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 9, 2022

I. Introduction

The Advisory Committee on Criminal Rules met in Phoenix, Arizona, on October 27, 2022. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents several information items. The Committee chose not to pursue one proposed amendment, provided feedback on issues being considered by a cross-committee working group, and heard multiple speakers who discussed their views and experiences as they related to a proposed amendment.

II. Information Items

A. Rule 49.1 and the CACM Guidance Referenced in the Committee Note (21-CR-I)

After extended discussion, the Committee unanimously accepted the Rule 49.1 Subcommittee's recommendation that it take no further action on Judge Jesse Furman's suggestion (21-CR-I) that it amend Rule 49.1 and its committee note.

1. The proposal

By way of background, in *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), Judge Furman held that CJA form 23s (and related affidavits)—submitted by criminal defendants to demonstrate financial eligibility for appointed counsel—are "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment. In contrast, the committee note to Rule 49.1 suggests that these forms should not be made available to the public. The committee note incorporates guidance from the Judicial Conference's CACM Committee. It states:

> The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:
>
> > The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
> >
> > * * * * *
> >
> > - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> >
> > * * * * *
>
> [T]he privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).[1]

[1] This language was added after the public comment period. The committee note includes the following description of changes made after publication:

> Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

Judge Furman wrote that this Guidance is "problematic, if not unconstitutional" and "inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date." He proposed deletion of the reference to financial affidavits in the committee note, and the following amendment to Rule 49.1(d):

> **(d) Filings Made Under Seal.** Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

2. The Committee's decision

The Committee discussed and then unanimously accepted the recommendation of its Subcommittee to take no further action on the proposal.

The Committee concluded that the current note did not pose a sufficiently serious problem to warrant an amendment. The Subcommittee had reviewed the cases considering requests for disclosure of the financial affidavits in question, and it found that with a single exception the reference to the CACM guidance in the committee note was not playing a central role in the courts' analysis or precluding them from considering all of the relevant issues. Indeed, the note was seldom discussed, and did not appear to be short circuiting the courts' analysis. Moreover, Judge Furman's opinion in *Avenatti* has now been published, and it sets forth his analysis for courts that confront the issue in the future.

Members also emphasized that the text of Rule 49.1(d) gives the courts full discretion, providing that they "may" order filings to be made under seal, and the courts have been considering the issues raised and employing that discretion in the cases in which disclosures have been sought. Indeed, the note itself merely quotes the CACM guidance.

The Committee was also concerned that the proposed amendment would be read as taking a position on issues of substantive law, which are not within its jurisdiction under the Rules Enabling Act. Whether these financial affidavits are judicial documents subject to disclosure under the First Amendment or common law right of access presents substantive legal issues. The Committee recognized that Judge Furman's proposed amendment was intended to be neutral, referring to "any applicable right of public access." But members thought amending the rule would inevitably be perceived as putting a thumb on the scales, sending a signal that the Committee disagreed with, or at least wished to distance itself from, the CACM guidance. During the consideration of the proposal a defense practitioner published an article opposing it, and members understood that the amendment would be opposed by the defense bar.

The proposed amendment also raised another concern: in essence, it reminded courts to consider the constitutional and common law rights of public access. But the inclusion of such a provision in one rule is problematic because it suggests that similar language would be needed in other rules as well to avoid negative implications. Professor Coquillette agreed that it was problematic to add such a provision.

Finally, the Committee recognized that the adoption of the proposed amendment and an accompanying note could not fully remedy the problem identified by Judge Furman. There is no mechanism for removing or amending an earlier committee note. Amending the rule and adding a new note would not remove the original committee note. Similarly, even if CACM were to revise its guidance, that would not change the original note.

For these reasons, the Committee voted unanimously not to proceed further with the proposal.

B. Rule 49 and Pro Se Access to Electronic Filing (21-CR-E)

The Committee discussed but reached no final conclusion on three issues being considered by the cross-committee working group that has been convened to consider a proposal to expand pro se access to electronic filing:

- whether to change the default rule that defendants proceeding pro se may file electronically only with the court's permission,
- whether to change the rule that pro se defendants are required to make paper service on parties who are on CM/ECF, and
- whether to encourage the use of other forms of electronic filing, such as filing by email or uploading to a court drop box.

