ADVISORY COMMITTEE
ON
CRIMINAL RULES

April 28, 2022

AGENDA
Meeting of the Advisory Committee on Criminal Rules
April 28, 2022

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1. Opening Business

- Chair's Remarks and Administrative Announcements (Oral Report)

- **ACTION: Review and Approval of Minutes**
  - Draft Minutes of the November 2021 Meeting of the Advisory Committee on Criminal Rules 14

- Report of the Rules Committee Staff

  - Report on the January 2022 Meeting of the Committee on Rules of Practice and Procedure
    - Draft Minutes of the January 2022 Meeting of the Committee on Rules of Practice and Procedure 39

  - Report on the March 2022 Session of the Judicial Conference of the United States
    - March 2022 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States 64

  - Rules and Projects Pending Before Congress, the Supreme Court, the Judicial Conference, and the Rules Committees
    - Chart Tracking Proposed Rules Amendments 86

  - Legislative Update
    - Legislation that Directly or Effectively Amends the Federal Rules (117th Congress) 92

2. ACTION: Proposed New Rule 62 (Criminal Rules Emergency) (for final approval)

- Reporters' Memorandum (April 6, 2022) 101

- Summary of Public Comments 124

- Proposed New Rule 62 & Committee Note 127

3. Filings Made Under Seal (Rule 49.1)

- Reporters' Memorandum (April 4, 2022) 152

4. Pro Se Access to Electronic Filing (Rule 49)

- Reporters' Memorandum (March 30, 2022) 155

5. Extending the Grand Jury's Term (Rule 62)

6. Pretrial Subpoena Authority (Rule 17)

7. Reminder of Prosecutorial Obligation (Rule 5)

8. Next Meeting: October 27, 2022

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

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

Advisory Committee on Appellate Rules

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

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Dennis R. Dow United States Bankruptcy Court Kansas City, MO	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC
	Associate Reporter
	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robert M. Dow, Jr. United States District Court Chicago, IL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of Law San Francisco, CA

Advisory Committee on Criminal Rules

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Honorable Raymond M. Kethledge United States Court of Appeals Ann Arbor, MI	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

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

ADVISORY COMMITTEE ON CRIMINAL RULES

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Honorable Raymond M. Kethledge United States Court of Appeals Ann Arbor, MI	Professor Sara Sun Beale Duke Law School Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Members

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

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Honorable Jesse M. Furman
(*Standing*)
United States District Court
New York, NY

Clerk of Court Representative

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

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
Raymond M. Kethledge Chair	C	Sixth Circuit	Member: 2013 Chair: 2019	---- 2022
Andre Birotte, Jr.	D	California (Central)	2021	2024
Jane Boyle	D	Texas (Northern)	2021	2024
Timothy Burgess	D	Alaska	2021	2023
Robert J. Conrad, Jr.	D	North Carolina (Western)	2021	2024
Roger A. Fairfax, Jr.	ACAD	Washington, DC	2019	2022
Michael J. Garcia	JUST	New York	2018	2024
Lisa Hay	FPD	Oregon	2020	2022
Bruce J. McGiverin	M	Puerto Rico	2017	2023
Jacqueline H. Nguyen	C	Ninth Circuit	2019	2022
Kenneth A. Polite*	DOJ	Washington, DC	----	Open
Catherine M. Recker	ESQ	Pennsylvania	2018	2024
Susan M. Robinson	ESQ	West Virginia	2018	2024
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

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Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
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. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1

Chair’s Remarks and Administrative Announcements

This item will be an oral report.

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
November 4, 2021

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met in Washington, D.C. on November 4, 2021. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Timothy M. Burgess
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr.
Judge Michael J. Garcia
Lisa Hay, Esq.
Judge Bruce J. McGiverin (via Microsoft Teams)
Angela Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Kenneth A. Polite, Jr., Esq., *ex officio*[1]
Judge Jacqueline H. Nguyen (via Microsoft Teams)
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Jesse M. Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Brittany Bunting, Administrative Analyst, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Burton DeWitt, Esq., Law Clerk, Standing Committee
Bridget M. Healy, Esq., Acting Chief Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center (via Microsoft Teams)
S. Scott Myers, Esq., Counsel, Rules Committee Staff
Julie Wilson, Esq., Counsel, Rules Committee Staff (via Microsoft Teams)

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

The following persons attended as observers on Microsoft Teams:

Amy Brogioli	American Association for Justice
Joseph J. Bell, Esq.	Bell & Shivas, P.C.
Dr. Robert G. Bell	Professional Associate of Bell & Shivas
Grant Blakenship	Reporter, Georgia Public Broadcasting
Patrick Egan, Esq.	American College of Trial Lawyers
Mimi Ferraioli	Professional Associate of Bell & Shivas
John Hawkinson	Freelance Journalist
Jeffrey S. Katz, Esq.	Professional Associate of Bell & Shivas
Brian C. Laskiewicz, Esq.	Bell & Shivas, P.C.
Maryann Locklin	Professional Associate of Bell & Shivas
James K. Pryor, Esq.	Practitioner
Larry Purpuro	Professional Associate of Bell & Shivas
Judith Ricucci	Professional Associate of Bell & Shivas
Mike Scarcella	Legal Affairs Reporter, Reuters
Ms. Shirley	Professional Associate of Bell & Shivas
Dan Turner	Professional Associate of Bell & Shivas
Kristie M. Ward	Paralegal, Bell & Shivas
Laura M.L. Wait, Esq.	Associate General Counsel, District of Columbia Courts
Laura Wexler	N/A
Allison Zieve, Esq.	Director, Public Citizen Litigation Group

Opening Business

Judge Kethledge opened the meeting with administrative announcements. He thanked the members in attendance, noting that many had travelled substantial distances. He also thanked the members of the public who were observing the meeting for their interest and for the proposals some of them had made. He drew attention to the fact that this was the first meeting for several new members: Judge André Birotte, Judge Jane Boyle, Judge Robert Conrad, and Assistant Attorney General Kenneth Polite, and for Angela Noble, the new clerk of court representative. The marshals provided a short security briefing, and Ms. Bunting reviewed best practices for in-person and virtual participants.

Ms. Wilson presented the Rules Committee Staff report, drawing attention to the materials beginning on page 56 of the agenda book. At its June meeting the Standing Committee approved proposed new Rule 62 and the other emergency rules for publication. The proposed emergency rules have been posted online, and copies have been sent to all members of the federal judiciary as well as many other interested parties. Comments are due February 16, 2022. The Standing Committee also transmitted the proposed amendment to Rule 16 regarding expert disclosures to the Judicial Conference, which approved them at its September meeting. The proposed amendment has now been transmitted to the Supreme Court, which has until May 1, 2022 to adopt and transmit to Congress.

Ms. Wilson also drew attention to two charts. The first, on pages 125–29, is a regular feature of each agenda book that tracks the progress of each amendment to the Federal Rules. The second, pages 130–33, describes and tracks all legislation that would directly or effectively amend the Federal Rules. She noted that since her report at the spring meeting there has been no action on the only bill that would affect the Federal Rules of Criminal Procedure, the Sunshine in the Courtroom Act—which would impact Rule 53. Ms. Wilson noted that she and the Rules Law Clerk will continue to monitor all legislation that may affect the Federal Rules.

Judge Kethledge drew the Committee's attention to the draft minutes. Professor King asked members who found any typographical errors that did not affect the substance to notify the reporters. A motion to approve the minutes was made, seconded, and passed unanimously.

Noting that there were many new members, and that it had been two years since the Committee met in person, Judge Kethledge asked each member, as well as those who were participating to support the Committee, to introduce themselves.

Commenting that that this was his ninth year on the Committee and his third as chair, Judge Kethledge made some opening comments about the nature of the Committee's work. He first stressed the importance of meeting in person and the important bonds of trust members have in one another, which transcend the things that often divide people. That trust in one another's integrity, good will, and good faith (along with the members' expertise) is the Committee's core asset. It cannot be developed over Zoom. He expressed gratitude for the many members who had been able to attend in person, but noted the need to understand that given different circumstances not all were able to do so. It is important for members to get to know one another as individuals (not on the basis of geography or other affiliations) in order to trust one another and work together. Judge Kethledge explained that the Committee's role is advisory. Its job is not to reflect public opinion, or to advance the interest of one side or another in criminal litigation. Rather, it is to discern, as well as we can based on our diverse experiences and working together, the best response to issues in the criminal justice system.

Rule 6: Historical Exception to Grand Jury Secrecy

Judge Kethledge introduced the grand jury items on the agenda with comments about the grand jury's importance and its ancient lineage, which traces back to the reign of Henry II. The grand jury provided an important role for citizens and developed into a check on prosecutorial power.

He urged the Committee to listen—but not defer—to the subcommittee. He noted that the Chief Justice's appointment of each member showed his confidence in their perspectives. The Committee should take up each issue in a plenary fashion.

Judge Kethledge noted the deep expertise the subcommittee brought to bear on the first item concerning the grand jury secrecy: proposals for an exception for records of historical or public interest. Judge Garcia, the subcommittee chair, was U.S. Attorney when the disclosure of the records concerning Julius and Ethel Rosenberg was litigated. Professor Beale argued the

government's case in *Douglas Oil v. Petrol Stops*, one of the leading Supreme Court cases on grand jury secrecy. Professor Beale and Dean Fairfax are also noted grand jury scholars, and the other members had seen the grand jury up close in practice, including their work representing witnesses and targets who were not prosecuted.

Judge Garcia presented the subcommittee's report. By a vote of five to two, the subcommittee recommended against proceeding with an amendment to allow disclosure of grand jury records of historical interest. When this issue was last considered in 2012, the Committee concluded that no amendment was needed because the system was working well. But since that time, the *McKeever* and *Pitch* cases created a circuit split, placing the D.C. and Eleventh Circuits on one side, barring disclosure, and other circuits, including the Second Circuit with the *Craig* decision, recognizing an exception to grand jury secrecy that could allow disclosure of records of exceptional historical importance. Additionally, in a statement accompanying the denial of certiorari in *McKeever*, Justice Breyer urged the Committee to look again at the issue. The Committee received multiple proposals for an exception for historical records (including proposals from the Department of Justice), and it referred them to the subcommittee.

Judge Garcia described the subcommittee's process. It reviewed the Committee materials from 2012, as well as the new submissions (some from groups that had previously urged an amendment as well as a proposal from members of the law firm who represented Professor Pitch). It held a miniconference with numerous panels to obtain a wide variety of perspectives. Participants included former U.S. Attorney Patrick Fitzgerald and Beth Wilkinson, former Principal Deputy in the Terrorism and Violent Crime Section, both of whom also had experience representing witnesses in a range of cases, including terrorism, drugs, and special counsel investigations. Other participants included a historian, representatives from Public Citizen and the Reporters Committee, the general counsel of the National Archives and Records Administration, career attorneys from the Department of Justice, and a member of the public who had been injured by grand jury leaks. It was a mix of perspectives, including participants who were working in and with the grand jury, and those who viewed grand jury records as a repository of information of exceptional historical or public importance. The miniconference was exceptionally helpful to subcommittee members.

The subcommittee proceeded first to draft the best possible amendment and committee note, considering the issues that such an amendment would raise before turning to the question whether to recommend pursuing the amendment. Judge Garcia explained that the subcommittee also had to decide what to say about the question of the courts' inherent authority to release grand jury materials. The subcommittee, by a vote of six to one, recommended against wading into that area. In the members' view, this is an Article III issue that is not within the Committee's authority. For the same reason, the subcommittee decided not to address the issue of the exclusivity of the exceptions in Rule 6(e).

Overall, Judge Garcia explained, the subcommittee took a minimalist approach, which he defined as a relatively short textual amendment with more information in the committee note. He

then explained the Committee's thinking on each of the issues noted in the report, beginning on page 137 of the agenda book.

The subcommittee limited the amendment to records of historical interest—rather than the broader criterion of public interest—and it limited the exception further to records of "exceptional" historic interest. It declined, however, the Department's suggestion that the amendment be limited to "archival" grand jury records, as well as Professor Craig's suggestion that the rule provide a special role for historians.

The subcommittee rejected the suggestion in several of the proposals to include in the text the list of factors identified in the Second Circuit's *Craig* decision. Instead, it referred to those factors in the committee note.

The question whether to limit the exception to records only after a stated number of years (a hard floor) was especially difficult. The proposals the Committee received varied widely, from no floor to a floor of 20, 30, or 50 years, with the Department of Justice advocating for each of these at various times. The subcommittee decided the rule should include a floor. Members were influenced by the testimony at the miniconference and the experience of some subcommittee members with witnesses in cases involving terrorism, drugs, and especially sensitive cases. In those cases, witnesses show real hesitation and fear. In the grand jury investigation of the 1993 World Trade Center bombing and other terrorism cases, Judge Garcia recalled seeing that hesitation and fear. He noted that those cases were now more than 20, but less than 30 years ago. He had been thinking of the fear of those witnesses, the role of the grand jury, and the need for it to function effectively.

Judge Garcia explained that the subcommittee settled, uneasily, on a floor of 40 years. The members recognized that any floor could be seen as too low, but also that those who supported disclosure might prefer no rule to one with too high a floor. The floor would be calculated from the closure of the case by the Department of Justice. The Department's procedures for closure are complex, and Judge Garcia noted that members might have questions about that for the Department's representatives.

The subcommittee decided to draft the rule text stating the standard for disclosure in general terms: whether the public interest in disclosure outweighs the need for continued grand jury secrecy. It placed other issues in the note, specifically the impact on any living person or prejudice to an ongoing investigation. The note also emphasizes that this is a narrow exception.

The subcommittee took the same approach to procedural requirements. The text includes only notice to the government and an opportunity to be heard. It leaves flexibility for the court to tailor other procedures to the requirements of an individual case.

The subcommittee rejected proposals to end grand jury secrecy after 60 or 75 years. Like the Advisory Committee in 2012, the subcommittee saw this as too great a departure from the principle of grand jury secrecy.

After it worked though all of these issues and approved the discussion draft on pages 153–55 of the agenda book, the subcommittee took up the question whether to recommend that the Committee move forward with this proposal. Although it was not unanimous, the subcommittee voted to recommend that the Committee not proceed with the amendment.

Judge Garcia described the evolution of his own views. He came in with experience as U.S. Attorney when the court was considering the petition to disclosure the *Rosenberg* records. He felt an interest (as did many others) in the disclosure of the records of such a historically significant case, but also had reservations arising from his experience with grand juries investigating violent crimes, and his representation in private practice of witnesses and targets. But as the subcommittee worked to develop the draft rule, he was increasingly struck by the strangeness of adding a historical exception to the Federal Rules. The existing exceptions to grand jury secrecy in Rule 6(e) all go to investigative and national security interests. An exception for historical interests—even exceptional historical interest—seems unlike the other exceptions recognized in the rule. In 2012, the Committee recognized that the system was working well. Courts were using inherent authority only in truly rare cases, and that led to the decision not to pursue an amendment.

After thanking Judge Garcia for his thorough presentation, Judge Kethledge said he would like comments from other members of the subcommittee first, before calling on other members for their initial thoughts. Then he would open the floor for discussion.

A subcommittee member identified herself as a defense lawyer in Philadelphia. She said her experience had driven her focus. The suggestions we received focused on what she called the "back end"—questions such as how to define historical interest and the factors to be considered. But in her professional experience in two cases (state and federal), the grand jury proceedings were distorted "up front." In a proceeding that involved a participant in the miniconference, the member said she observed the absolutely devastating effect that a leak, a breach of grand jury secrecy, had on the integrity of the grand jury process. So, her focus throughout had been on the "front end": how to maintain the integrity of the process from the outset. Miniconference participants confirmed her view that the protection of the integrity of the process from the outset was more important than considering what might happen after 30, 50, or 70 years. Advising a witness who is about to testify about exceptions to secrecy already undermines the process. Every grand jury witness she represented had asked "who will know what I say?" The more you have to describe exceptions, the more you undermine the process. Her driving principle was to maintain the grand jury's integrity on the front end.

Another subcommittee member emphasized the thoroughness of the subcommittee's process and noted that his views were well described in the third paragraph on page 145 of the agenda book. He commented that not only historians, but also sociologists and others might have scholarly interests and seek grand jury records of historical interest. Another issue of concern was placing the government in the awkward role of serving as the broker of competing interests. Reflecting on his experience giving warnings to witnesses when he was a federal prosecutor and preparing witnesses or targets, he thought having to explain the historical records exception would dilute the security that witnesses, subjects, and targets would feel.

A member of the subcommittee said the miniconference was very helpful and she thanked Judge Garcia for his summary. She ultimately agreed with the recommendation not to amend the rule. The discussion draft was well done, but the more she considered the issues in drafting, the more difficult they became. That was why ultimately she was not persuaded to support an amendment, especially in light of the problem of reassuring witnesses and their families. The historical records exception is qualitatively different than the other exceptions in Rule 6, and it is at odds with the core principle that grand jury secrecy is sacrosanct. And writing a rule for inherent authority doesn't make sense.

Mr. Polite began by noting that although he was a new member, he had had previous contacts with many of the members. He was an undergraduate with Dean Fairfax. He was a fellow AUSA with Judge Furman. He was a fellow U.S. Attorney with Judge Birotte. He was co-counsel with Ms. Recker. And Judge Garcia had hired him as an AUSA.

The Department of Justice appreciated the patience of the subcommittee. The Department's position has changed over the last three administrations, and Attorney General Garland has considered this anew. Despite the changes, there were constants. Mr. Wroblewski had been a pillar upon which the Department relied throughout. The Department consistently urged that the only exceptions to grand jury secrecy were those stated in Rule 6; it has argued for decades in cases across the country that the district courts have no authority to create exceptions beyond the text. There is now a circuit split on that issue. The Department has consistently supported an historical interest exception because it believes Rule 6 covers the waterfront of exceptions, but that in limited circumstances historically important grand jury materials should be made available to historians and others. A well-crafted amendment can preserve the critical tradition of grand jury secrecy and the primacy of the Federal Rules while allowing release in cases where significant time has elapsed and the public interest in the release of historical records outweighs the remaining need for continued secrecy.

The Department's 2011 proposal permitted release after 30 years if specific conditions were met: (1) the grand jury records had exceptional historical interest, (2) no living person would be materially prejudiced by disclosure, and (3) disclosure would not impede any pending grand jury investigation or prosecution. The 2011 proposal also provided blanket authority to the archivist to release grand jury records 75 years after closure of the relevant records without a petition to the courts.

The Department, Mr. Polite said, still believes this is generally the right approach. It recognizes that there is no clear cut or scientific basis for the number of years for the threshold for release, and its proposals have laid out different benchmarks. The Department supports a 25-year time frame if the rule limits release to cases in which the district court finds (1) no living person would be materially prejudiced by disclosure, (2) disclosure would not impede any pending grand jury investigation or prosecution, and (3) the public interest in disclosure outweighs the interest in retaining secrecy. The Department also supports a temporal end to secrecy for materials that become part of the National Archives. The need for secrecy in case of historical importance is eventually outweighed by the public's legitimate interest in preserving and accessing documentary

legacy, and after 70 years the interest in preserving secrecy and in the privacy of living persons normally has faded.

The next speaker identified herself as a Federal Defender and the other subcommittee member who favored adding an exception to Rule 6. She noted that not all defense attorneys were in agreement. All recognized the competing interests in individual privacy versus the value of reviewing the government's use of its authority. From the public interest perspective, the grand jury is a powerful, secret institution the government uses to gather information about people and entities, require testimony, and seek charges. There is a public benefit in some cases in having that information for historians and those who may want to revise how the government works. Sunshine on the use of authority is beneficial.

The member favored an exception for materials of historical interest, and she argued that the split in the circuits made it incumbent on the Committee to decide what the rules do allow. If the Committee takes no action, the district courts and courts of appeal will have to decide how to handle petitions for disclosure. Some circuits (such as the Second and Seventh) now allow disclosure, but others (including the D.C. Circuit and Eleventh) do not, and a case on the issue is now pending in the First Circuit. If we don't come up with a limited exception, courts will continue to review petitions for disclosure, coming to various conclusions, including some with less protection for grand jury secrecy than we might wish. So we should decide what the rule should allow. There is no need to decide the question of inherent authority. We can just say what the rule does allow. She supported a clear rule with disclosure permitted after 25 years. Forty years is excessive.

Judge Kethledge offered his own comments. The question before the Committee is a close one. Thinking of cases like *Rosenberg*, he could see the appeal of disclosure. The interest may be not only historical, but also whether the government's authority was abused, and it has been 40 years since the prosecution. On the other hand, this is like "high neck surgery" on a venerable institution in our criminal justice system. Evolved institutions like this one are distillations of experience and wisdom. They work in ways we are not aware of, and often benefit us in ways we do not understand. The potential for unintended consequences is greater than usual. But, as the last speaker said, the reality is that if our Committee does not act, the courts will. We now have a four to two circuit split, with the issue pending in another circuit, and Justice Breyer urged the Committee to resolve the issue.

The Committee's job, Judge Kethledge said, is to give our best advice on the question whether, as a matter of positive law, we should have an exception in the rule. That's the only decision the Committee has to make, and the only one it has the authority to make. The question of inherent authority—whether the authority to disclose grand jury material inheres in the judicial power vested by Article III—is beyond the Committee's purview. The Committee decides procedural matters, and that is a question of substantive constitutional law. As Justice Barrett wrote as an academic, sometimes courts have inherent authority, but Congress can override that with positive law. So the Committee should decide whether it thinks an exception to grand jury secrecy is a good idea.

Noting that he would not repeat points made in Judge Garcia's excellent summary, a member emphasized the value of the miniconference, especially the statement of Patrick Fitzgerald, who emphasized that the long memories that terrorist and organized crime groups can extend not only to witnesses but also their families.

Judge Kethledge then called on members not on the subcommittee for their initial thoughts.

A member expressed concern about the slippery slope created by adding an exception for historical interest. What, exactly, is historical interest? Disclosure in the interest of "good government" is another very broad concept. The member advocated waiting for the Supreme Court to define the courts' inherent authority, rather than trying to guess or put a floor on it in this context.

Another member agreed it was a difficult issue. He said he had struggled with it, but at the end of the day he was most struck by the concerns about the long memories of some groups, witnesses' fear, and unintended consequences. He had concluded that the preservation of the institution outweighs the potential benefits of greater disclosure. It is better to leave things as they are.

The next member stated that the Department of Justice's comments were lucid and thoughtful, but subject to change. In contrast, the views of line prosecutors were less subject to change, more focused on the ultimate purpose and effect of the grand jury, and weighed heavily in favor of secrecy. The member favored being careful and prudent about change–about both intended and unintended consequences.

Another member characterized his own views as "persuadable." Like Judge Garcia, the member initially felt an historical interest exception would be valuable if it could be put into a rule that would still be protective of the functioning and secrecy of the grand jury and the protection of the participants. He raised a several questions for discussion. First, for those with experience in private practice representing witnesses, wouldn't it be easier to explain an exception in the rule, rather than the effect of a multifactor test set out in cases like *Craig*? And for miniconference participants, since some courts have been considering and granting disclosure of historical records for some years, have there been any adverse effects? Has this impaired the function of the grand jury? Has there been any harm to witnesses, members of grand juries, or others?

A member of the subcommittee who represents witnesses responded that she had never advised those witnesses of the historical interest exception or *Craig* factors. Cases of extreme historical interest like *Nixon* and *Rosenberg* don't come up often enough for her to try to explain issues like inherent authority to lay witnesses, who would not understand if she tried.

On the second question, Judge Garcia said there was no testimony that anyone was hurt by the disclosures in *Rosenberg*, etc. Indeed in 2012 the Committee decided there was no problem with disclosure in these very rare cases. But amending the formal rule to give this authority would change the calculation. Plus the subcommittee did hear that witnesses fear disclosure. He himself had known potential witnesses who were so frightened they left the country to avoid testifying.

Professor Beale noted the second question was asked at the miniconference. Ms. Shapiro, who has for many years litigated these cases for the Department of Justice, stated that as far as the Department knows, no identifiable person has been hurt by disclosure for historical interest. Rather, the harm is to the institution of the grand jury and its functioning in the future. Harm can be cumulative, she said, and in some cases speculative.

A member asked if he was correct in understanding that the Department of Justice had been consistent for the last three administrations on the following points: (1) an exception for historical grand jury records should be recognized, (2) this can be done consistent with the protection of grand jury secrecy and the functioning of the grand jury as an institution, and (3) the rulemaking process is the way to do this.

Mr. Wroblewski said that was correct.

Another member expressed appreciation for the subcommittee's work and explained her own perspective and experience. She was an AUSA for 17 years, working with many grand juries, and has been on the defense side for nearly 10 years, representing witnesses and targets who have not been charged. She is concerned not just with the potential for physical injury from disclosure, but also injury to businesses and personal reputations. She now advises her clients that their testimony cannot be disclosed without a court order. If someone is indicted, the protections for witnesses are greatly reduced. Her main concern is the sanctity of the grand jury and the secrecy that protects those never indicted, who have no forum in which to respond to accusations. The grand jury hears only one side; it never hears the accused person's side.

The member said she was pleased that the discussion draft did not include a broader exception for disclosure in the public interest. Her experience included civil litigants seeking grand jury materials. For example, after a major investigation of the failure of a large financial institution, there were multiple civil lawsuits seeking to obtain all of the grand jury's records. The government prevailed in those cases. Other private litigants were affected by water pollution, and indeed the whole city was affected. One might argue there was a public interest in disclosure because of the sheer number of affected persons. She agreed with the earlier comment about a potential slippery slope starting with historical interest and the interest in government function. She concluded with a question: since the Supreme Court can resolve the circuit split, what is the harm in not taking this up now?

Judge Furman, the Standing Committee's liaison, thanked Judge Garcia and the subcommittee for its work on a close question with strong arguments on both sides. Noting he was speaking only for himself, he said he favored an amendment. Otherwise the Supreme Court will have to resolve the circuit split. If the Court agrees with the Department that the exceptions in the rule are exclusive, then there should be no disclosure in *Rosenberg*, though most of us seemed to favor disclosure (though it should be *very* rare). Alternatively, if the Court decides there is inherent authority, that would leave its development to the common law process, without the thoughtful limits the Committee would design. If we don't adopt a rule, we kick the can down the road to the courts. The rulemaking process would be superior. For some, the most salient concern is the long

memories of certain groups, such as terrorists and drug cartels. Judge Furman noted he had served as a prosecutor and was aware of these concerns, but he saw very little danger that records in these kinds of cases would be released under the proposed rule, though it would allow disclosure in *Rosenberg*.

Judge Furman thought the most salient concerns are about what one member called the "front end." He pointed to two reasons to think a rule would not cause harm at the front end. First, the Department of Justice, which is the most concerned about preserving the functioning of the grand jury, supports a rule. And second, since there are already multiple exceptions in Rule 6(e), one cannot now tell a witness that his or her testimony cannot be revealed. Indeed, a rule would be easier to explain to a witness than the *Craig* factors. Even national security materials are eventually released. On balance he supported a rule.

Judge Bates thanked the subcommittee for its work on a difficult and close question, and stated that he shared many of Judge Furman's views. He asked whether it was the subcommittee's intent to limit disclosure to cases like *Rosenberg*, to that narrow a category. If so, there is less concern about a slippery slope. Judge Bates thought it was hard to imagine that more than one tenth of one percent of cases would fall into that narrow definition of exceptional historical interest *and* the public interest in disclosure outweighs the need for continued secrecy more than 40 years after the case closed. So if the rule is that narrow, perhaps the concerns expressed are not as weighty.

Judge Garcia responded that the subcommittee tried to capture what the Committee in 2012 thought had been working well: disclosure only in truly exceptional cases. But as we tried to put this into a formal exception, it was difficult to replicate that limited approach. Although the discussion draft represents our best effort to do that, subcommittee members still were uneasy that whatever we put in the rule it will not be exactly that.

Judge Garcia thought it was hard to analogize the release of grand jury records to the release of national security materials. Like many of the members, he had dealt with intelligence agencies and national security issues, and he commented that they have their own system to deal with sources and methods, which are different than the grand jury.

So the subcommittee's goal was to bottle those previous inherent power cases in a rule, but the concern is that incorporating it in Rule 6 may change the calculus.

Professor Coquillette commented as a legal historian, noting that he and a coauthor had recently completed a two volume history of Harvard Law School that resulted in the revocation of its shield. Harvard Law School had a 60 year seal on historical records, and a 90 year seal on records concerning tenure and promotion. Professor Coquillette said he and his coauthor were able to work with those limits, finding alternative sources—as there must be for grand jury minutes. On the one hand, he stressed, history is very important for the health of our country. On other hand, historians can work effectively under a rule that precludes disclosure when there would be material prejudice to individuals and would bar disclosure for 60 years.

In response to the question of the breadth of the proposed exception—which might determine how much it would raise various concerns—Professor Beale drew attention to the discussion draft beginning on page 153. The text limits disclosure to cases of "exceptional historical interest," and the note strongly signals this is like the very restricted common law approach, referring to the *Rosenberg* and *Nixon* cases to define exceptional historical interest. The goal was to carry forward that very limited category.

Professor Beale also noted that in some respects the draft rule is *narrower* than the common law precedents because it applies only after 40 years, though some of the cases had allowed disclosure earlier. She thought some proponents of disclosure might prefer no exception in the rule, and the applicability of the *Craig* factors. If disclosure is to be permitted under any circumstances, this rule would arguably cabin it more than the current common law precedents, which in some cases allowed disclosure, for example, after 30 some years. The draft rule also requires the court to find that the public interest in disclosure outweighs the interest in continued secrecy. That should ensure that judges would be made aware of the long memories that are of concern in certain cases. There may still be an unintended signal from adding one more exception of a different kind. But the goal was to write a rule that would be no broader, and in some senses narrower, than what the courts have been doing, and to set clearer boundaries. Some might prefer broader disclosure in circumstances where some courts would permit that now. So it presents a close question.

Judge Garcia had faith that in terrorism cases courts would consider the effect of disclosure on witnesses, but he still had concerns about the "front end" functioning of grand juries. Even if we are confident courts would not release material regarding individuals in investigations concerning violent crimes or drug cartels, there are concerns about how adding an exception would influence the process. In response to a question about the *Rosenberg* case, he explained that it arose in the Second Circuit, where the courts apply the *Craig* factors under their inherent authority outside Rule 6.

A member who had earlier expressed support for the subcommittee's decision not to propose a broader public interest exception commented that she had struggled to understand how to define the concept of public interest for the historical interest exception, and to balance it against the need for continued secrecy. Another member chimed in, agreeing with the concern that private interests could override the need for secrecy.

Judge Kethledge asked for further discussion on the question whether to propose an amendment, focusing on what members had been calling the "front end" concerns. He asked members whether these concerns would be assuaged if we have a *very* narrow protective rule: a threshold of at least 50 years, extraordinary historical interest, and the interest in disclosure outweighs the need for continued secrecy. Or would it still be impossible to reassure witnesses, so that the institution of the grand jury would suffer?

Judge Garcia responded that this issue was critical for many on the subcommittee. The majority wanted to further narrow the rule, for example setting a higher number of years for the

floor. Eventually it was an almost astronomical number, say more than 50 years. At that point, the rule would not capture prior cases where disclosure had been allowed, and it was unclear whether it would make a difference to explain a 50-year versus a 35-year floor to a witness.

The member who first articulated the "front end" concerns said when she talks to witnesses in high profile cases, she doubts they could distinguish between exceptional historical interest and the current case in which they are being called to testify. Instead of thinking about the *Rosenberg* case, they will be thinking of the publicity in the current case. So with even the narrowest and most restrictive rule, she believed an explanation of the exception would undermine the quality of the testimony. No limits on the rule could alleviate her concerns.

Judge Kethledge asked whether a highly restricted rule with a threshold of 60 years would alleviate the concerns. The member responded that she did not know if that would be sufficient. She explained that the leak discussed at the miniconference concerned a towering figure in Philadelphia's civil rights community, whose reputation and legacy were destroyed by misrepresentations concerning a targeted leak. Even after 60 years such revelations would have an impact.

