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. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 15, 2025

Introduction

The Civil Rules Advisory Committee met in Atlanta on April 1, 2025. Members of the public attended in person, and public online attendance was also provided. Draft Minutes of that meeting are included in this agenda book.

Part I of this report will present four action items (one of which has two parts). During its April 1 meeting, the Advisory Committee voted to recommend publication in August 2025 of amendments to the following rules:

(a) Rule 41(a): The Advisory Committee proposes publication of amendments to Rule 41 to better facilitate voluntary dismissal of one or more claims in a litigation, as opposed to the entire action. This matter was first presented to the Standing Committee at its January 2025 meeting, but

several questions were raised that prompted re-examination of the proposal. As presented below, the Advisory Committee's Rule 41 Subcommittee (chaired by Judge Cathy Bissoon, W.D. Pa.) carefully considered these questions. The Committee retracted its proposal to extend Rule 41(d) to allow an award of costs after dismissal of even a single claim in a prior action.

(b) Rule 45(c) subpoena for remote testimony and clarification amendment to Rule 26(a)(3)(A)(i): The Rule 43/45 Subcommittee, chaired by Judge M. Hannah Lauck (E.D. Va.), met four times between the Advisory Committee's October 2024 meeting and its April 1 meeting. It now proposes publication of an amendment to Rule 45(c), prompted by *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). In that case, the Ninth Circuit held that even though the district court had found remote testimony justified under Rule 43 it could not, by subpoena, compel a witness to provide that testimony. The proposed place for the testimony was within 100 miles of the witness's residence but more than 100 miles from the courthouse, which the court said was beyond the "subpoena power" of the district court. The Ninth Circuit recognized that a rule change could alter this outcome, and the proposed amendment is designed to do that.

In addition, the Advisory Committee recommends publishing a proposed amendment to Rule 26(a)(3)(A)(i) clarifying that each party's pretrial disclosures must specify whether any of the witnesses the party expects to present will provide remote testimony. [Further Subcommittee work on remote testimony in general is described in the Information Items section below.]

(c) Rule 45(b)(1) service of subpoena: The Advisory Committee proposes publication of an amendment to specify methods of service of a subpoena that suffice under the rule, and also to authorize the court in a given case to approve alternative methods. The authorized methods draw in part from Rule 4(e)(2)(A) and (B) for service of original process -- personal delivery to the individual or leaving the subpoena at the person's dwelling place -- with the addition of service by U.S. mail or commercial carrier if a confirmation of delivery is provided. The amendment also authorizes the court to approve another means of service for good cause. The proposed amendment includes two other changes: (1) relaxing the current requirement that witness fees be tendered at the time of service, and (2) providing a 14-day notice period (subject to shortening by the court for good cause) when the subpoena requires attendance at a trial, hearing, or deposition.

(d) Rule 7.1: Responding to concerns that the current disclosure requirements do not adequately alert judges to possible grounds for recusal, the Advisory Committee recommends publication of an amendment intended to provide judges with additional needed information. Two main changes are proposed. One substitutes the term "business organization" for the word "corporation" in the current rule. This change reflects the reality that business entities often have non-corporate forms. The other is to require disclosure of any business organization that directly or indirectly owns 10% or more of the party. These changes are intended to reflect Advisory Opinion No. 57 from the Judicial Conference Committee on the Codes of Conduct.

Part II of this report provides brief descriptions of various ongoing projects of the Advisory Committee. Additional details on these topics can be found in the agenda book for the Advisory Committee's April meeting, which can be accessed via the link below:

https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/advisory-committee-civil-rules-april-2025

(a) Filing under seal: The Discovery Subcommittee continues to study possible changes to clarify the circumstances that justify filing under seal, and possible national procedures for handling motions to file under seal.

(b) Remote testimony: The Rule 43/45 Subcommittee continues to consider whether to relax the current requirements to support remote testimony in Rule 43(a), focusing in particular on the "compelling circumstances" requirement in the current rule. It hopes to benefit from a full-day conference on the subject later this year.

(c) Third-party litigation funding: For a decade, the Advisory Committee has had on its agenda a proposal to amend Rule 26(a)(1)(A) to add a requirement that the parties disclose litigation funding. Many submissions favoring and opposing such an amendment have been submitted during this period, and several bills have been introduced in Congress as well. At its October 2024 meeting the Advisory Committee appointed a TPLF Subcommittee chaired by Judge R. David Proctor (N.D. Ala.). That subcommittee has been gathering material and has also sent representatives to bar gatherings addressing the subject.

(d) Cross-border Discovery: The Cross-border Discovery Subcommittee, chaired by Judge Manish Shah (N.D. Ill.), continues its outreach to gain information about problems generated by such discovery and whether a rule change would be a desirable response. It is unclear whether rule changes will be proposed.

(e) Rule 55 default and default judgment rule: Rule 55(a) and Rule 55(b)(1) say that the clerk "must" enter a party's default for failure to plead, and that the clerk also "must" enter a default judgment when the action is for a "sum certain or a sum that can be made certain by computation," including costs of suit. An extensive FJC study showed that entry of default judgments by clerks is not done in most districts, and that in some districts clerks refer applications for entry of default to the court. Consideration has focused on providing by rule that the clerk may refer the matter to the court instead of entering a default or default judgment, and it may be that there will be a recommendation to abrogate Rule 55(b)(1) to provide that entry of default judgment must be done by the court.

(f) Random case assignment: This matter remains under active review, including monitoring adoption of the guidance issued by the Judicial Conference in March 2024 regarding district-wide random assignment of some actions.

I. ACTION ITEMS

(a) Rule 41(a)

The Advisory Committee proposes two amendments to Rule 41(a). The first adds additional flexibility for litigants by explicitly permitting the dismissal of one or more claims in an action, rather than only the entire action, as the text of the current rule suggests. Many courts already allow such flexibility without presenting problems, and permitting dismissal of claims is consistent with the policy reflected throughout the rules of narrowing the issues in a case pretrial. The second is requiring only the signatures of parties that are actively litigating in a case on a stipulation of dismissal. The Advisory Committee concluded that requiring signatures of parties who have departed from the litigation creates opportunities for such parties to stymie settlements if they cannot be found or oppose the stipulation.

Proposed amendments to Rule 41 were presented to the Standing Committee at its January 2025 meeting. Although the Standing Committee was aligned with the Advisory Committee with respect to the goals of the amendments, there were several areas of concern that the Standing Committee thought would benefit from a second look. After extensive deliberation the Rule 41 Subcommittee proposed several changes in response to this helpful feedback that the Advisory Committee adopted.

First, the Advisory Committee abandoned its earlier proposal to amend Rule 41(d), which provides that the judge may award costs to the defendant "[i]f a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant." Previously, the Advisory Committee approved an amendment to this provision that would have permitted the judge to award costs when the plaintiff had previously dismissed and refiled "one or more claims," as opposed to the entire action. Concerns were raised, however, that such an amendment would leave open the possibility that a judge would disproportionately award costs of an entire previous action, when the plaintiff had dismissed only a part of it. Upon reflection, the Subcommittee and Advisory Committee agreed that the amendment was unnecessary. The existing rule is typically deployed when a plaintiff has in fact dismissed an entire previous action, usually when the plaintiff is in search of a more favorable forum or judge. It is in those circumstances that an award of costs is most appropriate. As a result, the Advisory Committee concluded that Rule 41(d) should remain unchanged.

Second, the Advisory Committee made several minor changes to Rule 41(a) and the Committee Note to clarify that the deadline for unilateral dismissal of a claim is filing of an answer or motion for summary judgment by the party opposing the claim.

Third, the Advisory Committee reexamined the text of the proposed amendment to Rule 41(a)(1)(A)(ii) that would require that a stipulation of dismissal be signed by "all parties who have appeared and remain in the action." 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 obstruct a stipulation of dismissal if it cannot be easily found or if it refuses to sign the stipulation. A concern was raised at the Standing Committee meeting about the interaction between this proposed amendment and Rule 54(b), which provides that (absent a partial final judgment) all parties "remain" in the action until final judgment. So, if parties no longer actively litigating in the case are not required to sign a stipulation of dismissal those parties may not receive notice that their window to appeal has opened.

