "a complete statement of all opinions" is read the same way in Rule 16, there will be judges saying that experts on either side cannot give any testimony in federal court that is not in the disclosure that was made to the opposing side. And that may be fine. It would certainly solve the problem of surprise. But he wanted to flag the point that that this approach might be brought over from the civil side because of the identical language we are using here. Do the disclosures control what the witness can say on direct examination? If so, that was fine, he just wanted the committee to be aware that the civil view which grew out of the committee note to Rule 26 may play a role in interpreting this rule. His civil case management order states your expert cannot say anything that is not in that expert report. In fact, in the committee note to Rule 26, the Civil Rules Committee said that part of the intent was to eliminate the need for expert depositions, because you will know everything the expert is going to say from the report. It is intended to be a very comprehensive disclosure on the civil side.

Judge Campbell described the evolution of Civil Rule 26. In 1993, the Civil Rules Committee adopted this requirement including the language from the committee note that he previously read, which applied only to retained experts and employees of a party whose job it is to give testimony (essentially in-house experts). Civil Rule 26 did not require anything for other experts. In 2010, the Civil Rules Committee added a second requirement for non-retained experts because there were lots of people giving Rule 702 testimony in civil cases about whom there was never any formal disclosure. There were depositions, but no formal disclosure. We added what is now Rule 26(a)(2)(C), which is not a report from the expert. It is a report from the lawyer and it requires a summary of the opinions and the basis for them. The idea was then you put the other side on notice so that they could depose the people who are going to be giving expert testimony but who are not controlled by a party. You cannot proscribe exactly what they are going to say, but you should still let the other side know what is intended, what you are going to elicit. So there are those two distinct categories. Judge Campbell did not intend to upset this careful balance that has been struck for this criminal rule. But he did think that since we are using the exact language from the first category, the report requirement of a complete statement of the opinions, that courts are going to look to that part of Rule 26 and say aha, this means everything the witness is going to say from the witness stand needs to be in the report. And because we have only one standard in this rule, that will apply to the

police officer or the treating physician or whoever gets called, over whom the party does not have control in a criminal case.

Judge Molloy responded that the whole point of amending this rule is to level the playing field. He too followed the practice Judge Campbell described in civil cases. If there is an objection he looks at the report. Even if it is not literally there, if it is fairly there, if fair inferences can be drawn, then he would overrule the objection. If it is not fairly within the disclosure, then he would sustain it.

Judge Kethledge said the rule is saying you have to disclose the opinions you are going to elicit. This will define the scope of direct.

Mr. Wroblewski reminded the committee that the DOJ raised this concern at the earlier stages. The discussion is troubling because it suggests that we were not able to address this. We were concerned number one about the word "report" and again how that could be interpreted in relation to the requirements of Civil Rule 26. We tried to address that by getting rid of the word report and by adding the qualifiers "government's case-in-chief." The other concern goes to the point that we are putting all of these expert witnesses in the same basket. The civil rule says if this is your retained witness, you hired this witness, and you have to have a long report to lay it all out. The concern we tried to address when getting rid of the word "report" was that there are going to be many experts that are not retained by the government, who may be hostile to the government, or may be hostile to the defense when the defense calls them. We do not know precisely what they are going to say. He understood you want as much disclosure as possible so the other side can prepare. But the idea that the parties are going to control these witnesses, and specify with precision what they are going to say, is not an accurate perspective for all witnesses. For some witnesses, yes. But not all witnesses. So it is a bit troubling.

A member responded by asking how often someone in the DOJ would call a witness who they did not interview. The member could understand the lack of control over a treating physician. But the member thought it would be a pretty rare situation where the prosecutor would say, "we have no idea what this person is going to say but we are hopeful." Hope is not a litigation strategy. He agreed with Judge Campbell. People are going to look at the language that way. But the member emphasized the proposal addresses this with the language exempting a party from getting the expert's signature on the disclosure if the party was unable to do so because the witness was not under the party's control. So the AUSA would say this is the doctor, here is what I am going to examine him about, here is what I anticipate the testimony is going to be.

Mr. Wroblewski said in most cases the DOJ will be able to provide the required disclosure, but there will be cases where not only will we not have an opportunity to interview an expert witness, but the witness may be hostile. Take a white-collar case where the prosecutor is calling an accountant working for the company that is either charged or whose executives have been charged. The accountant might not want to talk to the government at all. And the prosecution might want the accountant/expert to testify not only about the facts and about how they came up with ledger entries, but also about the meaning of the entries in the ledger. Those people may end up as experts. And yes, the DOJ is going to give notice as much as it can about what those experts will say. In the summary that we provide now, we are required to give as much information as we can. It is troubling if the word "complete" is going to be interpreted as the civil rule context. That will be a problem for some experts. Not all, but for some.

Mr. Goldsmith cautioned against a carve out that says retained employees are on one side and non-retained witnesses are on the other. He commented that federal prosecutors do not have the same

certainty that they will be able to get some forensic analyst from FBI, DEA, ATF or state and local labs, and pin them down as you could with an employee in a civil case. The discussion has repeatedly referred to the retained employee v. hostile person. That is useful, he said, but only up to a point.

Judge Kethledge then observed that the Civil Rules Committee had their rule, and a committee note that said what it means, and we can have a committee note to the criminal rule that says what we want and what we think it means. We do not have the word "report." There is probably a consensus around the idea that we want the disclosure to provide fair notice to the other party of the opinions. Perhaps we ought to have in our committee note our own statement of what we think it means along those lines.

Judge Campbell agreed that it would be helpful to address this in the committee note, and that the committee might want to say the criminal rule is not intended to incorporate all aspects of the civil rule standard, and note the differences. If this is a disclosure from a lawyer, not a report written by a witness—which is what Civil Rule 26 requires—that may result in less precision. The intent is to give full and fair disclosure of all the opinions that the party intends to elicit, but not necessarily a verbatim transcript of the direct testimony or something to that effect. This would help keep judges from following Rule 26 precedents if they see nothing other than the exact language of Rule 26 in the text of Rule 16.

Judge Kethledge agreed that sounds like a wise approach. We do not want this proposal to become some sort of Trojan horse for making this some sort of de facto Rule 26 when we have made some careful distinctions.

A member suggested revising the text of the amendment to add after "a complete statement of all opinions that the government intends to elicit in its case in chief":

> or, in the event of an expert witness who is not retained or employed by the government, a statement of all opinions the government will attempt to elicit from the witness.

This would essentially carve out those witnesses for whom the government cannot guarantee that the opinions it thinks it is going to get are actually going to be given by the witness.

Another member expressed a preference for the complete statement language as is, and thought many of the concerns are tempered by the language that comes right after—"that the government will elicit"—which distinguishes it from the civil case. If the committee would want to go with what was just said, maybe a way to do that, is to say the government "intends" to elicit, which provides a sense that the government cannot guarantee that this is actually what will be said.

Eight additional members shared their preference for the current language in the text of the proposal. Of these, several thought the committee could clarify this concern in the committee note. Another thought that the new criminal rule will put the civil side of judges on notice that they need to pay attention to where the rule is different. A member noted that you have to get into corporate things, or sometimes medical issues, which are pretty rare, to have a hostile expert. Another member reminded the committee that the government has the grand jury, and could elicit these opinions in the grand jury. Judge Kethledge and Judge Molloy stated they were happy with the current text plus an addition to the committee note indicating the differences with the civil rule.

Note language regarding modification of requirement to disclose list of cases in which an expert testified. Turning to the remaining language in (iii) specifying what must be disclosed, Mr. Goldsmith said that the list of the expert's publications is something that the government should have an obligation

to find out and disclose. Regarding the required list of testimony in the previous four years, he was appreciative that the committee note language was changed from "on rare occasions" to "on occasion." He had concerns, however, about the committee note language concerning what the prosecution has to do in seeking an order modifying discovery. If somebody in a New Jersey state forensic lab is going to testify on narcotics or firearms, and is testifying virtually every week in Essex County, the line prosecutor's ability to get that information and update it accurately is not going to be as simple as it might seem. "On occasion," is not great, but to avoid that obligation the prosecutor has to seek an order. And that, he said, is more than is necessary.

Judge Kethledge responded that there is a strong consensus that this information should be provided. The only way to get you out of the rule is an order. Rule 16(d) already has this escape valve. Most experts themselves actually keep track of their testimony. It is just a list, not a transcript. Opposing counsel has to go off and find the transcripts. You have no obligation to do that. He was skeptical that this would be such a widespread problem that we need to change the default.

Mr. Goldsmith suggested that instead of a separate stand-alone order, perhaps the better procedural mechanism might be that when that the time for disclosure is set, the prosecution has the ability to say, it is calling two people from the local agency and getting all of the cases might be difficult, so that it is part and parcel of the setting of the underlying deadline.

Professor Beale responded that there is no limitation in (d) about when it is done, or that you have to wait or do it as a separate order. If you want to train your people to alert everybody at the beginning, there should not be any problem. And it should be part of what is coming to the judge under Rule 16.1.

Mr. Goldsmith suggested language to add to the committee note: "which may be part of the initial discussion of the court when the initial date is set." Judge Campbell offered alternative language, which Mr. Goldsmith accepted: "the party who wishes to call the expert may raise the issue at any scheduling conference or seek an order modifying expert discovery under Rule 16(d)." After some discussion of substituting "and" for "or," so that the default of establishing good cause under (d) is not modified, Judge Campbell suggested the following language: "In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying an order of discovery under Rule 16(d)."

A member asked whether instead of one statement about the discretion to delay the time, and another about this exception, it would be preferable to have just one reference to 16(d). With a single reference, everyone would know they can resort to 16(d) whether it be at the scheduling conference or a later motion if warranted, if you cannot get a list of prior testimony for a witness. There may be other parts of, for example, the signature, where you want to raise something under 16(d). Just one reference to 16(d) would be simpler.

Professor Beale noted that whether you want multiple references to Rule 16(d) depends upon how much you want to customize. If you really care about the list of prior testimony and you want to make sure you have made clear what is going to happen, talking specifically about when that can be raised allows anybody who has questions about it to find that right there. There is some utility in specifying this. The reporters noted that providing for modification of this particular requirement regarding previous testimony was important for the government's buy-in. Some prosecutors may oppose the rule because they say we cannot do this, and the answer was to make it clear: you can apply for relief under 16(d). Judge Campbell's suggested language shows it can be done in an efficient way, and prosecutors can be

trained on that and everybody will know what is going on. When the rule is published, we do not want more people objecting that it is not going to work because they have forgotten about Rule 16(d).

A motion to approve lines 26-39, on pages 128-129 was made and seconded, and passed by voice vote unanimously.

Exception to signature requirement when opinion and bases already disclosed in prior report signed by the expert. Regarding the signature requirement, lines 40-44, Professor Beale noted that the government asked for the language allowing an exception to the disclosure requirement for information previously provided. The parallel provision in (b) benefits the defense. Information provided in reports required under subsection F need not be repeated.

Professor King noted that Professor Struve had raised the concern that without additional language in the text, the defense may lack notice that there is something in a prior report that belongs within this list. Professor King directed the committee's attention to language to insert at the end of line 42 that she and Professor Beale had cleared with the style consultants in order to address this concern. The style consultants' preferred version was replacing the words "need not be" with "that information may be referred to, rather than repeated" in the expert disclosure. So that the text would read: "that information may be referred to rather than repeated in the expert witness disclosure." Professor Beale explained that a case may involve many experts and many reports, and the party may not recognize that there is another report that this expert prepared. There is no reason not to have a reference to incorporating. And the same thing will be in the defense disclosure rule requiring a defendant to cross reference.

Judge Kethledge agreed it was a good point, but suggested that "may be incorporated by reference" was better phrasing. Professor King responded that the "referred to" language was the style consultants' preference.

Mr. Wroblewski said that the language in the agenda book was added at DOJ's request in large part because of forensic science analysts who are required to prepare a report and also the supporting documentation for the bases for the opinions. The DOJ's concern was that the way they want to speak is through a formal report, which is reviewed as part of a regulated system. If this new language requires something in addition to disclosing that report, if they have to prepare something else and sign it too, they have serious questions. This new text suggests something else has to be provided, but we do not know what that is. We provide the report. In addition, our prosecutors write out a summary. We are going to call this expert and he will testify to these opinions. But now we are asking the forensic scientists to sign this new disclosure too.

Judge Kethledge responded that the lawyer is making the disclosure. You have already provided a report about an opinion under subsection F. But if you do not mention in your disclosure under G that the reason for not providing disclosure on one or more experts is that it has already been provided in this document under subsection F, the defendants might not know it is in the other document. All that is required is just a reference, such as one of these:

"We are also going to have the opinions in this report" or "in this section of this report."

"The opinions I'll offer are the ones specified in the report dated whatever."

Professor Beale suggested it could also say "all my opinions are in the Section F report."

Mr. Goldsmith said that it is perfectly fair to add language that information in an F report need not be repeated in the witness disclosure if it is referred to in the disclosure. It puts the opposing party on notice, and it will occur fairly often. But he suggested that some reference to the signature section should be added, or conversely from the signature section to this, so that the information need not be repeated, nor must the expert sign the disclosure as referenced in the subsequent paragraph. Otherwise, the uninitiated will say, when I refer to this, I have to sign it. Mr. Goldsmith commented that he did not believe the DOJ would have the ability to convince the FBI, DEA, ATF, and state and local lab experts to sign even that—something that simple—without the requisite levels of review. And if all we are doing is stating that the report we previously turned over under subsection F contains all the opinions, under those circumstances the disclosure need not be signed by the expert.

When some members said they did not understand the problem, Mr. Goldsmith explained that they needed some language in that paragraph or the signature paragraph that says if you are taking the "see my F report" option, then that suffices for the obligation of the witness to sign the disclosure under G.

Judge Kethledge and Professor Beale asked Mr. Goldsmith to restate and clarify his position. He said if the witness has already signed an F report that itself contains all the opinions, then the witness need not sign this disclosure. If there were both opinions in an F report and new opinions, he was not suggesting the need for a signature section that carves out what to sign. And it was not necessary for the expert to sign the list of publications and prior testimony, which could all come from the prosecutor and not from the expert. It would be hard to get chemists to sign something saying this is how many times I have testified.

Mr. Goldsmith confirmed that the DOJ was "OK" with the language "may be referred to rather than repeated," so long as this concern about the signature was addressed in the signature section.

A motion to add the language "may be referred to rather than repeated" was made, seconded, and unanimously passed by voice vote.

Expert signature if information is referred to rather than repeated. The committee then turned to the DOJ's request for a way to frame the language so that if it is all in the signed F report, it obviates the need for the expert's signature. Mr. Goldsmith said there was no need for the expert to sign what is essentially non substantive information. The prosecutor will state: here are the publications, the cases in which the expert testified, and the opinions to be offered are on pages 61-89 of my disclosure dated March 15. The expert's signature on this filing is unnecessary. You do not need the cross examination on this and it is adding a step which is going to be time consuming. If the amendment goes out for comment, he thought we would receive some pretty vociferous opposition from entities over which the DOJ has relatively little control.

Judge Kethledge suggested a second paragraph, parallel to the preceding paragraph, such as "the witness need not sign the disclosure for opinions as to which the expert has already signed a report previously disclosed under Section F." Mr. Goldsmith agreed that would be responsive to his concern.

Judge Campbell summed up the suggestion: the expert must sign the disclosure unless the government states in the disclosure that it could not obtain the signature through reasonable efforts, or the opinion contained in the disclosure was contained in a subparagraph F report signed by the witness.

Professor King noted that what was in the F report could be the opinions, could be the bases and reasons, could be part of those, or could be something else. It is only the information that is already in the

F report that need not be repeated in the disclosure. To say that you do not have to sign the disclosure at all if only some of the information required was referred to and not repeated goes too far. Can we specify those elements in (iii) that must be in the F report for the signature exception to apply?

Mr. Goldsmith responded that the real meat is the opinions and bases in the previously provided and signed lab report. Judge Campbell suggested adding the word "all": "The witness must approve and sign the disclosure, unless the government states in the disclosure that it could not obtain the witnesses signature through reasonable efforts, or all of the opinions contained in or referred to in the disclosure were set forth in a subparagraph F report signed by the witness." Mr. Goldsmith thought that the word "all" eliminates the problem where some of it is in F and some is not.

Professor Beale suggested the language should be both opinions and bases and reasons, so that the only things that do not have to be signed are the publications, list of prior testimony, and qualifications. Judge Kethledge agreed that the expert's signature on those items would not seem to be very important for impeachment purposes. That approach sounds reasonable if this would otherwise get into compliance with an ethical code briar patch, to have them sign as to anything new in the disclosure and they have already signed as to their opinions. In response to a member's question, he said that the change still required the government to provide the publications and list of testimony, but the signature of the prosecutor, an officer of the court, as opposed to the witness, would be sufficient.

Requiring disclosure of the reason a party could not obtain witness's signature. Judge Molloy also proposed a change to the last sentence of the signature provision: "unless the government states in the disclosure *the reason* that it could not obtain the witnesses signature," as opposed to, "I didn't have time." A member said she agreed, and that the reason the government could not obtain a witness signature is sometimes an important piece of information for cross examination.

When Professor Beale asked if the phrase "reasonable efforts" gets at the same thing, the member stated they were different. The member would not cross-examine a witness who was in labor and delivery and could not sign, but would cross the witness who cursed and emphatically refused to cooperate. That is an important piece of information that we need to know.

Another member suggested "makes a showing that it could not obtain," instead of stating the reason. Judge Kethledge responded that implied you have to go to the court as opposed to reciting in the disclosure.

In response to a question, Mr. Goldsmith said the DOJ had no problem with adding the reason that it could not obtain the signature.

A motion to approve the following language was made, seconded, and passed unanimously:

> The witness must approve and sign the disclosure, unless the government states in the disclosure the reason that it could not obtain the witness's signature through reasonable efforts, or all of the opinions and the bases and reasons for those opinions required to be disclosed under iii, were set forth in a subparagraph F report, and that report was signed by the witness.

When a party intends to use an expert but cannot identify the specific individual. A member raised a concern that in a many cases, such as a gun case, the government makes a disclosure that it plans to call an expert to testify that DNA is rarely found on a gun, and the reasons why, and so forth, but at the time of that disclosure they do not actually know who that expert will be, i.e., which of the ATF

examiners will be available. With Rule 16(d), in those circumstances a disclosure close to trial may be enough for the defense to meet the government evidence. But, the member said, it is a practical concern.

Mr. Wroblewski noted that is one of the DOJ's concerns with the timing provisions. There are many different kinds of cases, not just firearms, but say fingerprint analysis, where you do not know which analyst is going to come, so you cannot get a signature until quite late in the process. You know there is an analyst who is going to come, but you do not know which one, so you cannot get the prior testimony and that may come late. That was one of the concerns we were trying to deal with when discussing the timing provision. If we say we are going to have this kind of witness and this is the disclosure we can make at this point, it was not clear whether that will be allowed by district court.

A member suggested that the "reasonable efforts" and the reason for the lack of a signature are adequate to cover that problem. Judge Kethledge agreed, noting that the defense would say, OK, once you have that person, have them sign. But Judge Campbell pointed out that it is not just the signature. You cannot give a list of prior publications until you know who the witness is either. Mr. Goldsmith wondered if there is some elegant way to address a disclosure for a generic expert but not the specific person. Judge Kethledge suggested it could be another foreseeable circumstance that the committee note could cite as a basis for the court exercising discretion or granting relief 16(b) later than in other similar cases, although he thought that generally the court and the parties are going to work this out.

A member suggested adding to the language about the time to provide disclosure, the phrase "or times." Judge Kethledge responded that that would change the default, which is this must be one shot. The member said that the judge can say you have got to do everything but the publications or whatever for the generic expert by November 1, and as to that you have to do it later. Judge Kethledge said this may be the tail wagging the dog.

The reporters suggested that the supplemental and correcting provision the committee has yet to discuss might address this.

Judge Campbell reminded the committee that it need not come out with the final version of this rule today, because the Standing Committee typically approves in June what is going to be published in August. So a tentative view could be worked through by the Subcommittee again before the spring meeting. A member asked what would happen if the Standing Committee decides not to approve publication in June. Will it not be published? Judge Campbell did not think that would happen because there will be a pretty thorough report to the Standing Committee in January of everything that has happened here, including the current draft. And the Standing Committee will be able to provide thorough feedback at that time before the committee's spring meeting. We typically do not have a problem in the June meeting approving things for publication if the Standing Committee has had a previous chance to look at it in January.

After a lunch break, the committee returned to the proposed amendments to Rule 16, starting with lines 48-51 on p. 129 of the agenda book.

Supplementing and correcting. Professor King explained that initially the subcommittee considered a much more detailed paragraph for supplementing and correcting that was styled more closely to the one in the civil rule. But there was support for something much simpler that would cross reference Rule 16(c), which already creates a duty to supplement this disclosure as well as other disclosures that are ordered or are already in the rule. The subcommittee thought a cross reference to 16(c) would be an easier way to deal with concerns such as when it will be a different agent that testifies,

or a different doctor. The subcommittee included this language "or correction," because 16(c) discusses only additional material. The proposed amendment lists in the contents a complete statement of all opinions, and one party might decide not to call a particular witness or not to present certain evidence, and that correction should be provided to the other party, and is under Civil Rule 26. The subcommittee thought that was important to retain it because correction is different than supplementation with additional material. Professor Beale added that if the disclosure says the expert is going to say X, and now it is actually Y, that is a pretty important correction. The subcommittee thought it was important to drive that home.

Professor King also noted that the reasoning behind the "for the defendant" language in the brackets is that Rule 16(c) provides that the duty to supplement may be met by disclosure to the other party or the court. The subcommittee felt it would be important to make sure that the supplement or correction go directly to the opposite party, and one way to do that would be to add "for the defendant," but there was no decision on this language from the subcommittee. Professor Beale added that supplemental disclosures only to the court do not appear to be a problem with Rule 16(c) right now. Prosecutors are not just giving things to the court and not to the defendant. Everybody understands the supplementation would go to the other party so maybe we do not need that.

Mr. Wroblewski stated the DOJ supports this provision. Judge Kethledge said he did not believe the rule needs to say "for the defendant." (G)(i) now says the government must disclose to the defendant, and that is the disclosure we are talking about; it says "the."

A motion to approve the supplementation provision, taking out "for the defendant," was made, seconded, and approved unanimously.

Defendant's disclosures. Professor Beale explained that the provisions in (b) regarding the defendant's disclosures were parallel to the provisions in (a) regarding the government's disclosures, so that all of the changes made to the government's obligations would be made to these. Professor King reiterated those text changes:

- Line 20 would read "court, by order or local rule, must set a time."
- Line 39, p. 133 would read "that information may be referred to rather than repeated."
- Line 39, after the signature, would read "The witness must approve and sign the disclosure, unless the government states in the disclosure the reason that it could not obtain the witness's signature through reasonable efforts, or all of the opinions and the bases and reasons for those opinions required to be disclosed under iii, were set forth in a subparagraph F report, and that report was signed by the witness."
- And on line 39, the defendants' report should be subparagraph (c) so that would change, not paragraph F.

The reporters noted they would work with the style consultants to implement these changes.

Change "defense" to "defendant." The only objection was from a member who proposed changing "defense" to defendant. Another member agreed, and there was no objection to changing defense to defendant.

Reciprocity. Judge Campbell asked if some might object, even though the current rule requires reciprocal discovery, but see this amendment as going farther, requiring defense to provide details of defense strategy, crossing a line and violating due process rights.

Judge Molloy said this was an issue that was brought up at our miniconference, and was something he put in his notes as a possible addition to the language of Rule 16(b)(1)(c). But in light of Judge Kethledge's comments, he thought this was probably going to be fleshed out in litigation.

A member said she had been struggling with precisely the point just raised. She appreciated the balance between the procedural right of access to the report, the constitutional right to remain silent, and the judicial case management function that is going on here. Her concern is that by requiring the defense to produce a written document as the proposed rules states, we may be going too far. She could envision a situation in which the defense produces a report that the government then meets through supplementation, which has begun to erode the constitutional rights of the defendant. For the sake of mirror obligations, we are losing track of the fact that there are disproportionate obligations on the part of the parties. It is not like the civil case. The government has the burden. This much detail for a mirror obligation is going too far.

Judge Molloy asked if the concern is answered by the option of not asking for disclosure. As a practical matter, it is only when you request discovery under Rule 16 that you have the reciprocal obligations. The member responded that was not an option. Without asking, it is possible the defense would not get anything. The defense must ask. Another member said there are times when the member chose not to ask. And there still is a certain amount that has to be turned over. In principle, level playing fields and level obligations make a judicial process work better. But we do not have a level field here. The resources go to the government. They far out resource the defense. The right not to give out information is one of the few things that we might be able to use to counterbalance the resources and timeframe that so much favors the prosecution.

A member commented that he was not really troubled by this concern. We have a notice of alibi defense under Rule 12.1. If the defendant does not want to present an alibi, then he does not have to say a word. But if he wants to go down that path, he has an obligation of fair process to cough it up and give the prosecution an opportunity to challenge it. The same argument could be made that if a defendant wants to call an expert witness, leveling the playing field would be served by having the defendant not have to qualify the person as an expert, not having to follow *Daubert*, just leave it to whatever the government can do on cross. There are some obligations in other words that are inherent in the process of a fair trial, and it seemed to the member this is one of them. This member also related that some time ago it was the established rule in British defense bar that the defendant did not have to get on the stand, did not have to disclose anything whatsoever about the defense. There was a great deal of pressure from the defense side to expand the allegations of the Crown to make disclosure in criminal cases. The way a committee worked this out in the UK was a proposal that said the defendant may serve a comprehensive statement of the defense before trial. If the defendant does so, the government must reveal everything that it will use to prove the prosecution's case and anything that could possibly undermine the prosecution's case or assist the defendant. One of the fiercest critics of that proposal, who saw it as the end of criminal defense rights in the UK, now a judge, has said he now realizes that this reform ultimately worked to the profound benefit of the defendants. This kind of reciprocal disclosure will have a similar effect. Defendants will get a lot more out of it than they put into it. We believe in the government having the burden of proof beyond a reasonable doubt and a fair trial, but the proposition that anytime you ask a question of a defendant - they have no obligation to answer anything goes a whole lot farther than the Fifth Amendment, and is a counterproductive argument in the fullness of history.

Professor Beale pointed out that the current rule already requires reciprocity. It does say now that the summary must describe the witness's opinion, and the bases and reasons and the witness's

qualification. The amendment takes it further, depending upon on how the summary disclosures have been.

Another member said she had a similar concern about the constitutionality of requiring the defendant to affirmatively disclose the expert report. You do not have turn over the impressions of counsel. Expert reports slide into that a little bit but there can be a balance struck. On the whole the member thought that it would be more beneficial to the defense to have this rule than not have it.

