ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 20, 2023
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 20, 2023, in Washington, D.C. The following members, liaisons, and reporters were in attendance:

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

The following persons participated to support the Committee:

H. Thomas Byron III, Esq., Secretary to the Standing Committee
Allison Bruff, Esq., Counsel, Rules Committee Staff
Christopher Pryby, Esq., Law Clerk, Standing Committee

Opening Business

Judge Dever opened the meeting with administrative announcements. Judge Burgess was attending remotely from Alaska, and Professor Coquillette was attending remotely from Boston. Judge Garcia was not able to attend. He welcomed Judge Paul Barbadoro from the District of New Hampshire as the new liaison from the Standing Committee. Judge Dever noted Judge Barbadoro's exemplary service as a district judge for more than 30 years and his service in many other capacities in the judiciary, including his current service on the Standing Committee and as our new liaison.

Judge Dever also noted that two members would be ending their terms at this meeting. Judge Bruce McGiverin had served for six years, including admirable service on the Subcommittees for Emergency Rule 62 and Rule 49.1. Despite many travel challenges, Judge McGiverin had made it to all of our committee meetings, and Judge Dever expressed gratitude for his many insights. This would also be the last meeting for Lisa Hay, who would be retiring as the Federal Public Defender in the District of Oregon on June 30, 2023. Judge Dever said Ms. Hay had done valuable work on several subcommittees, including Rule 17, Rule 6, and Pro Se Filing. He thanked her for insights and her willingness and ability to call on an incredible network to gather additional information for the committee.

Finally, Judge Dever thanked the public observers for their interest, and recognized Senior Inspector Richardson for a security announcement.

Turning to the first item on the agenda, Judge Dever asked for comments on the draft minutes or a motion to approve them. The minutes were unanimously approved.

Judge Dever asked for reports from the Rules Staff. Ms. Bruff drew the Committee's attention to the chart in the agenda book detailing the amendments and where they are in the Rules Enabling Act process, beginning on page 111. She stated that several Criminal Rules were currently at the Supreme Court. If they are approved by the Court, they will be transmitted to Congress May 1, and absent contrary action, they will go into effect December 1, 2023. Those included amendments adding Juneteenth National Independence Day to the list of legal holidays, new emergency Rule 62, and the technical amendment to Rule 16.

Standing Committee Law Clerk Chris Pryby called attention to the legislation that would affect the Rules, listed in the agenda book beginning on page 117. He noted that House Joint Resolution 7 relating to the National Emergency for COVID has been signed into law by the President. That will terminate the national emergency and the authority under the CARES Act to hold certain criminal proceedings by video conference or teleconference.

Rule 17 and Pretrial Subpoena Authority

The Committee then turned to the proposal to expand pretrial subpoena authority under Rule 17. Judge Dever asked Professor Beale to begin the discussion. She directed the Committee's attention to the memo on page 124 of the agenda book. All members of the Committee had participated in person or virtually in the Committee's October meeting in Phoenix, where numerous speakers described their experiences—in different districts and in different kinds of cases—with efforts to employ Rule 17 to seek material in the hands of third parties. As described in more detail in the minutes, the Committee heard many defense counsel describe the need for subpoena authority in different kinds of cases and for different types of material that they felt they needed to be able to access in order to properly research possible defenses and lines of investigation. The speakers described very different experiences in different districts and actually different experiences in front of different judges in the same district. For example, one speaker said "the rulings are all over the place." In some districts

judges are reading Rule 17 very narrowly under the Nixon case, but in other districts judges read it much more generously.

Professor Beale said that another issue raised by many speakers in October was the uncertainty about whether defense counsel could seek these materials ex parte, or would have to explain what they were hoping to find and its relevance in a filing available to the prosecution. Again, the speakers in October described uncertainty and inconsistency, with some courts ruling that ex parte filing is not appropriate. In other courts, where counsel could not be certain whether an ex parte application would be approved or not, participants said they were taking a risk in making such an application. And in still other districts, the propriety of ex parte filing was well established. The Northern District of California, for example, has a local rule that makes it very clear you can do this.

Professor Beale noted we also heard different accounts of how broadly or narrowly the Nixon case is applied, and that led to the question whether this issue should be solved by litigation rather than by a rules amendment. As more fully explored in the memo in the agenda book, she explained, the Nixon court was interpreting the current rule, and its decision would not tie the hands of this Committee going forward if it is persuaded that the rule should be broader as a matter of policy.

Turning to the Subcommittee's activities since the October meeting, Professor Beale said that it had held two virtual meetings and had received valuable assistance from several experts who attended these virtual meetings. The Subcommittee spoke to Professor Orin Kerr and Richard Salgado about the Stored Communications Act and other issues relating to materials held online, and to other experts on issues affecting banks and other financial service entities. Additionally, the reporters interviewed other experts concerning the issues that might be raised by subpoenas for school records, medical and hospital records.

Professor Beale noted that no decision had yet been made whether to draft an amendment, but the Subcommittee has been keeping a list of issues (agenda book page 129) that it would need to consider if it were to draft a rule.

Judge Nguyen, the Subcommittee chair, then recapped in a different way, taking what she called a step back. Rule 17 has not been significantly amended since the 1940s. The scope of the initial request that we received was incredibly broad. Rather than delving into the weeds of the proposed language, the Subcommittee began the process with information gathering, an investigative phase, so to speak. That really started in October when we brought in all of the speakers to help us understand what the problem is on the ground. We heard the perspectives of both DOJ and defense counsel. And, as Professor Beale explained, it's very different depending on what district you're in.

At this point, Judge Nguyen said, the Subcommittee was starting to emerge from the information gathering process and would convene again to try to make some initial decisions. Given what it had learned so far—extensive work and very detailed information—the

Subcommittee would discuss whether it was ready to move forward, and if so, what issues it will be taking up. It would be helpful to the Subcommittee to know if there are additional areas of research that Committee members think the Subcommittee should be looking into as it embarks on this next phase.

Judge Dever thanked Judge Nguyen for her leadership as the Subcommittee chair, and opened the floor for suggestions regarding any other areas of information that members thought the Subcommittee should be gathering or other sources it should be consulting that were not identified in the agenda book.

A member who noted she was on the Subcommittee commented that her number one concern was that Rule 17 is very poorly written and is confusing. She noted there is confusion about the proper use of sections (a), (b) and (c) for subpoenas for documents versus for witnesses, and she stressed the need for clarification.

Professor Beale responded that many of the speakers in October referred to the need for clarification and uncertainty about exactly what Rule 17 does say. She thought the Subcommittee was very aware of that concern, and she agreed that any change would need to be clear (and our style consultants require clarity).

A member commented that this is an important rule, and that the Committee had received a wide range of comments. The prosecutors said it is fine the way it is, and it should not be amended. But the defense overwhelmingly thinks it needs to change because defense attorneys need a means to obtain more evidence not just to get ready for trial, but to investigate the case.

Hearing no additional comments, Judge Dever said that the Subcommittee would continue its work and report at the next meeting. He also encouraged any member who had additional thoughts to share them with the Subcommittee.

Access to Electronic Filing by Self-Represented Litigants

The next item was pro se access to electronic filing and Rule 49. Judge Dever noted that Judge Burgess was chairing the Criminal Rules Committee's Subcommittee on this topic, and a working group was coordinating the efforts of all of the Committees. He asked Professor Struve to provide an update on the working group's efforts.

Professor Struve began by thanking all the members of this committee and especially its clerk of court liaison for providing so much food for thought to help identify the questions that will be useful as the working group moves forward. She said that the fall and the January meetings posed questions that need answers if one is to consider moving forward with various possibilities.