Another member commented that in his youth as a prosecutor, 50 years seemed a long time, but less so now. If a contemporary researcher wanted to explore federal drug policy in the 1980s and 1990s, physical safety could still be an issue for witnesses and their families. Perhaps the judge would take that into account. The member also noted that in the academic world there is now a focus on names and legacies, and names are being removed from buildings and programs. Decades ago, grand jury witnesses were told their testimony would *never* be disclosed. That might make someone think twice if a nebulous historical interest exception is written into the rule. But he also recognized strong arguments the other way. He agreed there was only a remote chance of disclosure in a run of the mill case, but added that the exception would burden the discussion with witnesses, and disclosure could affect their reputations, impacting their children, grandchildren, etc. Judge Kethledge added that the reputation of targets could be affected as well.

Mr. Polite emphasized that the Department of Justice had consistently sought to limit the exception to cases in which the court finds no living person would be materially prejudiced by disclosure and no pending investigations would be prejudiced. These requirements are not in the current Committee discussion draft (though they are in the committee note). The Department continues to support their inclusion in the text.

There was discussion of the question whether adding the historical interest exception would affect the inherent authority issue. Judge Kethledge said it would have no de jure effect, but would have an effect de facto. Professor Beale noted that there have been very few inherent authority cases granting disclosure, and most of them have concerned historical interest. A few, such as the *Hastings* case, could have been decided on alternative grounds; some concurring judges in *Pitch* argued that inherent authority was not needed because disclosure could be made under another exception in Rule 6(e). Mr. Wroblewski pointed out, however, that Chief Judge Howell had raised the use of inherent authority in other grand jury contexts. So even if we resolve historical interest,

there still will be other inherent authority issues. Professor Beale agreed that this was an important qualification to her answer. Judge Kethledge observed that, as Professor Barrett had written, everyone agrees that district courts have some inherent authority, but the courts do not control the grand jury, so their authority over the grand jury may differ from that over other matters.

Judge Kethledge again asked members for any further comments on the question whether even a very narrow rule would still have a negative impact on the "front end," the functioning of the grand jury.

A member who supported an amendment explained that the current rule already provides multiple exceptions to secrecy, including use in a criminal case. Anyone advising a grand jury witness now has to say that if this person is indicted, your testimony may be disclosed. Since there are many other more important factors, such as leaks, she thought the disclosure of the new historical exception would have little impact on the "front end."

Judge Kethledge expressed concern that creating an express exception for historical importance could send a signal to potential leakers that disclosure is not categorically a bad thing. A potential leaker might think, "This is where they draw the line on the public interest in disclosure, but I draw it here."

Professor Beale drew the Committee's attention to another potentially broad exception of which witnesses should be informed: disclosure for use "preliminarily to or in connection with a judicial proceeding." For that exception, the petitioner must show "particularized need" to warrant use in a later civil case. Because there are already multiple exceptions to grand jury secrecy, this brings the Committee back to the question how much difference it would make to add this additional exception.

Following a lunch break, Judge Kethledge reconvened the meeting and asked for discussion regarding the threshold question: Whether the Committee ought to proceed with a new exception to Rule 6. If it the answer was yes, then they would work out the particulars.

A member reiterated her position the Committee should recommend an exception. She said she appreciated the comments about the Department's consistent position on several of these points and that the rulemaking process is the best place to address the issue of releasing matters of historical importance. She said she hoped that the discussion had brought more people around to the idea that this is the right body to add an exception addressing exceptional historical significance. If this Committee does not do so, this important issue will be left to different district courts reaching contradictory positions, and it will leave to the Supreme Court the question of inherent authority. The Committee could sidestep that authority question by a clear rule that tells judges, "This is the floor after which a historical exception can be evaluated, and here are the criteria to use." An exception would create greater consistency and protect the grand jury more than leaving things open to the district courts.

She said the subcommittee took seriously the need to limit the exception. It came up with good language about "exceptional" historical significance. It debated whether the rule should set

a number of years in the rule as a floor, or whether it should say after a sufficient time, and everybody agreed there needed to be a number in the rule. She agreed with the Department of Justice that 25 years is the right number, after which the district court can decide whether the weighing of public interest versus the interest of grand jury secrecy merits disclosure. Putting a hard threshold in the rule, saying exceptional historical importance, and including language in the comments about other factors that the court should weigh, will serve the judiciary by clarifying this. In light of the discussion, she hoped people had been persuaded to agree with adding the exception.

A member clarified that the current draft has a floor of 40 years, not 25.

Judge Kethledge commented on which entity ought to make these decisions, following up on earlier observations about the difference between the rule approach and the common law approach. The rule approach has the benefit of a broadly inclusive deliberative process, involving many people with different experiences. It is a more aggressive process though, designing the entirety and trying to answer all the questions at one swoop. The common law methodology allows courts the option of being very incremental. In the *Rosenberg* case, a court might say we will allow an exception here, and these are the reasons why we think it makes sense here. Then in the next case the court will ask is this like *Rosenberg*? It might conclude the next case is not exactly the same, but that it has some other element the court thinks is important. These refinements accrete and start building out into a rule. It's a slower and different way of doing things. It doesn't have input from the broad group as we do, but it does have its own virtues. And even if the issue goes to the Supreme Court, the Court can do that too.

Judge Kethledge asked for other comments. Hearing none he asked for a roll call vote on whether the Committee thought it was wise to proceed with a new exception to the secrecy requirement in Rule 6. Professor Beale clarified, and Judge Kethledge agreed, that a yes vote would leave open the details of the draft, such as whether the floor is 25 or 50 years. The question is, in principle, if we have the best possible draft should the Committee move forward with it? Or not?

The Committee members voted nine to three not to proceed further with an amendment to Rule 6. (The Department of Justice and two other members voted to proceed.)

Judge Kethledge thanked everyone on the Committee for their careful attention, particularly the members of the subcommittee and Judge Garcia.

Rule 6: Authority to Temporarily Excuse Grand Jurors

Professor Beale turned to the agenda item at Tab 3, a proposal from the former chair of this Committee, Judge Donald Molloy, at page 254 of the agenda book. Judge Molloy suggested that Rule 6 be amended to authorize the grand jury foreperson to give temporary excuses to individual grand jurors. He noted that this worked well in his district, and that he had been surprised to learn that other districts in the Ninth Circuit followed different practices. The proposal had been referred to the Rule 6 subcommittee.

With Judge Molloy's assistance, the subcommittee learned about the wide variation of practices in the districts of the Ninth Circuit, shown on the chart on page 252. Three districts said the foreperson cannot grant temporary excuses. Other districts allow the foreperson to temporarily excuse grand jurors as Montana does. And some districts permit only the jury office, or only the judge to do so.

The subcommittee thought this was sufficient information without surveying the policies in other circuits. Any national rule would require the majority of districts in the Ninth Circuit to change their procedures, even though no one had indicated that the procedures in those districts were unsatisfactory.

Although Judge Molloy reported that what they were doing in Montana worked very well, and other districts may like that approach, those districts could adopt the practice by local rule if they wished to do so. Some districts reported reasons for their different rules. For example, Arizona said they did not want to put this responsibility on the individual jury foreperson, and it was easier for the jury office to handle excuses, as it is looking at the quorums. Other districts prefer to leave this with the presiding judge, who develops a good overview.

The lack of uniformity has not been shown to be a problem. No one thought grand jurors were confused, or that they were concerned that they would have been treated differently in another district. Given the inconsistency, it was appropriate for the subcommittee to review the issue. But we investigated and concluded there was no need to move ahead with proposing a change in the national rules.

Judge Garcia, the subcommittee chair, added that the terrific survey revealed districts were using what worked for them. There is now flexibility that we would be taking away with a one-size-fits-all model. The subcommittee was unanimous. Professor Beale concluded that the subcommittee recommended that no further action be taken and that this item be removed from the agenda.

Judge Kethledge asked for discussion on the subcommittee's recommendation. Hearing none, he determined there was a consensus not to move forward. There was no objection to that conclusion. Professor Beale noted that Judge Kethledge will communicate the decision to Judge Molloy.

Rule 6: Authority to Reveal Grand Jury Information in Judicial Decisions

Professor King introduced the next agenda item, a proposal on page 263 of the agenda book at Tab 4, submitted to the Committee by Chief Judge Howell and Judge Lamberth from the District Court for the District of Columbia. In light of the D.C. Circuit's recent decision holding district courts do not have inherent authority to disclose grand jury information, Chief Judge Howell and Judge Lamberth sought clarification of their ability to publish decisions that include grand jury material. They expressed concern that without inherent authority they would not be able to continue their practice of publishing redacted judicial decisions that might reveal some grand jury matters. In the last paragraph on page 263 that carries over to the next page, they indicated that

this practice is critically important to avoid building a body of secret law in the grand jury context. They want to be able to explain their judicial decisions. In their view, sometimes that requires revealing grand jury information.

The subcommittee took this proposal very seriously. The reporters' memo to the subcommittee that appears on pages 265 through 276 discusses our research on how judges handled grand jury information in their decisions on issues such as motions to quash. We found judges were able to issue opinions on grand jury issues using redaction, sometimes noting that the grand jury material referenced in the opinion had become public and was no longer secret under Rule 6. Some decisions we found were redacted so heavily that it was difficult to tell what the motion was about or what the rationale of the decision was. But most of these opinions provided some information on the matter at hand, with redaction.

The subcommittee considered the memo, deliberated about the proposal, and concluded that an amendment to Rule 6 was not advisable. There were two rationales expressed at the time. One was that the current tools available to judges—particularly redaction—are adequate to allow for sufficient disclosure of their rulings. (Although subcommittee members commented that in some cases redaction had been insufficient and too much was revealed, no one suggested that we codify the rules for redaction.) The second reason that subcommittee members expressed for deciding not to move forward with the Howell/Lamberth proposal was that it was not ripe, and was only a hypothetical problem. There had been no ruling challenging an opinion on the basis that it violated Rule 6, and it was not clear that this would be a problem going forward. A third reason for not attempting to clarify this in Rule 6 was not discussed directly by the subcommittee, but it was addressed by the subcommittee when discussing the historical exception. The judges may have been seeking clarification in Rule 6 of their inherent authority, and the subcommittee was unwilling to add language about inherent authority to the rule. For those reasons, the subcommittee recommended that the proposal not move forward and that it be removed from the Committee's agenda. Professor King reemphasized that no deference whatsoever to the subcommittee's recommendation was expected or required.

Judge Kethledge asked Professor King about the point that the proposal was not ripe and asked what such a challenge would look like. Professor King responded that the government could object to a decision on a motion to unseal a document with redaction. Several cases involved a judicial opinion that had been sealed initially and then someone sought to unseal it. The judge consulted with the parties before unsealing it to see if the redaction in the opinion was adequate. It might come up in that scenario.

Judge Kethledge commented that judges usually don't circulate a draft opinion or tell the parties what they are planning to do. If a party says to the judge you need to do more to avoid revealing matters before the grand jury, and the judge disagrees, how can that be challenged? Mandamus the judge?

Professor King noted that several of the cases in the subcommittee memo did involve opinions in which judges explained that they had consulted with the parties, and that the parties

had agreed to the amount of redaction. She emphasized she did not want to mislead anyone about the weight that this particular concern had in the subcommittee's deliberations. Different members of the subcommittee may have been moved by different reasons. But the subcommittee was unanimous in its conclusion that redaction should be sufficient, and that no amendment was required.

Judge Kethledge opened the floor for comments, noting that it is a serious proposal, and the judges are probably most worried about instances where it appears that redaction would divulge information that does remain protected under Rule 6. What does the judge do in that instance? These judges want to have clarity about the law before they act.

Professor Beale added there could be close questions about whether something is covered by grand jury secrecy and whether the redaction is sufficient to prevent the disclosure. The judges in the D.C. Circuit have felt protected because if some disclosure does cross into that gray area, they believed they had the authority to reveal information as necessary to fully explain their ruling and the law. Their concern is that without clarification of that authority, judges will have to redact more, perhaps making the law less helpful. And we do not want secret law. The concern is this gray area. They were not saying that they could decide that they would release everything.

Judge Bates was asked to comment. He said that in the District of Columbia this is uniquely a chief judge problem. Issues with the grand jury go to the chief judge. That is why Chief Judge Howell, and one of her predecessors (Judge Lamberth) are most concerned. Most of the judges in his district never see this issue, so it is not something that they have experienced.

Judge Kethledge asked for additional comments. Hearing none, he asked if there was any disagreement with the subcommittee's recommendation. When no one responded, he concluded the sense of the Committee was to endorse the subcommittee's recommendation not to proceed further with this proposal.

Rule 49: Pro Se Access to Electronic Filing

Professor Beale introduced the agenda item at Tab 5, starting on page 278, which is a proposal to amend Rule 49 to allow pro se parties to file electronically, instead of prohibiting them from doing so unless the court finds good cause to allow electronic filing. It is a very thoughtful discussion by Sai, an individual who has done a lot of pro se filing. Sai argues it is a huge advantage to be able to use electronic filing and that the system is now stacked against pro se individuals. Sai has presented this argument to the Civil, Appellate, and Bankruptcy Rules Committees and has adjusted it in the context of criminal proceedings, recognizing the unique situation of prisoners. But pro se defendants who are not incarcerated, Sai argues, should have the same access as anyone else.

The reporters' memo explains that when the Committee amended Rule 49 in 2018, it thought a lot about whether, and under what circumstances, pro se defendants and prisoners should be permitted to file electronically. The committee note to Rule 49 recognizes that electronic and filing and service is in widespread use, but also that it is designed for attorneys and not for

laypeople. The Committee's judgment was that the rules must allow ready access to the courts for pro se defendants and incarcerated individuals. Perhaps in the future it would become more feasible for these persons to file electronically, but in 2018 they often lacked reliable access to the internet or email. Accordingly, Rule 49(a)(3) provides that represented parties may serve registered users by filing with the court's electronic filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Sai believes it is time to change that rule and open things up more for pro se parties on the criminal side as well as the civil side. The reporters for the Civil Rules Committee have noted that we are gaining relevant experience in courts that expanded access to electronic in response to COVID-19. But we do not know exactly what changes, including kiosks, are being made in the prisons to make electronic filing more available to individuals there, or more available to pro se criminal defendants. The civil reporters concluded it may be premature to amend the rule. Instead, they suggested, we might place the issue on a study agenda, and the committees could work together to gather information about what's happening, looking towards potential revisions in these parallel interlocking rules about pro se filing. Noting that the Civil Rules Committee had already met, Professor Beale suggested that Professor Struve or Judge Bates could report that committee's discussion of this proposal.

Judge Bates confirmed both the Civil and Bankruptcy Rules Committees had met. He said Sai is a very thoughtful litigant, with a lot of ideas, some of which have been taken up within the rules process. Judge Bates has asked Professor Struve to head up a discussion among all the reporters to identify a wise course forward for joint consideration and potentially for development of more information relevant to this issue. Professor Struve will be getting the reporters together to discuss it sometime in the future.

Professor Struve said she was looking forward to that joint endeavor. She noticed that the advisory committees have very distinct perspectives based on the kinds of things that tend to happen in their particular sets of rules. The bankruptcy folks have a particular perspective based on the hundreds of different kinds of docket events that you could have in a bankruptcy case. The civil rules folks are intrigued by this, and are focusing possibly on the distinction between case initiating filings and other filings, once a case is under way. The appellate folks have been looking with interest at the discussions in other committees and saying maybe we could have an appellate rule on this, even if the trial courts don't go for it yet. So it will be interesting to see how much develops jointly and how much develops in different ways across these sets of rules.

Judge Kethledge asked members for their thoughts, though he noted that the Committee would not be acting on the proposal immediately.

The clerk of court liaison commented that there many logistical issues involved in putting something like this together, including, for example, what version of CM/ECF each district uses, and attorney admissions issues, which limit the options now in the member's district. It is going to be very difficult. The member was not opposed to a rule like this, but to have uniformity is going

to be a tremendous task. She welcomed the idea of putting a subcommittee together to discuss it or to have further discussion on it, and thought it was worth exploring.

Judge Furman stated he was in favor of providing electronic access to those who are able to use it and do not abuse it, and that he supported a joint venture to explore it further. He was curious about how much of an issue or a problem it is. In his district there is a form to apply for ECF privileges as a pro se litigant, and the applicant must attest to certain things. That conveys a sense of seriousness about it, but he said he basically grants any application of that sort. In the pandemic his district has allowed people to email things to be filed. It might be better putting the onus on a pro se litigant who wants this privilege to request it, but maybe it is a problem elsewhere. This is an empirical question to investigate.

A member noted that there are very few pro se defendants who are not in prison in her district. She also noted that where there is a 2255 motion, there is a criminal case and a civil case going along together. She did not know if this pro se filing would count for the 2255's, too. She had no opinion about the proposal.

Judge Kethledge said because this is a reporters' task at the moment, he would not be convening a subcommittee. Professor Beale confirmed that was her understanding. If the reporters determine they need responses from each advisory committee on particular questions, then a subcommittee might be needed. But it is too early to say.

Time Limits on Habeas Dispositions in Appellate Courts

Professor King introduced the proposal at Tab 6, page 308, which is a suggestion for time limits for courts of appeal to decide matters in habeas cases. This is another proposal from Mr. Gary Peel who came to the Committee a few years ago proposing that something be done to speed up district court rulings in habeas cases. At that point, there was evidence of significant delays in district court disposition of habeas cases, enough to concern the Committee. The Committee referred the issue to the Judicial Conference Committee on Court Administration and Case Management ("CACM") for study. This proposal concerns courts of appeal, which are not in this Committee's bailiwick. Also, the proposal was not accompanied by any evidence that there is a systemic problem at the courts of appeal. The reporters recommend that the Committee decline to take further action on the suggestion and remove it from the Committee's agenda.

Judge Kethledge asked a member to comment. The member said he totally agreed that this suggestion should be removed from consideration. He said his court does not have a backlog in these cases, and he was not aware of a problem that warrants further study.

Judge Kethledge agreed these cases are not held up in his circuit. Hearing no other comments, he concluded that the Committee will not take action on that proposal.

Rule 59: Add Text Noting a 14-day Period for Reply to Objections

Professor King introduced the proposal at Tab 7, page 316: a suggestion from Judge Barksdale to add to Rule 59 text noting a 14-day period to respond to another party's objections.

The civil and the criminal provisions on responding to objections to magistrate judge rulings are not identical. The sentence noting a 14-day period to respond to another party's objections appears in Civil Rule 72 but not in Criminal Rule 59. Judge Barksdale commented that the reason for the difference is unclear, and that briefing from both sides is helpful in both contexts.

In preparing the memo in the agenda book, the reporters asked Judge McGiverin for his views on the proposal and the concern that the absence of the language in the criminal rule may lead judges to bar responses that would otherwise be allowed if there was some reference to a deadline for a reply. He responded that he has never seen a judge take a position that the rules do not allow a party to respond to the other side's objection. The reporters concluded that no change is needed because the existing rule is not broken, and suggested that this does not warrant a subcommittee. But of course it is up to the Committee to decide whether a subcommittee should look into this further.

Jonathan Wroblewski said he found it comforting that there was someone else out there who is bothered by asymmetry. But other than that, he agreed with the reporters' judgment.

Judge McGiverin added that parties should be allowed to respond to the other side's objection to a magistrate judge's decision, but at least in his district they are allowed to do so, with or without leave of the court. On the other hand, he noted his observation might not be representative, and that if other judges or practitioners find that this has created a problem, then it might be something to look into. He added that 28 U.S.C. § 636 includes only the 14-day period to object. He guessed that when the Committee drafted the criminal rule, they followed the statute, which includes nothing about a date for a reply. He also noted that other parts of the criminal rules, such as Rule 12, talk about different motions that a defendant can file. There is nothing in those rules about the government's ability to respond to the motion, although he would be very surprised if any court held the government could not respond to a motion to suppress evidence or other such motions.

Professor Beale added that Judge Barksdale does not say the omission in Rule 59 has caused a problem. It was more a concern on her part of a difference in the two civil and criminal rules.

With no more comments, Judge Kethledge confirmed that the Committee did not wish to take further action on this suggestion at this time.

Amending Rule 49.1 to Delete CACM Guidance from Committee Note

Professor Beale turned to Tab 8, page 319: a suggestion from Judge Furman to amend Rule 49.1. Judge Furman had occasion to rule on whether a defendant's CJA application and related affidavits were judicial documents that must be disclosed, with appropriate redactions, under the common law or First Amendment rights of access. The issue prompted him to examine Rule 49.1 and the committee note that was adopted as part of the cross-committee effort in response to the E-Government Act of 2002. The committee note includes guidance for implementation concerning privacy and public access to electronic criminal case files. It says the

"following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse," and the list that follows includes financial affidavits filed in seeking representation pursuant to the Criminal Justice Act. Professor Beale noted that the guidance in the note was essentially reaffirmed by the Judicial Conference when it added to its list victim statements, subsequent to the adoption of the committee note. Judge Furman found the guidance problematic, if not unconstitutional, as well as contrary to the views taken by most courts that have ruled on the issue.

Professor Beale said that the problem, if the Committee agrees with Judge Furman's analysis, is that the committee note is pointing courts in a direction that seems inconsistent with the First Amendment and the common law right of access. This Committee cannot amend a committee note without amending the rule itself. So, as noted on page 320, Judge Furman suggests that we add to the text, "subject to any applicable right of public access." That would signal that there are potentially applicable rights of public access and allow the Committee to write a new committee note explaining why that language was added.

The question before the Committee, she continued, is whether to have a subcommittee work on this. If so, that subcommittee would probably need to contact the Civil and Bankruptcy Rules Committees because Rule 49.1 was adopted as part of a cross-committee, parallel action. Another question would be how to work with the CACM Committee and the Judicial Conference to obtain clarification of the guidance. Although that is outside of our realm as a rules committee, it might be part of the interaction and outreach.

Judge Furman said Professor Beale did an amazing job laying the issue out, but if one wants a more thorough discussion of the particulars and is having trouble sleeping, his opinion was attached. He conducted a survey of the law and found that the relevant case law varies a little bit by circuit and in terms of whether and when the documents can be kept under seal or have to be released. But most courts have generally taken the view that under some circumstances they are subject to release. This rule and committee note language seems contrary to that, which struck him as problematic.

He recognized that one might ask whether there is a problem if courts are generally reaching the right result. He provided two reasons it is still desirable to amend the rule and note. First, neither the Criminal Rules nor the committee notes should be inconsistent with the Constitution or the common law. Second, courts may be misled. He found at least one decision from a judge in the Eastern District of New York that relied on the committee note to reject a disclosure motion, simply saying the note says it is not to be released, therefore it is not released.

Recognizing that any amendment to the committee note requires amending the rule itself, Judge Furman proposed an amendment. The amendment does not say these are judicial documents, but only makes a minimal change to avoid leading people astray and to signal to judges that they need to be mindful and engage in analysis, rather than blindly following the old committee note.

Judge Kethledge agreed that there is a problem. He described a 2014 case addressing the requirements for sealing documents that are part of the record. If documents are in the judicial

record and the court makes a decision, the public has a very strong presumptive right of access to review those documents to be able assess the court's opinion. In his circuit, sealing was wildly overused in that particular case. It was a class action, with serious allegations of wrongdoing by the defendant that affected millions of people in Michigan in a serious way. The plaintiffs retained an expert witness at the expense of $3 million, which would come out of a significant class recovery. Class members who were not named parties were barred from reviewing that expert's report to determine whether to object to the settlement because the district court said it was subject to a protective order. The court conflated the Rule 26 protective order standard with the sealing standard. So members of the class could not review most of the documents in the record in that case before deciding whether to object to the settlement. He said he had seen casual use of sealing in motion practice, which is a problem. He thought Judge Furman might have a point that this language in the rule or in the note could be making a small contribution to this mindset among the judiciary.

A member added that in her district, CJA financial affidavits are considered judicial documents and are not disclosed. There is probably a reason the Judicial Conference wrote that policy statement many years ago. Indigent defendants have a privacy interest in not having their personal financial information disclosed. A person who has enough money to retain counsel retains those privacy rights, and indigent defendants should not have that privacy violated. The CJA form asks for a list of dependents, debts, and other information that might be considered personal. That is one reason it is considered a private document.

There is also the Sixth Amendment right to counsel. Defendants should not be in the position of having to weigh giving up privacy in order to get a court appointed attorney, and the Judicial Conference likely thought that was too big a burden. The member said she was dismayed to hear that in some districts, the documents are considered public. A subcommittee on this topic would be worthwhile, and she requested being on it, but she would be taking the alternative approach of how to shore up this rule so that these documents are not revealed in other circuits.

Judge Kethledge noted the member made an interesting point that perhaps these forms even under the appropriate standard are just categorically not subject to disclosure. It is kind of a strict scrutiny standard once it is a judicial record; show a compelling interest to seal, and then the sealing has to be very narrowly tailored.

Mr. Wroblewski asked whether a subcommittee would be asked to determine whether this particular document is subject to public disclosure or whether presentence reports are subject to public disclosure or any other document. He did not think Judge Furman was asking for that, and Mr. Wroblewski expressed the hope that we would not have a Committee debate on the First Amendment right of access to every possible document.

Judge Furman agreed with Mr. Wroblewski's understanding that his proposal was limited. In response to the concerns about privacy he also agreed there are some serious issues and arguments may vary case by case. His point was simply that (other than perhaps one case from the Eastern District of New York) the courts have not generally taken a categorical approach that these

are not public documents. They have tended to analyze the facts and circumstances of the case, the possibilities for redactions and so forth. And that is not consistent with what the note says. He expressed concern that the note creates a trap for the unwary. It is inconsistent with what the law is. The First Circuit expressed doubt as to whether the CJA forms are judicial documents. Then in the alternative they equivocated a little bit on that and said, even if they are, we think the magistrate judge here weighed the balancing properly in not disclosing them. In the Second Circuit, you cannot reach that conclusion. They are clearly judicial documents, but in a particular case how that weighs and whether they should be public is a different story. His point was not to wade into that so much as to not have a note that is inconsistent with the law in some circuits, and that would lead people astray.

Judge Kethledge said the note seems to say that these CJA documents are categorically not available to the public. The question for a subcommittee is whether the rule or the note should instead allow that issue to be decided on a case-by-case basis. A subcommittee should address this. He asked Judge Birotte to chair the subcommittee, and Judge Birotte agreed to do so. Judge Kethledge said he would announce the other members of the subcommittee later. Judge Kethledge also stated he would follow up with Judge Bates on the suggestion to coordinate with civil and bankruptcy since they have similar language, and to advise the CACM Committee that this Committee is looking at the issue.

Rule 45(a)(6): Juneteenth National Independence Day

Professor King introduced the proposed addition of Juneteenth to Rule 45(a)(6). She noted the other advisory committees are considering the same addition and that the reporters recommend that the Committee approve an amendment that would insert the words "Juneteenth National Independence Day" immediately following the words Memorial Day. Professor Struve confirmed that that is entirely consistent with what other advisory committees are doing.

Judge Furman asked about the need for (a)(6)(A). On the theory that all of those holidays are declared a holiday by the President or Congress and therefore encompassed within (a)(6)(B), why have a rule that we have to update every time?

Professor Beale suggested that it may have been a belt and suspenders approach. Once a national holiday is declared, it should click in right away, but it would be easier for people to see it listed there and not have to try to look up if Juneteenth had been declared, or to find the legislation.

Professor Struve said this particular structure was carried forward when we did the time computation project back in 2009. And it is a handy reference. But that was still a good question.

Judge Kethledge commented that it is much clearer once it is listed in the rule. Professor Coquillette agreed that belt and suspenders is the correct explanation.

A member asked why the memo has the date June 19 added after the holiday name, but other holidays do not. Professor Beale clarified that the recommendation is to add "Juneteenth National Independence Day" without the date.

A motion to recommend the amendment was made and seconded, followed by a unanimous voice vote in favor.

Next Meeting and Adjournment

Judge Kethledge reminded everyone that the next meeting is scheduled for April 28, 2022, in Washington, D.C., thanked the Committee members, and adjourned the meeting.

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met by videoconference on January 4, 2022. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

The following attended on behalf of the Advisory Committees:

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

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. 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 Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

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

Others providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Julie Wilson and Scott Myers, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal

* Prior to the lunch break, Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Deputy Attorney General Monaco represented DOJ after the lunch break. Andrew Goldsmith was also present on behalf of the DOJ.

Judicial Center (FJC); Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He welcomed new Standing Committee members Elizabeth Cabraser and Professor Troy McKenzie. He also noted that Deputy Attorney General Lisa O. Monaco would attend the afternoon session of the meeting and thanked the other Department of Justice (DOJ) representatives for joining. In addition, Judge Bates thanked the members of the public who were in attendance for their interest in the rulemaking process.

Judge Bates next acknowledged Julie Wilson, who would be leaving the Administrative Office of the U.S. Courts (AO) at the end of January. Judge Bates thanked Ms. Wilson for her years of tremendous service to the rules committees. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters. The reporters and Advisory Committee Chairs expanded on these thanks at later points during the meeting.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the June 22, 2021 meeting.**

Bridget Healy reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 56 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2021. It sets out proposed amendments and proposed new rules that were recently approved by the Judicial Conference. Those proposed amendments and new rules were transmitted to the Supreme Court and will go into effect on December 1, 2022, provided they are adopted by the Supreme Court and Congress takes no action to the contrary. The chart also includes proposed amendments and new rules that are at earlier stages of the REA process.

Judge Bates noted that some public comments had been received on proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and that he expected more comments to be received by the close of the public comment period in February. These comments will be reviewed and discussed by the relevant Advisory Committees at their spring meetings.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which concerns the Advisory Committees' consideration of several suggestions regarding electronic filing by "pro se" (or self-represented) litigants. Noting that he had asked Professor Struve to convene the committee reporters in order to

coordinate their consideration of those suggestions, he invited Professor Struve to provide an update on those discussions.

Professor Struve thanked the commenters whose suggestions had brought this item back onto the rules committees' docket. She stated that at the group's first virtual meeting (in December 2021), the Advisory Committee reporters and researchers from the FJC had discussed how to formulate a research agenda on this topic. The goal is to share ideas on research questions, even though the four Advisory Committees in question may not necessarily reach identical views or formulate identical proposals for rule amendments.

Judge Bates highlighted the fact that the FJC researchers were being asked to devote time to this project and asked the Standing Committee if any members had any comments or concerns with utilizing the FJC's assistance. No members expressed any concern. Judge Bates also thanked Judge Kuhl for a thoughtful suggestion concerning terminology. Judge Kuhl reported that the state courts see a very high number of self-represented litigants, and that the courts are trying to phase out the use of Latin phrases (such as "pro se") that can be harder for lay people to understand. Judge Bates observed that the Advisory Committee chairs and reporters would take this point into account.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerns the proposal to amend the rules' definition of "legal holiday" to explicitly list Juneteenth National Independence Day. He noted that three of the four relevant Advisory Committees had already approved proposed amendments to add the new holiday to the list of legal holidays in their respective time-computation rules, and that the fourth Advisory Committee expects to do so at its spring 2022 meeting. Those proposals will come to the Standing Committee for consideration at its June 2022 meeting and will likely constitute technical amendments that can be forwarded for final approval without publication and comment.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met via videoconference on October 7, 2021. The Advisory Committee presented an action item along with multiple information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 100.