Professor King addressed the member with concerns, asking why the member felt this rule differs and crosses the line. First, the member had referred to the level of detail and also to the duty to supplement. What in this rule changes that situation? Second, the proposed language limits defense disclosure to a complete statement of all witness opinions the defense will elicit on direct. The government's obligation is limited to opinions the government will elicit in its case-in-chief. Professor King said she had been concerned about whether the defendant's disclosure should be limited by a direct examination condition or by a case-in-chief condition, or by no condition. The current rule has no condition, but the defense equivalent of the F report, the B report, is conditioned on the case-in-chief. So what, Professor King asked, did the member think about the description of the defense obligation?

The member responded that she wanted to consider sequencing. She did not see anything relevant in the materials, and was not sure how that can be addressed. Will they both disclose at the same time, and then the government will supplement based on the defense disclosure, and be able to use the defense disclosure to augment and refine its case against the defendant? She was trying to envision, as a practical matter, how this will work. She noted that for the defense it is hard to know until the government rests exactly what the case-in-chief will be. The government may not meet its burden, and the defense will not want to present an expert. So how can the defense determine what it must disclose under the proposed rule?

The reporters noted that the current Rule 16(b)(1)(C) provides that the defendant must provide a written summary of the expert testimony "the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial." This already requires a prediction about the evidence the defendant will need to present, made before the government has presented its case-in-chief. So how is the problem different under the proposed amendment than when you have to give a summary under the current rule? Is the concern that the court does not order simultaneous disclosure?

Professor Struve observed that the defendant's obligations are only triggered when the defense requests and the government complies. So would not that imply that the government first complies and then the defendant discloses? The reporters, who noted that few discovery disputes make it into reported decisions, could suggest only one possible scenario in which the defense might not get disclosures but would have to disclose itself. If the defense requests expert disclosure, and the government responds that it will not put on any expert evidence, some court might conclude that the government had complied with its discovery obligation and the defendant would be required to make "reciprocal" disclosure of expert testimony. But the reporters had not seen such a case and were not sure how courts would rule.

The reporters noted that except for requiring the disclosures to be more complete there were no changes in the rule. The proposal does not change the sequencing. The defendant need not disclose until the government complies. That is not changing. *See* line 15, p. 131. They assumed that means that a district judge would not order simultaneous disclosure.

Mr. Wroblewski said the framework of the rule as it stands right now is that once the defendant requests, then there is reciprocity. He understood why some of his defense colleagues were troubled that this is the framework. But he did not think that we should look at the reciprocity framework in just this particular context. We ought to follow the basic framework of the rule if we make changes to the expert witness rules.

Defendant's case-in-chief. A member noted the difference in the language between intent to use on direct examination and case-in-chief. Was that intended?

Professor King said the existing rule requires pretrial disclosure if the defendant intends to use under FRE 702, 705 "as evidence at trial." The government's disclosure duty is limited to opinions it will elicit from the witnesses "in its case-in-chief." In response to some concerns at the miniconference, it made sense to put a limit on the obligation of the defense and make it fully parallel. So the proposed language refers to "direct examination" and does not require the defendant to provide information about evidence it would use on cross examination.

In response to a member's question whether there a practical difference between direct examination and case-in-chief, Professor Beale first suggested that it was not clear the defense had a "case-in-chief." But Professor King responded that the term "case-in-chief" is currently used to refer to the defense obligation in Rule 16(b)(1)(B)(ii).

Another member commented if the defendant testifies and the government has a rebuttal case, where its expert testifies, and then the defendant's expert comes back in a surrebuttal, as the proposal is now written, the defendant would be required to disclose—in advance—the opinions elicited on direct examination in surrebuttal. That may not be feasible.

Professor Beale suggested "case-in-chief" is better on line 28 on page 132. She thought it would be best to pick the right phrase and have it in both lines 13 and 28. The scope of the preamble should be the same as the scope of the obligation, and it would also parallel lines 11 and 12 of government side.

Judge Kethledge supported using "case-in-chief." There seemed to be general agreement with this solution.

Committee note regarding of scope of the defendant's obligation. Professor King asked if there should be something in the committee note explaining that to make the disclosures parallel, the amended rule would limit the defense disclosure further than the existing rule by including the condition that the expert be intended for use in the defendant's case-in-chief. Judge Campbell thought that would be beneficial because otherwise this clear change in the rule might be lost.

Professor Beale said it would be useful to go back to restyling to determine if it reflects some reason the defense obligation would be broader than the government's in the existing rule.

Mr. Goldsmith asked if anyone thought the lack of parallelism now results in broader defense disclosures. Probably not, so to the extent that they are being made parallel, is not necessarily to constrict existing practice, but it will help ensure that the rule going forward reflects existing practice. Professor Beale agreed.

Judge Molloy suggested that the reporters have all that input and will incorporate it into the next revision of the text and the committee note.

Noting the likelihood that the defense obligation will be challenged in court, Judge Campbell asked whether the committee note should explain why the committee believes it is appropriate. Professor Beale responded that there is a Supreme Court case on point, *Williams v. Florida*. It holds there is no Fifth Amendment problem with asking a defendant to reveal before trial what he intends to put into evidence at trial, because it just speeds up what he was going to have to do at trial. We could put that into the committee note but it is baked into Rule16. That is why it is all reciprocal and constitutional. And that is why some states like Florida can go even farther. Defense witnesses can be deposed under Florida law. Under the Constitution, discovery obligations by the defense can go farther if the government reciprocates

A member agreed the proposed rule would be challenged but suggested that as a practical matter at the Rule 16.1 conference the defendant will generally say "we haven't decided" about expert witnesses. That is the reality that the member sees in requests for funds for a consulting expert. The defense wants to consult with the expert before they decide whether to call him. That expert may give them an opinion they do not want to use. They have a consultation and they may decide not to call that witness. Or in other cases, they have a consultation and then that consulting expert becomes a testifying expert. This is a defense protective reality. Almost every defense lawyer is going to hire a consulting expert, see what that expert's opinion is, and only then or later in the process decide whether to use an expert witness. If there is not a good witness, they will not have one. The defense has the ability to do that and the government would never know about it.

Professor Beale commented that this uncertainty may occur less frequently for the government, because it is further along in its case preparation at the time of discovery. So it is more likely to know whether it will call an expert (although they may only know it will be one of the ATF experts).

Vote on text for defense disclosures. Judge Kethledge noted that the committee had already approved the language for the government's disclosure and suggested a vote on the provisions regarding the defendant's disclosure.

The language for (b)(1)(C) as amended (with changes to parallel the changes made to the government's disclosure provision, substituting defendant for defense, and substituting case-in-chief for direct examination) was moved, seconded, and approved. Professor Beale complimented the committee, noting the discussion had improved the proposal.

Next steps. Judge Kethledge sketched out the next steps. The committee had approved the text as revised, but still needs to do more work on the committee note language. The committee report for the Standing Committee meeting in January will include the text of the amendments and revised committee note language. The committee may need to consider changes in the text at its spring meeting based on feedback from the Standing Committee.

Judge Campbell requested that the reporters provide a version that redlines the committee note language that changes, and Professor Beale agreed. Judge Furman, the member liaison from the Standing Committee, agreed that it would be helpful to have a working version of the committee note in January.

III. 18-CR-D, time for ruling on habeas motions

Judge Molloy drew the committee's attention to the letter receive from Judge Fleissig, the chair of the CACM Committee, responding to the committee's transmittal of 18-CR-D. The committee had written to the CACM Committee, noting that the current exemption of habeas cases from the list of motions that must be reported as pending might be contributing to delays in cases under 2254 and 2255.

Judge Fleissig wrote to say that the CACM Committee had studied the issue and concluded that the current approach was appropriate given the unique issues associated with Section 2254 petitions and Section 2255 motions. Professor Beale commented that although it was discouraging that there would be no change in the reporting of pending cases—since that had seemed to be a promising approach to reducing delays—the CACM Committee had identified another possible option. Judge Fleissig stated that the CACM Committee has asked its case management subcommittee to look into other steps that might address the problem of long delays, including additional staffing.

IV. 19-CR-A, calculation of IFP and CJA status

Professor Beale introduced the first proposal from Sai, which was addressed to the Civil, Criminal, and Appellate Rules Committees, and seeks changes in the process of determining IFP (in forma pauperis) status. In a footnote, Sai states that IFP includes CJA status in criminal cases. Professor Beale described the issues raised by Sai's proposal, including the question whether the rules committees had jurisdiction under the Rules Enabling Act. She emphasized that Sai was incorrect in equating IFP status with CJA status, which is governed by a different statute, and has a different process and different standards than IFP status. Professor Beale acknowledged Ms. Elm's assistance in helping the reporters explain these differences in their agenda book memo.

The committee has been asked to advise the Standing Committee on how this suggestion should be handled. Is this something that should be taken up by individual committees, or by a subcommittee drawn from all of the affected committees? Because CJA status is so different from the IFP status that is the focus of the suggestion, the reporters recommended that the Criminal Rules Committee not take a major role if other committees pursue it. But the Criminal Rules Committee does have an interest in IFP status for filings under 18 U.S.C. § 2254. Although those proceedings are technically civil they fall under the jurisdiction of the Criminal Rules Committee. So if the other committees want to look at changes on IFP status, the reporters thought the Criminal Rules Committee would want to have some input.

In response to Judge Molloy's enquiry, no member expressed an interest in pursuing the proposal at this time.

V. 19-CR-B, court calculation and notice of all deadlines

Professor Beale described briefly the second rules suggestion from Sai, which went not only to the Criminal Rules Committee, but also to the Appellate, Bankruptcy, and Civil Rules Committees. The purpose of the discussion was to get members' views on the merits of the suggestion and whether it should be pursued in a cross-committee inquiry. She explained that the proposal sought to require that courts give immediate notice to all filers of (1) the applicable date and time (including time zone) for future events, (2) whether and how the time could be modified, and (3) whether the event was optional or required. The notices would be cumulative, continuously updated, and user friendly, not requiring users to look up applicable rules or do calculations. Sai also proposed that the rule specify that filers could rely on the court's computed times. Although such information would be helpful to filers, Professor Beale noted it would put a significant burden on the clerks' offices. Also, the proposal that filers be able to rely on the calculations raised special issues. For example, what if the calculation of a jurisdictional time was in error? The question is whether the proposal should be studied, and if so whether it should be handled cross committee.

A judicial member commented that in her court the notices generated by the clerk's office state the date and time of filing, which allows a calculation of when 30 days (or another applicable period) will

run. And the rule tells you the time calculation. Her clerk might say, tell them to read the rule. Why should the court have to do more? Professor Beale responded that Sai was particularly concerned for pro se filers who do not have law degrees and may not know how to look up the rules governing time for pleadings and responses. In Sai's view, these people need more help, which should come from the courts.

Another member commented that determining time limits is difficult, even for lawyers, and much more so for pro se parties. In some cases, pro se parties rush to file a response immediately—which is less complete and well drafted than it otherwise might be—because they are unable to determine when they must file. The member wanted to know whether the clerks' offices have software applications that they use to determine the applicable time limits. If the courts have and are using such applications, why not use them for this purpose?

A judicial member said that his district was trying to provide as much information as possible, and parties receive a notice from the clerks' office of filings that includes the date any opposition is due. But if the clerk's office has made an error because the judge shortened the time, in his court the judge's order trumps the clerk's notice. So at least in his district, the clerk's office has been helpful. The member also noted that in his own orders he tries, as much as possible, to include dates certain in order to make the notice as clear as possible.

Another judicial member noted that pro se cases make up one third of the docket in his district. There are pro se staff members in the clerks' office, and the district has a handbook that provides helpful guidance to pro se filers. The member expressed sympathy for the plight of pro se filers in a system that is very complex. But the member emphasized that the clerk's office in his district was already "running as fast as they can." They are dealing with fewer personnel and smaller budgets and can no longer even guarantee that an order docketed today will be filed even by the next day. CM/ECF has a limited capacity to provide some of the information being sought, but only if the clerk's office has the time and personnel to generate that information—which they do not in the member's district. He called the suggestion a "huge ask," and said it was "not practical."

Another member agreed it was not practical, absent some mechanism like a software application mentioned earlier by a member. The member also drew attention to the risk to parties who would rely on such a calculation. He reminded the committee that the Supreme Court had held that a habeas petitioner was jurisdictionally out of time even though he had relied on the district court's erroneous statement of when his filing was due. So, at least under some circumstances, parties cannot rely on the calculations by the clerk's office or even the district court.

In response to Professor Beale's comment that there had been at least some interest in automation if it could be done easily, a judicial member raised another concern. He noted that many documents entered in the docket are mischaracterized. If a machine read those designations, it might calculate the wrong date.

Ms. Womeldorf noted the suggestion by one of the judicial members that he sought, when possible, to specify a date certain in his own orders. That might be a useful suggestion as a best practice. Another member noted, however, that these dates could be affected by later events. If the court has specified dates certain, then they must all be adjusted. That is not the case if one specifies that an action must be taken within a certain period before or after a given event.

VI. 19-CR-C, E-filing Deadline Joint Subcommittee.

Professor Beale drew the committee's attention to the final item in the agenda book: information about an E-filing Deadline Joint Subcommittee study, chaired by Judge Michael Chagares. The subcommittee is considering a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone. The subcommittee's membership is comprised of members of all of the rules committees. The committee's reporters and Ms. Recker, a member of the committee, are representing the Criminal Rules Committee.

The subcommittee is just beginning its work. It was on the committee's agenda to provide notice that the study is underway, and to solicit advice on any information that the subcommittee should gather and consider. The subcommittee will consider the impact on both counsel and the courts. Professor Beale noted Judge Molloy's comment about the impact late filings have on the courts. When a case is on his docket for the next morning, he may review the filings that evening. But he cannot do so if the filing comes in just before midnight.

Mr. Wroblewski asked whether the subcommittee had a member from the DOJ, noting that it would provide an important perspective. Judge Campbell and Ms. Womeldorf expressed interest in being sure that the DOJ's views were represented going forward.

Another member noted it would be nice from a practicing lawyer's standpoint to be able to finish earlier, and that counsel will take all of the time they are allowed. But the member noted different issues arise in mass litigation than criminal cases.

A member questioned how the new timing requirement would work, and Professor Struve stated that the system would still accept later filings, but they would not be timely unless submitted by whatever earlier time might be selected. The member responded this would likely result in motions to accept the late filings nunc pro tunc.

VII. Acknowledgement of members whose terms were ending

Judge Molloy invited Professor Kerr to make remarks since this was his last meeting. Professor Kerr said it had been a wonderful six years, a great personal and professional experience. He thanked the reporters and the staff for their efforts.

Judge Molloy thanked Professor Kerr for his service and Judge Campbell for his input and guidance. He also expressed this gratitude to Ms. Womeldorf, Ms. Wilson, and Ms. Cox for their efforts, noting that the staff's hard work always resulted in meetings going smoothly. He noted that Mr. Wroblewski had served even longer than he had, called him a tremendous asset, and offered Mr. Wroblewski kudos and thanks.

Finally, Judge Molloy expressed gratitude for eleven years of friendship and education on the committee, and he warmly thanked the reporters for their work, presenting them with thoughtful mementoes of their service.

Judge Kethledge summed up the thoughts of all those present, thanking Judge Molloy for his service, and especially his leadership. He called Judge Molloy an exemplary leader and steward who created and enhanced a spirit of good will, and had a great record of accomplishment.

The meeting was adjourned.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 28, 2020 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Phoenix, Arizona, on January 28, 2020. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair (by telephone)
Professor Edward Hartnett, Reporter

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

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

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

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Liesa L. Richter, Consultant

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter (by telephone); Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. This meeting is the last for Judge Srikanth Srinivasan, who in a few weeks will become the Chief Judge of the U.S. Court of Appeals for the District of Columbia. Judge Campbell thanked Judge Srinivasan for his contributions as a member of the Committee and wished him well in this new assignment. Judge Campbell welcomed three new members of the Standing Committee: Judge Gene Pratter, Kosta Stojilkovic, and Judge Jennifer Zipps. Judge Campbell also welcomed Judge Raymond Kethledge, who began his tenure as Chair of the Criminal Rules Advisory Committee last October. Judge Campbell noted the addition of a new member of the Rules Committee Staff, Brittany Bunting. Judge Campbell also recognized Julie Wilson, Rules Committee Staff Counsel, for reaching the milestone of 15 years of service with the federal government.

Scott Myers reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2019. The chart also shows the interim Bankruptcy Rules that have been recommended for adoption as local rules with an effective date of February 19, 2020. Also included are the rules approved by the Judicial Conference in September 2019 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2020, provided the Supreme Court approves them and Congress takes no action to the contrary.

Judge Campbell asked the judge members of the Committee if they had occasion in their courts to address new Criminal Rule 16.1, which went into effect on December 1, 2019. No judge member had yet addressed Criminal Rule 16.1. Judge Campbell observed that it would be good to raise awareness about the new Rule. He noted that he had occasion in a recent trial to apply the amended version of Evidence Rule 807, which also took effect last December, and found it much easier to apply than its predecessor. Judge Campbell also noted that the pending amendment to Evidence Rule 404(b) would have been helpful in a recent case, if it had been in effect.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 25, 2019 meeting.**

REPORT ON MULTI-COMMITTEE ITEMS

Judge Chagares, Chair of the Appellate Rules Advisory Committee, reported on the E-Filing Deadline Joint Subcommittee which was formed to analyze whether e-filing deadlines should be earlier than midnight. One key question under study is whether the midnight deadline negatively affects quality of life, particularly for young associates and staff. The subcommittee's consideration of e-filing deadlines is in part inspired by filing rules in Delaware. The rules in Delaware state court were amended effective September 2018 to provide for a 5:00 p.m. (ET) electronic-filing deadline. This accorded with similar local provisions in the District of Delaware that provide for a 6:00 p.m. (ET) electronic-filing deadline. The subcommittee has solicited

comments from the American Bar Association, paralegal and legal assistant associations, and law schools. The first public suggestion on this e-filing proposal voicing support for the proposal was received at 1:48 a.m. on the morning of the Appellate Rules Advisory Committee's fall meeting.

Professor Cooper, Reporter to the Civil Rules Advisory Committee, reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee. The subcommittee was formed to consider the implications of the Supreme Court's holding in *Hall v. Hall*, 138 S. Ct. 1118 (2018), that consolidation under Civil Rule 42(a) of originally-separate lawsuits does not merge those lawsuits for purposes of 28 U.S.C. § 1291's final-judgment rule. The *Hall v. Hall* Court suggested that, if this holding created any problems, the Rules Enabling Act process would be the right way to address them. Dr. Emery Lee of the Federal Judicial Center is undertaking a deep review of cases filed in 2015-2017. Those cases were filed, but may or may not have gone to final disposition, before the Court's decision in *Hall v. Hall*; it may be necessary to expand the period of study to include cases filed in three subsequent years.

Judge Chagares reported on a proposal, concerning the computation of deadlines, that was considered by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules at their respective fall 2019 meetings. The proposal came from Sai, who has submitted helpful rules suggestions over the years. Sai proposed a rule that would require courts to calculate all deadlines and tell the parties the dates of those deadlines. The committees recognized that such a practice would be helpful to litigants, particularly to pro se litigants, but concluded that it would be impracticable, and unduly burdensome, to task the courts with such a duty. Accordingly, the advisory committees have removed this proposal from their agendas.

Professor Hartnett, Reporter to the Appellate Rules Advisory Committee, described the advisory committees' consideration of another suggestion submitted by Sai. The standards for *in forma pauperis* (i.f.p.) status currently vary across districts, and Sai proposes replacing those varying standards with a nationally uniform one. Sai also raised concern about the Administrative Office forms that courts use to gather information bearing on i.f.p. status; Sai argues that some questions on these forms are ambiguous and/or unduly intrusive. After the advisory committees considered this proposal at their fall 2019 meetings, the Civil Rules Committee removed the proposal from its agenda, but the Appellate Rules Committee retained the proposal on its agenda, and the Criminal Rules Committee expressed the intention to follow the other committees' lead on the matter. The Appellate Rules Committee's interest in this item, Professor Hartnett explained, stemmed partly from the fact that – unlike the other sets of national Rules – the Appellate Rules have an official Form (Form 4) dealing with requests to proceed i.f.p. in the courts of appeals. Further, Supreme Court Rule 39 directs that litigants use Form 4 when seeking i.f.p. status in the Supreme Court. A participant asked why the Civil Rules Advisory Committee had removed the item from its agenda. Judge Bates, the Chair of that committee, explained that although the committee recognized the potential problems with the variation in standards for i.f.p. status, it could not see how to establish a workable single standard for 94 districts given the variety of financial circumstances across the districts. But, he noted, the Civil Rules Advisory Committee referred the forms questions raised by Sai to the Administrative Office, the entity that maintains certain district-court forms (including Forms AO 239 and 240 concerning requests for i.f.p. status). Professor Cooper, Reporter to the Civil Rules Advisory Committee, noted that that committee did not have occasion to reach questions relating to the scope limitation set by the Rules Enabling Act

– i.e., whether rulemaking on eligibility for i.f.p. status would alter substantive rights. Professor Cooper further questioned the feasibility of establishing a nationally uniform i.f.p. standard in light of regional variations in the cost of living.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Campbell prefaced the report by the Bankruptcy Rules Advisory Committee by thanking that committee for its admirably quick action in preparing interim rules and forms to implement the Small Business Reorganization Act of 2019 (SBRA). Judge Dow in turn commended Professor Gibson and Scott Myers, who took the lead in that project; he noted that the courts have already expressed appreciation for the interim rules and forms. Judge Dow and Professors Gibson and Bartell then delivered the report of the committee, which last met on September 26, 2019, in Washington, DC. The Advisory Committee presented one action item and two information items.

Action Item

Official Form Amendments Made to Implement the HAVEN Act. The Honoring American Veterans in Extreme Need Act (HAVEN Act) of 2019 became effective on August 23, 2019. The HAVEN Act was designed to exclude certain benefits paid to veterans or servicemembers (or their family members) from the Bankruptcy Code's definition of "current monthly income." A debtor's "current monthly income" is used in means testing computations to determine the debtor's eligibility for bankruptcy relief. Professor Bartell explained that the HAVEN Act does not affect the Bankruptcy Rules; however, its provisions require changes to three official forms: Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period). The Advisory Committee approved the amended forms and recommends that the Standing Committee retroactively approve (and provide notice to the Judicial Conference concerning) the amendments to the three official forms.

Professor Struve, Reporter to the Standing Committee, commended Professor Bartell and Scott Myers for their work on these forms.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Information Items

Interim Rules and Official Forms to Implement the SBRA. The SBRA will go into effect on February 19, 2020. It creates a new subchapter V of chapter 11 of the Bankruptcy Code and provides an alternative to the current reorganization path for small businesses. Professor Gibson explained that the SBRA requires amendments to a number of Bankruptcy Rules and Forms. Because the SBRA will go into effect before the rules amendments could make it through the full Rules Enabling Act process, the Advisory Committee voted to have the amendments issued as

interim rules for adoption as local rules or by standing orders in each of the districts. The Advisory Committee modeled its approach on an expedited process followed in 2005 when interim rules were needed to respond to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At its fall 2019 meeting, the Advisory Committee discussed the proposed draft interim rules and forms and voted to seek approval for their publication for public comment. (There were some post-meeting revisions to the package, and the Advisory Committee approved those revisions by email vote in October 2019.) The resulting eight proposed interim rules and nine official forms were, in turn, approved for publication by the Standing Committee (by email vote). The package was published for four weeks during October and November 2019. The Advisory Committee received seven relevant comments, which provided helpful suggestions. In response, the Advisory Committee made some revisions to the published package and also approved a few interim changes that had not been published – namely, revisions to four additional rules and the issuance of a new rule. By an email vote that concluded in December 2019, the Advisory Committee unanimously decided to recommend the issuance of thirteen interim rules. It also approved nine new or amended official forms. The Advisory Committee approved the official forms pursuant to its delegated authority from the Judicial Conference to issue conforming or technical official form amendments subject to later approval by the Standing Committee and notice to the Judicial Conference. By email vote in December 2019, the Standing Committee unanimously approved the issuance of the rules as interim rules and approved the promulgation of the forms. Judges Campbell and Dow subsequently requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of the interim rules to the districts for adoption as local rules. The Executive Committee unanimously approved the request. Judges Campbell and Dow sent a memorandum to all chief judges of district courts and bankruptcy courts requesting local adoption of the interim rules to implement the SBRA until rulemaking under the Rules Enabling Act can take place. At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules. Professor Gibson indicated that the Advisory Committee expects to bring to the Standing Committee's June 2020 meeting a request for approval for publication of permanent rules and forms.

Judge Dow commended the efforts of all involved in finalizing interim Bankruptcy Rules to be adopted by the districts as local rules in response to the SBRA.

Bankruptcy Rules Restyling. Professor Bartell remarked that the restyling process is going well. The style consultants have provided drafts of Parts I and II of the Bankruptcy Rules. The Restyling Subcommittee, reporters, and style consultants have exchanged different views on some changes to Part I. Professor Bartell noted that they are close to the point of finalizing Part I. The subcommittee has three meetings scheduled in the next six weeks to discuss the draft of Part II. The subcommittee expects to present final drafts of Parts I and II to the Advisory Committee at its spring 2020 meeting and, if approved, to request permission to publish from the Standing Committee at its mid-year meeting. Professor Bartell commended the style consultants for their wonderful work on these rules. The subcommittee is thrilled with what it is receiving from the style consultants and thinks that everyone involved in bankruptcy practice will be pleased with the restyled rules.

Judge Campbell noted that the restyling endeavor will be a multiyear effort and has gone very well over the past year. He commended Judge Krieger for her work chairing the subcommittee. Judge Dow thanked the style consultants, Professor Bartell, and Judge Krieger for their work throughout this process. In response to a question about the anticipated publication process, Judge Dow explained that the Advisory Committee intends to seek publication in stages but will hold all restyled rules for final approval and adoption at one time. Judge Dow expects that Parts I and II will be ready to present to the Standing Committee at the Standing Committee's June meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on October 30, 2019, in Washington, DC. The Advisory Committee presented several information items.

Rule 3 (Appeal as of Right — How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Proposed amendments to Appellate Rules 3 and 6 and Forms 1 and 2 are out for public comment. The Advisory Committee has received few comments thus far. The Advisory Committee has been considering this project since fall 2017, and its work finds new support in the Supreme Court's recent decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act. After identifying inconsistencies among different jurisdictions in how notices of appeal are treated, the Advisory Committee proposed rule amendments to reduce inadvertent loss of appellate rights by the unwary. The Advisory Committee expects to seek final approval of the amended rules and forms from the Standing Committee at its mid-year meeting.