Ultimately, after much discussion, the subcommittee decided to retain the proposed language "remain in the action," and the Advisory Committee agreed that the proposed language was sufficiently clear (particularly when compared to alternatives that sought greater precision but were quite clunky). Additions to the committee note have been made to clarify the amendment's purpose. Moreover, there are numerous instances in the rules that apply to parties actively litigating and not to those who are no longer in the case. One example is Rule 33, which permits service of interrogatories on "a party." It seems unlikely that anyone would interpret that rule to permit service of interrogatories on a party that is no longer prosecuting or defending against a live claim, Rule 54(b) notwithstanding. With respect to concerns that a party might not receive adequate notice, the Advisory Committee was satisfied that current safeguards make that unlikely, including the practice that such a party will continue to receive notice of docket entries through CM/ECF, although typically denominated as "terminated" from the action. In sum, the Advisory Committee concluded that the benefits of the amendment outweigh any risks, though it is of course open to reconsideration if the public comment period suggests otherwise.

Rule 41(a) Amendment Proposal

Rule 41. Dismissal of Actions or Claims

(a) Voluntary Dismissal.

(1) ***By ~~the~~ a Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ **a** plaintiff may dismiss an action **or one or more claims** without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared **and remain in the action**.

* * * * *

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action **or one or more claims** may be dismissed at ~~the~~ **a** plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action**, claim, or claims** may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * * * *

COMMITTEE NOTE

Rule 41 is amended in two ways. First, Rule 41(a) has been amended to add language clarifying that a plaintiff may voluntarily dismiss "one or more claims" in a multi-claim case. A plaintiff may accomplish dismissal of either an action or one or more claims unilaterally prior to an answer or motion for summary judgment by a party opposing that claim, or by stipulation or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. This amendment to Rule 41(a), permitting voluntary dismissal of a claim or claims, does not affect the operation of Rule 41(d), whose applicability is limited to situations when the plaintiff has previously dismissed an entire action.

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who have dismissed all claims, or had all claims against them dismissed. Such a requirement can be overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the parties currently litigating claims at the time of the stipulation provide both sufficient notice to those actively involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

(b) Rules 45(c) and 26(a)(3)(A)(i)

The Rule 43/45 Subcommittee has been very busy. It held four meetings after the Advisory Committee's October meeting to finalize its proposal to amend Rule 45(c) to remove the difficulty presented by the decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). That case held that, despite the 2013 revision of Rule 45 authorizing the court presiding over an action to issue a subpoena for testimony that can be served anywhere in the United States, for trial testimony that

authority extends only within the "subpoena power" of the court and does not permit the court to command a distant witness to provide remote trial testimony.

There have been disagreements among district courts about whether they have such power as to distant trial witnesses. The *Kirkland* decision seems to be the first court of appeals decision finding that the district court lacked such authority. The court reached this result even though the Committee Note accompanying the 2013 amendment to Rule 45 clearly said that such authority existed. The Ninth Circuit recognized, however, that a rule amendment could solve the problem.

The *Kirkland* decision is on the books and seems to be having some unfortunate ripple effects, even in cases involving only discovery rather than trial testimony. So the Subcommittee is bringing this amendment proposal forward now even though it has another (and possibly more important) topic on its agenda -- whether to relax the criteria for remote trial testimony under Rule 43(a).

In addition, the Advisory Committee is proposing a slight clarification for Rule 26(a)(3)(A)(i).

Rule 45(c) amendment proposal

Rule 45. Subpoena

* * * * *

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person:

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial or hearing and would not incur substantial expense.

(2) ***For Remote Testimony.*** Under Rule 45(c)(1), the place of attendance for remote testimony is the location where the person is commanded to appear in person.

(3~~2~~) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

* * * * *

COMMITTEE NOTE

In 2013, Rule 45(a)(2) was amended to provide that a subpoena must issue from the court where the action is pending, and Rule 45(b)(2) now provides that such a subpoena can be served at any place within the United States.

Since the 2013 amendments, however, some courts have concluded that they are without authority to command witnesses to provide remote trial testimony because the witnesses are not within the "subpoena power" of the presiding court. *See, e.g., In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023) (holding that a subpoena can compel remote trial testimony from a witness only if the witness resides or transacts business in person within 100 miles of the court or within the state in which the court sits). Questions have also been raised about whether a subpoena can compel a nonparty to provide discovery if the nonparty witness is located outside the geographical scope of the subpoena power to command the witness to appear in court. *See, e.g., York Holding, Inc. v. Waid*, 345 F.R.D. 626 (D. Nev. 2024) (rejecting the argument that a Nevada district court subpoena could not command production of documents within 100 miles of the nonparty's place of business in New Hampshire).

This amendment clarifies that the court's subpoena power for in-court testimony or to provide discovery extends nationwide so long as a subpoena does not command the witness to travel farther than the distance authorized under Rule 45(c)(1), which provides protections against undue burdens on persons subject to subpoenas. It specifies that, for purposes of Rule 45(c)(1), the witness "attends" at the place where the person must appear to provide the remote testimony. For purposes of Rule 43 and Rule 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

The amendment does not alter the standards for deciding whether to permit in-court remote testimony. Instead, it applies to any subpoena for witness testimony. Ordinarily, court approval is required for remote testimony in court. Rule 43, for example, authorizes remote testimony in trials and hearings but depends on court permission for such testimony. Rule 26(a)(3)(A)(i) requires that the parties disclose the identities of witnesses whose testimony will be presented, without distinguishing between in-person and remote testimony. Even remote deposition testimony is authorized only by stipulation or court order. See Rule 30(b)(4).

When a subpoena commands a witness to provide remote testimony, it is the responsibility of the serving party to ensure that the necessary technology is available at the remote location for such testimony.[1]

Rule 26(a) amendment proposal

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * * * *

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rules 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and~~,~~ (if not previously provided)~~,~~ the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises, and whether the testimony will be in person or remote;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

* * * * *

COMMITTEE NOTE

Under Rule 43, the court may permit remote testimony at trial. Because the rule presently requires disclosure of witnesses a party "expects to present," it should be understood to include witnesses who will testify remotely. This amendment clarifies that the disclosure requirement

[1] During the Standing Committee's January 2025 meeting, a question was raised about possible implications of changes to Rule 45(c) for the "unavailability" criterion for admissibility of deposition transcripts at trial under Rule 32(a)(4) or of prior testimony under Fed. R. Evid. 804(a). These questions received substantial attention before the Advisory Committee subcommittee. After lengthy discussion it was concluded that clarifying the subpoena power would not produce a change in the application of those other rules, which deal with hearsay objections. Some efforts were made to draft Committee Note language to affirm that there was no intention to alter the application of those rules. After lengthy discussion, however, it was concluded that including that language might cause complications rather than avoid them.

applies whether or not the witness is testifying in person or remotely and alerts the parties and the court that a party expects to present one or more witnesses remotely.

(c) Rule 45(b)(1)

This proposed amendment responds to a problem that has been brought up repeatedly in submissions to the Committee over the last two decades or so -- the ambiguity of the requirement in Rule 45(b)(1) of "serving" the witness with the subpoena and also (at the time of service) tendering the witness fee to the witness. For the majority of subpoenas, service is not problematical. But problems have emerged with sufficient frequency to justify a rule change.

The Advisory Committee proposed the amendment presented below to achieve three basic objectives:

(1) Borrowing from Rule 4(e)(2)(A) and (B) some well-recognized methods of service -- personal delivery or leaving at the abode of the person with a person "of suitable age and discretion who resides there," and adding service by mail or commercial carrier if that includes confirmation of receipt, as has been found sufficient in some courts. The proposed amendment also empowers the district to authorize additional methods for good cause;

(2) Adding a notice period -- 14 days in the draft -- unless the court authorizes a shorter period; and

(3) Providing that the tender of witness fees is not required to effect service of the subpoena, so long as the statutory fees are tendered upon service or at the time the witness appears as commanded by the subpoena.

This amendment proposal is designed to address practical problems that have sometimes resulted from the ambiguity of Rule 45(b)(1)'s current use of the term "delivering a copy to the named person" without being more specific about how that is to be done.

There has been at least one recent reported decision in which multiple attempts at service were deemed ineffective because the witness fee had not also been tendered. And in another recent case, the server did not initially deliver the witness fee check because it had the server's information on it and the server worried for his personal safety if that were revealed to the witness.

Rule 45. Subpoena

* * * * *

(b) Service.

(1) ***~~By Whom and How; Tendering~~ Means; Notice Period; Fees.***

(A) *By Whom and How.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by:

(i) delivering it to the individual personally;

(ii) leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(iii) sending a copy to the person's last known address by a method of United States mail or commercial carrier delivery, if the selected method provides confirmation of actual receipt; or

(iv) using another means authorized by the court for good cause that is reasonably calculated to give notice.

(B) *Time to Serve if Attendance is Required; Tendering Fees.* ~~and, i~~ If the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise, the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena requiring the person to attend must tender~~ing~~ the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the time and place the person is commanded to appear. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

COMMITTEE NOTE

Rule 45(b)(1) is amended to clarify what is meant by "delivering" the subpoena. Courts have disagreed about whether the rule requires hand delivery. Though service of a subpoena usually does not present problems -- particularly with regard to deposition subpoenas -- uncertainty about what the rule requires has on occasion caused delays and imposed costs.

