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

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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: December 13, 2024

I. Introduction

The Advisory Committee on Criminal Rules met in New York, N.Y., on November 6-7, 2024. Draft minutes of the meeting are attached.

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

- The Committee voted not to pursue an amendment to Rule 53 that would allow broadcasting of criminal proceedings under some circumstances.

- Continuing its study of a proposal to expand pretrial subpoenas under Rule 17(c), the Committee heard and discussed the views of 12 invited speakers who provided comments on a draft amendment.

- The Committee heard a report from its Privacy Subcommittee regarding proposals to amend Criminal Rule 49.1 to (1) protect minors' privacy by requiring the use of pseudonyms and (2) require redaction of all digits of social security numbers.

- The Committee established a new subcommittee to consider two proposals to amend Rule 40, which governs proceedings when an arrest is made under a warrant issued in another district.

- The Committee established a new subcommittee to consider a proposal to amend Rule 43 to extend the district courts' authority to use videoconferencing, beyond initial appearances and arraignments, with the defendant's consent.

- The Committee provided input on two cross-committee projects dealing with pro se access to electronic filing and bar admission in the federal courts.

- The Committee removed from its agenda a proposal to revise the procedures for contempt proceedings under Rule 42.

II. 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[1] proposed that Rule 53 be revised to permit the broadcasting of criminal proceedings, or to at least create an "extraordinary case" exception to the prohibition on broadcasting.[2]

[1] 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, 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.

[2] 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.

Judge Mosman, the chair,[3] presented the Rule 53 Subcommittee's unanimous recommendation that the Committee decline to amend the Rule. He began by describing the goals of the proposal as furthering transparency and trust in the legal system and improving public understanding of the judicial system. But the proposal also raised heightened concerns about security, privacy, and due process in criminal cases.

Judge Mosman described the information considered by the Subcommittee and how the Subcommittee had reached its conclusions.

First, the Subcommittee sought information about the basis for the adoption of Judicial Conference Policy § 420(b) (available here), which now permits the court to permit broadcasting of civil and bankruptcy non-trial proceedings in which no testimony will be taken. The chair and the reporters spoke at length with the chair of the Committee on Court Administration and Case Management, Judge Gregory F. Van Tatenhove, about the research and the process that led to the expansion of broadcasting under § 420(b). In light of the absolute prohibition of all broadcasting in Rule 53, CACM did not consider or discuss the advisability of making any change in criminal proceedings. In the context of civil and bankruptcy proceedings, Judge Van Tatenhove explained that CACM had made a policy decision to make a small incremental expansion of public access—giving the courts discretion to permit audio only, and only in civil and bankruptcy non-trial proceedings not involving testimony. He said that CACM currently has no plans for further expansion, and it was too early to determine how much the new authority was being used in civil and bankruptcy proceedings, or to evaluate any problems. This discussion revealed that the adoption of § 420(b) had no direct implications for Rule 53 at the present time.

Second, the Subcommittee sought to learn about the experience in state courts permitting broadcasting and particularly in empirical studies of the impact of the authorized broadcasting. Most states permit some form of broadcasting in some judicial proceedings, though the details vary greatly from state to state.

The Federal Judicial Center provided the Subcommittee with a comprehensive review of state law and a summary of the academic commentary on the issues raised by providing remote public access to criminal proceedings.[4] The reporters also consulted William Raftery at the National Center for State Courts, who has worked on numerous reports and publications on the topic over the past several years. He was especially helpful in tracking down information on the experience of state courts. Mr. Raftery advised the reporters that there is very little research into the actual performance of the widely varying state policies on remote public access in criminal proceedings. The Subcommittee found particularly helpful the material gathered by the Minnesota

[3] The Subcommittee initially appointed in November of 2023 included Judge Robert Conrad as chair, and 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 Mosman joined the Rules Committee and succeeded Judge Conrad as the Subcommittee chair. After Mr. Wroblewski's retirement, Ms. Tessier succeeded him as the Department of Justice representative on the subcommittee.
[4] The FJC research was added to the Advisory Committee's November meeting agenda book after the meeting when the research became available. The research memorandum begins on page 490 and can be accessed with the following link: https://www.uscourts.gov/sites/default/files/2024-12/2024-11-criminal-rules-meeting-agenda-book-final-revised-12-6_0.pdf.

Advisory Committee, which also reviewed the empirical studies and received reports and recommendations from a wide variety of participants in the Minnesota state courts.