Professor Hartnett explained that some litigants have mistakenly believed that they must designate every order they wish to challenge on appeal. The proposed amendment to Appellate Rule 3 would alert readers to the merger principle without trying to codify it. It would also add a provision stating that a notice of appeal encompasses the final judgment as long as it designates "an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties" or an order described in Appellate Rule 4(a)(4)(A) — i.e., an order disposing of the last remaining motion of a type that restarts the time to take a civil appeal. The rule leaves open the ability for litigants to deliberately and expressly limit the scope of the notice of appeal. "Without such an express statement, specific designations do not limit the scope of the notice of appeal." The proposed amendment to Appellate Rule 6 is simply a conforming amendment. The forms amendments reflect, among other things, the distinction between appeals from final judgments and appeals from other appealable orders. Professor Hartnett noted that courts continue to issue decisions that underscore the importance of these amendments. He described a recent decision in which a litigant filed a notice of appeal designating both a specific summary judgment ruling and the final judgment, "as well as any and all rulings by the court." The court concluded that because there had been a specific designation, the notice of appeal did not encompass orders that it did not list.

Professor Hartnett also noted that the Advisory Committee had received two public comments on the proposed amendments — one supportive and one critical. The main critique of

the proposed amendments stems from the language in proposed Appellate Rule 3(c)(5)(A), which refers to an order that adjudicates "all **remaining** claims and the rights and liabilities of all remaining parties." In contrast, Civil Rule 54(b) omits the word "remaining" and refers to "a judgment adjudicating all the claims and all the parties' rights and liabilities." In the commenter's view, there is not a final judgment until some document is entered that recites the disposition of all claims, not just the remaining claims. The premise of the proposed amendment is contrary to that: once the last remaining claim is resolved, there is a final judgment. The Advisory Committee unanimously supported this approach, which is in accord with leading treatises on federal practice and procedure.

One member inquired as to the purpose behind proposed Rule 3(c)(6), which would allow a litigant to designate a specific part of a judgment or appealable order and expressly exclude others from the scope of the notice of appeal. Professor Hartnett explained that it may sometimes be beneficial for a litigant to limit the scope of their notice of appeal. For example, a litigant may want to appeal an adverse ruling as to one party, without wishing to appeal the court's determinations as to other parties.

Another member asked if the language in subparagraph (5)(A) — "the rights and liabilities of all remaining parties" — creates tension with Civil Rule 58(e), which sets a default rule that an outstanding request for costs and/or fees does not prevent a judgment from becoming final for appeal purposes. The member suggested deleting "the rights and liabilities of all remaining parties" if it is not necessary to the proposed rule. Professor Struve responded that she understood this phrase to be a reference to the language in Civil Rule 54(b) — "the rights and liabilities of fewer than all the parties." Professor Cooper suggested that adding the "remaining" language in Appellate Rule 3(c)(5)(A) has the advantage of making clear that a final judgment need not indicate all claims that may have been previously disposed of. Judge Campbell inquired whether the language "all remaining claims" — without referencing rights and liabilities — would suffice. Professor Hartnett explained that the impetus behind including "rights and liabilities" in the new language was to integrate Appellate Rule 3(c) with Civil Rule 54(b). Professor Cooper noted that "claim" is a word with multiple meanings. He observed that the language in Rule 54(b) has existed for a very long time. It would be better, he suggested, for Rule 3(c) not to emphasize the word "claim" standing alone.

A member raised a related question regarding attorney's fee applications and whether this proposed rule might alter current law under which, as noted, Civil Rule 58(e) sets a default rule that a pending fee application does not prevent a judgment from becoming final for appeal purposes. It was suggested, though, that the same tension currently exists between Civil Rule 58(e) and Civil Rule 54(b). A member noted that Civil Rule 54(b) uses "claims *or* the rights and liabilities" while the proposed language of Appellate Rule 3(c)(5)(A) uses "claims *and* the rights and liabilities." This member suggested that the disjunctive / conjunctive distinction may be significant. Judge Chagares and Professor Hartnett indicated that the Advisory Committee will continue to consider these issues.

Rule 42 (Voluntary Dismissal). Proposed amendments to Rule 42 are out for public comment. Judge Chagares explained that during the restyling of the Appellate Rules, the phrase "may dismiss" replaced the phrase "shall … dismiss[]" in Rule 42(b)'s language addressing the

dismissal of an appeal on agreement of the parties. The concern addressed by the proposed amendment stems from the apparent discretion the current rule would give to the courts of appeal not to dismiss an appeal despite the parties' agreement that it should be dismissed. The amendment would change the relevant "may dismiss" to "must dismiss" in what would become the Rule's subdivision (b)(1). In addition, the Advisory Committee restructured Rule 42(b) for overall clarity and added a subdivision (c) to clarify that the rule does not alter the legal requirements governing court approval of settlements. The Advisory Committee has received no comments on this proposed rule change and expects to seek final approval from the Standing Committee at its mid-year meeting.

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares explained that the Advisory Committee has engaged in a comprehensive review of these two rules. Amendments to Rule 35 and 40 that set length limits for responses to petitions for rehearing are on track to take effect on December 1, 2020, if the Supreme Court approves them and Congress takes no contrary action. Apart from those pending amendments, Judge Chagares noted that while the Advisory Committee has not received any complaints about the rules, small changes to harmonize the two rules may be beneficial if unintended consequences can be avoided. Professor Hartnett noted that the benefits of a rewrite of these rules must be balanced against the risk of disrupting current practice. The Advisory Committee's consideration of further potential amendments has thus narrowed and is presently focused on two items. First, the Advisory Committee seeks to underscore the difference between the standards for en banc and panel rehearing. Second, it is reassessing the interaction between petitions for panel rehearing and petitions for *en banc* rehearing, particularly given that the procedures are governed by two separate rules. A review of local rules and internal operating procedures of various circuits revealed a widespread practice of treating an *en banc* petition as including a request for panel rehearing. The Advisory Committee is also considering ways to ensure that a panel cannot block litigants from seeking rehearing en banc (the concern focuses on instances when a panel makes changes to its decision and states that no further petitions for rehearing en banc will be permitted). A related question concerns whether post-panel-rehearing *en banc* petitions should be limited to instances when the panel changes the substance of its initial decision.

One member expressed a view that a qualifier based on "changes to substance" should not be included in any potential amendments to Rules 35 and 40. Even changes that may seem small and stylistic, he argued, can have big effects. The member emphasized that timely-filed petitions for panel rehearing or rehearing *en banc* affect the time for filing petitions for a writ of certiorari. That makes it especially important for the rules governing rehearing petitions to operate mechanically, so that litigants will be able to forecast reliably whether a rehearing petition will suspend the deadline to petition for certiorari. The same member observed that one proposed addition — the statement in proposed new Rule 35(b)(4) that if the Rule 35(b)(1) criteria for rehearing en banc are not present, "panel rehearing pursuant to Rule 40 may be available" — would be more appropriate in a committee note rather than in rule text. Another member asked if subdivision (b)(5) of the proposal should explicitly limit a second petition for rehearing *en banc* to those petitions that are directed toward the changes made by the panel after the initial petition for rehearing. Professor Hartnett suggested, though, that in a petition after the panel changes its decision, a party might also want to address changes that were requested but not made. For

instance, a panel's revised decision might cite a supervening Supreme Court precedent without sufficiently addressing the import of that new precedent.

Rule 25 (Filing and Service) and Privacy in Railroad Retirement Act Benefit Cases. In response to a suggestion from the Railroad Retirement Board's General Counsel, the Advisory Committee has been considering whether privacy protections afforded Social Security benefits cases under Civil Rule 5.2(c) and Appellate Rule 25(a)(5) should be extended to Railroad Retirement Act benefits cases. Judge Chagares noted the similarity between Social Security and Railroad Retirement Act benefits programs. Unlike Social Security cases, however, Railroad Retirement Act benefits cases go directly to the courts of appeal on petition for review. The Advisory Committee is considering whether other types of benefits cases likewise go directly to the courts of appeals for review and implicate similar privacy concerns. Professor Hartnett added that the Judicial Conference Committee on Court Administration and Case Management (CACM) has not objected to the Advisory Committee pursuing a possible rules amendment in this context.

A member suggested that this may become a slippery slope; he noted that ERISA and disability claims cases often involve the same kind of private personal information. Judge Campbell responded that the current proposal arose because the Railroad Retirement Board brought the suggestion to the advisory committee's attention. And the likelihood that the Appellate Rules would need to address many similar instances is low, given that the goal here is to address instances where an agency decision in a benefits case goes directly to the court of appeals. (In proceedings where agency review is initiated in the district court, Professor Hartnett observed, the Appellate Rules piggyback on the Civil Rules' privacy approach.)

Another member asked whether the draft language "of a benefits decision of the Railroad Retirement Board" is needed – why not just say "a petition for review under the Railroad Retirement Act"? Civil Rule 5.2(c) applies to "action[s] for benefits under the Social Security Act," but the rule language does not specify "a benefits decision by the Social Security Administration." Professor Hartnett responded that there may be other types of Railroad Retirement Board decisions that are subject to review under the Railroad Retirement Act; he promised to check with the Board's General Counsel.

Another member wondered what systems exist for protecting private information in review proceedings under the Longshore and Harbor Workers' Compensation Act and the Black Lung Act and whether those same systems should also suffice to protect privacy in review proceedings under the Railroad Retirement Act. Professor Hartnett explained that the ordinary mechanism available in any case would be a motion to seal. Railroad Retirement Act benefits cases are distinctive because they are essentially Social Security benefits cases for railroad workers; it would be very hard to address privacy concerns in such cases through standard redaction procedures. Judge Chagares added that the committee had not found any other types of proceedings that are as similar (as Railroad Retirement Act benefits cases are) to Social Security benefits cases.

Professor Bartell expressed concern about adding "privacy" to the draft amendment of Appellate Rule 25(a)(5). She noted that if the rule extended only the "privacy provisions" of Civil Rule 5.2(c)(1) and (2) to Railroad Retirement Act cases, it would raise questions about which parts of Civil Rule 5.2(c) are being incorporated.

Suggestion Regarding Decision on Grounds Not Argued. The Advisory Committee is considering a suggestion submitted by the American Academy of Appellate Lawyers. This suggestion would require a court of appeals, if contemplating a decision based on grounds not argued, to provide notice and an opportunity to brief that ground. Judge Chagares formed a subcommittee to consider this issue. The threshold question whether this suggestion is appropriate for rulemaking, or more appropriate as a subject of best practices. A member commented that, in addition to the difficulty of defining "grounds not argued," the suggested rule amendment may not accomplish anything that litigants could not already achieve through petitions for rehearing.

Suggestion Regarding "Good Cause" Definition for an Extension of Time to File a Brief. The Advisory Committee received a suggestion to specify criteria for finding "good cause" for an extension of time to file a brief. Judge Chagares noted that the term "good cause" appears multiple times in the Appellate Rules and Civil Rules. The Advisory Committee agreed that a good-cause determination depends on many factors and that no bright-line definition would be desirable. The Advisory Committee removed this item from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Civil Rules Advisory Committee, which last met on October 29, 2019, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Social Security Disability Review and Multidistrict Litigation (MDL) subcommittees.

Information Items

Social Security Review Subcommittee. Judge Bates explained that the subcommittee was formed in response to a suggestion submitted by the Administrative Conference of the United States (ACUS). ACUS proposed the adoption of national rules governing district-court review of Social Security Administration decisions, in order to provide greater uniformity and to recognize the appellate nature of such review. The subcommittee has prepared drafts that illustrate possible alternative approaches that a national rule could take. One approach would create a new rule within the Civil Rules; the other would create a new set of supplemental rules. Each of the draft alternatives is more modest than the original suggestion.

Judge Bates explained that the subcommittee and Advisory Committee have again returned to the initial question: whether to embark on this project, notwithstanding the usual preference for keeping the Rules trans-substantive. Beyond trans-substantivity, there are other competing concerns. Some reasons to create special rules for Social Security cases include the support from ACUS and the Social Security Administration, the modesty of the proposal, a preference for uniformity in procedure across districts, and the volume and uniqueness of Social Security cases. Countervailing considerations (in addition to the concerns about substance-specific rulemaking) include the opposition by plaintiffs' organizations and the DOJ, the likelihood that a national rule would not displace all the variations created by local rules, and a question as to the appropriateness of adopting rule amendments in order to address problems that may relate more closely to the insufficiency of agency funding. Judge Bates also emphasized the trans-substantivity concerns.

Uniformity in federal procedures is a laudable goal of the Rules Enabling Act. Judge Bates recognized the concern about carving out categories of cases for specific rules and the risk of favoritism that poses. He noted that the subcommittee considered whether rules should be created that focus more broadly on cases that — like Social Security cases — are based on an administrative record. Such a broad undertaking would be difficult to achieve, given the variety of agencies and matters that come to the district court for review.

Professor Coquillette remarked that the Rules Committees have received numerous requests to carve out special rules over the years, and Congress has at times seemed inclined to carve out particular categories like patent cases and class actions for special rules. If the Advisory Committee moves forward with a proposal, Professor Coquillette suggested that it should create a supplemental set of Social Security rules, rather than a new Civil Rule.

A member expressed the view that the Rules Committees picking specific areas and carving out special rules could be problematic; that might be a task to which Congress is better suited. A different member suggested that this issue ties in with broader issues about specialized courts.

Several judge members expressed support for the proposal. There is a gap in the rules with regard to these types of actions, and the proposal would provide a practical solution. Regarding trans-substantivity concerns, one noted that the federal courts already use local rules to create substance-specific rules for special types of cases. Professor Cooper observed that district judges plainly have authority to establish practices that go beyond the Rules Enabling Act's scope in the course of deciding cases. The question of the appropriate scope of local rules is more difficult. 28 U.S.C. § 2071(a) says only that local rules "shall be consistent with" any national rules promulgated under the Rules Enabling Act. Does the fact that varying local rules now address a topic justify the adoption of national rules on that topic?

Judge Campbell observed that this is a unique situation in which a government agency has asked the Rules Committees to address a problem. The subcommittee has done a great job and has identified some possible rules that could address inefficiencies in the current system. This stands as a compelling argument in favor of rulemaking. While trans-substantivity is a countervailing concern, the Rules Committees have already crossed that bridge with respect to, for example, admiralty cases and habeas proceedings. Social security cases constitute a large part of the courts' dockets, and the matter is important to a government agency, and these considerations may outweigh the concerns about substance-specific rulemaking. Judge Campbell also expressed his view that the proposal is even-handed and would simplify procedures for all parties. The main question at present is whether to publish a proposal. Judge Campbell added that he favored publication for comment.

A member echoed Judge Campbell's comments, noting that the presumption against substance-specific rules can be overcome. The opposition by the claimants' bar and DOJ, this member suggested, should not be dispositive here because their reasons for opposition do not go to the heart of the problem. The claimants' side argues that a uniform rule will displease judges. If that is the case, it is unclear how that would disadvantage only claimants. The DOJ cites trans-substantivity concerns. The Rules Committees can decide the trans-substantivity question on their

own. In this member's view, the proposal would be beneficial and streamline the process through modest improvements without favoring either side. Another member agreed.

A different member asked about the feasibility of a pilot project with this proposal. Professor Cooper explained that the DOJ has crafted a model rule and offered it to district courts as a suggested local rule (though this is not a formal pilot project). Further, the subcommittee has sought input from magistrate and district judges on how the rules work in Social Security cases. The general feedback is that the Civil Rules do not fit Social Security cases and that the proposed national rule reflects what judges are already doing and would be helpful. Judge Campbell agreed that the proposal parallels what many districts are already doing.

A judge member voiced support for publishing the proposal for public comment. The same member asked if the subcommittee had considered drafting a best-practices guide instead of a rule amendment. This member also noted that, in her district, magistrate judges are tasked with handling Social Security review proceedings. Judge Bates responded that the subcommittee continues to consider a best-practices approach but that it currently views a rule amendment as preferable. He also observed that the proposed rule would not affect how districts structure the handling of Social Security disability review cases.

Professor Coquillette agreed that the proposal should be published for comment and reiterated his support for the supplemental set of rules instead of a new Civil Rule.

A judge member observed that he shared the general concern over trans-substantivity. Based on the proliferation of local rules related to Social Security cases, however, trans-substantivity does not seem to be as much of a concern. The question then is whether to pursue uniformity by means of a national rule.

Subcommittee on Multidistrict Litigation. Judge Bates stated that the subcommittee has focused primarily on four areas: third-party litigation funding (TPLF); early vetting of claims through the use of plaintiff fact sheets (PFS) and defendant fact sheets (DFS); interlocutory review in MDL cases; and judicial involvement in the settlement process and review.

The Advisory Committee decided to remove TPLF from the subcommittee's agenda (as this phenomenon is not unique to or especially prevalent in MDL cases) and has returned it to the Advisory Committee for monitoring.

The subcommittee continues to study "early vetting" as a tool to winnow unsupportable claims and jump start discovery. The subcommittee has concluded that plaintiff fact sheets — and defense fact sheets, secondarily — are used in virtually all "mega" tort MDLs and in most other large MDL proceedings, particularly personal injury MDLs. Because plaintiff fact sheets take a lot of time to develop, a simpler practice called "census of claims" has emerged. All groups involved think this is a worthwhile approach to examine. While it gathers less information, the census of claims practice seems to serve very valuable purposes. Several transferee judges are using this approach in current MDL proceedings.

The issue of interlocutory review in MDL proceedings is under active assessment. The subcommittee is considering whether existing procedural mechanisms, chiefly 28 U.S.C. § 1292(b), provide adequate interlocutory appellate review of certain MDL orders. Judge Bates highlighted the subcommittee's study of Judge Furman's order in *In Re: General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (SDNY 2019), which granted a party's request for certification of an interlocutory appeal under § 1292(b). Judge Bates explained the difficulty of drafting a rule amendment that would expand options for interlocutory review only to certain kinds of MDLs, or to specific subject matters such as preemption or *Daubert* rulings. The subcommittee continues to consider these questions in the context of possible rule amendments.

The subcommittee also continues to consider the issue of judicial supervision in the MDL settlement process and settlement review. Judge Bates explained that the subcommittee is considering whether this issue is appropriate for rulemaking and whether any such rule should be limited to a certain subset of MDLs. While the academic community has expressed support for greater judicial involvement in MDL settlements, neither the bar nor transferee judges share that position. Judge Bates noted that this is an ongoing effort, and the subcommittee is in the early stages. One member, citing his MDL experience in which courts have been heavily involved, inquired whether there is a need for more judicial involvement in the settlement process. Judge Bates clarified that the subcommittee is looking at non-class-action MDLs where the rules do not offer the same mechanism for judicial involvement as under Civil Rule 23.

A judge member expressed the view that rulemaking may not always be appropriate in the MDL context. It would be difficult to carve out a category of MDL cases to which certain rules should apply. Flexibility in MDLs is preferable to a one-size-fits-all approach. Rather than rulemaking, this member suggested, it would be better to promote best practices through guidance from, for example, the Judicial Panel on Multidistrict Litigation (JPML) and the Manual for Complex Litigation. Of the topics under study, this member suggested, the best candidate for rulemaking would be interlocutory appeals; Section 1292(b) is not a good fit for MDLs.

Another member suggested that this is an area where some rulemaking would be helpful because procedural decisions can have huge substantive implications in MDL proceedings. In this member's experience, large MDLs usually result in settlement. Judicial management and decisions regarding interlocutory appeal have a massive impact on the outcome. As to addressing judicial involvement in the settlement process, however, this member suggested a need for caution.

A different member emphasized that in the mass tort MDL context, Civil Rule 23 brings with it a lot of jurisprudence that gives some backbone as to the roles of lead attorneys. The American Law Institute's project on aggregate litigation provides guidance on what ethical obligations lead attorneys have regarding settlement when representing large groups of clients. This member agreed with the earlier comment that some of these issues go beyond the role of procedure and may not be appropriate for rulemaking. In addition, creating a rule for interlocutory review in MDL proceedings may prolong these cases even further. This would cause practical concerns for clients.

A member noted that, in his experience in the Second Circuit, requests for interlocutory review under § 1292(b) are rarely granted. He asked how different courts are treating these

requests. Professor Marcus explained that the difficulty is finding all the cases in which these requests are made but denied. Judge Bates added that the subcommittee hears anecdotally that certain circuits never grant § 1292(b) requests, but clear data are not readily available to support or contradict these comments. A judge member noted that his research revealed little as far as cases dealing with when it is appropriate to grant § 1292(b) requests in MDL cases.

Another judge member commented that the JPML makes available a very fine body of resources for case management. She asked whether the JPML has a view regarding the need for rulemaking. Regarding interlocutory appeals, this member noted that added delay presents a real concern from a case management perspective.

Rule 4(c)(3) – Service by the U.S. Marshals Service. Professor Cooper explained that present language in Civil Rule 4(c)(3) creates an ambiguity by stating both "the court may order" service by a marshal at the plaintiff's request and "[t]he court must so order if the plaintiff" has i.f.p. status. One plausible interpretation is that if a plaintiff is granted i.f.p. status, then the court must order service by a marshal. A second interpretation is that the court's obligation to order service by a marshal is contingent on the plaintiff making a motion. If the rule were amended to remove the ambiguity, the amended rule could adopt either of these approaches, or it could instead adopt a different approach that would direct service by a marshal on behalf of any i.f.p. litigant even when the court does not order the marshals to effect service. The Advisory Committee is in discussions with the U.S. Marshals Service and the Administrative Office regarding possible solutions.

Judge Campbell stated that the staff attorneys in his court confirmed that 100% of prisoner pro se complaints that survive initial screening by the court under 28 U.S.C. § 1915A are served by a marshal, and about 50% of non-prisoner pro se cases are served by a marshal. In the other 50% of non-prisoner pro se cases, Judge Campbell noted that the plaintiffs effect service by other means. This suggests that there is a significant portion of cases where the marshals are not needed.

Rule 12(a) – Filing Times and Statutes. Judge Bates explained that the Advisory Committee has begun looking at Civil Rule 12(a), which sets the time to serve a responsive pleading. The general provision under paragraph (1) — setting the presumptive time at 21 days — includes the qualifying statement: "Unless another time is specified by this rule or a federal statute[.]" The Advisory Committee is considering whether the same qualifier should be added to paragraphs (2) and (3), which apply to the United States and its officers or employees. Judge Bates noted that the Freedom of Information Act sets a 30-day response time, which may apply to cases otherwise governed by Rule 12(a)(2). The Advisory Committee will discuss this issue more in-depth at its spring meeting.

Matters Removed from the Agenda. Judge Bates identified items that the Advisory Committee removed from its agenda after consideration. These items relate to expert witness fees in discovery, proportionality under Rule 26, clear offers under Rule 68, and a proposal that Rule 4(d) be amended to address the practice of "snap removal."

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Richter provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee presented three information items.

Rule 702 – Admission of Expert Testimony. The Advisory Committee has been examining Evidence Rule 702, following a 2016 report which raised concerns about methods used nationwide for forensic feature-comparison evidence. The report by the President's Council of Advisors on Science and Technology (PCAST) recommended the preparation of a committee note to Rule 702 that would guide judges as to the admissibility of forensic feature-comparison expert testimony. The Advisory Committee convened a symposium in October 2017 to discuss the PCAST report and related *Daubert* issues. It has continued to discuss potential rule amendments at subsequent Advisory Committee meetings. At its fall 2019 meeting, the Advisory Committee concluded that creating a free-standing rule governing forensic evidence would be inadvisable because such a rule would overlap problematically with Rule 702. Judge Livingston noted that the Advisory Committee is exploring judicial and legal education options on this issue and the Committee's Reporter is working with the FJC and Duke and Fordham Law Schools to organize judicial-education programming.

The Advisory Committee is continuing to consider a possible amendment that would add an element to Rule 702 to address the problem of experts overstating opinions. Prior to its fall meeting, the Advisory Committee convened a group of judges from around the country for a mini-conference at Vanderbilt University. The panel provided helpful comments about *Daubert* best practices and potential Rule 702 amendments on overstatement in expert opinions. At its spring 2020 meeting, the Advisory Committee will decide whether to move forward with proposed amendments or to put further consideration of Rule 702 on hold. The DOJ has suggested that the Advisory Committee take the position of "watchful waiting" and permit the DOJ to continue its work in this area and to allow its internal changes to percolate through the courts. Judge Livingston noted that the Evidence Rules Committee is working in tandem with the Criminal Rules Committee (which has been developing amendments to Criminal Rule 16 concerning expert disclosures).

Rule 106 – Rule of Completeness. The Advisory Committee received a proposal to amend Rule 106 to provide that a completing statement is admissible over a hearsay objection and to provide that the rule covers oral statements as well as written or recorded statements. Judge Livingston noted that most courts already permit completing oral statements, but under Rule 611 rather than Rule 106. Judge Livingston observed that the original committee note to Rule 106 stated that the rule was limited to writings and recorded statements only "for practical reasons." Those "practical reasons" might concern situations where completing oral statements are made by different declarants. Another practical concern is disrupting the order of proof in a case.

Judge Livingston explained that the hearsay issue presents the strongest reason for a rule amendment. The Sixth Circuit has a published opinion holding that in order to complete a statement under Rule 106, the completing portion of the statement must also be admissible under the hearsay rules. The Advisory Committee is considering whether and how the Evidence Rules

should allow these completing oral statements to come in as evidence. Some Advisory Committee members have taken the position that a rule amendment should, in effect, create a new hearsay exception, such that the completing portion of a statement comes in for its truth. Others took the position that a completing oral statement should come in for completeness, but not its truth unless it satisfies one of the hearsay exceptions. The Advisory Committee will continue to consider this matter at its next meeting.

Rule 615 – Excluding Witnesses. The Advisory Committee is considering a potential amendment to Evidence Rule 615, which provides that a judge may *sua sponte* — or must, upon request — exclude witnesses from a trial or hearing. Professor Richter noted that sequestration orders under Rule 615 tend to be short, and the brevity of these orders, as reflected in transcripts, creates uncertainty about their scope. For example, such orders may be interpreted as only requiring witnesses to physically leave the courtroom. On the other hand, they may extend beyond physical sequestration and regulate behavior and communications by witnesses outside the courtroom. The Advisory Committee identified a conflict in federal case law regarding these interpretations. Some courts say that for a Rule 615 order's scope to extend beyond physical sequestration, a judge's order must explicitly state that external communications are to be limited. Most courts, however, say that it is implicit in the Rule — and thus covered in vague orders — that sequestration extends beyond physical presence in the courtroom. Without specificity in a Rule 615 order, the Advisory Committee is concerned that witnesses will not have notice that the court intends to bar external communications.

The Advisory Committee has identified possible alternative rule amendments to address the issue of the scope of Rule 615 orders. At this point, the Advisory Committee is still considering whether any amendment is appropriate; it will continue to explore these possibilities at its spring meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Criminal Rules Advisory Committee, which met on September 24, 2019, in Philadelphia, Pennsylvania. The Advisory Committee presented three information items.

