ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
October 26, 2023
Minneapolis, Minnesota

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on October 26, 2023, in Minneapolis, Minnesota. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Robert J. Conrad, Jr.
Dean Roger A. Fairfax, Jr. (via Microsoft Teams)
Judge Michael J. Garcia (via Microsoft Teams)
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Jacqueline H. Nguyen
Angela E. Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Catherine M. Recker, Esq. (via Microsoft Teams)
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.[1]
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, Esq., Secretary to the Standing Committee
Allison Bruff, Esq., Counsel, Rules Committee Staff
Zachary Hawari, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center

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

Opening Business

Judge Dever began the meeting by introducing the University of St. Thomas School of Law Dean Joel Nichols, who welcomed the Committee, made some remarks about the School, and thanked the Committee for allowing students to observe its proceedings.

Judge Dever then introduced and welcomed the new Committee members, Marianne Mariano (who had already begun participating on the Rule 17 Subcommittee) and Magistrate Judge Michael Harvey. Judge Dever noted the members and other participants who were attending remotely and asked all of the participants to introduce themselves. Judge Dever noted that Mr. Wroblewski was representing the Justice Department at the meeting, because new ex officio member Nicole Argentieri, the Acting Assistant Attorney General, had been unable to attend. Nicole Teo, a former Rules Office intern and Elizabeth Shapiro, from the Department of Justice, were introduced as guests.

A motion to approve the minutes of the spring meeting passed unanimously.

Judge Dever asked the Rules staff to present updates on the pending rules and pending legislation. Ms. Bruff noted that the technical amendment to Rule 16, the amendments to Rules 45 and 56 adding Juneteenth National Independence Day to the list of legal holidays, and the new emergency Rule 62 will take effect December 1, absent congressional action (p. 105 of the Agenda Book). Mr. Hawari noted that pending legislation of interest was collected in the Agenda Book beginning on page 112. He mentioned that the Government Surveillance Transparency Act of 2023, introduced last month, would require the Judicial Conference to promulgate rules to put any criminal surveillance order, including search warrants, on a public docket and possibly create a case number and caption for it, with some exceptions.

Rule 17

Judge Dever asked Judge Nguyen to provide an update on the work of the Rule 17 Subcommittee. Noting the Reporters' more detailed memo on the Subcommittee's work beginning on page 127 of the Agenda Book, Judge Nguyen said the Subcommittee has had extensive discussions and input from the Department of Justice, the defense bar, law professors and other experts. The Subcommittee has been persuaded that a case has been made to move forward and engage in a more detailed study and consideration of a possible amendment, but it was still far from discussing specific language. As reported at the last full committee meeting, practices under Rule 17 vary widely from district to district and among judges within the same district, and some clarification of Rule 17 will be very useful. On the key substantive question of whether the *Nixon* standard is too restrictive, the Subcommittee has tentatively concluded that it is. Thus, it is considering possible amendments to expand subpoena authority under Rule 17.

Other key tentative conclusions are that any amendment should include judicial approval before a third party subpoena under Rule 17 is issued, and that subpoenas for personal and confidential information should be treated differently than those seeking nonprotected materials. After pretty extensive discussions, the Subcommittee's tentative conclusion is that the phrase "personal or confidential information" would be appropriate to define protected materials

without going too far in the weeds specifying exactly what they are. The Subcommittee also tentatively concluded that ex parte subpoenas should be allowed upon motion and a showing of good cause.

The Subcommittee met the previous day to discuss additional issues, such as whether information should be disclosed to opposing counsel and whether material should be turned over directly to the party or to the court. Next, it will be deciding what standards to apply to protected material and nonprotected material, and there are other issues to discuss as well before the actual drafting.

Professor Beale noted the Subcommittee had met five times since the spring meeting and although the tentative decision is to try to write a proposed amendment, it wouldn't necessarily be what the New York Bar Committee had recommended. The Subcommittee was moving systematically issue by issue, not presuming that the current rule is right, and not presuming that the Bar proposal is right. It was working to learn what's going on in practice because so much of this is not specified in the rule now, and practice is really working *around* the rule. She reminded the Committee of the earlier October 2022 meeting where practitioners described very different practices, experiences, and opinions, and she emphasized that the Subcommittee was continuing to try to understand the various issues. When the Subcommittee completes its consideration of the last of these issues, it will have to put the whole proposal together to see whether all of its tentative decisions fit together, and then come up with language to capture it all. She commented that the Subcommittee has been persuaded that the rule is very confusing and clarification is absolutely needed, but there are many questions about how to do that without micromanaging the process. She noted that the amendments might not stay in Rule 17 and might end up as two different rules. So there was a lot of work to do, both in finishing the initial review of the issues and reaching tentative conclusions on each, putting those issues together, and then drafting the language of a complete proposal. The Committee could anticipate further discussion at the spring meeting that will get more into substance, but the Subcommittee welcomed comments or questions about the tentative conclusions it has reached so far.

Judge Dever thanked Judge Nguyen for her leadership of the Subcommittee, and the members (Judge Boyle, Ms. Recker, Mr. Wroblewski, and Ms. Mariano) as well as the reporters for their work. He asked for comments.

Mr. Wroblewski described the proposal as "tricky" for a number of reasons. On the one hand there is near unanimity that the rule needs to be clarified. And in some districts, implementing the proposal would be a pretty simple and straightforward process because the use of subpoenas is widespread, there is no judicial oversight of them, and they are routinely ex parte. But in other districts, such as Philadelphia, where there is currently almost no subpoena practice, it would be a much bigger change. He characterized the proposal as a very big deal, and he commented that the Subcommittee's slow, steady, and measured approach was fantastic. He noted that the Subcommittee was considering a change that would overturn controlling Supreme Court precedent, rewrite the law of subpoenas in criminal cases, and likely change pretrial practice—though he noted the Subcommittee did not know yet exactly where it was going. He thought it was also an especially big deal because a few years earlier, in the *Carpenter* decision,

the Supreme Court said for the first time said that subpoena practice implicates the Fourth Amendment. Now, with cloud computing and third parties having control of every last little bit of our lives, he thought the Subcommittee's measured, careful approach was especially important. He hoped that after the Subcommittee came up with a rule, the Committee would road test it before publication with judges, prosecutors, and defense lawyers around the country. That would be a really important step. There is a lot of hard work to come, and he was grateful for the efforts of the reporters, Judge Nguyen, and the other Subcommittee members.

Another member of the Subcommittee thanked Judge Nguyen for keeping the work so organized. The member said the bottom line was we would be creating additional pretrial discovery for the government and the defense, though it was not yet clear whether this would be a little bit more discovery, or a lot more discovery.

Judge Dever commented that the process Mr. Wroblewski described—slow, steady, deliberative, and thoughtful—is a feature and not a bug of the process under the Rules Enabling Act.

