MINUTES
CIVIL RULES ADVISORY COMMITTEE
Atlanta, GA
April 1, 2025

The Civil Rules Advisory Committee met at the Elbert P. Tuttle U.S. Courthouse, in Atlanta, GA, on April 1, 2025. The meeting was open to the public. Members present included Judge Robin L. Rosenberg, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland (remotely), David Burman, Judge Annie Christoff, Professor Zachary Clopton, Chief Judge David Godbey, Jocelyn Larkin, Judge M. Hannah Lauck, Judge R. David Proctor, Judge Marvin Quattlebaum, Joseph Sellers, Judge Manish Shah, and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper (remotely) as Consultant. Judge John D. Bates, Chair, Professor Catherine T. Struve, Reporter, Carolyn Dubay, Chief Counsel of the Rules Committee Staff and Secretary to the Standing Committee, and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated. Other participants included: Bridget Healy, Esq., Scott Myers, Esq., Rakita Johnson, Shelly Cox (remotely), and Kyle Brinker with the Rules Committee Staff at the Administrative Office of the U.S. Courts, and Dr. Emery Lee and Dr. Tim Reagan (remotely) with the Federal Judicial Center. Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Welcoming Remarks

Judge Rosenberg opened the meeting by welcoming all observers with appreciation for their participation and interest in the rulemaking process. She thanked the Rules Committee Staff and the U.S. Court of Appeals for the Eleventh Circuit for hosting the meeting. Before beginning the day's agenda, Judge Rosenberg detailed the contributions by Joseph Sellers, who has been an attorney member of Advisory Committee since 2018, and for whom this was his last meeting as a member. She noted that Mr. Sellers had served on many subcommittees, including Discovery, MDL, Rule 43/45, Third-Party Litigation Funding, Rule 30(b)(6), and the CARES Act. Judge Rosenberg said that she could not think of a more active member, or one who has contributed so much to the rulemaking process. She also applauded how Mr. Sellers has interacted with committee members, staff, and the public, with an open mind, respect, and the ability to consider opposing views. She thanked him for his years of service to the Advisory Committee.

Judge Rosenberg also introduced the new Rules Committee Staff Chief Counsel, Carolyn Dubay. Judge Rosenberg noted Ms. Dubay's extensive experience in the judiciary and the Administrative Office, including her prior positions as an AO Deputy Judicial Integrity Officer, an attorney advisor at the AO, a senior researcher at the Federal Judicial Center, a Supreme Court fellow, and a law clerk for Judge Seybert (E.D.N.Y.). Judge Rosenberg welcomed Ms. Dubay and noted that she looks forward to working together. Judge Rosenberg also thanked Scott Myers, who has supported the Bankruptcy Rules and Standing Committees during his nearly two decades as an attorney for the Administrative Office. Mr. Myers is retiring this June.

Turning to the day's agenda, Judge Rosenberg noted that there were five action items to address, including four proposed amendments for publication. She thanked the various subcommittee chairs for their hard work and the public observers for their ongoing interest in the work of the Advisory Committee.

Opening Business

Before turning to action items, there were several items of opening business. First, Judge Rosenberg reported that in January the Standing Committee had approved for publication the proposed amendment to Rule 81(c)(3) regarding demands for jury trial after removal. A report of the most recent Session of the Judicial Conference of the United States is in the agenda book.

Scott Myers then delivered a report on the status of proposed amendments to the civil rules. He shared that the Judicial Conference and the Supreme Court had approved amended Rules 16, 26, and 26.1 and new Rule 16.1. Mr. Myers reported that he expected the proposed amendments to be delivered to Congress in the upcoming weeks. If Congress does not object, the new and amended rules will go into effect December 1, 2025.

Rules Law Clerk Kyle Brinker then delivered a brief report on legislation that may impact the civil rules, further detailed in the agenda book. Mr. Brinker noted that all bills introduced in the prior Congress expired at the end of its last session and must be reintroduced. One such bill, H.R. 1109, requiring disclosure of anyone who has a right to payment based on the outcome of a case, is currently being considered by the House Judiciary Committee. Professor Marcus noted that the text of the bill is in the agenda book in the materials on third-party litigation funding. Professor Marcus reported that the subcommittee studying that issue is aware of the bill and is monitoring its progress.

Judge Rosenberg then turned to the first action item: approval of the minutes of the October 10, 2024 Advisory Committee meeting, held at the Administrative Office in Washington, DC. The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

Action Items – Proposed Amendments for Publication and Public Comment

Rule 41(a)

The next action item was the proposed amendments to Rule 41(a), which the Advisory Committee had previously approved for publication at its October 2024 meeting. At its January 2025 meeting, the Standing Committee asked the Advisory Committee to take a second look at some of the language of the proposed amendments and the committee note. No member of the Standing Committee expressed opposition to the main goal of the amendments: to facilitate voluntary dismissal of individual claims. But there were questions raised about some other aspects of the amendments, detailed below. Because any proposed amendments would not be published for public comment until after the Standing Committee's June 2025 meeting, such reconsideration would not cause any delay to the progress of the amendments. The Rule 41(a) Subcommittee,

chaired by Judge Cathy Bissoon (W.D. Pa.) then met, considered the Standing Committee's comments closely, and responded to them.

Judge Rosenberg presented the revised proposal for amendments to the Advisory Committee. She noted that the amendments have two goals: (1) to clarify that the rule may be used to dismiss individual claims, and not only an entire action; and (2) to require that only parties currently engaged in the case must sign a stipulation of dismissal of one or more claims. Judge Bissoon then explained that the subcommittee has considered extensively all of the helpful suggestions raised by the Standing Committee and adopted some but not all of them. The Style Consultants also reviewed the new draft rule, and the subcommittee also responded to their suggestions. She then asked Professor Bradt to explain the changes made in response to the Standing Committee's feedback.