The amendment removes that ambiguity by providing that methods authorized under Rule 4(e)(2)(A) and (B) for service of a summons and complaint constitute "delivery" of a subpoena.

Though the issues involved with service of a summons are not identical with service of a subpoena, the basic goal is to give notice and the authorized methods should assure notice. In place of the current rule's use of "delivering," these methods of service also are familiar methods that ought easily adapt to the subpoena context.

The amendment also adds another option -- service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt. The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. *Cf.* Rule 45(b)(4) (proving service of subpoena). Experience has shown that this method regularly works and is reliable.

The amended rule also authorizes a court order permitting an additional method of serving a subpoena so long as that method is reasonably calculated to give notice. A party seeking such an order must establish good cause, which ordinarily would require at least first resort to the authorized methods of service. The application should also demonstrate that the proposed method is reasonably calculated to give notice.

The amendment adds a requirement that the person served be given at least 14 days notice if the subpoena commands attendance at a trial, hearing, or deposition. Rule 45(a)(4) requires the party serving the subpoena to give notice to the other parties before serving it, but the rule does not presently require any advance notice to the person commanded to appear. Compliance may be difficult without reasonable notice. Providing 14-day notice is a method of avoiding possible burdens on the person served. In addition, emergency motions for relief from a subpoena can burden courts. For good cause, the court may shorten the notice period on application by the serving party.

The amendment also simplifies the task of serving the subpoena by removing the requirement that the witness fee under 28 U.S.C. § 1821 be tendered at the time of service as a prerequisite to effective service. Though tender at the time of service should be done whenever practicable, the amendment permits tender to occur instead at the time and place the subpoena commands the person to appear. The requirement to tender fees at the time of service has in some cases further complicated the process of serving a subpoena, and this alternative should simplify the task.

(d) Rule 7.1

The Advisory Committee recommends publishing for public comment amendments to Rule 7.1(a) requiring disclosure by a corporate party of parents and business organizations that directly or indirectly own 10% or more of it. The goal of the amendment is to mandate disclosure of corporate "grandparents" or "great grandparents" in which a judge may hold a financial interest that requires recusal. This report elaborates on the reasons for these changes below after presenting the proposed rule amendment and Committee Note.

Rule 7.1(a) Amendment Proposal

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) ***Nongovernmental ~~Corporations~~ Business Organizations***. A nongovernmental ~~corporate~~ **business organization that is a** party or ~~a nongovernmental corporation~~ that seeks to intervene must file a statement that:

(A) identifies any parent ~~corporation~~ **business organization** and any publicly held ~~corporation~~ **business organization** ~~owning~~ **that directly or indirectly owns** 10% or more of ~~its stock~~ **it**; or

(B) states that there is no such ~~corporation~~ **business organization**.

* * * * *

COMMITTEE NOTE

Rule 7.1(a)(1) is amended in two ways intended to better assist judges in complying with their statutory and ethical duty to recuse in cases in which they or relevant family members have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4); Code of Conduct for United States Judges Canon 3C(1)(c).

First, the amended rule substitutes "business organization" in place of references to "corporation" to cover entities not organized as "corporations," defined narrowly. "Business organizations" is a more capacious term intended to flexibly adapt to the ever-changing variety of commercial entities, and the term is generally accepted and well understood. *See*, *e.g.*, Uniform Business Organizations Code (2015).

Second, the rule is amended to require disclosure of business organizations that "directly or indirectly own 10% or more of" a party, whether or not that ownership interest is formally denominated as stock. Such a direct or indirect owner is presumed to hold a sufficient interest in a party to raise a rebuttable presumption that a judge's financial interest in the owner extends to the party, warranting recusal. *See* U.S. Judicial Conference, Guide to Judiciary Policy § 220, Committee on Codes of Conduct, Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary Relationship (Feb. 2024). Under the amended rule, a party must disclose not only a parent business organization but also any publicly held business organization that is a grandparent, great-grandparent, or other corporate relative that owns 10% or more of a party, whether directly or through another business organization. The requirement to disclose "indirect" owners of 10%

or more of a party is a pragmatic effort to better inform judges of circumstances when their financial interests may be affected by a litigation or when further inquiry into the ownership interests in a party is appropriate.

As before, this rule does not capture every scenario that might require a judge to recuse. As reflected in the Committee on Codes of Conduct Advisory Opinion No. 57, a judge may need to seek additional information about a party's business affiliations when deciding whether to recuse. And, as before, districts may promulgate local rules requiring additional disclosures.

* * * * *

ADVISORY COMMITTEE REASONS FOR PROPOSED RULE CHANGES

Currently, Rule 7.1(a) requires that a nongovernmental corporate party disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The Rule 7.1 Subcommittee, created in spring 2023 and chaired by Justice Jane Bland (Supreme Court of Texas), was formed to consider rule changes to better inform judges of any financial interest "in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding." 28 U.S.C. § 455(b)(4).

More specifically, this project was sparked by concerns that judges are not sufficiently informed in situations in which they might hold an interest in a business organization that is a "grandparent" or "great-grandparent" of a party. For instance, a judge might hold an interest in a "grandparent" corporation that wholly owns a subsidiary that, in turn, owns a party. Under such circumstances, that judge likely has a financial interest requiring her to recuse. But because the rule requires disclosure of only a "parent corporation and any publicly held corporation owning 10% of more of [a corporate party's] stock," the judge will remain in the dark.

Although there do not appear to be serious concerns that judges have acted in a biased manner due to this lack of information, it is also the case that whenever a judge presides over a case in which she has an arguable financial interest in the outcome there is a threat to perceptions of the court's legitimacy and impartiality. As a result, over the last two years, the Subcommittee has considered several possible revisions to the rule that would make it more likely that "grandparents" and other entities up the corporate chain of ownership of a party, in which a judge is reasonably likely to hold an interest, will be disclosed without imposing unnecessarily onerous requirements on litigants.

Notably, the committee note to Fed. R. App. P. 26.1, whose relevant language is identical to Rule 7.1, has since 1998 provided that:

> Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. **The**

> **rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well.** For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. (Emphasis added.)[2]

This requirement does not appear to have spawned litigation, confusion, or controversy. Despite using the same language, though, Rule 7.1 has by and large been interpreted to require disclosure of only "parents," and not grandparents or other corporate relatives.

In the early days of this project, the Rules Law Clerk and Reporters canvassed a wide swath of disclosure requirements, including districts' local rules and various state rules, to develop an array of options. Among state and local rules, the two dominant approaches were to either use a broad catch-all term (such as to require disclosure of all "affiliates" of a party) or a lengthy "laundry list" of various specific business relationships. Subcommittee deliberation and outreach revealed that both approaches had problems. Broad catch-all provisions requiring disclosure of "affiliates" (or some such term) sweep in a wave of entities that the judge is unlikely to hold and often lead to vast disclosures in which any pertinent information might be buried. On the other hand, the "laundry list" approach seemed to encounter the ever-present danger of lists, that they are overinclusive and underinclusive and require constant maintenance to account for the constantly evolving variety of business relationships. Recognizing that no rule can uncover all instances when recusal might be required by the statute's demand that a judge disqualify on the basis of any interest "however small," 28 U.S.C. § 455(d)(4), our effort has been focused on threading the needle between a rule that is too capacious and one that is too specific. So, after much study, the Subcommittee returned to where it began: an effort to ensure disclosure of corporate "grandparents" and such, as Fed. R. App. P. 26.1 does now, albeit in the note.

In the midst of the Subcommittee's work, in February 2024, the Codes of Conduct Committee issued new guidance to judges: Committee on Codes of Conduct Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary Relationship. This guidance directs a judge to focus on whether a parent corporation that does not wholly own a party "has control of a party." The guidance does not define "control" but instead "advises that the 10% disclosure requirement in the Federal Rules (e.g., Fed. R. App. P. 26.1, Fed. R. Civ. P. 7.1, Fed. R. Bankr. P. 7007.1, and Fed. R. Bankr. P. 8012) creates a threshold rebuttable presumption of control for recusal purposes." Should a party disclose an owner of 10% of more of a party, the guidance advises that "a judge

[2] This language was added to the note in response to a public comment that disclosure of only a "parent" was too narrow. Review of the minutes and agenda books of the Appellate Rules Committee and the Standing Committee reveal no opposition, or even discussion, of this addition to the note. The amended rule was subsequently approved by the various bodies up the chain of command and went into effect in December 1998.

may exercise his or her discretion to seek information from the parties or their attorneys; a judge may also review publicly available sources, such as Securities and Exchange Commission filings."