Rule 16 – Discovery Concerning Expert Reports and Testimony. The Advisory Committee's draft amendments to Criminal Rule 16 seek to improve the specificity and timeliness of expert disclosures. The Advisory Committee undertook this project following public suggestions that Rule 16 be amended to track more closely the Civil Rule 26 approach to expert disclosures. The Advisory Committee has held two informational sessions in the past two years. Following these sessions, the Advisory Committee identified the main problems with Criminal Rule 16: timing of the disclosure, and disclosures that are too cursory and vague to allow the parties to adequately prepare for trial. The reporters and Rule 16 Subcommittee developed a proposal to address these problems. At its fall 2019 meeting, the Advisory Committee discussed and refined the draft amendments, and unanimously approved them and a proposed committee note.

Judge Kethledge summarized the Advisory Committee's main points of discussion and debate. First, the Advisory Committee debated whether a numerical or functional deadline for

disclosure would be preferable. The Advisory Committee decided a functional standard — "sufficiently before trial to provide a fair opportunity for" each party to meet the opponent's evidence — was appropriate because a one-size-fits-all approach does not work well in this context. The rule requires the district court to specify a deadline using this standard. Second, the Advisory Committee considered whether to term the disclosed document something other than a "summary" (as the current Rule calls it). The Advisory Committee elected to eschew the terms "summary" and "report" and instead to focus on the verb "disclose" – thus allowing the amended provisions to speak for themselves regarding required content of the disclosure. The proposed amendments would add to the list of required contents "a complete statement of all opinions" that the party will elicit in its case-in-chief.

While the proposal would not require the witness to prepare the document to be disclosed under Rule 16, it would require that the witness review and sign the document. Judge Kethledge explained that this provision serves an impeachment function. Judge Kethledge noted some of the concerns expressed by the DOJ about the proposal. For the signing requirement, the Department indicated that it does not always have control over the expert witness and may face difficulty getting the witness to sign; the draft includes an option for the disclosing party to "state[] in the disclosure why it could not obtain the witness's signature through reasonable efforts."

Judge Kethledge emphasized the deliberative process undertaken by the Rule 16 Subcommittee and the full Advisory Committee in developing this proposal. He commended those involved for contributing constructively and in good faith. The Advisory Committee's proposal is a product of a fairly delicate compromise. He explained that the Advisory Committee is confident that this proposed amendment would improve practice in criminal cases and allow expert testimony to be more effectively tested than it is at present.

Professor Beale added that the proposal will bring Criminal Rule 16 closer to Civil Rule 26 but she emphasized that criminal practice is different. Professor Beale explained the differences in pre-trial disclosures and discovery between civil and criminal practice. The goal of the proposed amendment is to allow the parties adequate time and opportunity to prepare for trial, and the proposal provides the necessary flexibility for that in the criminal context. Thus, the Advisory Committee drew on certain aspects of Civil Rule 26 but tailored the proposal for criminal practice. Professor King noted that the proposal limits the required disclosure to the expert opinions that will be elicited in the party's case-in-chief. This reflects special constitutional concerns in criminal cases.

The DOJ representative commented on the Advisory Committee's excellent process that took into account the Department's concerns and input and reached a consensus proposal agreeable to everyone.

A judge member inquired whether the "reasonable efforts" standard for obtaining the expert witness's signature could be clarified. Professor Beale responded that the committee note, which will be considered again at the Advisory Committee's spring meeting, could address this issue.

Professor Marcus commented that the proposal's duty to supplement the disclosure may cause problems, based on experience with a similar provision under the Civil Rules. Professor King responded that Criminal Rule 16(c) contains a continuing duty to disclose.

Judge Campbell asked what the defendant's "case-in-chief" refers to under the proposed Rule 16(b)(1)(C)(i). Professor Beale explained that "case-in-chief," as it applies to the defense, is when the defense puts on its own witnesses after the government rests. The current rule uses "case-in-chief" in several places – with respect to discovery obligations of both the government and the defense – but not with respect to the defense's expert witness disclosure obligations. Instead, under current subsection (b)(1)(C), the defense must disclose expert witnesses it intends to use as evidence at trial. The Advisory Committee was concerned that the absence of the restricting language "case-in-chief" in subsection (b)(1)(C) might inadvertently require the defendant to disclose *more* than the government. Professor Beale emphasized that it was the Advisory Committee's goal to make the party's obligations both parallel and reciprocal.

Judge Campbell expressed concern about adding the "case-in-chief" language to the defense's expert disclosure obligations. In his view, neither the current rule nor the proposed amendment make the disclosure obligations equal. He pointed out that adding the "case-in-chief" language to the defendant's disclosure obligations could be interpreted as expanding the disclosure obligation to all expert witnesses the defense intends to use, including any rebuttal experts. In contrast, it is not clear that the government would be obligated to disclose rebuttal expert witnesses.

Professor Beale explained that the issue of unequal disclosure standards has not been coming up in practice. She suggested that the language is worth looking at again but added that there may be concern about opening up the disclosure requirements to encompass more than "case-in-chief." Judge Kethledge noted that it is hard to find the right phrase; one possibility might be "disclose every witness you will use." Judge Campbell responded that this is what the rule already requires of the defendant, but not of the government; the Rule, he stressed, should be even-handed.

A member raised the question about the risk of one party trying to game the system under this proposal by under-disclosing and later supplementing. This member highlighted the door-shutting aspect of the Civil Rule 26 approach. The reporters responded that this potential issue had not been raised in any discussions and would be beneficial to address with the Advisory Committee.

A judge member commented that the defendant's "case-in-chief" language already existed in subdivision (b) and that there are practical reasons to use that term. Because a defendant has no obligation to preview his or her defense before trial, the government may not know what expert witnesses it needs for rebuttal. The same situation can arise where a defendant needs to call an expert witness in sur rebuttal. This member suggested that this is a reason to use parallel language and refer to "case-in-chief." Professor King explained that even though the proposal is reciprocal, it is situated within the larger context of various defense rights, including the protection against self-incrimination.

Another member remarked that the duty to supplement expert disclosures under Civil Rule 26 is critical to prevent trial by ambush. The member observed that this concern may not carry over to criminal practice to the same degree.

Professor King asked the Standing Committee members whether it makes sense to close the door on a criminal defendant's ability to supplement when the defendant identifies an additional expert witness during and because of an issue that arises at trial. She noted as a backdrop that the defendant has no duty to put on a defense at all.

Judge Campbell emphasized the tension present in criminal practice: there is an interest in avoiding sandbagging, but the system also must preserve the defendant's rights.

Professor Beale acknowledged these concerns. She reiterated that practitioners have not been reporting problems with delayed supplementation or parties gaming the system. Unlike with new Criminal Rule 16.1, there was no push to add an explicit good-faith element to the duty to supplement in this proposal. Judge Kethledge added that the Advisory Committee developed this proposal with the approach of limiting its efforts to actual, existing problems and building a consensus around them, rather than focusing on speculative problems.

Task Force on Protecting Cooperators. Judge Kethledge noted that the Task Force, chaired by Judge Lewis Kaplan, has made its recommendations, which related primarily to changes in the CM/ECF system and changes to Bureau of Prisons operations and policies. Some of the recommendations are proving challenging and expensive to implement.

In Forma Pauperis Status Suggestion. Judge Kethledge explained that the Advisory Committee chose not to pursue the suggestion regarding i.f.p. status because eligibility under the Criminal Justice Act involves different standards. The Advisory Committee would be interested in being involved with this multi-committee item, if it continues, as far as i.f.p. status relates to habeas cases.

OTHER COMMITTEE BUSINESS

Legislative Report. Julie Wilson delivered the legislative report and directed the Committee to the tracking chart in the agenda book. The chief legislative development concerning the rules committees is the SBRA, which was discussed previously. Along with CACM and the Office of Legislative Affairs, the Rules Committee Staff provided support to Judge Audrey Fleissig and Judge Richard Story last fall when they testified before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet. The hearing and their testimony primarily focused on sealing of court records, cameras in federal courts, and access to the Public Access to Court Electronic Records (PACER) database. Representative Nadler recently introduced H.R. 5645, the "Eyes on the Courts Act of 2020." The bill would provide for media coverage of all federal appellate proceedings, including Supreme Court proceedings. A Sunshine in Litigation Act bill will likely be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Ms. Wilson reported on the *Strategic Plan for the Federal Judiciary*, which sets out the core values of the federal judiciary and strategies for realizing those values. The *Plan* is updated every five years, and 2020 is an update year. Ms. Wilson directed the members to the agenda book containing an update from Judge Campbell on the *Plan* and the Rules Committees' work. Discussion was invited; Judge Campbell will continue to communicate with the Judiciary's Planning Officer regarding updates to the *Plan.*

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Washington, DC. on June 23, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

Agenda E-19 (Summary)
Rules
March 2020

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 28, 2020. All members participated.

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

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; Professor Liesa Richter, consultant to the Advisory Committee on

Evidence Rules; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five rules advisory committees and two joint subcommittees, and discussed an action item regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

The Advisory Committee met on October 30, 2019. Discussion items included: the rules and forms published for public comment in August 2019; potential amendments to Rules 25, 35, and 40; a suggestion that parties be given notice and an opportunity to respond if a decision will rest on grounds not argued; and the standard for in forma pauperis participation in appellate cases.

Rule 25

The Advisory Committee continued its discussion of potential amendments to Rule 25(a)(5) to ensure privacy protections in Railroad Retirement Act cases. A proposed rule amendment will be considered at the spring meeting.

Rules 35 and 40

Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Hearing) imposing length limits on responses to a petition for rehearing have been approved by

the Conference and submitted to the Supreme Court for its consideration, with a potential effective date of December 1, 2020. Beyond these specific pending amendments, the Advisory Committee continued to consider a suggestion that Rules 35 and 40 be revised comprehensively to make the two rules dealing with rehearing petitions more consistent, but has been dissuaded from doing so given the absence of a demonstrated problem calling for such a comprehensive solution, as well as potential unintended consequences and the general disruption of significant rules amendments. The Advisory Committee will continue to discuss more limited amendments to Rule 35 that would clarify the relationship between petitions for panel rehearing and rehearing en banc.

Finally, the Advisory Committee determined to retain on its agenda a suggestion that parties be given notice and an opportunity to respond if a decision may be based on grounds not argued. The Advisory Committee will also continue to consider in forma pauperis standards in appellate cases.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no action items.

Information Items

The Advisory Committee met on September 26, 2019. The bulk of the agenda concerned responses to two recently enacted laws and an update on the restyling of the Bankruptcy Rules.

Response to Enactment of the Honoring American Veterans in Extreme Need Act of 2019: Notice of Amendments to Official Forms 122A-1, 122B, and 122C-1

In response to the Honoring American Veterans in Extreme Need Act of 2019 (HAVEN Act, Pub. L. No. 116-52, 133 Stat, 1076), which became effective on August 23, 2019, the Advisory Committee approved amendments to Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of

Commitment Period). It submitted the amendments for retroactive approval by the Standing Committee, and for notice to the Judicial Conference.[1]

The HAVEN Act amends the definition of "current monthly income" in Title 11, U.S. Code, § 101(10A) to exclude:

> any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

The exclusions set forth in the HAVEN Act's amended definition of "current monthly income" supplement the current income exclusions for social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of terrorism. The HAVEN Act also limits the inclusion of certain pension and retirement income.

To address the statutory change, at its September 26, 2019 meeting, the Advisory Committee approved conforming changes to lines 9 and 10 of Official Forms 122A-1, 122B, and 122C-1. The revised forms were posted on the judiciary's website on October 1, 2019. The Standing Committee approved the changes and now provides notice to the Judicial Conference. The revised forms are set forth in Appendix A.

Response to the Enactment of the Small Business Reorganization Act of 2019: Distribution of Interim Bankruptcy Rules; Notice of Amendments to Official Forms 101, 201, 309E1, 309E2 (new), 309F1, 309F2 (new), 314, 315, and 425A

The Small Business Reorganization Act of 2019 (SBRA, Pub. L. No. 116-54, 133 Stat. 1079) creates a new subchapter V of chapter 11 for the reorganization of small business debtors, which will become effective February 19, 2020. The enactment of the SBRA requires

[1] Because the HAVEN Act went into effect immediately upon enactment, the Advisory Committee voted to change the relevant forms pursuant to the authority granted by the Judicial Conference to the Advisory Committee to enact changes to Official Forms subject to subsequent approval by the Standing Committee and notice to the Judicial Conference (JCUS-MAR 16, p. 24).

amendments to several bankruptcy rules and forms. Because the SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee voted to issue needed rule amendments as interim rules for adoption by each judicial district. In addition, the Advisory Committee recommended amended and new forms pursuant to the authority delegated to make conforming and technical amendments to Official Forms (JCUS-MAR 16, p. 24).

The Advisory Committee's proposed interim rules and form changes were published for comment for four weeks starting in mid-October 2019. As a result of the comments received, a subcommittee of the Advisory Committee recommended changes to several of the published rules and forms, changes to four rules that were not published for public comment, and promulgation of a new rule.

By email vote concluding on December 4, 2019, the Advisory Committee voted unanimously to seek the issuance of 13 interim rules, and it approved nine new or amended forms as Official Forms pursuant to the Advisory Committee's delegated authority from the Judicial Conference (JCUS-MAR 16, p. 24). By email vote concluding on December 13, 2019, the Standing Committee unanimously approved the Advisory Committee's proposed interim rules and Official Form changes required to respond to SBRA. This report constitutes notice to the Judicial Conference of amendments to Official Forms 101 (Voluntary Petition for Non-Individuals Filing for Bankruptcy), 201 (Voluntary Petition for Individuals Filing for Bankruptcy), 309E1 (For Individuals or Joint Debtors), 309E2 (For Individuals or Joint Debtors under Subchapter V) (new), 309F1 (For Corporations or Partnerships), 309F2 (For Corporations or Partnerships under Subchapter V) (new), 314 (Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization), 315 (Order Confirming Plan), and 425A (Plan of Reorganization for Small Business Under Chapter 11). The revised forms are set forth in Appendix B.

Following the Standing Committee's approval, the chairs of the Standing Committee and the Advisory Committee requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so that they can be adopted locally to facilitate uniformity in practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. On December 16, 2019, the Executive Committee approved the requests as submitted.

The chairs of the Standing Committee and the Advisory Committee sent an explanatory memorandum to all chief judges of the district and bankruptcy courts on December 19, 2019. The memorandum included a copy of the interim rules and requested that they be adopted locally to implement the SBRA until rulemaking under the Rules Enabling Act can take place.

A copy of the December 19 memorandum and the Advisory Committee's December 5 Report to the Standing Committee are included in Appendix B. The interim rules and amended forms are also posted on the judiciary's website.

At its spring 2020 meeting, the Advisory Committee will consider the issuance of permanent rules to comply with the SBRA and anticipates seeking the Standing Committee's approval at its June 2020 meeting to publish the rules and forms for public comment in August 2020.[2]

Bankruptcy Rules Restyling

The Advisory Committee also reported on the progress of the work of its Restyling Subcommittee in restyling the Bankruptcy Rules. The Advisory Committee anticipates that

[2] Although the Official Forms have been officially promulgated pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, the Advisory Committee intends to publish them again under the regular procedure to ensure full opportunity for public comment.

restyled versions of the 1000 and 2000 series of rules will be ready for publication for public comment this summer, subject to the Standing Committee's approval at its June 2020 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on October 29, 2019. In addition to its regular business, the Advisory Committee heard testimony from one witness regarding the proposed amendment to Rule 7.1 addressing disclosure statements, which was published for public comment in August 2019. The proposed amendment to Rule 7.1 remains out for public comment, and the Advisory Committee plans to consider the draft rule and anticipates seeking final approval from the Standing Committee at its June 2020 meeting. The Committee discussed a suggestion regarding service by the U.S. Marshals Service for in forma pauperis cases. In addition, the Committee received updates on the work of a joint Civil-Appellate subcommittee and two subcommittees tasked with long-term projects involving possible rules for social security disability cases and multidistrict litigation (MDL) cases.

Service by U.S. Marshals for In Forma Pauperis Cases

At the January 2019 Standing Committee meeting, a member raised an ambiguity in the meaning of Rule 4(c)(3), the rule addressing service by the U.S. Marshals Service for in forma pauperis cases. The rule states that "[a]t the plaintiff's request, the court *may* order that service be made" by a marshal and that the court "*must* so order" if the plaintiff is proceeding *in forma pauperis* (emphasis added). The ambiguity lies in the word "must" – when is it that the court "must" order service? The two sentences could be read together to mean that the court must order service by a marshal only if the plaintiff has requested it. Or the second sentence could be read independently to require marshal service even if the plaintiff does not make a request. The

ambiguity appears to be an unintended result of changes made as part of the 2007 restyling of the Civil Rules.

According to the U.S. Marshals Service, service practices for in forma pauperis cases vary across districts. Greater uniformity would be welcome, as would reducing service burdens on the Marshals Service. While it is not clear that a rule change would accomplish either goal, the Advisory Committee is exploring amendment options that would resolve the identified ambiguity. The Advisory Committee will continue to gather information on current practices and possible improvements in consultation with the U.S. Marshals Service.

Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

As previously reported, a joint subcommittee of the Advisory Committees on Civil and Appellate Rules is considering whether either or both rule sets should be amended to address the effect of consolidating initially separate cases on the "final judgment rule". The impetus for this project is *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that a judgment in one case would not be considered "final" until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if "our holding in this case 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." *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any "practical problems" have arisen post-*Hall*. As a first step, the subcommittee is working with the FJC to gather data about consolidation practices. The FJC's study will

initially include actions filed in 2015-2017 and may eventually include post-2017 actions. The subcommittee will not consider any rule amendments until the research is concluded.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases 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).

The subcommittee continues to work on a preliminary draft Rule 71.2 for discussion purposes. The subcommittee made the initial decision to include the rule within the existing Civil Rules framework with the goal of obtaining a uniform national procedure. Some members at the Advisory Committee's October 2019 meeting expressed concern that including subject-specific rules within the Civil Rules conflicts with the principle that the Civil Rules are intended to be rules of general applicability, i.e., "transubstantive." The DOJ has expressed concern about the precedent of adopting specific rules for one special category of administrative cases. The subcommittee has drafted a standalone set of supplemental rules to be considered as an alternative to including a rule within the existing Civil Rules.

The subcommittee will continue to gather feedback on the draft Rule 71.2, the supplemental rules and, of course, the broader question of whether rulemaking would resolve the issues identified in the initial ACUS suggestion. The subcommittee plans to decide whether pursuit of a rule is advisable and to recommend an approach at the Advisory Committee's April 2020 meeting.

MDL Subcommittee

The MDL Subcommittee was formed in November 2017 to consider several suggestions from the bar that specific rules be developed for MDL proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members continue to gather information and feedback by participating in conferences hosted by different constituencies, including MDL transferee judges.

The MDL Subcommittee has considered a long list of topics and narrowed that list over time. At the October 2019 meeting, the subcommittee reported its conclusion that third-party litigation financing (TPLF) issues did not seem particular to multidistrict litigation and in fact appear more pronounced in other types of litigation. For that reason, the subcommittee recommended removing TPLF issues from the list of topics on which to focus. Given the growing and evolving importance of TPLF, the Advisory Committee agreed with the subcommittee's recommendation that the Advisory Committee continue to monitor developments in TPLF. The MDL Subcommittee's continued work now focuses on three areas:

a. Use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery;

b. Interlocutory appellate review of some district court orders in MDL proceedings; and

c. Settlement review, attorney's fees, and common benefit funds.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on September 24, 2019. The meeting focused on a proposed draft amendment to Rule 16 that would expand the scope of expert discovery. The scope of discovery in criminal cases has been a recurrent topic on the Advisory Committee's

agenda for decades. Most recently, the Rule 16 Subcommittee was formed to consider suggestions from two district judges to expand pretrial disclosure of expert testimony in criminal cases under Rule 16 to more closely parallel the expert disclosure requirements in Civil Rule 26. At the Advisory Committee's October 2018 meeting, the DOJ updated the Advisory Committee on its development and implementation of policies governing disclosure of forensic and non-forensic evidence. The Rule 16 Subcommittee subsequently convened a miniconference in May 2019 to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. Participants were asked to identify any concerns or problems with the current Rule 16 and to provide suggestions for improving the rule.

While the DOJ representatives reported no problems with the current rule, the defense attorneys identified two problems: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Participants discussed ways to improve the current rule to address these identified concerns.

Based on the feedback, the Rule 16 Subcommittee drafted a proposed amendment that addressed the timing and contents of expert disclosures while leaving unchanged the reciprocal structure of the current rule. First, the proposed amendment provides that the court "must" set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. That time must be "sufficiently before trial to provide a fair opportunity for each party to meet" the other side's expert evidence. Second, the proposed amendment lists what must be disclosed in place of the now-deleted phrase "written summary."

After thorough discussion at the October 2019 meeting, the Advisory Committee unanimously approved the draft amendment in concept. The Rule 16 Subcommittee continues to refine the draft rule and accompanying committee note and will present the final draft to the

Advisory Committee at the May 5, 2020 meeting. The Advisory Committee plans to seek approval to publish the proposed amendment in August 2020.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 25, 2019. That morning, the Advisory Committee held a miniconference on best practices for judicial management of *Daubert* issues. The afternoon meeting agenda included a debrief of the miniconference, as well as discussion of ongoing projects involving possible amendments to Rules 106, 615, and 702.

Miniconference on Best Practices in Managing *Daubert* Issues

The miniconference involved an exchange of ideas among Advisory Committee members and an invited panel regarding *Daubert* motions and hearings, including the questions about the interplay between *Daubert* and Rule 702. The panel included five federal judges who have authored important *Daubert* opinions and who have extensive experience in managing *Daubert* proceedings, as well as a law professor who has written extensively in this area.

Rule 702

Following the miniconference, the Advisory Committee continued the discussion, noting that its consideration of these issues began with the Advisory Committee's symposium on forensics and *Daubert* held in October 2017. The Advisory Committee formed a Rule 702 Subcommittee to consider possible treatment of forensics, as well as the weight/admissibility question described below.

The Advisory Committee has heard extensively from the DOJ about its current efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment addressing overstatement of expert opinions, especially directed toward

forensic experts. The current draft being considered by the Advisory Committee provides that "if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results." At its next meeting on May 8, 2020, the Advisory Committee plans to consider whether to seek approval to publish for public comment a proposed amendment to Rule 702.

Rule 106

The Advisory Committee continues its consideration of various alternatives for an amendment to Rule 106, which provides that when a party presents a writing or recorded statement, the opposing party may insist on introduction of all or part of a writing or recorded statement that ought in fairness to be considered as well. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded oral statements to be admissible for completion, or rather to leave it to parties to seek admission of such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence. The Advisory Committee plans to consider at its May 8, 2020 meeting whether to recommend a proposed amendment to Rule 106 for public comment.

Rule 615

Finally, the Advisory Committee continues to consider a rule amendment to address problems identified in the case law and reported to the Advisory Committee regarding the scope of a Rule 615 order, regarding excluding witnesses. The Advisory Committee plans to consider

whether to recommend a proposed amendment to Rule 615 for public comment at its May 8, 2020 meeting.

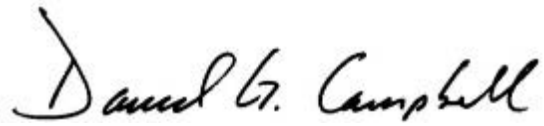
OTHER ITEMS

The Standing Committee's agenda included two additional information items and one action item. First, the Committee heard the report of the E-filing Deadline Joint Subcommittee, the subcommittee formed to consider a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone. The subcommittee's membership includes members of each of the rules committees as well as a representative from the DOJ. The subcommittee's work is in the early stage and it will report its progress at the June 2020 meeting.

Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, at the request of Judge Carl E. Stewart, Judiciary Planning Coordinator, the Committee discussed whether there were any changes it believed should be considered for inclusion in the 2020-2025 *Strategic Plan for the Federal Judiciary* (*Strategic Plan*). It is the Committee's view that, while committed to supporting the *Strategic Plan*, its work is very specific – evaluating and improving the already-existing rules and procedures for federal courts – and often does not involve the broader issues that concern the Judicial Conference and the strategic planning process. With this reality in mind, the Committee did not identify any specific additional rules-related suggestions but authorized the Chair to convey to Judge Stewart ongoing rules initiatives that should support the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Gene E.K. Pratter
Robert J. Giuffra Jr.	Jeffrey A. Rosen
Frank Mays Hull	Srikanth Srinivasan
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Appendix A – Official Bankruptcy Forms (form changes made to implement the HAVEN Act)
Appendix B – Memoranda, Interim Bankruptcy Rules, and Official Bankruptcy Forms regarding implementation of the SBRA

Effective December 1, 2019 REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2019); approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised March 2020

Effective February 19, 2020 The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code -- adding a subchapter V to chapter 11 -- made by the Small Business Reorganization Act of 2019		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

Revised March 2020

Effective (no earlier than) December 1, 2020 Current Step in REA Process: transmitted to Supreme Court (Oct 2019) REA History: approved by Judicial Conference (Sept 2019); approved by Standing Committee (June 2019); approved by relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifiies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised March 2020

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the *expressio unius* approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals. Also, the phrase "no mandate or other process may issue without a court order" is replaced in new (b)(3). A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142 .	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volumne paper notice recipients (intially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised March 2020

Legislation that Directly or Effectively Amends the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: Introduced in the House; referred to Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ) *Co-Sponsors:* Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: Introduced in the House; referred to Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security • 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: the Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: Introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsor:* Durbin (D-IL)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	• 5/8/19: Introduced in the Senate; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	• 5/9/19: Introduced in the Senate; referred to Judiciary Committee

Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 5/15/19: Introduced in the Senate; referred to Judiciary Committee
	H.R. 5395 *Sponsor:* Bacon (R-NE) *Co-Sponsors:* Graves (R-LA) Johnson (R-OH) Stivers (R-OH)		Identical to Senate bill (see above).	• 12/11/19: introduced in House; referred to Judiciary Committee • 1/30/20: referred to Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security

CARES Act	**H.R. 748**	CR (multiple)	**Bill Text (as enrolled):** https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf *See* pp. 247-50 **Summary:** Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencings. Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act. **Report:** None.	• 3/27/20: became Public Law No. 116-136

TAB 2

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TAB 2A

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

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

RE: **Final Recommendations for Amending Rule 16's Expert Provisions**

DATE: **April 9, 2020**

Following the Advisory Committee's tentative adoption of amendments to Rule 16's provisions on expert disclosures last fall, the subcommittee met by phone in October and March to continue its work on the proposal. After considering issues raised during the Advisory Committee's fall 2019 meeting, and during Judge Kethledge's presentation of the draft amendment and note to the Standing Committee, the subcommittee has completed revisions and recommends that the Advisory Committee approve the amended rule and accompanying committee note included at Tab 2C.

An overview of the subcommittee's deliberations and recommended changes follows.