Action Item

Publication of Proposed Amendment to Rules 35 and 40, and Conforming Amendments to Rule 32 and the Appendix of Length Limits. In this action item, the Advisory Committee sought approval for publication of a package of proposed amendments that would consolidate the contents of Rule 35 into Rule 40 and that would make conforming changes to Rule 32 and to the Appendix of Length Limits. Judge Bybee explained that the Advisory Committee had been considering comprehensive amendments to Rules 35 and 40 for some time. Rule 35 addresses hearings and rehearings en banc, and Rule 40 addresses panel rehearings. The proposed amendments would

transfer to Rule 40 the contents of Rule 35 so that the provisions regarding panel rehearing and en banc hearing or rehearing could be found in a single rule, Rule 40. Judge Bybee stated that as a result of discussion at the last Standing Committee meeting, the Advisory Committee acted with a freer hand to revise Rule 40 to clarify and simplify the rule. The result is a more linear rule that was unanimously approved by the Advisory Committee. Judge Bybee thanked the style consultants for their work on the proposed amended rule.

Judge Bates asked about the order of the subparts in Rule 40(b)(2). When listing potential reasons for rehearing en banc, would it not make more sense to list, first, instances when the panel decision conflicts with a decision of the Supreme Court, and then, instances when the decision creates a conflict within the circuit, and finally, instances when the decision creates a conflict with another court? Judge Bybee stated that the Advisory Committee considered the order when drafting the rule. The main reason behind the proposed structure is that an initial consideration for a court of appeals is to maintain consistency within its own docket. Hence, the Advisory Committee chose to list intra-circuit inconsistencies first (in 40(b)(2)(A)). Professor Hartnett agreed with Judge Bybee and added that subparagraph 40(b)(2)(A) is different because it addresses a situation that does not provide grounds for the Supreme Court to grant certiorari.

Judge Bates turned the discussion to proposed amended Rule 40(d)(1), which sets the presumptive deadline for filing a rehearing petition but provides for the alteration of that deadline "by order or local rule." He asked whether any circuits have local rules that alter that deadline and he questioned whether such local rulemaking was desirable. Professor Hartnett stated that this feature was carried over from current Rules 35(c) and 40(a)(1). A judge member noted that the 14-day limit to file a petition for rehearing is short, particularly for pro se prisoner litigants. In her circuit, there is a local rule that sets the limit at 21 days. This member recommended against precluding circuits from affording litigants a longer period by local rule.

A practitioner member asked whether the proposed Rule 40(g) should say "[t]he provisions of Rule 40(b)(2)(D) . . ." instead of just "[t]he provisions of Rule 40(b)(2)." As written, Rule 40(b)(2)(A)-(C) all refer to "the panel decision," which would be inapplicable in a petition for initial hearing en banc. Judge Bybee agreed that the wording of Rule 40(b)(2)(A) would not apply literally to a request for initial hearing en banc, but the intent of the Advisory Committee was to allow for an initial hearing en banc when there is an intra-circuit inconsistency. Judge Bybee noted that in his circuit, initial hearings en banc sometimes occur sua sponte when a panel notices two inconsistent opinions of the circuit and refers the inconsistency to the en banc court. The practitioner member agreed that it makes sense to be inclusive if there is a concern about intra-circuit conflict.

The practitioner member asked about Rule 40(b)(2)(C)'s use of the phrase "authoritative decision" when discussing a panel decision's conflict with a decision from another circuit. This phrase is not used elsewhere in the rule. Judge Bybee responded that this phrasing would rule out rehearing requests based on conflicts with unpublished decisions from other circuits. Professor Hartnett agreed that this provision was designed to exclude petitions asserting conflicts merely with unpublished (i.e., nonprecedential) opinions from other circuits. In response to a follow-up question, Judge Bybee acknowledged that the omission of "authoritative" from Rule 40(b)(2)(A) means that that provision can extend to intra-circuit splits involving unpublished decisions.

The same practitioner member pointed out that Rule 40(d)(5) bars oral argument on whether to grant a rehearing petition and asked whether this prohibition should be revised to allow for local rules or orders to the contrary. In his recent experience, a circuit had ordered argument on whether to grant a petition for rehearing – and subsequently issued a decision that both granted the petition for rehearing and reached a different outcome on the merits. Such a process can be useful, this member said, so why remove this flexibility? Judge Bybee explained that the rule is drafted to discourage requests for argument on whether to grant rehearing. Professor Hartnett added that, under Rule 2, the court has authority to suspend the prohibition on oral arguments by order in a case. Based on these responses, the practitioner member stated that he did not see a need to revise proposed Rule 40(d)(5).

A judge member asked a pair of drafting questions. First, he asked why the proposed new title for Rule 40 ("Rehearing; En Banc Determination") used the word "determination." Professor Hartnett explained that "en banc determination" was selected to encompass an initial hearing en banc, which would not be a "rehearing." Second, the judge member noted that the timing provision in current Rule 35(c) says "must be filed" but the timing provision in current Rule 40(a)(1) says "may be filed." He asked why proposed Rule 40(d)(1) used "may be filed" (on lines 105 and 112 of the draft at page 128 of the agenda book). Professor Hartnett responded that one possible reason was to avoid the use of a word ("must") that might lead lay readers to think that the rule was requiring the filing of a rehearing petition. A judge member agreed that pro se litigants might misread "must" as a requirement that they file a petition for a rehearing even if they do not desire a rehearing, while "may" clarifies that they can file a petition, and if they do so, they must do so within fourteen days. The Standing Committee, along with Judge Bybee, Professor Hartnett, and the style consultants, discussed the competing virtues of "may" and "must," as well as a suggestion from the style consultants to change to "any petition … must" (at lines 103-05) rather than "a petition … must." As a result of the discussion, Judge Bybee and Professor Hartnett agreed to change "a" to "any" in line 103 and "may" to "must" in line 105. As to the use of "may" in line 112, further discussion noted that keeping this as "may" would parallel the use of "must" and "may" in, respectively, Rules 4(a)(1)(A) and 4(a)(1)(B). Ultimately the decision was made to retain "may" at line 112.

A practitioner member suggested that the wording of proposed Rule 40(c) seemed (in comparison to the current rule) to liberalize the standard for granting rehearing en banc. New Rule 40(c) says it "[o]rdinarily … will be ordered only if" a specified condition is met, whereas current Rule 35(a) says that it "is not favored and ordinarily will not be ordered unless" a specified condition is met. Saying "will not be ordered unless" would help emphasize that en banc rehearing is not preferred. Relatedly, the same member noted that the phrase "rehearing en banc is not favored" had been moved to proposed Rule 40(a), and he suggested that phrase should appear in Rule 40(c). Professor Hartnett stated that the first of the member's points was a style issue on which the Advisory Committee had deferred to the style consultants. As to the second point, Professor Hartnett explained that the Advisory Committee had moved "rehearing en banc is not favored" up to Rule 40(a) for emphasis. He recalled that an earlier draft may have featured that phrase in both Rule 40(a) and Rule 40(c), and he suggested that the Advisory Committee would prefer to include the phrase in both subparts (even if redundant) rather than simply moving it to Rule 40(c). Judge Bybee agreed with Professor Hartnett but noted he had no objection to including

"rehearing en banc is not favored" in both Rule 40(a) and Rule 40(c). A judge member who had participated in the Advisory Committee discussions voiced support for including the phrase in both places. In response to the practitioner member's first point, Professor Garner suggested changing "ordered" to "allowed" in line 98 ("[o]rdinarily … will be allowed only if"). Such a change would recognize that the court has discretion, but is not required, to order an en banc rehearing if one of the four criteria is met.

A judge member thanked the Advisory Committee and thought the proposed amended rule is more user friendly and clearer. She suggested that reinserting the word "panel" in the title would clarify the rule, particularly for self-represented litigants. Professor Hartnett and Judge Bybee agreed with the suggestion to add "panel" back into the title. Judge Bates voiced his support for adding the word "panel" back into the title as well; he observed that might assist users of the table of contents.

A judge member, stating that adverbs are over-used, questioned the use of "ordinarily" in the phrase about when rehearing en banc will be ordered; this member expressed a preference for "may be allowed." A different judge member disagreed and thought the word "ordinarily" should be retained. In rare cases the court may want to grant rehearing en banc even though none of the stated criteria are met. A practitioner member concurred in the latter view and said that "ordinarily" usefully preserves the court's discretion both in Rule 40(c) and in proposed Rule 40(d)(4), which provides that the court "ordinarily" will not grant rehearing without ordering a response to the petition. Judge Bates agreed that "ordinarily" should be retained.

After further discussion, Judge Bybee requested approval for publication of the proposed transfer of Rule 35's contents to Rule 40, the proposed amendments to Rule 40, and the proposed conforming amendments to Rule 32 and the Appendix of Length Limits. The rule amendments being voted on would include the following changes to Rule 40 compared with the version shown at pages 122-132 in the agenda book: (1) insertion of "Panel" in the title; (2) correction of typographical errors on lines 77, 85, and 86; (3) on lines 97-98, replacing "Ordinarily, rehearing en banc will be ordered" with "Rehearing en banc is not favored and ordinarily will be allowed;" (4) on line 103, changing "a" to "any," and (5) on line 105, changing "may" to "must."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rules 35 and 40, with the changes as noted above, and conforming amendments to Rule 32 and the Appendix of Length Limits.**

Information Items

Amicus Disclosures. Judge Bybee invited Professor Hartnett to introduce the information item concerning potential amendments to Rule 29's disclosure requirements. Professor Hartnett underscored the Advisory Committee's interest in obtaining the Standing Committee's feedback on this topic. The Advisory Committee began a review of Rule 29 in 2019 following the introduction in both houses of Congress of the Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act). In 2021, Senator Sheldon Whitehouse and Representative

Henry C. "Hank" Johnson, Jr. requested that the Advisory Committee review Rule 29's disclosure requirements for organizations that file amicus briefs.

Professor Hartnett explained that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. Countervailing concerns include First Amendment rights of persons who do not wish to reveal their identity.

Professor Hartnett stated that there are many approaches the Advisory Committee could take in amending Rule 29, depending on how these various issues are resolved. One approach is that the Advisory Committee could move forward with minimal amendments such as adding "drafting" to the current rule's disclosure requirement concerning persons that "contributed money that was intended to fund preparing or submitting the brief" – to foreclose the contention that this disclosure requirement only reaches funding for the costs of printing and filing a brief.

He advised that a more extensive revision to Rule 29 is possible, and he noted three issues that the Advisory Committee is reviewing. First, Rule 29 could be amended to address contributions beyond funds earmarked for a particular brief. However, if the Advisory Committee goes down this road, it raises the question of the contribution threshold that would trigger disclosure requirements. The sketch of a potential rule on page 106 of the agenda book would trigger disclosure if a party (or its counsel) contributed at least 10 percent of the amicus's gross annual revenue. That 10 percent trigger is borrowed from Rule 26.1, which deals with corporate disclosures. The purposes of the two rules are different, but the 10 percent number provides a starting point for the discussion.

Professor Hartnett noted that a second issue is whether any increased disclosure requirements should apply only to relationships between the parties and an amicus, or whether such increased requirements should also encompass disclosures relating to the relationship between non-parties and an amicus. Finally, he stated that the Advisory Committee is also looking at the issue of whether to retain the current rule's exemption from disclosure for nonparty members of an amicus. An exclusion avoids some of the constitutional issues regarding membership lists, but if any disclosure requirement excludes members, it would make it easy to avoid disclosure by converting contributions into membership fees.

Judge Bates noted that this is a particularly important and sensitive subject, and specifically so because it comes through the Supreme Court to the Advisory Committee. Judge Bates asked if members had any comments or suggestions.

A practitioner member stated that the three issues Professor Hartnett noted are important to consider, and the Advisory Committee should try to find middle ground. A broader amendment, particularly with respect to disclosure regarding non-parties, may not be successful.

A judge member believed the Advisory Committee was asking the right questions and was right on point with its conclusions. Another judge member agreed that the Advisory Committee was heading in the right direction. As a judge, he would rather know who was behind a brief, though he noted that the importance of that question does get greatly overstated. He suggested that seeking the "middle ground" might prove to be quite a challenge because actors might structure their transactions to evade the disclosure requirement.

A practitioner member thought the middle ground route would be preferable. The member also noted that there is an uptick in the motions to file amicus briefs in district courts now, particularly in multi-district litigation and other complex litigation, and the district courts have less experience in dealing with amicus filings. Judge Bates noted the absence of any national rule governing amicus filings in the district court and observed that this may be a matter for other Advisory Committees and the Standing Committee to consider in the future. A judge member suggested that it is important for the Civil Rules to address amicus filings in the district courts, particularly to deal with the possibility that an amicus might file a brief for the purpose of triggering a recusal. (Discussion of amicus filings in the district court recurred later in the meeting, during the Civil Rules Advisory Committee's presentation, as noted below.) Another judge member suggested that it would be helpful to know more about the AMICUS Act's prospects of enactment.

A practitioner member noted that amicus filings often face a time crunch and increasing the disclosure requirements risks dissuading amici from undertaking the effort. For an organization with many members – such as a banking association – detailed disclosures could be burdensome.

A judge member suggested that one approach might be to adopt a rule that invites voluntary disclosures – that is, an amicus would either identify its principal members and funders or state that it is choosing not to disclose. This voluntary standard avoids constitutional issues while also allowing parties to disclose the information.

A judge member stated she liked the 10 percent rule. It is a significant trigger for recusal concerns, and it is already in use in the corporate disclosure requirements. Moreover, if the disclosure would require a judge to either recuse herself or to deny leave to file an amicus brief, it seems very "head-in-the-sand" to not require that disclosure.

A practitioner member stressed the importance of the distinction between parties and non-parties. As to parties, he observed that it is very easy to see the concern about a party using an amicus filing as an additional opportunity to make an argument. However, in practice there is a lot of coordination between amici and parties. Parties seek out potential amici whose voices they would like to get before the court. Though it is important to enforce the rule's current requirements, practical experience illustrates the limits of what can be done by rulemaking. As to non-parties, it would be useful for the court to know if there is a dominant, hidden figure lurking behind an amicus. But if the rule were to go beyond that level of detail, one would have to ask what problem the rule is trying to solve. If the court has never heard of the amicus, the court can simply assess the amicus brief on its own merits.

Judge Bybee thanked the Standing Committee members for their comments and stated that he would relay them to the Advisory Committee.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report in the agenda book. There were no further comments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which last met in Washington, DC on November 5, 2021. The Advisory Committee's report presented multiple information items but no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 302.

Information Items

Rules Published for Public Comment in August 2021. Judge Schiltz reminded the Standing Committee that proposed amendments to Rules 106, 615, and 702 had been published for public comment in August 2021. The proposed amendments to Rule 702, which clarify the court's gatekeeping role for admitting expert testimony, will be controversial. The Advisory Committee has received a number of comments on that proposal and expects to hear testimony on it at its upcoming January 2022 hearing. Judge Schiltz stated that courts have frequently misconstrued Rule 702 requirements as going only to the weight, and not the admissibility, of the expert's testimony; those judges will admit the testimony if they think that a reasonable juror could conclude that the requirements are met. The proposed amendments to the rule emphasize that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence, and that the trial court must evaluate whether the expert's conclusion is properly derived from the basis and methodology that the expert has employed. The latter aspect of the proposal is designed to address the problem of overstatement by experts.

Judge Schiltz provided some detail concerning the comments received regarding Rule 702. He explained that there is some opposition, particularly from members of the plaintiffs' bar, to the concept of amending the rule. Judge Schiltz said that the Advisory Committee is unlikely to accept this point of view, because it believes that Rule 702 needs clarification. Courts frequently issue decisions interpreting Rule 702 incorrectly. Conversely, comments from the defense bar say that the Advisory Committee has not done enough to clarify the rule, and that the committee note should be more explicit that certain decisions are wrong and are rejected. The Advisory Committee does not think specifically singling out incorrect decisions in the committee note is the correct approach.

When discussing a draft of the proposed amendments, some Advisory Committee members had expressed concern that under the proposal as then formulated ("if the court finds"), some judges might think they need to make formal findings on the record that all the requirements of the rule are met, even if no party objects to the expert testimony. To address this concern, the proposed amendment as published for comment instead uses the phrase "if the proponent has demonstrated." A number of commentators have objected to this change. These comments note

that the very problem the amendment is designed to fix is that often the judge delegates this responsibility to jurors when it should be the judge who determines whether the requirements are met. According to these commentators, because this language does not say who needs to make the determination, it does not in fact provide the clarification that the amended rule is intended to convey. Judge Schiltz asked whether the Standing Committee had comments on the proposed amendments to Rule 702 for the Advisory Committee's consideration at its next meeting.

A practitioner member noted that in mass tort litigation, there are complaints among defense lawyers that courts do not sufficiently screen expert testimony, choosing instead to say that objections go to weight, not admissibility. There are limits to how much can be done to legislate this issue, so the member agrees with the Advisory Committee's decision not to specifically criticize incorrect decisions in the committee note. However, some emphasis on enhancing the judicial role, even if only in situations where the testimony's admissibility is central and contested, would not be too much of an imposition on the court.

Rule 611 – Illustrative Aids. Judge Schiltz introduced this information item as one that the Advisory Committee will likely submit to the Standing Committee in June 2022 with a request for approval to publish for public comment. He explained that illustrative aids are not specifically addressed by any rules. Judges, himself included, often struggle to distinguish demonstrative evidence (offered to prove a fact) from illustrative aids. Additionally, judges have very different rules on whether parties must disclose illustrative aids prior to use at trial, as well as whether (and how) they can go to the jury. Finally, judges have different rules on whether illustrative aids are or can be part of the record. Judge Schiltz noted that there is a companion proposal to amend Rule 1006, which deals with summaries, that is also under consideration by the Advisory Committee.

A judge member applauded the proposed changes to Rule 611 and Rule 1006. He suggested that to the extent that the proposed addition to Rule 611 (as set out on pages 304-05 of the agenda book) sets conditions for the use of an illustrative aid, it seems odd to include items (3) and (4). Those two provisions—the prohibition on providing the aid to the jury over a party's objection unless the court finds good cause; and the requirement that the aid be entered into the record—are not conditions on the use of an illustrative aid but rather regulations of what happens after the use of the illustrative aid. Professor Capra agreed with the judge member that items (3) and (4) should be part of a separate subdivision.

A practitioner member noted that he does not turn over opening or closing slide presentations prior to using them in arguments. Also, during examination of a witness, he will often have an easel where he can write down highlights of the testimony as it is given. He asked whether these types of aids would be covered by the proposed rule. If these are considered illustrative aids, it is important to draft the rule in a way that does not discourage their use. Professor Capra acknowledged the validity of this concern, noted that these questions have been part of the Advisory Committee's discussions, and agreed that it would be important to ensure that the notice requirement would not be unduly rigid as applied to such situations. Judge Schiltz stated that the practitioner members on the Advisory Committee had expressed a similar concern, but the judge members favored requiring advance notice. Without advance notice, judges could have to deal with objections interpolated in the middle of an opening statement. In sum, Judge Schiltz

stated, this is a challenging issue, but the Advisory Committee is very focused on the pros and cons of the notice requirement.

Another practitioner member emphasized that trial practice has moved toward very slick presentations, for openings and closings, with expert witnesses, and even with fact witnesses. He stated that advance disclosure to opposing counsel can be a good idea; otherwise, if counsel shows the jury slides that mischaracterize the evidence, there is a real risk of a mistrial. The member said that judges often impose notice requirements for slides used in opening arguments, although they may be more flexible about closing arguments. Slides have become crucial in trial practice. Something might be lost by disclosing, he said, but disclosure avoids sharp practices. Judge Schiltz stated that he requires attorneys to provide advance disclosure, but the disclosure can be made five minutes beforehand. A judge member concurred; in her view, this is a case management issue on which it is difficult to write a rule. The judge has to know the case and require advance disclosures by the lawyers.

Professor Bartell noted the proposed rule text does not define "illustrative aid." For example, if a lawyer stands 20 feet away from the witness and asks, "can you see my glasses," one might say that is illustrative. She suggested being careful to cabin the rule's scope.

Rule 1006 Summaries. Judge Schiltz introduced this information item as a companion proposal to the proposed amendment to Rule 611. Rule 1006 provides that certain summaries are admissible as evidence if the underlying records are admissible and if they are too voluminous to be conveniently examined at trial. This rule is often misapplied. Some judges erroneously instruct the jury that a summary admitted under Rule 1006 is not evidence. Some judges will not admit a Rule 1006 summary unless all the underlying records have been admitted into evidence, which runs contrary to the purpose of Rule 1006. Other judges do the opposite and will not allow Rule 1006 summaries if any of the underlying records have been admitted into evidence. The confusion over Rule 1006 is closely related to the confusion over illustrative aids, and the Advisory Committee hopes to clarify both topics.

Rule 611 – Safeguards to Apply When Jurors Are Allowed to Pose Questions to Witnesses. Judge Schiltz provided the update on this information item, explaining that the proposed amendment would list the safeguards that a court must use when it allows jurors to ask questions. The proposed rule would not take any position on whether jurors should be allowed to ask questions, but rather would provide a floor of safeguards that must apply if the judge does allow juror questions. These safeguards were taken from caselaw.

A judge member stated that it makes sense to have a rule regarding juror questions because it is an important and perilous area. He noted that there are various possible approaches to juror questions; one is to allow the lawyers to take the juror's question under advisement and allow the lawyers to decide whether they will cover that topic in their own questioning of the witness. This seems like it might often be the prudent course, but proposed Rule 611(d)(3) appears to foreclose it. Professor Capra said he would look into this issue. His understanding was that judges that permit juror questions generally read the questions to the witness, and then allow for follow-up questioning from counsel.

Judge Bates asked whether proposed Rule 611(d)(1)(D) should be a bit broader. He suggested that instead of saying that no "negative inferences" should be drawn, it should say "no inferences" should be drawn. Professor Capra agreed that "negative" should be omitted. Following up on Judge Bates's suggestion, a judge member added that it would be better to be even broader and suggested that Rule 611(d)(1)(D) say that no inference should be drawn from anything the judge does with a juror's question (whether asking, not asking, or rephrasing it). Judge Bates stated his agreement with the judge member's suggestion.

A judge member asked a question about Rule 611(d)(1). As she read the rule, it seems to prohibit juror questions outright unless the judge provides the required instructions "before any witnesses are called." She asked how the rule would handle instances where the issue of juror questioning arises mid-trial; also, she wondered whether this timing requirement should be placed elsewhere in the rule. Professor Capra promised to take this issue into account.

Judge Schiltz referred the Standing Committee to the Advisory Committee's report in the agenda book for information regarding the remainder of the information items, and there were no further comments.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on September 14, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 157.

Action Item

Rule 7001. Judge Dow introduced this action item to request approval to publish for public comment an amendment to Rule 7001. The proposed amendment responds to Justice Sotomayor's suggestion in her concurring opinion in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021), that the rulemakers "consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned," because the delay in resolving turnover proceedings can present a problem for a debtor's ability to recover the car that the debtor needs to get to work in order to earn money to fund a Chapter 13 plan. Before the Advisory Committee had a chance to address Justice Sotomayor's comment, a group of law professors submitted a suggestion, which later was generally endorsed by another suggestion submitted by the National Bankruptcy Conference. The law professors recommended a new rule to allow all turnover proceedings to be brought by motion rather than adversary proceeding. The Advisory Committee decided on a narrower approach tailored to the issues raised by Justice Sotomayor and proposed amending Rule 7001 to provide that turnover of tangible personal property of an individual debtor could be sought by motion as opposed to adversary proceeding. The Advisory Committee decided not to adopt a national procedure for these turnover motions, preferring instead to allow them to remain governed by local rules.

An academic member stated that this rule will be a huge improvement over current procedure. He asked what would happen, under the proposal, in a Chapter 7 case when the trustee is seeking turnover of tangible property. The member expressed an expectation that the motion procedure would not apply to the trustee's turnover proceeding, because the proposal only extends to proceedings "by an individual debtor." Judge Dow agreed that under the proposed amendment, the trustee would need to seek turnover by adversary proceeding.

Upon motion, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 7001.**

Information Items

Rule 9006(a)(6) (Legal Holidays). Judge Dow stated that the Advisory Committee has approved a technical amendment to Rule 9006(a)(6) adding Juneteenth National Independence Day to the list of legal holidays. The Advisory Committee is not asking for approval at this time; rather, it will make that request in June 2022 in coordination with the other Advisory Committees' parallel proposals.

Electronic Signatures. Judge Dow introduced this information item, which concerns electronic signatures by debtors and others who do not have a CM/ECF account. Judge Dow noted that this issue connects to the question of electronic filing by self-represented litigants, but he observed that the working group of reporters and FJC researchers is addressing the latter topic, so the Advisory Committee's focus in this information item was on the electronic-signature topic. The Advisory Committee is looking at the practice of requiring the debtor's counsel to retain a wet signature for documents signed by the debtor and filed electronically. Previously, when the Advisory Committee last considered amendments to Rule 5005(a) that would have allowed the filing of debtors' scanned signatures without the retention of the original "wet" signature, the DOJ raised concerns with technologies available for verifying those signatures. The Advisory Committee has asked the DOJ whether its concerns have been alleviated by intervening technical advances. The pandemic has given us some experience with courts relaxing the wet-signature-retention requirement, and the FJC is assisting the Advisory Committee in studying the issue. There is a preliminary draft of a possible amendment to Rule 5005(a) on page 161 of the agenda book.

Professor Gibson stated the Advisory Committee found this to be a challenging problem. With documents that are filed electronically, what constitutes a valid signature for purposes of the rules? Under all rule sets, a CM/ECF account holder's signature is associated with that holder's unique account. A filing made through the account holder's account, and authorized by that person, constitutes the person's signature. But that does not address the common situation in bankruptcy where the *attorney* is filing a document with the *debtor's* signature, as the debtor is not the account holder. (Also, a pro se litigant might be allowed by some courts to submit documents through some electronic means other than CM/ECF—for instance, via email.) The Advisory Committee is not sure where it stands with wet signature requirements, but it is continuing to explore. Professor Gibson also noted that the Advisory Committee needs to learn more about lawyers' views concerning the requirement that the attorney for a represented debtor retain a wet signature.

An academic member noted that the DOJ's concern the last time this issue came before the Advisory Committee was that without a requirement for the retention of a wet signature, the Department's experts in bankruptcy fraud prosecutions would not be able to verify the authenticity of a signature. He asked whether the possible change in approach now would flow from a change in what a handwriting expert was willing to testify to, or whether it would flow from the advent of electronic methods for verifying the signature. Professor Gibson answered that technology has improved since the last time the Advisory Committee addressed this issue, and now there are electronic-signing software programs that offer a means to trace electronic signatures back to the signer. DOJ has told the Advisory Committee that the proposal is no longer dead from the beginning, meaning there does not always have to be a wet signature for its experts to be able to verify the authenticity of the signature. But it depends on the technology. Software that enables verification of electronic signatures may not currently be incorporated into the software that consumer lawyers are using to prepare bankruptcy filings. The technology exists, however. Therefore, the Advisory Committee felt it is worth pursuing the amendment. Judge Dow noted that the Advisory Committee has included the DOJ in the discussions of this item from the outset and has stressed to the DOJ that its input is necessary.

Professor Coquillette applauded Professor Gibson's attention to state ethics requirements and cautioned that the Advisory Committee needs to be careful not to amend the rules in ways that could conflict with state-law professional-responsibility requirements. State-law professional-responsibility requirements may, for example, address the lawyer's retention of a client's "wet" signature.

Deputy Attorney General Monaco said she is hopeful that the Department can work through some of the technology issues that this proposal would raise. The Department has convened an internal working group to review the issue.

A judge member noted that he understands the point that the Advisory Committee does not want to have rules that require adoption of new software, but might the rules incentivize it? What if the rule says that if counsel use software that enables electronic signature verification, then they do not have to retain a wet signature? That could be a good development.

Restyling. Judge Dow introduced the final information item: an update on the restyling project. The project is going well. Parts I and II have gone through the entire process up to (but not including) transmission to the Judicial Conference, which will happen once the remaining parts have also passed through the entire process. Parts III through VI are out for public comment and are on track to go to the Standing Committee at the next meeting. Parts VII, VIII, and IX will come to the Advisory Committee this spring and should be ready for Standing Committee approval for publication this summer.

Professor Bartell added that while the restyling project has been ongoing, some of the restyled rules have been subsequently amended. The Advisory Committee still needs to decide how it wants to handle these amended rules. One possibility will be to request to republish for public comment all the restyled rules that have been subsequently amended.

Professor Kimble stated that the style consultants will conduct one final top-to-bottom review of all the restyled rules for consistency and any other minor issues. They are currently doing so for Parts I and II.

Judge Bates thanked the style consultants for their work on the restyling project.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on October 5, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee briefly noted other items on its agenda, one of which elicited discussion. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 184.

Action Item

Publication of Rule 12(a). Judge Dow introduced the only action item, a proposed amendment to Rule 12(a) that the Advisory Committee was requesting approval to publish for public comment. Rule 12(a) sets the time to serve responsive pleadings. Rule 12(a)(1) recognizes that a federal statute setting a different time should govern, but subdivisions 12(a)(2) and (3) do not recognize the possibility of conflicting statutes. However, there are in fact statutes that set times shorter than the time set by Rule 12(a)(2). While not every glitch in the rules requires a fix, this is one that would be an easy fix. The Advisory Committee decided unanimously to request publication for public comment.

Professor Cooper added there is an argument that Rule 12(a)(2) as currently drafted supersedes the statutes that set a shorter response time, and the Advisory Committee never intended such a supersession. In addition to fixing the glitch, the proposed amendment will avoid the potential awkwardness of arguments concerning unintended supersession.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 12(a).**

Information Items

Multi-District Litigation (MDL) Subcommittee. Judge Dow introduced the work of the MDL Subcommittee as the first information item. Two major topics remain on the subcommittee's agenda. First, the subcommittee is looking at the idea of an "initial census" (what used to be known as "early vetting")—that is, methods for the MDL transferee judge to get a handle on the cases that are included in the MDL. There are three current MDLs where some version of this is in use—the *Juul MDL* before Judge Orrick in the Northern District of California, the *3M MDL* before Judge Rodgers in the Northern District of Florida, and the *Zantac MDL* before Judge Rosenberg (who chairs the MDL Subcommittee) in the Southern District of Florida. Second, the subcommittee is reviewing issues concerning the court's role in the appointment and compensation of leadership

counsel. Several meetings ago, the Advisory Committee discussed what it called a "high impact" sketch of a potential new Rule 23.3 that would extensively address court appointment of leadership counsel, establishment of a common benefit fund to compensate lead counsel, and court rulings on attorney fees. More recently, the subcommittee has been considering a sketch of a "lower impact" set of rules amendments that focuses on Rules 16(b) and 26(f). It would deal with both the initial census and issues of appointing, managing, and compensating leadership counsel throughout an MDL proceeding.

The approach taken in the lower impact sketch is similar to what the Advisory Committee did with Rule 23 a few years ago: operate at a high level of generality and not try to prescribe too much, but put prompts in the rules so that lawyers and judges know from day one a lot of the important things that they will encounter over the number of years it will take for an MDL to conclude. The subcommittee is trying to preserve flexibility. Much of what is in the rule sketch will not apply in any single given MDL. The prompts in the rule will guide MDL participants, and the committee note will provide more detail on how the court might apply these prompts. The subcommittee has met with Lawyers for Civil Justice and will meet with American Association for Justice and others in the coming months.

Professor Marcus observed, with respect to the call for rulemaking with respect to matters such as attorney compensation in MDLs, that rulemaking on such topics is challenging. One approach would be to amend Rule 26(f) so as to require the lawyers to address such matters in their proposed discovery plan; this could then inform the judge's consideration of how to address those matters in the Rule 16(b) order. As to oversight of the settlement, Judge Dow noted that the subcommittee initially considered giving the judge oversight of the substance of the settlement, but now is focusing instead on whether to provide for judicial oversight of the process for arriving at the settlement. In current practice, some judges exert indirect influence on the settlement, for example through their orders appointing leadership counsel. But whether to make rules concerning settlement in MDLs is the most controversial issue the subcommittee is considering, and its members do not agree on how best to proceed. Professor Cooper added that the rules do not currently define what obligations, if any, leadership counsel has to plaintiffs other than their own clients.