Professor Bradt first noted that the most significant change to the original proposal was to abandon any amendment to Rule 41(d), regarding the judge's power to award costs to a defendant against whom a plaintiff has refiled a previously voluntarily dismissed action. The subcommittee had proposed an amendment that would allow a judge to award costs related to a previously dismissed claim or claims. Its aim, however, was only to make Rule 41(d) parallel the amended language in Rule 41(a) that clarifies that a plaintiff may voluntarily dismiss a claim or claims. The Standing Committee expressed concerns, however, that the new provision was confusing and potentially left open the possibility of a judge disproportionately awarding costs of an entire prior action when only part of it had been voluntarily dismissed from that action and refiled. Upon reconsideration, the subcommittee acknowledged the potential confusion and concluded that no amendment to Rule 41(d) was necessary. Although many federal courts already interpret Rule 41(a) to allow dismissal of less than an entire action, research could not unearth any cases that had awarded costs when only those claims were refiled. Rather, Rule 41(d) is typically deployed when the plaintiff does in fact dismiss an entire action and then refiles it, likely (and perhaps blatantly) in pursuit of a more favorable judge or forum. Since Rule 41(d) is most apt in such circumstances, and not when only some but not all claims are dismissed, the subcommittee decided that Rule 41(d) was best left alone. Professor Marcus added his agreement with this conclusion.

Professor Bradt then noted that, in response to another question from the Standing Committee, the subcommittee had also clarified the committee note to state explicitly that the deadline for voluntary dismissal without a court order or stipulation is the filing of an answer or motion for summary judgment by the party opposing the claim.

Another area of concern raised by the Standing Committee involved the proposed amendment to Rule 41(a)(1)(A)(ii) to require signatures on a stipulation of dismissal only by parties who have appeared and "remain in the action" (as opposed to "all parties who have appeared," as the rule currently requires). The subcommittee's goal in proposing this amendment is to ensure that a party who has departed the litigation (either by voluntarily dismissing all of its claims, or having all claims against it voluntarily dismissed) cannot disrupt a settlement if it cannot be easily found or if it refuses to sign the stipulation. At the Standing Committee meeting, a Reporter to another committee asked about the interaction between this amendment and Rule 54(b), which provides that (absent a partial final judgment) all parties "remain" in the action until final judgment. This Reporter expressed concern that if parties who are no longer actively litigating

in the case are not required to sign the stipulation those parties may not receive notice that that their window to appeal has opened.

Professor Bradt reported that, for several reasons, detailed in the agenda book, the subcommittee decided to stay with the proposed language "remain in the action." In sum, the subcommittee concluded that the benefits of the revised rule outweigh the risks. Moreover, as Professor Marcus explained, there are numerous instances when the rules contemplate a distinction between a party to a case who is actively litigating and one who is not. Additionally, as a practical matter, parties who have been dismissed from the action continue to receive CM/ECF notices about the case, and it is reasonable to expect them to pay attention to the docket if they believe they have preserved some right to appeal despite dismissing all of their claims, or having all claims against them dismissed.

Judge Rosenberg then opened the floor to comments from Advisory Committee members. One judge member expressed approval of the "remain in the action" language as sufficiently clear and confirmed that CM/ECF alerts should guard against parties missing the appeal window.

Judge Bates expressed a concern about the amended title of the Rule, which now refers to "Dismissal of Actions or Claims." The new title perhaps creates ambiguity because some parts of the rule speak to dismissal of claims and others only to dismissal of the action. For instance, amended Rule 41(a) speaks to dismissal of one or more claims, but it may be unclear whether the rule also allows dismissal of an entire action. Several other judge members also expressed their concerns about the ambiguity, particularly for especially textualist-inclined courts, so during the lunch hour, the subcommittee agreed to make clear in both the text of the rule and the committee note that Rule 41(a) allows dismissal of both one or more claims or entire actions.

After the Reporters made this revision during the lunch break, the Advisory Committee reconvened. Upon consideration of this revision, and upon a motion and a second, the Advisory Committee voted unanimously to recommend to the Standing Committee that the proposed amendments to Rule 41(a) be published for public comment.

Rule 45(c) and Rule 26(a)(3)(A)(i)

Judge Rosenberg then introduced the next action item, a proposed amendment to Rule 45(c), part of the work of the Rule 43/45 Subcommittee, chaired by Judge Hannah Lauck (E.D. Va.). The proposed amendments are spelled out at p. 95-98 of the agenda book, with minor changes based on suggestions from the Style Consultants, detailed in an Appendix distributed to committee members at the meeting. The intent of this amendment is to clarify that the rule permits a subpoena to a witness to provide remote testimony within 100 miles of where they live and work. Some courts, such as the Ninth Circuit in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), have held that, despite contrary language in the committee note, the rule provides courts with only the power to command that a witness appear for trial if the witness lives or works within 100 miles of the courthouse where the trial is being held.

Judge Lauck explained that with respect to remote testimony the subcommittee was "tackling the forest and the trees," but this is "the first tree." She explained that remote testimony

is a much larger part of litigation life since the pandemic, so reexamination of the provisions addressing that topic in the rules is ripe. This first step responds specifically to the Ninth Circuit's decision in *Kirkland.* The proposed amendment would clarify that the subpoena power extends nationwide, so long as the witness is commanded to testify within 100 miles of the locations enumerated in Rule 45(c)(1)(A). This would be accomplished through a new Rule 45(c)(2) providing that "Under Rule 45(c), the place of attendance for remote testimony is the location the person is commanded to appear in person." The committee note also clarifies that for purposes of Rule 45(c), the witness "attends" at the place where the person must appear to give testimony, while for purposes of Rules 43 and 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

Judge Lauck reported that the subcommittee had engaged in extensive outreach with respect to this particular issue and the broader issue of remote testimony more generally. Further analysis of the broader issue is necessary to consider potential amendments to Rule 43 affecting when remote testimony may be used. But the subcommittee decided that the broader project should not delay a response to the particular issue presented in *Kirkland*. Judge Lauck also noted that the subcommittee has proposed an accompanying amendment to Rule 26(a)(3)(A)(i) to require initial disclosure of witnesses a party intends to call to testify remotely.