The project had been subdivided. One topic was the potential for eliminating the current requirement that a non CM/ECF user who files a paper with the court must serve that paper on all other parties to the case separately and in a traditional method. That requirement of separate service seems redundant, because everyone else who is on CM/ECF is receiving the document

through the notice of electronic filing (NEF). So this part of the project is assessing whether the national rules could and should be amended to eliminate that separate service requirement. Professor Struve and Dr. Reagan from the Federal Judicial Center (FJC) had conducted further research, focusing on some districts that have eliminated that requirement and interviewing court personnel from those districts to see how that has been going. They had spoken to 17 different people from nine districts, including people from seven districts that exempt paper filers from separate service on the CM/ECF participants in their case. They all reported that the process was working well.

Professor Struve said that one of the questions that came up in the discussions was whether all paper filings actually end up in CM/ECF and are accessible. She said the answer is yes, they should be, except for ex parte submissions or things that aren't supposed to be accessible to the other side, and those were not. In essence, it works the same way for the paper filer as it would for the CM/ECF participant. In some districts everyone, including self-represented litigants, has to traditionally serve sealed filings on the other parties because they can't get the link through the NEF. In other districts that is not necessary because there's a way to tell CM/ECF that parties in the case can get access to that document in CM/ECF. In those districts, you don't have to separately serve, and that is true for the self-represented litigants as well.

Professor Struve said that the research so far is very positive on the feasibility of eliminating the separate service requirement, but she and Dr. Reagan had encountered an interesting issue that would arise in cases in which there was more than one self-represented party (which their respondents said was rare). If we eliminate the separate service requirement, it would be eliminated only for CM/ECF participants. So if there are two self-represented litigants in the same case and neither is on CM/ECF, each self-represented litigant would be required to serve the other through a traditional means. But how does the paper filer know which other litigants in their case are not on CM/ECF such that they must traditionally serve them? Professor Struve said they had received various answers to this question. Some parties who are not in CM/ECF are enrolled in an electronic noticing program, and that solves the problem. If a self-represented party is enrolled in the electronic noticing program, they are getting the NEF. The NEF solves the problem, because it tells them who they need to serve in a traditional manner. It will say, for example, the following parties did not receive service via CM/ECF, and you must serve them traditionally. Professor Struve thought that was an excellent idea, and she commented that every district that does that agreed. In those districts and with those litigants who are in the electronic notice program, there is no issue. As to other districts or litigants who are not in the electronic notice program, their respondents reported they were aware of no problems. Although no one reported they had not received a filing, Professor Struve thought this was still an issue to consider. She expressed optimism that rulemaking ingenuity could address it. For example, we could have an information forcing provision in the rule that says explain whether you separately served anyone. She thought that might be a topic for discussion in the working group. Professor

Struve commented that she and Dr. Reagan planned to process the fruits of their discussion in a more formal report, but she thought that would be the most actionable and immediate item.

Professor Struve stated that the seven districts that exempt paper filers from separate service on the CM/ECF participants in their cases were the District of Arizona, the Northern District of Illinois, the Western District of Missouri, the Southern District of New York, the Western District of Pennsylvania, and the Districts of South Carolina and Utah. These districts varied in many respects, but all were happy with exempting paper filers from separate service.

Judge Dever recognized the Committee's clerk of court liaison, who said she had spoken at length with Professor Struve. On the service issue, the liaison thought that was something that we could easily work out. In cases with multiple paper filers, she commented that they serve each other in the traditional way now, and she did not think it would be a big deal if everybody else got served electronically. Although she did not see the service side as raising major issues, she did think that the technicalities of actually allowing pro se filers to use CM/ECF would raise logistical issues that we would need to figure out.

Judge Dever thanked the clerk of court liaison, noting that she was the clerk in the Southern District of Florida, and she also had a network of people in other districts that she has consulted about what's going on in different courts. That is very useful because we have 94 different judicial districts.

Judge Dever then invited Professor Struve to report on other aspects of the project. She said they had been pursuing two other topics. First, in the districts that permit a self-represented litigant to access the CM/ECF, how has that been going and what issues have come up? Five of the districts in which she and Dr. Reagan were pursuing their enquiries allow CM/ECF access to self-represented parties without special permission, and in two more districts the court decides whether to allow the access after the litigant has gone through a process. Their respondents went into some detail about the benefits that they saw from permitting e-access, principally no longer having to deal with the processing of the paper filings by these litigants and all the ways in which that saves them time. This of course also eliminates the need to paper serve court orders on them, which some of the respondents also praised. And they also said it results in an electronic record of what was filed, avoiding later arguments about things like whether Page 10 was missing from the filing. You have a record of that.

Professor Struve and Dr. Reagan also asked respondents about burdens on the clerk's office or the court. Responses ranged from no burden at all, to sometimes we have to do a little more quality control, or in some cases, substantially more quality control (meaning things like the party filed in the wrong event). There is also some training time as well as time spent on the phone troubleshooting problems as they arise. So the burden varies, and the respondents differed in their assessment of the resources they would need in order to address access to CM/ECF. They had a particularly interesting discussion with someone who moved from the Southern District of Florida to the Western District of Pennsylvania and expressed surprise that they were able to give access to CM/ECF. But that respondent also said you would need training resources in order

to accomplish this. That bears on the concern about resources, though it may be shifting court resources from the folks who are opening the paper filings and processing them to the folks who are training. So it seems to be true that a court couldn't just switch immediately from one to the other, but they might find that the resources net out.

From the reports of clerks' offices that are now dealing with this, the question of administrative burden and problems seems to be rather in the eye of the beholder. Each of their respondents basically said it's not a problem, but some of them recalled a few instances when someone had put something in that had to be dealt with. Generally they said someone spotted it and the court restricted access. But if it's a real problem, the court might revoke the privileges.

The interviews did provide answers to some of the questions that had come up in Committee discussion. There were questions whether it is hard to identify a litigant who's not a lawyer but is in CM/ECF, and all of the respondents said no, not at all. They also said they had encountered no problems about self-represented litigants sharing credentials, partly because sharing your credentials in the new system means sharing your PACER account, which is sort of like sharing what you'll have to pay for if someone goes and downloads things. Moreover, most of the districts that they looked at only grant access for a particular case, which reduces the likelihood of a problem with sharing credentials. They were told of one instance where there was a problem with shared credentials, but it was a mother who was a litigant and the son was filing papers. That seemed idiosyncratic and not really a widespread problem.

The respondents said that if one wanted a gating system, CM/ECF has the technical capacity. You can set up a type of event to which only court personnel have access and make that the only kind of event that a self-represented litigant could use. Then the court would have to review the filing and then move it to a non-restricted access status. They said it would be technically feasible, but none of those districts had tried to set up such a restriction. Professor Struve thought that probably reflected their overall viewpoint: they saw no problems with the current situation, and such a restriction would create more work for the clerk's office.

Professor Struve and Dr. Reagan also asked about alternative means of electronic access. You can unbundle the CM/ECF benefits and provide them à la carte, as it were, such as allowing electronic filing by some other means, such as e-mail or upload. Five districts do that and they like it. They say it's very similar in its benefits to allowing access to CM/ECF, and they did not identify many technical problems (though the Southern District of New York was much less strongly favorable about their e-mail filing program). The other thing they found very interesting was that eight of these districts now offer E-noticing. Even if someone is not in the CM/ECF, they can sign up to get electronic notices, which basically is signing up for the NEF. Professor Struve expected the use of E-noticing to spread; four of these districts are actively promoting it to their litigants. The benefits to the clerk's office are obvious: they don't have to send out paper court orders. They praised this to the skies.

Concluding her interim report, Professor Struve reported she was much indebted to Dr. Reagan for his expert guidance as they conducted these interviews. She could attest to the superb

work done by the FJC, especially when it consists of qualitative information obtained via interview. Understanding the effort that goes into that, she felt even more indebted to the FJC researchers.

Professor Beale asked whether Professor Struve and Dr. Reagan had learned anything about the possibility that electronic service might address problems that arise when people move frequently and may not even have a stable home address. She wondered whether their respondents thought shifting to some kind of system where everyone gets electronic notice of filings would improve access to justice. Or did respondents voice only the advantage of not having to mail things out? Might this improve the receipt of critical information so that people don't default?