Judge Bates said he agrees with the Civil Rules Committee report's observation that the absence of any mention of MDLs in the Civil Rules is striking, given that MDLs make up a third or more of the federal civil caseload. He commended the Advisory Committee and subcommittee on their work on these issues.

A judge member suggested that the Advisory Committee consider addressing appointment of special masters. The role that courts have delegated to special masters in some large MDLs is significant. If the Advisory Committee addresses special masters, a rule could deal with whether and when special masters should have *ex parte* communications with counsel. There is the potential for an appearances problem if the special master is viewed as favoring one side or the other. A poor decision concerning the use of a special master can have significant consequences. Professor Marcus noted that Rule 53 requires that the order appointing a special master must address the circumstances, if any, in which the master may engage in *ex parte* communications.

However, the question then is whether Rule 53 is sufficient to address the issue in the MDL context.

A judge member thanked the subcommittee for its work on the MDL rules. He expressed skepticism concerning the desirability of rules specific to MDLs, noting that one size does not fit all as the cases range from quite simple to large and complicated. The current rules are flexible and capacious enough to accommodate the differences. Judge Chhabria's point (in the *Roundup MDL*) concerning the transferee judge's learning curve is well taken, but the judge member questioned whether a rule change could really make that learning curve any easier.

Apart from that big-picture skepticism, this judge member also made some more specific suggestions. First, the question of who should speak for the plaintiffs during the early meet-and-confer is a big one, and whether any rule should address that is a worthy issue that may warrant treatment if the Advisory Committee is going to be addressing MDLs. Second, in some MDLs the court has appointed lead counsel on the defense side, and the judge member queried whether the rules should address that. Third, if the rules will be amended to address table-setting issues that counsel and the court should consider early on, one such issue is whether there will be a master consolidated complaint and what its effect will be (a topic touched on in *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015)). Fourth, the judge member stressed that the common benefit fund order should be clear as to whether plaintiffs' lawyers will be required to submit to the common benefit fund a portion of their fees arising from the settlement of cases pending in other courts; he expressed doubt, however, as to whether the question of court authority to impose such a requirement is an appropriate topic for rulemaking. Lastly, the member noted that in the current rule sketch of proposed Rule 16(b)(5)(F) provided in the agenda book (at p. 197) it seemed a little odd to require the court in an initial order to provide a method for the court to give notice of its assessment of the fairness of the process that led to any proposed settlement.

A practitioner member stated that the judge member whose comments preceded hers had raised all the issues that she had in mind. She suggested that the Rule 16 approach is particularly well taken. It will cause more lawyers to read Rule 16 earlier and to pay attention to it. Rule 16 is "the Swiss Army knife" for active case management, and it is precisely the right context for adding provisions to deal with MDLs. Right now, judges are innovating in their MDL case-management orders, but that procedural common law is not as well disseminated as it should be amongst the people who need it the most: transferee judges and the lawyers practicing before them. If Rule 16 addresses MDL practice, judges will cite the rule in their orders, and in turn these orders will more likely be published and found in searches. Moreover, the proposed approach will not stifle the flexibility that exists in the absence of a rule. No two MDLs are the same. She noted that she wishes there were a repository of all MDL case-management orders. Getting MDLs into the rules in a very flexible way may confer at least some of that benefit.

Professor Coquillette seconded Professor Cooper's point concerning the significance of conflict-of-interest issues with lead counsel in MDLs. Questions percolate regarding American Bar Association (ABA) Model Rule 1.7. The rulemakers should always be aware that attorney conduct is subject to another regulatory system, which applies broadly because most federal courts adopt by local rule either the ABA Model Rules or the rules of attorney conduct of the State in which they sit. Professor Marcus noted the added complication that the lawyers in an MDL may

be based in many different states. Professor Coquillette observed that the ABA Model Rules do have a choice-of-law provision, but it can be challenging to apply.

An academic member expressed his appreciation for the work of the subcommittee and reporters on this. He echoed the suggestion that, in this area, less is more. With the complexity and variation of MDLs, encasing things in formal rules is probably not a good idea. The goal should be to provide transparency and give some guidance to judges who do not have prior experience in MDLs. However, it would be a mistake to try to make something concrete when it should be plastic. Thus, the Manual for Complex Litigation seems to be the natural place to locate much of the guidance concerning best practices. This member also cautioned against trying to assimilate MDLs to Rule 23 class actions. Class action practice should not be the model for MDLs, because MDLs require flexibility.

Judge Bates acknowledged that the range of MDLs is daunting and that is a reason to question whether rules that apply to all MDLs can be formulated. However, that view is in tension with the Federal Rules of Civil Procedure themselves, which are a set of rules that apply to an even wider variety of cases.

A judge member echoed the comment on having a "best practices" guide outside the rules, and stated that the Advisory Committee should resist writing rules specific to MDLs.

Another judge member applauded the effort to continue to think about this important but difficult topic. The draft Rule 16(b)(5) is a little unusual in that it is a precatory statement about what a judge should consider, but it does not give the judge any additional tools that the judge does not already have. In this sense, the sketch of Rule 16(b)(5) resembles the Manual for Complex Litigation. This member suggested that, instead, the focus should be on whether there are tools that MDL transferee judges want but do not currently have, and whether those tools are something that an amendment under the Rules Enabling Act process can provide. Judge Dow observed that although a new edition of the Manual for Complex Litigation is in process, it will be several years before it comes out. The Judicial Panel on Multidistrict Litigation, likewise, has tried to provide guidance on best practices, but has held conferences only intermittently. He noted that the Standing Committee's discussion overall evinced more support for the low-impact (Rule 16) approach than the high-impact (Rule 23.3) approach. Director Cooke reported that the FJC is in the preliminary stages of organizing a committee to assist in the preparation of a new edition of the Manual for Complex Litigation.

Discovery Subcommittee. Judge Dow briefly discussed the Discovery Subcommittee's work on privilege log issues. Plaintiffs' and defendants' lawyers have very different views as to whether the current rules present problems. However, there are areas of consensus—that it could be valuable to encourage the parties to discuss privilege-log issues early on, perhaps with the

judge's guidance, and that a system of rolling privilege logs is useful. These areas are the subcommittee's current focus.

Judge Dow also noted the subcommittee's work on sealing. The AO is already reviewing issues related to sealing documents. The Advisory Committee is going to hold off on further consideration of sealing issues and will monitor the progress of the broader AO project.

Rule 9(b) Subcommittee. Judge Dow introduced the work of the new Rule 9(b) Subcommittee (chaired by Judge Lioi). The subcommittee is considering a proposal by Dean Benjamin Spencer to amend Rule 9(b)'s provision concerning pleading conditions of the mind ("[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally"). The subcommittee has had its first meeting and will report to the Advisory Committee at its March meeting.

Other Items

Judge Dow briefly noted a multitude of other projects under consideration by the Advisory Committee, including proposals regarding Rules 41, 55, and 63, as well as one regarding amicus briefs in district courts and one involving the standards and procedures for granting petitions to proceed as a poor person ("in forma pauperis"). Judge Dow also noted that the Advisory Committee is awaiting public comments on the proposed new emergency rule, Rule 87.

Professor Cooper asked whether amicus practice in the district court may present very different questions from amicus practice in appellate courts. In addition to the relative rarity of amicus filings in the district court, he suggested there might be more of a risk that an amicus's participation could interfere with the parties' opportunity to shape the record and develop the issues germane to the litigation in the district court. The discussion during the Appellate Rules Committee's presentation left Professor Cooper concerned about drafting a Civil Rule to address amicus issues.

Judge Bates agreed that amicus filings in the district court could present different issues. He doubted whether there would be many instances where anything in an amicus brief could help to develop the record of the case. For example, in an administrative review case, the record is already set by what was before the administrative agency. And in most other civil cases, the factual record will be developed by the parties through discovery. On the other hand, amicus filings could help to frame or identify issues.

A judge member noted that he too was skeptical about addressing amicus filings in the Civil Rules. This seems to be a solution in search of a problem. If an organization wants to file an amicus brief, it requests leave to file the brief, and the judge decides whether to grant leave and how to handle ancillary issues such as affording the parties an opportunity to respond. Especially given that amicus filings in the district courts are relatively rare, why should the Civil Rules

address this topic when they do not address the general topic of briefs? The judge member also noted that having a rule regarding amicus briefs might encourage people to file more of them.

Judge Bates echoed the judge member's skepticism. Amicus briefs in district courts are almost all filed in just a few courts nationwide, including the District of Columbia (which has a local rule) and the Southern District of New York. This may be something where it is best to leave the practice to local rules in the few courts that see most of the amicus briefs.

Judge Dow stated that he agreed with the comments of the judge member and of Judge Bates. He noted that if a person has the resources to draft an amicus brief, it will have the resources to figure out how to request leave to file it.

A practitioner member stated that amicus briefs are being filed with increasing frequency in MDLs. This is not to say that there should be a Civil Rule on point, but it may be useful to keep in mind that the Appellate Rules' treatment of amicus briefs can be a useful resource for district judges. This member stated that amicus filings in the district court may sometimes attempt to contribute to the record by requesting judicial notice of particular matters; and amicus filings might sometimes add to the complexity in MDLs that are already complex enough. However, trying to craft a Civil Rule to address such issues may be borrowing trouble.

Professor Hartnett returned to the concern (that a member had raised during the discussion of the Appellate Rules Committee's report) that an amicus filing might be made in the district court with the goal of triggering the judge's recusal. Appellate Rule 29 allows the court of appeals to disallow or strike an amicus brief when that brief would require a judge's disqualification. Amicus filings designed to trigger recusal—if they became a common practice—would be more dangerous at the district court level when the case is before a single judge.

Another practitioner member stated that it would be a big mistake to have a national rule governing amicus briefs in district courts. Amicus briefs can be taken for what they are worth, and judges can either read them or not read them. To regulate this on a national basis just does not make sense.

Turning to matters covered in the Civil Rules Committee's written report, Judge Bates noted the Civil Rules Committee's decision not to proceed with a proposal to amend Rule 9 to set a pleading standard for certain claims under the Americans with Disabilities Act. He requested that the Civil Rules Committee coordinate with the Rules Committee Staff at the AO to communicate this decision to Congress. The proposal in question, he noted, initially came from members of the Senate.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on November 4, 2021. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 258.

Information Items

Grand Jury Secrecy Under Rule 6(e). Judge Kethledge described the Advisory Committee's decision not to proceed with a proposed amendment to Rule 6 regarding an exception to grand jury secrecy for materials of exceptional historical or public interest. The Advisory Committee had received multiple proposals for such an exception. Both the Rule 6 Subcommittee (chaired by Judge Michael Garcia) and the full Advisory Committee extensively considered the proposals. The subcommittee held an all-day miniconference where it heard a wide range of perspectives, including from former prosecutors, defense attorneys, the general counsel for the National Archives, a historian, Public Citizen Litigation Group, and the Reporters Committee for Freedom of the Press. The subcommittee thereafter met by phone four times. It had two main tasks. First, it tried to draft the best proposed amendment. Second, it had to decide whether to recommend to the full Advisory Committee whether to proceed with a proposed amendment. The draft rule that the subcommittee worked out would have allowed disclosure only 40 years after a case was closed, and only if the grand jury materials had exceptional historical importance. However, a majority of the subcommittee decided not to recommend that the full Advisory Committee proceed with an amendment.

At its fall 2022 meeting, the Advisory Committee discussed the matter fully and voted 9-3 not to proceed with an amendment. Judge Kethledge noted that the Advisory Committee benefited from a wealth and broad range of relevant experience on the part of its members. The Advisory Committee understood the proposal's appeal and found it to present a close question. The members identified "back end" concerns – that is to say, possible risks that could arise at the time of the disclosure of the grand jury materials – and noted that those concerns could be addressed (although not fully avoided) by employing safeguards. However, Advisory Committee members were concerned that on the "front end" – that is, when a grand jury proceeding is contemplated or ongoing – the potential for later disclosure pursuant to the proposed exception would complicate conversations with witnesses and jeopardize the witnesses' cooperation. A number of members also noted that this exception would be different in kind from those that are currently in the rule. The other exceptions relate to the use of grand jury materials for other criminal prosecutions or national security interests. Historical interest would be an altogether different kind of exception. There was the sense that a historical significance exception would signal a relaxation of grand jury secrecy and could lead to unintended consequences. The grand jury is an ancient institution that advances its purposes in ways that we are often unaware of; this heightens the risk of unintended consequences from a rule amendment. The DOJ has consistently supported a historic significance exception, but all eight former federal prosecutors on the Advisory Committee opposed having an amendment along these lines. In sum, the Advisory Committee voted to not make an amendment, subject to input from the Standing Committee.

Judge Bates stated that he thought this was a carefully considered decision by the Advisory Committee.

A practitioner member expressed agreement with the recommendation not to proceed. This is a hard issue, and he recognizes the appeal of having an exception, but as a former federal prosecutor who is now on the other side of the bar, he does not feel comfortable having an

exception that only touches certain cases, namely those of exceptional historical interest, and therefore treats some grand jury participants differently than others.

A judge member praised the Advisory Committee's report for its thoroughness. This member asked how categorically the Advisory Committee had rejected the possibility of disclosures of very old materials of great public interest. Did the Advisory Committee believe that, had there been a grand jury investigation into the assassination of President Lincoln, disclosing those grand jury materials now would create "front end" problems with the cooperation of current-day witnesses? Judge Kethledge stated that it was the sense of the Advisory Committee that it should not add a new exception to Rule 6, even for material of great historical interest. One can think of examples where one would be glad for materials of such strong historical interest to be disclosed, but that does not mean that there should be a rule permitting such disclosure. As an analogy, take President Lincoln suspending habeas corpus during the Civil War. Many people would say they are glad that he did so because things may have turned out differently if he had not done so. Yet at the same time, most people would not want a general rule allowing the President to suspend habeas corpus when he sees fit.

Additionally, Judge Kethledge noted that although the Advisory Committee decided not to recommend a rule amendment, that does not exclude the possibility of common-law development of an exception. There is a circuit split as to whether federal courts have inherent authority to authorize disclosure of grand jury materials. Justice Breyer thought that the Advisory Committee should resolve the circuit split via rulemaking. However, Judge Kethledge stated his view, which he believed the Advisory Committee shares, that the underlying question of inherent authority was outside the purview of Rules Enabling Act rulemaking. If the Supreme Court resolves the circuit split in favor of recognizing inherent authority to authorize disclosure, the courts will be free to take a case-by-case approach.

Professor Beale added that a number of Advisory Committee members had noted that they felt comfortable with the state of the law prior to *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), and probably would have concluded (as the Advisory Committee had in 2012) that there was not a problem with courts very occasionally authorizing disclosure. Yet writing it out in a rule is fundamentally different: It would change the calculus and change the context under which the grand jury would operate going forward. It is unclear how changing that calculus and context would affect the grand jury as an institution.

A judge member said he thought that the Advisory Committee should consider a rule. He recalled from the Advisory Committee's discussions a shared sense that it is actually a good thing that grand jury materials have been released in certain cases of exceptional historical significance. The problem under the current regime is the circuit-to-circuit variation on whether disclosure is ever possible. Additionally, by not resolving the issue the Advisory Committee is just kicking the can down the road. If the Supreme Court rules that courts lack inherent authority to authorize disclosures not provided for in the Rule, then there will be renewed pressure for a rule amendment. If the Supreme Court instead rules that courts do have such inherent authority, there will still be demands for a rule amendment so as to provide a common approach to disclosure decisions. Therefore, either way, the rulemakers will end up having to take up this issue again.

The same member also stated he was less persuaded by the argument that an exception for materials of exceptional historical interest will dissuade witnesses from testifying. As it is, there are exceptions to grand jury secrecy, including—in some circuits—a multifactor test for whether to release grand-jury materials to the defendant once the defendant has been indicted. Thus, prosecutors already are unable to tell witnesses that there are no circumstances under which their testimony could become public. Furthermore, the comment that certain organizations, such as Al Qaeda or gangs, have long memories is a red herring: These are not the types of cases of exceptional historical interest that would fit within the contemplated exception. The member closed, however, by thanking the Advisory Committee for its thoughtful consideration of the issue.

Professor Hartnett advocated precision in the use of the phrase "inherent authority." It can mean two different things: first, the court's authority to act in the absence of authorization by a statute or rule; and second, the court's authority to act despite a statute or rule that purports to prohibit it from acting. The latter type of inherent authority is much narrower and its scope presents a constitutional question. Judge Kethledge acknowledged this distinction, but noted that the question addressed by the Advisory Committee was only whether to adopt a provision of positive law, in the Criminal Rules, recognizing the exception in question.

Clarification of Court's Authority to Release Redacted Versions of Grand Jury-Related Judicial Opinions. Judge Kethledge introduced this information item, which stems from a suggestion by Chief Judge Howell and former Chief Judge Lamberth of the District of Columbia District Court. The suggestion requested that Rule 6(e) be amended to clarify the court's authority to issue opinions that discuss and potentially reveal matters before the grand jury. Both the subcommittee and entire Advisory Committee considered the issue. The Advisory Committee's conclusion was that the issue is not yet ripe. There has not been any indication so far that redaction is inadequate as a means to avoid contentions that the release of a judicial opinion somehow violates Rule 6. Absent any recent contentions that the release of a judicial opinion violated Rule 6, the Advisory Committee did not think it should act on the suggestion at this time.

Rule 49.1 and CACM Guidance Referenced in the Committee Note. Judge Kethledge introduced this information item, which arises from a suggestion by Judge Furman. Judge Furman suggested amending Rule 49.1 and its committee note to clarify that courts cannot allow parties to file under seal documents to which the public has either a common law or First Amendment right of access. The Advisory Committee appointed a subcommittee to review the issue. Judge Kethledge noted that in his experience, there does seem to be a problem of parties filing documents under seal that should not be so filed.

Judge Furman clarified that the issue is more with the committee note than the text of the rule. The committee note specifies that a financial affidavit in connection with a request for representation under the Criminal Justice Act should be filed under seal. This is in tension with the approach of most courts, which have found that these affidavits are judicial documents and therefore subject to a public right of access under the Constitution. However, at least one court in reliance on the committee note has allowed defendants to file CJA-related financial affidavits under seal.

OTHER COMMITTEE BUSINESS

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 332 summarized most of the relevant information, but an additional bill had been introduced since the finalization of the agenda book. The AMICUS Act, which had been introduced in the previous Congress, was reintroduced in December, albeit with some differences compared to the previous version. As relevant to the Standing Committee, the new bill would apply to any potential amicus in the Courts of Appeals or Supreme Court, regardless of how many briefs it filed in a given year. The Rules Law Clerk also specifically noted the Protecting Our Democracy Act, which had passed the House in December 2021 and now awaits action in the Senate. That bill would prohibit any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of grand jury materials related to the prosecution of certain individuals that the President thereafter pardons. Additionally, the bill would direct the Judicial Conference to promulgate under the Rules Enabling Act rules to facilitate the expeditious handling of civil suits to enforce Congressional subpoenas.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 339. The Judicial Conference has asked all its committees to provide any feedback on lessons learned over the past two years that may assist it in planning for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts.

Judge Bates asked the Standing Committee whether there was anything the members thought the Standing Committee should focus on in responding to the Judicial Conference. No members had any comments or questions regarding this item.

Judge Bates then asked the Standing Committee members whether there was any concern with delegating to him, Professor Struve, and the Rules Committee Staff the matter of communicating with the Judicial Conference. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Judicial Conference Committee Self-Evaluation Questionnaire. Every five years, the Judicial Conference requires all its committees to complete a self-evaluation. Judge Bates stated that he had circulated to the Standing Committee members a draft of that response.

The main item to address in the current draft is the modest adjustments to the jurisdictional statement for the Standing Committee and the Advisory Committees. First, the draft deletes the reference to receiving rule amendment suggestions "from bench and bar" because the Advisory Committees receive suggestions from others as well. Second, the draft clarifies that the Standing Committee, rather than the Advisory Committees, approves rules for publication for public comment. Third, the draft's descriptions of the duties of the Standing Committee and Advisory Committees have been revised to reflect the discussion of those duties in the Judicial Conference's procedures governing the rulemaking process.

Judge Bates asked the Standing Committee whether there were any comments regarding the draft response to the Judicial Conference's committee self-evaluation questionnaire. There were none.

Judge Bates requested that the Standing Committee members delegate to him, Professor Struve, the Advisory Committee chairs, and the Rules Committee Staff the matter of responding to the self-evaluation questionnaire. Judge Bates noted that the Advisory Committee chairs had already weighed in on the draft response. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Update on Judiciary's Response to COVID-19 Pandemic. Julie Wilson provided an update on the judiciary's response to the COVID-19 pandemic. She observed that the federal judge members of the Standing Committee had access to a number of resources on this topic via the "JNet" (the federal judiciary's intranet website). There is a COVID-19 task force studying a wide range of items relevant to the judiciary's response to the pandemic. Its current focus is on issues related to returning to the workplace. The task force has a virtual judiciary operations subgroup ("VJOS") that includes representatives from the courts, federal defenders' offices, and DOJ, and it is studying the use of technology for remote court operations. Ms. Wilson noted that she has highlighted for the VJOS participants the relevant Criminal Rules concerning remote versus in-person participation, and she predicted that suggestions on this topic are likely to reach the rulemakers in the future.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their patience and attention. The Standing Committee will next meet on June 7, 2022. Judge Bates expressed the hope that the meeting would take place in person in Washington, DC.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2022. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard 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 Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Burton DeWitt, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal

Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, Department of Justice (DOJ).

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on three items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) the proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and published for public comment in August 2021; (2) consideration of suggestions to allow electronic filing by pro se litigants; and (3) consideration of amendments to list Juneteenth National Independence Day in the definition of "legal holiday" in the federal rules. Finally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 32, 35, and 40, and the Appendix of Length Limits, with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

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

The proposed amendment to Rule 32 is a conforming amendment that reflects the proposed transfer of Rule 35's contents into a restructured Rule 40. In Rule 32(g)'s list of papers that require a certificate of compliance, the amendment would replace the reference to papers

submitted under Rules 35(b)(2)(A) or 40(b)(1) with a reference to papers submitted under Rule 40(d)(3)(A).

Rule 35 (En Banc Determination)

The proposed amendment to Rule 35 would transfer its contents to Rule 40 in an effort to provide clear guidance in one rule that will cover en banc hearing and rehearing and panel rehearing.

Rule 40 (Petition for Panel Rehearing)

The proposed amendment to Rule 40 would expand that rule by incorporating into it the provisions of current Rule 35. The proposed amended Rule 40 would govern all petitions for rehearing as well as the rare initial hearing en banc.

Proposed amended Rule 40(a) would provide that a party may petition for panel rehearing, rehearing en banc, or both. It sets a default rule that a party seeking both types of rehearing must file the petitions as a single document. Proposed amended Rule 40(b) would set forth the required content for each kind of petition for rehearing; the requirements are drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

Proposed amended Rule 40(c)—which is drawn from existing Rules 35(a) and (f)—would describe the reasons and voting protocols for ordering rehearing en banc. Rule 40(c) makes explicit that a court may act sua sponte to order rehearing en banc; this provision also reiterates that rehearing en banc is not favored. Proposed amended Rule 40(d)—drawn from existing Rules 35(b), (c), (d), and existing Rules 40(a), (b), and (d)—would bring together in one place uniform provisions governing matters such as the timing, form, and length of the petition. A new feature in Rule 40(d) would provide that a panel's later amendment of its decision restarts the clock for seeking rehearing.

Proposed Rule 40(e)—which expands and clarifies current Rule 40(a)(4)—addresses the court's options after granting rehearing. Proposed Rule 40(f) is a new provision addressing a panel's authority to act after the filing of a petition for rehearing en banc. Proposed Rule 40(g) carries over (from existing Rule 35) provisions concerning initial hearing en banc.

Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure

The proposed amendments are conforming amendments that would reflect the relocation of length limits for rehearing petitions from Rules 35(b)(2) and 40(b) to proposed amended Rule 40(d)(3).

Information Items

The Advisory Committee met by videoconference on October 7, 2021. In addition to the matters discussed above, agenda items included the consideration of two suggestions related to the filing of amicus briefs, several suggestions regarding in forma pauperis issues, including potential changes to Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis), and a new suggestion regarding costs on appeal.

Amicus Briefs

The Advisory Committee reported that, in response to a suggestion from Senator Sheldon Whitehouse and Representative Henry Johnson, Jr., it is continuing its consideration of whether additional disclosures should be required for amicus briefs. Proposed legislation regarding disclosures in amicus briefs has been filed in the Senate and House, most recently in December 2021.

The Advisory Committee reported that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient

disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. On the other hand, when considering any disclosure requirement, it is necessary to consider the First Amendment rights of those who do not wish to disclose themselves.

The Advisory Committee sought the Committee's feedback on these issues. In doing so, the Advisory Committee highlighted the distinction between disclosure regarding an amicus's relationship to a party and disclosure regarding an amicus's relationship to a nonparty. The Advisory Committee also noted that any proposed amendments to Rule 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. Various members of the Committee voiced their perspectives on these issues, and expressed appreciation for the Advisory Committee's ongoing work on these topics.

The Advisory Committee also has before it a separate suggestion regarding amicus briefs and Rule 29. In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The suggestion proposes adopting standards for when judicial disqualification would require a brief to be stricken or its filing prohibited. This suggestion is under consideration by the Advisory Committee.

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

The Advisory Committee is continuing to consider suggestions to regularize the criteria for granting in forma pauperis status, including possible revisions to Form 4 of the Federal Rules of Appellate Procedure. It is gathering information on how courts handle such applications, including what standards are applied and how Appellate Form 4 is used.

Costs on Appeal

In a recent decision, the Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring arguments about costs to the court of appeals. *See City of San Antonio v. Hotels.com L. P.*, 141 S. Ct. 1628 (2021). Accordingly, the Advisory Committee created a subcommittee to explore the issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Rule 7001 (Types of Adversary Proceedings) with a recommendation that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7001 addresses a concern raised by Justice Sotomayor in *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021). The *Fulton* Court held that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property from third parties. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings can be very slow because, under Rule 7001(1), they must be pursued by an adversary proceeding. Addressing the need of chapter 13 debtors, such as those in *Fulton,* to quickly regain possession of a seized car in order to work and earn money to fund a plan, she stated that the Advisory Committee on Rules of Bankruptcy Procedure should consider rule amendments that would ensure prompt resolution of debtors' requests for turnover under § 542(a). Post-*Fulton*, two suggestions were submitted that echo Justice Sotomayor's call for amendments; these suggestions advocate that the rules be amended to allow all turnover

proceedings to be brought by a quicker motion-based practice rather than by adversary proceeding.

Members of the Advisory Committee generally agreed that debtors should not have to wait an average of a hundred days to get a car needed for a work commute, and they supported a motion-based turnover process in that and similar circumstances involving tangible personal property. There was less support, however, for broader rule changes that would allow all turnover proceedings to occur by motion. The Advisory Committee ultimately recommended an amendment to Rule 7001 that would exempt, from the list of adversary proceedings, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."

Information Items

The Advisory Committee met by videoconference on September 14, 2021. In addition to the recommendation discussed above, the Advisory Committee considered possible rule amendments in response to a suggestion from the Committee on Court Administration and Case Management (CACM Committee) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account and discussed the progress of the Restyling Subcommittee.

Electronic Signatures

The Bankruptcy Rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors or others without CM/ECF privileges will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently deemed to constitute the person's signature for rules purposes. The issue the Advisory Committee has been considering, therefore, is whether the rules should be amended to allow the electronic signature of someone without a CM/ECF

account to constitute a valid signature and, if so, under what circumstances. The Advisory Committee's Technology Subcommittee is studying this issue.

Bankruptcy Rules Restyling Update

The 3000, 4000, 5000, and 6000 series of the restyled Bankruptcy Rules have been published for comment. The Advisory Committee will be reviewing the comments at its spring 2022 meeting.

In fall 2021, the Restyling Subcommittee completed its initial review of the 7000 and 8000 series and began its initial review of the 9000 series. The subcommittee will continue to meet until the subcommittee and style consultants have agreed on draft amendments. The subcommittee expects to present the 7000, 8000, and 9000 series of restyled rules—the final group of the restyled bankruptcy rules—to the Advisory Committee at its spring 2022 meeting with a request that the Advisory Committee approve those proposed amendments and submit them to the Standing Committee for approval for publication.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing) with a request that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets

a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language is problematic for several reasons. First, while it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. Second, the current language fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Third, the current language could be interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) supersede inconsistent statutory provisions.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1), namely, that a different response time set by statute supersedes the response times set by those rules.

Information Items

The Advisory Committee met by videoconference on October 5, 2021. In addition to the action item discussed above, the Advisory Committee considered reports on the work of the Multidistrict Litigation Subcommittee and the Discovery Subcommittee, and was advised of the formation of an additional subcommittee that will consider a proposal to amend Rule 9(b). The Advisory Committee also retained on its agenda for consideration a suggestion for a rule establishing uniform standards and procedures for filing amicus briefs in the district courts, suggestions that uniform in forma pauperis standards and procedures be incorporated into the Civil Rules, and suggestions to amend Rules 41, 55, and 63.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over time, the subcommittee has narrowed the list of issues on which its work is focused to two, namely (1) efforts to facilitate early attention to "vetting" (through the use of "plaintiff fact sheets" or "census"), and (2) the appointment and compensation of leadership counsel on the plaintiff side. To assist in its work, the subcommittee prepared a sketch of a possible amendment to Rule 16 (Pretrial Conferences; Scheduling; Management) that would apply to MDL proceedings. The amendment sketch encourages the court to enter an order (1) directing the parties to exchange information about their claims and defenses at an early point in the proceedings, (2) addressing the appointment of leadership counsel, and (3) addressing the methods for compensating leadership counsel. The subcommittee drafted a sketch of a corollary amendment to Rule 26(f) (Conference of the Parties; Planning for Discovery) that would require that the discovery plan include the parties' views on whether they should be directed to exchange information about their claims and defenses at an early point in the proceedings. For now, the sketches of possible amendments are only meant to prompt further discussion and information gathering. The subcommittee has yet to determine whether to recommend amendments to the Civil Rules.

Discovery Subcommittee

In 2020, the Discovery Subcommittee was reactivated to study two principal issues. First, the Advisory Committee has received suggestions that it revisit Rule 26(b)(5)(A), the rule that requires that parties withholding materials on grounds of privilege or work product protection provide information about the materials withheld. Though the rule does not say so and the accompanying committee note suggests that a flexible attitude should be adopted, the suggestions state that many or most courts have treated the rule as requiring a document-by-

document log of all withheld materials. One suggestion is that the rule be amended to make it clearer that such a listing is not required, and another is that the rule be amended to provide that a listing by "categories" is sufficient.

As a starting point, the subcommittee determined that it needed to gather information about experience under the current rule. In June 2021, the subcommittee invited the bench and bar to comment on problems encountered under the current rule, as well as several potential ideas for rule changes. The subcommittee received more than 100 comments. In addition, subcommittee members have participated in a number of virtual conferences with both plaintiff and defense attorneys.

While the subcommittee has not yet determined whether to recommend rule changes, it has begun to focus on the Rule 26(f) discovery plan and the Rule 16(b) scheduling conference as places where it might make the most sense for the rules to address the method that will be used to comply with Rule 26(b)(5)(A).

The second issue before the subcommittee is a suggestion for a new rule setting forth a set of requirements for motions seeking permission to seal materials filed in court. In its initial consideration of the suggestion, the subcommittee learned that the AO's Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and Bankruptcy Clerks Advisory Groups and the AO's newly formed Court Administration and Operations Advisory Council (CAOAC). In light of this effort, the subcommittee determined that further consideration of the suggestion for a new rule should be deferred to await the result of the AO's work.