Professor Marcus added that the proposals here are intended to resolve the issue presented in *Kirkland*, while leaving for later analysis any proposal to alter the standards for when remote testimony is available under Rule 43. Judge Rosenberg then added that the amendments were the focus of intense discussions among the reporters, including Professor Struve. The subcommittee also made several small changes to the rule's syntax, as proposed by the Style Consultants. Compared to the agenda book materials at pp. 97, the changes to Rule 45(c) are: (1) add the word "remote" before testimony at line 337, and (2) remove the sentence from the note beginning at line 345, which stated that the rule has no effect on the criterion for unavailability for deposition testimony under Rule 32(a)(4)(D), or Federal Rule of Evidence 804(a). With respect to Rule 26, the subcommittee adopted a suggestion from the Style Consultants to remove an comma and add parentheses.

An attorney member of the subcommittee sought elaboration on the removal of the sentence in the committee note regarding the amendment's lack of effect on unavailability for deposition testimony. Professor Struve explained that there were concerns that specifically allowing remote testimony within 100 miles might render an otherwise unavailable witness (in a court following *Kirkland*) available for a deposition. But this is a residual question and may be resolved during the broader discussion of Rule 43, so saying anything about it now may be premature and the issue can be monitored. Professor Bradt added that the goal is to correct the narrow issue in *Kirkland* without tying the committee's hands when it comes to other issues related to remote testimony.

A discussion then followed about the language of the proposed amendment to Rule 26(a)(3)(A)(i) requiring initial disclosure of witnesses "and whether the testimony will be in person or remote." One academic committee member suggested that the rule be modified to require disclosure of witnesses the party "expects" will be remote, since it may be unclear at such an early stage of the case whether or not the witness will appear in person. A judge member agreed and

noted that under Rule 43 it is ultimately the judge's decision whether a witness will be allowed to testify remotely; such a result cannot be accomplished unilaterally by a party in a disclosure. Professor Marcus noted that the amendment is not intended to give the parties control over whether a witness will ultimately testify remotely, but rather to alert the other parties and the judge to the possibility. The court will eventually make the decision on whether witnesses will be allowed to appear remotely at the final pretrial conference. A judge member agreed that the language was sufficiently clear as proposed and that the court will necessarily consider any remote-testimony questions as the trial date nears.

Two other judge members expressed concerns about the specific reference in the proposed amendment to Rule 45(c) and what work the reference is doing in the rule. These judges suggested further clarifying the text to refer even more specifically to Rule 45(c)(1). Another judge member suggested reorganizing to make the new provision part of Rule 45(c)(1) in order to more precisely clarify its effect. Professor Marcus explained that the intent is to limit the effect of the rule to the scope of the subpoena power. Rule 45(c) provides protection to the witness against having to travel more that 100 miles, while Rule 43 and 77(b) are focused on protecting the trial process. Moreover, Professor Marcus warned against unintended consequences of rejiggering the rule's structure and noted that the purpose of this small change was narrowly tailored to clarify the ambiguity noted in *Kirkland*.

Judge Rosenberg then called the morning break, during which the reporters and subcommittee chair conferred on the changes suggested from the floor. After discussion the following change was proposed: adding "(1)" after the reference to "Rule 45(c)" in Rule 45(c)(2), and in the committee note. No one objected to this change.

Upon consideration of the revision to the proposed rule, and upon motion and a second, the Advisory Committee voted unanimously to recommend to the Standing Committee that the proposed amendments to Rule 45(c) and Rule 26(a)(3)(A)(i) be published for public comment.

Rule 45(b)

Judge Rosenberg then introduced a proposed amendment to Rule 45(b) regarding service of subpoenas. The proposed amendment appears beginning at p. 131 of the agenda book, with modifications reflected in the Appendix distributed to committee members in response to suggestions from the Style Consultants. Judge Rosenberg explained that the amendment is designed to address ambiguities around delivery of a summons and tendering of fees that have been raised periodically for nearly two decades.

Judge David Godbey (N.D. Tex.), Chair of the Discovery Subcommittee, noted that some courts had read the current rule to require in-hand service of a subpoena, while other courts had read the language more flexibly to allow other methods of service. The subcommittee's efforts were focused on providing clarity with respect to other acceptable methods of service. Moreover, based on feedback from practitioners, the proposed amendment adds a presumptive 14-day window between service of the subpoena and the time the witness must appear to testify. Professor Marcus added that another change to the rule was to permit the tendering of fees to the witness at the time of service or the time and place where the witness is commanded to appear. The current

requirement that fees must be tendered at the time of service makes service more complicated and may hinder even "heroic" efforts to serve a recalcitrant witness. Because the serving party wants the witness to appear, there is a strong incentive to provide fees for a witness who needs them. For other witnesses, tendering at the place of appearance serves the purposes of the rule.

Professor Struve suggested that it might be helpful to engage with Administrative Office staff who maintain Form 88 for subpoenas. That form makes no mention of fees, which makes sense under the current rule. But if the rule changes, revision of the form will be necessary and the new version should include language informing the witness that fees will be tendered at the place of appearance, if not before.

An attorney member of the subcommittee highlighted other features of the amended rule, including providing for the use of a commercial carrier so long as a receipt is provided, other means of service that a court may authorize for good cause if standard methods aren't working, and the value of the 14-day window, which is standard practice that will be made uniform and mandatory by rule.

Another attorney member noted that the committee should be on the lookout for public comments that the rule is too vague when it comes to some terminology, such as the witness's last known address, or a person of suitable age and discretion. But this member believed that the rule should go forward for publication as written, and the committee can see what emerges from the comment period. Professor Marcus added that refinements can be made, if necessary, after the comment period.

