COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. James C. Dever III, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 7, 2024

I. Introduction

The Advisory Committee on Criminal Rules met in Washington, D.C., on April 18, 2024. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents the following information items.

- The Committee heard and discussed an interim report from the Rule 17 Subcommittee, which is studying the possibility of amending the rule to expand the availability of third-party subpoenas.

- The Committee heard an interim report from the Rule 53 Subcommittee, which is studying the possibility of amending the rule to permit broadcasting under some circumstances.

- The Committee provided input on several cross-committee projects, including those dealing with pro se access to electronic filing, redaction of social-security numbers, and bar admission in the federal courts.

- The Committee decided to refer a suggestion on the protection of minors' privacy to a new Privacy Subcommittee that would also review other suggestions for amendments to the privacy rules, including Criminal Rule 49.1.

- The Committee deferred action on a proposal to amend Rule 40 pending the possible receipt of a related but more comprehensive proposal under consideration by the Magistrate Judges Advisory Group.

II. Rule 17 subpoena authority (22-CR-A)

The Subcommittee has continued to move in a careful and deliberate fashion to consider the many issues raised by the proposal to amend Rule 17. As reported at the Committee's November 2023 meeting, the Subcommittee has tentatively concluded that amendments are warranted both to clarify the rule and to expand the scope of pretrial subpoena authority for third parties before trial, because the *Nixon* standard,[1] as applied in most districts, is too narrow to provide a basis for obtaining much of the material the defense needs from third parties. The Subcommittee also tentatively concluded that an amended rule should provide case-by-case judicial oversight of each subpoena application, express authorization of ex parte subpoenas, and different standards or levels of protection for personal or confidential information ("protected information") and unprotected information.

At the April 2024 Committee meeting, the Subcommittee reported on the additional tentative decisions it had reached after the November meeting.

A. <u>The purpose of the proposed amendment and framing.</u>

The Subcommittee decided to place the amendments in Rule 17, rejecting the suggestion that it consider placing expanded subpoena authority in a new rule. The Subcommittee decided it was important to place any changes within Rule 17 to make it clear that these were incremental changes intended to bring the Rule into conformity with practices in several districts where it was working well. The Subcommittee did not want to suggest this was an entirely new discovery provision, which might generate unwarranted opposition.

[1] *United States v. Nixon*, 418 U.S. 683, 700 (1974), requires a party seeking documents through Rule 17(c) to "clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity." The Court also stated that when a party seeks pre-hearing production of documents, it must establish: (4) "that [the documents] are not otherwise procurable reasonably in advance of [the proceeding] by exercise of due diligence"; and (5) "that the party cannot properly prepare for [the proceeding] without such production and inspection in advance of [the proceeding], and that the failure to obtain such inspection may tend unreasonably to delay the [proceedings]." *Id*. at 699-700.

B. Articulating the showing required to obtain a subpoena.

The Subcommittee had made significant progress in drafting the standard required for a subpoena seeking information that is not personal or confidential, such as surveillance video from a business, and will turn to the requirements for subpoenas seeking information that is personal or confidential next.

C. Procedural issues.

Regulating disclosure of material produced to opposing party. Although the practice is not uniform, several courts have required all material subpoenaed by one party to be disclosed to the opposing party, even if the subpoena was granted ex parte. The Subcommittee concluded that this practice undercuts the utility of allowing ex parte subpoenas. Each party's disclosure obligations are governed by other provisions, particularly Rule 16, and seeking a subpoena under Rule 17 should not alter those obligations. Accordingly, the Subcommittee tentatively concluded that the rule should make it clear that if the court grants an ex parte subpoena, it may not require disclosure of all material produced to the other party. Rather, the Subcommittee agreed, the Rule should explicitly note that access to such information by other parties is regulated by existing disclosure rules (Rules 12.1, 12.2, 12.3, 16, and 16.1(b)). Even if a party can show when requesting the subpoena that the evidence it seeks is admissible, it does not follow that the party will necessarily introduce any of it. But whatever a party does intend to use, that party must disclose to other parties under the discovery rules, at the time required by Rule 16.