Judge Bates asked if the hardest issue was the standard. He noted that the Subcommittee has dealt with a lot of the issues, procedural and otherwise, with respect to the rule. But the *Nixon* standard has created the problem in some districts and nationwide, so is coming up with the standard the ultimate hardest issue? The Subcommittee has identified that it should be a two-part standard, one for the personal and confidential information and one for other information. Had there been discussion yet on trying to come up with the standard and was that really going to be a difficult issue?

Judge Nguyen said the Subcommittee would meet at least twice before the Committee's April meeting and would be tackling that issue first. The answer to that question was going to cause a sea change in the use of Rule 17. So yes, in that sense it would be hard. But before tackling that standard, the Subcommittee thought it was important to first get out of the way some of these other issues about how the subpoena was going to work. Is it going to be by motion? Are ex parte applications allowed? When are in camera reviews appropriate, and how to guide district judges in that? How do you treat personal and confidential information? The Subcommittee wanted to have those questions answered preliminarily to create a framework around which it could come up with an appropriate standard.

Professor Beale said the Subcommittee could not answer the question about the standard without making some preliminary decisions. For example, it was important to decide whether the standard would be bifurcated and whether there was going to be more protection for protected information. There is an interaction between the issues. The category of protected information might need to be larger if the general standard for nonprotected information is very low. The Subcommittee had not yet had that discussion.

Professor King agreed that some of the issues that the Subcommittee had been talking about so far depend to some degree on the standards and vice versa. It is an iterative process, and the hardest part may be fitting them together, and deciding, for example, if what we say about in camera review makes sense, given the scope of "personal or confidential." They are somewhat

tradeoffs, and they balance and affect each other. So she thought coming back and creating a coherent package would probably be tough.

A member said that the issue that seems to be lurking in the background is the pretrial discovery that will be created with this kind of rule change. On the civil side, the member noted, excessive discovery, both in terms of cost and delay, has had a very negative effect on case resolution and jury trials. The criminal side by and large has not had that kind of issue. He thought it would be unfortunate if speedy trial and other considerations were impacted in a negative way by a change in Rule 17.

Noting she was familiar only with criminal practice, Professor Beale asked whether the member could confirm her impression that the problems with civil discovery arise principally from reciprocal demands by the parties for discovery from one another, and not from the parties' efforts to discover material in the hands of third parties. If so, she commented, the parallel in criminal proceedings would be discovery under Rule 16, not discovery from third parties, and the changes being considered here would be different from the most problematic aspects of the dynamic in civil proceedings.

The member agreed, but also noted that the current emphasis in Rule 17 focuses on trial subpoenas, not subpoenas for discovery. The member thought that would be a significant change, and Professor Beale agreed. Another member commented that on the civil side under Rule 45, which covers third party subpoenas, you can get just about anything.

A different member noted the intersection between the developing amendment and the Stored Communications Act (SCA). He said perhaps 70% of the warrants he reviews are under the Stored Communications Act—it's in the cloud, it's Apple, it's Google, it's emails, texts, cell site information. Some of the defense attorneys said they would be interested in some of that. But of course, for most of that information the Stored Communications Act requires a warrant. So how would this subpoena interface with that?

Judge Nguyen replied that nothing in any rule change would affect any statutory protection, and the Committee would have to be certain that the language that it drafts makes that point clearly. Professor Beale agreed and stressed that the rule change would not override any statutory protections for privacy, such as the Stored Communications Act. Judge Nguyen emphasized that any other laws that provide protections right now would not be affected in any way by any rule change.

The member said the SCA defines what you can get by subpoena and when you need a warrant. He didn't think Google would honor a subpoena. There are whole classes of information that the government has access to, and there was a reason that 70% of the warrants are in that area—that's where all the evidence is.

The member said his fundamental question was whether a subpoena under whatever standard the Subcommittee was considering—coming from a third party and not from the government—would satisfy the SCA? Professor Beale said no. The SCA gives different rights to

the government and this would not give third parties rights that they don't already have to override protections of the SCA.

On the question whether this rule would change criminal into civil discovery, another member said there was no chance of that because of all the protections in the rule. The rule could not permit serving the other side with interrogatories or request for production or depositions.

Professor King responded to the member asking about the SCA. One of the things that the Subcommittee talked about is how important it is to (as Mr. Wroblewski noted) road test these ideas on the constituencies that are going to be most concerned about them. So certainly the Subcommittee would solicit even more input from third parties who are likely to hold the kind of information that will be subpoenaed, and seek their reactions and concerns about any potential change. She noted that it had already started that process by talking to an expert on the SCA as well as practitioners from that industry. It would continue to do that. But, she said, the issue was not just the SCA. Similar issues arise under HIPAA and FERPA, as well as state protection privacy laws. All of these statutes have idiosyncratic controls on disclosure, and the rule has to accommodate them. The Subcommittee has no interest at all in changing the legislative policies that have been crafted in all of these jurisdictions in their laws that govern disclosure. The idea is to clarify what information the parties in criminal cases can get from third parties through subpoena before or for trial, and not to change how individual types of information have already been regulated.

A member added that it would not override statutes, but would provide more discovery.

Judge Nguyen agreed it would be an expansion, that is an important point to keep in mind, and it will be significant. She said the Subcommittee was very sensitive to how that intersects with statutes and current protections in place. Although it had researched that area, she thought the idea of road testing it would be really important because the Subcommittee does not necessarily have all the expertise. So input from members and from people who are on the ground would be important to make sure that what the Subcommittee was contemplating and trying to memorialize in draft language would actually work out in that fashion.

Mr. Wroblewski noted that there might be metadata or cell site information that is not governed by the SCA, and constitutional issues that are implicated. That makes drafting the standard really hard: the rule must set out something that will allow the user to recognize that the rule doesn't cover everything, and you must go to these other privacy protection laws, and perhaps consult Fourth Amendment jurisprudence. It was going to be difficult.

A liaison to the Committee said he understood the Rule would not override any federal law, but he emphasized the need to clarify the effect on state privacy protection laws. If the Rule would not allow a party to subpoena information that would otherwise be protected under a state privacy law, he thought that should be made explicit. Because it doesn't necessarily follow that that would be the case (as it would be with respect to the federal law), it should be set forth in the committee note or text to make that limitation clear.

Another member said this all came about because of this letter from the New York bar saying that in this day and age they need more discovery because of the internet, and the situation has changed over 60 years. They convinced us to look into the fact that they likely do need more pretrial information. The Subcommittee did not know how much, but it will be a significant change.