Professor Cathie Struve, who is leading the cross-committee working group, attended the meeting and participated in the discussion.

The Committee recognized that very few defendants in federal criminal cases would be affected by a change in the default rule precluding them from using CM/ECF without the court's permission. Even defendants proceeding pro se generally have standby counsel who can use CM/ECF. Moreover, many defendants are incarcerated and lack access to facilities for electronic filing. Finally, the FJC survey noted at least one court reported already granting a non-represented defendant permission to use CM/ECF. Thus a change in this portion of the criminal rule was not seen as a high priority.

There was greater interest in a change in the rule now requiring paper service on parties who are already on CM/ECF, and discussion turned to practical questions, such as how a defendant would know whether others (such as co-defendants) were on CM/ECF. Concerns were also raised about the possible burdens such a change might impose on the clerk's office. Both Professor Struve and the Subcommittee to which the pro se filing proposal had been referred expressed interest in following up to learn how the districts that have local rules are handling these issues.

Finally, members expressed interest in greater use of alternative means of electronic filing, such as filing by email or uploading to a drop box. Members stressed the value of employing technology to allow persons representing themselves to take advantage of the benefits of electronic filing, though it was not clear how this could be accomplished.

C. Expansion of Rule 17 Third-Party Subpoenas (22-CR-A)

The remainder of the meeting was devoted to consideration of some of the issues raised by a proposal from the White Collar Crime Committee of the New York City Bar to significantly expand the availability of third-party subpoenas. The Committee invited eleven experienced practitioners to participate, including defense lawyers in private practice, Federal Defenders, and representatives of the Department of Justice. Each had been recommended as a person with particular experience with Rule 17 Subpoenas. The participants were:

Michael Carter, Executive Director, Federal Community Defenders Office, Eastern District of Michigan

Robert (Rob) Cary, Williams & Connolly, Washington, D.C.

Mary Ellen Coleman, Assistant Federal Public Defender and Branch Supervisor for the Federal Public Defender for the Western District of North Carolina, Asheville Division

Donna Elm, Criminal Justice Act panel attorney for appeals and habeas cases for the District of Arizona, the Middle District of Florida, and the Ninth and Eleventh Circuits

James E. (Jim) Felman, Kynes, Markman & Felman, P.A., Tampa

Mike Gill, Criminal Chief, Eastern District of Virginia, and Chair, Criminal Chiefs Working Group

Angie Halim, criminal defense trial attorney representing indigent federal criminal defendants, Philadelphia

Ellen Leonida, BraunHagey & Borden, San Francisco

Lisa Miller, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice

Dimitra Sampson, Assistant United States Attorney, District of Arizona

Stephen (Steve) Wallin, Criminal Justice Act panel attorney, Phoenix

The Committee's goal was to learn more about the current use of third-party subpoenas in federal criminal cases. It conducted this portion of the meeting in a conference format, with each participant making initial remarks and then responding to questions and comments from members. The Committee focused first on two foundational questions.

What are the standards for securing third-party subpoenas, and how difficult is it for the defense to meet those standards? What specific problems had practitioners encountered in their efforts to meet those standards?

> What role does judicial oversight play? In the participants' experience, were judges exercising oversight in approving third-party subpoenas and/or in filtering information received from a third party? Had that oversight caused problems or been beneficial, and, if so, why?

The Committee then turned to a variety of other issues that had been raised by the participants in their earlier informal submissions to the Rule 17 Subcommittee. It devoted the final portion of the meeting to general discussion.

Some of the main points that emerged were the wide variety of approaches in different districts (and in some districts from judge to judge), concerns about the rule's ambiguity, a consensus among defense participants that an amendment is needed to clarify the standard and expand the availability of third-party subpoenas, and a range of views among participants concerning the role of judicial oversight.

The Committee is very grateful to the participants for volunteering their time and expertise. Members found the presentations, responses to members' questions, and the general discussion to be extremely valuable. They will provide an excellent basis for the Rule 17 Subcommittee's consideration of the New York City Bar proposal.