Regulating who receives returns. A related issue is who should receive the subpoena returns. Rule 17(c)(1) states that the court "*may* direct the witness to produce the designated items in court before trial or before they are to be offered into evidence." Despite its permissive language, some courts have concluded that Rule 17 requires the court to order returns to the court, and does not permit a subpoena recipient to produce material to a party. The Subcommittee concluded that the rule should (1) clearly authorize the court to order a witness to produce the items to the party requesting the subpoena, but (2) require returns to the court in two circumstances: when a subpoena is requested by a party without representation or when it seeks material that is personal or confidential. In those two circumstances, the Subcommittee thought that greater judicial oversight would be critical before disclosure to the party seeking the subpoena.

D. Notice to a person or entity whose information is sought.

Consistent with its view that Rule 17 should not override other bodies of law, the Subcommittee tentatively concluded that the Rule should not address disclosure to the persons or entities whose information is sought by a subpoena. Rather, any disclosure requirements should continue to be governed by these other laws. Many federal and state laws protect privacy and limit the disclosure of certain kinds of information. Familiar examples are the federal and state laws protecting health information and school records, as well as the Stored Communications Act. Many of these laws also include provisions concerning when—and to whom—disclosures should be made (and not made).

The Subcommittee noted, however, that Rule 17(c)(3) already requires notice to victims about subpoenas for personal or confidential information, and the Subcommittee is not considering any change to that provision.

E. Application to proceedings other than trial.

The Subcommittee is considering language that would clarify that subpoenas under Rule 17 are available not only for trial but also for at least some other proceedings. Parties are entitled to present evidence at a number of proceedings, and they may need a third party subpoena to do so.

F. Discussion at the April meeting.

Discussion at the meeting raised a number of issues the Subcommittee will continue to consider as it moves forward. Judge Bates and several members advised the Subcommittee to consider judicial workload concerns. For example, draft language under consideration would require the judge to make multiple determinations when the parties seek ex parte subpoenas: (1) whether the material sought is personal or confidential; (2) whether the applicable standard for obtaining the subpoena has been met, and (3) whether good cause has been shown to have the subpoena issue ex parte. If the material is returned to the court for in camera review, the court would also have to make a fourth determination what to disclose and to whom to disclose it. Judge Bates also raised a concern that the breadth of the term "personal or confidential" would require most subpoena returns to be made to the court.

A member also raised a new issue: whether the court could order the person or entity receiving a subpoena not to disclose it. For example, could the court order an internet service provider (ISP) not to disclose a subpoena to the customer whose records were sought? If so, should the Rule address this?

A member also requested that the Subcommittee consider whether the Rule should address who can challenge a subpoena. For example, should the government be able to challenge a defense subpoena to a third party?

III. Rule 53 and broadcasting criminal proceedings

Rule 53 currently provides "[e]xcept as otherwise provided by a statute or these rules, the court must not permit … the broadcasting of judicial proceedings from the courtroom." Because no current statute or rule permits the broadcasting of criminal proceedings, Rule 53 prohibits the broadcasting of the proceedings in all federal criminal proceedings. A coalition of media organizations[2] proposed that Rule 53 be revised to permit the broadcasting of criminal

[2] The media organizations are Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting, Inc., Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company (operator of Court TV), Los Angeles Times Communications LLC, National Association of Broadcasters, National Cable Satellite Corporation d/b/a C-SPAN, National Press Photographers Association, News/Media Alliance, The New York Times Company, POLITICO LLC,

proceedings, or to at least create an "extraordinary case" exception to the prohibition on broadcasting. In November of 2023, Judge Dever appointed a subcommittee to study the proposal.[3] The Subcommittee included Judge Conrad as chair with members Judge Burgess, Judge Harvey, Ms. Mariano, and Mr. Wroblewski. Judge Conrad's appointment as Director of the Administrative Office of U.S. Courts required changes in the membership of the Subcommittee. Judge Michael Mossman has joined the Criminal Rules Committee, and he will serve as a member of the Rule 53 Subcommittee.