Professor Struve responded that some of their respondents did volunteer ensuring access among the listed benefits of the various kind of electronic access, and in one district the clerk led with that point, saying it was their job to serve the people who litigate. But generally—perhaps because of the questions in the interview protocols—the respondents were focused on burdens or advantages for the clerk's office. But she thought some did mention e-mail addresses may be more stable over time than physical addresses. She also noted that their questions did not address incarcerated self-represented litigants. Some districts are doing exciting things for them, but it is very institution specific.

Professor Struve commented that in an electronic noticing system the person needs to keep their e-mail address up to date and have the ability to download the documents and store them electronically in an accessible way. She commented that she knew people who can get emails but could not reliably read court documents on their cell phones. Moreover, she and Dr. Reagan found that courts with noticing programs seemed to be taking the opportunity to say people who have signed up for E-noticing are forgoing receipt of paper copies. It is not a belt and suspender system. She expressed concern about the ability of self-represented litigants to store electronic copies of documents and access them reliably, though she noted that issue was not within the working group's remit. The clerks' offices did mention some of these things. For example, sometimes people will say they did not get their one free look. When you get a NEF, you get one free look at the filing, and after that you have to pay if you are accessing the document through PACER. So litigants who are savvy know they need to download filings on their first look and put them in their Dropbox.

In other words, Professor Struve said, the cost to self-represented litigants of getting the benefit of electronic noticing is no one will send them paper anymore.

In response to the question whether self-represented litigants could come to the courthouse to get free access to the filings, Professor Struve responded that she and Dr. Reagan did not ask about that specifically. But on occasion when she suggested maybe not everyone is good at storing documents on their cell phone, some clerks responded that the litigants can come to the courthouse, and there's a kiosk where they can look at filings. Professor Struve thought that might be courthouse specific.

The Committee's clerk of court liaison explained that any litigant has access to come to the courthouse and view the documents for free, but they are charged if they want to print the documents.

Judge Burgess thanked Professor Struve for her report, and asked if any members had thoughts or suggestions about what the Subcommittee on Pro Se Filing should be looking at. The clerk of court liaison raised the question whether this issue called for a federal rule. Should we leave it to each court to determine their needs, or make it a rule that all courts must follow? She commented that her court was in a very big district with many high profile cases. She said the idea of letting any pro se party e-file or just file electronically frightened her. The district has a very high profile. Donald Trump lives there. In some cases members of the public file things that are not necessarily related to the case in any way. They just want to be heard. How do we control that? Do we just let everybody have a password and file as long as they say that they have something to say in the case? Or do we allow the judge to say no, these people don't have anything legitimate to add to the case, and not allow them to file? She was concerned about those kinds of cases, not the average everyday litigant that has a case pending. She said she was afraid of big cases where people come out of the woodwork and just want file things. They also get threats against their judges and against the clerk's staff. If they file in paper, the clerk's office can control it. But if self-represented parties are given access to CM/ECF, they would not have much control.

Judge Burgess asked the clerk of court liaison a follow-up question. Were her concerns about the additional work for staff, or about just clogging the docket in particular cases with unrelated filings? She responded she was concerned about both. Since the clerk's office has the quality control for every document filed in any case, unrelated filings do create more work for staff. But they will also clog up the docket. She asked the judges in the room whether they would want 1000 documents in their cases from members of the public who are not related to the case in any way but have something to say.

Professor Struve responded that sounds like an utter nightmare. But the good news is that would never be allowed in any of the seven or eight districts allowing self-represented litigants with access to electronic filing where she and Dr. Reagan had conducted interviews, because to file you must have a PACER account and be a litigant in a particular case. The clerk's office looks for that match, and only allows access to CM/ECF and filing for parties to the particular case. So at least that piece of it seems to have worked itself out.

The clerk liaison replied that they all want to be "interested parties," and file notices of interested parties. She has thousands of individual citizens who want to be interested parties in these cases and want to be heard.

Judge Burgess said he appreciated these comments, and he thought they warranted a closer look at the concerns about the potential for unrelated filings that could clog the docket in a case and increase the workload of the clerk's office.

Judge Dever thanked Judge Burgess for continuing to chair the Subcommittee, which he said would continue to coordinate with the Professor Struve and the Committee's reporters. He also thanked the clerk of court liaison for raising the question whether there needs to be a rule. He thanked Professor Struve and the FJC, which had provided a great deal of detailed information about what's going on across the districts. Judge Burgess added this thanks to Dr. Reagan.

Unified National District Court Bar Admission

The next agenda item, beginning on page 143 of the agenda book, was Professor Morrison's suggestion of a unified national bar admission. Judge Dever asked Professor Beale to give a summary. She said this was a very lengthy and significant proposal—directed not only to our committee but to other committees—to consider adopting a national rule of bar admission. The submission suggests that that there is now considerable variation district to district, and a significant number of districts impose very high hurdles that individuals have to meet to participate in litigation, including, for example, a high cost for pro hac vice filings. To become a member of the bar in many districts you must pass the state bar exam, which obviously is a significant commitment of time and money.

The proponents note we now have nationwide Federal Rules of Evidence, Civil Procedure, Criminal Procedure, and Bankruptcy Procedure. They contend it is time to eliminate the barriers that affect individual litigants, individual lawyers, and litigation groups. Professor Beale noted that a large number of groups participated in this submission. They have already attempted to get changes in local rules and districts where they would like to participate in litigation and where they felt the barriers were too high. But those efforts on a district by district basis had been unsuccessful. Professor Beale said the question is how to proceed since the proposal was presented to more than one committee.

Judge Bates began by commenting that this was a very interesting and thoughtful proposal spearheaded by Alan Morrison, but joined by several litigation groups and other individuals. He agreed it raised some serious issues, and might warrant serious consideration though it was not without other concerns and problems. He thought it likely there would be some resistance among the courts. It would remove local control over not only bar admission, but also bar discipline. He thought there would be concern about taking the local judges and members of the bar out of the disciplinary process and putting that disciplinary process in a centralized location. The few problem members of the bar may be constrained more if they know that the judges they are appearing before and other lawyers in their community are handling discipline, rather than some centralized location that has no real connection to them.

Judge Bates noted that the proposal would also affect the Civil and Bankruptcy Rules, though it would have less impact on the Appellate Rules because they already to some extent provide for a unified bar. Accordingly, he had decided to form a joint subcommittee with representation from the Criminal, Civil, and Bankruptcy Rules Committees (though he noted Bankruptcy had a lesser interest because it generally adopts the bar provisions of the local

district court). He said the joint subcommittee would gather additional information regarding the current situation and issues, and undertake some data collection, perhaps with the assistance of the FJC. It would take some time, which was appropriate for such a thoughtful submission. Judge Bates commented that Alan Morrison, who spearheaded the proposal, had been a very active participant in the rules process and a very constructive participant in it over the years. Professor Struve had volunteered to work with another reporter to lead the joint subcommittee.

Professor Coquillette provided background information on the Committee's role in disciplining or overseeing attorney admission. When Janet Reno was Attorney General, the Department of Justice proposed a system of federal rules of attorney conduct that would have created a unified federal bar and a unified system of federal disciplinary rules. The Rules Committees held three major conferences on the proposal and drafted a set of federal rules of attorney conduct. At that time, he said, the Department of Justice had some very serious issues with certain State Bar associations. In Oregon, Rule 8.4 blocked Department of Justice supervision of FBI agents and sting operations. The State Bars in several states said that the DOJ could not interview potential witnesses because of Rule 4.2 and the need to have approval of a represented defendant's lawyer. There were, he said, many, many issues. In the end there was a lot of opposition from the State Bars and the ABA. But that was some time ago, and Professor Coquillette said he very strongly agreed with Judge Bates that the time may have come to reexamine this.

A member said if the subcommittee takes this up, she would be interested to learn more about the history and what the ethics rules are in different districts. She was aware of some of the history in Oregon. In the Rigatti case, the Oregon Supreme Court said that undercover operations might violate the state ethics rules depending on whether the lawyers were lying to people as part of those investigations. She thought that was one of the reasons they wanted to make sure lawyers practicing in Oregon followed the Oregon Rules of Ethics. If we had a national admission system, she wondered what state ethics rules might not be applied and what some of those controversies were.