I. Issues regarding the text of the rule

A. Defendant's "case-in-chief"; rebuttal experts

At the fall meeting, there was support for changing the scope of disclosure required for defendants from testimony the defendant intends to use "as evidence at trial" (as currently provided in the rule) to testimony the defendant intends to use during the defendant's "case-in-chief." The subcommittee supported the change to ensure that defendant's disclosure obligation would (1) be no broader than that of the government, (2) parallel the wording in Rule 16(b)(1)(B)(ii), which now requires disclosure of test results "if the defendant intends to use the item in the defendant's case-in-chief at trial," and (3) be consistent with current practice, which had not attached special importance to the omission of the phrase "case-in-chief" in the current rule. Research had revealed no explanation for the change to "evidence at trial" from the initial draft approved by the Rules Committees that had limited each party's disclosure obligation to evidence to be used in the party's case-in-chief.

The subcommittee revisited this issue during its March call in response to Judge Campbell's comments at the Standing Committee meeting. Judge Campbell suggested that perhaps both parties should disclose all expert testimony they intend to use at trial, not only testimony they intend to present in their case-in-chief. The reporters' memo to the subcommittee before its March call addresses this issue in some detail. *See* Tab 2B.

After discussion, the subcommittee agreed that it was appropriate to use the phrase "case-in-chief" to describe the scope of the defendant's disclosure obligation. But it decided to add language requiring the government to disclose not only testimony it intends to use in its case-in-chief, but also testimony it intends to use "during its rebuttal to counter testimony that the

defendant has timely disclosed under (b)(1)(C).” The subcommittee concluded this change was needed to address the core challenge addressed by the proposal: providing adequate notice to the defendant of expert testimony that the government knew, before trial, that it would be using at trial. Members agreed that it would be unfair to require the defense to disclose its experts and not require the government to disclose the experts it intended to use to rebut that testimony.

All subcommittee members supported the change, so long as it was limited to only those experts intended to rebut experts the defendant had timely disclosed under (b)(1)(C). There was no support for requiring a defendant to disclose an expert the defendant would use to rebut a government’s rebuttal expert. The government had not suggested that lack of notice regarding such surrebuttal experts was a problem, and members agreed that under the current rule district judges have no difficulty managing this unusual situation.

After the subcommittee call and consultation with the style consultants, the new language was revised to be more concise. As revised, (a)(1)(G) requires the government to disclose:

> any testimony that the government intends to use at trial under Federal Rule of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C).

Tab 2C, rule text at lines 9-13; *see* lines 28-31 (parallel change).

B. Modified requirement for exception to signature requirement

After consultation with the style consultants, the subcommittee modified the language regarding an exception to the signature requirement that had been approved by the Advisory Committee at its fall meeting. That language provided that a party seeking an exemption must state “the reason it could not obtain the witness’s signature through reasonable efforts.” The modified language provides instead that the party must state “why it could not obtain the witness’s signature through reasonable efforts.” *Id.* at lines 47-49; 98-100. This change avoids repetition of the word reason/reasonable and appears to be the same substantively.[1]

[1]Additional stylistic changes were made to this subsection. The language approved at the fall meeting provides an exemption from the signature requirement when “all of the opinions and the bases and reasons for them required under (iii) were set forth in a report previously provided under (F) and signed by the witness.” It was revised to read “has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).” Tab 2C, rule text at lines 50-52; 101-03. The style consultants also suggested changes to the phrasing of cross-references throughout the rule to comply with their guidelines, as well as several small style changes, which were made.

C. Issues discussed that did not result in changes to the text

Constitutional concerns. Following a request by Judge Campbell to address any constitutional concerns that might be raised by the proposed amendments to the defense disclosure provisions, the subcommittee considered possible constitutional challenges under the Due Process and the Self Incrimination Clauses of the Fifth Amendment. For the reasons stated in the reporters' memorandum (Tab 2B), the subcommittee concluded that the revisions did not raise constitutional concerns.

Specifying efforts made to obtain the witness's signature. Some subcommittee members thought the rule ought to require a party to specify the efforts made to obtain a witness's signature when seeking to take advantage of that exception to the signature requirement. After discussion, this change was not made. Members concluded that the word "reasonable" that modified the word "efforts" was sufficient to permit a party to seek an order from a judge if necessary, and that judges deal with similar issues regularly.

II. Issues regarding the committee note

In addition to making revisions needed to conform to the changes in text approved by the Advisory Committee at its fall meeting or discussed above, the subcommittee reordered the paragraphs of the committee note to correspond to the subsections of the rule, and also considered several other changes to the committee note.

A. Reference to Speedy Trial Act

The subcommittee made the following change to the note: "The court also retains discretion under Rule 16(d) ~~and~~ consistent with the provisions of the Speedy Trial Act to alter deadlines." Tab 2C, committee note at line 35. This recognizes that while the Speedy Trial Act allows for certain periods of delay to be excluded, it is not itself a means of extending a disclosure deadline.

B. Reference to Civil Rule 26

The subcommittee deleted the last two of the three sentences in the note approved by the full committee in the fall that referenced Civil Rule 26, and modified the first to read: "Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of ~~transplant~~ practice under the civil rule ~~to~~in criminal cases, which differ in many significant ways from civil cases." *Id.* at line 46. Members expressed the view that it was not necessary or helpful to describe the many differences between civil and criminal litigation.

The omitted sentences had read:

> Rather, the amendment is tailored to criminal litigation. For example, unlike Civil Rule 26, which mandates a more exhaustive report for retained experts and only a summary for experts who have not been retained by the party, the disclosure

required in the criminal rule must be made for all experts, those who are specially employed for their testimony as well as those, such as law enforcement officers or treating physicians, who are not.

C. Documents accompanying a report

The subcommittee added the parenthetical "(including accompanying documents)" to the note in order to emphasize that supporting documents disclosed with a report are part of the report. *Id.* at line 54.

D. Government experts not identified at the time disclosure required.

A member of the Standing Committee suggested that the committee note address the situation in which the government knows what expert testimony it will be presenting but not the exact identity of which expert will be available to testify. The subcommittee concluded that if there was some change in the expert's identity after the initial disclosure, it could be addressed by the rule's provision on supplementation and correction. To flag this, the subcommittee added a phrase to the committee note: "This provision is intended to ensure that, if there is any modification, expansion, or contraction of a party's expert testimony or change in the identity of an expert after the initial disclosure, the other party will receive prompt notice of that correction or modification." *Id.* at lines 76-77.

E. Game playing regarding duty to supplement disclosures

The subcommittee discussed but decided to make no change to address another concern raised at the Standing Committee meeting. Some members expressed concern that the requirement of supplementation might encourage or permit game playing or pro forma disclosures intended to prompt the other side to reveal its strategy. The subcommittee noted that the amendment did not create the obligation for supplementation. To the contrary, the requirement is in the existing rule, and it had not created the kinds of difficulties that members were concerned about at the Standing Committee. The subcommittee saw no reason to think that adding the timing and content requirements to the rule would change that situation.

TAB 2B

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MEMO TO: Rule 16 Subcommittee
Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Materials for Conference Call (March 26 at 4:00pm EDT)

DATE: March 17, 2020

The purpose of our upcoming call is to consider comments received since the subcommittee's last meeting by telephone. As you recall, during our last call we reviewed the language tentatively adopted at the full Advisory Committee's September 2019 meeting and developed additional language for the note to address issues that were raised but not resolved at that meeting. In January, Judge Kethledge presented the draft amendment and note for discussion at the Standing Committee, and we also received comments on one additional issue from a member of the subcommittee.

We hope to consider the issues raised and reach consensus on a draft that can be approved at the Advisory Committee's May meeting and forwarded to the Standing Committee with a recommendation that it be published for public comment this August.

The proposed amendments to Rule 16(a)(1)(G) and (b)(1)(C), and the accompanying note, are provided below. In addition, for your convenience we have also included a version of the note showing the changes made after the September meeting.

I. Issues raised at the Standing Committee meeting

A. Limiting disclosure to material to be used in a party's "case-in-chief"

At the Standing Committee meeting, Judge Campbell raised concerns about the proposal to eliminate the inconsistency between the provision requiring the government to disclose experts it intends to call in its "case-in-chief at trial" and the provision requiring the defendant to disclose experts he intends to use "as evidence at trial." *Compare* Rule 16(a)(1)(g) ("case-in-chief at trial"), *and* Rule 16(b)(1)(C) ("evidence at trial").

Judge Campbell suggested that it might be preferable to use the phrase "evidence at trial" for the disclosure obligations of *both* the prosecution and the defense, and he expressed concern about how the "case-in-chief" language would apply to rebuttal experts.[1] Because the phrase "case-in-chief" is used in other parts of Rule 16 that require both the government and the defendant to disclose documents, objects, and reports of examinations and tests,[2] Judge

[1] At the Standing Committee meeting, another member asked how the proposal deals with rebuttal and surrebuttal witnesses as well.

[2] *See* Rule 16(a)(1)(E)(ii), (a)(1)(F)(iii), (b)(1)(A)(ii), (b)(1)(B)(ii).

Campbell suggested that the reporters research how this language has been construed, and whether it had raised any constitutional problems.

Below, we briefly describe our research and conclusions.

1. No precedents or history on the distinction between "evidence at trial" and "case-in-chief"

It appears that neither practitioners nor judges have focused on the difference in wording between "evidence at trial" in Rule 16(b)(1)(C) and "case-in-chief" throughout the remainder of Rule 16, in provisions governing both government and defense disclosures. Indeed, we found only a single case that briefly noted the difference, in connection with the application of reciprocal discovery for the sentencing phase of a capital case, and that was in a footnote.[3] Moreover, as you may recall, the Rules Committee's archives provided no explanation for the difference, and our research has revealed no reason for it. In a prior discussion of this issue, Committee members suggested that, in practice, courts and litigants have assumed defense disclosure obligations are no broader than the obligations of the government. Yet by using different formulations, the rule currently suggests that there is such a difference.

The draft proposes to eliminate this disparity and the possibility that in the future the rule might be read to impose a broader disclosure obligation on the defense than on the prosecution, a reading that could raise constitutional concerns. Indeed, any rule requiring the defense to disclose information without also requiring the government to disclose the same information would likely be unconstitutional. In *Wardius v. Oregon*,[4] the Court held that an alibi rule that failed to provide reciprocal discovery by the prosecution of its rebuttal alibi witnesses violated due process. It noted: "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses."[5] "Due Process," the Court added, has "little to say regarding the amount of discovery which the parties must be afforded, [but] it does speak to the balance of forces between the accused and his accuser."[6] It was "fundamentally unfair" for the state to "require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."[7] If

[3] *United States v. Beckford*, 962 F. Supp. 748, 754 n.3 (E.D. Va. 1997) (rejecting the government's argument that because the words "case in chief" do not appear in subsection (b)(1)(C), that part of Rule 16 applies to expert testimony the defendant intends to use at sentencing as well as at trial on the guilt issue, concluding that the provisions of Rule 16(b) "read as a whole, applies only to the *guilt phase* of a prosecution") (emphasis in original).

[4] 412 U.S. 470 (1973).

[5] *Id.* at 475.

[6] *Id.* at 474.

[7] *Id*. at 476.

there was to be any imbalance in discovery rights, "the State's inherent information-gathering advantages" suggest that that imbalance "should work in the defendant's favor."[8]

Because leaving the asymmetric language in the rule unnecessarily invites an application that could later be challenged as unconstitutional under *Wardius,* we believe it is important to clarify that the scope of disclosure is symmetric. The question here is whether (1) the duty of the government should be expanded to all experts it will use at trial, (2) the duty of the defense should be restricted to experts it will present during its case-in-chief, or (3) some alternative phrasing should be adopted for both.

We recommend that the existing proposal, adopting the second option, is the best course.

2. Limiting discovery to "case-in-chief" rather than "at trial" preserves the status quo regarding rebuttal witnesses

The phrase "at trial" could be read as including rebuttal witnesses (by the government to defense experts, and by the defendant to those government rebuttal witnesses) that are presently excluded by the "case-in-chief" restriction.[9] Neither the current rule nor the proposed amendment refers expressly to rebuttal witnesses.

Our research found few cases that discussed how Rule 16(b) applied to what the parties termed "rebuttal witnesses." One case assumed that a rebuttal expert witness in a federal criminal case would be an expert presented by the government *after* the defendant's case-in-chief, and that those experts (and any witnesses the defendant might call to rebut them) need not be

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[8] *Id*. at 475 n.9.

[9] *Cf. Izazaga v. Superior Court*, 815 P.2d 304, 316-17 (Cal. 1991) (concluding that including rebuttal witnesses was "the only reasonable interpretation of the requirement that the prosecution disclose '[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial'" and noting that the Ohio Supreme Court "held the requirement that the prosecution disclose the witnesses it 'intends to call at trial' includes 'all witnesses it reasonably anticipates it is likely to call, *whether in its case-in-chief or in rebuttal*.'" (*quoting State v. Howard*, 56 Ohio St. 2d 328, 383 N.E.2d 912, 915 (1978) (emphasis added.))). *See also* WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 20.5(e) n.71 (4th ed. & Dec. 2019 update):

> **Error! Main Document Only.**Some of the state provisions also require the prosecution to respond to the defendant's witness list by adding to its witness list any witnesses it intends to call in rebuttal to the defense witnesses. *See, e.g.*, Colo. R. Crim. P. 16(II)(c); Mont. Code Ann. § 46-15-322(6); Mich. Comp. Laws Ann. § 768.20(2). *See also* Ohio R. Crim. P. 16(I) (each side must list "names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebutttal").

disclosed under Rule 16(b).[10] In other cases, the court noted the government had no obligation under the rule to disclose experts called in rebuttal.[11]

We did, however, find a few cases in which the court had required pretrial disclosures regarding rebuttal witness testimony, but allowed the disclosures to be provided later, closer to the trial.[12] This may roughly parallel Civil Rule 26(a)(2)(D)(ii), which provides for later disclosure of evidence "intended solely to contradict or rebut evidence on the same subject matter identified by another party" under the portions of the rule requiring disclosure of expert witnesses at least 90 days before trial.

Since the proposed amendment does not set time for disclosures, though it requires the court to set a time, it would permit the courts to determine whether and when to order disclosures of rebuttal witnesses, if the rule were interpreted to require pretrial disclosure of rebuttal

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[10] In *United States v. Isch*, No. CR-09-040-D, 2009 WL 4582540 (W.D. Okla. Dec. 1, 2009), the court stated:

> Normally, the party with the burden of proof is entitled to submit rebuttal evidence and argument. . . . However, the trial court has broad discretion regarding the mode and order of the presentation of evidence. This discretion extends to the rebuttal or sur-rebuttal stages of trial. Rebuttal and sur-rebuttal stages are ordinarily confined to a party's attempts to refute evidence presented by his opponent in the preceding stage. The trial court has discretion to exclude evidence that a party should have offered at an earlier stage of trial. However, the trial court also has discretion to admit "evidence in rebuttal which might well have been brought" in the case-in-chief.
>
> Because the disclosure requirements of Rule 16(b) apply to evidence intended to be used during a defendant's case-in-chief, *true rebuttal evidence normally is not within the scope of the rule. However, to qualify under this exception, such contemplated defense evidence must be confined to matters in response to evidence presented during the government's rebuttal case*. Evidence that should have been presented in the case-in-chief, and was not disclosed, is at risk of exclusion.

*1-2 (footnotes and citations omitted) (emphasis added).

[11] *United States v. Richmond*, 153 F.R.D. 7, 8 (D. Mass. Feb. 15, 1994) (commenting that Rule 16, "by its explicit terms, does not require disclosure of any experts to be called in rebuttal. Rather, disclosure is limited to experts to be called by the government during its case in chief"); *see also United States v. W.R. Grace*, 526 F.3d 499, 509, 513–14 (9th Cir. 2008) (noting that district court explicitly excluded rebuttal witnesses from the government's duty to make expert disclosures).

[12] *See United States v. Hernandez-Guevara*, No. CR 18-299 (SRN/BRT), 2019 WL 430857, at *1 (D. Minn. Feb. 4, 2019) (government's motion for delayed discovery of rebuttal witnesses granted without opposition); *see also United States v. Ranallo*, 2019 WL 6975447, at *1, 6 (D. Minn. Dec. 20, 2019) (noting that the discovery schedule to which the parties had agreed required the government and defendants to "make their principal expert disclosures" by a certain date and "make any rebuttal expert disclosures" by a subsequent date).

witnesses.[13] As Judge Kethledge stated at the Standing Committee meeting, this may be a matter of the trial judge's case management.

3. Limiting discovery to "case-in-chief" rather than "at trial" helps to avoid having to address an ongoing controversy concerning other parts of Rule 16

Substituting the phrase "as evidence at trial" for "case-in-chief at trial" in Rule 16(a)(1)(G) and (b)(1)(C) would raise the much more difficult question whether such a change would need to be made throughout Rule 16, in the provisions governing pretrial disclosure of documents, objects, test results, etc. It is hard to justify using "as evidence at trial" only in the provisions governing expert discovery since that would put those provisions at odds with the remainder of Rule 16, where disputes about the meaning of "case-in-chief" arise far more often than when expert testimony is at stake.

a. A division among the courts regarding the scope of "case-in-chief at trial" in cases involving documents and objects

In construing the portions of Rule 16 that govern pretrial disclosures of documents and objects, a split has developed on the question of what is included in the case-in-chief and whether it can include material introduced during cross examination of opposing witnesses.

In general, the courts have agreed that material intended solely for impeachment purposes is not part of the case-in-chief and thus need not be disclosed,[14] but there is a split on the question whether that phrase encompasses attempts to introduce a document or other object as an exhibit for other purposes during cross-examination. In a lengthy opinion reviewing a variety of

[13]Although these federal cases seem to have assumed that a defendant's due process rights are not violated by the government's non-disclosure of rebuttal witnesses that the government intends to use in response to expert witnesses disclosed by the defense, the California Supreme Court has held that due process requires that the government disclose the witnesses it intends to call in response to the experts disclosed by the defense. *Izazaga v. Superior Court*, 815 P.2d 304, 318 (Cal. 1991) ("Reciprocity under the due process requires notice that the defendant will have the opportunity to discover the prosecutor's rebuttal witnesses (and their statements) following discovery of defense witnesses by the prosecutor. Reciprocity requires a fair trade, defense witnesses for prosecution witnesses, and nothing more."); *see People v. Tillis*, 956 P.2d 409, 416 (Cal. 1998).

[14] *E.g.*, *United States v. Medearis*, 380 F.3d 1049, 1057 (8th Cir. 2004); *United States v. Palafox*, 2018 WL 10016686, at *2 (D. Nev. Dec. 12, 2018); *United States v. Heine*, 2017 WL 4423408, at *8 (D. Or. Oct. 5, 2017); *see also United States v. Gray-Burriss*, 791 F.3d 50, 57 (D.C. Cir. 2015) ("Here, however, the court barred the defense from using the excluded contract 'for any purpose,' including impeachment and refreshing a witness' recollection during the *government's* case-in-chief. Thus, the sanction reached uses of [sic] the evidence that may not have triggered a reciprocal discovery obligation under Rule 16 in the first place.") (internal citations to the record omitted) (citing *Medearis*, 380 F.3d at 1057, and *United States v. Moore*, 208 F.3d 577, 579 (7th Cir. 2000) (holding that a document used only for impeachment is not excludable under Rule 16)).

sources, one court defined case-in-chief procedurally, to encompass only the evidence presented by the defense once the prosecution has rested its case.[15] This decision is consistent with the first definition in BLACK'S LAW DICTIONARY.[16]

As an informative article explained, this interpretation also may be more intuitive to defense counsel:

> Even if a defendant chooses to put on a case, what evidence he ultimately presents will be a reaction to the government's case-in-chief – for example, which witnesses testified, what they said, the effectiveness of cross-examination, whether certain exhibits were admitted by the court, the perceived jury reaction, and so forth. A defendant may go to trial not intending to put on a case, but then change his mind midtrial if the government's case is stronger than expected. To expect a defendant to disclose ahead of time exactly what evidence he will use at trial during his case-in-chief ignores the realities of a criminal trial because even armed with an indictment, an exhibit list, and a witness list from the government, a criminal defendant still faces considerable uncertainty as to the precise contours of the government's case. Logically speaking, until the government rests, there is no such thing as a defendant's case-in-chief.[17]

But the majority of courts that have considered the question have rejected that procedural (or temporal) interpretation and focused instead on the purpose for which the defendant sought to introduce a document, reasoning that a narrow, temporal interpretation of "case-in-chief" would create a loophole in reciprocal disclosure contrary to the purpose of Rule 16.[18]

According to this view, if the defendant's cross-examination is intended to challenge an element of the offense or to introduce a defense – rather than just impeach a prosecution witness – then it is part of the defendant's case-in-chief. A recent case reviewed the decisions of other courts and explained:

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[15] *United States v. Harry*, 2014 WL 6065705, at *5-11 (D.N.M. Oct. 14, 2014). Despite following a bright-line temporal definition of "case-in-chief," the court acknowledged that there could be cases where, to avoid recalling witnesses, everyone asks their questions of a witness while he is present. In such situation, "the cross-examination is really a direct examination with non-leading questions," and the defendant's "case-in-chief" should include that examination even though the government has not rested yet. *Id.* at *10.

[16] *Id.* at *5-6 (quoting BLACK'S LAW DICTIONARY 244 (9th ed. 2009) ("[t]he evidence presented at trial by a party between the time the party calls the first witness and the time the party rests" or "[t]he part of a trial in which a party presents evidence to support the claim or defense")).

[17] Sara Kropf et al., *The 'Chief' Problem With Reciprocal Discovery Under Rule 16*, THE CHAMPION 20, 22 (September/October 2010).

[18] *United States v. Larkin*, 2015 WL 4415506, at *5 (D. Nev. July 20, 2015).

Defendant argues that the term case-in-chief solely refers to evidence that will be introduced during the "Defendant's case," that is, the time during trial after the Government rests its case, and does not refer to evidence introduced during cross-examination of Government witnesses. General Mot. at 5. In contrast, the Government argues that the term case-in-chief refers to evidence that will be introduced to challenge "the substance of the charges (e.g. the elements of the offense)," rather than evidence used to "to impeach or refresh memories," regardless of the timing when that evidence will be introduced. *Id.*

The Fourth Circuit and district courts in the District of Oregon, the District of D.C. and the District of Idaho have held that determining whether evidence is being introduced as part of the case-in-chief depends on the purpose of the evidence's introduction and not the timing of the evidence's introduction. *See United States v. Holden*, 2015 WL 1514569, at *2 (D. Or. March 19, 2015) ("The Court concludes Rule 16(b)(1)(A)(ii) does require Defendant to disclose to the government all substantive, non-privileged evidence that Defendant plans to introduce at trial, regardless whether Defendant intends to introduce the evidence through a witness he calls at trial or through cross-examination of a government witness."); *United States v. Hsia*, 2000 WL 195067, at *2 (D.D.C. Jan. 21, 2000) ("The Court will evaluate the purpose of any cross-examination in the context of the trial."); *United States v. Young*, 248 F.3d 260, 268 (4th Cir. 2001) (applying a purpose-based analysis for determining Rule 16(b) discovery obligations); *United States v. Swenson*, 298 F.R.D. 474, 476 (D. Idaho 2014) (same). Specifically, these courts look to whether the evidence is introduced for impeachment purposes or for substantively challenging the elements of the charged offense and not whether the evidence is introduced during cross-examination rather than after the government has rested its case. *See, e.g.*, *Holden*, 2015 WL 1514569, at *2 (requiring disclosure of all substantive, non-impeachment evidence "regardless whether Defendant intends to introduce the evidence through a witness he calls at trial or through cross-examination of a government witness").

The Court finds these cases to be persuasive. If Rule 16(b) applied only to evidence introduced after the Government rested its case, Rule 16(b) would "effectively [be] render[ed] . . . a nullity unless a defendant asserted an affirmative defense or planned to put on his or her case after the government rested." *Swenson*, 298 F.R.D. at 477. Indeed, "the use of evidence by a criminal defendant outside of the scope of traditional cross-examination through one of the government's witnesses is standard modern trial practice . . . because it is more efficient, is respectful of the availability of out-of-district witnesses, and presents the evidence to the factfinder in a more streamlined and understandable manner." *Holden*, 2015 WL 1514569, at *3; *see also Hsia*, 2000 WL 195067 at *2 ("Especially if the defense also intended

to call that witness, its cross-examination can quickly become part of its case-in-chief under Rule 16, regardless of whether the government has rested its case."). [19]

An influential decision that arose in response to a defendant's argument that she had no duty to provide reciprocal discovery under Rule 16(b)(1)(A) because she had "no present intention to do anything but cross-examine the government's witnesses"[20] also relied on another argument. In that case, the court pointed to the definition of "case-in-chief" as "[t]he part of a trial in which a party presents evidence to support its claim or defense."[21] Under this definition, evidence introduced by the defendant during cross-examination of government witnesses to support her defense should be considered part of defendant's "case-in-chief."[22] The court rejected the argument that the defendant had no duty to provide pretrial disclosure, and concluded that her case-in-chief (or "evidence-in-chief" as the rule was phrased before restyling) included any part of the trial in which evidence is presented to support a claim or defense, and thus included evidence introduced during cross-examination of government witnesses to support her defense.[23]

Courts following the majority rule have refused to permit defendants to cross-examine a government witness based on a document or audiotape not produced before trial, when the defendant was seeking to show, for example, that another person had committed the offense.[24]

b. The split has not arisen in cases arising under the provisions governing expert disclosures

We found no cases in which this problem of defining "case-in-chief" was raised in the context of expert disclosures. As noted, that problem typically arose in cases concerning attempts to introduce an exhibit (generally a document, though in one case an audiotape) as a basis for questions on cross examination during the government's case-in-chief. The case law demonstrates that documents, for example, often have value both as impeachment and as evidence that challenges the elements of the charged offense. It is this dual function that creates

[19] *United States v. Aiyaswamy*, 2017 WL 1365228, at *4 (N.D. Cal. Apr. 14, 2017); *see also United States v. Palafox*, 2018 WL 10016686, at *2 (D. Nev. 2018); *United States v. Heine*, 2017 WL 4423408, at *8 (D. Or. Oct. 5, 2017).

[20] *Hsia*, 2000 WL 195067, at *1 (D.D.C. Jan. 21, 2000).

[21] *Id.* at *2 (quoting BLACK'S LAW DICTIONARY (7th ed. 1999)).

[22] *Id.*

[23] *Id.*

[24] *United States v. Young*, 248 F.3d 260, 269-70 (4th Cir. 2001) (holding that the trial court's exclusion of the evidence was an appropriate sanction when the defense failed to disclose audiotapes it intended to use to both impeach a government witness and to suggest that it was the witness who had committed the crime).

disputes about whether pretrial disclosure is necessary. Unlike documents and reports, expert testimony cannot be presented on cross examination. It requires calling a new person to the stand. There may be an occasional case in which a defendant seeks to present testimony from the very same witness the government has listed as its own expert. But other than that unusual situation, defense expert witnesses will always be presented after the government's case-in-chief, not during it. Thus, applying "case-in-chief" in the context of defense expert witnesses will not involve the controversy that has arisen in other parts of Rule 16 about whether that phrase should be defined procedurally, or instead by the inference the proponent seeks the factfinder to make from the evidence.