In light of this guidance, the Subcommittee also considered amending Rule 7.1 to require corporate parties to disclose any entity that has control over it. This move would, however, beg the question (as does the Codes of Conduct Committee guidance) as to what constitutes "control." The guidance does not attempt such a definition; instead, it refers to 10% ownership figure in the various Federal Rules as a proxy for control.

Based on the Codes of Conduct Committee guidance, the Subcommittee concluded that a rule that continues to mandate disclosure of *ownership* of a party is the most promising avenue toward disclosure of grandparents, et al. The goal is to better equip judges to comply with the Codes of Conduct guidance, and therefore their statutory and ethical obligations. This is, and always has been, a tricky exercise. Although the appellate rule has not caused controversy, a rule cannot be amended by amending only the committee note, so the challenge has been to draft rule language that will best meet our goals without being over or underinclusive.

As a result, the Advisory Committee has settled on two proposed changes to the rule, as reflected in the above proposal:

(1) Replace references to "a corporate party" with the broader term "business organizations."

(2) Require disclosure of "a parent business organization" and "any publicly held business organization that directly or indirectly owns 10% or more of" a party.

The Subcommittee's rationale for each of these changes follows.

Business Organizations

The Advisory Committee was concerned that references to "corporations" in the rule is too narrow since there are many business organizations other than corporations whose disclosure would assist judges in complying with their recusal obligations. For instance, "LLCs" or "Master Partnerships" are not necessarily defined as corporations under some state laws. Having concluded that the term corporation now feels too narrow, the next question becomes what to replace it with. The Subcommittee considered several possibilities, but "business organizations" quickly emerged as the most common and generally understood term. For instance, the National Conference of Commissioners on Uniform State Laws and the American Bar Association have long authored the "Uniform Business Organizations Code." Texas also has a "Business Organizations Code." Additionally, while some schools have stuck with the traditional name "Corporations," most leading law schools' introductory corporate law courses are now called "Business Organizations" or "Business Associations."

Direct or Indirect Ownership

As explained above, and as the draft Committee Note reflects, the primary goal was to better inform judges of the possibility that the value of interests they hold in "grandparents" and others up the chain of ownership from parties might be affected by the outcome of cases before them. Although this requirement does not seem controversial, as evidenced by the lack of controversy that has emerged from 27 years of experience with the appellate rule's committee note, drafting rule language to capture this goal has proven challenging. But once the Subcommittee settled on a lodestar of consistency with the Codes of Conduct Committee's guidance, its focus turned to ensuring disclosure of owners of 10% or more of a party.[3] Candidly, absolute precision has proven elusive, so the Subcommittee eventually converged on rule language that reflects the intent of the amendment and will hopefully prompt parties to reveal owners and part owners in which judges are likely to hold investments and whose value may be affected by the outcome of the litigation.

First, the Advisory Committee decided to retain the requirement that a "parent business organization" be disclosed. "Parent" is to some degree an elusive term that might be defined in numerous ways. Nevertheless, it has been part of the various federal disclosure rules since their inception, and it does not seem to have caused significant problems. The Advisory Committee considered eliminating the requirement of disclosing a parent altogether (that is, requiring only disclosure of publicly held direct or indirect owners of 10% or more) but concluded that there was no good reason to eliminate it, and that there may very well be occasions when a judge holds an interest in a privately held entity that is a parent of a party, but the judge is unaware.

Second, the Advisory Committee opted for language requiring disclosure of direct or indirect owners of 10% or more of a party. As the Committee Note explains, this is a pragmatic concept intended to prompt disclosure of grandparents or others who may own a significant share of a party via ownership of another intermediate entity. Such disclosure would trigger the suggestion in the Codes of Conduct Committee advisory opinion that a judge investigate further whether recusal is necessary. As was the case when the words "parent corporation" were discussed in the 1990s, there is a certain inherent imprecision to the language, but parties have long been trusted to meet their disclosure obligations faithfully and practically based on the purpose of those obligations. The Subcommittee labored over whether to prescribe a mathematical formula for indirect ownership or to lay out a series of examples of indirect ownership (or lack thereof) in the note, but ultimately opted against either option, in favor of a more general standard informed by a purpose defined in the committee note.

Of course, rulemakers should always be wary of imposing vague requirements on litigants. At the same time, however, this is not a rule that governs how parties conduct litigation or interact with one another. Nor is it a rule that is related to the law, facts, and merits of a case. Rather, it is

[3] As reflected in the draft amendment, the proposed rule abandons the term "stock" to define ownership, since ownership interests may have many different labels.

a rule that attempts to help judges comply with a mandate that itself is rather vague. To borrow from mathematics, the Rule's relationship to the recusal standard is something like an asymptote -- a line that a curve approaches but never touches. After several years of deliberation and study, the Advisory Committee is eager to hear the reactions of those potentially affected by the rule in the public-comment period. If in fact, what is proposed is too vague or onerous compared to the potential benefits, we will surely learn that then.

II. Information items

The Advisory Committee also has many ongoing projects, often under the guidance of one of its subcommittees. This summary description can be augmented by reference to the agenda book for the Advisory Committee's April meeting via the link provided earlier in this report.

(a) Filing under seal

In addition to the Rule 45(b)(1) amendment dealing with service of subpoenas, the Discovery Subcommittee has also been evaluating proposals to amend the rules to implement procedural guardrails around sealing decisions. Some of these proposals are rather elaborate. Other submissions demonstrate that different districts have an array of local practices affecting decisions whether to permit filing under seal.

Specifying the standard for filing under seal in the rules

One thing has remained a relative constant during these deliberations, that the standard for granting a protective order under Rule 26(c) is not as demanding as the standard for sealing materials filed in the court's record. *See, e.g.*, *June Medical Services, L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022) ("Different legal standards govern protective orders and sealing orders.").

Nevertheless, that difference is not specified in the current rules. Some time ago, the Discovery Subcommittee drafted a rule amendment designed to bring home that point:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

(4) ***Filing Under Seal.*** Filings may be made under seal only under Rule 5(d)(5).

The Committee Note could recognize that protective orders -- whether entered on stipulation or after full litigation on a motion for a protective order -- ought not also authorize

filing of "confidential" materials under seal. Instead, the decision whether to authorize such filing under seal should be handled by a motion under new Rule 5(d)(5).

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed [or permitted] {authorized} by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings.[4]

This provision could be accompanied by a Committee Note explaining that the rule does not take a position on what exact locution must be used to justify filing under seal, or whether it applies to all pretrial motions. For example, some courts regard "non-merits" or "discovery" motions as not implicating rights of public access comparable to those involved with "merits" motions. Trying to draw such a line in a rule would likely prove difficult, and might alter the rules in some circuits.

One starting point is that since 2000 Rule 5(d)(1)(A) has directed that discovery materials not be filed until "used in the proceeding or the court orders filing." Exchanges through discovery subject to a protective order therefore do not directly implicate filing under seal.

Another starting point here is that there are federal statutes and rules that call for sealing. The False Claims Act is a prominent example of such a statute. Within the rules, there are also provisions that call for submission of materials to the court without guaranteeing public access. Rule 26(b)(5)(B) obligates a party that has received materials through discovery and then been notified that the producing party inadvertently produced privileged materials to return or sequester the materials, but also says the receiving party may "promptly present the information to court under seal for a determination of the [privilege] claim." Rule 5.2(d) also authorizes court orders for filing under seal to protect privacy. Rule 5.2(h) provides that if a person entitled to protection regarding personal information under Rule 5.2(a) does not file under seal, the protection is waived. Other rule provisions mentioning filing under seal include:

[4] The bracketed addition "or permitted" was suggested during the Advisory Committee's October 2023 meeting, to reflect the possibility that federal law might permit such filing without directing that it occur. It might be better to say "authorized," so that possibility is also included in the above sketch.

Rule 5.2(f) -- Option to file unredacted filing under seal, which the court must retain as part of the record.