The Subcommittee learned that there has been very little empirical research on the effects and impact of broadcasting. As a research memorandum provided to the Minnesota Advisory Committee stated:

> The methodology of most data on how cameras in the courtroom impact judicial outcomes is flawed. First, the short length of the studies (which generally range from one to three years), and diversity of cases makes it difficult to obtain a representative sample, collect accurate data, and generalize and apply the results. Furthermore, the evaluation design of most studies, self reporting questionnaires, is defective. As frequently opined by social scientists, self-reporting question[n]aires are highly unreliable. Most of the "research" has not been reproduced and is limited in application to that specific trial. There is much room for improvement in the scientific data surrounding cameras in the courtroom.
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> Current data on the impact of cameras in the courtroom is limited. The studies that exist suffer from low sample sizes, self-reporting bias, and the inability to be replicated. Therefore, the data is generally not applicable to populations other than the exact population that was studied. However, the data is still useful at offering a limited perspective in how cameras in the courtroom impact trials. Most of the data shows that very few negative impacts are realized when cameras are in the courtroom. While further research is necessary, the limited data supports the move towards allowing cameras in the courtroom. However, anecdotal evidence from other jurisdictions may also support a cautionary approach to implementing cameras in the courtroom.

Memorandum to Justice Thissen from Kaitlin Yira, Cameras in the Courtroom Studies (Nov. 11, 2021) (footnote omitted). Judge Mosman later remarked at the Committee's November meeting that in his view the memo's concluding comment that "limited data supports the move towards allowing cameras" was unpersuasive given its strong critique of the existing studies and data.

After collecting and reviewing this information, Subcommittee members discussed the question whether to move forward with an amendment to Rule 53. In general, members expressed concern that cameras would have a negative effect on witnesses and victims in criminal cases. One member described his experience in cases in Indian Country, where he found that witnesses and victims in cases involving sexual abuse or murders were terrified. They would certainly not want to testify if the case would be broadcast. The member noted this was not unique to these kinds of prosecutions. A bank teller in a robbery case might feel the same way. Indeed, in a recent RICO prosecution it had been necessary to use contempt to compel a FedEx driver to testify about making a delivery. Jurors are afraid of gangs and have heightened fear in certain kinds of cases. And criminal cases often involve confidential informants, whose identity and the assistance provided

should not be broadcast. Moreover, even witnesses who do testify may restrict what they are willing to say if they know their testimony will be broadcast.

Subcommittee members also expressed concern that broadcasting might lead to more threats to defense counsel and defense experts, as occurred in the Derek Chauvin prosecution. There might also be subtle and harder to measure impacts. Jurors and potential witnesses might withhold certain personal or sensitive information. There might also be greater impacts in certain kinds of cases, including increases or decreases in conviction rates.

The Subcommittee concluded that given the paucity of empirical research on the effects of broadcasting in state proceedings, the state experience with broadcasting did not assuage these serious concerns. Members favored a conservative approach to broadcasting in criminal cases, and the Subcommittee voted unanimously not to move forward with an amendment to Rule 53.

At the November meeting, Committee members generally found the Subcommittee's reasoning persuasive, and they voted to remove the proposal from the Committee's agenda.[5] Members emphasized the critical distinctions between civil and bankruptcy practice—in which Judicial Conference Policy § 420(b) allows the court to permit audio broadcasting of non-trial proceedings in which no testimony will be taken—and criminal proceedings. In criminal cases, even proceedings that do not involve taking testimony present many of the same concerns as those in which testimony is taken. These include, for example, proffers of the testimony a witness may give, and sentencing proceedings, which frequently include discussions of a defendant's cooperation.

Some members had suggested this might be an appropriate subject for a pilot study. But because Rule 53 now has an absolute ban on all broadcasting in criminal cases, no study could authorize any form of broadcasting absent an amendment of the Rule.

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

The Rule 17 Subcommittee, with Judge Nguyen serving as chair, is considering potential responses to perceived problems for defendants who seek documents or other items by subpoena from third parties under Rule 17. As previously reported, the Subcommittee has been conducting an extensive investigation to learn more about gaps and ambiguities in the rule and difficulties created by the application of the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683, 700 (1974),[6] which interpreted the rule's current text. The Subcommittee gathered information about subpoena practice in various districts from eleven experienced practitioners who

[5] The Department of Justice abstained from the vote, and one member dissented on the grounds that additional study of state practices should be pursued.

[6] *United States v. Nixon*, 418 U.S. 683, 700 (1974), requires a party seeking documents through existing 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.

attended the Committee Meeting in October, 2022; met with experts whose practices included responding to subpoenas (tech companies, banks, and financial service companies); heard summaries of the Reporters' discussions with individuals representing medical providers, hospitals, and schools, as well as attorneys from the Department of Justice who work on victim and witness issues in the Executive Office of U.S. Attorneys; and reviewed research from the Rules Law Clerks and the Reporters on the history and present application of Rule 17 and *Nixon* in federal courts, as well as subpoena regulation in the states.