A judge member expressed concern about the suggested provision, at Rule 45(1)(A)(ii), that authorizes leaving the summons at the witness's dwelling with someone of suitable age and discretion who resides there. This judge expressed the concern that a summons might be left with anyone who lives in the same large apartment building as the witness but would then never be delivered. Professor Marcus responded that this language is drawn directly from Rule 4 for service of the summons and complaint. He was unaware of whether a problem like the one described arises with respect to original service, but it would be anomalous to require more to serve a subpoena than the summons and complaint.

A judge liaison expressed concern that the wording of the proposed Rule 45(b)(1)(A)(iii) was unclear with respect to whether a confirmation of receipt is required when the serving party uses U.S. mail or only when the serving party uses a commercial carrier. Judge Godbey responded that the subcommittee intended that the receipt be required for both U.S. mail and commercial-carrier delivery.

Another judge member then asked whether the rule required only a method of service that provides confirmation of receipt or whether the rule demands that actual confirmation of receipt be provided. Judge Godbey and Professor Cooper agreed that the intent of the rule was to require that the serving party actually receive the confirmation of delivery, so the language should make that clear. An attorney member agreed, noting that if delivery is unsuccessful, then the judge could consider alternative means of service, consistent with the language from the *Mullane* case in the rule. But another attorney member agreed that the language of the rule may suggest that service is

accomplished upon mailing even if no receipt is provided, so the rule should prescribe "actual" confirmation of receipt. After further discussion, the reporters agreed to review the language over lunch and perhaps provide a revision.

Following lunch, the reporters suggested inserting the word "actual" before receipt in Rule 45(b)(1)(A)(iii) to clarify that actual confirmation of receipt is necessary for service to be effective. Judge Bates asked whether the Style Consultants might consider the word "actual" to be redundant. Professor Marcus responded that because the addition of "actual" was at the request of the several committee members who thought it provided needed clarity, its inclusion should be considered substantive. Professor Cooper added that the word "actual" here performs a useful function to distinguish the rule from Rule 87, from which the word "actual" was left out intentionally.

A judge member then suggested that the use of the word "form" might be ambiguous, since "form" might refer to the characteristics of the subpoena itself and not the method of serving it. Another judge member agreed that the use of the term "method" instead of "form" would be clearer. Professor Cooper noted that the word "form" is drawn from Rule 4(f)(2)(C)(ii), addressed to serving an individual in a foreign country by "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt." But, Professor Cooper added, parallel language is not required here in light of the specificity of the rule. The Advisory Committee reached consensus that "method" would be preferable to "form," and the reporters made the change.

Following the discussion, and after making the revisions agreed to during the discussion, upon a motion and second, the Advisory Committee voted unanimously to recommend to the Standing Committee that the proposed amendments to Rule 45(b) be published for public comment.

Rule 7.1(a)

Judge Rosenberg next turned to the Chair of the Rule 7.1 Subcommittee, Justice Jane Bland (Supreme Court of Texas), who was attending remotely, to introduce the final action item: amendments to Rule 7.1 on corporate-party disclosures to be published for public comment. Currently, the rule requires that a corporate party disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The subcommittee has been focusing primarily on the concern that current Rule 7.1 does not require corporate parties to disclose corporate "grandparents," in which a judge might hold a financial interest that requires recusal. Justice Bland noted that the Codes of Conduct Committee's recently revised guidance to judges cited to the various federal disclosure rules in identifying 10% ownership of a party as creating a rebuttable presumption that a judge with a financial interest in such an owner of the party should recuse, unless the judge learns information that demonstrates that she nevertheless has no financial interest in the outcome of the litigation. The subcommittee's efforts have been directed toward providing judges with enough information about a corporate party's ownership to decide whether recusal is necessary.

Toward that end, after research and deliberation the subcommittee has proposed two changes to the Rule.

First, to change references to "corporations" to "business organizations." The reason for the change is to capture various business entities, such as LLCs or master partnerships, that may not be formally labeled corporations under the relevant state law that created them. "Business organizations" is a broader term that better reflects the range of entities that should be disclosed, since a financial interest in such an entity might require recusal. The subcommittee landed on "business organizations" as the appropriate term because of its common usage, including in the Uniform Business Organizations Code, various state laws, and the introductory course in many law schools.

Second, to direct that a party disclose "any publicly held business organization that directly or indirectly owns 10% or more of it." The goal is to require disclosure of publicly traded grandparents or great grandparents that have sufficient ownership of a party to trigger investigation of recusal consistent with the Codes of Conduct Committee guidance. The subcommittee believes that this expanded disclosure requirement will ensure that judges have sufficient information about any entity up the corporate chain of ownership in which she may hold a financial interest. Other subcommittee members agreed that this language should promote the necessary disclosures. The use of the term "it," which had been vetted by the Style Consultants before the meeting, is intended to require disclosure of all ownership interests, regardless of their formal label as "stock" or "shares," or some other term.

Professor Bradt added that the subcommittee had deliberated extensively over the appropriate language after study of other disclosure requirements in local rules and state courts. Based on outreach to judges and attorneys regarding their experience with these rules, the subcommittee opted against requiring disclosure of a catch-all set of corporate connections, such as "affiliates," as overly broad and onerous to comply with and digest. The subcommittee also opted against a lengthy list of specific connections to disclose as being potentially over or underinclusive and potentially requiring amendment as new corporate forms emerge that may not be on the list. Given the subcommittee's goal of ensuring that "grandparents" are disclosed – likely an uncontroversial proposition since the committee note to F.R. App. P. 26.1 since 1998 has guided attorneys to disclose "grandparent and great grandparent corporations" without controversy. As the committee note explains, the proposed language represents a pragmatic concept intended to accomplish what the Appellate Rule already demands. Since the rule covers a matter ancillary to the merits and does not define parties' obligations to one another, the subcommittee came to the views that its approach, albeit imprecise, was the best avenue toward achieving its goal. An attorney member added that the public-comment period would be especially useful in learning whether this change is in fact insufficiently clear.