Amicus Briefs

The Advisory Committee has received a suggestion urging adoption of a rule establishing uniform standards and procedures for filing amicus briefs in the district courts. The proposal is accompanied by a draft rule adapted from a local rule in the District Court for the District of Columbia, and informed by Appellate Rule 29 (Brief of an Amicus Curiae) and the Supreme Court Rules. The Advisory Committee determined that the suggestion should be retained on its study agenda. The first task will be to determine how frequently amicus briefs are filed in district courts outside the District Court for the District of Columbia.

Uniform In Forma Pauperis Standards and Procedures

The Advisory Committee has on its study agenda suggestions to develop uniform in forma pauperis standards and procedures. The Advisory Committee believes that serious problems exist with the administration of 28 U.S.C. § 1915, which allows a person to proceed without prepayment of fees upon submitting an affidavit that states "all assets" the person possesses and states that the person is unable to pay such fees or give security therefor. For example, the procedures for gathering information about an applicant's assets vary widely. Many districts use one of two AO Forms, but many others do not. Another problem is the forms themselves, which have been criticized as ambiguous, as seeking information that is not relevant to the determination, and as invading the privacy of nonparties. Further, the standards for granting leave to proceed in forma pauperis vary widely, not only from court to court but often within a single court as well.

The Advisory Committee retained the topic on its study agenda because of its obvious importance and because it is well-timed to the ongoing work of the Appellate Rules Committee (discussed above) relating to criteria for granting in forma pauperis status. There is clear potential for improvement, but it is not yet clear whether that improvement can be effectuated

through the Rules Enabling Act process.

Rule 41(a) (Dismissal of Actions – Voluntary Dismissal)

Rule 41(a) governs voluntary dismissals without court order. The Advisory Committee is considering a suggestion that Rule 41(a) be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. There exists a division of decisions on the question whether Rule 41(a)(1)(A)(i) authorizes dismissal by notice without court order and without prejudice of some claims but not others. That provision states, in relevant part, that "the plaintiff may dismiss an action without a court order by filing … a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment . . . ." The preponderant view is that the rule authorizes dismissal only of all claims and that anything less is not dismissal of "an action"; however, some courts allow dismissal as to some claims while others remain. The Advisory Committee will consider these and other issues relating to Rule 41, including the practice of allowing dismissal of all claims against a particular defendant even though the rest of the action remains.

Rule 55 (Default; Default Judgment)

Rule 55(a) directs the circumstances under which a clerk "must" enter default, and subdivision (b) directs that the clerk "must" enter default judgment in narrowly defined circumstances. The Advisory Committee has learned that at least some courts restrict the clerk's role in entering defaults short of the scope of subdivision (a), and many courts restrict the clerk's role in entering default judgment under subdivision (b). The Advisory Committee has asked the FJC to survey all of the district courts to better ascertain actual practices under Rule 55. The information gathered will guide the determination whether to pursue an amendment to Rule 55.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met in person (with some participants joining by videoconference) on November 4, 2021. A majority of the meeting was devoted to consideration of the final report of the Rule 6 Subcommittee. The Advisory Committee also decided to form a subcommittee to consider a suggestion to amend Rule 49.1.

Rule 6 (The Grand Jury)

Rule 6(e) (Recording and Disclosing the Proceedings). The Advisory Committee last considered whether to amend Rule 6(e) to allow disclosure of grand jury materials of exceptional historical importance in 2012, when it considered a suggestion from the DOJ to recommend such an amendment. At that time, the Advisory Committee concluded that an amendment would be "premature" because courts were reasonably resolving applications "by reference to their inherent authority" to allow disclosure of matters not specified in the exceptions to grand jury secrecy listed under Rule 6(e)(3). Since then, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), overruled prior circuit precedents and held that the district courts have no authority to allow the disclosure of grand jury matters not included in the exceptions stated in Rule 6(e)(3), thereby deepening a split among the courts of appeals with regard to the district courts' inherent authority. Moreover, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out the circuit split and stated that "[w]hether 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." *McKeever*, 140 S. Ct. at 598 (statement of

Breyer, J.).

In 2020 and 2021, the Advisory Committee received suggestions seeking an amendment to Rule 6(e) that would address the district courts' authority to disclose grand jury materials because of their exceptional historical or public interest, as well as a suggestion seeking a broader exception that would ground a new exception in the public interest or inherent judicial authority. The latter urged an amendment "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." In contrast, over the past three administrations (including the suggestion the Advisory Committee considered in 2012), the DOJ has sought an amendment that would abrogate or disavow inherent authority to order disclosures not specified in the rule. The DOJ's most recent submission advocates that "any amendment to Rule 6 should contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive."

After the Rule 6 Subcommittee was formed in May 2020 in reaction to *McKeever* and *Pitch*, two district judges suggested an amendment that would explicitly permit courts to issue judicial opinions when even with redaction there is potential for disclosure of matters occurring before the grand jury.

As reported to the Conference in September 2021, the subcommittee's consideration of the proposals included convening a day-long virtual miniconference in April 2021 at which the subcommittee obtained a wide range of perspectives based on first-hand experience. Participants included academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration. In addition, the subcommittee held four meetings over the summer of 2021.

Part of its work included preparing a discussion draft of an amendment that defined a limited exception to grand jury secrecy for historical records meant to balance the interest in disclosure against the vital interests protected by grand jury secrecy. The draft proposal would have (1) delayed disclosure for at least 40 years, (2) required the court to undertake a fact-intensive inquiry and to determine whether the interest in disclosure outweighed the public interest in retaining secrecy, and (3) provided for notice to the government and the opportunity for a hearing at which the government would be responsible for advising the court of any impact the disclosure might have on living persons. In the end, a majority of the subcommittee recommended that the Advisory Committee not amend Rule 6(e).

After careful consideration and a lengthy discussion, a majority of the Advisory Committee agreed with the recommendation of the subcommittee and concluded that even the most carefully drafted amendment would pose too great a danger to the integrity and effectiveness of the grand jury as an institution, and that the interests favoring more disclosure are outweighed by the risk of undermining an institution critical to the criminal justice system.

Further, a majority of members expressed concern about the increased risk to witnesses and their families that would result from even a narrowly tailored amendment such as the discussion draft prepared by the subcommittee. A majority of the members concluded that the dangers of expanded disclosure would remain, and that the addition of the exception would be a significant change that would both complicate the preparation and advising of witnesses and reduce the likelihood that witnesses would testify fully and frankly. Moreover, as drafted, the proposed exception was qualitatively different from the existing exceptions to grand jury secrecy, which are intended to facilitate the resolution of other criminal and civil cases or the investigation of terrorism.

Consideration of these suggestions by both the subcommittee and the full Advisory Committee revealed that this is a close issue. Although many members recognized that there are rare cases of exceptional historical interest where disclosure of grand jury materials may be warranted, the predominant feeling among the members was that no amendment could fully replicate current judicial practice in these cases. Moreover, members felt that, even with strict limits, an amendment expressly allowing disclosure of these materials would tend to increase both the number of requests and actual disclosures, thereby undermining the critical principle of grand jury secrecy.

Members also discussed a broader exception for disclosure in the public interest. The subcommittee had recommended against such a broad exception, and members generally agreed that a broader and less precise exception would be an even greater threat to the grand jury.

Finally, the Advisory Committee chose not to address the question whether federal courts have inherent authority to order disclosure of grand jury materials. In the Advisory Committee's view, this question concerns the scope of "[t]he judicial power" under Article III. That is a constitutional question, not a procedural one, and thus lies beyond the Advisory Committee's authority under the Rules Enabling Act.

The Advisory Committee further declined the suggestion that subdivision (e) be amended to authorize courts "to release judicial decisions issued in grand jury matters" when, "even in redacted form," those decisions reveal "matters occurring before the grand jury." The Advisory Committee agreed with the subcommittee's determination that the means currently available to judges—particularly redaction—were generally adequate to allow for sufficient disclosure while complying with Rule 6(e).

Rule 6(c) (Foreperson and Deputy Foreperson). Also before the Advisory Committee was a suggestion to amend Rule 6(c) to expressly authorize forepersons to grant individual grand

jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts. The Advisory Committee agreed with the recommendation of the subcommittee that at present there is no reason to disrupt varying local practices with a uniform national rule.

Rule 49.1 (Privacy Protections for Filings Made with the Court)

Rule 49.1 was adopted in 2007, as part of a cross-committee effort to respond to the E-Government Act of 2002. The committee note incorporates the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the CACM Committee that "sets out limitations on remote electronic access to certain sensitive materials in criminal cases," including "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act." The guidance states in part that such documents "shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access."

Before the Advisory Committee is a suggestion to amend the rule to delete the reference to financial affidavits in the committee note because the guidance as to financial affidavits is "problematic, if not unconstitutional" and "inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date." *See United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021) (holding that the defendant's financial affidavits were "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment).

The Advisory Committee formed a subcommittee to consider the suggestion. Its work will include consideration of the privacy interests of indigent defendants and their Sixth Amendment right to counsel, and the public rights of access to judicial documents under the First Amendment and the common law. The subcommittee plans to coordinate with the Bankruptcy

and Civil Rules Committees since their rules have similar language, and will also inform both the CACM Committee and the CAOAC that it is considering this issue.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met in person (with some non-member participants joining by videoconference) on November 5, 2021. In addition to an update on Rules 106, 615, and 702, currently out for public comment, the Advisory Committee discussed possible amendments to Rule 611 to regulate the use of illustrative aids and Rule 1006 to clarify the distinction between summaries that are illustrative aids and summaries that are admissible evidence. The Advisory Committee also discussed possible amendments to Rule 611 to provide safeguards when jurors are allowed to pose questions to witnesses, Rule 801(d)(2) to provide for a statement's admissibility against the declarant's successor in interest, Rule 613(b) to provide a witness an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the statement is admitted, and Rule 804(b)(3) to require courts to consider corroborating evidence when determining admissibility of a declaration against penal interest in a criminal case.

Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence)

The Advisory Committee is considering two separate proposed amendments to Rule 611. First, the Advisory Committee is considering adding a new provision that would provide standards for allowing the use of illustrative aids, along with a committee note that would emphasize the distinction between illustrative aids and admissible evidence (including demonstrative evidence). Second, the Advisory Committee is considering adding a new provision to set forth safeguards that must be employed when the court has determined that jurors will be allowed to pose questions to witnesses.

Rule 1006 (Summaries to Prove Content)

The Advisory Committee determined that courts frequently misapply Rule 1006, and most of these errors arise from the failure to distinguish between summaries of evidence that are admissible under Rule 1006 and summaries of evidence that are inadmissible illustrative aids. It is considering amending Rule 1006 to address the mistaken applications in the courts.

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

The Advisory Committee is considering a proposed amendment to Rule 801(d)(2) regarding the hearsay exception for statements of party-opponents. The issue arises in cases in which a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another, and it is the transferee that is the party-opponent. The Advisory Committee is considering an amendment to provide that if a party stands in the shoes of a declarant, then the statement should be admissible against the party if it would be admissible against the declarant.

Rule 613 (Witness's Prior Statement)

The Advisory Committee is considering a proposed amendment to Rule 613(b), which currently permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. However, courts are in dispute about the timing of that opportunity. The Advisory Committee determined that the better rule is to require a prior opportunity to explain or deny the statement (with the court having discretion to allow a later opportunity), because witnesses will usually admit to making the statement, thereby eliminating the need for extrinsic evidence.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

The Advisory Committee is considering a proposed amendment to Rule 804(b)(3). The rule provides a hearsay exception for declarations against interest. In a criminal case in which a

declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement, but there is a dispute about the meaning of the "corroborating circumstances" requirement. The Advisory Committee is considering a proposed amendment to Rule 804(b)(3) that would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

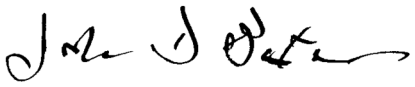
JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (1st Cir.), regarding pandemic-related issues and lessons learned for which Committee members recommend further exploration through the judiciary's strategic planning process. The Committee's views were communicated to Chief Judge Howard by letter dated January 11, 2022.

FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

In 1987, the Judicial Conference established a requirement that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." JCUS-SEP 1987, p. 60. Because this review is scheduled to occur again in 2022, the Committee was asked to evaluate the continuing importance of its mission as well as its jurisdiction, membership, operating procedures, and relationships with other committees so that the Executive Committee can identify where improvements can be made. To assist in the evaluation process, the Committee was asked to complete the 2022 Judicial Conference Committee Self-Evaluation Questionnaire. The Committee provided the completed questionnaire to the Executive Committee.

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

Effective December 1, 2021

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2021)
- Approved by Judicial Conference (Sept 2020) and transmitted to Supreme Court (Oct 2020)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Amendment conforms the rule to amended Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Amendments conform the forms to amended 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	Subdivision (c) amended to replace 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	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	Amendment conforms the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	AP 26.1, BK 8012
BK 9036	Amendment requires high-volume paper notice recipients (initially 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.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
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. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They were published along with the SBRA Rules in order to give the public a full opportunity to comment. The proposed change to Form 122B was approved at all stages after the public comment period closed in February 2021, and when into effect December 1, 2021. There were no comments on the remaining SBRA forms and they remain in effect as approved in 2019.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021 – Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi).	CV 87 (Emergency CV 6(b)(2))
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2022.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021 – Feb 2022)

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

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- To be published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved by Standing Committee (January 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to (g) to reflect the consolidation of Rules 35 and 40.	Rules 35 and 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	Rule 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	Rule 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	Rules 35 and 40.
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to all subparts of the rule, not just to subpart (a).	

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.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.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Mutual Fund Litigation Reform Act	**H.R. 699** *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** This bill provides a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 2/2/21: Introduced in House; referred to Judiciary Committee and Financial Services Committee • 3/22/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Protect Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Co-sponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Administrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	
Eliminating a Quantifiably Unjust Application of the Law Act of 2021	**H.R. 1693** *Sponsor:* Jeffries (D-NY) *Co-Sponsors:* [56 bipartisan co-sponsors]	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr1693/BILLS-117hr1693rfs.pdf **Summary:** The bill decreases the penalties for certain cocaine-related controlled substance crimes, and allows those convicted under prior law to petition to lower the sentence. The bill then provides that "[n]otwithstanding Rule 43 of the Federal Rules of Criminal Procedure, the defendant is not required to be present" at a hearing to reduce a sentence pursuant to the bill.	• 3/9/21: Introduced in House; referred to Judiciary Committee and Committee on Energy and Commerce • 5/18/21: Referred to Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security • 7/21/21: Judiciary Committee consideration and mark-up session held; reported from committee as amended • 9/28/21: Debated in House • 9/28/21: Passed house in roll call vote 361-66 • 9/29/21: Received in enate; referred to Judiciary Committee

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Sunshine in the Courtroom Act of 2021	**S.818** *Sponsor:* Grassley (R-IA) *Co-sponsors*: Blumenthal (D-CT) Cornyn (R-TX) Durbin (D-IL) Klobuchar (D-MN) Leahy (D-VT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines. This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."	• 3/18/21: Introduced in Senate; referred to Judiciary Committee • 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 6/24/21: Ordered to be reported without amendment favorably by Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Co-sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)		**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."	• 3/18/21: Introduced in Senate and House; referred to Judiciary Committees • 5/3/21: Letter received from Sen. Grassley and Rep. Issa • 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates • 10/19/21: Referred by House Judiciary Committee to Subcommittee on Courts, Intellectual Property, and the Internet

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Co-sponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes." Section 2 of the bill contains the following two subdivisions that implicate Rules: "(b) PROTECTION OF TRADE SECRETS.— (1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts. (2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, as such rules would function in the absence of an evidentiary privilege." "(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software."	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology • 10/19/21: Referred by Judiciary Committee to Subcommittee on Crime, Terrorism, and Homeland Security
Juneteenth National Independence Day Act	**S. 475**	AP 26; BK 9006; CV 6; CR 45	Established Juneteenth National Independence Day (June 19) as a legal public holiday	• 6/17/21: Became Public Law No: 117-17

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Bankruptcy Venue Reform Act of 2021	**H.R. 4193** *Sponsor*: Lofgren (D-CA) *Co-Sponsors:* Buck (R-CO) Perlmutter (D-CO) Neguse (D-CO) Cooper (D-TN) Thompson (D-CA) Burgess (R-TX) Bishop (R-NC) **S. 2827** *Sponsor:* Cornyn (R-TX) *Co-sponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to Bankruptcy proceedings. Senate version includes a limitation absent from the House version giving "no effect" for purposes of establishing venue to certain mergers, dissolutions, spinoffs, and divisive mergers of entities. Would require the Supreme Court to prescribe rules, under § 2075, to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in Bankruptcy Cases and arising under or related to proceeding before bankruptcy and district courts and BAPS.	• 6/28/21: H.R. 4193 introduced in House; referred to Judiciary Committee • 9/23/21: S. 2827 introduced in Senate; referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	**S. 2497** *Sponsor*: Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195 **Summary:** Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate. • Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate.	• 7/28/21: Introduced in Senate, Referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Co-Sponsors:* [168 co-sponsors]	CR 6; CV	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/5314/text [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate]	• 9/21/21: H.R. 5314 introduced in House; referred to numerous committees, including House

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
	S. 2921 *Sponsor:* Klobuchar (D-MN) *Co-Sponsors:* Blumenthal (D-CT) Coons (D-DE) Feinstein (D-CA) Hirono (D-HI) Merkley (D-OR) Sanders (I-VT) Warren (D-MA) Wyden (D-OR)		**Summary:** Various provisions of this bill amend existing rules, or direct the Judicial Conference to promulgate additional rules, including: • Prohibiting any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of certain grand jury materials related to individuals pardoned by the President • Requiring the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	Judiciary Committee • 9/30/21: S. 2921 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs • 12/9/21: H.R. 5314 debated and amended in House under provisions of H. Res. 838 • 12/9/21: H.R. 5314 passed by House • 12/13/21: House bill received in Senate
Congressional Subpoena Compliance and Enforcement Act	H.R. 6079 *Sponsor:* Dean (D-PA) *Co-Sponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** The bill directs the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	• 11/26/21: Introduced in House; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	S. 3385 *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Sanders (I-VT) Blumenthal (D-CT) Hirono (D-HI) Warren (D-MA) Lujan (D-NM)	AP 29	**Bill Text:** https://www.congress.gov/117/bills/s3385/BILLS-117s3385is.pdf **Summary:** In part, the legislation would require 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.	• 12/14/21: Introduced in Senate; referred to Judiciary Committee

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Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Courtroom Videoconferencing Act of 2022	**H.R. 6472** *Sponsor:* Morelle (D-NY) *Co-Sponsor:* Fischbach (R-MN) Bacon (R-NE) Tiffany (R-WI)	CR	**Bill Text:** https://www.congress.gov/117/bills/hr6472/BILLS-117hr6472ih.pdf **Summary:** The bill would make permanent certain CARES Act provisions, including allowing the chief judge of a district court to authorize teleconferencing for initial appearances, arraignments, and misdemeanor pleas or and sentencing. The bill would require the defendant's consent before proceeding via teleconferencing, and would ensure that defendants can utilize video or telephone conferencing to privately consult with counsel. The bill's provisions would apply even in the absence of an emergency situation.	• 1/21/22: Introduced in House; referred to Judiciary Committee
Save Americans from the Fentanyl Emergency Act of 2022	**H.R. 6946** *Sponsor:* Pappas (D-NH) *Co-Sponsosr:* Newhouse (R-WA) Budd (R-NC) Suozzi (D-NY) Van Drew (R-NJ) Cuellar (D-TX) Roybal-Allard (D-CA) Craig (D-MN) Spanberger (D-VA)	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr6946/BILLS-117hr6946ih.pdf **Summary:** The bill decreases the penalties for certain fentanyl-related controlled substance crimes, and allows those convicted under prior law to petition to lower the sentence. The bill then provides that "[n]otwithstanding rule 43 of the Federal Rules of Criminal Procedure, the defendant is not required to be present" at a hearing to vacate or reduce a sentence pursuant to the bill.	• 3/7/22: Introduced in House; referred to the Committee on Energy and Commerce and Judiciary Committee
Government Surveillance Transparency Act of 2022	**S. 3888** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Daines (R-MT) Lee (R-UT) Booker (D-NJ) **H.R. 7214** *Sponsor:* Lieu (D-CA) *Co-Sponsors:* Davidson (R-OH)	CR 41	**Bill Text:** https://www.congress.gov/117/bills/s3888/BILLS-117s3888is.pdf [Senate] https://www.congress.gov/117/bills/hr7214/BILLS-117hr7214ih.pdf [House] **Summary:** The bill explicitly adds a sentence and two subdivisions of text to Rule 41(f)(1)(B) regarding what the government must disclose in an inventory taken pursuant to the Rule. See page 25 of either PDF for full text.	• 3/22/22: Introduced in Senate; referred to the Judiciary Committee • 3/24/22: Introduced in the House; referred to the Judiciary Committee

TAB 2

TAB 2A

MEMO TO:	**Criminal Rules Committee**
FROM:	**Professors Sara Sun Beale and Nancy King, Reporters**
RE:	**Recommendations of the Rule 62 Subcommittee Regarding Comments Received after Publication**
DATE:	**April 6, 2022**

At its April 2022 meeting the Criminal Rules Committee will be asked to approve the final version of proposed Rule 62 to forward to the Standing Committee, and subsequently to the Supreme Court and Congress.

The public comment period closed February 16, and the Rule 62 Subcommittee met by telephone on March 14 to consider the comments received. A brief description of each comment is provided at Tab 2B of the April 28, 2022 agenda book, and the full text of the comments may be accessed at this link.

This memorandum describes the deliberations of the Rule 62 Subcommittee and its recommendations regarding revisions of the published rule and note. In brief, the subcommittee recommends no changes to the *text* of the proposed rule as published for public comment, but it does recommend two related revisions to the committee note accompanying proposed 62(d)(1).

The discussion that follows begins with the subcommittee's recommended change to the committee note, then addresses each of the other issues raised by the public comments, for which the subcommittee recommends no changes.

I. RECOMMENDED CHANGE – PARAGRAPH (d)(1) AND VICTIMS

A. Comments received

Paragraph (d)(1) concerns "public access." Three submissions commented on the reference to "victims" in the published committee note discussing (d)(1), which read: "The rule creates a duty to provide the public, *including victims*, with 'reasonable alternative access,' notwithstanding Rule 53's ban on the 'broadcasting of judicial proceedings.'" (emphasis added). The comments offered conflicting views.

The **Department of Justice (21-CR-0003-0008)** requested that the following sentence be added to the note: "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771." It explained:

> …without an explicit reference to the CVRA, the commentary's grouping of victims with the public for the purposes of providing "reasonable alternative access, contemporaneous if feasible" may result in courts providing reasonable alternative access that falls short of the CVRA's requirements. We believe a victim should be considered similar to a participant in the proceedings, and not the public. Most

> importantly, we think the CVRA must be scrupulously followed. When providing "reasonable alternative access," courts must account for a victim who wishes to exercise her right: 1) to be "reasonably heard" at any public court proceeding involving the "release, plea, sentencing," or parole of the accused; 2) to not be excluded from any such court proceeding subject to limited exceptions; and 3) to have reasonable, accurate, and timely notice of any public court proceeding involving the crime, release, or escape of the accused. 18 U.S.C. § 3771(a)(2)-(4). Non-contemporaneous access or access that allows a victim to watch or listen, but not participate in the public proceedings, may not satisfy the CVRA. To avoid confusion the Department recommends explicitly referencing courts' obligations to comply with CVRA in the commentary.

The **National Association of Criminal Defense Lawyers (NACDL (21-CR-0003-0011)** strongly disagreed with DOJ's request, and it urged no change to the published note. NACDL argued:

> The current draft Note is entirely correct to group alleged victims with other members of the public for this purpose. The CVRA does not dictate the details of "victim" notice or access, and in some respects is superseded by Fed.R.Crim.P. 60. As to procedural implementation, then, under the principles of the Rules Enabling Act the CVRA's notice and attendance requirements are properly subordinated to the provisions of the new Rule (in the event of a qualifying emergency), just as it is to Rule 60(a) in ordinary times. The Department's suggested addition to the Committee Note would not "avoid confusion" but rather would engender it, by encouraging challenges by alleged "victims," either before or after the fact, to proceedings held in accordance with the Rule.

Professor Miller and the Federal Criminal Justice Clinic at the University of Chicago (FCJC) (21-CR-0003-0013) requested that the Committee eliminate the phrase "'including victims' from the phrase 'duty to provide the public, including victims, with 'reasonable alternative access.'" Alternatively, the FCJC suggested revising the note to reflect the Sixth Amendment's priority of access for the friends and family of the defendant, and to ensure reasonable press access.

In addressing this topic and several others discussed below, the FCJC argued that some of the language in the proposed rule and note is misleading or inconsistent with existing constitutional standards:

> The Note's express reference to victims and silence about friends and family of the defendant may be interpreted to suggest that courts should prioritize the access rights of victims over others when space is limited. The Note thus appears to conflict with Supreme Court precedent that requires courts to provide access for friends and family of the accused, *Oliver*, 333 U.S. at 272.

The FCJC stated that "access problems can be felt most acutely by friends and family of the accused," listing lack of technology or the knowledge to use it, "[i]mprecise instructions that

impede their ability to access proceedings," and the importance of their contributions at detention hearings and sentencings, under 18 U.S.C. §§ 3142(g)(3)(A); 3553(a)(1)."

B. Background

As the note explains, the committee was concerned that emergency conditions could limit public access to criminal proceedings protected by the First and Sixth Amendments, and it believed guidance was needed on this point given the prohibition on "broadcasting" in Rule 53. None of the participants in the miniconference raised concerns about access by victims in particular, and the consideration of access for victims first appeared in the note's explanation for the term "public proceeding." That sentence reads: "The term 'public proceeding' was intended to capture proceedings that the rules require to be conducted 'in open court,' *proceedings to which a victim must be provided access*, and proceedings that must be open to the public under the First and Sixth Amendments." (emphasis added).

At the committee's fall 2020 meeting, a member suggested that a reference to victims be added to either the text or the note because the CVRA and Rule 60 require that they be permitted to be reasonably heard at some proceedings. Following that meeting, the subcommittee considered defining "the public" for the purposes of Rule 62 as including, but not limited to, "victims, the family and friends of the defendant, and the press." The subcommittee decided to add a reference to victims in the published note. But it chose not to define "the public" or add references to the press or defendant's family and friends. As approved for publication, the committee note provided: "The rule creates a duty to provide the public*, including victims*, with 'reasonable alternative access,' notwithstanding Rule 53's ban on the 'broadcasting of judicial proceedings.'" (emphasis added).

C. Subcommittee deliberations on the public comments

The subcommittee was concerned that the proposed Rule and note avoid conflicts with the CVRA, as it is not the committee's intention to supersede that statute. The reporters noted that as matter of Standing Committee policy the advisory committees generally tailor proposed rules to align with existing statutes—rather than supersede them under the Rules Enabling Act—and that conforming to that policy is particularly important here because Rule 62 is part of a coordinated package of rules being prepared on an accelerated schedule.

One member of the subcommittee expressed the view that the access for the public should be sufficient for victims, and there was a suggestion that if victims were listed, friends and family of the defendant should be listed as well.

The reporters responded that victims, unlike other members of the public, have statutory rights—as well as rights under Rule 60—to *participate* in some hearings. The provisions in the CVRA, as well as Rule 60, provide victims a right to be "reasonably heard" at certain proceedings. This right to participate in the proceeding differs from the rights a member of the public would have under the First Amendment and common law rights of access.

The reporters suggested an alternative that would draw attention to the concerns about victim participation under the CVRA—and also the concerns raised by FCJC that any access comply with the First and Sixth Amendments—without suggesting a position on substantive issues of constitutional law, prioritizing any particular group among the public, or attempting to list which groups should be "included" in the concept of the public. They proposed deleting the phrase "including victims" and adding this sentence to the note's discussion of (d)(1): "When providing 'reasonable alternative access,' courts must be mindful of the constitutional guarantees of public access in the First and Sixth Amendments, and [any applicable statutory provision, including] the Crime Victims' Rights Act, 18 U.S.C. § 3771."

Subcommittee members generally supported this approach, and discussion focused on the wording of the addition. One question was whether to include the bracketed language referencing other potential statutes on access. Although no one knew of any other applicable statute regulating access to criminal proceedings, members noted that including the bracketed phrase would accommodate future legislative developments. Mr. Wroblewski suggested that it would aid parallel construction to include a reference to "rights" to mirror the reference to "guarantees," but that suggestion did not receive general support.

D. The Subcommittee's recommendation

The subcommittee recommends deleting the parenthetical phrase "including victims" and adding this new paragraph to the committee note to (d)(1):

> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access in the First and Sixth Amendments, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

The subcommittee's proposed committee note—showing the proposed deletion as a strikeout and insert underlined—reads:

> **Paragraph (d)(1)** addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" was intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public~~, including victims,~~ with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.
>
> The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only

when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.

When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access in the First and Sixth Amendments, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

II. SUGGESTIONS DECLINED: NO CHANGE RECOMMENDED

A. Subdivision (a) - The role of the Judicial Conference

1. Comments received

Two comments addressed the language in subdivision (a) authorizing the Judicial Conference to declare a "judicial emergency." The comments state conflicting views. The **Federal Magistrate Judges Association (FMJA) (21-CR-0003-0006)** expressed concern that "the Judicial Conference might not be well suited to addressing regional or District-specific emergencies of the type more likely to present in the future." In contrast, the **Federal Bar Association (21-CR-0003-0009)** "agree[d] that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." It noted that "[c]onferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts."

2. Subcommittee deliberations

Subcommittee members noted that the committee had already thoroughly considered concerns that the Judicial Conference was not well-suited to addressing more localized emergencies. The published rule reflects a consensus of all the Advisory Committees and the Standing Committee that this authority should be lodged within the judicial branch, and that only the Judicial Conference should be authorized to make that determination. The Judicial Conference will act as a national gatekeeper, charged with strictly limiting the authority to depart from the Rules of Criminal Procedure, which have been carefully designed to protect constitutional and statutory rights, as well as other interests.

The Criminal Rules Committee was satisfied that the Judicial Conference has demonstrated the ability to gather information and respond quickly to emergencies, including those that might affect only certain circuits or districts. At the November 2020 meeting, the Committee discussed the concern that sole reliance on the Judicial Conference to declare a rules emergency is unwise if

the Conference might under some circumstances be unable to act. The minutes state: "Professor Coquillette, who served for decades as the Reporter to the Standing Committee, stated that the Judicial Conference has been nimble and responsive, and it can act quickly through its Executive Committee." Minutes at 5-6. The minutes also state that "[o]ur subcommittee thought that the Judicial Conference would be able to gather the necessary information and respond expeditiously to emergencies." *Id.* at 4.

After discussion, the subcommittee declined to revise the carefully crafted consensus about the authority of the Judicial Conference reflected in subdivision (a) as published.

B. Paragraph (d)(1) - Public access, issues other than victims

1. Adding reference to constitutional standards, deleting or revising existing references to contemporaneous and audio access

a. Comments received. Two comments expressed concern that the language "contemporaneous if feasible" in the text of (d)(1) and accompanying note did not convey adequately the importance of providing contemporaneous access and might be read as endorsing delayed access. They proposed different revisions to avoid this concern.

The **FMJA (21-CR-0003-0006)** requested that the committee "eliminate the reference of contemporaneous if feasible" or revise the text to "indicate public access may only be denied if the interests of justice require a proceeding to go forward without public access." The FMJA expressed concern that this phrase "might actually lead to more frequent denial of public access."

The **FCJC (21-CR-0003-0013)** commented that the committee should revise the proposed rule to "expressly provide that any limitations on public access during Rules Emergencies must satisfy *Waller*." Specifically, "the Rule should be amended to expressly state that courts must provide both contemporaneous and audio-visual public access except where closure complies with the constitutional standard." The FCJC objected to the statement in the note that "In a proceeding conducted by videoconference, a court could provide access to the audio transmission if access to the video transmission is not feasible." Also, the FCJC urged that "the Rule and Note should clarify that feasibility and appropriateness are likewise governed by the constitutional standard."