By this past October, the Subcommittee had developed a discussion draft that contained language addressing a number of currently contested issues. The draft included, for example: two potential issuance standards to replace the *Nixon* standard (one for subpoenas seeking legally protected or personal or confidential information, and another for information that is not); clarification that parties may seek subpoenas for evidentiary hearings and sentencings as well as trial; a provision authorizing and regulating ex parte subpoenas; provisions regulating the return and disclosure of information sought by subpoena; in camera review before disclosure of protected information and information sought by unrepresented defendants; and a provision on protective orders.

At its fall meeting this past November, the Committee devoted an entire day to Rule 17. At the meeting, twelve invited speakers shared their views about the issues addressed in the discussion draft. The speakers represented varied districts and professional backgrounds, and included a mix of prosecutors and defense attorneys, a privacy expert, and an expert from a victim's advocacy organization. In the morning, the speakers offered prepared remarks then answered questions from Committee members. The afternoon began with a discussion among the speakers and Committee members about recurring areas of concern and consensus. The last session was a conversation among Committee members.

There was widespread agreement—among both the speakers and Committee members—on a significant number of points, including the following:

- Courts are now applying the *Nixon* standards and various procedural aspects of Rule 17 inconsistently.
- It may be possible to get agreement on a standard that would relax somewhat *Nixon*'s admissibility requirement.
- Although some subpoenas should require court approval, others should be available to the parties without a motion.
- Access to ex parte subpoenas to third parties is needed, and when material is produced, automatic disclosure to the opposing party should not be required.
- In camera review by judges before disclosure is burdensome. It is not needed in all cases.
- Some subpoenas can be returned directly to the requesting party and need not be returned to the court.
- Negotiation rather than litigation between the requesting party and subpoena recipient is the norm for many cases and should be encouraged.
- Subpoenas should be available to both parties for sentencing and at least some evidentiary hearings in addition to trial, including hearings on suppression motions.

On other points, differing views were more pronounced, including a difference of opinion about the efficacy of protective orders; the degree to which various changes would increase risks to and chill cooperation by victims and witnesses; the magnitude of the difficulties posed by the current rule for defendants; whether certain changes would prompt abuse by defendants; and the need for different standards for protected and unprotected information and how to define that distinction.

The Subcommittee will be working on formulating a somewhat narrower, more incremental draft proposal for the Committee's spring meeting, taking this helpful guidance into account.

IV. Reference to minors by pseudonyms (24-CR-A and 24-CR-C); full redaction of Social-Security numbers (22-CR-B)

The Committee heard and discussed a report from Judge Harvey, the chair of the Privacy Subcommittee, which is considering two proposals to amend Rule 49.1's redaction provisions.

A. Reference to minors by pseudonyms

The Department of Justice has proposed amending Rule 49.1 to require that minors by be referred to only by pseudonyms, rather than by their initials. As explained in the Department's suggestion, referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—may be insufficient to ensure the child's privacy and safety. Child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and child-exploitation offenders sometimes track federal criminal filings and take other measures to identify child victims and contact and harass them.

The American Association for Justice and National Crime Victim's Bar Association (24-CR-C) support the Department's proposal, but they add the suggestion that the Advisory Committees "consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence." They state, "the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover."

The Subcommittee learned that the practice of using pseudonyms rather than initials is already well established. It is the Department of Justice's current practice, and neither public defenders nor clerks of court identified any concerns with the proposed modification of the rule. There were concerns, however, about requiring gender-neutral pseudonyms in the text of the rule. Although this is already done in many cases, using phrases like Minor Victim number 1, there are cases in which the evidence and the nature of the charges are gender specific. Accordingly, the Subcommittee will attempt to develop language for a draft committee note encouraging the use of gender-neutral pseudonyms when that is feasible.

B. Full redaction of Social-Security numbers

Senator Ron Wyden has expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules—permit filings to include "the last four digits of the social-security number and taxpayer-identification number."

Although full social security numbers are often relevant in certain kinds of prosecutions (such as those for various forms of fraud), the Subcommittee was unable to identify any reason that the last four digits were needed in public filings. Indeed, some members thought that full redaction was likely easier than partial redaction in cases in which social security numbers were included in sealed filings or covered by protective orders. The fraud division attorneys consulted raised no concerns about full redaction from public filings.