The Advisory Committee then adjourned for its scheduled lunch break. After lunch, discussion resumed. The clerk liaison expressed support for the rule so long as the information provided would be compatible with clerks' conflicts-check software. An attorney member responded that the requirement was not onerous and could be easily filed with other mandatory disclosures in such a way that the clerk need not enter it into the conflicts check manually. Another attorney member suggested replacing the words "more capacious" in the committee note with "broader." The change was adopted without objection.

Following the discussion, and after making the revisions agreed to during the discussion, upon a motion and second, the Advisory Committee voted unanimously to recommend to the Standing Committee that the proposed amendments to Rule 45(b) be published for public comment.

Intercommittee Reports

Privacy Issues

Judge Rosenberg then turned to Professor Struve to provide a report on the status of proposed privacy amendments. Professor Struve explained that the advisory committees had originally received suggestions to amend the privacy rules to address concerns relating to social security numbers and minor children. After receiving these suggestions, the Tom Byron (former Chief Counsel of the Rules Committee Staff) and reporters undertook a holistic study to determine whether any additional privacy-related amendments should be made. Last fall, the Privacy Rules Working Group concluded that no other additional topics need attention at this time.

Professor Struve then provided an update regarding the proposal to require complete redaction of social security numbers, noting a divergence between the Bankruptcy Rules Committee and the other advisory committees. The Bankruptcy Rules Committee has determined that there are practical reasons why stakeholders in bankruptcy proceedings still need the last four digits of a social security number. The Bankruptcy Rules Committee therefore does not intend to move forward with any changes to their privacy rule regarding such redactions.

Because the proposal to require complete redaction of social security numbers is gathering momentum among the other committees, Professor Struve suggested that the Civil Rules Committee should consider whether to amend Rule 5.2. Professor Struve noted that social security review proceedings are governed by the Civil Rules; however, as set forth in the memo in the agenda book, it does not seem that requiring complete redaction of social security numbers would present any problems in such proceedings. One additional item for the Advisory Committee's consideration is that in tax refund proceedings, it might be necessary for someone to know the social security number of the person seeking a refund. The U.S. Court of Federal Claims requires filing both a redacted and an unredacted version of the complaint; the U.S. Tax Court requires filing the social security number separately from anything that is posted on the docket. The Civil Rules Committee may wish to consult the Tax Division of the DOJ on this issue.

Additionally, the Advisory Committee should consider whether individual taxpayer identification numbers also should be fully redacted. The current rule refers to an "individual's" taxpayer identification number. Research is ongoing as to whether this means the IRS's definition of an "individual taxpayer identification number," or "ITIN," or whether it means any number that identifies an individual as a taxpayer, such as an "employer identification number" or "EIN."

Finally, the Criminal Rules Committee is taking the lead on considering whether to require that minors be denoted by pseudonyms rather than initials. Professor Struve suggested that the Civil Rules Committee should keep pace with this, not least because the habeas and Section 2255 rules incorporate by reference the Civil Rules.

Service and E-Filing by Self-Represented Litigants

Professor Struve next reported on the project on service and electronic filing by self-represented litigants, noting that the project has been before the Advisory Committee on previous occasions, but is now moving closer to suggested amendments to specific rules. Proposed amendments are not being presented for consideration by the Advisory Committee at this time, but rather are offered in the hope to get feedback for consideration in fall 2025. The goals of the project are to alter the rules requiring self-represented litigants to continue serving paper copies on litigants who are receiving electronic notice of their filing through the electronic filing system, and to broaden the access of self-represented litigants to electronic filing systems in general.

Professor Struve reported that there is some uncertainty as to whether the Bankruptcy Rules Committee will participate in this project. Last fall, it determined that these amendments were not presently appropriate for the Bankruptcy Rules. However, the Bankruptcy Rules Committee's materials for its spring meeting include a memo in which the project is brought before the Committee for further consideration of that choice. It is quite possible that the Committee will adhere to its prior decision. It appears that participants in the project are nonetheless comfortable proceeding with amendments to the Civil, Criminal, and Appellate Rules, even if the Bankruptcy Rules are unchanged. If the Bankruptcy Rules do not change, the Bankruptcy Rules Committee will need to consider how to amend those Rules to dovetail with any changes to the other sets of rules, in cases where a bankruptcy case is appeal to a district court, bankruptcy appellate panel, or court of appeals. If this Committee has a view on the best approach to take—whether it is more important to have horizontal uniformity, such that all matters before the district court are treated the same regardless of the type of case, or vertical uniformity, such that bankruptcy cases are treated the same regardless of the stage of the proceeding—that would be of interest to the Bankruptcy Rules Committee.

Professor Struve sought feedback from the Advisory Committee on the current drafts of the proposed amendments. Proposed Civil Rule 5(b)(2) would provide that the notice of electronic filing constitutes service on those who receive it. What would become Rule 5(b)(3) then carries forward the existing alternate methods of service, except for the one concerning notice of electronic filing. In its current form, the (b)(3) list of alternate forms of service includes a proviso that exists in the current rule, in proposed Rule 5(b)(3)(E), that service by electronic means that a person has consented to in writing is not effective if the sender learns that it did not reach the person to be served. Professor Struve explained that this language made its way into the rule when this type of service was very new, and there was a desire to provide assurance that people were in fact receiving what they were supposed to receive. However, the draft does not include a similar caveat in proposed Rule 5(b)(2), because it seems that people are now comfortable that participants in CM/ECF are receiving the notices of electronic filing.

Proposed Rule 5(b)(4) would address the service of papers that are not filed. It provides that a method other than a notice of electronic filing must be used, since none would be generated. This is intended to address the many papers that are served but not filed, but if any committee members thought that it is redundant or otherwise unnecessary, they were invited to say so.

The proposed amendments to Rule 5(d) would switch the presumption from the current presumption that self-represented litigants do not get to use the electronic filing system to a presumption that they do, unless the court acts to exclude them from participating.

