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

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 31, 2019

I. Introduction

The Advisory Committee on Criminal Rules met on May 7, 2019, in Alexandria, Virginia. The draft minutes of that meeting are attached at Tab B. There are no action items. This report discusses the following information items:

- The Committee's decision not to move forward with a suggestion that it amend Rule 43 to permit the court to sentence or take a guilty plea by video conference;
- The Committee's decision not to move forward with a suggestion that it amend and clarify Rules 40 (arrest for violating conditions of release set in another district);
- The Committee's mini-conference considering suggestions that Rule 16 be amended to provide additional pretrial discovery concerning the testimony of expert witnesses; and

- Updates received by the Committee concerning the work of the Task Force on Cooperators and recent decisions concerning Rules 6 (disclosure of historically significant grand jury materials) and Rule 12 (standard for reviewing untimely claims).

II. Rule 43

A Subcommittee was previously appointed to consider the suggestion in the opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. On two recent occasions, the Committee has rejected suggestions that it expand the use of video conferencing for pleas or sentencing but members concluded that it would be appropriate to revisit the issue with this case in mind. In *Bethea*, the defendant's many health problems made it extremely difficult and for him to come to the courtroom, and given his susceptibility to broken bones, doing so might have been dangerous for him. But even in such an exceptional case, and even at the defendant's request, the panel in *Bethea* concluded, "the plain language of Rule 43 requires all parties to be present for a defendant's plea" and "a defendant cannot consent to a plea via video conference." *Id.* at 867. Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a very compelling case. On the other hand, members wondered if the case might be a one-off, since practical accommodations at the request of the defendant – with the agreement of the government and the court – have been made in such rare situations, obviating the need for an amendment. Judge Molloy concluded that the issue warranted further study by a subcommittee.

At the May meeting, the Subcommittee, chaired by Judge Denise Page Hood, recommended that the Committee not pursue an amendment to allow video conferencing to be used for plea and sentencing proceedings. The Subcommittee acknowledged that there are, and will continue to be, cases in which health problems make it difficult or impossible for a defendant to appear in court to enter a plea or be sentenced, and that Rule 43 does not presently allow the use of video conferencing in such cases (though that is less clear for sentencing than for plea proceedings). Nonetheless, it recommended against amending the rule for three principal reasons. First, and most important, the Subcommittee reaffirmed the importance of direct face-to-face contact between the judge and a defendant who is entering a plea or being sentenced. Second, there are options – other than amending the rules – to allow a case to move forward despite serious health concerns. These options include, for example, reducing the criminal charge to a misdemeanor (where video conferencing is permissible under Rule 43), transferring the case to another district to avoid the need for a gravely ill defendant to travel, and entering a plea agreement containing both a specific sentence under Rule 11(c)(1)(C) and an appeal waiver. Moreover, the Subcommittee thought that plain error analysis might be applicable in a case like *Bethea*, allowing the appellate court to affirm a conviction and sentence of a defendant who agreed to (and perhaps sought) to plead and be sentenced by video conference. Thus there are many other ways to avoid reversing convictions or sentences as a result of agreed-upon solutions to this problem. Third, the Subcommittee was concerned that there would inevitably be constant pressure on defendants and parties from judges to expand any exception to the requirement of physical presence at plea or

sentence. Accordingly, the Subcommittee concluded that at this time no change in Rule 43 is warranted.

Members agreed with the Subcommittee's analysis and discussed additional input from a Texas border district whose judges strongly supported the use of video conferencing for pleas and or sentencing. Judge Campbell explained that Chief Judge Lee Rosenthal, one of the Texas judges who urged the Committee to permit video conferencing, has a unique problem. Because her district has thousands of § 1326 defendants (charged with illegal reentry) and hundreds of miles between courts, either the judge must travel or the marshals have to transport people between courts. These are generally cases with quick resolutions and relatively small sentences, so they probably present the strongest argument in favor of implementing a video conferencing arrangement. However, the Committee agreed with Judge Campbell's view that it would be undesirable to open the door to video conferencing for these critical procedures. One of the hardest things district judges do is face the defendant and look him in the eye to deliver a sentence. It brings a seriousness and a soberness to the process that is important, even though it is hard, and even though some judges have to travel to do it.

After extended discussion, the Committee unanimously agreed with the Subcommittee's recommendation to make no change in Rule 43 at this time.

III. Rule 40

The Committee discussed a new suggestion from Magistrate Judge Patricia Barksdale (MDFL) that it consider amending Rule 40, which governs the procedures for arrest for violations of conditions of release set in another district. Although the Rule could benefit from clarification, the Committee concluded that the issues raised by Judge Barksdale arise relatively infrequently, are being handled appropriately, and thus do not warrant an amendment at this time.

Judge Barksdale expressed concern that several aspects of the Rule are not clear. As she explained, the questions of concern arise in the following scenario:

> District A places a defendant on pretrial release under conditions, and – with the permission of District A – the defendant moves to District B, which agrees to supervise the defendant. While in District B, defendant commits an alleged violation of release conditions. District A issues a warrant for Defendant's arrest. Based on that warrant, Defendant is arrested in District B and brought immediately to a Magistrate Judge in District B.

Judge Barksdale's questions arise from the interaction of Rule 40 with 18 U.S.C. § 3148(b) and Rule 5(c)(3) in the scenario above. Section 3148(b) governs the procedure for revocation of pretrial release, and as generally understood it provides that the revocation proceedings will ordinarily take place in District A and be heard by the judicial officer who ordered the release.