Rule 26(c)(1)(F) -- protective order "requiring that a deposition be sealed and opened only on court order" [possibly redundant now that discovery materials are filed only when "used in the proceeding"]

Rule 45(e)(2)(B) -- subpoena provision parallel to Rule 26(b)(5)(B)

Rule G(3)(c)(ii)(B) -- complaint in forfeiture action filed under seal

Rule G(5)(a)(ii)(C)(1) -- 60-day deadline for filing claim in forfeiture proceeding "not counting any time when the complaint was under seal"

There is a lingering issue about what constitutes "filing." Rule 5(d)(1)(A) says that "[a]ny paper after the complaint that is required to be served must be filed no later than a reasonable time after service." One would think that an application to the court for a ruling on privilege under Rule 26(b)(5)(B) should be served on the party (or nonparty) that asserted the privilege claim. Having given the notice required by the rule, the party claiming privilege protection should often be aware of the contents of the allegedly privileged materials, so service of the motion (including the sealed information) would not be inconsistent with the privilege. And it is conceivable that should the court conclude the materials are indeed privileged its decision could be reviewed on appeal, presumably meaning that the sealed materials themselves should somehow be included in the record. Perhaps they would be regarded as "lodged" rather than filed.

As noted already, Rule 5.2(d) also has provisions on filing under seal to implement privacy protections per court order. In somewhat the same vein, Rule 5.2(c) limits access to electronic files in Social Security appeals and immigration cases.

Rule 79 also may bear on these issues. Rule 79(d) directs the clerk to keep "records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference."

Finally, it is worth noting that it appears there are different degrees of sealing. Beyond ordinary sealing, there may be more aggressive sealing for information that is "highly confidential," or some similar designation. And national security concerns may in exceptional circumstances call for even stricter confidentiality protections. It is not clear that a Civil Rule adopting these distinctions is necessary or appropriate.

Specifying procedures for deciding whether to permit filing under seal

Various submissions emphasize that there is a considerable variety of approaches to the handling of this question among different districts. Almost any set of national procedures would likely add required steps to the methods employed by some districts. At the same time, there might be arguments that some procedures in a national rule could displace procedures already in place in certain districts.

From the perspective of the practicing bar, this variety can produce headaches. In addition, as filing deadlines approach on motions and other matters, the question whether the materials a party wants to file can be filed under seal may loom large. Yet at least one proposal was that there be a mandatory seven-day waiting period after a motion to seal is filed before the court can rule on it.

As noted below, an ongoing concern is whether trying to develop and implement nationally-binding procedures for sealing decisions is worth the effort. Moreover, it may be that the dockets of some districts may be quite different from the dockets of other districts in terms of the confidentiality of materials that might be filed.

Against this background, at its April meeting the Advisory Committee discussed a variety of specifics that might be included among such national procedures. More detail on these items is provided at pp. 242-46 of the agenda book for the Advisory Committee's April meeting. Here is a summary:

(1) Can the motion to seal itself be filed under seal?

(2) If filing under seal is authorized by the court, must the filing party also file a redacted version of the material in the court's open docket?

(3) Must the party seeking leave to file under seal notify any person who claims a confidentiality interest in the materials (perhaps a nonparty whose materials were obtained by subpoena) of the application?

(4) If the motion to seal is denied, what happens then? There are at least two alternatives -- the moving party may seek to remove the materials (though it's not clear this is possible in the era of CM/ECF), or the seal is removed from the filed materials.

(5) Must the motion to seal specify a date when the seal will be lifted?

(6) Should the sealing rule guarantee any "interested person" or "member of the public" the right to move to unseal? These issues are ordinarily handled under Rule 24 on intervention, so it is not clear that a special rule is needed for the sealing situation.

(7) If the motion to seal does not specify a date on which the seal will be lifted, should the rule provide that the seal be removed upon "final termination" of the action? At least in cases in which there is an appeal, it may be a challenge for the clerk's office to determine when final termination occurs.

* * * * *

There has been at least one submission opposing adoption of any rule amendments. See 21-CV-G, from the Lawyers for Civil Justice, arguing that the various amendment proposals would unduly limit judges' discretion regarding confidential information, conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

At the Advisory Committee meeting, the Discovery Subcommittee presented three questions:

(1) Should the Subcommittee try to develop nationally uniform procedures for handling motions to seal?

(2) If so, how should it go about gathering information to inform a decision about which procedures to adopt? As introduced below, the various proposals we have received cannot all be adopted as some conflict with others.

(3) If the national rules do not prescribe procedures for motions to seal, is there a value nonetheless to amending the rules to specify that the standard for sealing court files differs from the standard for protective orders?

The Subcommittee will return to these questions. Views of Standing Committee members would be very helpful to the Subcommittee.

(b) Remote testimony

Until 1996, Rule 43(a) required that all witness testimony at trials occur in open court -- only in-person testimony was accepted. In that year, the rule was amended by the addition of the following sentence:

For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

The Committee Note accompanying this addition to Rule 43(a) emphasized the continuing commitment to the value of live, in-person witness testimony at trials and suggested that the most likely justification for court permission for remote trial testimony would be an unforeseen inability

of a witness previously expected to appear at trial to attend the trial. As of 1996, that meant that, as to any witness outside the court's subpoena power, there would not be such a justification.

But developments since 1996 have produced significant changes. For one thing, the 2013 amendments to Rule 45 meant that the court's subpoena power is no longer limited to one part of the country; though the court cannot require a distant witness to show up in the courtroom, it can issue a subpoena requiring the witness to appear somewhere else. The action item regarding Rule 45(c) presented earlier in this agenda report confirms -- as the Committee Note to the Rule 45 amendment said in 2013 -- that a subpoena could be used to compel remote trial testimony just as it could be used to compel remote deposition testimony.

Technological change since 1996 has changed the landscape on remote testimony, a point made during the Standing Committee's January 2025 meeting. In 1996, the remote testimony possibility was largely focused on use of the telephone. Today Zoom, Teams, and other services enable something much more like live in-person testimony.

The pandemic experience brought home how effectively these technological breakthroughs can enable participation in court proceedings from remote participants. A number of state court systems -- notably those of Michigan and Texas -- have made great use of these technologies for efficient court proceedings.

These developments have also called attention to the somewhat odd disjunction between Rule 43(a) and Rule 43(c), which provides:

> When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

Though there is no explicit authorization for remote testimony, this provision does not seemingly require that the witness be present in court to provide the "oral testimony." Certainly the witnesses who testified in depositions need not be in court. But it does not appear that Rule 43(c) was considered when Rule 43(a) was amended in 1996.

Though one might say that there is a major difference between a "trial" and a hearing on a motion, in at least some instances that difference might seem less compelling. One example is a motion for a preliminary injunction under Rule 65(a). If credibility determinations are a reason for insisting on live in-person testimony, it would seem that they may often matter in preliminary-injunction hearings. Moreover, under Rule 65(a)(2) even after the hearing has begun the court "may advance the trial on the merits and consolidate it with the hearing" on the motion, seemingly dissolving the dividing line between a "trial" and a "motion" altogether.

Last August, the Bankruptcy Rules Committee published a proposed rule amendment that would remove the "compelling circumstances" requirement for remote testimony in relation to "contested matters," but not for adversary proceedings. In terms of complexity and duration, it

may be that the dividing line between "contested matters" and trials of adversary proceedings is -- like the difference between a trial under Rule 43(a) and a motion under Rule 43(c) -- not so clear as might be expected.

At the same time, the Advisory Committee remains convinced that live in-person testimony remains the "gold standard" for trials. That said, the Rule 43/45 Subcommittee has begun to consider removing the "compelling circumstances" requirement from Rule 43(a) along the following lines:

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~in compelling circumstances~~ and with appropriate safeguards, the court may permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.

This possible revision substitutes "contemporaneous remote testimony" for "testimony ... by contemporaneous transmission from a different location." The premise is that the shorter phrase has become commonplace since the rule was amended in 1996. It also is used in the proposed Rule 45(c) amendment in the Action Items section of this report.

This would be a small change in the rule -- only deleting three words -- but might well signal a significant shift in the attitude toward such remote trial testimony. A Committee Note could stress a number of themes in explaining how this small change should be applied under the amended rule. Whether such a small change in the rule would support an extensive Committee Note might be an issue.

The following is not by any means a draft Committee Note, but it does discuss things that a Note could address. At least some of them may be controversial, and this presentation does not presume to determine how those controversies would be resolved. The Advisory Committee invites Standing Committee reaction to the utility of these considerations that might be included in a Committee Note.

The Note could begin by stressing that the amendment does not retreat from the view that in-person testimony is critical, and may be supplanted by remote testimony only when a careful examination of pertinent factors shows that in the given circumstance that strong preference for in-person testimony at trial should be relaxed. Nothing in the rule requires a judge to permit remote trial testimony, and the assumption of the amendment is that courts will approach requests for remote trial testimony with caution and skepticism.

Against that background, a Note could identify a non-exclusive series of factors that a court could weigh in deciding whether to authorize remote trial testimony. The Note's theme might be

that the good cause standard has real teeth in this context, given the universally-recognized importance of face-to-face evaluation of credibility, and that judges should therefore carefully consider all the pertinent factors before authorizing remote testimony.