Proposed Rule 5(d)(2)(B)(ii) provides that local provisions that would bar access of self-represented litigants to the electronic filing system must have reasonable exceptions, unless the court provides an alternative method for electronic filing and electronic noticing for such litigants. The other salient feature of this proposal is that the court can set conditions and restrictions on the access of self-represented litigants to the electronic filing system.

Professor Struve highlighted a few points. First, the current draft uses the term "self-represented litigants," but many existing rules refer to such individuals as "unrepresented." Although Professor Struve noted that she would prefer to use the term "self-represented litigants," she recognized that this project was not intended to overhaul all of the rules that refer to "unrepresented" litigants, so the next draft of the proposed amendments will use "unrepresented."

This draft uses "papers" instead of "documents" because the Committee uses whichever term is already used within the same rule, and Rule 5 uses "papers."

There are places in the proposed Rules 5(d)(2)(B)(i) and (ii) where the draft includes bracketed language that would more clearly spell out what it means to "use" the court's electronic filing system. The bracketed language refers to filing papers and receiving electronic notice of activity in a case. The longer and more explicit version may be more helpful to self-represented litigants who would be impacted by the rule, but the style consultants prefer the shorter and more concise version.

Proposed Rule 5(d)(2)(B)(iii) puts "conditions and restrictions" on access. The style consultants have suggested that this is redundant. It may make more sense to explain to a self-represented litigant that a court may either place restrictions, or conditions, or both, and therefore some slight redundancy may be useful.

A judge member raised a question about proposed Rule 5(d)(2)(B)(ii), which states that if a local rule or court provision prohibits self-represented persons from using the court's electronic filing system, the provision must include "reasonable exceptions" or "another electronic method." The judge member asked what a reasonable exception would be, if not access to the court's electronic filing system. Professor Struve responded that this is the flipside of the idea of "conditions and restrictions," and is intended to mean something other than prohibiting all self-represented litigants from using the system. A court can, for example, prohibit incarcerated individuals from using it, or require users to take a course before having access. The committee note will be expanded to connect the "conditions and restrictions" concept with the "reasonable exceptions" concept.

An attorney member expressed his support for the more expansive wording of the ability to file papers and receive notice, for people who are less familiar with the legal system.

The Clerk Liaison noted that from the clerks' perspective, this proposed rule change was welcome. Electronic receipt of documents saves staff resources and accelerates the time in which the documents can be reviewed by the judge. Further, treating self-represented litigants similarly to attorneys, to the extent possible, helps the clerk's offices' interactions with self-represented litigants. From his perspective, the appropriate guardrails are there, and he expressed his support for the proposal.

Attorney Admissions

Professors Struve and Bradt, the co-reporters of the intercommittee group considering proposals to more easily facilitate attorney admissions to the district courts, rested on the materials in the agenda book in light of the late hour. Professor Struve noted that the committee was still engaged in research and outreach and would report on its progress in the fall

Subcommittee Reports

Discovery Subcommittee

Judge Godbey, Chair of the Discovery Subcommittee, reported that it had been mostly focused on the proposed amendments to Rule 45(b), which was approved for publication earlier in the meeting. The other major issue on this subcommittee's plate is the proposal for national uniform rules on motions to seal. Judge Godbey thanked the subcommittee's members, especially the lawyer members, for their hard work on this complicated issue.

District practices vary a great deal on motions to seal, creating complications for lawyers. Although a majority of subcommittee members expressed support for at least considering uniform rules, such a project would require enormous time and effort. Moreover, districts have well-established procedures and local rules, so a new national standard could cause challenges for those districts forced to adopt a different process. As a practical matter, the vast majority of requests to seal are stipulated to by the parties, so proposals demanding more extensive procedures may make a process that should be easy unnecessarily complicated. Professor Marcus added that a new national rule would surely require many districts to change their practices, which may also complicate matters for lawyers used to well-established processes. He suggested that another possibility might be a rule that clarified that the standard for a motion to seal is different from the standard that applies to protective orders under Rule 26(c). Such a rule would remind lawyers that they need to refer to the applicable circuit law for the relevant standards.

A lawyer member contended that many of the proposals for new rules were overly onerous for both the judge and the litigants. This member noted that he had heard about an effort to notify people that documents had been sealed so they could potentially intervene to file a challenge. Professor Marcus noted that one submission suggested that the AO maintain a centralized website that included every request to file under seal so that anyone who might want to challenge such a request could find it there. Thus far, the subcommittee has not pursued this idea, as there already is much litigation on requests to seal.

A judge member expressed concerns about a national rule that simply incorporates the First Amendment and common-law standards for motions to seal, on the ground that such a rule would beg many questions in different kinds of cases. Professor Marcus noted that the goal of such a rule would not be to change the standard but to alert lawyers to determine what the relevant standards are in the circuit in which they are litigating. One judge member saw value in this approach by alerting parties that they need judicial approval to seal documents.

Another judge member expressed skepticism of national standards because the methods courts have already developed are working well for them. Any rule would need to either be so detailed as to essentially become a best-practices guide, or it would be so vague as to leave many questions unanswered. This judge also questioned whether there was anything to be gained by a rule that only alerted lawyers that the standard for sealing varied from the standard for a protective order. Another judge member added that no national standard is likely to be feasible until there is a national CM/ECF system that is uniform across the districts. This judge agreed that there may be value in a rule reminding lawyers that the sealing standard is different, but expressed doubts that a rule could develop a uniform, substantive test that would apply across the whole range of potential circumstances.