In support, the FCJC made two main arguments. First, it argued that contemporaneous, visual access can only be limited if *Waller*'s four-part test is met. It maintained that visual access is critical to the public's trust in the fairness of the judicial system, to ensure "that the public can follow who is speaking during a proceeding and can understand the proceeding's meaning," monitor the temperament and bias of court participants, learn about unjust or illegal prosecutions or mistreatment of the defendant, and gather otherwise unavailable data on race and gender. Second, the FCJC argued that the phrases "contemporaneous if feasible," "reasonable alternative access," and "appropriate circumstances" all misstate the constitutional standard, which requires [1] that a closure must "advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support

the closure." (citing *Waller*, 467 U.S. at 48 and *Press-Enterprise I*, 464 U.S. at 510). The FCJC argued the published note could lead to confusion or be read as implicitly "abandon[ing] *Waller* in favor of a novel single-factor test" focused on the third requirement. The FCJC also argued that "to the degree" that the proposed rule authorizes closures that do not comply with the law, it "is unconstitutional and violates the Rules Enabling Act."

The FCJC also reported that during the current public health emergency no districts limited the public to transcripts or previously-recorded audio, at least after the early days of the pandemic, that 14 districts have guaranteed some public video access to video proceedings during the pandemic, and that 32 districts appeared to limit the public's virtual access to audio alone, with insufficient attention to the *Waller* test.

b. Subcommittee deliberations. The subcommittee considered and rejected the suggestion that it add language to the proposed rule or note referencing the constitutional standards for closure in *Waller* and *Press Enterprise*. The published note states only that the "term 'public proceeding' was intended to capture proceedings that the rules require to be conducted 'in open court,' proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments."

In advising the subcommittee on this issue, the reporters noted that many rules are drafted in general terms that leave to case-by-case development the application of constitutional standards, even when public comments seek to include such standards. For example, when the Criminal Rules Committee published a proposal to amend Rule 41(b)(6) to allow remote electronic searches outside the district, many comments sought revisions to provide more detailed requirements that the proponents argued were required by the Fourth Amendment. The committee declined to make those additions. The committee note explained:

> The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing and copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.[1]

The Rule 62 Subcommittee was not inclined to add language to the note accompanying (d)(1) that would point to *Waller* or *Press Enterprise* as governing every potential restriction on public access, which could include so-called "partial" closures. It also rejected the alternative of adding to the note a sentence that would state that the rule "does not seek to identify, define, or affect the constitutional requirements for limiting public access." Instead, the subcommittee

[1] To respond to a widespread misunderstanding that the amendment eliminated any Fourth Amendment restrictions on remote searches of persons who accessed their computers using a virtual public network (VPN), and to clarify that the rule was about venue for seeking a warrant and did not affect the constitutional rules governing searches—which no rule could do—the Committee did revise the caption and explained in the note: "Adding the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must also be met."

concluded that the addition to the note that it had just approved to address the concern about victims would be also sufficient to address the concern that the rule would be read as misstating the constitutional standards. That addition, which appears on page 5 of this memo, begins: "When providing 'reasonable alternative access' courts must be mindful of the constitutional guarantees of public access in the First and Sixth Amendments . . . ."

The subcommittee also declined to revise the "contemporaneous, if feasible" language in the text of the rule or the note, despite the concerns raised by both the FMJA and the FCJC. Initially, the proposed rule and note did not contain this language. In the memo to the committee for its fall meeting in 2020, the reporters stated that although there was some support for requiring that the "reasonable alternative access to that proceeding" be "real time" or "contemporaneous," the subcommittee had decided not to include that requirement, preferring to allow the courts to determine what is feasible in a variety of circumstances that cannot be foreseen. The memo explained:

> The amendment does not address the question how such access must be provided, recognizing that there are a variety of virtual platforms and settings, which will inevitably change over time. Problems that have arisen on some platforms during the current pandemic may very well be eliminated, and perhaps replaced by different problems, in the future. Attempting to anticipate such technological developments in a rule seems unwise.

At its fall 2020 meeting, the Criminal Rules Committee expressed some support for including the requirement of contemporaneous access. It was then that a member suggested including in the note some *examples* of alternative access, and stated that in that member's district, "[t]hey had not yet figured out a way to get the public into the video, but if there is a video hearing members of the public can access the audio." Minutes at 16.

Following that meeting, the subcommittee reconsidered this issue. As a compromise between the view that access must be contemporaneous and the view that the ability to provide contemporaneous access might be compromised in future unknown emergency situations, the subcommittee agreed to make several additions to the note: the language "contemporaneous, if feasible," the reference to audio access, and the statement about the use of an overflow room. It also added "contemporaneous if feasible" to the *text* of the proposed rule, rejecting the argument that it was sufficient to include it only in the note. The word "feasible" was selected instead of "possible" because it was used elsewhere in the rule, in (a) and (c), and the subcommittee intended it to convey the same meaning. The committee later accepted these changes in approving the rule and note for publication.

After considering the public comments from the FMJA and the FCJC, most subcommittee members were not persuaded that the phrase "contemporaneous, if feasible" in the rule text would create more problems than it would prevent, though one member preferred that it be deleted. Members had a range of views on whether "possible" would be better than "feasible," and how to express a preference for video rather than audio access but still allow audio if the video fails. Without consensus in favor of a particular change in either the rule or the note on these points, the

subcommittee retained the published language "contemporaneous, if feasible" in the text of the proposed rule, and the language in the last paragraph of the published note on (d)(2).

2. Adding requirements that unless *Waller* is satisfied, public access must allow participants to see observers, and must not require advance registration

a. Comments received. The **FCJC (21-CR-0003-0013)** urged the committee to revise the Rule and note to "expressly require that court participants be able to see the public unless *Waller* can be satisfied." Stating that during the pandemic at least 32 districts rendered spectators "effectively invisible" by reducing them to a phone number on a computer screen, the FCJC argued that the public should be visible to participants to the degree possible. It argued that "the presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *Gannett Co.*, 443 U.S. at 380). Without being seen, the public may lose trust in the criminal justice system, the FCJC argued. Admitting that "*Waller* may well allow such restrictions based on technological capacity and courtroom decorum," the FCJC argued that "such closures should be analyzed and justified, not taken as the default."

The FCJC also asks the Committee to bar courts from conditioning public access on advance permission of the court, except as permitted by *Waller*. The submission states: "Eliminating advance registration requirements would bring public access during Rules Emergencies closer to the norm: The public could 'walk into' a courtroom at any time, with or without permission, unless the courtroom has been lawfully closed."

b. Subcommittee deliberations. Neither the subcommittee nor the committee had discussed these two concerns before. Like the FCJC's earlier suggestion to add a reference to *Waller*, these suggestions raise the question how much to say in the rule or note about constitutional requirements. Both of these suggestions also raise the question how much detail to provide in the rule about requirements for remote access, and what to leave to individual courts, or to standards provided by CACM, the Benchbook, etc.

The subcommittee recognized that courts have mentioned the potential benefits of public access on participant behavior, as the FCJC notes. The members were not persuaded, however, that a change to the proposed rule or note mandating that participants can see observers was warranted. The new note language that the subcommittee had already agreed to add ("When providing 'reasonable alternative access' courts must be mindful of the constitutional guarantees of public access in the First and Sixth Amendments, ..."), should address any constitutional concerns about access options that limit the participants' view of observers, such as crowded or distanced courtrooms, overflow viewing areas, or remote proceedings.

As to advance registration for joining remote proceedings, the subcommittee had learned in the process of drafting the rule that registration was one of many practices courts were using to manage remote proceedings without violating Rule 53's ban on broadcasting. Neither the subcommittee nor the committee had expressly considered whether the practice violated

constitutional requirements. Members were aware of rulings upholding a variety of other restrictions on access, such as checking ID's before entry.

The subcommittee declined to revise either the rule text or note to single out the practice of advance registration.

3. Requiring announcement of public access limitations

a. Comments received. After describing the many barriers to public access during the pandemic,[2] the **FCJC (21-CR-0003-0013)** proposed adding to the rule the requirement of a prominently placed, district-wide announcement of any public access limitations that (a) details the scope of the limitation, (b) explains in plain language how the public can access court, and (c) contains necessary constitutional findings. The FCJC argued:

> "[s]ome of these access problems may violate the constitutional requirements for closure, for example, general orders that did not check off the requirement to "consider alternatives" or to identify the connection between the form of closure and the "overriding interest" of the pandemic. *Waller*, 467 U.S. at 48. Meanwhile, some districts provided no general order setting out the scope of district-wide public access limitations. When closures affect every criminal case in a district the public announcement notice should be equally broad. *Cf. Hearst Newspapers, L.L.C.*, 641 F.3d at 183.

b. Subcommittee deliberations. This proposal—like some other aspects of the FCJC's submission—sought to incorporate many detailed provisions into (d)(1). The reporters offered two main observations. First, the Benchbook, or guidance from CACM or other bodies, might be a more appropriate site for this level of detail than the rule. Second, the proposal would affect not only criminal cases, but also civil cases.

The subcommittee declined to add this requirement for a district-wide announcement to the proposed rule or note.

4. Barring courthouse-only access for the public

a. Comment received. The **FCJC (21-CR-0003-0013)** objected to language in the published note that states: "For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided."

[2] FCJC described the following practical barriers to access: (1) districts lacked an announcement describing how to access virtual court in a handful of districts, or had only ambiguous orders; (2) districts required registration well in advance of proceedings, by 4 pm the day before or 24 hours in advance; (3) districts required making "request to the chambers of the presiding judge" for permission; (4) districts permitted only the parties and courtroom personnel to attend proceedings virtually, requiring observers to travel to the courthouse itself; (5) in the order limiting public access to the courthouse, districts failed to state the "necessary connection" between public health and safety and the specifics of the public access limitation or that identified "reasonable alternatives"; and (6) other technical glitches.

The FCJC argued that "[t]he Rule should prohibit courthouse-only [public] access to remote proceedings," and "should recommend that districts allow remote access to any proceedings remotely or partially remotely. That remote access should not be within the courthouse itself." Noting that several districts allowed only in-person public access, even to remote or partially remote hearings, the FCJC commented it is "debatable whether doing so during a deadly and contagious pandemic constitutes public access within the meaning of the First and Sixth Amendments." But in any event, the FCJC contends, such a restriction is "unwise." It explained: "when public health or safety is on the line—no one should have to choose between exercising their First or Sixth Amendment rights and risking their lives."

b. Subcommittee deliberations. The reporters advised the subcommittee that the practice of live streaming into an overflow room in the courtroom predates the pandemic, in situations where the demand for seats has exceeded those available in the courtroom. The reporters noted that in urging courts to provide the public with unlimited visual access to all remote proceedings, the FCJC did not take account of Rule 53's ban on broadcasting. That ban does not prohibit live streaming into another space in the courthouse but would probably bar live streaming to the public. The reporters were not aware of any case in which a court upheld either a First or Sixth Amendment objection to providing access via transmission to another courthouse space, and noted that the FCJC had cited no instance of a court requiring a person to risk her life to observe a court hearing.

Given the subcommittee's previous decision to add a general reference to constitutional requirements to the note, see page 5 of this memo, and its preference to avoid adding more detailed requirements for access, members were not persuaded to recommend barring courthouse-only access for either constitutional or policy reasons.

C. Paragraph (d)(2) -- Allowing the court to sign for the defendant

1. Comments received

Judge Denise Cote (21-CR-0003-0005) recommended that (d)(2) be revised to provide that "defense counsel or the court may sign for the defendant." She explained "it may be difficult and create unnecessary delay for the attorney to affix the defendant's name to a signature line and then provide that document to the court." She argued Rule 62 should focus exclusively on creating an unambiguous record of the defendant's consent, regardless who affixes the defendant's signature. Describing her court's experience during emergencies including the pandemic, Judge Cote noted that it regularly conducted proceedings where everyone participated remotely from different locations, and it was both useful and important for the court to be able to sign documents on the defendant's behalf with proper safeguards:

> Defense counsel were provided an opportunity to consult confidentially with the defendant and the judge confirmed on the record that the consultation had occurred, that the issue requiring the defendant's signature had been discussed, and that the defendant had knowingly and voluntarily given consent. Defense counsel often ask the judge to add the defendant's signature to the form or express relief when we

> volunteer to do so. Again, what is essential is that the consultation has occurred, that consent has been knowing and voluntary, and that there is an adequate contemporaneous record of this consultation and assent.

The **FMJA (21-CR-0003-0006)** also advocated flexibility to deal with situations such as a defendant who is eligible for release, but whose counsel is unable to obtain the defendant's signature because of restrictions on visitation at detention facilities, and it agreed that the court should be able to sign for a defendant if the court can obtain "oral consent on the record." It urged that:

> Flexibility during emergencies is the key to ensuring a defendant can be seen promptly by the Court, especially when first arrested. Many members of the FMJA had to obtain oral consent on the record during the pandemic and believe the flexibility to do this was critical to ensuring that initial presentments, in particular, went forward without delay.

2. Subcommittee deliberations

As published, (d)(2) states (emphasis added): "If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—defense counsel may sign for the defendant if the defendant consents on the record." And (d)(2) also allows counsel to sign on behalf of a defendant who is not before the court at the time of consent; in that scenario, defense counsel must file an affidavit.

As published, the note states:

> **Paragraph (d)(2)** recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.

During the drafting process, the question whether to allow the court to sign documents for defendants who are represented by counsel, instead of requiring counsel to sign and submit those documents, was discussed first by the subcommittee, and then at the November 2021 meeting of the full committee. A member questioned why the judge could not sign for a defendant who consented on the record, asking why an additional step and additional paperwork was needed. And Judge Furman—our Standing Committee liaison—urged the committee to follow the practice in

the Southern District of New York, where both he and Judge Cote sit.

As reflected in the minutes of the November 2020 meeting, Judge Dever (who chaired the Emergency Rules subcommittee) agreed that creating an evidentiary record is an important function of the rule, noting that the written signature by counsel on the defendant's behalf is an "extra piece of evidence to the extent someone later says, 'I didn't really consent, or the judge misunderstood me' or something, which it raises issues again. There may need to be an evidentiary hearing." Minutes at 19. This procedure was suggested by defense attorneys at the miniconference, and the subcommittee was also following a local rule provided by one of the members. The draft also reflected the view that "if the rule now generally requires something be in writing, it will be useful to have the thing in writing." *Id.* Finally, Judge Dever raised an additional concern "that the judge might get in between that relationship, and that having the lawyer sign was better than allowing the judge to say, 'you consent—don't you?—and we're going to do this today.'" Minutes at 28. After further discussion at its May 2021 meeting, the Committee approved the draft language without change, based on the understanding that if the judge can see and hear that a counseled defendant consents, then *counsel* may sign on the defendant's behalf.[3]

Considering the objections of Judge Cote and the FMJA, the subcommittee discussed again whether to allow the judge as well as counsel to sign a writing for the defendant. What of the potential delay for counsel to create and file the document containing the consent? Members noted that defense counsel had not raised this concern or complained of difficulty creating or filing signed documents. To the extent this change is requested to further the preferences of defense counsel, the subcommittee was not persuaded that it reflected the views of the defense bar, or the best interests of defendants. From the beginning, defense attorneys have supported this as an appropriate safeguard. Defense participants at the miniconference, and subsequently defense members of Criminal Rules Committee and the Standing Committee, apparently did not believe that "it may be difficult and create unnecessary delay for the attorney to affix the defendant's name to a signature line and then provide that document to the court," or that emergency conditions would "almost always impede" counsel's submissions.

[3] The May 2021 draft minutes state (emphasis added):

> Mr. Wroblewski asked how the affidavit requirement in (d)(2) is triggered. Professor King responded that if the defendant is live before the judge on a video conference, and the judge can see and hear the defendant's consent, then the defense counsel can sign on the defendant's behalf. The judge can be fairly sure the defendant is actually giving consent. Lines 41–42 with the affidavit address the situation where the defendant is not in front of the judge. The judge may not be able to see or hear the defendant, but defense counsel is nonetheless signing for the defendant. This suggested procedure came from the miniconference, at which lawyers and judges talked about how they were managing difficulties during the pandemic. Using affidavits was how they were managing it, and there were no real concerns arising from that practice.

Draft minutes at 20.

Members of the subcommittee also were not persuaded that the requirement would inevitably delay proceedings, noting their own experiences during the pandemic. One member argued that in her experience there would be no efficiency gains by allowing the judge rather than counsel to sign. Nor was the subcommittee persuaded that avoiding any delay that might occur is a sufficient basis for discarding the advantages of a writing signed by the defendant's attorney, rather than the judge. Those advantages, as related in the history of the committee's deliberations noted above, include (1) departing from existing rules only as much as necessary—not whenever more convenient—during emergency conditions, (2) avoiding later claims that the judge's signature did not accurately reflect defendant's consent, and (3) ensuring that a judge is not in the position of asking a defendant directly for consent, but rather must go through counsel, preserving the duty of counsel to determine whether the defendant consents.

The subcommittee also considered whether it would be helpful to add some language in the committee note to clarify what the rule does and does not require but decided not to revise the published version.

D. Subdivision (e) -- Consultation with counsel in proceedings other than pleas and sentencing

1. Comments received

Three comments addressed the consultation language.

The **FMJA (21-CR-0003-0006)** recommended deleting from paragraph (e)(1) the requirement "that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings." That paragraph addresses videoconferencing authorized by current Rules 5, 10, 40, and 43(b)(2). The FMJA expressed concern that this requirement "appears to impose a duty on the Court only in emergency situations," and implies that this obligation does not exist in the non-emergency times.

Judge Cote (21-CR-0003-0005) recommended revising the proposed consultation requirements in (e)(1) and (2) so that they require that the defendant have an "adequate opportunity" to consult with counsel "confidentially either before ~~and~~ or during" certain videoconference proceedings. She explained:

> Our experience ... has been that consultation between the defendant and defense counsel might be very difficult to arrange, particularly if a defendant is incarcerated. If the record created by the judge during the proceeding establishes that an adequate opportunity for consultation has been provided for the particular proceeding (that is, for whatever the defendant must understand from that proceeding and do at it), that should be sufficient.

A third comment from **NACDL (21-CR-0003-0011)** supported retaining the requirement as published, but recommended adding to the note more explanation of what an "adequate

opportunity" would entail. NACDL expressed strong support for the requirement of an adequate opportunity to consult with counsel before (as well as during) proceedings under proposed Rule 62(e). During the pandemic, NACDL's members were "often unable to consult with clients—a critical aspect of rendering effective assistance of counsel—as frequently, for as long, or with sufficient privacy, as is required for us to establish a proper attorney-client relationship and fulfill our professional duties and constitutional mission." NACDL urged an addition to the committee note stating that "an 'adequate opportunity' will ordinarily require an unhurried and confidential meeting between the accused and counsel that occurs well before—and whenever feasible, not on the same day as—the proceeding itself." Noting that the current note is silent on what "before" means, NACDL urged that it should not be sufficient to have only a few minutes of contact just before the proceeding, while the other participants are waiting.

2. Subcommittee deliberations

The subcommittee discussed whether stating this obligation in the emergency rule would create any negative implication about normal practices, and whether that possibility is sufficient to justify the deletion of this procedural safeguard. The subcommittee remained convinced that the difficulty defense counsel have experienced in their efforts to meet with or otherwise communicate with their clients was one of the most serious challenges posed by the pandemic. The requirement in the proposed rule that the court ensure that counsel have an adequate opportunity to consult with their clients before as well as during video proceedings was intended to facilitate the constitutional right to effective assistance of counsel, even during judicial emergencies. In the Committee's view, the authorization of video for proceedings in which the rules currently bar its use is a last resort—a necessary evil during a judicial emergency—that requires stringent procedural safeguards. One of those safeguards is the express requirement in (e)(2) and (3) that courts ensure an adequate opportunity to consult with counsel both before and during the proceeding. The Committee also included this requirement in (e)(1) for video proceedings already authorized by Rules 5, 10, 40, and 43(b)(2) to address specifically situations in which emergency conditions "substantially impair" the opportunities to consult with counsel that a defendant ordinarily would have during nonemergency conditions.

The subcommittee believed that including this requirement in (e)(1)—where it is clearly conditioned on the impairment of consultation opportunities by emergency conditions—will not suggest that courts can dispense with consultation opportunities in non-emergency times. Accordingly, it declined to delete this language from (e)(1) as the FMJA requested.

The subcommittee discussed Judge Cote's request to change the proposed rule from requiring an adequate opportunity for confidential consultation with counsel before *and* during a video conference proceeding, to requiring only an adequate opportunity before *or* during the proceeding. In drafting the rule to require courts to ensure an adequate opportunity for confidential consultation both before and during a proceeding, the subcommittee learned that courts had been able to provide confidential consultation before and during video proceedings in multiple ways. Although members were aware that ensuring these opportunities often meant delays or interruptions, and that, as Judge Cote notes, confidential consultation could "be very difficult to arrange," members did not agree that any difficulty providing these opportunities justified the

change requested.

The subcommittee also declined to specify in more detail what ensuring an adequate opportunity to consult would entail, as NACDL requests. Members preferred retaining the general term "adequate opportunity" in the rule and the note, without adding the suggested elaboration that an adequate opportunity required "an unhurried and confidential meeting between the accused and counsel that occurs well before—and whenever feasible, not on the same day as—the proceeding itself." The rule's text already specifies the court ensure adequate opportunity for consultation that is confidential. And although members were sympathetic to NACDL's concern that a few minutes of contact before a proceeding may not be adequate to ensure effective representation, the subcommittee believed that to protect the defendant's rights to counsel, judges should have flexibility to adapt consultation opportunities to the varying circumstances of the individual proceeding, the participants in that proceeding, and the emergency during which the proceeding takes place.

E. Subdivision (e) -- The requirements for videoconferencing of pleas and sentencing

1. Subparagraph 62(e)(3)(B) – a written request from the defendant

a. Comments received. The Committee received comments from **Judge Denise Cote (21-CR-0003-0005)** and **Judge Mark R. Hornak (21-CR-0003-0012)** on this portion of the rule.

Judge Cote recommended omitting the requirement that felony pleas and sentencing can occur by videoconferencing only if the defendant, after consulting with counsel, has made a written request that the proceeding be conducted by videoconferencing. She urged that the rule be revised to allow videoconferencing if "the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by videoconferencing."

Judge Cote contended there is no need for a written request received *before* the proceeding, and if a written request is required, the rule should allow signature by the defendant, defense counsel, *or the court* on behalf of and with authorization from the defendant on the record. She urged that the focus should be on whether there is consent, based on consultation with defense counsel, and that the record adequately reflect informed and voluntary consent. She stressed practical difficulties:

> During an emergency it may be particularly difficult for a defendant to sign and transmit any writing to his/her counsel or the court. A defendant, particularly an incarcerated defendant, may lack access to the technology needed to sign and electronically transmit a request to his/her counsel or the court, and during an emergency such as a pandemic, defense counsel and the court may not be able to receive a signed writing by mail. Even if the Rule envisions that defense counsel may sign the written request on behalf of the defendant, defense counsel may in many emergencies find it difficult to create the writing and to transmit it.

Judge Hornak concurred in this portion of Judge Cote's comment. Based on his court's experience, he concluded:

> the requirement of an advance writing signed by the defendant (1) would likely be inconsistent with the circumstances generating the emergency that would warrant such proceedings in the first place, (2) would generate a procedure that would be functionally impractical in most every case during an emergency, (3) would create a precondition for which there does not appear to be empirical or anecdotal evidence of necessity, and (4) addresses a concern which may be readily addressed in alternative ways.

Judge Hornak stated that in his court the defendant's consent has been placed on the record and then confirmed in a colloquy with the defendant and counsel at each video-conference proceeding. He concluded that "imposing the 'written request signed by the defendant' requirement is almost certainly inconsistent with the existence of the emergency that would require it in the first place."

> Whether the emergency is caused by a natural disaster, act of war/terrorism /civil unrest, or a pandemic, the necessity to consider the use of videoconferencing in the first instance will be driven by the high level of difficulty (if not impossibility) in terms of access and operations that the emergency will engender. This will be particularly acute for those in detention, but even for defendants on bond/ conditions of release, physical or other access in order to exchange and process written and signed request documents will likely be most challenging and difficult for their own reasons.

Judge Hornak also stated that in his experience the courts have been conducting a "a detailed on-the-record colloquy to confirm the counseled consent and desire of the defendant to proceed via videoconferencing, and in those in which I have presided, there has been no doubt about that counseled consent and desire before the hearing proceeded." In his role as chief judge, he had received no formal or informal concerns about the counseled voluntary nature of the defendants' consent. Moreover, he argued, imposing this requirement is inconsistent with the type and level of judgments that district judges make in every plea proceeding. Finally, he concluded that allowing counsel to sign the required writing would not solve the problem because the existence of the emergency would almost always impede counsel's access.

Accordingly, Judge Hornak recommended either retaining the current consent procedures under the CARES Act, or requiring confirmation of counseled consent and a desire to proceed by videoconferencing via a judicial colloquy with the defendant at the beginning of the proceeding in question.

b. Subcommittee deliberations. The subcommittee reviewed the history of this written request requirement in (e)(3). The committee has consistently maintained that in-person proceedings for pleas and sentencings serve vital purposes and that the provisions allowing video or teleconferencing for these procedures are a last resort requiring the highest level of procedural

protections.

The committee regarded the decision to consent to videoconferencing for a plea or sentencing to be at least as significant as other decisions requiring written consent or request under the Rules. *See, e.g.*, Rules 23(a)(1) (waiver of trial by jury), 10(b)(2) (waiver of appearance at arraignment), 43(b)(2) (consent to trial of misdemeanor by videoconferencing or "in the defendant's absence"), and 20(a)(1) (transfer of case to another district if defendant states in writing a wish to plead guilty or nolo and waive trial in the district and consents in writing to transfer for disposition). The requirement of a writing serves two functions. First, by underlining the significance of the decision the defendant is making, it helps to ensure that the decision is knowing and voluntary. Second, it creates a record of the defendant's request or consent.

The requirement that the request for the use of video come from the defendant—after consultation with counsel—was intended to reduce the potential for pressure the defendant might feel if he or she were asked by the court to consent.

The subcommittee noted that in stressing the burdens of obtaining an incarcerated defendant's signature during the pandemic, some of the comments apparently overlooked subsection (d)(1) of the proposed rule, which allows defense counsel to sign for the defendant. During an emergency, if counsel has not been able to meet with the defendant in person, a videoconference or telephone conference between the defendant and counsel may be sufficient to provide an adequate opportunity for the consultation that is essential for an informed request for plea or sentencing by video; counsel could then sign for the defendant under (d)(1). To the extent the comments argue that requiring a request signed *by counsel* should not be required either, the subcommittee disagreed, for the reasons stated earlier in connection with (d)(1).

2. Subdivision (e) – advice about consenting to remote pleas or sentencing

a. Comment received. The **FMJA (21-CR-0003-0006)** suggested that the rule should include specific information that counsel must provide to the defendant when the rules specify that the defendant must consent to videoconferencing or other remote means:

> FMJA suggests that the rule itself specify that, in seeking a defendant's informed consent, counsel must explain that the defendant is not required to consent or to waive the right to be present in person at any proceeding. It notes that if a defendant does not consent to use of remote means, the lack of consent may impact the timing of when a proceeding can occur, depending on the nature of the emergency situation. Accordingly, it suggests that consideration should be given to whether the defendant also must be informed of how non-consent may impact the timing of a proceeding.

b. Subcommittee deliberations. The subcommittee declined add the requested language to the rule. The draft rule requires an adequate opportunity to consult with counsel, and does not attempt to prescribe the content of attorney-client communications to ensure that the defendant is "fully informed." Neither the subcommittee nor the committee had previously

considered adding any language regarding the information that counsel must provide.

The reporters reminded subcommittee members that in the past, the committee has chosen not to intrude on the attorney-client relationship by mandating the content of such communications. When revising Rule 11(b)(1) after the Supreme Court's decision in *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2010), for example, the committee rejected a suggestion that Rule 11 should be amended to require the judge to confirm *that counsel* had advised the defendant about potential immigration consequences, because of concern about interfering with the attorney-client relationship. Instead, the committee's proposed addition, 11(b)(1)(O), required *the court* to inform all defendants that immigration consequences may occur upon conviction. Members of the subcommittee agreed it was not appropriate to add language regarding attorney-client communications in this instance either.

F. Paragraph (d)(4) -- Extending time under Rule 35

1. Comment received

If emergency conditions provide good cause, (d)(4) allows a court to extend the time to take action under Rule 35 as reasonably necessary. The **Department of Justice (21-CR-0003-0008)** recommended that the Committee add to the note accompanying this paragraph the following language to make it clear that the extension is "limited to sentences imposed immediately prior to or during the criminal rules emergency." It explained:

> The extension of time to take action under Rule 35 only applies to sentences imposed within 14 days immediately prior to the declaration of a criminal rules emergency or to sentences imposed during the criminal rules emergency. Nothing in this rule is intended to provide relief for a defendant who had the benefit of a full 14-day period under Rule 35, but failed to take action.

2. Subcommittee deliberations

The published committee note states the rationale for (d)(4):

> **Paragraph (d)(4)** provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking

other actions on its own or on a party's motion for good cause shown.

The Department did not raise during the drafting process the proposed addition to the note it now requests but did suggest some limiting language. At its suggestion, the Committee approved the sentence that reads: "Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35."

The subcommittee discussed the reasons for the requested addition. The Department was concerned that without a clearer limiting statement, this provision would result in frivolous motions seeking relief under Rule 35, including motions by those who had the benefit of a full 14-day period under Rule 35 before the emergency declaration but failed to take action. Although one member stated he could be persuaded to agree with the Department's request to add note language clarifying this does not apply to someone who let his time run without taking action, others noted that the rule and note as published adequately address this concern. The subcommittee declined to make the requested change.

G. Adding a new subdivision on grand juries

The **Department of Justice (21-CR-0003-0008)** also recommended adding a new subsection (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. In its submission **NACDL (21-CR-0003-0011)** opposed this proposal.

The subcommittee did not address this issue during its teleconference, agreeing that because this proposal was not included in the published draft of Rule 62, it could not be added without republication of the whole rule. Republication would derail the accelerated schedule set by the Standing Committee for all of the emergency rules.

Accordingly, this suggestion is included as a separate item for the April meeting.

Summary of Public Comments Proposed Rule 62

Offshore, Cayman (21-CR-0003-0003) wrote characterizing the proposed changes as "a power grab" and suggesting "[l]iterally get a life."

Judge Denise Cote (21-CR-0003-0005) recommended:

- revising (d)(2) to provide that "defense counsel or the court may sign for the defendant,"
- revising (e)(1) and (2) so that they require that the defendant have an "adequate opportunity" to consult with counsel "confidentially either before ~~and~~ or during" certain videoconference proceedings, and
- revising (e)(3)(B) to omit the requirement of a prior written request signed by the defendant to allow plea and sentencing proceedings to be conducted by videoconference.

The Federal Magistrate Judges Association (FMJA) (21-CR-0003-0006) expressed concern about giving the Judicial Conference the exclusive authority to declare a rules emergency, and it proposed several changes in the rule as published:

- eliminating the requirement that public access be "contemporaneous if feasible" or revising the text to "indicate public access may only be denied if the interests of justice require a proceeding to go forward without public access"**;**
- taking a flexible approach and allowing the court to sign for a defendant if the court can obtain "oral consent on the record";
- deleting from paragraph (e)(1) the requirement "that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings"; and
- including specific information that counsel must provide to the defendant when the rules require the defendant's consent to videoconferencing or other remote means.