Judge Dever thanked the members for their comments and noted that the discussion illustrates why the Subcommittee is being deliberative and continuing to study these issues. It had received information from Professor Kerr, a former academic member of this Committee, who is an SCA scholar, as well as from attorneys that have represented and advised entities that hold electronic information. And those discussions will continue because the Subcommittee was trying to answer the initial question that the Committee always asks in connection with any proposal that we get: is there a problem? The Committee spends a lot of time exploring that. And then if we think there is a problem, can we address that without creating more problems? We do that by being cognizant of issues like the ones that have been raised in the discussion. That partly explains why the process, compared to some other subcommittees, is taking a little longer because it really is a big issue. Other than the victim amendments, Rule 17 essentially is as it was from the beginning, unlike Rule 45 in the Civil Procedure Rules, which has been changed a number of times since those rules were adopted. He again thanked Judge Nguyen and all the members of the Rule 17 Subcommittee for their continued hard work and invited Committee members to contact the reporters with any other thoughts. He noted that one of the benefits of the Committee's structure is that it has stakeholders with lots of experience and perspectives that all help collectively to get it right with any proposed rule change.

Rule 23

Judge Dever turned the Committee's attention to Rule 23, and the memo at page 134 of the Agenda Book. The Committee received a proposal from the Federal Criminal Procedure Committee of the American College of Trial Lawyers (ACTL) to change Rule 23, which now requires a written request from a defendant for a bench trial, the consent of the United States, and the approval of the court. At its last meeting the Committee decided it would be useful to gather more information on the question whether there is a problem, and both the Department of Justice (DOJ) and the defenders helped gather additional information. Judge Dever said that after introductory comments from the reporters, he would ask for discussion of whether to create a subcommittee to further study this issue, and if so, what the subcommittee would be studying, and how any proposal would interact with Supreme Court precedent.

Professor King noted that the Reporter's memo, at page 134 of the Agenda Book, is quite short and briefly reviews the discussion at the last meeting. That discussion, in the minutes at pages 24–34 of the Agenda Book, focused on whether there is a problem with the current rule and the differences in practices around the country regarding DOJ consent to requests for bench trials. At the end of that discussion, the Committee decided to seek more information about what was going on around the country, and that information is presented in the memo on pages 136–140. A DOJ survey, Mr. Wroblewski reported, revealed that about one fourth of the districts have some sort of policy on the decision whether or not to consent to a bench trial, and that

generally that policy is requiring supervisory approval. But half of the districts have no policy and about one fourth did not respond. Very few of the districts—only eight—indicated there was a backlog as a result of the COVID-19 emergency. One of the reasons given for the proposal was that it would help clear that backlog. But as Mr. Wroblewski said at our last meeting, there are other reasons to work hard on clearing those backlogs if they exist, apart from this proposal. The third question on which he surveyed attorneys around the country was whether there should there be a national policy. The answer, on page 137 of the Agenda Book, was that the reasons for bench trial requests differ significantly and an appropriate national policy is not obvious.

Some of the reasons for bench trial requests and refusals—from the defense perspective—were listed on pages 138–140. Professor King explained that because the respondents were promised that they wouldn't be identified, the information about exactly who was answering this set of questions had been limited to preserve anonymity. But we received fifteen responses from nine federal defenders and six CJA attorneys representing many different districts in many different circuits with a broad spectrum of practice. These ranged from districts where defense attorneys said they have never won a bench trial and would not request them, to districts where the attorneys responded that U.S. attorneys never consent, or that it was not a problem. She observed that there seemed to be no clear pattern to what is going on here.

Noting that this information supplemented the Committee's discussion at the spring meeting, Professor King said it was time to decide whether to continue to pursue this proposal. The proposal itself seeks an amendment that would (see page 162 of the agenda book) add the following section:

> (2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit the defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant's waiver of a jury trial without the government's consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.

She noted the proposal adds a procedural aspect and then states a standard for the court to reject the government's objection.

The questions for the Committee, Professor King said, are very similar to the ones discussed at the prior meeting. Is there a problem with the existing rule that a rule change would modify, and, if so, what should the modification look like? Should it be procedural change? Should there be something different than what is proposed here? Should there be some standard for rejecting a prosecution objection to a bench trial? How will it be reviewed?

Judge Dever expressed his appreciation for the additional information from the Department and from the defenders, and he added some comments regarding the leading case dealing with Rule 23 and its constitutionality. The constitutional challenge in *Singer v. United States* was decided in 1965. The case upheld Rule 23 (little changed since 1946), which requires that the defendant make a request for a bench trial in writing, that the government consent, and that the court approve. The Court in *Singer* added two important points. It acknowledged that the

way the rule was written, the Department of Justice did not have to provide a rationale. The Court stated that because of our confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the government articulate a reason for demanding a jury trial at the time that it refuses to consent. Nor should we assume that the federal prosecutors would demand a jury trial for an ignoble purpose. The second point the Court made (discussed in the memo and seen in some cases particularly during COVID), was that it was not determining whether the trial court could override the government's objection in certain compelling circumstances, if there was an inability to provide a fair trial. That point was raised in the transcript in the New York case (*United States v. Cohen,* 481 F.Supp.3d 122 (E.D.N.Y. 2020)) referenced in the memo and in the proposal. As members thought about whether to establish a subcommittee, he posed a question. Since the Constitution already provides an out to the rule as written in exceptional situations, what is the space between the proposal and what the Supreme Court has said already exists? If we draft a rule that had this procedural reference, he thought it would seem to be suggesting that there is some additional space beyond the need for a fair trial. But it is difficult to figure out what that would be, particularly in light of the backdrop of the jury trial being the gold standard in terms of adjudication, its presence in Article III, Section 2 before even the Sixth Amendment is adopted, and then in the Sixth Amendment itself. He asked for the views of committee members about whether we need to set up a subcommittee to further study it, and if so, what information is lacking.

Professor Beale added that you could view this as a procedural mechanism to allow the defense to raise the *Singer* problem. If they put in writing (e.g., "Here's the problem, this is why having a jury trial would be really bad in this case") then in determining whether to give relief the court can give the government a chance to respond that either there is not a serious problem or to explain how the court could act to ensure the fairness of the trial. *Singer* does say we are not going to assume that the government is doing anything for nefarious reasons, but she did not think the proposal necessarily assumed nefarious conduct. Rather it just gave the government a chance to respond to the defense statement explaining why a bench trial is so critical in the particular case.

Judge Bates responded that the proposal also says that the court must make this decision using the very vague standard "sufficient to overcome." He observed that in most cases both sides are either requesting a bench trial or resisting a bench trial because they think it is more likely that they will win. How, he asked, is the judge going to apply the standard "sufficient to overcome the presumption" when in reality both sides are saying, "Hey, I stand a better chance of winning" with the bench trial or without the bench trial?

Professor Beale responded that the idea is that it might be a good idea to draft an amendment as there is no procedure right now under Rule 23 to raise the kind of issues that *Singer* says are possibly enough to override the government's lack of consent. *Singer* doesn't tell you how that would work.