Another member commented that there may be some merit to this proposal, but he questioned how this fell within the proper role of the Criminal Rules Committee. Were the proponents seeking a new Federal Rule of Criminal Procedure that would establish a national bar? Judge Bates responded that those were important questions, and would be part of the new working group's enquiry. He commented that it was not crystal clear that amending the Federal Rules of Civil and Criminal Procedure would be either the proper or the best way to deal with the issues.

Mr. Wroblewski agreed that it would be important to understand the history, and he also agreed with Professor Coquillette that this was a new and different context. He remembered the prior context, and he said the previous DOJ proposal was really about government questioning of represented persons and other related issues. There is now federal law on some of the issues, and

the McDade amendment—a federal statute—obviously bears on it. He thought it would be an interesting project.

Another member asked whether the Committee was talking about a Bar Association that would supplant the state rules, and do away with the state bars? Judge Bates responded that the proposal is for a uniform bar admission, not for a new set of disciplinary rules to supplant state ethics. The member responded that Texas had an elaborate process, and she could not imagine they would ever want to give that up. Professor Beale drew the Committee's attention to the point that the proposal focused only on the federal courts, seeking uniform national admission to practice in Federal District Court. She noted that the situation regarding practice in the appellate courts, as had been noted, is significantly different.

Judge Dever closed the discussion of the proposal with several comments. He thanked the member who had asked whether the proper response to the problems described in this proposal would be a Rule of Criminal Procedure. Judge Dever said the Committee always begins asking whether it has the authority to respond to the problem or issue, and if a new rule is proposed we ask if there should be a rule. If a rule change is proposed, we ask whether there is a significant problem with the rule as written. He said he looked forward to contributing to the work of the new joint subcommittee.

Rule 23 and Jury Trial Waiver Absent Government Consent

The next topic on the agenda was a proposal to amend Rule 23 from the Federal Criminal Procedure Committee (FCPC) of the American College of Trial Lawyers. Judge Dever commented that the provision in Rule 23 regarding bench trials had been largely unchanged since its drafting about 80 years ago, and had been upheld against a constitutional challenge in 1965. He said that the question for the Committee was again whether there was a significant problem with the rule as written that warrants creating a subcommittee to further study this proposal.

Judge Dever then recognized Professor King to introduce the proposal, which began on page 215 of the agenda book. She noted that the FCPC proposed language for a new subsection of Rule 23(a) that would allow the court to approve the defendant's waiver of the jury trial without the government's consent if it finds that the reasons presented by the defendant—with the opportunity for the government to respond—are sufficient to overcome the presumption in favor of jury trials. The FCPC advanced several reasons for the proposed change. First, in a significant number of cases, the government does not consent and that causes a problem for those defendants that want a bench trial instead of a jury trial. They based this assertion on a survey described on pages 215-16 and 247-48. Second, FCPC asserts that bench trials are more efficient than jury trials, and the proposed amendment could assist in reducing the backlog of cases that had been created by the pandemic. Finally, the FCPC stated that roughly one third of the states do not require the prosecution's consent and allow for the defendant to waive a jury with only the judge's consent.

Professor King described the history of this particular provision. The Committee considered a proposal to permit the waiver of a jury in favor of a bench trial without the prosecutor's consent in 1963, and at that time it divided the Committee. She noted that views were mixed, and drew the members' attention to the discussion of that on page 221. More recently, when drafting the emergency rule the Committee considered a proposal to allow a defendant to waive jury trial in favor of bench trial with permission of the judge alone. The full Committee at one point approved a much narrower amendment that would be applicable only during an emergency declaration. That provision, which was approved by the Committee and submitted to Standing Committee (page 217), provided that if the defendant waives a jury trial in writing, that court may conduct a bench trial without government consent if, after providing an opportunity for the parties to be heard, the court finds a bench trial is necessary to avoid violating the defendant's constitutional rights.

Professor King said the Standing Committee sent the proposed amendment back to the Criminal Rules Committee for consideration of several concerns. First, was an amendment necessary? A bench trial would be necessary to avoid violating the defendant's constitutional rights in only a very small number of cases, and judges were already handling those problems. Second, this particular proposal might be controversial enough to potentially derail the package of emergency rules that was going to the Supreme Court on an accelerated timeline. In both the Standing Committee and on this Committee, she said, there had been considerable division among the members on the policy question whether the rules should provide some opportunity for defendants to waive a jury without the prosecution's consent. And at the Subcommittee, the Criminal Rules Committee, and Standing Committee there was some disagreement about how often the government withholds consent. There had been no FJC study, and it was pretty clear that it differed from district to district. In some districts people said that was happening, and in other districts they said this never happens. The government either consents or it's not a problem.

Professor King said the question presented by the new proposal was whether at this point the Committee wanted a subcommittee to study this further. The reporters' memo states the view that this is not a constitutional question. It is a policy question on which the states are divided, with two thirds of them roughly following the federal model of requiring government consent, and the remaining 19 states allowing bench trials without government consent.

Judge Bates returned to the point Judge Dever had made earlier, saying this proposal again raises the basic rules approach of asking a series of questions. First, is there a problem? If so, is a rules amendment the best way to address the problem, and would it fix the problem? And are there any collateral consequences? He commented that whether there was a problem here was a real issue to be examined. He said he had one data point, though admittedly it was on a unique category of cases. He had queried all his colleagues and the clerk's office to get data on the January 6th cases in his district. He learned that to date there had been 44 bench trials, and 15 more were currently scheduled. All of those required the government's consent. He was aware of only one case in which the government did not consent. That was in one of the Oath Keepers sedition conspiracy cases. The judge in that case thought it was proper for the government not to

consent to because the case really should go before a jury. And in one other case the judge declined to have a bench trial because the judge felt that similar kinds of issues really should go before a jury. But, Judge Bates said, except for those two instances, which were pretty unusual, the government had been pretty regularly agreeing to bench trials on the January 6th cases.

And as a follow up to that data point, Judge Dever noted on page 248 the FCPC submission seems to say that in 2020, 13% of the criminal trials in federal court have been bench trials, which by definition means DOJ consented in those. He thought that further confirmed Judge Bates' observational data point.

Judge Bates agreed with Professor King's earlier statement that it does vary from jurisdiction to jurisdiction. He said to his knowledge there were some U.S. Attorney's Offices that generally speaking will not consent to bench trials.

Given that data point, Mr. Wroblewski asked, how do we determine if there is a problem or not? If we ask a subcommittee to look into this and they gather more data, he wondered if we would be in any better position a year from now when we have more data points. We now know 13% of the trials nationwide are bench trials, and we know sometimes it doesn't happen. And there are differences among districts. But how do we know if there's a problem?

Judge Dever commented that what brought every member to the Committee was their life and professional experience, and that was why we were asking them the initial question. We live in a world of limited resources. We do form subcommittees and study proposals, but sometimes we decline to do it. He highlighted Professor King's point that when we looked at this issue most recently, it was in the context of Rule 62 and an emergency already having been declared. Judge Dever noted that one of the FCPC's arguments was that there was a great backlog of cases due to COVID. He wanted to hear whether that was true in the districts other committee members were familiar with, because it was not the case in his own district. He thought Mr. Wroblewski had made a really good point. Part of the discussion at this meeting was on the first principle: is there a problem with the rule that's essentially been written the way it's been written for 80 years, that 31 of 50 states essentially follow, and that survived a constitutional challenge in 1965. As the Supreme Court stated, the Sixth Amendment speaks in terms of the accused. But the jury trial provision in Article 3, Section 2 doesn't limit it to the accused, and this raises the issue of the United States' interest.

