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: December 8, 2023

I. Introduction

The Advisory Committee on Criminal Rules met in Minneapolis, Minnesota, on October 26, 2023. Draft minutes of the meeting are attached.

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

- The Committee heard 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 removed from its agenda a proposal to allow bench trials under some circumstances without the government's consent, but it identified an issue concerning the Sentencing Guidelines that the Standing Committee might consider appropriate to bring to the attention of the Sentencing Commission.

- The Committee discussed a proposal by 38 members of Congress to authorize broadcasting of proceedings in the cases of United States v. Donald J. Trump. Rule 53 prohibits the broadcasting of criminal proceedings, and the Committee concluded that it had no authority to take the requested action, nor would any potential amendment to Rule 53 take effect in time to affect those cases, given the statutory and Judicial Conference requirements for the promulgation of amendments.

  The Chair informed the Committee that after the completion of the Agenda Book, a media coalition had submitted a related proposal requesting, inter alia, that the Committee amend Rule 53 to allow the broadcasting of some or all criminal proceedings, and he announced the appointment of a subcommittee to take up that proposal.

- The Committee discussed and provided input on several cross-committee projects, and it removed from its agenda the cross-committee proposal to amend the deadline for e-filing.

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

The Subcommittee has been moving in a careful and deliberate fashion to consider the many issues raised by the proposal to amend Rule 17, and it has tentatively concluded that amendments are warranted both to clarify the rule and to expand the scope of pretrial subpoena authority. As a policy matter, it would be beneficial to expand the parties' authority to subpoena material from third parties before trial. The *Nixon* standard,[1] as applied in most districts, is too narrow to provide a basis for discovering and obtaining much of the material the defense needs from third parties.

The *Nixon* standard requires a party to show that the specific material being sought will be admissible at trial (or other upcoming proceeding). Rigorously applied, it prevents the defense from obtaining material that it has not yet been able to review and cannot access through Rule 16 because the government does not possess it. Without first reviewing such material, the defense cannot verify that it will be admissible. Indeed, in some districts the standard is so strict that it has discouraged counsel from even seeking subpoenas, despite their ethical obligation to investigate facts that would provide a basis for a defense. Information that could be essential to the defense, such as information that would be turned over under *Brady* or Rule 16 if possessed by the government, can remain off limits because there is no mechanism in the Rules for discovery from

[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.

third parties in criminal cases. In the Subcommittee's view, some expansion of the authority to obtain access to such material in the hands of third parties is warranted to increase the accuracy and fairness of the process.

Before beginning the work of drafting a proposed standard other than *Nixon* for obtaining a third party subpoena, the Subcommittee focused on issues that may affect that central task, and it reached the following tentative conclusions.

- All third party subpoenas should be subject to judicial supervision. The subpoena authority is compulsory process, and judicial oversight is important to regulate its use in criminal cases. The party seeking a subpoena should do so by filing a motion.

- The rule should distinguish between—and set different standards for—subpoenas seeking materials that are private or protected and those seeking materials not subject to such protections. Third party subpoenas might seek documents or items that are private, confidential, privileged, or otherwise protected by law, such as victim information, school disciplinary records, health care and counseling records, correspondence, emails and texts, financial records, business or enforcement strategies, law enforcement personnel files, presentence reports, or adoption records. As a practical matter, assurance of adequate safeguards for protected information is a prerequisite for any proposal seeking a more relaxed standard for other non-confidential information, such as gas station surveillance video, store receipts, hotel registrations, jail records of cellmates, etc.

- The rule should use the phrase "personal or confidential information" to define which subpoenas would require the higher standard for issuance.

- The rule should provide for ex parte subpoenas upon a showing of "good cause."

Discussion at the meeting clarified several points concerning the work of the Subcommittee. First, the Subcommittee's decisions at this point are necessarily tentative, and will need to be revisited to create a coherent proposal. Second, Subcommittee chair Judge Nguyen and the reporters emphasized that nothing in the rule would override any statutory protections for privacy, such as those in the Stored Communications Act or statutes protecting medical and educational records. The Subcommittee has been consulting with experts on these statutory regimes and will continue to do so. It will also consider the possible constitutional implications of subpoenas under the Fourth Amendment. Finally, because this would be such a significant change, there was support for road testing any proposal with judges, prosecutors, and defense lawyers before publication.