Judge Dever responded that people are raising these issues because they are being litigated. So lawyers know if you want the court to do something, you file a motion and you cite the Supreme Court case that says "Judge, you can actually look behind this in a compelling

circumstance." A member added that the *Cohen* case is the example of that, where the judge agreed this is the extraordinary case.

A defense member stated that there are cases where defense counsel may not trust a jury to set aside some prejudicial issues that are not necessarily evidence of any guilt but can sway a jury. But, she said, there is another issue involving coercive plea agreements. The defendant may want to go to trial to preserve some legal issues, but not lose acceptance of responsibility. And sometimes the government may withhold acceptance, as a tactic, and perhaps gain two years on a sentence. She said we should allow the judge to make that decision and did not understand why the government can override a judicial decision about that. There may be a need for a procedural mechanism.

Judge Dever noted he had cases in which DOJ consented. But if the prosecutors would not agree to a conditional plea, he had given defendants acceptance of responsibility even after a jury trial where everyone in the courtroom (except the jury) knew the only reason for having the jury trial was to permit a suppression ruling to be appealed. The judge, he said, has ultimate control over acceptance, which is not really tied to a Rule 23(a) issue.

Another member said that the right to a jury trial is constitutional, exceptional circumstances are already in there, and adding this to Rule 23 would just encourage people to think that now we have exceptions. The right to a jury would be very much hampered, and the member was against changing the rule.

Another member wanted to go back to the foundational question of whether there is a problem. It is challenging to measure something that has not occurred, and it is difficult to develop empirical data. Of 94 districts, 25 have a policy of supervisor approval and 52 have no policy. But we don't know what the results are, so it is not clear that we've gained any empirical understanding of what's happening. The additional research added only 15 respondents to the 12 examples set forth in the proposal.

Another member agreed. She said she had been very surprised by the survey results from the defenders because in 28 years of practice, she was aware of only two cases that went to a bench trial. That was because the government had uniformly said it would not consent. And surveying her own CJA panel before this meeting she concluded they were not asking for bench trials. It was hard to measure the problem in districts where there has been a uniform practice of not consenting. She could not measure that in her district, and she doubted it was possible to measure whether there was a problem in the manner that had so far been proposed. She added that defendants do not get acceptance of responsibility. Even if they have a very narrow legal issue that they want to pursue, it has to go before a jury. She said her court had been very busy, had a very small bench, and in effect there was a tax on the clients who tried to pursue that issue.

Professor King mentioned another response in addition to those listed on pages 4–6 of the memo. The Committee received an email from Lisa Hay, a former member of the Committee, who had surveyed her FPD colleagues and reported 14 additional responses. But there was still not a lot of information.

A member asked what prevented the defense from filing a motion to say to the judge, "I'm only trying this legal issue, and it is really only the acceptance of responsibility question I'm concerned with." Was it because judges on that bench are of the view that if the government doesn't consent, you don't get the waiver of jury trial?

A member responded that they do file that motion, but she did not think that would be an exceptional circumstance to overcome the government's lack of consent simply because there's going to be a trial penalty. The defense did make the court aware that they would be willing to have the bench trial, but when they moved for the acceptance points at sentencing, they seldom got them. Some of their judges had awarded acceptance points in that situation, but it was not a uniform practice and was certainly different with different judges. So there was a penalty at the end of it for their clients. Where there is an acceptance issue on a small narrow legal issue, usually there is a fair record made, but the member could not measure it because people did not really approach the government for the bench trial. It was just presumed that they would not consent. She thought that was probably not fair to the government. The member was not sure they are having robust conversations after all these years because of ongoing practice. She believed her district was not isolated in this and had been interested in the results of the survey of her colleagues because it was different than the experience in her district.

Another member noted that in addition to the acceptance issue, there was an issue concerning sentencing appeals. Plea agreements today have very strict statements of facts, on guideline amounts and so forth, and then include complete waivers of appeal unless the court imposes a sentence that is way beyond these guidelines. For example, a client may want to be able to challenge some factual matters that may apply at sentencing and not accept a plea agreement, and may be forced to go to trial in order to preserve those issues. The government's position is "you sign our plea agreement or there is no plea agreement." They will not do exceptions to standard appellate waivers simply because the defendant wants to contest enhancements for vulnerable victims, drug amounts, multiple victims, etc. So in those instances, a client may say "I want to go to trial," and defense counsel may want to try it to a judge because what they really want to challenge are those factors that affect the defendant's sentence and right to appeal. Mr. Wroblewski stated he was very sympathetic to the concern about acceptance of responsibility, but it was not obvious to him how having a bench trial would resolve it. If the defendant is contesting some of the government's facts—whether in a jury trial, or a bench trial, or to the probation officer and the presentence report responses—it was not obvious why that should matter in terms of whether you get the two or three levels of acceptance of responsibility. He characterized that as an acceptance of responsibility problem that belongs in front of the Sentencing Commission.

Mr. Wroblewski said he was not aware of many efforts being made to try to take advantage of the exception that *Singer* allows, so he thought that was not the problem. What might be a problem? A district may have a uniform policy not to do bench trials or have no policy, and the resulting disparity around the country is conceivably some sort of concern. But the answer to that would be to ask the Attorney General to tell each U.S. Attorney's Office to develop a policy and to consider all of the different circumstances. He commented that it was not

obvious that would be the right policy. Article III says all trials shall be by jury, and a prosecutor might say we are just following that, and unless there's a really, really good reason that is within the narrow *Singer* exception, there should be a jury trial. If you seek a uniform policy, he said, you should be careful what you wish for. The policy may be never to consent to a bench trial, as opposed to sometimes, after considering all the circumstances.

A member wanted to know if Mr. Wroblewski was suggesting there should be 94 different policies. Mr. Wroblewski said he was not. But if the problem the Committee saw was that the Department has no uniform policy, then we should have a uniform policy.

Judge Dever said that another way to ask this is whether changing Rule 23 responds to either the absence of a policy of the Attorney General or the absence of language in the guidelines commentary to Section 3E1.1 that clarifies that if a person goes to trial solely to preserve an appellate issue because of the inability to negotiate a conditional plea, the court may award acceptance of responsibility. If there is a trial solely because the defense wants to preserve the issue on a motion to suppress, the defendants do get acceptance of responsibility, at least in his district.

A member asked if the Committee could have the Sentencing Commission look at acceptance of responsibility policies. The member thought this seemed to be an acceptance of responsibility problem more than anything else. Could they do anything with the problem? Mr. Wroblewski responded that the Committee could write and ask the Commission to take it up, and the Commission could certainly take it up. It has amended acceptance of responsibility multiple times for all kinds of reasons. Indeed, there was an amendment going into effect next week. The member commented that where the defendant wants to appeal an issue and is pleading guilty on everything else, the Guidelines could include a statement that encouraged giving acceptance of responsibility.