The Department of Justice (21-CR-0003-0008) requested three changes:

- an addition in the note to (d)(1) stating: "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771";
- an addition in the note to (d)(4) stating that the extensions of time permitted by the rule are "limited to sentences imposed immediately prior to or during the criminal rules emergency"; and
- a new subsection (d)(5) allowing courts to extend the term of sitting grand juries during judicial emergencies.

The Federal Bar Association (21-CR-0003-0009) applauded the emergency rules and agreed that the Judicial Conference—rather than specific circuits, districts, or judges—should be permitted to declare a rules emergency.

S.N. (21-CR-0003-0010) commented that it is "imperative that such pandemics and natural disasters are factored into how the Government proceeds with law making."

The National Association of Criminal Defense Lawyers (NACDL) (21-CR-0003-0011) expressed gratitude for the reiteration in each subsection of proposed Rule 62(e) of the requirement that the court find there has been an "adequate opportunity" for consultation between counsel and the defendant before as well as during video conferences in lieu of conventional in-person court appearances. NACDL urged the addition of note language describing what is required for an adequate opportunity for consultation. Finally, it opposed the Department of Justice suggestions regarding victim participation and the CVRA, as well as the Department's suggestion of a new subsection (d)(5).

Judge Mark Hornak (21-CR-0003-0012) opposed the requirement of a prior written request signed by the defendant to allow plea and sentencing proceedings to be conducted by videoconference.

Professor Miller and the Federal Criminal Justice Clinic at the University of Chicago (FCJC) (21-CR-0003-0013) proposed multiple changes to the published rule and note:

- eliminating from the note to (d)(1) of the phrase "'including victims' from the phrase 'duty to provide the public, including victims, with 'reasonable alternative access'";
- revising the proposed rule to "expressly provide that any limitations on public access during Rules Emergencies must satisfy *Waller*";
- clarifying that visual contemporaneous access can be limited only when the court has complied with the constitutional standard;
- revising the Rule and note to "expressly require that court participants be able to see the public unless *Waller* can be satisfied";
- requiring a prominently placed, district-wide announcement of any public access limitations that (a) details the scope of the limitation, (b) explains in plain language how the public can access court, and (c) contains necessary constitutional findings; and
- barring courthouse-only access for the public.

TAB 2B

Public Comments Proposed Rule 62[1]

Offshore, Cayman (21-CR-0003-0003) wrote characterizing the proposed changes as "a power grab" and suggesting "[l]iterally get a life."

Judge Denise Cote (21-CR-0003-0005) recommended:

- revising (d)(2) to provide that "defense counsel or the court may sign for the defendant,"
- revising (e)(1) and (2) so that they require that the defendant have an "adequate opportunity" to consult with counsel "confidentially either before ~~and~~ or during" certain videoconference proceedings, and
- revising (e)(3)(B) to omit the requirement of a prior written request signed by the defendant to allow plea and sentencing proceedings to be conducted by videoconference.

The Federal Magistrate Judges Association (FMJA) (21-CR-0003-0006) expressed concern about giving the Judicial Conference the exclusive authority to declare a rules emergency, and it proposed several changes in the rule as published:

- eliminating the requirement that public access be "contemporaneous if feasible" or revising the text to "indicate public access may only be denied if the interests of justice require a proceeding to go forward without public access"**;**
- taking a flexible approach and allowing the court to sign for a defendant if the court can obtain "oral consent on the record";
- deleting from paragraph (e)(1) the requirement "that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings"; and
- including specific information that counsel must provide to the defendant when the rules require the defendant's consent to videoconferencing or other remote means.

The Department of Justice (21-CR-0003-0008) requested three changes:

- an addition in the note to (d)(1) stating: "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771";
- an addition in the note to (d)(4) stating that the extensions of time permitted by the rule are "limited to sentences imposed immediately prior to or during the criminal rules emergency"; and
- a new subsection (d)(5) allowing courts to extend the term of sitting grand juries during judicial emergencies.

[1] The full text of each comment is available on regulations.gov at the following link: https://www.regulations.gov/docket/USC-RULES-CR-2021-0003/comments.

The Federal Bar Association (21-CR-0003-0009) applauded the emergency rules and agreed that the Judicial Conference—rather than specific circuits, districts, or judges—should be permitted to declare a rules emergency.

S.N. (21-CR-0003-0010) commented that it is "imperative that such pandemics and natural disasters are factored into how the Government proceeds with law making."

The National Association of Criminal Defense Lawyers (NACDL) (21-CR-0003-0011) expressed gratitude for the reiteration in each subsection of proposed Rule 62(e) of the requirement that the court find there has been an "adequate opportunity" for consultation between counsel and the defendant before as well as during video conferences in lieu of conventional in-person court appearances. NACDL urged the addition of note language describing what is required for an adequate opportunity for consultation. Finally, it opposed the Department of Justice suggestions regarding victim participation and the CVRA, as well as the Department's suggestion of a new subsection (d)(5).

Judge Mark Hornak (21-CR-0003-0012) opposed the requirement of a prior written request signed by the defendant to allow plea and sentencing proceedings to be conducted by videoconference.

Professor Miller and the Federal Criminal Justice Clinic at the University of Chicago (FCJC) (21-CR-0003-0013) proposed multiple changes to the published rule and note:

- eliminating from the note to (d)(1) of the phrase "'including victims' from the phrase 'duty to provide the public, including victims, with 'reasonable alternative access'";
- revising the proposed rule to "expressly provide that any limitations on public access during Rules Emergencies must satisfy *Waller*";
- clarifying that visual contemporaneous access can be limited only when the court has complied with the constitutional standard;
- revising the Rule and note to "expressly require that court participants be able to see the public unless *Waller* can be satisfied";
- requiring a prominently placed, district-wide announcement of any public access limitations that (a) details the scope of the limitation, (b) explains in plain language how the public can access court, and (c) contains necessary constitutional findings; and
- barring courthouse-only access for the public.

TAB 2C

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 62. Criminal Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that:

(1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and

(2) no feasible alternative measures would sufficiently address the impairment within a reasonable time.

(b) Declaring an Emergency.

(1) ***Content.*** The declaration must:

(A) designate the court or courts affected;

[1] New material is underlined in red.

(B) state any restrictions on the authority granted in (d) and (e); and

(C) be limited to a stated period of no more than 90 days.

(2) *Early Termination.* The Judicial Conference may terminate a declaration for one or more courts before the termination date.

(3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule.

(c) Continuing a Proceeding After a Termination. Termination of a declaration for a court ends its authority under (d) and (e). But if a particular proceeding is already underway and resuming compliance with these rules for the rest of the proceeding would not be feasible or would work an injustice, it may be completed with the defendant's consent as if the declaration had not terminated.

(d) Authorized Departures from These Rules After a Declaration.

(1) ***Public Access to a Proceeding.*** If emergency conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.

(2) ***Signing or Consenting for a Defendant.*** If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the

defendant if the defendant consents on the record.

(3) ***Alternate Jurors.*** A court may impanel more than 6 alternate jurors.

(4) ***Correcting or Reducing a Sentence.*** Despite Rule 45(b)(2), if emergency conditions provide good cause, a court may extend the time to take action under Rule 35 as reasonably necessary.

(e) Authorized Use of Videoconferencing and Teleconferencing After a Declaration.

(1) ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule does not modify a court's authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 43(b)(2), except that if emergency conditions substantially

impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings.

(2) *Videoconferencing for Certain Proceedings at Which the Defendant Has a Right to Be Present.* Except for felony trials and as otherwise provided under (e)(1) and (3), for a proceeding at which a defendant has a right to be present, a court may use videoconferencing if:

(A) the district's chief judge finds that emergency conditions substantially impair a court's ability to hold in-person

proceedings in the district within a reasonable time;

(B) the court finds that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding; and

(C) the defendant consents after consulting with counsel.

(3) *Videoconferencing for Felony Pleas and Sentencings.* For a felony proceeding under Rule 11 or 32, a court may use videoconferencing only if, in addition to the requirement in (2)(B):

(A) the district's chief judge finds that emergency conditions

substantially impair a court's ability to hold in-person felony pleas and sentencings in the district within a reasonable time;

(B) the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing; and

(C) the court finds that further delay in that particular case would cause serious harm to the interests of justice.

(4) ***Teleconferencing by One or More Participants.*** A court may conduct a

proceeding, in whole or in part, by teleconferencing if:

(A) the requirements under any applicable rule, including this rule, for conducting the proceeding by videoconferencing have been met;

(B) the court finds that:

(i) videoconferencing is not reasonably available for any person who would participate by teleconference; and

(ii) the defendant will have an adequate opportunity to consult

confidentially with counsel before and during the proceeding if held by teleconference; and

(C) the defendant consents.

Committee Note

Subdivision (a). This rule defines the conditions for a Criminal Rules emergency that would support a declaration authorizing a court to depart from one or more of the other Federal Rules of Criminal Procedure. Rule 62 refers to the other, non-emergency rules—currently Rules 1-61—as "these rules." This committee note uses "these rules" or "the rules" to refer to the non-emergency rules, and uses "this rule" or "this emergency rule" to refer to new Rule 62.

The rules have been promulgated under the Rules Enabling Act and carefully designed to protect constitutional and statutory rights and other interests. Any authority to depart from the rules must be strictly limited. Compliance with the rules cannot be cast aside because of cost or convenience, or without consideration of alternatives that would permit compliance to continue. Subdivision (a) narrowly restricts the conditions that would permit a declaration granting emergency authority to depart from the rules and defines who may make that declaration.

First, subdivision (a) specifies that the power to declare a rules emergency rests solely with the Judicial

Conference of the United States, the governing body of the judicial branch. To find that a rules emergency exists, the Judicial Conference will need information about the ability of affected courts to comply with the rules, as well as the existence of reasonable alternatives to continue court functions in compliance with the rules. The judicial council of a circuit, for example, may be able to provide helpful information it has received from judges within the circuit regarding local conditions and available resources.

Paragraph (a)(1) requires that before declaring a Criminal Rules emergency, the Judicial Conference must determine that circumstances are extraordinary and that they relate to public health or safety or affect physical or electronic access to a court. These requirements are intended to prohibit the use of this emergency rule to respond to other challenges, such as those arising from staffing or budget issues. Second, those extraordinary circumstances must substantially impair the ability of a court to perform its functions in compliance with the rules.

In addition, paragraph (a)(2) requires that even if the Judicial Conference determines the extraordinary circumstances defined in (a)(1), it cannot declare a Criminal Rules emergency unless it also determines that no feasible alternative measures would sufficiently address the impairment and allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in compliance with the rules was substantially impaired for extensive periods of time. But there would have been no Criminal Rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C. § 141.

Another example might be a situation in which the judges in a district are unable to carry out their duties as a result of an emergency that renders them unavailable, but courthouses remain safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the rules, but temporary assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

Subdivision (a) also recognizes that emergency circumstances may affect only one or a small number of courts—familiar examples include hurricanes, floods, explosions, or terroristic threats—or may have widespread impact, such as a pandemic or a regional disruption of electronic communications. This rule provides a uniform procedure that is sufficiently flexible to accommodate different types of emergency conditions with local, regional, or nationwide impact.

Paragraph (b)(1). Paragraph (b)(1) specifies what must be included in a declaration of a Criminal Rules emergency. Subparagraph (A) requires that each declaration of a Criminal Rules emergency designate the court or courts affected by the Criminal Rules emergency as defined in subdivision (a). Some emergencies may affect all courts, some will be local or regional. The declaration must be no broader than the Criminal Rules emergency. That is, every court identified in a declaration must be one in which extraordinary circumstances that relate to public health or safety or that affect physical or electronic access to the court are substantially impairing its ability to perform its functions in compliance with these rules, and in which compliance with the rules cannot be achieved within a reasonable time by alternative measures. A court may not exercise authority under (d) and (e) unless the Judicial Conference includes the court in its declaration, and then only in a manner consistent

with that declaration, including any limits imposed under (b)(1)(B).

Subparagraph (b)(1)(B) provides that the Judicial Conference's declaration of a Criminal Rules emergency must state any restrictions on the authority granted by subdivisions (d) and (e) to depart from the rules. For example, if the emergency arises from a disruption in electronic communications, there may be no reason to authorize videoconferencing for proceedings in which the rules require in-person appearance. But (b)(1)(B) does not allow a declaration to expand departures from the rules beyond those authorized by subdivisions (d) and (e).

Under (b)(1)(C), each declaration must state when it will terminate, which may not exceed 90 days from the date of the declaration. This sunset clause is included to ensure that these extraordinary deviations from the rules last no longer than necessary.

Paragraph (b)(2). If emergency conditions end before the termination date of the declaration for some or all courts included in that declaration, (b)(2) provides that the Judicial Conference may terminate the declaration for the courts no longer affected. This provision also ensures that any authority to depart from the rules lasts no longer than necessary.

Paragraph (b)(3) recognizes that the conditions that justified the declaration of a Criminal Rules emergency may continue beyond the term of the declaration. The conditions may also change, shifting in nature or affecting more districts. An example might be a flood that leads to a contagious disease outbreak. Rather than provide for extensions, renewals, or modifications of an initial declaration, paragraph (b)(3) gives the Judicial Conference

the authority to respond to such situations by issuing additional declarations. Each additional declaration must meet the requirements of subdivision (a), and must include the contents required by (b)(1).

Subdivision (c). In general, the termination of a declaration of emergency ends all authority to depart from the other Federal Rules of Criminal Procedure. It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the proceeding authorized by (d)(3) is the completed impanelment. In addition, subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by this emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (c) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

Subdivisions (d) and (e) describe the authority to depart from the rules after a declaration.

Paragraph (d)(1) addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" was intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open

to the public under the First and Sixth Amendments. The rule creates a duty to provide the public~~, including victims,~~ with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.

The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.

When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access in the First and Sixth Amendments, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

Paragraph (d)(2) recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the

record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.

It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

Paragraph (d)(3) allows the court to impanel more than six alternate jurors, creating an emergency exception to the limit imposed by Rule 24(c)(1). This flexibility may be particularly useful for a long trial conducted under emergency conditions—such as a pandemic—that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment

leaves to the discretion of the district court whether to impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

Paragraph (d)(4) provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown.

Subdivision (e) provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a Criminal Rules emergency. The term "videoconferencing" is used throughout, rather than the term "video teleconferencing"

(which appears elsewhere in the rules), to more clearly distinguish conferencing with visual images from "teleconferencing" with audio only. The first three paragraphs in (e) describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court's authority to use teleconferencing when videoconferencing is not reasonably available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).

Subdivision (e) applies to the use of videoconferencing and teleconferencing for the proceedings defined in paragraphs (1) through (3), for all or part of the proceeding, by one or more participants. But it does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

Paragraph (e)(1) addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This paragraph was included to eliminate any confusion about the interaction between existing videoconferencing authority

and this rule. It clarifies that this rule does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

The requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients. The Committee believed it was essential to include this prerequisite for conferencing under Rules 5, 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs (e)(2), (3), and (4), in order to safeguard the defendant's constitutional right to counsel. The rule does not specify any particular means of providing an adequate opportunity for private communication.

Paragraph (e)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present" under the Constitution, statute, or rule, excluding felony trials and proceedings addressed in either (e)(1) or (e)(3). Such proceedings include, for example, revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met.

First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the

chief judge (or alternate under 28 U.S.C. § 136(e)) has found that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

Second, subparagraph (e)(2)(B) conditions videoconferencing upon the court's finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.

Third, subparagraph (e)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.

The Committee declined to provide authority in this rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by videoconference during an emergency declaration. And this rule does not address the use of technology to maintain communication with a defendant who has been removed

from a proceeding for misconduct. Nor does it address if or when trial participants other than the defendant may appear by videoconferencing.

Paragraph (e)(3) addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).

Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in

individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of "request" for "consent" was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

Paragraph (e)(4) details conditions for the use of teleconferencing to conduct proceedings for which videoconferencing is authorized. Videoconferencing is always a better option than an audio-only conference

because it allows participants to see as well as hear each other. To ensure that participants communicate through audio alone only when videoconferencing is not feasible, (e)(4) sets out four prerequisites. Because the rule applies to teleconferencing "in whole or in part," it mandates these prerequisites whenever the entire proceeding is held by teleconference from start to finish, or when one or more participants in the proceeding are connected by audio only, for part or all of a proceeding.

The first prerequisite, in (e)(4)(A), is that all of the conditions for the use of videoconferencing for the proceeding must be met before a court may conduct a proceeding, in whole or in part, by audio-only. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(3)(A), (B), and (C). No part of a felony sentencing proceeding may be held by teleconference, nor may any person participate in such a proceeding by audio only, unless those videoconferencing requirements have been met. Likewise, for a misdemeanor proceeding, teleconferencing requires compliance with (e)(1) and Rule 43(b)(2).

Second, (e)(4)(B)(i) requires the court to find that videoconferencing for all or part of the proceeding is not reasonably available before allowing participation by audio only. Because it focuses on what is "reasonably available," this requirement is flexible. It is intended to allow courts to use audio only connections when necessary, but not otherwise. For example, it precludes the use of teleconferencing alone if videoconferencing—though generally limited—is available for all participants in a particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, if only an audio connection with a defendant were feasible because of security concerns at the facility where the

defendant is housed, a court could find that videoconferencing for that defendant in the particular proceeding is not reasonably available. Or, if the video connection fails for one or more participants during a proceeding started by videoconference and audio is the only option for completing that proceeding expeditiously, this rule permits the affected participants to use audio technology to finish the proceeding.

Third, (e)(4)(B)(ii) provides that the court must find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding. Opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing as when a defendant or a defense attorney has only one telephone line to use to call into the conference, and there are no "breakout rooms" for private conversations like those videoconferencing platforms provide. This situation may arise not only when a proceeding is held entirely by phone, but also when, in the midst of a videoconference, video communication fails for either the defendant or defense counsel. An attorney or client may have to call into the conference using the devices they had previously been using for confidential communication. Experiences like these prompted this requirement that the court specifically find that an alternative opportunity for confidential consultation is in place before permitting teleconferencing in whole or in part.

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding, even if the defendant previously requested or consented to videoconferencing. A defendant who is willing to be sentenced with a videoconference connection with the judge may balk,

understandably, at being sentenced over the phone. Subparagraph (e)(4)(C) does not require that consent to teleconferencing be given only after consultation with counsel. By requiring only "consent," it recognizes that the defendant would have already met the consent requirements for videoconferencing for that proceeding, and it allows the court more flexibility to address varied situations. To give one example, if the video but not audio feed drops for the defendant or another participant near the very end of a videoconference, and the judge asks the defendant, "do you want to talk to your lawyer about finishing this now without the video?," an answer "No, I'm ok, we can finish now" would be sufficient consent under (e)(4)(C).

TAB 3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 49.1 (21-CR-I)

DATE: April 4, 2022

Judge Jesse Furman wrote to the Criminal Rules Committee expressing concern about the committee note to Rule 49.1, which incorporates a portion of the 2004 Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files. The Guidance quoted in the committee note states the "following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse," and the list that follows includes financial affidavits filed in seeking representation pursuant to the Criminal Justice Act.

Judge Furman had occasion to rule on whether a defendant's CJA application and related affidavits were judicial documents that must be disclosed, with appropriate redactions, under the common law or First Amendment rights of access. In preparing his opinion, he examined Rule 49.1 and the committee note that was adopted as part of the cross-committee effort in response to the E-Government Act of 2002. He found the inclusion of the Guidance problematic, if not unconstitutional, as well as contrary to the views taken by most courts that have ruled on the issue.

Because the committee cannot amend a committee note without amending the rule itself, Judge Furman proposed that the committee amend the rule to signal that there are potentially applicable rights of public access and allow the committee to write a new committee note explaining why that language was added. His suggested amendment would read:

> **(d) Filings Made Under Seal.** Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

After initial discussion of Judge Furman's proposal at the committee's November meeting, it was referred to a new Rule 49.1 Subcommittee, chaired by Judge Andre Birotte. This memo provides an update on the subcommittee's work.

The subcommittee met by Microsoft Teams to discuss Judge Furman's proposal. Judge Kethledge stressed that the committee's authority under the Rules Enabling Act extends only to procedure, not substance. It has no authority, for example, to determine whether the financial forms in question are judicial documents subject to disclosure under the First Amendment. Judge Furman's argument is that the note appears to take an erroneous position on this issue. The additional text he proposed ("Subject to any applicable right to public access") is deliberately neutral on whether there is a right of public access applicable to any particular record or document. But he intended the text to provide a basis for a new committee note that could correct the error in the original committee note.

Although recognizing that the committee note seemed to take a position on the substantive issue, some subcommittee members were unsure whether it would be possible to draft a truly neutral amendment and committee note. Some members also expressed concern that the amendment would not be neutral, but rather would be read as suggesting that the documents in question are subject to disclosure. Moreover, it would be difficult to explain the purpose of the amendment without expressing a view on the merits of the guidance referenced in the original committee note.

The subcommittee was also informed that an amendment might generate opposition from the defense bar. Ms. Hay provided a forthcoming article arguing that "the defense bar should reject any diminishment of the privacy protections in Rule 49.1 and defend the privacy interests of our clients," presenting arguments based on "the constitutional rights to equal protection and financial privacy, and against compelled self-incrimination."

The subcommittee concluded that it wanted to see note language (perhaps several alternatives) before taking a vote on whether to proceed with an amendment, and it plans to reconvene after the April meeting.

TAB 4

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Electronic pro se filing

DATE: March 30, 2022

This memo provides an update on the pro se filing project, which we discussed briefly at the November meeting.

Because questions concerning the access of self-represented persons to electronic filing is relevant to all the Rules of Procedure, Professor Cathie Struve, the reporter for the Standing Committee, has convened a working group composed of all of the reporters, senior members of the Rules Office staff, and researchers from the Federal Judicial Center (FJC).

After an initial session in which the reporters helped to clarify the information that would be most useful, the researchers from the FJC developed and conducted a survey involving interviews with representatives from dozens of clerk's offices selected to be representative of the federal system as a whole. The FJC researchers completed the interviews, and the working group met to review a preliminary version of a report summarizing the findings.

A final public version is being prepared, and will be available in time for the Committee's fall meeting. The Pro Se Filing Subcommittee, to be chaired by Judge Timothy Burgess, will meet after the final version is released.

Based on the working group's discussion of the preliminary report, it is not clear whether the findings will provide a basis for any proposed rules changes. One development of interest—which may not lend itself to any change in the rules—is the practice in some districts of accepting filings from pro se litigants, including prisoners, by forms of electronic submission other than the CM/ECF system, including email, PDF upload, or online form.

TAB 5

TAB 5A

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 62; extending the grand jury's term (21-CR-0003-0008)

DATE: April 4, 2022

As noted at the end of our memo describing the comments received on Rule 62, the Department of Justice has proposed adding a new subsection (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. This proposal was not considered by the Rule 62 Subcommittee during its teleconference because adding it to the current rule would have required republication, derailing the accelerated schedule set by the Standing Committee for all of the emergency rules.

Accordingly, the proposal is presented here as a new agenda item.

Rule 6(g) provides that a grand jury's term expires after 18 months unless the court grants an extension of up to six months after finding the extension is in the public interest. During a criminal rules emergency, the Department explained, the court may be unable to empanel a new grand jury to replace a grand jury whose term expired, especially if those emergency circumstances persist for an extended time. During the pandemic, many districts were forced to close or restrict the use of grand juries for extended periods of time, and the ability of some courts to empanel new grand juries has been significantly limited.

Without a properly empaneled grand jury, the Department notes, defendants may suffer delays in being afforded their constitutional rights and the courts' ability to operate could be substantially impaired. Allowing courts to extend a sitting grand jury during a criminal rules emergency beyond Rule 6(g)'s usual limitations, the Department urges, would allow court operations to continue, as well as afford defendants their constitutional rights. Although the Department's memo does not address this point, the lack of a grand jury may also hamper criminal investigations that rely on the grand jury's subpoena authority. Accordingly, the Department proposed this new subsection for proposed Rule 62:

> **(5) Continuing Existing Grand Juries.** A court may extend sitting grand juries, despite Rule 6(g), if the court finds that an extension is within the public interest.

We note that NACDL's comments on Rule 62 (21-CR-0003-0011) opposed this proposal as "unwise," stating:

> Grand juries expire after 18 months for good reason: to prevent the development of too close a relationship between jurors and prosecutors, and thus to protect the grand jury's independence. See *United States v. Skulsky*, 786 F.2d 558, 562 (3d Cir. 1986); *United States v. Fein*, 504 F.2d 1170, 1178–79 (2d Cir. 1974). The limited term also ensures a greater level of public participation due to turnover in composition of the jury, again protecting the grand jury's historic independence

> that explains and thus necessarily informs its enshrinement in the Fifth Amendment. If an emergency does not prevent previously sworn grand jurors from continuing to meet (as would occur under the government's belated proposal), then we do not see how it would prevent the empaneling of a new jury, if needed.

The Department's proposal presents two issues for discussion.

First, is there sufficient interest in the proposal to warrant assignment to a subcommittee for further consideration?

If the proposal warrants further consideration, the second issue concerns timing. As noted, the proposal cannot be considered as part of the proposed final draft of Rule 62 that will be presented to the Standing Committee in June. It must, instead, be an amendment to Rule 62. Although we believe there is no formal bar to immediate consideration of such an amendment, we are concerned that it might generate confusion to publish a proposed amendment while Rule 62 itself is still undergoing the final steps of the Rules Enabling Act process.

We consulted Professor Capra (who coordinated the emergency rules project) and Professor Struve (the reporter for the Standing Committee), and both recommend that we not send the proposal forward while the initial Emergency Rules are still pending. Professor Capra commented that working on an amendment to a rule still in the pipeline would generate confusion, and could also undermine Rule 62 by suggesting—quite incorrectly—that the committee wasn't thorough in the first place. Accordingly, he suggested that we defer consideration of the proposal until the Supreme Court submits Rule 62 to Congress, at the earliest.

Accordingly, if there is interest in pursuing this suggestion, we suggest that the Committee defer action to avoid creating complications during the final stages of the approval process for Rule 62.

TAB 5B

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

January 26, 2022

The Honorable Raymond M. Kethledge, Chair
Advisory Committee on the Criminal Rules
United States Court of Appeals
Federal Building
200 East Liberty Street
Ann Arbor, MI 48104

Re: Comments on Proposed New Criminal Rule 62 (Criminal Rules Emergency)

Dear Judge Kethledge:

The Department of Justice submits the following comments on the proposed new Criminal Rule 62 (Criminal Rules Emergency) developed by the Advisory Committee on Criminal Rules in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

We want to first thank you and the Committee for the extraordinary work done in developing the proposed rule which we think reflects the best of the Judicial Conference's rules development process. The draft incorporates input from the bench and bar, including the voices of judges and attorneys from districts hard hit by the pandemic and other emergencies. The draft rule is also the product of thoughtful and respectful deliberations of the Criminal Rules Committee over many months. We especially want to thank Judge Dever and Judge Conrad, for their chairmanship of the Emergency Rule Subcommittee. You and they have been great stewards of the response to the pandemic and the CARES Act directive.

We also very much support the Committee's decision to be guided by well-defined and clearly stated principles in the development of the proposed rule. We agree with the Committee that the Federal Rules of Criminal Procedure protect important constitutional and statutory rights and other interests, and that they should not be set aside lightly. We also think any new rule for emergencies must address the range of circumstances that might arise and should be developed in close consultation with people involved in these issues on the ground.

The Department supports the proposed new rule. We write to recommend two clarifying changes to the draft commentary as well as to recommend that the Committee add one additional element to the proposed rule. We recognize that the additional element could require a separate publication and request for public comment. Nonetheless, we ask that the change be considered, and if necessary, published separately later this year for comment.

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The Department recommends that the Committee add a reference to the Crime Victims Rights' Act (CVRA), 18 U.S.C. § 3771, in the commentary for subsection (d)(1) of proposed Rule 62 to clarify courts' obligations to victims. Specifically, the Department recommends adding:

> "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771."

Proposed Rule 62(d)(1) addresses the courts' obligation to provide alternative access to the public when emergency conditions substantially impair in-person attendance at public court proceedings and indicates that a court "must" provide "reasonable alternative access, contemporaneous if feasible." The rule itself is silent on the courts' obligations to victims. The commentary for paragraph (d)(1) groups victims with the public, stating that the "rule creates a duty to provide the public, including victims, with 'reasonable alternative access'" and that "public proceedings" includes a "proceeding to which a victim must be provided access." The commentary also allows for "audio access to a video proceeding."

The Department is concerned that without an explicit reference to the CVRA, the commentary's grouping of victims with the public for the purposes of providing "reasonable alternative access, contemporaneous if feasible" may result in courts providing reasonable alternative access that falls short of the CVRA's requirements. We believe a victim should be considered similar to a participant in the proceedings, and not the public. Most importantly, we think the CVRA must be scrupulously followed. When providing "reasonable alternative access," courts must account for a victim who wishes to exercise her right: 1) to be "reasonably heard" at any public court proceeding involving the "release, plea, sentencing," or parole of the accused; 2) to not be excluded from any such court proceeding subject to limited exceptions; and 3) to have reasonable, accurate, and timely notice of any public court proceeding involving the crime, release, or escape of the accused. 18 U.S.C. § 3771(a)(2)-(4). Non-contemporaneous access or access that allows a victim to watch or listen, but not participate in the public proceedings, may not satisfy the CVRA. To avoid confusion the Department recommends explicitly referencing courts' obligations to comply with CVRA in the commentary.

The Department also recommends that the Committee clarify in the commentary for subsection (d)(4) of the proposed Rule 62 that the Rule 35 extension is limited to sentences imposed immediately prior to or during the criminal rules emergency. Specifically, the Department recommends adding to the commentary:

> "The extension of time to take action under Rule 35 only applies to sentences imposed within 14 days immediately prior to the declaration of a criminal rules emergency or to sentences imposed during the criminal rules emergency. Nothing in this rule is intended to provide relief for a defendant who had the benefit of a full 14-day period under Rule 35, but failed to take action."

Subsection (d)(4) provides an emergency exception to Rule 45(b)(2) by authorizing the court to extend the time to correct a sentence beyond Rule 35's 14-day requirement "as reasonably necessary" when emergency conditions provide "good cause." The commentary notes that "nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35," but does not explicitly limit the sentences to be corrected to those which could be potentially impacted by the declaration of a criminal rules emergency – sentences imposed during the 14 days immediately prior to or during the criminal rules emergency. The Department is concerned that without an explicit limitation on the emergency exception to Rule 45(b)(2), the provision could be subject to use contrary to the intentions of the Committee. Limiting the sentences that could be corrected to those directly impacted by the criminal rules emergency would prevent any abuse of the rule.

Finally, the Department recommends that the Committee add a new subsection (d)(5) to the current draft rule allowing courts to extend sitting grand juries beyond Rule 6(g)'s limitations. Specifically, the Department recommends adding a new subsection (d)(5):

> "(5) Continuing Existing Grand Juries. A court may extend sitting grand juries, despite Rule 6(g), if the court finds that an extension is within the public interest."

Under Rule 6(g), a grand jury's term expires after 18 months, unless the court grants an additional extension of up to six months upon a finding that the extension is in the public interest. The circumstances underlying a criminal rules emergency may prevent the court from empaneling a new grand jury to replace the grand jury whose term expired, especially if those emergency circumstances persist for an extended time. Without a properly empaneled grand jury, defendants could suffer delays in being afforded their constitutional rights and the courts' ability to operate could be substantially impaired.

During the pandemic, many districts have closed or restricted the use of grand juries for extended periods of time. Moreover, the ability of some courts to empanel new grand juries has been significantly limited. Allowing courts to extend a sitting grand jury during a criminal rules emergency beyond Rule 6(g)'s usual limitations would allow for court operations to continue, as well as afford defendants their constitutional rights.

\- - -

The Department appreciates the opportunity to share our comments with you and the Committee, and we look forward to continuing to work on this proposal and others to improve the delivery of justice to the American people.