4. Limiting discovery to "case-in-chief" rather than "at trial" is consistent with the prudent targeting of amendments

The current proposal concerns only expert witness disclosure, and it is not intended to be a comprehensive revision of Rule 16. To this point, the Advisory Committee has avoided the controversies that led to the failure of other proposals to amend Rule 16 by focusing on a single issue and developing a consensus on the proper approach. Indeed, the Advisory Committee has been keen to limit this proposal to those specific concerns about expert discovery that practitioners have repeatedly identified, namely last minute or vague disclosures that undermine the ability to prepare for trial.

There are several other novel or unsettled issues we found in the caselaw that this proposal does not, and probably should not, attempt to address. They include whether or not the defense must disclose that it wishes to call an expert witness whom the government has disclosed it plans to use as an expert,[25] and whether or not a court order imposing disclosure obligations for the defense imposes a duty despite the lack of defense request.[26] Courts have divided, too, on the question whether a truthful response that the government intends to call no expert witnesses constitutes compliance for purposes of this rule. One court concluded that when the government had no expert testimony to disclose, requiring the defendant to disclose his experts was not

[25] *United States v. Vargas*, 915 F.3d 417, 421 (7th Cir. 2019) (upholding exclusion of testimony by defense expert when defendant did not disclose witness and summary of his testimony to prosecution, even though the prosecution disclosed to the defendant before trial that it would be calling the expert, but later decided not to).

[26] *United States v. Ellison*, 2020 WL 704916, * 2-3 (3d Cir. Feb. 12, 2020) (*citing Williams v. Florida,* discussed *infra*, affirming the defendant's conviction despite the fact that the district court's order deemed a defendant who received discovery from the government to have requested discovery. Although this required the defendant to provide "reciprocal" discovery without her prior request, the court of appeals concluded that defendant's Fifth Amendment rights were not violated because requiring the defendant to produce evidence she intended to introduce in her case-in-chief merely accelerated the timing of the disclosure she intended to make.); *see also United States v. Chapman*, 2015 WL 10401776, *24 (D.N.M. Aug. 28, 2015) (noting court's discovery order provided that unless the defendant filed a waiver within seven days, he was deemed to have requested all discovery listed in Rule 16, triggering Rule 16's reciprocal discovery obligations and ordering defendant to provide discovery regarding expert).

reciprocal at all but "one-sided," casting a shadow over the defendant's right against self-incrimination, his right to counsel, and work product doctrine.[27] Other courts have rejected this analysis, finding that it would be inconsistent with a proper reading of Rule 16(d)(2), which allows the court to impose sanctions when the government has failed to comply with its disclosure obligations under Rule 16. Since the government did comply for purposes of this part of Rule 16, it should also be held to have complied for purposes of (b)(1)(C)(i).[28] Moreover, the reciprocal structure of Rule 16 is intended to avoid surprise, reduce the need for continuances, and allow a fair opportunity to test the adversary's evidence. Requiring the defense to disclose serves these purposes, these courts reason.[29]

Given the difficulty of amending Rule 16, it is prudent to maintain the proposed amendment's targeted focus on guaranteeing timely and specific pretrial disclosure of expert testimony, a goal supported by a broad consensus, rather than enlarging the scope of the project to take on other issues. Taking on controversies like the question whether it would be desirable to expand the scope of disclosure in other parts of Rule 16 to evidence to be used "at trial" rather than only in the party's "case-in-chief," or the other issues noted above, poses an unnecessary risk of derailing more modest efforts to solve the problem we were asked to solve.[30]

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[27] *United States v. Young*, 2010 WL 1418748, at *2 (D. Me. Apr. 6, 2010).

[28] *See United States v. Rajaratnam*, 2011 WL 723530, at * 2-4 (S.D.N.Y. Feb. 25, 2011) (rejecting *Young*); *United States v. Finazzo*, 2013 WL 618425, at *2-3 (E.D.N.Y. Feb. 19, 2013) (following *Rajaratnam*).

[29] *Id.*

[30] We also note that there here is some controversy about whether Rule 16(a)(1)(E) permits the government (or, presumably, the defense) to bury the material within its larger discovery, rather than identifying it specifically. *Compare United States v. Losch*, 2019 WL 6524874, at *4 (D. Ariz. Dec. 4, 2019) (holding that disclosure of more than 76,000 pages of material with no indication of what portions were critical triggered the defense obligation to disclose the evidence it intended to present in its case-in-chief), *and United States v. Crowder*, 325 F.Supp.3d 131, 135 (D.D.C. 2018) (stating that "the government does not trigger defendant's reciprocal obligation to disclose its 'case-in-chief' materials under Rule 16 simply by providing some amount of relevant discovery to defendants and then 'stating that the documents upon which [the government] intends to rely are found somewhere therein;'" holding that the defendant would "be obligated to identify documents and other materials she intends to rely on in her case-in-chief only after the government first identifies and produces the same material, with the same specificity, to her.") (citations omitted). *See also* Sara Kropf et al., *The 'Chief' Problem With Reciprocal Discovery Under Rule 16*, THE CHAMPION 20, 21 (September/October 2010).

Among unsettled issues we identified through our research, this is the one closest to the present subject of the Advisory Committee's work. Nevertheless, it was not raised at the miniconference as a concern and, moreover, could probably be handled by judges and parties on a case-by-case basis. Therefore, we do not recommend attempting a further change to the proposed amendment to address it.

B. Constitutional concerns

Judge Campbell asked the Advisory Committee to address any constitutional issues that might be posed by the proposal, and at various times in the discussion members have expressed concern that requiring the defendant to provide expanded expert witness disclosures (or perhaps any disclosures of his defense) before trial would violate the defendant's constitutional rights. The due process bar to mandating disclosure from the defense without mandating the same disclosures by the government was discussed above in connection with *Wardius*. This subsection discusses the Fifth Amendment's prohibition on compelled self-incrimination.[31]

Fifth Amendment objections to Rule 16 are governed by the Supreme Court's opinion in *Williams v. Florida*.[32] Over a strong dissent by Justice Black, the Court upheld a Florida rule that required the defendant to provide pretrial notice that he intended to raise an alibi defense, and to disclose the witnesses he intended to call to make this defense. The Court explained that the rule merely accelerated the choice the defendant would have to make at trial, avoiding the need for the court to grant a continuance:

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments.
>
> Very similar constraints operate on the defendant when the State requires pretrial notice of alibi and the naming of alibi witnesses. Nothing in such a rule requires the

[31] The Court has also rejected claims that the exclusion of defense witnesses as a sanction for the failure to comply with pretrial disclosure rules violates Due Process or the defendant's Sixth Amendment right to Compulsory Process, relying on the Supreme Court's decision in *Taylor v. Illinois*, 484 U.S. 400 (1988). *See generally* WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 20.6(c) (4th ed & Dec. 2019 update). *Taylor* is often cited by lower courts when rejecting claims that the exclusion of a defense expert witness as a sanction for a late or deficient disclosure violated the Constitution. *See, e.g.*, *United States v. Lang*, 717 F. App'x 523 (6th Cir. 2017) (upholding exclusion of defense experts). Some courts rely on *Taylor* to limit the option of exclusion to deliberate violations by the defense. *See United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991) (drastic remedy of excluding a witness not permitted when no willful and blatant discovery violations occurred). This is a potential constitutional limitation on the use of exclusion of a witness as a sanction that does not arise in civil cases.

[32] 399 U.S. 78 (1970).

> defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.

399 U.S. at 83-85. The Court rejected Justice Black's argument, in dissent, that the "constitutional right to remain absolutely silent cannot be avoided by superficially attractive analogies to any so-called 'compulsion' inherent in the trial itself," and that "nothing in the Constitution permits the State to add to the natural consequences of a trial and compel the defendant in advance of trial to participate in any way in the State's attempt to condemn him." 399 U.S. at 113 (Black, J., dissenting).

Similarly, Rule 16 leaves to the defendant the choice whether to present evidence or remain silent but requires the defendant to disclose certain evidence earlier than trial during reciprocal discovery, so that the parties can prepare for trial. Under *Williams,* the existing reciprocal discovery provisions of Rule 16 have withstood Fifth Amendment challenges. The proposal's codification of the need to set a time for disclosure and the minimum content required for that disclosure should not affect this. Nor would *restricting* the scope of defense disclosure to witnesses to be presented in the defendant's case-in-chief.

C. Government experts not identified at the time disclosure required

A member of the Standing Committee suggested that it might be desirable to amend the note to address a situation the government had suggested might occur with some frequency: at the time pretrial disclosure is required, the government knows it will present an expert to address a certain issue but it has not yet identified which expert will be available. For example, there may be multiple experts within the ATF who could opine on a particular issue, but the government does not know which of them will be available at the time of trial.

Mr. Goldsmith did refer to the possibility of addressing this particular problem, but as far as we can recall, the Advisory Committee reached no conclusion about how it should be addressed. Should the government be required to designate an individual, so that the defense can examine the witness's credentials, prior testimony, publications, and so forth, even if it might be inconvenient for the witness to testify at trial, unless the government seeks an order deferring discovery under Rule 16(d)(1)? Or is there some better way to address this situation?

D. The duty to supplement and correct disclosures

The proposed amendment provides that each party must "supplement or correct the disclosure in accordance with" Rule 16(c). Some members of the Standing Committee expressed concern that this requirement of supplementation might encourage or permit game playing or pro forma disclosures intended to prompt the other side to reveal its strategy, with parties repeatedly

changing their positions. For example, they suggested, in a case concerning a corporation the process could never end if each side keeps amending and the other side has to respond. One member suggested it would be better to have the door shut close at a certain point, as is done in civil cases. Another member suggested that it might be useful to develop in the note language saying that the parties cannot sandbag. The question for the subcommittee is whether to develop note language to address this concern.

It would be useful to have the subcommittee discuss whether new note language is warranted. The provision in question merely reminds the parties of the overarching obligation already imposed by Rule 16(c), which regulates all pretrial disclosure obligations. In your experience, has this sort of pro forma disclosure and game playing been a problem? (Certainly that was not the issue that the participants in the miniconference urged the Advisory Committee to take up.) And if it did arise, do judges already have the necessary case management tools? And finally, would the potential for sandbagging be especially severe in connection with expert witness disclosures?

II. Note references to Speedy Trial Act issues

During the last subcommittee call, Ms. Robinson expressed some concern about lines 30-31 in the committee note, which currently provide: "The court also retains discretion under Rule 16(d) and the Speedy Trial Act to alter deadlines to ensure adequate trial preparation." She noted that the Speedy Trial Act allows for certain periods of delay to be excluded from its provisions, including any delay occasioned by the need for effective trial preparation, but the Speedy Trial Act is not the vehicle to obtain a continuance or extension of a deadline.

Accordingly, she has suggested a slight modification of the note address this concern: "The court also retains discretion under Rule 16(d) *consistent with the provisions of the* Speedy Trial Act to alter deadlines to ensure adequate trial preparation." We have no objections to this proposed change.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(G) Expert witnesses.

(i) Duty to Disclose. At the defendant's request, the government must disclose to the defendant, in writing, the information required by (iii) for any testimony that the government intends to use at trial under Federal Rule of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C). If the government requests discovery under (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, disclose to the defendant, in writing, the information required

by (iii) for testimony that the government intends to use under Federal Rule of Evidence 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the government to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure must contain:

- a complete statement of all opinions that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);
- the bases and reasons for them;

- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The government must supplement or correct the disclosure in accordance with (c).

Rule 16. Discovery and Inspection

* * * * *

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(C) Expert witnesses.

(i) Duty to Disclose. At the government's request, the defendant must disclose to the government, in writing, the information required by (iii) for any testimony that the defendant intends to use under Federal Rule of Evidence 702, 703, or 705 during the defendant's case-in-chief at trial, if:

- the defendant requests disclosure under (a)(1)(G) and the government complies; or
- the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. The disclosure must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief;
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The defendant must supplement or correct the disclosure in accordance with (c).

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Committee Note

The amendment addresses two shortcomings of the prior provisions on expert witness disclosure: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.

Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) generally mirror one another. The amendment to (b)(1)(C) includes the limiting phrase—now found in (a)(1)(G) and carried forward in the amendment—restricting the disclosure obligation to testimony the defendant will use in the defendant's "case-in-chief." Because the history of Rule 16 revealed no reason for the omission of this phrase from (b)(1)(C), this phrase was added to make (a) and (b) parallel as well as reciprocal. No change from current practice in this respect is intended.

The amendment to (A)(1)(G) also clarifies that the government's disclosure obligation includes not only the testimony it intends to use in its case-in-chief, but also testimony it intends to use to rebut testimony timely disclosed by the defense under (b)(1)(C).

To ensure enforceable deadlines that the prior provisions lacked, subparagraphs (G)(ii) and (C)(ii) provide that the court, by order or local rule, must set a time for the government to make its disclosure of expert testimony to the defendant, and for the defense to make its disclosure of expert testimony to the government. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party. Deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness, or the time the government would need to find a witness to rebut an expert disclosed by the defense. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order.

(G)(ii) and (C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leaves to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subparagraphs (G)(i) and (iii)—and the parallel provisions in (C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years. Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases.

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying discovery under Rule 16(d).

Subparagraphs (G)(iv) and (C)(iv) also recognize that, in some situations, information that a party must disclose about opinions and the bases and reasons for those opinions may have been provided previously in a report (including accompanying documents) of an examination or test under subparagraph (a)(1)(F) or (b)(1)(B). Information previously provided need not be repeated in the expert disclosure, if the expert disclosure clearly identifies the information and the prior report in which it was provided.

Subparagraphs (G)(v) and (C)(v) of the amended rule require that the expert witness approve and sign the disclosure. However, the amended provisions also recognize two exceptions to this requirement. First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts.

Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications, publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

Subparagraphs (G)(vi) and (C)(vi) require the parties to supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that, if there is any modification, expansion, or contraction of a party's expert testimony, or change in the identity of an expert after the initial disclosure, the other party will receive prompt notice of that correction or modification.

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DRAFT AMENDMENT TO
RULE 16(a)(1)(G) –April 9, 2020

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure

* * * *

(G) Expert witnesses. –

(i) Duty to Disclose. At the defendant's request, the government must ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the government intends to use at trial under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ during its case-in-chief ~~at trial~~, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C). If the government requests discovery under ~~subdivision~~ (b)(1)(C)(ii) and the defendant complies, the government must, at the

defendant's request, ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ testimony that the government intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ as evidence at trial on the issue of the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the government to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure ~~summary provided under this subparagraph~~ must contain:

- a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the government will elicit from the witness in its case-in-chief, or during its

rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);

- the bases and reasons for ~~those opinions~~ them; ~~and~~
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The government must supplement or correct the disclosure in accordance with (c).

DRAFT AMENDMENT TO
RULE 16(b)(1)(C)—4-9-2020

Rule 16. Discovery and Inspection

* * *

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure

* * *

(C) Expert witnesses. –

(i) Duty to Disclose. At the government's request, ~~T~~the defendant must~~, at the government's request,~~ disclose ~~give~~ to the government, in writing, the information required by (iii) for ~~a written~~ ~~summary of~~ any testimony that the defendant intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence as evidence~~ during the defendant's case-in-chief at trial, if:

~~(i)~~ ● the defendant requests disclosure under ~~subdivision~~ (a)(1)(G) and the government complies; or

~~(ii)~~ ● the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. ~~This~~The ~~summary~~ disclosure must contain:

● a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the defendant will elicit from the witness in the defendant's case-in-chief;

● the bases and reasons for them~~those opinions; and~~

● the witness's qualifications, including a list

of all publications authored in the previous 10 years; and

- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or

● has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The defendant must supplement or correct the disclosure in accordance with (c).

* * * * *

TAB 3

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

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

RE: **Permanent Rules for Emergencies**

DATE: **April 10, 2020**

The CARES Act, Pub. L. No. 116-136, § 15002 (b), 134 Stat. 281, 527 (2020), which provides authority to use video and telephone conferencing for certain proceedings in criminal cases.[1] It also directs the Judicial Conference to develop emergency measures for the courts. Section 15002(b)(6) provides:

> NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the ''Rules Enabling Act''), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

The legislation envisions the development of emergency rules that would not be specific to COVID-19, or to pandemics, but would be applicable to a wide range of national emergencies that could have a significant impact on the functioning of the federal courts. The relevant provisions of the CARES Act follow this memorandum at pages 143-45.

Judge Kethledge has appointed a subcommittee to develop proposals to be presented at the Advisory Committee's fall meeting. The members of the subcommittee are:

- Judge Dever
- Judge Kaplan
- Judge McGiverin
- Ms. Recker
- Ms. Elm (on an interim basis)
- Mr. Wroblewski

Judge Dever will chair the subcommittee.

This item is on the agenda for a preliminary discussion to help the subcommittee identify issues that it should address, including the kinds of circumstances that might arise and the rules that would be impacted. We envision that it will also be necessary for the subcommittee to consult widely to identify the issues and develop proposals, and this will probably involve one or more miniconferences.

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[1]The adoption of this statutory authority fully addresses the issues raised by Judge Furman in Suggestion 20-CR-C. Accordingly, the suggestion can be removed from the Advisory Committee's agenda.

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which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates.

(b) VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS.—

(1) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court), upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, may authorize the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available, for the following events:

(A) Detention hearings under section 3142 of title 18, United States Code.

(B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure.

(C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure.

(D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure.

(E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure.

(F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure.

(G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code.

(H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure.

(I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure.

(J) Proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act"), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

(2) FELONY PLEAS AND SENTENCING.—

(A) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit

that includes the district court) specifically finds, upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice, the plea or sentencing in that case may be conducted by video teleconference, or by telephone conference if video teleconferencing is not reasonably available.

(B) APPLICABILITY TO JUVENILES.—The video teleconferencing and telephone conferencing authority described in subparagraph (A) shall apply with respect to equivalent plea and sentencing, or disposition, proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act").

(3) REVIEW.—

(A) IN GENERAL.—On the date that is 90 days after the date on which an authorization for the use of video teleconferencing or telephone conferencing under paragraph (1) or (2) is issued, if the emergency authority has not been terminated under paragraph (5), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the authorization and determine whether to extend the authorization.

(B) ADDITIONAL REVIEW.—If an authorization is extended under subparagraph (A), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the extension of authority not less frequently than once every 90 days until the earlier of—

(i) the date on which the chief judge (or other judge or justice) determines the authorization is no longer warranted; or

(ii) the date on which the emergency authority is terminated under paragraph (5).

(4) CONSENT.—Video teleconferencing or telephone conferencing authorized under paragraph (1) or (2) may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.

(5) TERMINATION OF EMERGENCY AUTHORITY.—The authority provided under paragraphs (1), (2), and (3), and any specific authorizations issued under those paragraphs, shall terminate on the earlier of—

(A) the last day of the covered emergency period; or

(B) the date on which the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the

National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) no longer materially affect the functioning of either the Federal courts generally or the district court in question.

(6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

(7) RULE OF CONSTRUCTION.—Nothing in this subsection shall obviate a defendant's right to counsel under the Sixth Amendment to the Constitution of the United States, any Federal statute, or the Federal Rules of Criminal Procedure.

(c) The amount provided by this section is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

DISTRICT OF COLUMBIA

FEDERAL FUNDS

FEDERAL PAYMENT FOR EMERGENCY PLANNING AND SECURITY COSTS IN THE DISTRICT OF COLUMBIA

For an additional amount for "Federal Payment for Emergency Planning and Security Costs in the District of Columbia", $5,000,000, to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

INDEPENDENT AGENCIES

ELECTION ASSISTANCE COMMISSION

ELECTION SECURITY GRANTS

For an additional amount for "Election Security Grants", $400,000,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle: *Provided*, That a State receiving a payment with funds provided under this heading in this Act shall provide to the Election Assistance Commission, within 20 days of each election in the 2020 Federal election cycle in that State, a report that includes a full accounting of the State's uses of the payment and an explanation of how such uses allowed the State to prevent, prepare for, and respond to coronavirus: *Provided further*, That, within 3 days of its receipt of a report required in the preceding proviso, the Election Assistance Commission will transmit the report to the Committee on Appropriations and the Committee on House Administration of the House of Representatives and the Committee on Appropriations and the Committee on Rules and Administration of the Senate:

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

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

RE: **Erroneous statutory reference to Fed. R. Crim. P. 41 (Suggestion 20-CR-A)**

DATE: **April 13, 2020**

Judge Patricia Barksdale has written to draw the Advisory Committee's attention to an error in 18 U.S.C. § 981(b)(3)'s reference to Rule 41. Section 981(b)(3) concerns authority for issuing a seizure warrant relating to civil forfeiture, providing venue authority to a judicial officer in any district where a forfeiture action against the property may be filed. Section 981(b)(3) begins "[n]otwithstanding the provisions of [R]ule 41(a) of the Federal Rules of Criminal Procedure . . . ."

Rule 41 was substantially reorganized in 2002, and the statutory reference to Rule 41(a) no longer refers to the relevant portion of the rule. Venue authority, formerly in subsection (a), was transferred to subsection (b). Accordingly, Judge Barksdale suggests that it would be helpful to amend the committee note to direct practitioners and judges to the correct subsection of Rule 41.

The Advisory Committee has no authority to adopt such a committee note. New committee notes may be added only when the rule in question is amended, and there is no reason to amend Rule 41. Thus, no action by this committee is necessary, and the suggestion should be removed from our agenda.

Ms. Wilson notified the Office of the Law Revision Counsel of the House of Representatives (OLRC), the office that publishes the Code and is responsible for monitoring the accuracy of references in the Code. OLRC responded that, in these types of situations, OLRC's procedure is to insert a footnote after the inaccurate reference that explains the correct reference, and then to include the error in its annual compilation of such issues that it submits to the House Office of Legislative Counsel of the House of Representatives. According to OLRC, next time the statute is amended, the Office of Legislative Counsel should include a corrected reference to Rule 41 in the amended statutory language. Until that time, the footnote will direct readers to the correct subsection of Rule 41.

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From: Patty Barksdale [redacted]
Sent: Sunday, February 16, 2020 10:06 AM
To: Julie Wilson [redacted]
Cc: Jennie Allen [redacted]
Subject: Suggested Correction Related to Fed. R. Crim. P. 41

Hello Ms. Wilson.

Jennie Allen in the Judicial Services Office provided your name as a contact for rule matters.

In considering revisions to the Federal Rules of Criminal Procedure, will you please consider a change to correct an error and add a helpful reference?

The error concerns the current reference to Fed. R. Civ. P. 41**(a)** in 18 U.S.C. § 981(b)(3). The intended reference, I believe, is Fed. R. Civ. P. 41**(b)**.

Section 981(b)(3) concerns authority for issuing a seizure warrant relating to civil forfeiture, providing venue authority to a judicial officer in any district where a forfeiture action against the property may be filed. Section 981(b)(3) begins, "Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure …"

Rule 41 was substantially reorganized in 2002. Venue authority used to be in 41(a). Now it's in 41(b). The current reference to 41(a) does not make sense.

The old rule, current rule, and current statute are below.

Suggested change:

In 18 U.S.C. § 981(b)(3), strike "(a)" and replace it with "(b)" to reflect reorganization of Rule 41. The statute is intended to read more like this: "Notwithstanding the venue provisions of Ruel 41 …"

In Advisory Committee Notes to Rule 41, consider referencing 18 U.S.C. § 981(b)(3) to point practitioners and judges to the appropriate venue authority when a civil and criminal seizure warrant are brought together in the investigating district for seizure of property in another district.

Thank you for your consideration.

18 U.S.C. § 981(b)(3) (current)
(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

Rule 41. Search and Seizure (Old Version, pre-2002)
(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

Rule 41. Search and Seizure (Current Version)
(a) Scope and Definitions.
(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
(2) Definitions. The following definitions apply under this rule:
(A) "Property" includes documents, books, papers, any other tangible objects, and information.
(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.
(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.
(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.
(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Venue for a Warrant Application. At the request of a federal law enforcement officer or an attorney for the government:
(1) a magistrate judge with authority in the district -- or if none is reasonably available, a judge of a state court of record in the district -- has authority to issue a warrant to search for and seize a person or property located within the district;
(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;
(3) a magistrate judge--in an investigation of domestic terrorism or international terrorism--with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;
(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:
(A) a United States territory, possession, or commonwealth;
(B) the premises--no matter who owns them--of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or
(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.
(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:
(A) the district where the media or information is located has been concealed through technological means; or
(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202
[redacted]

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TAB 5

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MEMO TO: Members, Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 6 (Grand Jury Secrecy)
(Suggestions 20-CR-B and 20-CR-D)

DATE: April 10, 2020

The Advisory Committee has received two formal suggestions that it consider amending Rule 6(e)'s provisions on grand jury secrecy, and there are two recent judicial decisions containing statements in support of considering an amendment. The question for discussion at the spring meeting is whether to appoint a subcommittee to consider such an amendment. To provide a basis for this discussion, we briefly describe the Advisory Committee's action in 2012 on a similar proposal, the two current proposals, and the judicial statements supporting committee consideration of an amendment.

In 2012, the Advisory Committee decided not to pursue a proposal by Attorney General Eric Holder to authorize disclosure of historical materials if multiple criteria were met. The minutes state:

> Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

An excerpt of the relevant portion of the spring 2012 minutes is included at the end of this memo.

In Suggestion 20-CR-B, Public Citizen Litigation Group (PCLG) and five associations of historians and archivists[1] seek a change in Rule 6 now because of recent decisions holding that Rule 6 does not permit district courts to release such materials. These groups argue that the recent decisions provide a basis for revisiting the Advisory Committee's 2012 decision that no amendment was necessary. They note that a conflict in the circuits now exists. *See* 20-CR-B at 2-3. Moreover, the Supreme Court recently denied certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), a case in which the petitioner asked the Court to resolve the conflict. In a statement with respect to the denial, Justice Breyer stated the issue is one "the Rules Committee both can and should revisit." *Id.* (Breyer, J., concurring).

PCLG and the other groups supporting Suggestion 20-CR-B propose two changes: (1) an exception to the rule of secrecy for grand jury materials of "historical importance" and (2) an

[1]The other groups supporting 20-CR-B are the American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists.

explicit statement that "[n]othing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances."

Suggestion 20-CR-D represents the views of the Reporters Committee for Freedom of the Press as well as thirty media organizations listed on the final page of the suggestion. These groups agree with PCLG and its allies that Rule 6 should be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." Suggestion 20-CR-D at 1. But the Reporters Committee and media organizations propose language that, in their view, "mirrors the flexible test that has been applied by courts in this context, [and] better balances the public's interest in obtaining access to grand jury materials of particular historical and public interest with the interests underlying grand jury secrecy." *Id*. The suggestion describes the rationale for an amendment at this time, and it analyzes the tests employed by the Second Circuit and other courts to determine whether release of materials is appropriate in individual cases. Finally, the suggestion supports not only including authority addressing materials of "historical or public interest," but also an explicit statement that "[n]othing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records in exceptional circumstances."