Judge Bates agreed it would be necessary for the committees involved with the proposal to see what data might support it. He also observed that one of the bases for the proposal was a claim that there is backlog of cases awaiting jury trials in the federal courts because of the pandemic. That too would have to be assessed. He was not sure it was universally true. It was not true in some districts, including his own, where any backlog was being caused by the unique presence of the January 6th cases, not by the COVID pandemic. Also, because the rule process takes several years, it would not be possible for a rules amendment to address any current backlog from the pandemic. It would be at least four years before a rule could go into effect.

A judicial member of the committee asked if members from the defense bar thought there were certain categories of cases where the defense thought it was beneficial to have a bench trial rather than a jury trial, and the government is disproportionately not consenting in that category of cases. He thought this might be true, for example, in child porn or child enticement cases.

Professor King responded to the question how we know if there is a problem. She said we cannot know just by looking absolute statistics of bench trials, because there is a qualitative aspect. Suppose, she said, we find that there are particular districts or particular set of cases where defense attorneys are concerned that the government should have consented to the waiver but did not do so. Do we then look to see why the government wanted a jury? Do we look to see if consent was granted in other cases? Or whether there a conviction on all counts anyway? What, she asked, is the problem with the government's refusal in the cases where it is refusing consent? And is that something that the rules could deal with as opposed to something else? She thought in these districts it would be very difficult to identify a threshold point at which the judges or the government should be consenting. She commented that it is very, very difficult to look back and identify when that was happening, and she emphasized that this is an adversarial process.

A judicial member said he had a fact-based concern as well as a principled concern regarding the backlog rationale for the proposal. The experience in his district, he said, was completely the opposite from that underlying the FCPC proposal: in his district they were unable to find jury trials. Criminal filings had at one time exceeded civil filings in his district, but now they are a fraction of the civil filings. So in his district, there would be no need to reverse the presumption in favor of jury trials. As to an objection based on principle, he expressed concern about the vanishing of the criminal jury trial, noting studies had found that jury trials are disappearing on the criminal side as fast or faster than on the civil side. He saw adding another way to reduce the number of criminal jury trials as a problem for the justice system, not a benefit. For that reason, he thought requiring both parties to consent to a bench trial was very positive. He would be reluctant to alter that.

Another member commented that this is an adversarial process, and she asked why we would take away the government's right to consent or not consent to a bench trial. That, she thought, would have to be considered if the Committee decides to take up the proposal.

After a 10 minute recess, Judge Dever called the meeting to order and he opened the floor to other committee members for discussion of the question whether they perceived a problem with the rule as written that warrants further study.

A practitioner member stated that she had previously chaired the committee of the American College (the FCPC) that submitted the proposal. When the Criminal Rules Committee was considering emergency Rule 62, she had reached out to the FCPC to ask its members if they had seen a problem with refusals to consent to bench trials. That enquiry was the genesis of the current proposal. She heard, at that time, there absolutely was a problem. Although we have statistics indicating that the government must have consented in 13% of the cases, she pointed

out that we do not know how often the government refused to consent. The open empirical question, she said, looms large and warrants the Committee's involvement because it has the mechanisms to examine whether a problem does exist. That is what it was doing with the Rule 17 Subcommittee, which had been inviting subject matter experts to describe their experiences. She emphasized that the FCPC had continued to pursue this issue after Rule 62 was drafted. The FCPC, she said, includes defense practitioners from all across the country, as well as current and retired U.S. Attorneys and Assistant U.S. Attorneys (though not a sitting Assistant U.S. Attorney). She thought the breadth of the FCPC's membership gave "at least some indication that across the country, practitioners believe that a problem exists."

Professor Beale related those comments to something several speakers said at the Committee's October meeting: in their districts defense counsel did not ask for subpoenas because they knew they would not be successful. For that reason she thought it would not be sufficient to know how many requests have been refused. Rather, the real issue was whether practitioners ask and the government consents in appropriate cases. And of course that would require the Committee to have some idea of what constitutes an appropriate case for a bench trial. She noted that when Judge Bates was describing the January 6th cases, he referred to a case the judge thought "should" go to a jury. She said that if the Committee took up the proposal it would have to think about some very fundamental questions, including what kind of cases should go to juries even if the defendant doesn't want to, and when the government's refusal to consent would be inappropriate. Noting that a prior speaker had emphasized this was an adversarial system, Professor Beale commented that there are not two equal adversaries. Instead, many aspects of the rules treat the defense differently from the government. And the government cannot refuse to allow the defendant to plead guilty or refuse to allow the defendant to incriminate herself. There are many protections for the defendant that the government cannot require a defendant to use. On the other hand, she said, the parties are not permitted to agree to have a private or closed trial, because there is a public interest in having a public trial and the First Amendment requires an open courtroom. So a full examination of the proposal would require consideration of the function of the jury, and whether it is just a right of the defendant. Or does the government have an equal right? And there are also empirical questions. Are there districts, as a prior speaker said, in which the government will never consent? And if that's the case, how many are there? And does the Committee think that's a problem? That would require the Committee to have a normative or policy position. The proposal contends there is a sufficient problem that then we need to investigate the empirics and have our own conclusion about the policies. But it was for the Committee to decide whether there was a big enough problem that it wished to commit the resources of a subcommittee, the reporters, and meeting time. The Committee cannot do everything and must prioritize.

A member said that sounded like an even deeper and broader probe than originally presented in the FCPC proposal. He wanted to understand what problem the proposal was seeking to remedy. What, he asked, is the problem with two party consent given the constitutional presumption of a jury trial? Professor Beale responded that there may not be a

problem. She thought that was the ultimate policy or normative question. She also reminded the Committee that it did not have to adopt or reject the particular proposal. As with Rule 17, the question is whether there is enough of a problem it would be worth looking again at Rule 23. If so, the Committee might substantially revise the proposed amendment or might (as with Rule 6 recently) study it for quite a while and then conclude that it was not prepared to go ahead with an amendment. She asked whether members were persuaded from the proposal or their own experience that this issue warranted a significant expenditure of Committee time.

Focusing on what kind of evidence the Committee needed, another member noted the proposal had attempted to provide evidence of a problem. On pages 215-16, the proposal described an informal survey finding that in at least 12 districts prosecutors rarely or never consent to a bench trial. Thus the Committee had information about at least twelve districts, and it had been told that the process differs district by district: we get bench trials in some places, but not in others. The member thought that was enough of an indication of a problem: procedural unfairness where defendants are being treated differently in different districts across the country based on different prosecutorial decisions—assuming that the Committee did not think the prosecutor needs to have that authority. She noted that there are different charging decisions in different districts, but that was within the role of prosecutorial discretion. This proposal, in contrast, focused on a procedural rule that the Committee had created on how to waive a jury trial. At some point the Committee added the requirement that the defendant has to ask for a bench trial, the prosecutor has to agree, and the court has to approve. But it could revisit the question whether that's the right procedure, and whether the prosecutor's consent should be required. The Committee could also assess whether the Rule is being applied differently across the country. As to the earlier comment about the disappearing jury trial, the member said action by the Sentencing Commission concerning "the trial tax" might be a better way to reinvigorate jury trials.

Judge Bates suggested there might be a middle course between appointing a subcommittee and removing the proposal from the Committee's agenda. In some instances when he had thought it premature for the Civil Rules Committee to appoint a subcommittee, as chair he and the reporters (sometimes working with the FJC representative) worked together to gather additional empirical data that would be useful in deciding whether there was a sufficient problem. So it might be possible to develop more information without appointing a subcommittee.

Mr. Wroblewski said that if there is a problem with a backlog of cases that could be solved by bench trials, we should find out now and respond immediately. He said that during the pandemic many districts were not holding jury trials, and there were significant issues with defendants being able to exercise their constitutional right to have a trial. The Department of Justice pressed all of its U.S. Attorneys to offer every defendant the opportunity to have a bench trial to avoid this particular problem. But the vast majority—almost all defendants—declined the offer. So if there was a current problem that could be solved by the government consenting to bench trials, he thought we should find out right away, so that DOJ could get the word out to the

U.S. Attorneys that you appear to have a backlog, and this is a way to address it now. We do not, he emphasized, need to wait three or four years before an amendment could be adopted.