Another member stated the view that this was not an acceptance of responsibility problem, but rather a lack of uniformity problem. Ninety-four different rules are not going to solve that problem. And it is a rare day that the judge cedes the court's power to the prosecutor in a courtroom so willingly. Having the judge make that decision (the rule change being proposed) would not increase the number of bench trials. The real issue is the lack of uniformity. It is difficult to measure whether that is a problem. The rule gives one party in a courtroom the almost absolute power, save the *Singer* exception, to determine whether there will be a bench or jury trial. And the judge is not the party with this power. The proposed change would not actually result in a terrible increase in bench trials, but it would result in more uniformity.

A member drew attention to the presumption for jury trial resolution, and the presumption against amending rules unless they respond to a substantial problem. He saw this as an amendment in search of a problem, not a solution for one.

Another member reiterated that the Committee did not even know the results in the 25 districts that have a policy or the 52 that do not have a policy. So the Committee still did not have the empirical data that everyone had been searching for. The member argued that a decision should not be made on the basis of an assumption, when the Committee lacked that foundational

understanding. Mr. Wroblewski asked the member to articulate what information she thought was lacking. The member responded. First, in the 25 districts that have a policy to go through the supervisor, what happens when the supervisor reviews them? Are those 25 districts routinely denying the request? What is the result? Second, in the 52 districts that have no policy at all, of the requests that are made, how many are granted?

Mr. Wroblewski noted that the data about the jury trials is from the courts. Judge Dever commented that the ACTL proposal says 11% of the cases tried were bench trials (page 159 of the agenda book). That suggested a lot of U.S. Attorneys consented. There would not have been bench trials if they not consented.

Professor King said that the questions that were presented to the defense attorneys resemble an initial list of questions for prosecutors that she had drafted when we were first thinking about questions that would get more information. That granular kind of survey conceivably could be given to prosecutors to get more detail. "How often do defendants ask? How often do you reject? What are the reasons you reject?" But, she emphasized, the question for the Committee was how that information would make a difference to the issue that it had to resolve. If a survey like that generated responses, what kind of responses would prompt members to say "OK, well, given this, we don't need a subcommittee" or "OK, well, we do need a subcommittee." How is the information pivotal?

The member responded that it was pivotal to understanding whether there is a problem. Eleven percent of trials are bench trials, but the Committee did not know the denominator (i.e., the number of defendants who wish to have a bench trial). The member said this was similar to Rule 17, where the Committee had learned that in many districts defense attorneys do not seek subpoenas because they know they will not be successful. Trying to identify some kind of percentage of success is difficult when the issue might be one of defense attorneys not even asking because they might be in a district where the U.S. Attorney's Office never or rarely consents. The member thought the Committee was trying to measure something that was not happening. There were a number of defense attorneys and defenders who said that it is a problem, and the member credited those statements.

Judge Dever asked the member what space the member envisioned between the proposal and the *Singer* standard, which recognizes that the judge can override DOJ's refusal in a compelling circumstance where a court concluded a defendant could not get a fair trial. What is the space beyond a fair trial that the Committee would be creating, and what problem does that space address in the proposed rule? The member responded that amending the rule would make that space. Judge Dever asked what other problem—beyond not getting a fair trial—would the rule address that the member wants to put in the hands of a judge? The member responded that she could not articulate another problem; the issue was a question of a fair trial and the court is able to identify that.

Another member asked even assuming that the Committee could define what constitutes an improper purpose for a prosecutor to deny a waiver, what was the likelihood of figuring out how often that improper purpose, whatever it may be, was happening? He said he could think of

really terrible reasons that very seldom occur. But if both sides are tribunal shopping, he asked, was that improper? Was it improper for a prosecutor to say, "I just prefer a jury over this judge"? And if that was improper, how could the Committee figure out from DOJ how often that was happening?

Another member was not yet convinced that there was a problem that a subcommittee could study and solve. The defendant already has the ability to file a motion, and the court can reach the exceptional circumstances case. The rest of the cases, the member observed, fall within the strategic category. As a judge, the member said, she wouldn't want to know or be in the position of figuring out whether an attorney thought she was a defense-friendly judge or didn't like her questions. The Committee would presume the government is acting in good faith and the defense is acting in the best interests of the client, and those are strategic calls. The court would do better to stay out of it. And the standard proposed is very amorphous: reasons sufficient to overcome the presumption in favor of the jury trial. The judge must ask the DOJ to justify why it thought a jury would be better. She thought that was very awkward. And it was in some ways very counterintuitive to the trial judge's role of letting each side try its own case and make decisions on how to proceed, including whether strategically it is better to have a jury trial or a bench trial.

Another member said the current requirement of government consent was really not taking that decision out of the hands of the judge. Rather, the rule says before we have a bench trial, both parties have to consent. The rule requires a written request by the defendant. Requiring the government's consent is just another way of saying we do not change the constitutional presumption of jury trial unless both parties consent and the judge approves. The member thought it seemed an eminently fair rule.

A member commented that it is nearly impossible to meet the existing "fair trial" standard for overriding the government's insistence on a jury. Judge Dever observed that was the issue in the EDNY case. But if we amend the rule, Judge Dever asked for someone to articulate what that space would be beyond the fair trial. Is it an abuse of discretion standard? What would be a compelling reason?

The member continued that because the *Singer* exception is such a big hurdle, there are very few requests. When there is a request and the government says no, defense counsel seldom take that much further, because the problems the member had previously mentioned are not related to a fair trial. The defendant has a right to a jury trial. If the defendant wants to waive that, then the question is the community interest, the interest of society. The judge should make that decision and the government should not be able to override that decision. It was difficult to measure how often that was occurring because the Committee did not know how many defendants have abandoned that direction in the face of the government's opposition. The member said that a number of people she contacted did not respond, which might indicate that was not a problem or an issue. Perhaps, she said, some of the reasons defense counsel were seeking bench trials on behalf of their clients were for other policy decisions that we're trying to get around within the government itself. Maybe the problems were driving them toward no trials at all and this bench trial option. She said she was not sure how to solve those issues.