Additionally, Suggestion 20-CR-D draws attention to the most recent judicial decision on the district court's authority, the Eleventh Circuit's en banc decision in *Pitch v. United States*, No. 17-15016, 2020 WL 1482378, at *1 (11th Cir. Mar. 27, 2020) (reh'g en banc), which reversed circuit precedent to hold that the district courts have no authority under Rule 6 to authorize release of grand jury materials. In a concurring opinion, Judge Jordan urged the Advisory Committee to consider amending the rule.

> Although the Advisory Committee deemed Attorney General Holder's proposed amendment unnecessary, its determination implicitly contemplated that a historical importance exception might be ripe for consideration at some future date. Given the current circuit split and the Supreme Court's recent denial of certiorari on the issue, *see McKeever v. Barr*, —— U.S. ——, 140 S.Ct. 597, —— L.Ed.2d —— (2020), it appears that day is upon us. *See id.* at 598 (Breyer, J., respecting the denial of certiorari) (noting that this is an "important question" that the Rules Committee "can and should revisit"). I therefore urge the Advisory Committee on Criminal Rules to consider whether Rule 6(e) should be amended to permit the disclosure of grand jury materials for matters of exceptional historical significance and, if so, under what circumstances.

Id. at *18 (Jordan, J., concurring).

Excerpt from the Minutes of the April 22-23, 2012 Meeting of the Advisory Committee on Criminal Rules (pp. 7-8)

D. Proposed Amendment Referred for Review by Subcommittee

1. Rule 6. Grand Jury Secrecy.

Judge Keenan, Chair of the Rule 6 Subcommittee, reported on its review of Attorney General Eric Holder's October 18, 2011 proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The amendment (as proposed by the Department of Justice) would (1) allow district courts to permit disclosure, in appropriate circumstances, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for grand jury materials that had become part of the National Archives.

Judge Keenan stated that the subcommittee had held two lengthy teleconferences to discuss the Attorney General's proposal. It also reviewed written and oral comments from (1) Public Citizen Litigation Group (PCLG) (which litigated *In re Kutler* and other cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials to the Committee's past amendments to Rule 6(e). Judge Keenan reported that, at the close of the second teleconference, all members of the subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

Judge Raggi summarized a telephone conversation she had with Counsel for the Archivist of the United States, the Chief Administrator for the National Archives and Records Administration (NARA), and a supporter of the proposed rule. She explained that a rule amendment providing for a presumption that grand jury materials would be disclosed after a specified number of years—seventy-five in the case of the proposal—would significantly recalibrate the balance that had

long been applied to grand jury proceedings, which presumed that proceedings would forever remain secret absent an extraordinary showing in a particular case. Judge Raggi explained that the Committee might not be inclined to effect such a historic change by a procedural rule, particularly in the absence of a strong showing of need. Judge Keenan added that subcommittee members generally agreed that NARA should not become the gatekeeper for grand jury materials. Several members agreed that no real problem exists that presently warrants a rule amendment.

Mr. Wroblewski thanked Judge Keenan and the subcommittee members for the careful consideration given to the Attorney General's suggestion. He explained that the Department will continue to object to requests for disclosure based on Supreme Court precedent that the Department interprets as establishing a rule that rejects district judges' assertions of inherent authority to release historically significant grand jury materials. Mr. Wroblewski made clear, however, that the Department does think the prudent policy is to permit release under appropriate circumstances.

Judge Kravitz observed that Congress may weigh in on this issue, which also counsels against pursuing further action by rule.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

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March 2, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

[Via email to: RulesCommittee_Secretary@ao.uscourts.gov]

Re: Proposal to revise Federal Rule of Criminal Procedure 6(e)

Dear Ms. Womeldorf:

On behalf of Public Citizen Litigation Group (PCLG), American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists, I am writing to propose an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure. The proposed amendment would make clear that district courts have authority to order disclosure, in appropriate circumstances, of grand jury materials of historical significance, and it would provide a temporal end point for grand jury secrecy with respect to materials that are stored as archival records at the National Archives.

American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists have been successful petitioners in several cases seeking the release of grand jury records of great historical significance. For example, in 2008 and 2015, they successfully petitioned for release of grand jury records concerning the indictment of Julius and Ethel Rosenberg. *See In re Petition of Nat'l Sec. Archive*, No. 08 Civ. 6599, 2008 WL 8985358 (S.D.N.Y. Aug. 26, 2008); *In re Petition of Nat'l Sec. Archive*, 104 F. Supp. 3d 625 (S.D.N.Y. 2015). Representing clients including these organizations and individual historians, PCLG has handled several cases on unsealing grand jury records based on historical significance. *See In re Craig*, 131 F.3d 99 (2d Cir. 1997); *In re Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011) (ordering release of Richard Nixon's Watergate grand jury testimony); *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (ordering release of some of the transcripts of the Alger Hiss grand jury proceedings). The release of grand jury materials through this type of petition has helped to complete the historical record and shed light on the course of judicial proceedings in these historically important cases.

The Advisory Committee on Criminal Rules concluded in 2012 that amending Rule 6(e) was unnecessary because it agreed with the federal courts' consensus that the existing rule did not displace the courts' inherent authority to order disclosure of historically significant grand jury materials. Since that time, however, the former judicial consensus has been disturbed by a D.C.

Circuit decision holding that the existing rules do not permit such disclosure. Revision of Rule 6(e) is therefore now needed to protect the public's interest in access to these important materials.

Introduction

In 2011, then-Attorney General Eric Holder wrote to the Advisory Committee on Criminal Rules to request an amendment to Rule 6(e) to address district courts' authority to order disclosure of certain grand jury material of historical significance. His letter was prompted by a case brought by PCLG on behalf of American Historical Association, American Society for Legal History, Organization of American Historians, and Society of American Archivists, *In re Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011), in which the district court granted a petition to unseal the 1975 grand jury testimony of former President Richard Nixon.

At that time, both the Second and Eleventh Circuits had recognized the district courts' inherent authority to release grand jury materials. *See United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004) (citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398–99 (1959), and *In re Petition to Inspect & Copy Grand Jury Materials* (*In re Hastings*), 735 F.2d 1261 (11th Cir. 1984)). And the Tenth Circuit had implicitly held the same. *See In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178–79 (10th Cir. 2006) (remanding to district court to decide whether case presented exceptional circumstances, without deciding question of courts' inherent authority).

Although Mr. Holder's letter, sent on behalf of the Department of Justice, disagreed that courts have inherent authority to order disclosure except as specified in Rule 6(e), the letter agreed that disclosure of grand jury records in cases of historical importance was often sensible: "After a suitably long period, in cases of enduring historical importance, the need for continued secrecy is eventually outweighed by the public's legitimate interest in preserving and accessing the documentary legacy of our government." Letter from Attorney General to Advisory Comm. on Crim. Rules, Oct. 18. 2011, at 1, *reprinted in* Advisory Comm. on Crim. Rules, Agenda Book 217 (Apr. 2012), https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf.

After considering Mr. Holder's request, a letter sent in response by PCLG, the case law, and other pertinent materials, the Committee declined to revise Rule 6(e) because it found that courts were aptly addressing this situation through exercise of inherent authority. The Committee minutes state: "Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority." Advisory Comm. on Crim. Rules, Minutes 7, *supra* p.9 (emphasis added); *see also* Agenda Book, *supra*, at 209–71 (documenting Committee's detailed assessment of Rule 6(e)'s text, history, precedent, and policy).

At that time, the D.C. Circuit had indicated that district courts' authority was not circumscribed by Rule 6(e). *See, e.g., In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154–55 (D.C. Cir. 2007) (releasing grand jury material because it became "sufficiently widely known" that it lost "its character as Rule 6(e) material" (internal quotation marks omitted)). More recently, however, it held that district courts lack authority to release grand jury material except as

specifically provided for in Rule 6(e) and, therefore, that they may not release materials of historical interest notwithstanding the passage of time and other circumstances indicating that the public interest in disclosure outweighs the concerns underlying grand jury secrecy. *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019).

Because the D.C. Circuit in *McKeever* created a conflict among the Circuits, the historian who sought records in that case filed a petition for certiorari to the Supreme Court. In opposing the petition, the Solicitor General wrote: "Although the decision below creates a conflict with decisions of other circuits, that conflict can and should be addressed in the first instance by the rules committee, which has the ability to amend Rule 6(e)." Br. for Resp. at 9, *McKeever v. Barr*, No. 19-307 (U.S. 2019).

The Supreme Court denied the petition. In a statement with respect to the denial, Justice Breyer acknowledged that the lower courts are in disagreement, that the DC Circuit's holding "appears to conflict with the considered views of the Rules Committee," and that the issue is important. *McKeever v. Barr*, 539 U.S. __, 2020 WL 283746 (Jan. 21, 2020) (Breyer, J., concurring). He concluded that the issue is one "the Rules Committee both can and should revisit." *Id.*

Meanwhile, the Eleventh Circuit has sua sponte decided to rehear en banc a case presenting the same issue. *See Pitch v. United States*, 925 F.3d 1224 (11th Cir. 2019). In that case, a panel of the Eleventh Circuit had applied its longstanding circuit precedent, *In re Hastings*, to affirm a district court order releasing grand jury materials relating to the 1946 Moore's Ford Lynching—considered by some to be the "last mass lynching in American history." *Pitch v. United States*, 915 F.3d 704, 707, 709–11 (11th Cir. 2019); *see id*. at 709–11. The full court vacated the panel decision and heard oral argument in the fall, but it has not yet issued the en banc decision.

Accordingly, PCLG, American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists now request that the Committee on Rules of Practice and Procedure revisit the issue and propose amending Federal Rule 6 to incorporate the view stated by the Advisory Committee in 2012: that district courts possess the authority to "reasonably resolve[] applications" for release of grand jury material in cases of historical importance. The groups also propose that, in addition to defining the circumstances when exercise of authority to release historical materials is appropriate, the Committee propose a further amendment to Rule 6(e) specifying that its exceptions do not limit the federal courts' inherent authority to order disclosures in exceptional circumstances.

Background on Rule 6(e)

Federal courts follow the "long-established policy that maintains the secrecy of the grand jury proceedings." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). Grand jury proceedings are conducted secretly to preserve the anonymity of grand jurors, to facilitate uninhibited deliberations, to protect witnesses against tampering, to encourage full disclosure, and to avoid alerting suspects about the investigation and possible cooperating witnesses. *Douglas Oil*

Co. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979); *Aisenberg*, 358 F.2d at 1346. Nonetheless, grand jury secrecy "is not absolute." *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973). For example, a court may authorize disclosure of a grand jury matter "preliminarily or in connection with a judicial proceeding," Fed. R. Crim. P. 6(e)(3)(E)(i), or "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury," *id*. 6(e)(3)(E)(ii).

Although Federal Rule of Criminal Procedure 6(e)(3) sets forth several exceptions to the general rule of secrecy, "the rule is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court." *In re Hastings*, 735 F.2d at 1268. As the Supreme Court has stated, "Rule 6(e) is but declaratory" of the principle that "disclosure [is] committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co.*, 360 U.S. at 399; *see Douglas Oil Co.*, 441 U.S. at 223 (holding that a court has substantial discretion to determine whether grand jury transcripts should be released).

Accordingly, several courts have long recognized that courts have inherent authority to order release of grand jury material outside Rule 6(e)'s enumerated exceptions, when warranted by special circumstances. *See Aisenberg*, 358 F.3d at 1347 (citing *In re Hastings*, 735 F.2d 1261); *Craig*, 131 F.3d at 102–03; *see also In re Special Feb., 1975 Grand Jury*, 662 F.2d 1232, 1235–36 (7th Cir. 1981) (noting that the "court in rare situations may have some discretion" to permit disclosure outside Rule 6(e)), *aff'd on other grounds sub nom. United States v. Baggot*, 463 U.S. 476 (1983). These cases are consistent with the "history of Rule 6(e)," which "indicate[s] that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts." *In re Hastings*, 735 F.2d at 1269, *quoted in Aisenberg*, 358 F.3d at 1347 n.30; *see also Chambers v. NASCO, Inc*., 501 U.S. 32, 47 (1991) (stating that courts should "not lightly assume" that the Federal Rules diminish "the scope of a court's inherent power").

As a result of the courts' leading role, "exceptions to the secrecy rule generally have developed through conformance of Rule 6 to the 'developments wrought in decisions of the federal courts,' not *vice versa*." *Am. Historical Ass'n*, 49 F. Supp. 2d at 286 (quoting *In re Hastings*, 735 F.2d at 1268). For example, in 1977, the Rule was amended to change the definition of "other government personnel" to whom disclosure may be made, following a trend in the courts of allowing disclosure to certain government personnel. *See* Fed. R. Crim. P. 6 advisory committee's note to 1977 amendment. In 1979, the Rule was amended to add a requirement that grand jury proceedings be recorded, another change in response to a trend among the courts. *See id.*, advisory committee's note to 1979 amendment. And in 1983, the Advisory Committee explained that Rule 6(e)(3)(C) was being amended to state that grand jury materials may be disclosed to another grand jury, which "even absent a specific provision to that effect, the courts have permitted ... in some circumstances." *Id*., advisory committee's note to 1983 amendments; *see also Am. Historical Ass'n*, 49 F. Supp. 2d at 286 (listing additional examples in which Rule 6 was revised to conform to court practices).

In light of this history, PCLG, American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists agree with the Advisory Committee's view, as stated in 2012, that Rule 6(e) as currently written should pose no obstacle to the courts' exercise of inherent authority to order unsealing of records in appropriate circumstances not listed in the Rule. *See* Advisory Comm. on Crim. Rules, Minutes, *supra*, at 7 (agreeing that courts have inherent authority to unseal grand jury records in appropriate circumstances). Properly understood, Rule 6 does not limit, but rather reflects, the courts' authority.

Rule 6(e)(2), entitled "Secrecy," states at subdivision (A): "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Subdivision B in turn provides that specified "persons must not disclose a matter occurring before the grand jury"—including grand jurors, interpreters, court reporters, government attorneys, and certain other government personnel. Thus, the Rule does not impose a blanket nondisclosure requirement, as it does not require secrecy by witnesses, their family members, or judges, for example. *See* Rule 6, advisory committee's note to 1944 Rule ("The rule does not impose any obligation of secrecy on witnesses."). Critically, Rule 6(e)(2) does not prohibit a *court* from disclosing grand jury matters.

Immediately following subdivision (2), entitled "Secrecy," is subdivision (3), entitled "Exceptions." Although this subdivision does not address exceptional circumstances such as significant historical interest, exceptions do not exist in a vacuum; they must be exceptions *to* something. In Rule 6(e), subdivision (3) states exceptions to the subdivision (2) secrecy requirement. But a person requesting that the court release historically significant grand jury materials is not seeking an exception to subdivision (2) because, again, subdivision (2) does not impose a secrecy requirement on *courts*.

In short, Rule 6(e) does not impose a secrecy requirement on courts, and exercise of a district court's inherent authority would not undermine any of the purposes of Rule 6(e). Nonetheless, given the D.C. Circuit's contrary decision in *McKeever*, to avoid additional litigation over the issue, and to facilitate efforts by historians, archivists, and journalists to uncover and preserve important historical records, an amendment to Rule 6(e) that expressly acknowledges the district courts' authority to release records in cases of historical importance is warranted. Doing so would also follow the rulemakers' historical practice of revising Rule 6 to conform to the decisions of the federal courts. *See Am. Historical Ass'n*, 49 F. Supp. 2d at 286. Additionally, the rule should expressly acknowledge that the stated exceptions do not deprive the courts of inherent authority they otherwise possess to authorize release of grand jury materials in other exceptional circumstances.

Rationale for amendments to Rule 6(e)

1. Cases of historical significance

a. Important interests served by disclosure

As discussed above, several courts have exercised their inherent authority to grant petitions to unseal grand jury records in cases of particular historical interest. Although the cases are relatively few in number, they go back decades and illustrate the importance of the courts' ability to order disclosure of historical records.

For example, in 1987, historian Gary May successfully sought the release of the minutes of grand jury proceedings pertaining to William Remington, a prominent public official who was indicted for perjury in 1950 by the second of the two grand juries involved in the Alger Hiss investigation based on testimony from former Soviet spy Elizabeth Bentley, who accused Remington of being a Communist spy. *See In re Petition of May*, No. 11-189 (S.D.N.Y. Jan. 27, 1987, as amended Apr. 17, 1987). The court noted "the alleged abuses of [this] grand jury which have been the subject of published decisions" gave the public a "strong interest" in "understanding of the administration of justice" in this case of "undisputed historical interest." *May*, slip op. at 4 (citing *United States v. Remington*, 208 F.2d 567 (2d Cir. 1953); *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951)).

In 1990, in *In re Petition of O'Brien*, No. 3-90-X-35 (M.D. Tenn. 1990), a court ordered the disclosure of grand jury records from the investigation of the 1946 race riot in Columbia, Tennessee. *See Am. Historical Ass'n*, 49 F. Supp. 2d at 293 (citing *O'Brien*). And in 2009, in *In re Petition of Tabac*, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009), retired law professor William Tabac petitioned for the release of the grand jury testimony of four witnesses pertaining to the 1963 jury tampering indictment of Jimmy Hoffa. Finding the testimony to be "of great historical importance," the court held that the petitioner had satisfied his burden of demonstrating special circumstances and that the balance of factors weighed in favor of releasing the testimony of a witness who was deceased, and ordered release of that witness's grand jury testimony (while denying release of the testimony of three witnesses who might still be alive). *Id.* at *2.

In response to petitions from American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists, courts have also unsealed records concerning the grand jury proceedings leading to the indictments of Alger Hiss and of Julius and Ethel Rosenberg in light of the historical impact of those cases. *See Am. Historical Ass'n*, 49 F. Supp. 2d at 287–88 (granting unsealing of portions of transcripts from Alger Hiss grand jury proceedings related to four specific issues of historical importance); *Nat'l Sec. Archive*, 2008 WL 8985358 (granting unsealing of transcripts of all witnesses in the Rosenberg grand jury proceeding who were deceased, had consented to the release of the transcripts, or were presumed to be indifferent or incapacitated based on their failure to object); *Nat'l Sec. Archive*, 104 F. Supp. 3d at 629 (granting petition to unseal transcripts of two witnesses in the Rosenberg grand jury proceeding who had died since 2008).

In 2011, a district court in the District of Columbia granted the petition of four of these organizations and historian Stanley Kutler to unseal the historically important transcript of the deposition of Richard Nixon taken in 1975 in connection with proceedings of the third Watergate grand jury. *See Kutler*, 800 F. Supp. 2d at 50. Had this petition been filed today, public access to this valuable historical material would have been barred by the D.C. Circuit's subsequent decision in *McKeever*.

Importantly, court orders unsealing historically significant grand jury records not only have advanced general understanding of our nation's history, but also have provided important insight into the functioning of the judicial process in important cases. For example, the records from the Rosenberg 1950 grand jury that were unsealed in 2015 showed that Ethel Rosenberg's brother David Greenglass, himself part of the spying conspiracy, had testified that Ethel was not involved: "[H]onestly, this is a fact: I never spoke to my sister about this at all." *See* Nat'l Sec. Archive, *New Rosenberg Grand Jury Testimony Released*, July 14, 2015, https://nsarchive2.gwu.edu/news/20150714-Rosenberg-spy-case-Greenglass-testimony/. At trial, however, he testified that Ethel had typed handwritten notes for delivery to the Soviets and operated a microfilm camera hidden in a console table. *Id.* (noting that Greenglass later admitted that he had lied on the stand to protect his wife). The released grand jury testimony thus suggests that prosecutors presented trial testimony concerning Ethel Rosenberg's role that they knew or had reason to know contradicted earlier sworn testimony by the same witness. *Id.* (stating "that the documents provided answers to three key questions: Were the Rosenbergs guilty of spying? Yes. Was their trial fair? Probably not. Did they deserve the death penalty? No."). The international news coverage of revelations from the records speaks to their significant historical importance. *See, e.g.*, Robert MacPherson, *Grand jury testimony brings up questions on Ethel Rosenberg guilt*, The China Post, July 17, 2015, *available at* https://nsarchive2.gwu.edu/news/20150714-Rosenberg-spy-case-Greenglass-testimony/The%20China%20Post.pdf; Sam Roberts, *Secret Grand Jury Testimony from Ethel Rosenberg's Brother Is Released*, N.Y. Times, July 15, 2015, https://www.nytimes.com/2015/07/16/nyregion/david-greenglass-grand-jury-testimony-ethel-rosenberg.html; Mahita Gajanan, *'Atom spy' Ethel Rosenberg's conviction in new doubt after testimony released*, The Guardian, July 15, 2015, https://www.theguardian.com/us-news/2015/jul/15/ethel-rosenberg-conviction-testimony-released-atom-spy.

Grand jury records unsealed in other cases have made similarly important contributions to the historical record. The unsealed transcripts of the Alger Hiss grand juries show that, unknown to Hiss and his defense counsel, testimony of Whittaker Chambers, the key witness against Hiss, was contradicted by two grand jury witnesses. *See* The Alger Hiss Story, https://algerhiss.com/history/new-evidence-surfaces-1990s/the-grand-jury-minutes/. Conversely, redacted grand jury transcripts concerning the 1963 indictment of Jimmy Hoffa released by the court in *In re Tabac* suggest that concerns about prosecutorial misconduct in that proceeding are unfounded. *See* Edecio Martinez, *What Jimmy Hoffa Knew: Did Powerful Teamsters Boss Plot to Ambush the FBI?*, CBS News, July 27, 2009, https://www.cbsnews.com/news/what-jimmy-hoffa-knew-did-powerful-teamsters-boss-plot-to-ambush-fbi/.

As these examples show, courts' ability to exercise inherent authority to unseal grand jury records, although sparingly exercised, is a vital tool for completing the public historical record of significant events, including the record of the functioning of the judicial process, in historically significant cases.

b. Considerations for evaluating requests to disclose

To set forth a test for assessing requests for disclosure of grand jury material in cases of historical importance, the "special circumstances" test articulated in *Craig* and applied by district courts in several subsequent cases provides an appropriate starting point. *Craig* sets forth a fact-intensive inquiry in which the court, weighing nine factors, balances the historical importance of the grand jury records against the need to maintain secrecy: (1) the identity of the parties seeking disclosure, (2) whether the government or the defendant in the grand jury proceeding opposes disclosure, (3) why the disclosure is sought, (4) what specific information is sought, (5) the age of the grand jury records, (6) the current status—living or dead—of the grand jury principals and of their families, (7) the extent to which the grand jury records sought have been previously made public, either permissibly or impermissibly, (8) the current status—living or dead—of witnesses who might be affected by disclosure, and (9) any additional need for maintaining secrecy. *See Craig*, 131 F.3d at 105–06. At the same time, this test appropriately leaves some room for the courts to exercise their judgment in light of the particular circumstances. *See Douglas Oil Co.*, 441 U.S. at 223 (stating that, under Rule 6(e), "we emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion" (citing *Pittsburgh Plate Glass Co.*, 360 U.S. at 399)).

Opinions in cases seeking grand jury records show that this type of test does not result in automatic granting or denial of petitions, but rather guides thoughtful consideration to ensure that unsealing occurs only when it does not threaten the rationale for secrecy and does serve the public interest in a complete record in cases of historical interest. *See, e.g.*, *Craig*, 131 F.3d at 106 (affirming denial of petition); *Tabac*, 2009 WL 5213717, at *2 (after weighing *Craig* factors, granting petition); *Am. Historical Ass'n*, 49 F. Supp. 2d at 297 (after weighing *Craig* factors, granting petition as to part of the record and denying as to part). Release of records under the *Craig* test does not threaten grand jury proceedings or undermine the purposes that support secrecy generally. Significantly, in opposing requests for grand jury records in cases including *Kutler*, *Pitch*, and *McKeever*, the government did not suggest that grand jury materials released on this basis have caused any problems for witnesses, targets, or prosecutors, or in any way undermined grand jury proceedings.

Notably, the Department of Justice has agreed—both in its 2011 letter to the Advisory Committee on Criminal Rules and in a 2019 filing in *Pitch*—that if courts have authority to release historical materials, these factors set forth the appropriate considerations that should guide exercise of that authority. *See* Letter from Att'y Gen., *supra*, at 11; DOJ En Banc Br. at 41, *Pitch v. United States*, No. 17-15016 (11th Cir. Aug. 12, 2019) (stating that "[a]ssuming arguendo that the district court properly entertained Pitch's petition, the district court did not err in employing the list of factors to be considered in weighing such a request outlined by the Second Circuit in *In re Craig*");

id. at 42 (stating that "the non-exhaustive factors identified in *Craig* provide rough guidance, while permitting consideration of unique factors that may weigh against disclosure in a given case").

2. End point for grand jury secrecy

We further propose that Rule 6(e) recognize that, at some point, the bases for the general rule in favor of non-disclosure of grand jury records no longer justify continued secrecy. We suggest 60 years as a reasonable end point, after which grand jury records should be available to the public.

In 2011, when the Attorney General suggested that the Committee consider amending Rule 6(e), he proposed that, 75 years after a case is closed, grand jury records stored at the National Archives and Records Administration (NARA) become available to the public "in the same manner as other archival records in NARA's collections, typically by requesting access to the records at the appropriate NARA research facility or by filing a FOIA request." Letter from Att'y Gen., *supra*, at 8. The letter explained that "[a]fter 75 years, the interests supporting grand-jury secrecy and the potential for impinging upon legitimate privacy interests of living persons have virtually faded. *Id*.; *see id.* 8 n.4 (noting that classified records are automatically declassified after 75 years).[1] Thus, although the letter suggested a longer time period, the Attorney General himself proposed a temporal end point.

Not all grand jury records are stored at NARA. By statute, the Archivist of the National Archives and Records Administration (NARA) is authorized to direct the transfer to NARA of records that are at least 30 years old and determined by the Archivist "to have sufficient historical or other value to warrant their continued preservation." 44 U.S.C. § 2107. The head of the agency that has custody of the records, however, can maintain the records for the agency's use where needed. *Id*. Although records of 60-year-old cases of historical interest presumably will be maintained at NARA, there is no reason to write into the Rule a requirement that the records be at NARA. We therefore propose that the Rule simply provide for a 60-year end point on secrecy of grand jury records.