Party agreement: The 1996 Note provides a pretty good description of the role of party agreement:

> Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

That approach seems equally relevant under a stand-alone good cause standard. And granting permission for remote testimony may be particularly important when both sides want to present some witnesses by remote testimony. But the decision is ultimately for the court, not the parties.

Importance of having this witness testify: The fact a witness can offer admissible testimony hardly proves that it is important to have that particular witness at trial. Indeed, under Fed. R. Evid. 403, the court may exclude "cumulative" witnesses who have relevant evidence.

At the same time, there may be situations in which only one witness has personal knowledge of critical matters, such as what was said during a given conversation, or what happened at a specific location that is important to the dispute.

In between, there are myriad gradations. At the other end of the spectrum from the "essential" witness with "unique" knowledge, for example, a witness may be needed to lay a foundation for admission of a given exhibit, or to show that a person was at a given location at a particular time. Depending on the exhibit or the circumstances at the given time, there may be numerous others who can provide the same information. This is the opposite of "unique" evidence.

This factor may sometimes resemble the "apex witness" concern that some report arises with frequency. Many cases hold that high government officials and high corporate officers ought not even be required to appear for a deposition unless they have unique and extremely important knowledge. Indeed, depending on the circumstances of a given case, there may be a significant question about whether the high official has any direct knowledge of the matters to be presented at trial. At least in some circumstances, insisting on testimony by a given witness when others could equally provide comparable evidence could be employed to impose costs on another party. Though providing remote testimony may often be less intrusive for the witness than appearing in court for in-person testimony, the need to prepare adequately and be present electronically at the right moment may be more burdensome than submitting to a deposition.

Importance of in-person testimony to make credibility determinations: Particularly as to witnesses who only provide a foundation for exhibits or present other noncontroversial matters, there may be little concern with the value of in-person attendance to enable the trier of fact to determine credibility. As to other witnesses, however, conflicts between the testimony of different witnesses about important events in the case may make credibility determinations central to the case. Courts may have different views on the value of face-to-face judgments of credibility, but this factor should inform the court's decision whether in-person testimony would contribute value to the trial.

Technology issues: There has been a sea change in technology since the 1996 amendment was adopted, and further changes are likely. Nonetheless, the court should ordinarily give considerable attention to at least two sorts of technology issues:

First, the court may evaluate the technology available in its courtroom. Not all courtrooms are identical in that regard. For various reasons, including security concerns, it may be very difficult to navigate the technology in some courts.

Second, the court should also make a careful inquiry into the method the proponent of remote testimony proposes to use to provide that testimony. The proponent ought to be able to assure the court that such testimony will be smoothly presented.

Deposition testimony as a substitute: Another consideration is whether deposition testimony from this witness -- particularly a video deposition -- would be equal to or better than "live" remote testimony. If the deposition of the witness was taken a long time before trial, the deposition may not fairly represent what the witness can provide on the issues that have emerged in trial preparation. If so, however, it may be that a re-deposition of this witness would be a viable solution and therefore a reason to relax the rule that ordinarily a witness need submit to a deposition only once.

The 1996 Note took a position: "Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena." Of course, the "reach of a trial subpoena" is nationwide now (subject to our proposed amendment to Rule 45(c)), but the more basic point is that there may be a policy disagreement about whether a deposition is to be preferred. The proponents of change urge that the rule should presume that remote testimony is preferred. Granting the court expanded latitude to authorize remote testimony does not necessarily mean that the rule should embrace this hierarchy of methods of testimony when deciding whether to authorize remote testimony in a particular case, but given technological change since 1996, the 1996 preference for a video deposition no longer seems obvious.

Evaluating safeguards: As in 1996, the amended rule would still require "adequate safeguards." As with technology, it would seem that the proponent of the witness should bear the burden of persuading the court that such safeguards will be in place. Some assert that parties

routinely agree on safeguards. Further information may suggest some safeguards that could be mentioned in a Note, though not as an exclusive list. On this score, the 1996 Committee Note did include the following: "Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying." Whether that can be said with remote testimony, or how it may be ensured, may be important factors. Short of having lawyers for all the parties in the room where the witness testifies, experience will probably show that safeguards have been developed to achieve something like parity with the traditional deposition setting.

Timing: The 1996 Note strongly implied that remote testimony should be limited to situations in which the need for it resulted from a sudden, last-minute development:

> A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

At that time, a subpoena could not be used to compel a witness to provide trial testimony unless the witness was within the "subpoena power" of the trial court. Though the *Kirkland* case has cast doubt on this conclusion, the 2013 amendment to Rule 45 changed that predicate assumption; now a subpoena may compel the witness to attend at a place within the geographical limits of Rule 45(c). The Rule 45(c) amendment proposed for publication for public comment in the Action Items section above is designed to ensure that the court that balances the 43(a) factors and finds good cause for this witness to testify remotely will not encounter an authority barrier to obtaining that remote testimony.

The 1996 timing discussion presumably provided comfort for parties beyond the "subpoena power" of the court because the fact they were located far away would likely be known early on. (Corporate officers might be a prominent example.) Removing that limiting factor may invite something like "apex trial testimony." Whether that could be justified under the other factors mentioned above is debatable, however. If the only reason for opposing remote testimony by the CEO who genuinely has unique and important evidence is that the parties knew all along that she lived and worked on the other side of the country, it might not seem that factor should be decisive should the court conclude that remote testimony is preferable to a deposition.

Another timing element has to do with ensuring that the need for remote testimony is known to the other parties and (given the need for court approval under Rule 43(a)) to the court. The proposed amendment to Rule 26(a)(3)(A)(i) included with the Rule 45(c) amendment in the Action Items section of this report should facilitate in that effort.

Amending Rule 43(c) also?

The Rule 43/45 Subcommittee has also considered whether there is reason to amend Rule 43(c) to bring it into parallel with Rule 43(a). As noted above, it can be said that the dividing line between trial testimony and testimony on a motion is not always crystal clear. It seems that oral

testimony offered during motion hearings is ordinarily in-person, so the remote testimony issue with which we are grappling may not be presented. *See* 9A Fed. Prac. & Pro. § 2416 at nn. 10-11. But one might add specific reference to remote testimony to the delphic "oral testimony" in the current rule. [Arguably "oral testimony" meant in-person testimony when the rule was written.] For a starting point, the following might be added to parallel Rule 43(a):

> **(c) Evidence on a motion.** When a motion relies on facts outside the record, the court may hear the mater on affidavits or may hear it wholly or partly on oral testimony or on depositions. For good cause and with appropriate safeguards, the court may permit contemporaneous remote oral testimony.

* * * * *

This work is ongoing. Reactions/insights from Standing Committee members are welcome.

(c) Third-party Litigation Funding

This TPLF Subcommittee (chaired by Judge R. David Proctor, N.D. Ala.) was created at the Committee's October 2024 meeting, and has embarked on a program designed to educate subcommittee members about the issues involved. This effort involves ongoing outreach; Subcommittee representatives have met with bar groups about the issues raised and further such sessions are planned.

Meanwhile, there have been developments in other arenas. In Congress, a number of bills calling for disclosure of TPLF were introduced. Most recently, in February 2025, Rep. Issa introduced H.R. 1109 (119th Cong. 1st Sess.), the Litigation Transparency Act of 2025. A link to this bill is included in this agenda book. Bills have been introduced in a number of states directing disclosure as well. Several years ago the State of Wisconsin adopted "tort reform" legislation that included disclosure requirements for TPLF arrangements. Other states that have entertained such legislative proposals include West Virginia and Louisiana.

Some district courts have adopted local rules or practices with regard to disclosure of funding. The District of New Jersey adopted a local rule requiring disclosure whether there was funding and, if so, of the identity of the funder. In the Northern District of California, there is a local rule or standing order calling for disclosure in class actions.

There is, in short, little question that TPLF has gained prominence. And the amount of such funding seems to be growing rather rapidly.

There seems to be sharp disagreement, however, on whether to greet these developments or deplore them. On one side, litigation funding is greeted in some circles as "unlocking the courthouse door" by facilitating the assertion of valid claims. On the other hand, litigation funding is sometimes deplored in mass tort litigation as enabling the assertion of hundreds or even

thousands of groundless claims "found" by claims aggregators and "sold" to lawyers who don't do their Rule 11 due diligence before filing in court.

From a rulemaking standpoint, beyond deciding whether to regard litigation funding as basically good or bad, there are a number of questions needing answers. Here are some of them:

(1) How does one describe in a rule the arrangements that trigger a disclosure obligation? In an era when lawyers and law firms often rely on bank lines of credit to pay the rent, pay salaries, hire expert witnesses, etc., all seem to agree that TPLF disclosure requirements should not apply to such commonplace arrangements.