Judge Rosenberg sought guidance from attorney members as to whether the differing practices across the district courts created challenges for lawyers. One attorney member said that these different rules do often present problems that add expense and uncertainty, problems exacerbated by the likelihood that such issues often must be addressed at the last minute before a filing deadline. Many lawyers just agree to a request to seal because the fight is not worth the effort, perhaps leading to oversealing. This lawyer, however, agreed that developing a national standard would be difficult. Another attorney member agreed that uncertainty over whether a motion to seal a document filed along with the document would be granted often created agita. A different lawyer member agreed that lawyers hate the cacophony of approaches among the districts, but that it would be very hard to develop a single standard. Another lawyer member echoed this view: the current system is a "gigantic pain" but he feared that a national rule would be driven toward the most rigorous standard. He noted his experience with some very restrictive districts and warned that if such an approach were nationalized it would make life much more difficult for lawyers. Another attorney member worried that even if the rule presented a national standard, districts would still interpret that standard in different ways, making the effort at uniformity fruitless. In sum, the attorney members of the Advisory Committee noted dissatisfaction with the current state of affairs but also concerns that a national rule, assuming one could be developed, could make things worse.

Judge Bates expressed pessimism about the rules process coming up with a national rule. CACM undertook a similar effort 23 years ago and managed to do very little. Even very little may be worthwhile, but a national standard would be a "very heavy lift" and may not be worth the effort. Another judge member suggested exploring an amendment to Rule 16 that would direct the judge's attention to potential sealing issues early in the litigation. This judge noted that the bankruptcy courts have a "free peek" process under which a judge will look at a document and allow the party to withdraw it if the motion to seal is denied.

Summing up, Professor Marcus said that the emerging consensus seemed to be that there was not a groundswell in favor a national substantive standard, but that an amendment calling attention to the differing standards for a motion to seal and a protective order may have promise. The issue will therefore remain on the subcommittee's agenda for further study.

Rule 43/45 Subcommittee

Judge Rosenberg explained that in addition to its work on the proposed amendment to Rule 45(c), now recommended for publication, this subcommittee is reviewing proposals to relax the current constraints on remote trial testimony under Rule 43(a). She explained that, prior to 1996, there was no provision in the rules permitting remote trial testimony. The current rule allows such testimony in rare circumstances, but technology developed since 1996 may render that rule's limitations on remote testimony anachronistic. Judge Rosenberg reported that the subcommittee was working on putting together a mini-conference this summer, sponsored jointly by Duke Law School's Bolch Judicial Institute and UC-Berkeley's Berkeley Judicial Institute, to hear from judges and practitioners about their experiences with expanded remote testimony.

Judge Lauck, the chair of the subcommittee, noted that the 1996 rule was likely directed toward testimony submitted by telephone, but "contemporaneous transmission" may now be accomplished by various video-conferencing software applications. The subcommittee is considering loosening the restrictions on such testimony at trial, and at hearings on motions. She noted that this issue has generated a great deal of interest. Although no one challenges that the "gold standard" remains live, in-person testimony in open court, and that this should remain the presumption, positive experience with remote testimony during the pandemic suggests that it should be allowed more regularly. Currently, the rule essentially states a preference for prior deposition testimony over live remote testimony, but times may have sufficiently changed to undermine that preference. For instance, Justice Bland has shared information about the widespread and successful use of remote testimony in Texas state courts. In large states, and perhaps districts, the opportunity for remote testimony may materially enhance access to court. Indeed, jurors seem to find live remote testimony easier to follow than reading or playing a video of a prerecorded deposition. Judge Lauck also noted that the subcommittee has already received feedback from various bar groups, and that the upcoming mini-conference will also be helpful in giving the subcommittee the information it needs.

Judge Lauck also noted that the Bankruptcy Rules Committee is considering a minor change to its rules that would drop in many cases the "compelling circumstances" requirement similar to the requirement in our Rule 43(a). A judge liaison noted that such a change would not be minor, as contested matters in bankruptcy can be as complex as a civil trial.

Judge Bates added his thanks to the subcommittee for taking on this vital subject. Experiences during the pandemic have opened our eyes to possibilities that we need to explore, but great care needs to be taken. He noted that it would be important for the Advisory Committee to collaborate with the other rules committees, because changing Rule 43(a) to make remote testimony more common will send a strong signal that such testimony is acceptable more often. He also cautioned against a change in the rule accompanied by an overly lengthy committee note.

Third-Party Litigation Funding Subcommittee

This subcommittee, created at the October 2024 meeting and chaired by Judge David Proctor (N.D. Ala.), is in its early days. Judge Proctor reported that the subcommittee is getting its arms around the topic, and has met, or will meet, with various lawyer groups. The subcommittee is also planning to send members to numerous upcoming academic conferences on this issue. As Professor Marcus noted, this is a dynamic issue and the reporters and members of the subcommittee are learning a great deal. The subcommittee will report on its progress at the fall meeting.

Cross-Border Discovery Subcommittee

Subcommittee Chair Judge Manish Shah (N.D. Ill.) reported that the cross-border discovery subcommittee has engaged in extensive outreach, including to the Department of Justice, Lawyers for Civil Justice, the American Association for Justice, the Sedona Conference, and the ABA. The prevalence of cross-border discovery and conflicting national laws related to privacy and disclosure often create significant challenges. Whether a federal rule could mitigate those challenges remains an open question. One possibility is to include cross-border discovery among the issues parties must meet and confer about and include in their discovery plan under Rule 26(f). Some have suggested that early attention from the judge could be salutary. But some, including DOJ, have expressed that such a requirement is unnecessary because anticipated problems often do not arise, and, if they do, they can be solved by the parties without involvement of the court. All told, Judge Shah reported, there does not appear to be a groundswell of support from practitioners in favor of a rule change. But the underlying issues will likely only become more complicated, so the subcommittee will remain in listening mode. Judge Rosenberg agreed, noting that none of the organizations the subcommittee has reached out to have strongly supported a rule change, though the Sedona Conference has laid out a potential methodology for approaching these issues.