III. Rule 23 and government consent to bench trials (23-CR-B)

The Committee decided to remove from its agenda a proposal by the Federal Criminal Procedure Committee of the American College of Trial Lawyers to change Rule 23, which now requires a written request from the defendant for a bench trial, the consent of the United States, and the approval of the court. The proposal was first discussed at the Committee's April meeting,

and the Committee sought additional information to help it determine whether there is a problem with the current rule. Members were unable to reach consensus on identifying a problem with the existing rule. Article III treats jury trial as the gold standard of adjudication, and the Supreme Court's decision in *Singer v. United States*, 380 U.S. 24 (1965), held that a judge can override the government's refusal to consent in a compelling circumstance in which the defendant could not get a fair trial. Some members also noted that 11 percent of trials are now bench trials, and they saw no basis for concluding that this number was too low.

Members also expressed a variety of concerns about requiring a court to determine whether the reasons presented by a defendant were "sufficient to overcome" "the presumption in favor of jury trials," as the proposal recommended. This would take the courts into uncharted territory. Would it be improper, for example, for the government to withhold consent because the U.S. Attorney favored adjudication by juries? What if the parties were assessing the likelihood of success before a particular judge? Would that be improper in an adversarial system? If so, it seemed likely to generate an awkward procedure in which counsel would be pressed to identify why they did, or did not, wish to try their case before a particular judge.

In light of these issues, a majority of the Committee voted against appointing a subcommittee to pursue the proposal in greater depth.

During the discussion, however, concerns were raised about the defendant's ability to obtain credit for acceptance of responsibility under U.S.S.G. § 3E1.1(b) after a jury trial held solely to preserve an antecedent issue for appeal when the government had declined to either accept a conditional plea or consent to a bench trial. Members saw this as a Guidelines issue, not a rules issue. There was support for making the Sentencing Commission aware of those concerns, and several members voiced support for clarifying that judges may award acceptance of responsibility in those circumstances.

IV. Rule 53 and broadcasting court proceedings in the cases of United States of America v. Donald J. Trump (23-CR-E)

The Committee discussed a letter from 38 members of Congress requesting that the Judicial Conference explicitly authorize the broadcasting of the court proceedings in the cases of United States of America v. Donald J. Trump. Judge Mauskopf forwarded the letter to the Rules Office to be logged as a suggested amendment. The Committee concluded it lacked the authority to take the requested action, or to amend Rule 53 in time to affect those trials.

Federal Rule of Criminal Procedure 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, including the Trump prosecutions.

The Committee agreed that it had no authority to exempt or waive in a particular case the application of Federal Rule of Criminal Procedure 53. The Rules Enabling Act, which is the

exclusive source of authority for this Committee (and the Standing Committee), provides no mechanism for waiving or exempting individual cases from the general rules of practice and procedure for cases in district courts. The Committee has statutory authority to assist the Judicial Conference by recommending new or amended rules, but no authority to recommend exceptions to existing rules in individual cases.

The Committee also interpreted the Congressional letter as possibly seeking an amendment to Rule 53 that would allow exceptions for particular cases of public importance. After reviewing the amendment process, the Committee recognized that even if each step in the amendment process were taken as quickly as possible, an amendment could take effect no earlier than December 1, 2026, after the completion of the particular trials that were the focus of the Congressional letter.

However, after the Agenda Book was completed, the Committee had also received a proposal from a coalition of media organizations that requested Rule 53 be revised to permit broadcasting in criminal proceedings or to include an exception for extraordinary cases. A subcommittee has been appointed to study this proposal. As noted, the amendment process could not be completed until December 1, 2026 at the earliest, and is unlikely to proceed that quickly. Thus any amendment would not affect the cases that were the focus of the earlier Congressional letter.

V. 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 noted a developing 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 already receiving notices from CM/ECF. As to self-represented litigants' access to e-filing, current practices vary greatly, and the working group is considering a minimalist approach.

B. The E-filing deadline

Following the lead of its sister rules committees, the Committee voted to remove from its agenda a proposal that the e-filing deadlines be changed from midnight to an earlier time in the day. The Third Circuit recently adopted a controversial rule changing the e-filing deadline, and this was not the time to move ahead with a national rule.

C. Social Security Numbers

The Committee received an oral report from Mr. Byron regarding the redaction requirements for Social Security numbers. 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.

Last year, the decision was made to allow the Bankruptcy Rules Committee to take the lead, and to determine whether they still considered the last four digits to serve a valuable purpose in some context in bankruptcy proceedings. That committee has now reached the tentative conclusion that there are at least some situations in which the last four digits do serve a useful purpose.

Accordingly, the Criminal, Civil, and Appellate Rules Committees will take up the question whether uniformity remains paramount. There will be continued communication among the reporters, under the direction of Professor Struve, and it may be possible to bring a proposal to the committees' spring meetings.