Professor Beale said that in April, two kinds of cases were brought up repeatedly, and they seemed to come up again in those comments from the group of Federal Defenders and CJA lawyers surveyed. One was child pornography cases, where the jury may be very, very offended by what they see and the defense thinks that the jurors won't be thinking about anything else. Another was the very complex case, where the jury may not be able to follow everything. Perhaps the defendant is really at an unusual disadvantage in these kinds of cases and ought to be able to decide that it is not in his or her interest to claim the jury right. And perhaps the government ought to not claim an almost unfair additional advantage, because the problem is jury prejudice or about the limits of what a lay jury can understand, and the government would be getting a little too much leverage there. That's part of what the proposal we received was about: the Sixth Amendment right rather than an Article III preference for the way things have to be. And at that point, we ought to go closer to letting the defendant make that decision. But of course Article III does state that preference, and there is a value to having jury involvement. If the Committee was going to send a subcommittee out to think about this, it ought to have some sense of what happens if an individual U.S. Attorney, or the DOJ as a whole, says "We like Article III and we're not going to consent to a bench trial unless we're convinced that this would be reversed on appeal as a trial that deprives the defendant of due process."

Judge Bates said the conversation had been very interesting and enlightening, and that the Committee must exercise care as to whether a change to Rule 23(a) would really address the acceptance of responsibility or the preservation of factual issues for sentencing problems. He thought these were problems more closely related to the plea process and sentencing. It should also be careful about putting an unworkable burden on the judge to figure out when the two sides are just saying things they don't really want to be said before the judge. The one issue that had been discussed as a reason for a rule amendment that falls somewhat outside of that—though it might not be a sufficient reason for the rule amendment—is the issue of uniformity. If uniformity is something that really is leading to unfairness in the system, perhaps it should be addressed. Whether a rule change or this particular rule change is the way to do that is not clear. Maybe, he said, the way to do it is to try to persuade the Attorney General to insist on some uniformity among the U.S. Attorney's Offices.

Judge Dever asked for each member's view.

All but three members opposed forming a subcommittee. Several noted the difficulty in defining what the problem is with the existing rule. One noted the case-by-case policy in his former district worked well, and another noted his former district's policy was to grant a jury waiver whenever one was requested. Of the three members in favor of a subcommittee to explore an amendment, one suggested the subcommittee could consider a modest change that would at least incorporate *Singer* and change the ultimate decider to the court.

Judge Dever then stated that the proposal would not be pursued further by subcommittee. Later in the meeting, he clarified that the item would be removed from the Committee's agenda.

Responding to comments from several members that the acceptance of responsibility situation is a problem and that the Sentencing Commission should be contacted, Judge Dever

said that he would recommend to the Standing Committee that the Sentencing Commission be made aware of the concern that arose during the Committee's discussion. Specifically, several members suggested clarifying that judges may award acceptance of responsibility after a jury trial held solely to preserve an antecedent issue for appeal when the government would not accept a conditional plea or a bench trial.

Access to Electronic Filing by Self-represented Litigants

After the break, Judge Dever asked Professor Struve to present on the next issue, access to the courts by self-represented litigants, discussed in the Agenda Book beginning on page 185.

Professor Struve, who has been coordinating the efforts of an inter-committee working group, began by thanking some of the participants in the meeting (including Ms. Noble, the Committee's clerk of court liaison, Judge Burgess, and the reporters) for their assistance. Professor Struve explained that the working group was studying (1) the ability of self-represented litigants to access the courts by means of various electronic avenues, including access to CM/ECF for filing, and (2) service of papers by self-represented litigants subsequent to filing. She drew the Committee's agenda to her report in the Agenda Book, and did not attempt to repeat all of that information. She did note that recent developments included finalizing a report on interviews Professor Struve and Dr. Reagan from the Federal Judicial Center (FJC) conducted with personnel from nine districts.

On service by self-represented litigants, Professor Struve said the working group was developing a consensus that the national rules should no longer require self-represented litigants who had access to e-filing to make redundant and burdensome service on persons on CM/ECF, since they would already receive NEFs. Although draft language would not be available until the Committee's spring meeting, Professor Struve said that one option was to bring the other rules (Civil, Bankruptcy, and Appellate) closer to the structure of Criminal Rule 49, which—unlike the other rules—begins with electronic service, which is now the dominant mode of filing.

Regarding self-represented litigants' access to electronic filing, Professor Struve noted that current practices vary greatly, both at different court levels (with appellate allowing the greatest access and bankruptcy the least) and from district to district. She stated that the working group was considering a "minimalist" rule that would not mandate access for self-represented litigants, but would require districts that generally disallow access to make reasonable exceptions. She compared this to the approach taken in Criminal Rule 49(e) from 2011–2018. It required local rules to mandate electronic filing "only if reasonable exceptions are allowed." She said this approach would recognize that districts may be in very different situations with regard to the availability of technology. Professor Struve then invited any comments.

Judge Burgess asked whether the interviews revealed any information related to the concerns that had previously been voiced on the Committee concerning problems with the accuracy of filings by self-represented litigants or burdens on the clerk's office. Professor Struve first noted the potential for some selection bias because the interviews were conducted in districts that had removed the separate service requirement. But the sample did include districts that allowed access and others that allowed access only with permission. In the districts where

they conducted these interviews, there were few concerns about either of these issues. Some respondents did say that it was necessary to train and deploy staff to facilitate electronic filing by self-represented litigants, and to be sure there were adequate staff. On the other hand, allowing self-represented litigants to file electronically reduced burdens on the clerk's office to process and scan paper filings, and eliminated the need for the clerk's office to serve self-represented litigants who were filing electronically, since they would receive electronic filings. As to the accuracy of filings, the representatives who were interviewed did not see that as a major problem, and in one district, the representatives said the self-represented litigants made fewer errors than attorney filers. Professor Struve did note that some of the respondents said that it was important to include the ability to revoke credentials if necessary.

Professor Struve summed up the views of the persons they interviewed, saying that the districts that are allowing electronic filing by self-represented litigants are quite happy with it.

Judge Dever thanked Judge Burgess and Professor Struve for their efforts, and he expressed his appreciation for Ms. Noble's valuable input based not only on her experience in the Southern District of Florida, but also from her contacts throughout the country.

The E-Filing Deadline

Judge Dever asked Professor Beale to explain the recommendation, page 206, that this item be removed from the Committee's agenda.

Professor Beale drew the Committee's attention to the report from Judge Bybee and Professor Struve, Agenda Book page 207, reporting the views of the E-Filing Deadlines Joint Subcommittee. The Joint Subcommittee focused on the developments since Judge (now Chief Judge) Michael Chagares made the initial suggestion that the filing deadlines in the national rules be changed from midnight to an earlier time in the day. The Third Circuit recently adopted a new local rule that makes the presumptive deadline for most electronic filings 5:00 p.m. The new rule had produced strong negative reactions from some members of the bar, and an internal DOJ survey also elicited negative comments. Given these developments, she said, the Joint Subcommittee thought that this was not the time to move ahead with a national rule.

Judge Bates suggested, however, that although it had only been in effect for a few months, the Third Circuit had a sense the new local rule was working well, and there had not been a lot of resistance from the bar. He also pointed out that it would be easier to adopt such a change in the Third Circuit, which falls within a single time zone, than the Ninth Circuit, which spans several time zones.