A. The Subcommittee's report.

The Committee heard an interim report on the work of the Rule 53 Subcommittee. The Subcommittee reported on its initial meeting, which focused on identifying the issues of greatest interest and concern, and the topics on which members wished to have more information. At the reporters' request, Mr. Hawari provided the Subcommittee with a memo and supporting materials detailing the history of Rule 53, including all prior efforts to amend the rule. Regarding the issues of concern, Subcommittee members stressed concerns about the impact on victims and jurors, witness intimidation, and broadly speaking the administration of justice. Broadcasting could also be dangerous for certain defendants. Several Subcommittee members found particularly helpful in identifying concerns Judge Becker's statement for the Judicial Conference in 2000 opposing a bill to allow camera coverage of judicial proceedings.[4]

Subcommittee members expressed great interest in collecting more information about what is happening in the states, including rules and policies now in use, and studies about the effects of the state procedures allowing broadcasting, especially experience in criminal proceedings. Subcommittee members also emphasized the need to work collaboratively with other relevant committees, particularly the Committee on Court Administration and Court Management (CACM), which announced a policy in September 2023 permitting audio broadcasting of proceedings in civil and bankruptcy cases when no testimony is being taken. Members expressed interest in learning more about the information CACM relied upon, noting that the policy suggested ongoing studies of its impact.

At its meeting, Subcommittee also discussed the importance of limiting its deliberations to public access to criminal proceedings, distinguishing the different topic of remote *participation* in proceedings. Remote participation in proceedings by judges, parties, counsel, witnesses, and victims may raise different issues, such as the need to protect the right to counsel by ensuring that

Radio Television Digital News Association, Society of Professional Journalists, TEGNA Inc., Univision Networks & Studios, Inc., and WP Company LLC d/b/a The Washington Post.

[3] To the extent the media coalition's proposal also sought broadcasting of the "fast-approaching trial in United States v. Donald J. Trump, 23-cr-257-TSC (D.D.C.)," consideration of such a case-specific exemption from the Rule is foreclosed for the same reasons that the Committee, at its November 2023 meeting, declined to pursue a request in a letter from 38 members of Congress that the Judicial Conference "explicitly authorize broadcasting in the court proceedings in the cases of United States of America v. Donald J. Trump." The Committee recognized that under the Rules Enabling Act it has no authority to exempt or waive in a particular case the application of Federal Rule of Criminal Procedure 53.

[4] Prepared Statement of Hon. Edward R. Becker, Hearing before the Senate Subcommittee on Administrative Oversight of the Court (Sept. 6, 2000).

counsel and defendant can communicate confidentially. In addition, access to criminal proceedings may involve different considerations than access to civil proceedings, including the Sixth Amendment right to a public trial. Finally, Subcommittee members emphasized the importance of considering all of the issues, and possible approaches, including permitting only audio access, or only delayed access, or only access to certain types of proceedings.

B. Comments at the April Committee meeting.

In response to the Subcommittee's report, Professor Coquillette stressed the importance of the Subcommittee's plan to focus on the history of prior attempts to amend the rule to permit broadcasting, noting lessons learned from that experience. He noted that CACM has a major stake in these issues, and it is important to recognize its operating procedures and philosophy differ from those of the Rules Committees. A Committee member also expressed interest in learning more about the views of defense counsel in state criminal cases that have been broadcast.

IV. Cross-committee projects

A. Self-represented litigant access to electronic filing.

The Committee received a report from Professor Struve describing the activities of the working group. Although no draft language was available, she said the working group would be convening over the summer to work on proposals for electronic access for filing purposes and also modifying the service requirement in cases where a self-represented litigant is receiving a notice of electronic filing through CM/ECF.