Other Information Items

Rule 55 Default Judgments

Judge Rosenberg reminded the committee that in October members discussed the FJC study on practices in the district courts regarding default judgments. At that meeting, several members expressed concerns about the requirement in Rule 55(b)(1) that a clerk "must" enter a default judgment for a sum certain against a defendant who has not appeared and defaulted. The FJC study revealed that practices among the districts vary considerably, and judges are often involved in this process despite the text of the rule. Judge Rosenberg noted that the rule has existed for a very long time, so there is a question as to the extent of any real-world problem it creates. That said, there may be a benefit to clarifying the rule to make it consistent with actual practice.

Professor Marcus reported that he has been looking closely at this issue since the October meeting. One question is whether default practice creates a significant problem for the federal courts. Recent research by Professor Bookman (Fordham Law) has demonstrated that defaults do present a major problem in the state courts, where around 90% of cases end that way, but there are

far fewer defaults in federal courts, where the stakes are often higher and more attention is paid to each case. Professor Marcus added that there are many local rules on defaults that the committee might prefer not to tamper with. But the committee could avoid that with a narrow proposal directed at the requirement in the rule that a clerk must enter a default judgment for a sum certain, as outlined in the agenda book. One possibility might be to eliminate Rule 55(b)(1), which would have the effect of requiring all default judgments be entered by the court. Another possibility would be to change the "must" in the rule to a "may" after consultation with the presiding judge.

An attorney member supported making a change along the lines of what Professor Marcus described, since, in his experience, it would be more descriptive of what actually happens. Although the current rule has long existed without causing major problems, much has changed since the rule's promulgation, including more complex claims that may include attorney fee awards or complicated computation of the "sum certain." The duty to enter such a default judgment should not fall on the clerk. Judge Rosenberg added that there is value in litigants' knowing who the true decision maker will be, and the current rule obscures that if the judge is involved. The clerk liaison agreed that a change in the rule would better describe typical practice because clerks often direct parties seeking such a judgment to make a motion.

Two judge members expressed support for eliminating Rule 55(b)(1) and requiring all requests for default judgment be made by motion. In their view, judicial attention is merited and requiring it in these cases wouldn't add a significant burden. Judge Bates agreed, noting that he sees perhaps a dozen such cases a year (often when a company has defaulted in a case seeking payment on an ERISA claim), and he is involved in all of them. Another judge member wondered whether there should be better guidance for clerks if they are to retain the duty to enter default judgments, perhaps via an AO form.

The reporters agreed to continue studying the issue for further discussion at the October meeting.

Random Case Assignment

Professor Bradt reported that proposals for rulemaking on district court case assignment remain on the agenda while the reporters continue to monitor the district courts' uptake of the 2024 Judicial Conference to randomly assign cases seeking injunctions against government action among all judges in a district, rather than assigning the case to the lone judge in a division in which a case is filed. Many districts have chosen to follow the guidance, while in others the question remains under consideration. Professor Bradt explained that close monitoring would continue in the upcoming months and that he would report again at the fall Advisory Committee meeting.

Items to be Dropped from the Agenda

Professor Marcus outlined several proposed amendments that are recommended to be dropped from the agenda. He thanked those who submitted these thoughtful proposals, even though after careful consideration the reporters recommend that the Advisory Committee not pursue them.

First, several creative and thoughtful proposals from Sai (24-CV-O; P; Q; R). These proposals center on making various practices currently covered by local rules uniform throughout the country. One proposal would mandate uniform word and line limitations throughout the district courts for various filings. Another would be to create a new set of federal "common rules" based on practices apparently adopted by most or all districts. As Professor Marcus explained, while more uniformity on these matters might make life easier for attorneys practicing in multiple districts, the local rules represent important variation and experimentation among the districts, for whom "one size may not fit all." As a result, a national set of rules covering issues related to filings does not seem promising.

Second, Joshua Goodrich proposed amending Rule 12(f) to allow motions to strike material in legal briefs and memoranda (24-CV-T). The current rule applies only to pleadings, and Mr. Goodrich believes there should be an opportunity to file such a motion to expunge redundant or scandalous material from other filings. As noted in the agenda book, the extent of the need for such a rule is unclear, and adding such a motion to Rule 12 could create confusion over the effect of that motion on the timing of the defendant's answer. Moreover, adding opportunities to make motions to strike materials in an adversary's papers may increase friction instead of inducing civility.

Third, Serena Morones suggests limiting the duration of expert depositions to four hours under Rule 30(d)(1) (25-CV-A). Essentially, she contends that the current limit of seven hours is inhumane and overlong given the prior production of an expert report. This leads to unnecessarily long depositions during which opposing counsel seeks to bully or trap the expert witness into a sound bite that may later be grist for a *Daubert* motion. Professor Marcus noted that the seven-hour limit may be worthy of further discussion, but that expert depositions are an unlikely target for special treatment, especially when experts are likely compensated for appearing at a deposition, unlike lay witnesses.

No Advisory Committee member expressed opposition to removing these items from the agenda.

Federal Judicial Center Update

Judge Rosenberg then turned to representatives from the Federal Judicial Center, Drs. Emery Lee and Tim Reagan (remotely), to elaborate on their memo updating the Advisory Committee on the Center's recent activities. Reagan noted that one project the Center is working on is collecting best practices from districts that allow unrepresented litigants to use electronic filing. The Center has compiled the districts' policies and looks forward to releasing a report soon. Professor Marcus noted that this information will be very useful as the advisory committees continue to investigate this issue.

Recognition of Judge Bates

With the agenda accomplished, Judge Rosenberg turned the floor over to Judge Bates, who took the occasion to "say goodbye" to the Advisory Committee after having attended every meeting for the last nine years. Since his term as Standing Committee Chair is expiring at the end

of the summer, this will be his last meeting as a committee member or chair. He thanked the committee members for their dedication and care. Judge Bates wished the Advisory Committee best of luck in its efforts.

Judge Rosenberg, in turn, thanked Judge Bates on behalf of the Advisory Committee for his years of service, as chair of both this committee and the Standing Committee. She thanked him for his calm and dedicated leadership and for setting the very high standard that we all aim to reach.

With that, Judge Rosenberg adjourned the meeting.