In response, Professor Beale said the Joint Subcommittee had input from DOJ's internal survey, and it included a member from the Third Circuit. She commented that clearly there was not a ground swell of support for changing the national rules at this time.

Professor Struve provided information concerning the views of the sister rules committees. Bankruptcy, Civil, and Appellate all removed this item from their agendas at their fall meetings.

A Committee member from the Third Circuit who had served on the Joint Subcommittee reported that the bar's response to the new local rule had been "vehemently negative."

The Committee voted unanimously to remove the item from its agenda.

Rule 53

Judge Dever introduced the next item, page 218, a letter to Judge Mauskopf, requesting that the Judicial Conference explicitly authorize the broadcasting of the court proceedings in the cases of *United States v. Donald J. Trump*. Judge Mauskopf forwarded that letter to the Rules Office to be logged as a suggested amendment. Judge Dever said that the reporters' memo concludes that the Committee has no authority to exempt or waive Federal Rule of Criminal Procedure 53, which currently provides that "the court must not permit . . . the broadcasting of judicial proceedings from the courtroom." Moreover, construing the letter as a request to amend Rule 53, the memo concludes that even if the Committee were to move at "warp speed," the change would not take effect for three or more likely four years because of the nature of the rulemaking process. Also, as the reporters' memo noted, there is an excellent discussion of the history of the judiciary's consideration of broadcasting (see footnote 17, page 222).

Professor Beale said she would provide a little more detail following this excellent summary. She commented that the reporters took pains to provide a clear explanation of their conclusion that the Committee lacked the authority to make any exception to allow broadcasting trials of exceptional public interest. The memo laid out the source of the Committee's statutory authority under the Rules Enabling Act (REA). The REA authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the district courts. The REA also requires the Judicial Conference to authorize the appointment of a standing committee on practice, procedure and evidence, and that standing committee authorizes the appointment of additional committees to assist the conference by recommending rules. That, she said, is the authority that allows the appointment of this Committee and the other advisory committees. The Committee has statutory authority to assist the Judicial Conference by recommending rules, but no authority to recommend exceptions to existing rules and the REA.

The Committee's only authority is to recommend rules, not to provide any exceptions to rules, and Rule 53 on its face is extremely clear. As quoted on page 219, it states that "Except 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" (emphasis added). No one has suggested that any statute would permit the requested broadcasting, and no one has suggested any other rule that might do so. Thus, we have an absolute rule. Our authority is limited to giving advice on and making suggestions on rules, and we have no authority to authorize exceptions to an across-the-board straight rule.

The reporters had also considered the Congressional letter as seeking an amendment to Rule 53 that would allow exceptions for particular cases of public importance. On pages 220–221, the memo discussed the question how quickly the Committee could move and how the process would work. Professor Beale summarized the necessary steps. After the Committee

initially approves a proposed amendment, it recommends the amendment to the Standing Committee. The Standing Committee, if it approves it, sends the proposed amendment out for publication and a period for public comment. After the comment period, the Committee reviews the public comments and decides whether to move ahead with the amendment. If the Committee then approves the amendment, either as published or with changes responsive to the comments, it presents its recommendation to the Standing Committee. At that point, if the Standing Committee approves a proposed amendment (such as a change in Rule 53 to allow the broadcasting of important cases), it then submits the proposed amendment to the Judicial Conference. If the Judicial Conference accepts the Standing Committee's recommendation, it forwards the proposed amendment to the Supreme Court. If the Supreme Court were to agree, under the REA by May 1 of any particular year, the Court would then transmit that recommendation to Congress. Finally, if Congress takes no contrary action by December 1, the amendment becomes law.

As their memo explained, Professor Beale said that even if the Committee were to act at "warp speed," an amendment to Rule 53 could not take effect until December 1, 2026. Moreover, it would probably take longer because the Committee would have to delve into the prior debates and discussion about the merits of broadcasting from the courtroom, as well as new issues, including changes in technology. So even if the Committee were to work as quickly as possible, the reporters had concluded that it would not be possible to amend Rule 53 before the completion of the particular trials that were the focus of the Congressional letter.

Judge Dever advised the Committee of a new proposal to amend Rule 53 from a coalition of media organizations that had not been received in time for consideration at the meeting (it was received after the Agenda Book had been prepared). The media organizations requested that Rule 53 be revised to permit broadcasting of criminal proceedings, or at least that it include an exception for extraordinary cases. He said the very thoughtful letter had been posted on the Committee's website for those who would like to review it now. He drew attention to current online resources on the history of cameras in the courtroom, cited in footnote 17 on page 222, and noted that there had been recent activity within the Judicial Conference in coordination with the Committee on Court Administration and Case Management (CACM) in connection with the broadcasting of civil proceedings.

Judge Dever announced he was appointing a subcommittee, chaired by Judge Conrad, to study the media coalition proposal. The other members would be Judge Burgess, Mr. Wroblewski, and the Committee's two new members, Judge Harvey and Ms. Mariano. Judge Dever thanked them all in advance for their work on this project.

Given the limitations on the Committee's authority (as explained by the reporters) and the fact that he was appointing a Rule 53 Subcommittee, Judge Dever commented that there would not be much for the Committee to discuss until it received a report from the Subcommittee. He asked Judge Bates if he had any comments.

Judge Bates asked whether the analysis just presented would preclude the Committee from drafting a new rule or amendment that would allow broadcasting under some circumstances

(not in a case-specific basis for the Trump case), either in an extraordinary case, in the discretion of the judge, or perhaps with the concurrence of the Judicial Council. He asked for confirmation that the reporters' analysis would not preclude this.

Professor Beale responded that the Committee was not precluded from considering such changes; indeed that was the reason that the reporters had analyzed the nature and time required to adopt such an amendment to Rule 53. She thought that the receipt of the new media consortium proposal—which clearly proposed such a change—was the catalyst for Judge Dever's decision that it was time to appoint a subcommittee.

Judge Dever agreed with Professor Beale's comments, noting that the reporters' memo summarized the authority of the Committee to act. The Committee certainly has the authority to consider the media proposal (as well as the letter of the members of Congress if viewed as alternatively requesting that we consider a potential rule change dealing with extraordinary cases or more generally). The Subcommittee would explore all of those topics. He added that the Committee had not studied the issue of broadcasting for 29 years, and it also raised issues under study by other committees, particularly CACM.

In response to a query from a member, Judge Dever agreed this would not be done at "warp speed." As discussed in connection with Rule 17, deliberative, thoughtful study of issues was a feature and not a bug of the process under the REA, because once a rule is amended, that becomes the law, not merely advice. So in considering whether to amend Rule 53, the Committee would continue to be thoughtful and deliberate. It would begin, as always, with the question whether there was a problem under the current rule, and, if so, what the solution might be.