(2) Is this problem limited to certain kinds of litigation? For example, some see MDL proceedings or "mass tort" litigation as a particular locus. Others regard patent litigation as a source of concern; in the District of Delaware there have been disputes about disclosure of funding in patent infringement litigation. Yet others (including a number of state attorneys general) fear that litigation funding may be a vehicle for malign foreign interests to harm this country, or at least hobble American companies when they compete for business abroad.

(3) Should the focus be on "big dollar" funding? One sort of funding is what is called "consumer" funding, often dealing with car crashes and involving relatively modest amounts of money. "Commercial" funding, on the other hand, is said in some instances to run to millions of dollars.

(4) Does funding prompt the filing of unsupported claims? Funders insist that they carefully scrutinize the grounds for the claims before deciding whether to grant funding, and that they reject most requests for funding. They also say that they offer expert assistance to lawyers that get the funding to help them win their cases. Since the usual non-recourse nature of funding means that the funder gets nothing unless there is a favorable outcome, it seems that funding groundless claims would not make sense.

(5) The above is largely keyed to funding of individual lawsuits. A new version, it seems, is "inventory funding," which permits the funder to acquire an interest in multiple lawsuits. One might say this verges on a line of credit; in a real sense if a firm's inventory of cases don't pay off the firm can't pay the bank. How such inventory funding actually works remains somewhat uncertain.

(6) If some disclosure is required, what should be disclosed, and to whom should it be disclosed? The original proposal called for disclosure of the underlying agreement and all underlying documentation. But if funders insist on candid and complete disclosure regarding the strengths and weaknesses of the cases on which lawyers seek funding, core work product protections would often seem to be involved.

(7) Will requiring some disclosure lead to time-consuming discovery forays that distract from the merits of the underlying cases?

(8) What is the court to do with the information disclosed if disclosure is required? One concern is that lawyers seeking funding are handing over control of their cases in contravention of their professional responsibilities. Though judges surely have a proper role in ensuring that the lawyers appearing before them behave in an ethical manner, they would not usually undertake a deep dive into the lawyer-client relationship to make certain the lawyers are behaving in a proper manner.

(9) If judges don't normally have a responsibility to monitor the lawyers' compliance with their professional obligations, does that change when settlement is possible? Should judges then be concerned that settlement decisions are controlled by funders whose involvement is not known to the court?

* * * * *

There surely are other questions to be explored. Presently it seems likely that the George Washington National Law Center will hold an all-day conference about the topic for the subcommittee, tentatively scheduled the day before the Committee's Fall meeting.

Guidance from Standing Committee members about the issues presently under study, or others that should be added, would be welcome. A link to the bill pending in Congress is provided below.

https://www.congress.gov/bill/119th-congress/house-bill/1109/text?s=2&r=1&q=%7B%22search%22%3A%22hr1109%22%7D

(d) Cross-border Discovery

The Cross-border Discovery Subcommittee (chaired by Judge Manish Shah, N.D. Ill.) also remains in the learning outreach mode. Representatives of the Subcommittee have attended meetings of the Lawyers for Civil Justice, the American Association for Justice, and the Sedona Group. In addition, Prof. Zachary Clopton (Northwestern), a member of the Subcommittee, has met with a panel of transnational discovery experts affiliated with the ABA. The information-gathering effort continues.

It is presently unclear whether there is widespread enthusiasm for rule amendments keyed to cross-border discovery issues. To a significant extent, it seems that lawyers say "we can work that out." The basic tools for working it out seem to be in place in the rules already. There seems no doubt that any party could raise cross-border discovery issues in a Rule 26(f) discovery-planning meeting and present any disagreements to the court under Rule 16.

For at least some lawyers, the current rules appear to be sufficient. To consider one possible rule amendment -- to add explicit reference to cross-border discovery to Rule 26(f) -- there appear to be sectors of the bar that find that possibility extremely unnerving. For some of them, a rule change along these lines might signal to the judge that it is important to put the brakes on discovery and proceed in a gingerly manner. Some might consider that a recipe for delay tactics.

A somewhat different point is that divergent attitudes toward privacy and intrusive discovery could create a zero/sum situation. From one perspective, multinational actors may be faced with a Hobson's choice between violating non-U.S. privacy rules (e.g., the GDPR in the EU), and disobeying American judicial orders to provide the sort of broad discovery common in U.S. litigation, risking possible default.

In the background lies the Hague Convention. Early on, some responding parties insisted that American courts should routinely insist that parties seeking discovery abroad be required to resort first to the Convention's techniques.

Many claim that the Convention is too slow and too narrow to satisfy the information needs of U.S. litigation. The Convention itself may offer a middle ground solution if the parties agree to appointment of a local official in the country where the information is held to streamline the Convention process. But that is possible only if all the parties agree.

To complicate things further, many countries are not signatories to the Convention, and some that are parties to the Convention have "reservations" that forbid complying with American discovery.

Mediating between these divergent attitudes toward privacy and the legitimacy of giving parties the power to compel disclosure without having first to get a court order to that effect is a challenging task. At the margins, one side says that the other side is "hiding" its critical information overseas, and the other side says the American plaintiffs are exploiting American discovery to make their clients face the risk of sanctions in the U.S. unless they violate the privacy laws of an EU (or other) country. Thus the Hobson's choice.

* * * * *

At present, it remains uncertain whether a rule change is warranted or, if so, what it should be. Views of Standing Committee members on this topic would be helpful.

(e) Rule 55 default procedure

At the request of the Advisory Committee, the Federal Judicial Center did a very thorough study of default practice under Rule 55. The study was prompted by the fact the current rule (seemingly unchanged in this regard since 1938) says that the clerk "must" enter a default when a party does not defend, and also "must" enter a default judgment when the suit is "for a sum certain

or a sum that can be made certain by computation," including costs of suit. A link to that report appears below:

https://www.fjc.gov/content/389994/default-and-default-judgment-practices-district-courts

The concern is that what the rule commands seems not to be the actual practice in many places, particularly as to entry of default judgment. When the FJC study was first presented to the Advisory Committee at its October 2024 meeting there was discussion of changing "must" to "may," but there was concern that giving the clerk unbridled discretion whether to enter a default or default judgment seemed inappropriate, so the topic got further study.

That study showed that -- at least as to entry of default judgment -- the court's discretion plays an important role, as described in the Federal Practice & Procedure treatise:

> When an application is made to the court under Rule 55(b)(2) for the entry of a judgment by default, the district judge is required to exercise sound judicial discretion in determining whether the judgment should be entered. The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements of Rule 55(b)(2) that an application must be presented to the court for the entry of judgment and that notice of the application must be sent to any defaulting party who has appeared. The latter requirement enables the defaulting party to show cause to the court why a default judgment should not be entered or why the requested relief should not be granted. This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when the defendant is technically in default and that fact has been noted under Rule 55(a). * * *
>
> In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record before it. * * * Among the factors considered are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have; or whether the default was caused by a good-faith mistake or excusable or inexcusable neglect on the part of the defendant. Plaintiff's actions also might be relevant; if plaintiff has engaged in a course of delay or has sought numerous continuances, the court may determine that a default judgment would not be appropriate.

10A Fed. Prac. & Pro. § 2685 at 28-49. The quoted material spans many pages of the treatise because the notes to this text provide citations to a multitude of illustrative cases. It does seem odd to give the clerk that degree of discretion.

At the same time, it does not seem that default practice in the federal courts is nearly as important as a matter of administration of justice as default practice in the state courts. As the FJC study showed in two charts (pp. 24-25 of the study), default judgments have since 1988 fallen from about 9% of all civil terminations to under 2% of all civil terminations.

This federal court situation can be contrasted with the situation in at least some state courts. There has been much concern recently about the increasing frequency of default judgments in state courts, often in debt collection matters in which the alleged debtor does not have assistance of counsel and fails to appear. *See* Pew Charitable Trusts, *How Debt Collectors Are Transforming the Business of State Courts* (2020). Some of this activity may result from the practice of "debt buying." *See* Federal Trade Commission, *Structure & Practices of the Debt Buying Industry* (2013). *See also* Paula Hannaford-Agor & Brittany Kauffman, *Prevent Whack-A-Mole Management of Consumer Debt Cases: A Proposal for a Coherent and Comprehensive Approach for State Courts* (2020). The ALI has launched a Project on High Volume Litigation to consider these issues. There has been substantial academic attention to what's happening in state courts as well. *See, e.g.*, Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 Harv. L. Rev. 1704 (2022).