Judge Bruce McGiverin greatly assisted the Committee in understanding the issues by sharing his own experience and by consulting widely among the community of magistrate judges.

There is general consensus that at least two aspects of Rule 40 are not clear. First, Rule 40(d) says to apply the procedures in Rule 5 "as applicable." Determining which parts of Rule 5(c)(3) apply requires a careful analysis of Rule 5(c)(3), and it may generate some differences of opinion. The second area of possible confusion concerns Rule 40(c), which seems to allow the magistrate judge in the arresting district to alter the release order that was issued by the magistrate judge in the prosecuting district. There is a possible conflict between that and 18 U.S.C. § 3148(b), which appears to require the defendant to be brought back to the prosecuting district and would also severely limit whatever could be done by the magistrate judge in the arresting district. This raises the question is what (if anything) Rule 40(c) applies to, and what it allows the magistrate judge in the arresting district to do.

After discussing the ambiguities in Rule 40 and in 18 U.S.C. § 3148(b), the Committee turned to the question whether revising the rule to clarify it was warranted. Although the rule could benefit from clarification, the Committee agreed with Judge Campbell's observation that many rules could benefit from clarification, but the Rules Committees must be selective. Given the relative infrequency with which this scenario arises, and the fact that the courts have generally handled the cases that do arise without significant problems, the Committee decided to take no action at this time.

IV. Rule 16 Mini-Conference

Judge Kethledge, Chair of the Rule 16 Subcommittee, reported on the mini-conference on the discovery of expert reports and testimony. The Committee had received proposals to amend Rule 16 so that it more closely follows Civil Rule 26 in the disclosures regarding expert witnesses. There was a very strong group of participants, including six or seven defense practitioners, and five or six representatives from the Department of Justice. Most had significant personal experience with these issues and had worked with experts. The discussion was broken down into two parts. First, participants were asked to identify any concerns or problems they saw with the current rule, and second, they were asked to provide suggestions to improve the rule. There was a very candid and vigorous exchange.

The defense side identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received summaries of expert testimony a week or the night before trial, which significantly impaired their ability to prepare for trial. Second, they said that they do not receive disclosures in sufficient detail to allow them to prepare to cross examine the witness. In contrast, the Department of Justice representatives stated that they were unaware of problems with the rule. Judge Kethledge thought that there were significant variations among the districts, and from AUSA to AUSA. If so, reforms might be needed to improve discovery from weaker performers, so that the defense can adequately prepare for trial.

When discussion turned to possible solutions on the issues of timing and completeness of expert discovery, Judge Kethledge reported that the participants made significant progress in identifying some common ground that would guide the Subcommittee. The Subcommittee came away from the mini-conference with concrete suggestions for language that would address both issues.

Department of Justice representatives said that framing the problems in terms of timing and sufficiency of the notice was very helpful. It was useful to know that the practitioners were not seeking changes regarding forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. The lack of precise framing explained, at least to some degree, why the Department personnel who focused on these other issues were not aware of problems with disclosure relating to expert witnesses. The Department's representatives expressed willingness to work with the Committee to develop language that would both address the timing and sufficiency of disclosures regarding expert testimony and be acceptable to the broad community of federal prosecutors. They also committed to working with Committee member and Federal Defender Donna Elm to develop training materials for federal prosecutors.

Judge Kethledge said his goal was for the Subcommittee to bring a proposed amendment to the Committee's September meeting.

V. Updates

The reporters provided oral updates on recent cases interpreting Rules 6 and 12, which were of interest because the courts drew heavily on Committee minutes and reports. There are now circuit splits concerning both rules. These updates were informational only. There has been no proposal to amend either rule.

The reporters described one circuit split on the question whether the district courts have inherent authority outside of Rule 6 to permit disclosure of historically significant grand jury materials. In 2001, the Committee had declined to pursue a proposal by Attorney General Eric Holder to amend Rule 6 to provide procedures for the disclosure of "archival" grand jury materials. The proposal would have allowed disclosure if (1) materials met multiple criteria, (2) disclosure would not materially prejudice any living person or impede any investigation, and (3) no other public interest required continued secrecy. Since only a small number of cases had raised the issue and precedent in some circuits had permitted disclosure in exceptional circumstances, the Committee declined to pursue an amendment.

The other circuit split described by the reporters concerned the standard for appellate review of untimely claims under Rule 12. When the Committee undertook revisions to Rule 12 prompted by the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), it recognized but did not resolve the issue.

The use of the Committee's reports and minutes by litigants and courts in these cases led to a useful discussion of what Committee materials are public and how the minutes are prepared, as well as the role of Committee Notes.

The Committee also received an update from Judge Kaplan, chair of the Task Force on Protecting Cooperators as well as the Criminal Rules Committee's Cooperator Subcommittee. Judge Kaplan reminded the Committee that the Task Force had delivered its report to Director James Duff in two parts. The first concerned potential procedural changes within the Bureau of Prisons. Although there have been some delays, the Department is going forward with the recommendations. Judge Amy St. Eve is working with the Department on these issues. The second part involved changes to Case Management/Electronic Case Files (CM/ECF) that would make information from which individuals could infer who was cooperating less readily available. There is a real tension between protecting the lives and well-being of cooperators on the one hand and ensuring transparency and accountability on the other hand. Director Duff referred this part of the report to the Committee on Court Administration and Case Management (CACM Committee) last spring. Significant work must be done to the CM/ECF system to implement the Task Force's recommendations. Although there is no specific time line now, it is also moving forward. As a result, the CACM Committee has requested that the Committee continue to defer consideration of draft Rule 49.2 (which addresses access to cooperation information through PACER).