Sincerely,

KENNETH POLITE

Digitally signed by KENNETH POLITE
Date: 2022.01.26 17:46:37 -05'00'

Kenneth A. Polite, Jr.
Assistant Attorney General

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

TAB 6

TAB 6A

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 17, pretrial subpoena authority (22-CR-A)

DATE: April 4, 2022

The White Collar Committee of the New York City Bar has written to suggest a major revision to Rule 17, which governs subpoenas. Noting that the rule has not been updated since 1944, the White Collar Committee argues that Rule 17 needs to be modernized to reflect "the reality of evidence-gathering in the electronic age." As construed by the courts, it states, when documents and other items of potential value to defendants are in the hands of third parties, "defense counsel face significant and often insurmountable barriers to obtain those materials."

The proposed amendment includes the following elements:

- Changes directed to the scope of the items sought;
- Changes in the provisions governing subpoenas for personal and confidential information;
- Changes to the scope of limitations on obtaining witness statements; and
- A new provision authorizing courts to modify orders to require advance approval of subpoenas in individual cases.

The White Collar Committee's letter describes the overall purposes of the proposed amendments:

> These amendments have been drafted to address the systematic impediments to criminal defendants' ability to obtain documents and objects in support of their defenses and thus to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions; at the same time, the amendments have also been tailored to protect the privacy of individual third parties and empower courts to prevent misuse of the rule.

The question for discussion is whether to refer the proposal to a subcommittee for further consideration.

TAB 6B

WHITE COLLAR CRIME COMMITTEE

MARSHALL L. MILLER
CHAIR
mmiller@kaplanhecker.com

February 17, 2022

Honorable Raymond M. Kethledge
Chair, Advisory Committee on Criminal Rules
United States Court of Appeals
Federal Building
200 East Liberty Street, Suite 224
Ann Arbor, MI 48104

Re: **Proposed Amendment to Rule 17 of the Federal Rules of Criminal Procedure**

Dear Judge Kethledge:

This letter is submitted on behalf of the New York City Bar Association (the "City Bar"), to accompany a proposal formulated by the City Bar's White Collar Crime Committee (the "Committee").[1] We write to you in your capacity as Chair of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (the "Advisory Committee") to respectfully request that the Advisory Committee consider proposing to the Judicial Conference certain amendments to Federal Rule of Criminal Procedure 17 ("Rule 17"). The proposed amended rule is attached to this letter, both with changes tracked, *see* Exhibit A, and as a clean copy, *see* Exhibit B.

These changes seek to modernize and fine-tune Rule 17—a rule that has not been significantly updated since 1944 and that represents the only means by which criminal defendants can obtain information by subpoena in advance of trial—to reflect the reality of evidence-gathering in the electronic age and to eliminate ambiguities in the current rule as to when a court order is required. The City Bar supports the proposed amendments for the reasons stated below.

The mission of the City Bar is to equip and mobilize the legal profession to practice with excellence and to promote the rule of law and access to justice in support of a fair society in our

[1] The proposal was also endorsed by the City Bar's Federal Courts, Criminal Justice Operations, and Criminal Courts Committees and its Mass Incarceration Task Force.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

community, our nation, and throughout the world. The City Bar's White Collar Crime Committee is comprised of over 35 experienced attorneys whose principal area of practice is the defense of complex criminal cases in federal and state courts and before regulatory tribunals. Our membership includes former state and federal prosecutors and career criminal defense attorneys, who regularly submit *amicus curiae* briefs on major questions of criminal law and advocate for reforms of penal statutes and procedural rules, both federal and state. Our members are among the most active trial lawyers in New York's federal courts. Our Committee has decades of hands-on experience with the Federal Rules of Criminal Procedure and is well-qualified to understand those places where the Rules, as currently written, have sown confusion in the criminal courts or appear to fall short of ensuring equal access to justice for all, irrespective of a defendant's wealth or status.[2]

Introduction and Reason for Proposed Amendments to Rule 17(c)

The complexity and breadth of federal criminal prosecutions have grown considerably in recent years as Congress has passed legislation expanding the reach of federal criminal law into new areas,[3] prosecutors have focused on novel theories of prosecution,[4] and the gathering of evidence in the digital age has become ever more sophisticated and technical.[5] But even as such developments have increased the burden on defense attorneys to adequately prepare to defend criminal cases, the rules governing the availability of subpoenas in criminal cases have not kept up. Rule 17 has stood relatively unchanged since it was adopted in 1944 and has been applied extremely narrowly by trial courts, largely based on the reasoning of two Supreme Court cases which, as discussed below, did not even address defense subpoenas directed to non-governmental third parties.

[2] The Committee also includes within its membership prosecutors and enforcement attorneys from federal government agencies; these government attorneys abstained from taking a position on this proposal, and this letter and the proposal thus do not reflect their views or those of the agencies with which they are employed.

[3] In one example, Congress enacted an anti-spoofing statute as part of the Dodd-Frank Act, and the Justice Department has dedicated a team to specifically address the conduct. *See* Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010); *see also* Dave Michaels, *Justice Department Presses Ahead with "Spoofing" Prosecutions Despite Mixed Record*, WALL ST. J. (Feb. 7, 2020, 1:55 PM), https://www.wsj.com/articles/justice-department-presses-ahead-with-spoofing-prosecutions-despite-mixed-record-11581095386.

[4] Two recent examples include prosecutions under the wire fraud statute in the NCAA bribery case and prosecutions under the Computer Fraud and Abuse Act. For a discussion of the propriety of the "right to control theory" of wire fraud, see Harry Sandick & Jared Buszin, *Justices Should Revisit 2nd Circ. Theory in NCAA Bribe Case*, LAW360 (Feb. 3, 2021), https://www.law360.com/whitecollar/articles/1350039/justices-should-revisit-2nd-circ-theory-in-ncaa-bribe-case (discussing *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021)). For a discussion of expanding criminal liability under the computer trespass statute, see Peter A. Crusco, 'Van Buren v. United States'*: 'Unauthorized Access' in the Virtual World of Expanding Federal Criminal Liability*, N.Y.L.J. (Dec. 21, 2020), https://www.law.com/newyorklawjournal/2020/12/21/van-buren-v-united-states-unauthorized-access-in-the-virtual-world-of-expanding-federal-criminal-liability.

[5] For an extensive examination of the unique challenges—including cost, volume, and complexity—that electronic discovery presents in the fair and accurate resolution of criminal cases, see, e.g., Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L & CRIMINOLOGY 237 (2019).

The constrictive limitations on such subpoenas under Rule 17 stand in stark contrast to the rules controlling the government's discovery obligations, which have expanded to keep pace, at least to some extent, with changing times. As originally drafted, the rule governing the government's discovery obligations, Rule 16, provided for only limited discovery and, significantly, preserved the absolute discretion trial courts had previously exercised in permitting or denying any discovery in criminal cases. *See* FED. R. CRIM. P. 16 advisory committee's note to 1944 adoption. In a nod to prevailing practice at the time, the Advisory Committee's note observed that the permissibility of discovery in criminal cases as a matter of law "[was] doubtful" under "existing law." *See id; see also United States v. Rosenfeld*, 57 F.2d 74, 76-77 (2d Cir. 1932) (declining to extend the right to discovery in civil cases to criminal cases). But since 1944, that rule has been amended multiple times—in recognition of defendants' need for access to potentially exculpatory information, the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent case law—so that it now permits discovery without the necessity of a court order and requires the government to produce all items in its "possession, custody or control" which are "material to preparing the defense."

As a result, if documents material to the preparation of the defense are in the possession of the government, the defense should have access to them under Rule 16. But if, as is often the case, documents and other items of potential value to the defense are in the possession of third parties, defense counsel face significant and often insurmountable barriers to obtain those materials. In most cases, the government develops much of its evidence through the grand jury investigative process. Even after indictment, use of grand jury subpoena authority remains available to the government provided that there is an ongoing investigation into any (1) potential new charges against the defendant in a superseding or separate indictment, or (2) possible addition of a new defendant or defendants to the existing indictment, a frequent occurrence. The result is an unfair imbalance between the prosecution and the defense in preparing for trial—an imbalance that is particularly acute where, as in the majority of cases, defendants and their counsel have limited resources to employ alternative means (such as private investigators) to obtain needed information, not only to address evidence already in the government's possession, but also to develop affirmative defenses.

The amendments we propose are enclosed with this letter.[6] These amendments have been drafted to address the systematic impediments to criminal defendants' ability to obtain documents and objects in support of their defenses and thus to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions; at the same time, the amendments have also been tailored to protect the privacy of individual third parties and empower courts to prevent misuse of the rule. We hope you will agree that the amendments we propose are consistent with the ideals that motivated the Supreme Court's decision in *Nixon*: "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. *The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts*, within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (emphasis added).

[6] We have set forth the proposal in two attachments: (1) Exhibit A, a redline against the current rule to reflect the proposed changes, and (2) Exhibit B, a clean copy of the proposed amended rule.

We first address a proposed amendment to Rule 17(c)(1), which currently authorizes subpoenas to obtain documents and other tangible items subject to certain limitations. We then discuss proposed amendments to sections concerning personal or confidential information ((17(c)(3)), information not subject to subpoena (17(h)), and judicial authority to issue modifying or protective orders (17(i)).

Proposed Amendments to Rule 17(c)(1) and (2)—Changes Directed at Scope of Items Sought

As currently drafted, Rule 17(c) provides:

> (c) *Producing Documents and Objects*.
>
> (1) *In General*. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
>
> (2) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

In *theory*, subsection (c) of Rule 17 permits criminal defendants to use subpoenas to obtain documents from third parties, although, unlike the subpoenas *ad testificandum* described in subsection (a) and while the language contains some ambiguity, prior judicial approval is arguably required before issuance of a subpoena *duces tecum* pursuant to Rule 17(c). In *practice*, however, Rule 17(c) is rarely, if ever, useful to criminal defendants because courts have interpreted its application so narrowly. The narrow interpretation stems from the initial but now outdated purpose of the rule when adopted in 1944 and from two Supreme Court opinions which applied the rule in unique circumstances, which had nothing to do with the defense's need to obtain material evidence from third parties.

Rule 17 has not changed significantly since its enactment almost 80 years ago. *See* FED. R. CRIM. P. 17 advisory committee's notes to amendments. Rule 17(c) in particular has not been amended apart from the general restyling of the criminal rules in 2002 and the inclusion of protective measures for victims in 2008. *See id.* It was not intended to provide a means of fact or defense development for criminal cases, but as a way to expedite the trial by bringing documents into court "in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose . . . of enabling the party to see whether he can use (them)." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 n.5 (1951) (internal citation omitted). The stated intention of the rule was consistent with the thinking of the time that defendants were entitled to little discovery.[7]

[7] *See* Benjamin E. Rosenberg and Robert W. Topp, *The By-Ways and Contours of Federal Rule of Criminal Procedure 17(c): A Guide Through Uncharted Territory*, CRIM. L. BULL., Vol. 45 No. 2 (2009), at page 8 & n. 19. ("Rosenberg Article").

The Supreme Court has twice addressed Rule 17(c), but neither case involved a defense subpoena of documents or information from a third party. In *Bowman Dairy*, the defendant, in an effort to circumvent the then-narrow scope of Rule 16 with respect to discovery from the government, served a broad subpoena on *the government.* *Bowman Dairy*, 341 U.S. at 215-16. Not surprisingly, the Court held that despite the seemingly broad language of Rule 17(c), the subpoena could not exceed the scope of Rule 16. *Id.* at 220-21. *Bowman Dairy* was followed by *United States v. Nixon*, 418 U.S. 683, 707 (1974), a case best remembered for ordering the production of the incriminating White House tapes that led shortly thereafter to President Nixon's resignation. In a less well-known part of the opinion, the Court addressed a motion *by government prosecutors*, not a criminal defendant, seeking a Rule 17(c) subpoena. Relying on *Bowman Dairy*, the Court held that when *government prosecutors* wish to issue a Rule 17(c) subpoena returnable before trial, the government must show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699-700. The *Nixon* test is strict and reflects to an important degree the fact that the prosecutors had served the subpoena after a grand jury had returned the indictment; the Court was apparently sensitive to the rule that the government cannot cause grand jury subpoenas to issue after an indictment to bolster its evidence for trial. Indeed, it is our experience that government prosecutors rarely attempt to satisfy the *Nixon* standard, but instead rely on grand jury subpoenas or search warrants to obtain documents from third parties.

Neither *Bowman Dairy* nor *Nixon* addressed the situation where a defendant was seeking documents from a third party. Nevertheless, most lower courts have embraced the *Nixon* standard and applied it to defense subpoenas of third parties. *See, e.g.*, *United States v. Wey*, 252 F. Supp. 3d 237, 253 (S.D.N.Y. 2017) (applying *Nixon* standard to third-party subpoenas); *United States v. Henry*, 482 F.3d 27, 30 (1st Cir. 2007) (affirming lower court's application of *Nixon* standard to third-party subpoena); *United States v. Stevenson*, 727 F.3d 826, 831 (8th Cir. 2013) (noting that the Eighth Circuit has applied the *Nixon* standard to third-party subpoenas).

Criminal defendants, however, unlike government prosecutors, do not have an alternative means of issuing subpoenas *duces tecum*. For this reason, a growing number of courts and commentators alike have questioned whether the strict *Nixon* standard should apply to third party subpoenas issued by a *defendant.* *See, e.g.*, *United States v. Tucker*, 249 F.R.D. 58, 63 (S.D.N.Y. 2008) ("It is [ ] fair to ask whether it makes sense to require a defendant seeking to obtain material from a non-party by means of a Rule 17(c) subpoena to meet the *Nixon* standard."); *United States v. Rajaratnam*, 753 F. Supp. 2d 317, 321 n.1 (S.D.N.Y. 2011) ("[I]t remains ironic that a defendant in a breach of contract case can call on the power of the courts to compel third-parties to produce any documents '*reasonably calculated to lead to the discovery of admissible evidence*,' . . . while a defendant on trial for his life or liberty does not even have the right to obtain documents '*material to his defense*' from those same third-parties. Applying a materiality standard to subpoenas *duces tecum* issued to third parties under Federal Rule of Criminal Procedure 17(c) would resolve that

puzzle at great benefit to the rights of defendants to compulsory process and at little cost to the enforcement of the criminal law, since Rule 17(c) permits the government to issue subpoenas as well."); *United States v. Smith*, No. 19-cr-00669, 2020 WL 4934990, at *3-4 (N.D. Ill. Aug. 23, 2020) (questioning appropriateness of *Nixon* admissibility standard but quashing subpoena for CFTC documents on deliberative process grounds).[8]

Despite this growing recognition, most trial courts still apply the narrow *Nixon* standard and restrict defense subpoenas on third parties.[9] The problems that result from this interpretation of Rule 17(c) cannot be overstated. For example, without a meaningful ability to require production of documents from third parties prior to trial, the defense is effectively restricted to information the government gathers in the scope of its investigation and is severely constrained in its ability to develop affirmative defenses. Why should this matter? Consider the following hypothetical posed by the authors of a recent article:

> The defendant is the CFO and 25 percent owner of a family-owned business. He is indicted for utilizing his position to embezzle several million dollars from that business by creating both a wholly owned company and false invoices from it to the family-owned business.
>
> He then [allegedly] used his position of trust to pay the false invoices to his own company from the family business. The defendant advises his counsel of the wrongdoing of his accuser and other exculpatory facts that, if true, could constitute a defense at trial, mitigation of punishment, and/or impeachment of the government's primary accuser. The family-owned business uses a highly sophisticated, respected financial software package . . . . The defense forensic accountant concludes that the truth or falsity of the defendant's allegations would be fully disclosed by the accounting software and its data.

[8] S*ee also* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions,* 15 GA. ST. U.L. REV. 601, 647 (1999) (*"Nixon* do[es] not forestall completely a defendant's efforts to secure documents before trial from third parties, but make[s] it unnecessarily difficult by imposing a high threshold for invoking Rule 17(c) that focuses on the evidentiary nature of the requested documents without reference to the defense at trial."); Robert G. Morvillo et al., *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 160 n.12 (2005) ("It is extraordinarily difficult for a defendant, who has limited ability to investigate, to know enough about the discovery he is seeking such that he can comply with the *Nixon* requirements."); Hon. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption,* 43 RUTGERS L. REV. 1089, 1089 (1991) ("It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters."); Rosenberg Article at pages 17-20 (discussing cases that have questioned appropriateness and applicability of *Nixon* standard to defense efforts to obtain materials from non-parties).

[9] *See Henry*, 482 F.3d at 30 (noting that under Rule 17, "the defense may use subpoenas before trial to secure admissible evidence but not as a general discovery device" and affirming district court decision to quash third-party subpoena); *United States v. Bergstein*, 788 F. Appx 742, 746 (2d Cir. 2019) (citing *Nixon* standard for third-party subpoenas and noting that the Second Circuit has "applied the *Nixon* standard to Rule 17(c) subpoenas requested by a defendant") (summary order); *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002) (citing *Nixon* standard without analysis as governing third-party subpoena); *Stevenson*, 727 F.3d at 831 (noting that the Eighth Circuit has applied the *Nixon* standard to third-party subpoenas); *United States v. Sleugh*, 896 F.3d 1007, 1012 (9th Cir. 2018) (citing *Nixon* rule in context of Rule 17 subpoenas to phone companies).

Alan Silber and Lin Solomon, *A Creative Approach for Obtaining Documentary Evidence From Third Parties*, NEW & INSIGHTS (July 17, 2017), https://www.pashmanstein.com/publication-a-creative-approach-for-obtaining-documentary-evidence-from-third-parties.

As the authors explain, the lawyer in this scenario has no way of knowing if the client's allegations are true and whether the client has a viable defense, and the only way to make that determination is to obtain and analyze the financial data in the business software. But under the *Nixon* standard employed by most courts, it is likely that the defendant's 17(c) subpoena for that financial data would be quashed because until the defense sees the evidence, it cannot establish that it is "evidentiary and relevant."[10]

This problem pertains not just at criminal trials, but also in the pre-plea stage of criminal cases. In this regard, it is worth noting that only 2% of federal criminal cases proceed to trial. A rule that limits the pre-trial ability of 98% of criminal defendants to obtain documents that may be relevant to their case (other than those documents produced by the government) has the effect of restricting virtually all defendants' ability to make a fully informed decision concerning the strengths or weaknesses of the government's case against them, incentivizes defendants to plead guilty without full exploration of the merit of the government's case, and, therefore, increases the risks of wrongful convictions of defendants who may have had a meritorious defense. This is especially true in cases where guilt depends not necessarily on what the defendant did or did not do, but how it was perceived and understood by others, such as in cases where the materiality of a false statement is at issue. Without the ability to subpoena documents from third parties to test the government's allegations or to develop an affirmative defense of which the government was not aware, a defendant may find himself pleading guilty instead of pursuing what could have been a meritorious defense. These perverse results cannot have been intended by the Federal Rules of Criminal Procedure.

The Committee therefore proposes that the Advisory Committee revise Rule 17(c) to grant both parties to a criminal proceeding the ability to marshal documents and information, so long as they are "relevant and material to the preparation of the prosecution or defense." Notably, this standard, which the Committee proposes incorporating by adding a new section (c)(2) to Rule 17, and which is taken from the standard defining the government's obligations under Rule 16, would still be markedly higher than the civil discovery standard,[11] and thus would not open the door to burdensome fishing expeditions. The new proposed section (c)(2) would authorize parties to subpoena impeachment material in advance of trial (and not just admissible evidence under the *Nixon* standard) because the ability to effectively confront and impeach a witness is essential to a fair adversarial process. *See*, *e.g.*, *United States v. Rodriguez*, 496 F.3d 221, 225 (2d Cir. 2007) (describing *Giglio* obligation to disclose impeachment information as "serv[ing] the objectives of

[10] *See also* Rosenberg Article at 12-13 (discussing difficulty of meeting *Nixon* evidentiary standard without even seeing documents that are being sought).

[11] *See* FED. R. CIV. PRO. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").

both fairness and accuracy in criminal prosecutions"). To further minimize the risk of undue burdens, we propose adding to the section of Rule 17(c) governing quashing or modifying the subpoena—section (c)(2) in the existing rule and section (c)(3) in the Committee's proposal—a provision for the subpoena to be quashed or modified not only if compliance would be "unreasonable or oppressive," as the rule currently provides, but also if the documents sought "are . . . otherwise procurable reasonably in advance of trial by exercise of due diligence," a standard drawn from *Nixon*. *See Nixon*, 418 U.S. at 699.

Next, the Committee proposes removing the last two sentences from Rule 17(c)(1) because they do not reflect how material is exchanged, as a practical matter, in the digital age. The change also makes clear that no court order is required to issue a subpoena, regardless of whether the documents and objects sought are to be produced in advance of trial.[12] Under current practice, courts differ on whether a court order is required when a subpoena seeks the production of materials in advance of trial.[13] In our view, such a requirement is unnecessary. Eliminating the requirement of a court order (except for circumstances set forth in Rule 17(c)(3), as discussed below) obviates the need for parties to reveal trial strategy in seeking court approval, unless they succeed in convincing the court to permit them to proceed *ex parte.* Any concerns about abusive subpoena practice can adequately be addressed either through motions to quash and rulings on the introduction of evidence obtained via Rule 17 subpoena or through the new modifying order that would be authorized by proposed Rule 17(i).

Proposed Amendment to Rule 17(c)(3)—Obtaining Personal or Confidential Information

The Committee also proposes amending the current Rule 17(c)(3) (which would become Rule 17(c)(4)) that currently governs subpoenas for personal or confidential information from a victim in two ways: (a) to broaden the provision so that it requires advance court approval for a subpoena for personal or confidential information from any individual, not just a victim, and (b) to make clear that such a subpoena, issued pursuant to Rule 17(c)(4), is the *only* type of Rule 17(c) subpoena that requires judicial approval prior to issuance.

This change would make clear that the Advisory Committee's previous inclusion of such a requirement for subpoenas seeking personal or confidential information was not intended merely to be surplusage, and that other subpoenas issued to other third parties—which do not call for personal or confidential information about an individual—do not require judicial approval prior to issuance and may be issued pursuant to the procedures set out in Rule 17(a).

In addition, the Committee proposes including within the rule examples of what constitutes "personal or confidential information," both to guide courts and counsel, while leaving the precise definitional contours of the phrase to case development. And the Committee proposes limiting the applicability of this portion of the rule to subpoenas that call for personal or confidential information about an individual who is a natural person, as opposed to a corporate entity. This change would serve to prevent corporate victims from claiming that virtually *all* of their documents

[12] We have also proposed a conforming change to Rule 17(a).

[13] Rosenberg Article at page 31 et seq.

and information are "confidential" and disregarding the original purpose of the rule, which was to ensure that individual crime victims were treated with "dignity and respect."

Proposed Amendment to Rule 17(h)—Scope of Limitation on Obtaining Witness Statements

The Committee also proposes adding language to Rule 17(h) to clarify the Rule's scope. Rule 17(h) currently provides:

> (h) *Information Not Subject to a Subpoena*. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

As originally enacted, Rule 17(h) provided that "[s]tatements made by witnesses or prospective witnesses may not be subpoenaed *from the government or the defendant* under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2." *See* Order of the Supreme Court, 207 F.R.D. 89, 440 (2002) (emphasis added). This Rule implements the Jencks Act, which requires the government to produce witness statements "in [its] possession" only after the witness has "testified on direct examination." 18 U.S.C. § 3500(a), (b). Neither the Jencks Act nor Rule 26.2 imposes any restrictions or obligations regarding statements that are in the possession of third parties. When this provision was amended to its current version in 2002, the italicized language above was removed. But the Advisory Committee made clear that this "change[] [was] *intended to be stylistic only*," and was simply "part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." 207 F.R.D. at 443 (emphasis added). Since that time, however, the Committee has seen an increasing number of cases in which third party subpoena recipients and/or the government have argued that Rule 17(h) does not allow the use of a Rule 17 subpoena to obtain *any* witness statements, even those in the hands of third parties. *See, e.g.*, *United States v. Yudong Zhu*, No. 13-cr-761, 2014 WL 5366107, at *3 (S.D.N.Y. Oct. 14, 2014); *United States v. Vasquez*, 258 F.R.D. 68, 72-73 (E.D.N.Y. May 20, 2009). Thus, the Committee proposes a revision to Rule 17(h) expressly limiting the applicability of the rule to subpoenas that call for witness statements "from the other party."

Proposed Addition of Rule 17(i)

To ensure that the broader availability of Rule 17(c) subpoenas to prosecution and defense counsel is not misused, the Committee proposes the addition of a new provision authorizing courts to issue modifying orders to require advance approval for all such subpoenas in individual cases, upon a showing of good cause and specific and articulable facts—including through an *ex parte* submission if necessary. This provision, whose language was drawn from Rule 16(d)(1), will enable courts to balance the proposal's goal of broadening subpoena authority to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions, with the need in specific cases to prevent misuse of subpoenas for intimidation or personal embarrassment.

Conclusion

This proposal to modernize Rule 17 is based on the real experiences of our membership regarding the limitations on the ability of criminal defendants to obtain critical documents, data, and information in complex cases in New York federal courts, as well as other federal courts throughout the country. The proposal would further the goal of increasing access to justice for all participants in the criminal justice system, a goal we understand to be shared by the government and defendants alike. We appreciate the opportunity to submit the City Bar's proposal to you and are available to provide any additional information the Advisory Committee may require.

Respectfully submitted,

Marshall L. Miller
Chair, White Collar Crime Committee
New York City Bar Association

Cc: Prof. Sara Sun Beale, Co-Reporter, Advisory Committee on Criminal Rules
Prof. Nancy King, Co-Reporter, Advisory Committee on Criminal Rules

EXHIBIT A

Rule 17. Subpoena (*WITH CHANGES TRACKED*)

(a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command ~~the witness to attend and testify at the time and place the subpoena specifies.~~each person to whom it is directed to do the following at a specified time and place: attend and testify or produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) PRODUCING DOCUMENTS AND OBJECTS.

(1) *In General*. A subpoena may order the witness to produce ~~any books, papers,~~ documents, ~~data~~electronically stored information, or ~~other objects the~~ tangible things in that person's possession, custody, or control. A command in a subpoena ~~designates. The court~~to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials at the time and place the subpoena specifies.

(2) *Scope*. A subpoena may ~~direct~~order the witness to produce ~~the designated~~ items ~~in court before trial or before they~~described in (1) that are ~~to be offered in evidence. When the items arrive, the court may permit~~ relevant and material to the ~~parties and their attorneys to inspect all or part of them~~preparation of the prosecution or defense, including for the impeachment of a potential witness.

(~~2~~) 3) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive, or if the documents or objects sought are otherwise procurable by exercise of due diligence.

(~~3~~) 4) *Subpoena for Personal or Confidential Information ~~About a Victim.~~* . After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about ~~a victim~~an individual may be served on a third party only by court order. This is the only type of subpoena that requires judicial approval prior to issuance, absent entry of a modifying order under subsection (i). Personal or confidential information includes medical records, psychological records, school records, and other similar information. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the ~~victim~~individual so that the ~~victim~~individual can move to quash or modify the subpoena or otherwise object.

(d) SERVICE. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender

to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) PLACE OF SERVICE.

(1) *In the United States*. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) *In a Foreign Country*. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

(f) ISSUING A DEPOSITION SUBPOENA.

(1) *Issuance*. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) *Place*. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) CONTEMPT. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) INFORMATION NOT SUBJECT TO A SUBPOENA. No party may subpoena a statement of a witness or of a prospective witness, from the other party, under this rule. Rule 26.2 governs the production of the statement.

(i) MODIFYING ORDER. At any time the court may, for good cause and based on specific and articulable facts, require a party to obtain court approval before issuing a subpoena under this rule. The court may permit a party to show good cause and provide specific and articulable facts by a written statement that the court will inspect ex parte.

EXHIBIT B

Rule 17. Subpoena (*CLEAN*)

(a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command each person to whom it is directed to do the following at a specified time and place: attend and testify or produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) PRODUCING DOCUMENTS AND OBJECTS.

(1) *In General*. A subpoena may order the witness to produce documents, electronically stored information, or tangible things in that person's possession, custody, or control. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials at the time and place the subpoena specifies.

(2) *Scope*. A subpoena may order the witness to produce items described in (1) that are relevant and material to the preparation of the prosecution or defense, including for the impeachment of a potential witness.

(3) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive, or if the documents or objects sought are otherwise procurable by exercise of due diligence.

(4) *Subpoena for Personal or Confidential Information*. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about an individual may be served on a third party only by court order. This is the only type of subpoena that requires judicial approval prior to issuance, absent entry of a modifying order under subsection (i). Personal or confidential information includes medical records, psychological records, school records, and other similar information. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the individual so that the individual can move to quash or modify the subpoena or otherwise object.

(d) SERVICE. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) PLACE OF SERVICE.

(1) *In the United States*. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) *In a Foreign Country*. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

(f) ISSUING A DEPOSITION SUBPOENA.

(1) *Issuance*. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) *Place*. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) CONTEMPT. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) INFORMATION NOT SUBJECT TO A SUBPOENA. No party may subpoena a statement of a witness or of a prospective witness, from the other party, under this rule. Rule 26.2 governs the production of the statement.

(i) MODIFYING ORDER. At any time the court may, for good cause and based on specific and articulable facts, require a party to obtain court approval before issuing a subpoena under this rule. The court may permit a party to show good cause and provide specific and articulable facts by a written statement that the court will inspect ex parte.

TAB 7

TAB 7A

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 5(f), reminder of prosecutorial obligation (21-CR-K)

DATE: March 30, 2022

Judge Bruce Reinhart has written to suggest a change in Rule 5(f), which was added by the Due Process Protection Act, Pub. Law No. 116–182, 134 Stat. 894 (2020). It provides:

> **(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.

Judge Reinhart comments that the requirement that the order be given "'on the first scheduled court date when both prosecutor and defense counsel are present' is confusing" because it might refer either to the initial appearance or to a later date. Accordingly, he suggests that it would be preferable to require that the order be entered at arraignment.

Although Judge Reinhart suggests that issuing the order at the later date of arraignment "would make more sense," that is not the timing chosen by Congress when it directly amended Rule 5. Moreover, as he notes, Congress chose not to consult the Administrative Office or this Committee in the process of drafting the Act.

In considering whether to proceed further with Judge Reinhart's suggestion, the Committee should consider whether it is prudent at this time to revise an amendment recently added by direct Congressional action. Although Judge Reinhart notes the possibility of confusion depending on when counsel is appointed, his email provides no indication that courts have been unable to comply with Rule 5(f)'s congressional directive. Absent any indication that the directive cannot be implemented, it may be premature to consider an amendment at this time. Indeed, as a technical matter, doing so would require that the amendment added by Congress would be deleted from Rule 5, so that a new amendment could be added to Rule 10, which governs arraignment.

TAB 7B

From: RulesCommittee Secretary
To: RulesCommittee Secretary
Subject: Criminal Rules committee idea
Date: Wednesday, November 03, 2021 3:24:05 PM

From: Bruce Reinhart
Sent: Tuesday, October 26, 2021 8:15 AM
To: Angela Noble
Subject: Criminal Rules committee idea

In October 2020, Congress (without input from the AO Rules Committee) passed the Due Process Protection Act, which added FR Crim P 5(f):

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.

The requirement to give this order "on the first scheduled date when both prosecutor and defense counsel are present" is confusing. It could refer to the initial appearance if the FPD is appointed or if retained counsel appears (whether or not they enter a permanent appearance). Or, it might refer to a later date if CJA is appointed or retained counsel is hired after the initial appearance. It would make more sense to require this order to be entered at arraignment, when there is permanent defense counsel and we are ordering the other discovery per the Standing Discovery Order.

Bruce E. Reinhart
U.S. Magistrate Judge
Southern District of Florida