C. Next steps

Both of these proposals were also referred to the other advisory committees, and before making a decision to move forward with any proposed amendments to Rule 49.1, the Committee will consult those committees. The Committee recognizes that uniformity across the privacy rules was a cardinal value in drafting the existing rules, and that the Bankruptcy Committee has determined that the last four digits of Social-Security numbers remain useful in certain bankruptcy filings. On the other hand, members thought that there was relatively little overlap in bankruptcy and criminal practice, and they were not sure that different requirements on these issues would cause any practical difficulties. It would be helpful to hear the views of the Standing Committee on the need for uniformity on these particular issues.

Additionally, all of the Committees would benefit from additional research on the potential for harm as a result of allowing public filings to include the last four digits of Social-Security numbers.

V. Ambiguities and gaps in Rule 40 (23-CR-H and 24-CR-D)

The Committee received two proposals advocating revisions to clarify Rule 40, which governs arrests for failure to appear and violations of conditions of release set in another district.

Magistrate Judge Bolitho proposed clarifying two questions that arise under Rule 40 when a defendant from outside the district is arrested for violating her pre-sentencing release: Is the defendant is entitled to a detention hearing in the district of arrest? And, if so, what is the standard?

The Magistrate Judges' Advisory Group submitted a comprehensive proposal that identifies seven points of confusion under Rule 40 involving procedures and substantive rights, informing the defendant of an alleged violation, providing a defendant with notice the right to counsel, applicable detention standards, and modification of detention orders.

Judge Harvey, who had discussed these proposals with their drafters and reviewed them carefully, expressed the view that the rule is indeed very unclear, and clarification would be beneficial. After a brief discussion, Judge Dever announced the appointment of a subcommittee, chaired by Judge Harvey, to consider these proposals.

VI. Rule 43 and extending the authority to use videoconferencing (24-CR-B)

Judge Brett Ludwig wrote requesting that the Committee consider amending Rule 43 to extend the district courts' authority to use videoconferencing, beyond initial appearances and arraignments, with the defendant's consent. He urged that experience under the CARES Act demonstrated that there is no good reason to limit the use of technology to only initial appearances and arraignments. He stated that under the CARES Act "courts around the country embraced the use of technology without any noticeable deficit in the administration of justice," and his own court and others were "able to fairly and efficiently conduct all manner pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32."

The Committee discussed the question whether to appoint a subcommittee to return to the question whether to expand the availability of videoconferencing as a substitute for the defendant's physical presence. It has considered similar issues on multiple occasions. The Committee considered a variety of proposals to expand videoconferencing in 2002, 2008-10, 2017, 2019, and 2020, and has consistently rejected authorizing videoconferencing for pleas or sentencings except in the truly extraordinary circumstances detailed in provisions of the emergency rule, Rule 62.

Although members expressed no interest in returning to the question whether to permit videoconferencing for plea and sentencing proceedings, there was some support for seeking to identify any other proceedings for which videoconferencing should be permitted with the defendant's consent. The rules currently permit the use of videoconferencing for initial appearances and arraignments, in misdemeanor cases, and for conferences about exclusively legal issues (though it appears not all judges are aware of that authority).

Judge Dever concluded that enough issues had been raised to warrant the appointment of a subcommittee. Its first question would be what (if any) proceedings should be covered by a rules change.

VII. Cross-committee projects

A. Self-represented litigant access to electronic filing

Professor Struve reported on developments in the working group as well as discussions of potential rules in the other advisory committee meetings. She explained the Bankruptcy Committee appeared to be least likely to allow self-represented litigants to access the court's electronic filing systems because of concerns about multiple pro se defendants in a single case. The Civil and Appellate Committees were less concerned than the Bankruptcy Committee about this issue. Judge

Dever observed that the Criminal Rules Committee probably not have concerns about the Bankruptcy Committee taking a different approach.

When asked for feedback, Committee members reiterated the need to consider that incarcerated individuals would have trouble accessing electronic filing systems. In response, Professor Struve emphasized that the draft rule change would only permit—but not require—a self-represented litigant to file electronically.

B. Unified Bar Admissions

Professor Struve highlighted various aspects of the Joint Subcommittee's written report. The Joint Subcommittee was considering a national rule that would foreclose federal districts from requiring attorneys practicing before a court in that district to be a member of that state's bar. But the Joint Subcommittee will need to consider whether there is rulemaking authority to address this topic. Professor Coquillette agreed that the judiciary's authority to address attorney admissions remains an important question.

VIII. Contempt proceedings (23-CR-C)

The Committee removed from its agenda a proposal to make a wide variety of statutory and rules changes, including amending Rule 42. Many of the elements appeared to be substantive, rather than procedural, and the proposed amendments to Rule 42 depended upon, and were interwoven with, proposals to amend 18 U.S.C. § 401 and a host of other statutes.