3. Exceptional circumstances generally

In addition to exercising authority to release materials of historical importance, courts have long exercised inherent authority to disclose grand jury material in exceptional circumstances. Indeed, although in *McKeever* the D.C. Circuit held that courts lack inherent authority to disclose grand jury material to the public in any circumstance, that court in prior cases had recognized that courts do have such authority. For example, the D.C. Circuit released grand jury material concerning journalist Judith Miller because it had become "sufficiently widely known" during the

[1] The Attorney General also proposed that Rule 6(e) should permit courts to order disclosure of grand jury records *only* if those records were at least 30 years old *and* had been transferred to NARA.

subsequent trial and in public statements by grand jury witnesses. *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d at 154–55; *see In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (noting that where grand jury witness's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed," this fact "lost its character as Rule 6(e) material" (internal quotation marks omitted)); *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (affirming district court decision holding that Rule 6(e) did not bar court from disclosing grand jury report and recommendation to congressional committee); *see also In re Bullock*, 103 F. Supp. 639, 641–42 (D.D.C. 1952) (rejecting a "literal interpretation" of Rule 6(e) and ordering release of grand jury records to the Commissioners of the District of Columbia so that they could undertake a disciplinary investigation of a Metropolitan Police Department officer).

Because exceptional circumstances by their nature cannot necessarily by identified in advance, we recommend that the Committee propose an amendment to Rule 6(e) to make explicit that the Rule does not limit any inherent authority the district courts otherwise possess to unseal grand jury records in exceptional circumstances.

Proposed amendment

For the foregoing reasons, PCLG, American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists request that, the Committee revise Rule 6(e) to add the following bolded text:

> (3)(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:
>
> ….
>
> **(vi) on petition of any interested person if, after notice to the government and an opportunity for a hearing, the district court finds on the record that:**
>
> **(a) the petition seeks grand-jury records of historical importance;**
>
> **(b) at least 20 years have passed since the relevant case files associated with the grand-jury records have been closed;**
>
> **(c) no living person would be materially prejudiced by disclosure, or any prejudice could be avoided through redactions or such other reasonable steps as the court may direct;**
>
> **(d) disclosure would not impede any pending government investigation or prosecution; and**
>
> **(e) no other reason exists why the public interest requires continued secrecy.**

An order granting or denying a petition under Rule 6(e)(3)(E)(vi) is a final decision for purposes of Section 1291, Title 28.

….

(8) Nothing in this Rule prevents disclosure of grand-jury materials more than 60 years after closure of the case file.

(9) Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances.

We would be happy to discuss this proposal further with the Committee.

Sincerely,

Allison M. Zieve
Director, Public Citizen Litigation Group

On behalf of Public Citizen Litigation Group, American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists

cc: Hon. Raymond M. Kethledge,
Advisory Committee Chair
Prof. Sara Sun Beale, Reporter
Prof. Nancy J. King, Associate Reporter

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REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Bruce D. Brown, Executive Director

April 7, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, D.C. 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Revise Federal Rule of Criminal Procedure 6(e) in No. 20-CR-B

Dear Ms. Womeldorf:

The Reporters Committee for Freedom of the Press (the "Reporters Committee") and the 30 undersigned media organizations (hereinafter, collectively, the "Media Coalition") write regarding the recommendation made by Public Citizen Litigation Group and several historical organizations and societies (hereinafter, collectively, "Public Citizen") that the Advisory Committee on Criminal Rules amend Rule 6(e) of the Criminal Rules of Civil Procedure to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public. Letter No. 20-CR-B from Allison Zieve to Rebecca A. Womeldorf, (March 2, 2020), available at https://www.uscourts.gov/sites/default/files/20-cr-b_suggestion_from_allison_zieve_-_rule_6_0.pdf. Like Public Citizen, the Media Coalition supports an amendment to Rule 6(e). However, in the view of the Media Coalition, the proposed amendment set forth herein, which mirrors the flexible test that has been applied by courts in this context, better balances the public's interest in obtaining access to grand jury materials of particular historical and public interest with the interests underlying grand jury secrecy.

The Reporters Committee is an unincorporated nonprofit association that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Attorneys from the Reporters Committee represented a group of petitioners led by Elliot Carlson—a journalist and historian—in successfully petitioning for the release of transcripts of certain historically important witness testimony given before a grand jury in Chicago in August of 1942. The opinion of the Seventh Circuit in that case, *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016) ("*Carlson*"), was cited by Justice Breyer in his concurrence with the Supreme Court's denial of historian Stuart A. McKeever's petition for certiorari in *McKeever v. Barr*, 539 U.S. __, 2020 WL 283746 (Jan. 21, 2020). As Justice Breyer noted, *Carlson*, as well as prior court of appeals decisions in *Craig v. United States*, 131 F.3d 99 (2d Cir. 1997) ("*Craig*"), and *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984) ("*In re Hastings*"), appear to comport with "the considered views of the Rules Committee," yet conflict with the recent holding of the majority of a three-judge

panel of the D.C. Circuit in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) ("*McKeever*"). In March, after the Supreme Court's denial of certiorari in *McKeever*, the Eleventh Circuit sitting en banc overruled its own decades old precedent in *In re Hastings*, joining the D.C. Circuit across the ledger from the Second and Seventh Circuits on this issue. *See Pitch v. United States*, --- F.3d ----, No. 17-15016, 2020 WL 1482378 (11th Cir. Mar. 27, 2020) ("*Pitch*").

As discussed in greater detail below, the release of the grand jury materials at issue in *Carlson*—as well as the additional cases cited in Public Citizen's letter—served the public by offering a more complete record of an important historical event without threatening the general rule of grand jury secrecy. For this reason, the D.C. Circuit's decision in *McKeever* and the Eleventh Circuit's decision in *Pitch* are concerning, premised as they are in a rigid interpretation of Rule 6(e). *McKeever*, 920 F.3d at 846, 850 (interpreting Rule 6(e) to "require a district court to hew strictly to the list of exceptions to grand jury secrecy") [1]; *Pitch*, 2020 WL 1482378, at *1 ("We now hold that Rule 6(e) is exhaustive, and that district courts do not possess inherent, supervisory power to authorize the disclosure of grand jury records outside of Rule 6(e)(3)'s enumerated exception.").[2] In order to clarify that Rule 6(e) does not displace district courts' discretion to permit the release of grand jury materials in appropriate circumstances, the Media Coalition proposes that the Advisory Committee on Criminal Rules amend Rule 6(e) to (i) recognize the existence of that authority and (ii) foreground the factors identified by the Second Circuit in *Craig* and applied by other courts, including the Seventh Circuit in *Carlson*, for district courts to consider when a petitioner argues that special circumstances warrant the disclosure of particular grand jury materials.

---

[1] (Now Chief) Judge Srinivasan dissented from the majority opinion in *McKeever*. Citing the D.C. Circuit's en banc decision in *Haldeman v. Sirica*, 501 F.2d 714 (1974), he would have held that district courts have discretion to release grand jury materials in situations other than those expressly enumerated in Rule 6(e). *McKeever*, 920 F.3d at 855 (Srinivasan, J., dissenting). As the dissent persuasively argues, permitting district courts to exercise their inherent authority in this manner "squares with the Advisory Committee's evident reason for declining to add a Rule 6(e) exception for historically-significant materials—viz., that district courts already authorized such disclosures as a matter of their inherent authority." *Id.* at 855.

[2] Several Eleventh Circuit judges departed from the en banc majority opinion in *Pitch*. Judge Wilson, joined by two others judges, dissented, concluding that the plain text of Rule 6(e) "does not expressly eliminate courts' inherent authority to release grand jury materials," and further, that "the history of the rule and the Advisory Committee Notes also [show] that Rule 6(e) was meant to codify—not 'ossify'—the common law." *Pitch*, 2020 WL 1482378, at *23–24 (Wilson, J., dissenting). Judge Rosenbaum wrote a separate dissent; in her view, the Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (2019) (codified at 44 U.S.C. § 2107) "depends for its operability on construing Rule 6(e) not to abrogate the courts' common-law inherent power to authorize release of grand-jury materials when appropriate, even in the absence of an articulated exception under Rule 6(e)," and thus demonstrates Congress' intent. *Id.* at *26 (Rosenbaum, J., dissenting). Finally, though Judge Jordan concurred in the majority's opinion, he wrote separately to note that the guidepost for disclosure of grand jury materials in the pre-Rules era "was only whether the ends of justice would be furthered," and to encourage this Committee to consider amending Rule 6(e). *Id.* at 16–18 (Jordan, J., concurring).

* * *

The Media Coalition commends Public Citizen's thorough summary of the law, and its analysis of the background of Rule 6(e), which is not repeated herein. The Media Coalition writes separately, however, to urge that the Advisory Committee on Criminal Rules adopt a more straightforward amendment affirming district courts' discretion to unseal grand jury materials in special circumstances, and directing district courts to look to the factors identified in *Craig* in deciding whether the disclosure of particular grand jury materials is warranted for reasons of historical or public interest.

I. Rule 6(e) should make explicit that it does not displace district courts' authority to order the disclosure of grand jury materials in appropriate cases.

The Media Coalition's proposal, like that of Public Citizen, clarifies that Federal Rule of Criminal Procedure 6(e) does not displace or override district courts' longstanding supervisory authority to unseal grand jury materials in appropriate circumstances not expressly addressed in Rule 6(e). Rule 6(e) was enacted in 1944 to "continue[]"—not fundamentally alter— "the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*." Fed. R. Crim. P. 6(e), Advisory Committee Notes 1944 (italics added) (citations omitted); *see also In re Report & Recommendation of June 5,1972 Grand Jury*, 370 F. Supp. 1219, 1229 (D.D.C. 1974) (stating that Rule 6(e) "was not intended to create new law," and "remains subject to the law or traditional policies that gave it birth"); *Craig*, 131 F.3d at 102 (explaining that the Rule originated to "reflect[] rather than create[] the relationship between federal courts and grand juries").

As the Seventh and Second Circuits have recognized, the enumerated exceptions to the general rule of grand jury secrecy found in Rule 6(e)(3)(E) were added gradually, over time, to conform Rule 6(e) to the "developments wrought in decisions of the federal courts." *See Carlson*, 837 at 765; *Craig*, 131 F.3d at 102. For example, it was district courts' "recognition of the occasional need for litigants to have access to grand jury transcripts [that] led to the provision" now found in Rule 6(e)(3)(E)(i) "that disclosure of grand jury transcripts may be made 'when so directed by a court preliminarily to or in connection with a judicial proceeding.'" *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 220 (1979). Similarly, "in 1979 the requirement that grand jury proceedings be recorded was added to Rule 6(e) in response to a trend among [federal] courts to require such recordings." Fed. R. Crim P. 6(e)(1), Advisory Committee Notes to 1979 Amendment. And when Rule 6(e) was amended in 1983 to permit disclosure of material from one grand jury for use in another, this Committee again looked to the practices of the courts, noting that "[e]ven absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances." Fed. R. Crim. P. 6(e)(3)(C), Advisory Committee Notes to 1983 Amendment.

Simply put, the proposed amendment would make clear that Rule 6(e) is not—as it was never intended to be—a "straitjacket on the courts." *In re American Historical Ass'n*, 49 F. Supp. 2d 274, 284 (S.D.N.Y. 1999) ("*Historical Ass'n*"). And the time is right for the Committee to reexamine the Rule. Justice Breyer, in regards to the Supreme Court's denial of certiorari in *McKeever*, and Judge Jordan, in his concurrence in the Eleventh Circuit's en banc decision in *Pitch*, both have urged the Committee to do so. *McKeever v. Barr*, 539 U.S. __, 2020

WL 283746 (Jan. 21, 2020) ("Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit."); *Pitch*, No. 17-15016, 2020 WL 1482378, at *16 (11th Cir. Mar. 27, 2020) ("I encourage the Judicial Conference's Advisory Committee on Criminal Rules to address whether Rule 6(e) should be amended to permit the disclosure of grand jury materials for matters of exceptional historical significance."). Such an amendment will ensure that Rule 6(e) continues to develop over time in response to district courts' measured interpretation of the appropriate scope of grand jury secrecy in particular circumstances.

II. Rule 6(e) should be further amended to incorporate the non-exhaustive list of factors identified by the Second Circuit in *Craig*, which allow courts flexibility to balance the public interest in disclosure with that in grand jury secrecy on a case-by-case basis.

The nuanced and flexible test employed by the Second Circuit in *Craig* allows courts to appropriately consider not only the weight of the public interest, but also any other specific factual matters relevant to a particular request to unseal specific grand jury materials for reasons of historical or public interest. *Craig* arose from the petition of a scholar researching Harry Dexter White, "a former Assistant Secretary of the Treasury who was accused of having been a communist spy." 131 F.3d at 101. The scholar sought the transcript from a special grand jury proceeding during which White answered the charges against him; White died just months later, shortly after denying the accusation before the House Un-American Activities Committee. *Id.* The case reached the Second Circuit on appeal from the U.S. District Court for the Southern District of New York, which held that although "disclosure of grand jury materials under circumstances other than those specifically enumerated in Federal Rule of Criminal Procedure 6(e)(3) is sometimes permissible," *id*., the facts specific to Craig's petition did not overcome the interest in grand jury secrecy. *See In re Craig*, 942 F.Supp. 881, 883 (S.D.N.Y. 1996). The Second Circuit affirmed both the denial of Craig's petition, and the district court's holding (for which it found authority in the earlier Second Circuit case, *In re Biaggi*, 478 F.2d 489, 494 (2d Cir. 1973)) that "special circumstances" could warrant disclosure of grand jury materials:

> It is, therefore, entirely conceivable that in some situations historical or public interest alone could justify the release of grand jury information. To the extent that the John Wilkes Boothe or Aaron Burr conspiracies, for example led to grand jury investigations, historical interest might by now overwhelm any continued need for secrecy. And to say that a certain factor—like historical interest—can never suffice as a matter of law misunderstands the fact-intensive nature of the inquiry that is to be conducted. Indeed, the "special circumstances" departure from Rule 6(e) is simply incompatible with per se rules and absolutes.

Craig, 131 F.3d at 105. The Second Circuit went on to offer a "non-exhaustive list of factors that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions":

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why

> disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

Id. at 106.

These same factors were cited by and guided the decision of the U.S. District Court for the Northern District of Illinois and the Seventh Circuit in granting the petition to unseal grand jury transcripts in *Carlson*. There, the lead petitioner, historian Elliot Carlson, sought records of grand jury testimony "concern[ing] an investigation into the *Chicago Tribune* in 1942 for a story it published revealing that the U.S. military had cracked Japanese codes"—a closely held military secret at the height of World War II. *Carlson*, 837 F.3d at 755. Following the publication of the *Tribune* article, which "appeared to be . . . based on a classified Navy communiqué that alerted naval commanders to the impending attack on Midway Island," the government empaneled a grand jury and launched an investigation into the *Tribune* and one of its reporters under the Espionage Act of 1917. *Id.* at 756. Acknowledging the Second Circuit's reasoning in *Craig* to be "the most comprehensive" appellate-level analysis of the issue written after the promulgation of the Federal Rules of Criminal Procedure, the Seventh Circuit held that "Rule 6(e)(3)(e) is permissive, not exclusive, and it does not eliminate the district court's long-standing inherent authority to make decisions as needed to ensure the proper functioning of a grand jury . . . includ[ing] the power to unseal grand jury materials in circumstances not addressed by Rule 6(e)(3)(E)." *Id.* at 766–67.

Disclosure of the grand jury materials sought in *Carlson* served important historical and public interests. Release of the *Tribune* grand jury transcripts gave the news media, as well as historians and scholars, a more complete understanding of a singular event in American history: the first and, to date, only time that the government has sought the indictment of a major news organization for allegedly violating the Espionage Act by publishing classified information. For example, included in the *Tribune* grand jury materials were previously unknown details about how *Tribune* reporter Stanley Johnson obtained the information in question. *See*, *e.g.*, Michael E. Ruane, *75 Years Ago, an Epic Battle—and an Alarming Press Leak*, Washington Post, June 6, 2017, B01, 2017 WL 17428030 ("The dispatch wound up in the hands of the [aircraft carrier USS Lexington's rescued executive officer, Cmdr. Morton Seligman, who was bunking with Johnson."). And the grand jury records at issue in *Carlson* spoke to more contemporary issues as well. Commentators drew comparisons to more recent government efforts to pursue "leak" investigations under the Espionage Act, *see*, *e.g.*, Ofer Raban, *Assange's New Indictment: Espionage and the First Amendment*, Columbus Telegram, May 15, 2019, 2019 WLNR 1621339 ("An incensed President Franklin Roosevelt demanded that Espionage Act charges be brought against the reporter, the managing editor, and the *Tribune* itself. But unlike Assange's grand jury, the Tribune's grand jury refused to issue indictments."), and unauthorized disclosures of government information to members of the news media, in general. *See, e.g.*, *The Grave Danger Posed by Leakers*, Providence Journal, Sept. 3, 2017, A13, 2017 WLNR 27137979 (arguing that

"[t]he same issues that prevented justice after Midway are still in play today"); Noah Feldman, *World War II Leak Case is a Win for Edward Snowden*, Times of Oman, Sept. 21, 2016, 2016 WLNR 28720320.

The Media Coalition's proposal that Rule 6(e) be amended to incorporate the *Craig* factors finds support in a number of district court decisions. *See, e.g.*, *In re Petition of Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at *2 (M.D. Tenn. April 14, 2009); *Historical Ass'n*, 49 F. Supp. 2d 274, 291 (S.D.N.Y. 1999) (granting petition in part). It also finds support in correspondence and court filings made by the government. As Public Citizen notes, *see* Letter No. 20-CR-B (March 2, 2020), at 2, the Department of Justice wrote in a 2011 letter to this Committee that "the Second Circuit's basic insight in *[Craig]* . . . seems fundamentally correct." Letter from Attorney General to Advisory Comm. On Criminal Rules, Oct. 18, 2011, at 5, 7, *reprinted in* Advisory Comm. On Crim. Rules, Agenda Book 217 (Apr. 2012).[3] The Justice Department reiterated that position in an en banc brief to the Eleventh Circuit in *Pitch v. United States*, stating that "[a]ssuming arguendo that the district court properly entertained Pitch's petition, the district court did not err in employing the list of factors to be considered in weighing such a request outlined by the Second Circuit in *[Craig]*." DOJ En Banc Br. at 41, *Pitch v. United States*, No. 17-15016 (11th Cir. Aug. 12, 2019); *see also Carlson v. United States*, 837 F.3d 753, 767 (7th Cir. 2016) (government concedes that the district court did not abuse its discretion in applying the factors in *Craig*, assuming it had the authority to do so).

Indeed, application of the non-exhaustive list of factors identified in *Craig* allows courts the flexibility to balance all relevant factors and circumstances with respect to specific grand jury materials, and thus better reflects the balance of authority on this issue than the amendment proposed by Public Citizen. Though the Media Coalition agrees with Public Citizen as to the benefits of making explicit district courts' authority to unseal grand jury materials in circumstances not expressly addressed in Rule 6(e), the proposal made by the Media Coalition guides district courts to conduct a nuanced balancing like that conducted by the Second Circuit in *Craig*. District courts are well-equipped to weigh all relevant factors in response to requests to unseal grand jury materials for reasons of historical and public interest; indeed, this Committee has previously acknowledged as much. The proposal made by the Justice Department in the above-mentioned 2011 letter would have limited district courts' authority to unseal grand jury materials for reasons of historical or public interest to circumstances in which "30 years have passed since the relevant case files associated with the grand-jury records have been closed," *See* Letter from Attorney General to Advisory Comm. On Criminal Rules, Oct. 18, 2011, at 9. The Committee rejected that proposal, reasoning that a rule on disclosure that is "subject to specific procedures [] and . . . provide[s] a specific point in time at which it is presumed that materials may be released" is unnecessary, because "in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority." Committee on Rules of Practice of Procedure, Minutes of Meeting of June 11–12, 2012, at 44.[4]

[3] Available at https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf.
[4] Available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06- 2012-min.pdf.

* * *

For the reasons herein, the Media Coalition proposes the following amendment (added text bold) to Rule 6(e):

> (3)(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:
>
> . . .
>
> **(vi) on petition of any interested person for reasons of historical or public interest, and in consideration of the following non-exhaustive list of factors:**
>
> - **the identity of the party seeking disclosure;**
> - **whether the defendant to the grand jury proceeding or the government opposes the disclosure;**
> - **why disclosure is being sought in the particular case;**
> - **what specific information is being sought for disclosure;**
> - **how long ago the grand jury proceedings took place;**
> - **the current status of the principals of the grand jury proceeding and that of their families;**
> - **the extent to which the desired material—either permissibly or impermissibly—has been previously made public;**
> - **whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and**
> - **the additional need for maintaining secrecy in the particular case in question.**
>
> . . .
>
> **(8) Nothing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records in exceptional circumstances.**

Thank you for your consideration of this proposal. Please do not hesitate to contact Reporters Committee Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions. We would be pleased to discuss the matter further with the Committee at its convenience.

Respectfully,

The Reporters Committee for Freedom of the Press
The Associated Press
Association of American Publishers, Inc.
Atlantic Media, Inc.
Boston Globe Media Partners, LLC
Cable News Network, Inc.
The E.W. Scripps Company
Gannett Co., Inc.
Hearst Corporation
Inter American Press Association
International Documentary Assn.
Los Angeles Times Communications LLC
The McClatchy Company
The Media Institute
MediaNews Group Inc.
MPA - The Association of Magazine Media
National Press Club Journalism Institute
The National Press Club
National Press Photographers Association
The New York Times Company
The News Leaders Association
Newsday LLC
NYP Holdings, Inc.
POLITICO LLC
Radio Television Digital News Association
Reveal from The Center for Investigative Reporting
Society of Environmental Journalists
Society of Professional Journalists
Tribune Publishing Company
Tully Center for Free Speech
The Washington Post

cc: Allison M. Zieve, Director, Public Citizen Litigation Group

TAB 6

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

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

RE: **"Waiver" in Rules 49.1 and 59**
(Suggestion 20-CR-E)

DATE: **April 10, 2020**

Judge Michael Chagares has written to suggest that the Advisory Committee consider whether it might wish to consider revising Rule 49.1(h) and 59(a) and (b), which use the term "waiver." (He also notes that this is not an exhaustive list of Criminal Rules that use the term.) Drawing attention to the Supreme Court's decisions distinguishing between waiver and forfeiture, he raised the question whether these rules (and perhaps other Criminal Rules) are consistent with the Court's definitions of the terms "waiver" and "forfeiture."

We recommend that no action be taken at this point, for several reasons.

First, Rule 49.1(h) mirrors provisions in the Bankruptcy and Civil Rules, which were adopted in compliance with section 205(c)(3) the E-Government Act, which required the Supreme Court to prescribe rules to protect privacy and security concerns relating to electronic filing and public availability of federal court records. The Standing Committee established a subcommittee, composed of representatives from each of the advisory committees, to develop uniform rules (with an understanding that some adjustments might be required by each of the rules committees). Criminal Rule 49.1—and specifically Rule 49.1(h)—were the result of this cross-committee process undertaken under the authority of the Standing Committee. It uses the same language as Civil Rule 5.2(h) and Bankruptcy Rule 9037(e). The Civil and Criminal Rules both provide that "[a] person waives the protection of [the rule] as to the person's own information by filing it without redaction and not under seal." Bankruptcy Rule 9037 is identical except that it refers to waiver by "an entity." No changes should be made in Rule 49.1(h) unless similar changes are made in the parallel rules. Moreover, to the best of our knowledge, none of the advisory committees have received any information that the waiver provisions in these parallel rules have caused any difficulty.

Second, and more generally, a wide array of rules now use the term "wavier," and absent a pressing reason to do so it seems unwise to begin a comprehensive project to identify and revise all such provisions in the Criminal, Civil, Bankruptcy, Appellate, and Evidence Rules. For example, during the restyling process the Evidence Rules Committee decided not to change the language of Evidence Rule 502, dealing with attorney client privilege, which includes the word "waiver." The committee reasoned that the phrase waiver of the attorney client privilege was widely used in reference to the rule, and was causing no difficulty despite the fact that it might technically be characterized as a forfeiture. A comprehensive effort to review all of the rules would reopen that issue.

Finally, in the case of the Criminal Rules, efforts to do a comprehensive overhaul might cause significant difficulties. The amendment of Rule 12 was delayed by differences of opinion on issues of waiver and forfeiture that continue to divide the circuits (and divided judicial members of the Rules Committees).

Given these concerns, without evidence that the terminology is causing difficulty in application or other harm, this project may be premature. We recommend keeping it on the Advisory Committee's study agenda for future consideration.

From: Michael Chagares
Sent: Tuesday, March 3, 2020 8:52 PM
To: Raymond Kethledge
Cc: Sara Sun Beale; Nancy King; David Campbell; Rebecca Womeldorf; Ed Hartnett; Catherine T Struve; Coquillette, Daniel
Subject: Suggestion for a Rules Study Regarding Variants of Waiver

Dear Ray:

I had a suggestion that the Advisory Committee on the Criminal Rules might want to study.

The Supreme Court in Hamer v. Neighborhood Housing Services of Chicago, 138 S. Ct. 13, 17 n.1 (2017), reminded us all of the important distinction between waiver and forfeiture and observed that courts and attorneys have frequently overlooked the difference. The Court previously held that "forfeiture is the failure to make the timely assertion of a right," while "waiver is the 'intentional relinquishment or abandonment of a known right.'" United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The consequences of a waiver and a forfeiture are significant and indeed distinct — particularly regarding whether a waived or forfeited matter may be resurrected. See Wood v. Milyard, 566 U.S. 463, 471 n.5 (2012) (observing that "a federal court has the authority to resurrect only forfeited defenses"); Olano, 507 U.S. at 733 ("Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under [Federal Rule of Criminal Procedure] 52(b).").

I have been reviewing the criminal rules and think that there are some rules your committee may want to review to ensure that a variant of "waiver" was not used indiscriminately or improperly. Of course, uses of waiver (or variants thereof) in the rules may reflect deliberate policy choices. Below is a short, non-exclusive list of rules that might warrant study by the committee:

Rule 49.1(h) – note that the Rule provides that "[a] person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal." The 2007 Advisory Committee Note acknowledges that indeed a person "may wish to waive the protection," but it also states that "[i]f a person files an unredacted identifier by mistake, that person may seek relief from the court." (emphasis added).

Rules 59(a), (b)(2) – the Rules provide that the "[f]ailure to object in accordance with this rule waives a party's right to review." But a failure to object is generally the classic example of a forfeiture, see, e.g., Brown v. Colvin, 845 F.3d 247, 254 (7th Cir. 2016), and, as one court has noted, "[c]lassifying a failure to object as a waiver when a right is well known and regularly involved would largely collapse the distinction between waiver and forfeiture" United States v. Chavarria-Ortiz, 828 F.3d 668, 671 (8th Cir. 2016). That has apparently led at least a few courts to treat "waiver" under these Rules as a forfeiture. See, e.g., United States v. Kelley, 774 F.3d 434, 439 (8th Cir. 2014)

("Because Rule 59(a) . . . 'is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice.'" (quoting Thomas v. Arn, 474 U.S. 140, 155 (1985)); United States v. George, 573 F. App'x 465, 471 (6th Cir. 2014). Further, the 2005 Advisory Committee Note states that "[d]espite the waiver provisions [in Rules 59(a) and (b)], the district court retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed."

Best,

Mike