B. Unified Bar Admissions.

The Committee received an oral report from Professor Struve, who described the Joint Subcommittee's information gathering and the pared back proposals it was considering. Professor Coquillette provided some of the relevant history, including a memorable description of an earlier effort to establish uniform rules of attorney conduct in the federal courts as the Charge of the Light Brigade in rulemaking. Members suggested several issues the Joint Subcommittee might consider, including how the Supreme Court handles state disbarments as well as Rules Enabling Act issues.

C. Social-security numbers and other privacy issues.

Mr. Byron reported regarding the redaction requirements for social-security numbers and other privacy issues. The Criminal Rules (and the parallel provisions in the Bankruptcy, Civil, and Appellate Rules) allow the inclusion of the last four digits of social-security numbers in court filings. Previous suggestions to require the redaction of the full social-security number had been rejected on the grounds that the last four digits were useful in bankruptcy cases, and the value of uniformity outweighed any concerns that might differ in other contexts.

Senator Wyden had suggested that we amend the privacy rules—not just the Criminal Rule 49.1, but the others as well—to require complete redaction of social-security numbers, no longer permitting the inclusion of the last four digits. That suggestion prompted discussion among the reporters and the Rules staff about whether there are other issues concerning the privacy rules that warrant consideration. Because there are some related issues that are worth considering in terms of the specifics of the Rules amendments—some cutting across the privacy rules in different rule sets, and some specific to particular rule sets such as Bankruptcy or the Criminal Rules—the working group is tentatively recommending that the suggestion from Senator Wyden be considered in the context of a larger review.

Mr. Byron asked for feedback and suggestions about the best way to undertake the next steps here. Would it make sense to continue the efforts of the Reporters Working Group, working with the Rules Committee staff? Should one advisory committee take the lead on any cross-cutting issues across the rule sets and the privacy rules to the extent that they have common language and common approaches? Or should this Committee and others ask the Standing Committee to appoint a joint subcommittee as sometimes seems appropriate? He noted that the next agenda item for this Committee is a recommendation from the Department of Justice about pseudonyms for minors. He understood that Judge Dever was creating a new subcommittee, chaired by Judge Harvey, to consider the pseudonym proposal and other issues that may arise from the working group. This led to the discussion of the next item.

V. Reference to minors by pseudonyms (24-CR-A)

The Department of Justice has submitted a proposal to amend Rule 49.1 to protect the privacy of minors. Rule 49.1(a)(3) now requires the use of initials to mask the identity of minors in various court documents. As the letter explains, Child Exploitation prosecutors within the Department have raised serious concerns that this practice does not effectively protect minors' identities, and it would be better to use pseudonyms.

Judge Dever announced a new Privacy Subcommittee, headed by Judge Harvey, to consider this proposal as well as other issues under Rule 49.1, including the redaction of social-security numbers. Given this development, Mr. Byron suggested that it might be beneficial for Criminal Rules to take the lead in moving forward on the issues under Rule 49.1. Mr. Byron commented that uniformity concerns would continue to remain paramount.

VI. Ambiguities and gaps in Rule 40 (23-CR-H)

Magistrate Judge Bolitho submitted a proposal to clarify Rule 40 as it applies when a defendant from outside the district is arrested for violating her pre-sentencing release. In Judge Bolitho's view, the Rule does not clearly answer two key questions: Is the defendant entitled to a detention hearing in the district of arrest? If so, what is the standard?

Judge Harvey informed the Committee that the Magistrate Judges Advisory Group is preparing a comprehensive request concerning additional amendments to Rule 40 that would address several issues of concern, including the situation raised by Judge Bolitho. After thanking Judge Harvey for developing information that would be helpful in addressing Judge Bolitho's

suggestion, Judge Dever announced that the Committee would defer consideration of Judge Bolitho's suggestion pending receipt of a more comprehensive proposal.