Judge Conrad (the new Subcommittee chair) asked whether to anticipate parallel reviews by other advisory committees. Judge Bates said that he was aware only of CACM, and that committee would not be looking at a change to Rule 53. CACM is looking at remote proceedings more generally, not specifically in the criminal context but more in the civil context, bankruptcy context, and also with respect to possible changes in terms of public access, which have already been made through the Judicial Conference policy. So there were things going on in this general area but not with respect to the specific question of broadcasting criminal proceedings. Judge Bates also observed that the media request was actually for broadcasting of criminal proceedings, not just criminal trials, and Rule 53 applies to criminal proceedings, not just trials. But again, neither CACM nor any other committee was looking at broadcasting of criminal proceedings.

As a follow up to Judge Bates' point, Judge Dever said that the Subcommittee would be developing an understanding of the historical part, including what this Committee had done, what CACM has done, and what the Judicial Conference has done with regard to broadcasting generally. He anticipated the Subcommittee would receive information from CACM.

A member asked about his recollection of testing of broadcasting judicial proceedings and a pilot program in the Ninth Circuit. Professor Beale responded that the pilot had included only civil proceedings, and it was possible because the Civil Rule, unlike Rule 53, does not forbid broadcasting across the board. That made the pilot program in some districts possible.

Although a recommendation came out of a pilot program to move toward more availability of broadcasting as a national rule, that recommendation was not successful. Professor Beale thought it was at that point—when the proposal to amend the Civil Rules was rejected—that our Committee ended its consideration of a parallel change to the Criminal Rules. Noting that the Subcommittee would review the history thoroughly, Professor Beale suggested that anyone who wanted to know more about that see the online history linked from footnote 17, Agenda Book page 220. She characterized it as very interesting reading that details the actions of different groups, including the Judicial Conference and CACM, and she noted that the Federal Judicial Center had been very involved at different points in time.

Judge Dever said that Mr. Byron, who had been coordinating with CACM on issues relating to civil or bankruptcy proceedings and public access, would continue those efforts and be a resource for the new Subcommittee.

A member asked with respect to the Congressional letter, would the Committee communicate that directly back to the authors of the Congressional letter? Similarly, how would it communicate its decision not to form a subcommittee to consider an amendment to Rule 23, and to remove that item from its agenda?

Professor Beale responded that was up to the chair. Judge Dever stated his view that if someone had taken the time to ask the Committee to consider something, the Committee should write back to them once it had considered the suggestion. If the Committee has decided not to move forward, it communicates that. He noted that occasionally the Committee has received suggestions from judges who raise a variety of issues, and the Committee will seek to determine whether this is more than an isolated one-off example. If it decides to remove the item from its agenda, the chair historically writes the judge or other person who made the suggestion to let them know of the Committee's decision.

Judge Bates commented a communication would be made regarding a decision, particularly where, as here, the suggestion came from Congress and was rather to the Director and not directly to the Committee. In response to a member's concern about the difficulty of explaining the Committee's decision to appoint a subcommittee that would be looking at a proposal to allow broadcasting in the future—but not in the Trump trials which were the focus of the Congressional letter—Judge Bates assured the Committee that the communication would be made with care.

Social Security Numbers

Mr. Byron provided an oral report. He explained that under Professor Struve's leadership last year the Rules Office prepared a statutorily required report to Congress on the adequacy of the privacy rules in all of the rules settings. One of the things that was addressed in that report last year was the redaction requirements for Social Security numbers. Also last year, the committees received a letter from Senator Wyden asking the committees to consider again the question whether the last four digits of Social Security numbers need to be or should be allowed to be included in court filings, or alternatively, whether the full Social Security number should be required to be redacted under the rules.

As that report to Congress laid out, when the original privacy rules were considered and adopted in 2005 and took effect in 2007, the Bankruptcy Rules Committee deemed it important to have those last four digits for identification purposes in a variety of contexts in bankruptcy cases. And the other committees, including the Criminal Rules Committee, as well as Civil and Appellate, determined that the value of uniformity across the rule sets outweighed any concerns that might differ in those contexts from the bankruptcy situation.

That issue was reconsidered following the FJC's study concerning compliance with the redaction requirements in 2015. This Committee, as well as Civil and Appellate, again concluded that the value of uniformity outweighed any particularized privacy concerns in the context of those different rule sets other than Bankruptcy. And the Bankruptcy Rules Committee once again determined that it was important to retain the permissive use of those four last four digits in certain filings.

So now the issue is back to all four committees. Last year, the decision was made to allow the Bankruptcy Rules Committee to consider whether they were still of the view that the last four digits of Social Security numbers served a valuable purpose in some capacity in the bankruptcy context. The Bankruptcy Rules Committee discussed that question in the last two meetings and reached the tentative conclusion that there are at least some situations in bankruptcy cases where that identifying information can be valuable both to the debtor and sometimes to creditors as well. At this point, the Bankruptcy Rules Committee is going to continue to study the issue, but Mr. Byron said it seems unlikely that they would adopt a revision of the Bankruptcy Rule 9037 to require complete redaction of Social Security numbers. And to the extent they make any other changes to redaction requirements in their rules, it would take additional time for study about when and in what situations it is valuable to have that information.

Mr. Byron said that finding teed up for this Committee (as well as Civil and Appellate Rules) the question whether that uniformity goal remains paramount. Or, in light of the passage of time, the continued concerns in this area, and the suggestion from Senator Wyden, should the Committees now consider whether to adopt a requirement that differs from the Bankruptcy Rules and requires redaction of the full Social Security number in filings subject of course to the other provisions and exceptions (of which there are several) in Criminal Rule 49.1?

Mr. Byron described the latest developments, which included a meeting of the reporters for all of the committees that started an initial discussion of what might happen next and the timeline. There would be continued communications among the reporters for the advisory committees, with the assistance of Professor Struve, with the hope that it might be possible to bring a proposal to the committees' spring meetings if there was room on their agendas. He hoped to have some more news on that timeline in advance of the spring committee meetings. In the meantime, he said they would be very interested in any feedback, reactions, or guidance from this Committee about whether it would be valuable either to retain a uniform approach across the rulesets, or at least as between Criminal and Bankruptcy, or whether the privacy concerns that have been raised warrant considering a full redaction requirement or some other provision. He

invited any comments at the meeting and encouraged members to send any further thoughts to him or to the reporters.

Concluding Remarks

Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 18, 2024, and he noted that the work of the subcommittees would continue between the meetings. He also thanked the reporters, and Ms. Cox, Mr. Byron, and the members of the team at the Administrative Office, as well as St. Thomas for hosting the Committee.

Judge Dever then announced that the meeting was adjourned.