A member agreed completely, saying no matter how many problems we might find it was still the government's right, and it should be the government's right to waive or not to waive a jury trial. As Mr. Wroblewski said, the Department should get the message out to its prosecutors to waive a jury when there is a significant backlog. The member thought that would be much better than taking away the government's precious right to a jury trial.

Mr. Wroblewski emphasized that although he had not yet had an opportunity to survey his DOJ colleagues, he was fairly confident that they would share his reaction that the proposal was not particularly persuasive, and it was not a very close call. One of the two primary problems identified in the proposal was interference with the defendant's rights because of the unavailability of jurors. But as this Committee and the Standing Committee recognized in considering Rule 62, and as reflected in the case cited in the proposal (United States v. Cohn, page 248), a judge can impose a bench trial over the government's objection when necessary to protect the defendant's constitutional rights. The constitution supersedes any provision of the Federal Rules of Criminal Procedure. No amendment is needed to change that, and the case discussed in the FCPC proposal (Cohn) demonstrates that.

Mr. Wroblewski also stressed that the Constitution has an explicit preference for jury trials. Article III states that "The trial of all crimes, except in the cases of impeachment, shall be by jury." That, he said, is the presumption. The Supreme Court has explained there are exceptions, but that is the presumption. He wondered whether the fact that 13% of cases involve bench trials shows that problem is that there are too many, not too few, jury waivers. He noted there are many very good reasons for the constitutional presumption. We want the community to be involved. There is a big difference between a jury and a judge—who is a government employee. And there is a difference between 12 jurors that must act unanimously and one single judge who decides on his or her own. He urged the Committee to recognize the values embedded in the Constitution and its jury trial provisions. He thought Professor Beale was asking the right questions: when is it appropriate to waive that and give that up? He suggested all members needed to wrestle with that.

In connection with the comment on the jury's constitutional role, Judge Dever observed that under Rule 29(a) the court may grant a motion for a judgment of acquittal at the close of the government's evidence. To the extent there was concern about the need for a bench trial in a certain kind of case because of concerns that the jury may act irrationally if they see certain types of evidence or a technical defense, Rule 29(a) provides another procedural remedy within the jury trial process and the existing rules.

Another member said that anecdotally at least the Committee is aware that in some districts the government does not consent to waiver of a jury trial. She did not know whether that was a problem that a subcommittee could resolve. As Mr. Wroblewski had observed, the issue really is whether the government is entitled not to waive the jury. Thus it might be premature to

appoint a subcommittee to gather additional empirical information, rather than first tackling the broader policy question. She was not sure who the additional empirical information (e.g., whether 10% or 20% of districts did not consent) could help answer the policy question.

The member also asked whether this was something that the Department of Justice could address as a matter of policy. To the extent that there was a district operating outside of the norm the Department expects, she suggested the solution might be for the Department to enact some sort of policy or directive. She and another member used to practice in the same district, and neither could recall a single case where the U.S. Attorney didn't consent if the defense wanted to waive, regardless whether the prosecutors were comfortable with that. The member did not recall whether that was an official office policy, but it was very close to that. So that was a policy matter, and she was doubtful that a subcommittee, rather than the Department, could take care of the problem.

A practitioner member commented that the extraordinary situations of COVID and the January 6th trials (where it was in the interest of the government to move those cases along and may encourage bench trials) were so atypical they might skew the data. She focused on situations that the courts do not see: when defendants request that the prosecution consent to a bench trial, the government says no, and that is the end of it. She returned to the policy question raised earlier: do we want cases like this to be decided by the government or by the court? As Rule 23 now stands, the government is pretty much the sole arbiter of whether a defendant can waive a jury trial except in cases in which the government's refusal would result in a violation of some other constitutional right. In those cases, courts have granted relief. But the courts do not see other cases in which the prosecution refuses a defense request for consent to a bench trial, and there is no extraordinary constitutional favor. In those cases the defense is unlikely to present the issue to the courts, which may be unaware of the scope of the problem. She concluded by restating the question whether as a policy matter the prosecution or the court should decide whether a particular case needs to be public and open in front of 12 jurors.

Another member said he was intrigued by Judge Bates' suggestion that there might be some way to get the data that the Committee might need, but he wondered how we would get data on the cases just described. He thought there might be informal surveys of judges and/or lawyers asking about scenarios where defense may have had a conversation with the prosecution and made a request and the prosecution said no. He wondered whether as a practical matter the Committee could get enough data to decide if this is an issue.

Noting that other members had framed this as an adversarial provision, a member said that conceptually the Sixth Amendment and the Article III provision related to jury trial clearly give the defendant a constitutional right, but there is also a community right. He distinguished this community right from any right of the government. He then raised the question whether the government should be the arbiter of when that community right is vindicated, or whether it should be left to the court. He thought that framing was critical. He also appreciated the challenges with regard to collecting the necessary data. The proposal did include some data. He

thought there might, as Judge Bates had suggested, be a middle ground of ways to gather more evidence, whether it's anecdotal or some sort of survey that would inform whether the proposal was worth pursuing.

Judge Bates acknowledged that collecting the data might be difficult, but he also identified several sources of data the Committee might pursue, perhaps with the assistance of the FJC. The Justice Department could reach out to the U.S. attorneys and units within Main Justice for information regarding requests for bench trials. With the help of the FJC, the Committee could do something similar through the Federal Public Defenders, and it might get some useful information on how often the government refuses defense requests for consent to jury waivers. Though that information might be imperfect, he thought it would be useful.

A member responded that all of the data would really be specific to each district. For example, suppose there is a district in which the prosecutors never agree to jury trials because they think the judges are biased in the sense of being really bent towards the defense. So the prosecutors refuse to consent. Given the different possibilities, the member cautioned it would be necessary to try to understand what is really going on once we gather data.

Professor King posed several questions. If there are reasons that are impermissible for the prosecutor to deny consent, are those same reasons also impermissible for the judge? Or suppose the prosecutor says "I believe in the jury. I think everyone should have a jury trial. I think it's important to the community. So I do not consent to bench trials." If that is acceptable, she thought every prosecutor who wanted to deny consent could just say that. Except for the narrowly written draft emergency rule (limited to cases in which the court found a bench trial was necessary to avoid violating the defendant's constitutional rights) she thought it would be very difficult to determine what sorts of reasons are permissible and what sorts are not for purposes of a rule. Other alternatives might be better, such as the judiciary Benchbook, or DOJ policy. She thought the procedure for deciding could certainly be clarified in the rule, but it would be much more difficult to make the normative decision what reasons are and are not legitimate.

A member suggested that it would be legitimate for the government to refuse consent because the prosecutor thinks the judge would not like the government's case. She asked whether others agreed.

Another member responded to the question how to gather the data. She supported seeking data from the Justice Department and the Federal Defenders. But she emphasized that the Committee already had a statement from the private bar: the statement in the proposal. Lawyers from across the country decided that it was worthy enough of consideration that they put together and submitted this proposal.

A member expressed curiosity about districts that as a matter of course never agree to a bench trial and wanted to know more about that. He could only recall a couple of times where the government did not agree to bench trial when the defense had asked for it. He also stated that

his district was not experiencing any backlog from the pandemic. He thought the January 6th trials were a real exception. He could see where the court in some cases, such as some of these January 6th cases, would really want to have a jury trial as opposed to a bench trial.

The Standing Committee liaison returned to Professor Beale's question whether there are classes of cases where it would be inappropriate for the government to deny a bench trial to a defendant who is seeking one, saying he had been struggling with that question. For him, the presumption of jury trial was so strong presumption that he needed to try to identify what are the kinds of cases where we would be willing to effectively say by rule that the government should not be allowed to object. He had not experienced the problem of the government objecting, but he felt he had powerful tools to ensure a fair jury trial: overseeing the voir dire process, enforcing Evidence Rule 403, and properly instructing the jury. He thought those tools were so powerful that he had great confidence that he could pick a fair jury in almost any kind of case. He thought Professor Beale might have been thinking of cases that involve really ugly brutal facts, or cases that have such extraordinary pretrial publicity that the polarization is horrendous. Although one might think you need the option of a bench trial in those cases, he said he had tried those kinds of cases. He had tried the governor of Puerto Rico when he was running for reelection, and they were able to pick a fair jury. So he did not immediately see that there was a class of cases where by rule we would be willing to effectively tell the government it is not allowed to prevent a bench trial.

A member responded that one example where the defense might want a bench trial is a defendant with prior criminal convictions who wants to testify and believes that the judge could set aside the prejudice that those convictions might show. That defendant might think a jury, even if well instructed, is just going to take those convictions into account. She thought that was an example where the bias that a jury might have is hard to overcome, and a defendant might think they could get a fair trial in front of a judge and want to testify. Regarding the history of Rule 23 that was described in an earlier memo,[1] the member commented that whether the government should have this veto had been addressed several times but not resolved. She thought might be worth investigating that idea again, including consideration of whether there is disparity across the country. She thought the Committee could already say anecdotally there is such disparity, though it might not be able to answer whether the government was objecting for good reasons or not. She asked why the government veto was originally included in Rule 23. She suggested an alternative: if the defense requests a bench trial, they should state their reasons, the government can respond why they oppose, and then the judge would be in a position to represent the community's interest. She acknowledged the constitutional preference for jury trials, but said the judge could enforce that constitutional preference rather than the prosecutor. She thought it was a question of where that power should be. Since the Committee knows the government does not consent in some districts, she did not think it was important to learn more about how many such districts there are. As to the reason Rule 23 was drafted, she appreciated the earlier research

[1] The member was referring to the memo on pp. 220-29 of the agenda book.

memo[2] that indicated there was not much discussion of this issue when the rule originally came up. One commentator said the defendant can waive all these other rights, why not also the jury trial. The 1960s was the last time this was seriously considered, and there was another view. She suggested the key question was why the government, rather than the judge, should have that veto authority.

Judge Dever commented that the research memo the member had referenced did discuss the nine cases that were totally consistent with Singer. In upholding the constitutionality of Rule 23 as written, the Singer Court distinguished exceptional cases where the judge may determine it would not be possible to get a fair jury. There are change of venue provisions, and Judge Dever noted that the previous day had been the horrible anniversary of the bombing in Oklahoma City, and that trial took place in Denver because it was not possible to get a jury in Oklahoma.

A member interjected that she did not read the memo on pages 220-29 of the agenda book as a setting forth a constitutional right of the government to a jury trial.

Mr. Wroblewski said he would be happy to take up any request for research among the U.S. Attorney community to ask them about which districts have what policies and also to consider, at the appropriate time, whether the Department should have some sort of policy. He also noted that Professor King had raised a good question: what is the appropriate standard? When is it appropriate to waive and when is it not appropriate? He thought it was not obvious, and he asked how one could write a policy other than to say you should not reject a request for a bench trial without thinking about it and considering all the totality of all the circumstances. He reiterated that he was happy to gather any information requested, as well as to discuss the possibility of guidance either immediate to address any backlog or longer term to address any other concerns.

Judge Dever thanked Mr. Wroblewski, and said that he thought it would make good sense for Mr. Wroblewski to gather that information as well as information about (1) whether there is a COVID backlog, and (2) data on declining and whether there is a national policy or instruction from the Attorney General, or something U.S. Attorney specific. Judge Dever said the Committee could also try to gather information from the Federal Public Defender community. A member suggested also seeking information from CJA panel attorneys, which she said had a very good organization that could provide additional information, and Judge Dever agreed.

Judge Dever said that was how the Committee would proceed, and in concluding the discussion of this item he echoed an earlier comment about the thoughtful discussion. He noted that one of the key benefits of the Committee's process was hearing from so many different stakeholders and perspectives to get to the right result.

[2] The member was referring to the memo on pp. 220-29 of the agenda book.

Rule 49.1 and Privacy Protections for Social Security Numbers

Professor Beale introduced the next item on the agenda, on page 274 of the agenda book, concerning privacy protections for Social Security numbers under Rule 49.1. Our docket contains a public suggestion that is a portion of a letter from Senator Wyden of Oregon to the Chief Justice. She noted that the treatment in the agenda book was very short because it was a cross-committee suggestion concerning a suite of rules that were all drafted at the same time, after the adoption of the E-Government Act. The parallel rules all have the same language and take the same approach. So any possible change to those to our rule would inevitably require consideration of parallel changes to other rules as well.

Thus the question is how best to move forward and which group has the biggest stake in this? There is agreement that the Bankruptcy Rules Committee has the biggest stake, so they are going to take the lead. Professor Beale asked Mr. Byron to provide an update from the Bankruptcy Rules Committee's meeting and information about what might be coming next. She noted that Criminal Rules would clearly be in the back seat on this, not in the driver's seat, and the car has to go in the same direction for all of these Committees.

Mr. Byron said that the Bankruptcy Rules Committee has begun discussing this question, which is very complicated for them. Many provisions in the Bankruptcy Rules require the last four digits of individual Social Security number or taxpayer ID number, and many reasons have been advanced historically and reiterated in the most recent discussion for why those rules should retain that requirement. He stated that it was not likely that the Bankruptcy Rules Committee would complete its consideration of this question quickly. One of the things discussed in the Bankruptcy Rules meeting a few weeks ago was the fact that the FJC is undertaking a study about compliance with not just the redaction requirement for Social Security numbers, but also the other requirements for redaction in the privacy rules generally. He said there might have been some uncertainty about whether that FJC study would also address the question that the Bankruptcy Rules Committee was considering, which is whether there is a policy reason to change or retain the current requirement in the privacy rule. The discussion in the Bankruptcy Rules Committee might require additional time.

Mr. Byron said that he would discuss with all the chairs and reporters whether it made sense to continue to await resolution by the Bankruptcy Rules Committee or whether instead to go ahead and ask Criminal, Civil, and Appellate Rules to consider on their own whether some change is warranted. It would be premature to say what the outcome of that discussion will be, because we need more information about where Bankruptcy is heading, and how long it would take to resolve those questions. Mr. Byron thought it was unlikely what the Bankruptcy have reached a decision by the fall meeting of this Committee. He also noted it was possible Bankruptcy's problems might be unique. Because they have so many financial records, they might decide to continue to require the last four digits of the Social Security numbers. But it could be that Civil and Criminal—or even just Criminal Rules—might conclude that they do not really need the last four digits of the Social Security number, that it's too much of an

infringement on people's privacy to have that somewhere it can be accessed. But Mr. Byron cautioned that at present it was too preliminary and the decision has been made that Bankruptcy will continue to try to work through this, though there will come a point at which we will have to think about the other rules.

Professor Beale summed up the discussion with the comment that the next steps involving the various committees would be orchestrated by Professor Struve, Judge Bates, and Mr. Byron. At this point, the Committee was not being asked to take any action, and likely the issue would not be on its agenda for the fall meeting.

Removal of Items from the Study Agenda

Judge Dever asked Professor Beale to introduce the next items on the agenda, and she directed the Committee's attention to page 277 of the agenda book, which was the first of two proposals to remove items from the Committee's study agenda. The study agenda allows the Committee to put suggestions to one side to allow additional time before making a determination whether there are sufficient indications of a problem to warrant the substantial commitment of Committee resources for the in-depth study of a possible amendment. In the case of these two items, the reporters recommend that the suggestions be removed from the study agenda, because there has not been a showing of a significant problem that could be remedied by a rules amendment. She stressed that this was merely a recommendation from the reporters, who were inviting comment and consideration by members.

The first of the two study agenda items concerned conditional guilty pleas under Rule 11(a)(2). Professor Beale explained that Judge Susan Graber, who was then a member of the Standing Committee, sent the Committee a very brief e-mail saying here is a recent decision in United States v. Lustig,[3] and there may be room to clarify the rule.

In Lustig, the Court of Appeals concluded that the District Court had erred in denying a motion to suppress. The majority held that that error had was not harmless because it could have affected the defendant's decision to plead guilty. It identified the proper test for conditional plea cases as whether there's a reasonable possibility that the error contributed to the defendant's decision to plead guilty. The court noted that test will necessarily be hard for the government to meet because the record will seldom contain enough information to allow the court to conclude beyond a reasonable doubt that the error did not contribute to the defendant's plea decision. Judge Watford concurred, writing separately to highlight his different view of what Rule 11(a)(2) required. In his view, the statement "A defendant who prevails on appeal may then withdraw the plea" leaves no room for any harmful error analysis as long as the defendant has prevailed on appeal. When the defendant reserves the right to appeal a ruling under Rule 11(a), the only question for the appellate court is whether the ruling in question was in error. Harmless error comes into play only in determining whether the district court's ruling itself could be affirmed.

[3] 830 F.3d 1075 (9th Cir. 2016).

The question for the Committee, Professor Beale said, is whether this demonstrates a problem warranting an amendment. There are only a relatively small number of conditional pleas, and this seems to be a garden variety disagreement between two members of the same court (each of which then cited cases from other circuits). When this suggestion was first presented, the Committee was not sure this was a distinctive and significant problem, so it put it on the study agenda to see whether other courts saw a problem, or whether there were calls for a clarification of the rule. There had been no further indications of support for an amendment. The Lustig opinion did demonstrate a disagreement about the proper interpretation of Rule 11. But it is not the Committee's job to try to identify and resolve every disagreement among courts of appeals about exactly how a rule should be interpreted. The reporters recommended that the Committee not wade into that disagreement, and that it remove this item from its agenda.

Judge Dever opened the floor for discussion. After a brief clarification distinguishing between tabling the suggestion (which had essentially been done while it was on the study agenda) and removing it from the agenda, the Committee unanimously agreed to remove the item from the study agenda.

Professor Beale introduced the next agenda item, on page 278 of the agenda book. A practitioner named Mr. Gleason wrote suggesting an amendment to address cases where the prosecution and the defense both agreed the defendant should be found not guilty by reason of insanity. He stated that in a recent case where he represented the defendant, the government and the defense both agreed the proper outcome was a verdict of not guilty by reason of insanity. But the rules do not allow a plea of not guilty by reason of insanity.

Professor Beale explained that the Insanity Defense Reform Act of 1984 and Rule 11 together create the current landscape. The Act calls for a special verdict if the issue of insanity is properly raised by notice to the government under Rule 12.2. The Act provides that the jury shall be instructed to find—or in the event of a non-jury trial, the court shall find—the defendant guilty, not guilty, or not guilty by reason of insanity. This channels the insanity defense through a verdict in either a bench trial or jury trial, and the Act makes no provision for a plea that the government might agree to, or that the defendant has a right to enter. That raised the question how such cases are being handled now. As the reporters' memo explains, an informal practice has developed in which the parties agree to the relevant facts and they are submitted to the court for a bench trial. There's usually a stipulation of those facts. If there are expert reports from the person who's examined the defendant finding that he or she was insane at the time of the crime and the government is confident that this is correct, there is no reason to dispute it. But there is no provision for a plea that the parties agree to. So the case is submitted to the court on the stipulated facts, and the court enters the special verdict that's provided for under the Act. Professor Beale noted the Act was enacted by Congress after John Hinckley was found not guilty by reason of insanity. The Act reflected a concern about overuse of the insanity defense, and it included the narrower federal definition of insanity. So Congress was seeking to keep insanity cases on track and within some narrow limits. She noted that when the issue was raised at an earlier meeting Mr. Wroblewski told the Committee that the criminal chiefs and others had

described this workaround procedure of a bench trial on stipulated facts. It can be cumbersome; it takes a little longer than just having the parties come in and do a plea. But it is workable. At that meeting, one member commented that the bench trial on stipulated facts avoids a problem where the defendant, because of his mental state, may be unable to appreciate something like his role in the events and thus may not be able to plead knowingly. That member said they could not support a plea proceeding because of potential incapacity on the defendant's part, even though the defendant would be competent to stand trial.

The Committee decided to put the suggestion on its study agenda. The reporters confirmed the use of the procedure. We had an earlier research memo from Mr. Crenny, who tried to identify courts in which this procedure had been used. The agenda book memo, pp. 277-80, which updated Mr. Crenny's research, included lengthy footnotes citing the many courts of appeals that have acknowledged this procedure occurred in particular cases in front of them, and many cases in the district courts.

The question before the Committee was whether to remove the item from its study agenda or move ahead with a proposed amendment. Is there a significant problem that would warrant a change in the rule? Professor Beale said it was the reporters' view that the informal practice was working well enough, and that it would be prudent to remove the item from the study agenda. She said the issue was presented for discussion.

Judge Dever began with the observation that one benefit of the so-called workaround process ensures that the judge gets all those reports and is able to review them before making a decision, and the judge then has the defendant before him in court. He then opened the floor for discussion of the proposal to remove this from the study agenda.

A member agreed that no amendment was needed in light of the workaround procedure, but he had a question about the Committee's process. What happens when an item is removed from the study agenda? Does the person who suggested an amendment receive notification?

Professor Beale responded that over the years there has been an effort to respond, at least to judges who have made a proposal, and certainly to do so in the case of a judge that has been a member of the committee. She was not sure whether that was the case for all public suggestions.

Mr. Byron added that there is a tracking system on the Administrative Office website that includes all suggestions for any of the rules. The tracking system allows any member of the public to see the status of their suggestion or any other suggestion. When an item is removed from a committee's consideration, the website is updated to reflect that action. And, as Professor Beale mentioned, at the chair's discretion there is individual communication for some suggestions.

Judge Dever stated his general view that if someone took the time to write in with the proposal, we ought to let that person know once we make a decision. He also noted how much thought goes into the consideration of each proposal.

A motion was made, seconded, and approved unanimously to remove this item from the study agenda.

Judge Dever advised the Committee that its next meeting would be on October 26, 2023. He anticipated it would be in the Midwest or the East Coast, and he said that members would be notified when the choice of location was final.

Judge Dever reminded the Committee that this was the last meeting for Judge McGiverin and Ms. Hay. He said both had made enormously helpful contributions to the Committee's work, noting also that each had to travel a substantial distance to meetings. He invited them to make parting remarks.

Judge McGiverin said he was grateful for the opportunity to serve on this Committee. He found it inspiring to see the members' strong commitment to getting it right, down to the last comma in the committee notes. It was also inspiring to see members from both the defense bar and from the DOJ (Mr. Wroblewski and others) go beyond mere advocacy to arrive at a more disinterested place to get the rules right. Judge McGiverin said each of the chairs of the Committee while he was a member—Judges Molloy, Kethledge, and Dever—had provided exemplary leadership, and he also praised the work of the reporters, saying that it anchored the Committee's work.

Ms. Hay expressed gratitude for the professionalism and collegiality she had experienced during her three years on the Committee. She said she appreciated that the Committee generally takes a conservative approach, making changes only when needed. But she commented that sometimes the rules have not really kept up with the practice and there is great variation in how courts are interpreting them. She encouraged the Committee to also continue to be creative in its responses. She cited public access to grand jury records and subpoenas under Rule 17(c) as examples where the rules are not being followed. When the rules are not followed, she suggested, it may be a disservice not to clarify or modify them. Ms. Hay stated that she really appreciated the thoughtfulness people have put into the Committee's deliberations, and she thanked Judge Dever, his predecessor Judge Kethledge, and the reporters. We could not do this work, she said, without the research and guidance that they had provided to keep us organized, educated, and on the right track. She too had found her service on the Committee inspiring.

After thanking the staff at the Administrative Office and the reporters for the work that went into the meeting preparations and announcing that lunch was available, Judge Dever adjourned the meeting and wished all participants safe travels home.