Changing the procedures for default cases may be in order to respond to what Prof. Bookman calls "a broken adversarial system" in the state courts. Pamela Bookman, *Default Procedures*, 173 U. Pa. L. Rev. ___ (forthcoming 2025) (at 3). But these important developments do not seem pertinent to concerns about Rule 55. The claims asserted in these state-court actions would almost always be based on state law, and in the event of diversity of citizenship the amount-in-controversy requirement would ordinarily prevent filing in federal court. Thus, Prof. Bookman reports that state-court default rates are "often over 70% in debt-collection cases * * * down from rates as high as 95% a decade ago." *Id.* at 1-2.

Making major changes to Rule 55 might entail providing specifics that (as the FJC report shows) are handled quite differently in districts with local rules about default procedure. *See* Appendix C to the FJC report. Among the possible questions are (1) what is required to initiate default procedure (an "application," a "request," or a "motion"); (2) whether notice to the defendant of the application for entry of default, in addition to service of process, should be a requisite to entry of default or default judgment; (3) what exactly must be shown to support entry of default or default judgment; (4) whether entry of default judgment must be preceded by formal entry of default; (5) whether there should be a meet-and-confer prerequisite to entry of default; (6) how the clerk should compute interest and attorney fees (if included as part of costs of suit); and (7) whether there should be a time limit after entry of default for seeking entry of default judgment.

At the Advisory Committee's April 2025 meeting, there was support for removing the "must" command from the rule, and also for abrogating Rule 55(b)(1). As presented in the Advisory Committee agenda book, these possibilities might be presented as follows:

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk may ~~must~~ enter the party's default or [refer] {forward} the matter to the court for directions.

(b) Entering a Default Judgment.

Alternative 1

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—may ~~must~~ enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person nor in military service affected by 50 U.S.C. § 3931, or [refer] {forward} the matter to the court for directions.[5]

[5] Reference to 50 U.S.C. § 3931 seems warranted, though it is not presently mentioned in Rule 55. Some local rules do mention this provision. It is entitled "Protection of servicemembers against default judgments," and provides:

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit --

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

Alternative 2

(1) ~~**By the Clerk.** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk -- on the plaintiff's request, with an affidavit showing the amount due -- must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.~~ [Abrogated]

(2) ~~**By the Court.** In all other cases, t~~The party must apply to the court for a default judgment. * * * *

In addition, a reference to 50 U.S.C. § 3931 should probably be added to Rule 55(b)(2) at the same time, perhaps whether or not Rule 55(b)(1) is abrogated.

(f) Random assignment of cases

As reported previously, the Advisory Committee continues to monitor district-court responses to the Judicial Conference's March 2024 guidance regarding random assignment of civil cases. This monitoring indicates that there are many districts that have modified their case-assignment practices in response to the Conference guidance. The issue will remain on the Advisory Committee's agenda and the committee will continue to monitor the situation as it develops.

---

(2) Appointment of attorney to represent defendant in military service

> If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

A later provision calls for plaintiff to post a bond if the court is unable to determine whether the defendant is in military service.

Given the possibility that amendment of the rule could be said to supersede this statutory requirement, it may be prudent to include mention of the statute in Rule 55(b)(1) and, perhaps, add a reference to it in Rule 55(b)(2).

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) ***Nongovernmental ~~Corporations~~ Business Organizations***. A nongovernmental ~~corporate~~ business organization that is a party or ~~a nongovernmental corporation~~ that seeks to intervene must file a statement that:

(A) identifies any parent ~~corporation~~ business organization and any publicly held ~~corporation~~ business organization ~~owning~~ that directly or indirectly owns 10% or more of ~~its stock~~ it; or

[1] New material is underlined in red; matter to be omitted is lined through.

(B) states that there is no such ~~corporation~~ business organization.

* * * * *

Committee Note

Rule 7.1(a)(1) is amended in two ways intended to better assist judges in complying with their statutory and ethical duty to recuse in cases in which they or relevant family members have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4); Code of Conduct for United States Judges Canon 3C(1)(c).

First, the amended rule substitutes "business organization" in place of references to "corporation" to cover entities not organized as "corporations," defined narrowly. "Business organizations" is a more capacious term intended to flexibly adapt to the ever-changing variety of commercial entities, and the term is generally accepted and well understood. *See*, *e.g.*, Uniform Business Organizations Code (2015).

Second, the rule is amended to require disclosure of business organizations that "directly or indirectly own 10% or more of" a party, whether or not that ownership interest is formally denominated as stock. Such a direct or indirect owner is presumed to hold a sufficient interest in a party to raise a rebuttable presumption that a judge's financial interest in the owner extends to the party, warranting recusal. *See* U.S. Judicial Conference, Guide to Judiciary Policy § 220, Committee on Codes of Conduct, Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary

Relationship (Feb. 2024). Under the amended rule, a party must disclose not only a parent business organization but also any publicly held business organization that is a grandparent, great-grandparent, or other corporate relative that owns 10% or more of a party, whether directly or through another business organization. The requirement to disclose "indirect" owners of 10% or more of a party is a pragmatic effort to better inform judges of circumstances when their financial interests may be affected by a litigation or when further inquiry into the ownership interests in a party is appropriate.

As before, this rule does not capture every scenario that might require a judge to recuse. As reflected in the Committee on Codes of Conduct Advisory Opinion No. 57, a judge may need to seek additional information about a party's business affiliations when deciding whether to recuse. And, as before, districts may promulgate local rules requiring additional disclosures.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * * * *

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rules 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and~~,~~ (if not previously provided)~~,~~ the address and telephone number

[1] New material is underlined in red; matter to be omitted is lined through.

of each witness—separately identifying those the party expects to present and those it may call if the need arises, and whether the testimony will be in person or remote;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

* * * * *

Committee Note

Under Rule 43, the court may permit remote testimony at trial. Because the rule presently requires disclosure of witnesses a party "expects to present," it should be understood to include witnesses who will testify remotely. This amendment clarifies that the disclosure requirement applies whether or not the witness is testifying

in person or remotely and alerts the parties and the court that a party expects to present one or more witnesses remotely.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 41. Dismissal of Actions or Claims

(a) Voluntary Dismissal.

(1) ***By ~~the~~ a Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ a plaintiff may dismiss an action or one or more claims without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have

[1] New material is underlined in red; matter to be omitted is lined through.

appeared and remain in the action.

* * * * *

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action or one or more claims may be dismissed at ~~the~~ a plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action, claim, or claims may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * * * *

Committee Note

Rule 41 is amended in two ways. First, Rule 41(a) has been amended to add language clarifying that a plaintiff may voluntarily dismiss "one or more claims" in a multi-claim case. A plaintiff may accomplish dismissal of either an action or one or more claims unilaterally prior to an answer or motion for summary judgment by a party opposing that claim, or by stipulation or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. This amendment to Rule 41(a), permitting voluntary dismissal of a claim or claims, does not affect the operation of Rule 41(d), whose applicability is limited to situations when the plaintiff has previously dismissed an entire action.

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who have dismissed all claims, or had all claims against them dismissed. Such a requirement can be overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the parties currently litigating claims at the time of the stipulation provide both sufficient notice to those actively involved in

the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 45. Subpoena

* * * * *

(b) Service.

(1) ~~***By Whom and How; Tendering***~~ ***Means; Notice Period; Fees.***

(A) *By Whom and How.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by:

(i) delivering it to the individual personally;

(ii) leaving a copy at the person's dwelling or usual place of

[1] New material is underlined in red; matter to be omitted is lined through.

abode with someone of suitable age and discretion who resides there;

(iii) sending a copy to the person's last known address by a method of United States mail or commercial carrier delivery, if the selected method provides confirmation of actual receipt; or

(iv) using another means authorized by the court for good cause that is reasonably calculated to give notice.

(B) *Time to Serve if Attendance is Required; Tendering Fees.* ~~and, i~~If the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing,

or deposition, unless the court orders otherwise, the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena requiring the person to attend must tender~~ing~~ the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the time and place the person is commanded to appear. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

* * * * *

Committee Note

Rule 45(b)(1) is amended to clarify what is meant by "delivering" the subpoena. Courts have disagreed about

whether the rule requires hand delivery. Though service of a subpoena usually does not present problems—particularly with regard to deposition subpoenas—uncertainty about what the rule requires has on occasion caused delays and imposed costs.

The amendment removes that ambiguity by providing that methods authorized under Rule 4(e)(2)(A) and (B) for service of a summons and complaint constitute "delivery" of a subpoena. Though the issues involved with service of a summons are not identical with service of a subpoena, the basic goal is to give notice and the authorized methods should assure notice. In place of the current rule's use of "delivering," these methods of service also are familiar methods that ought easily adapt to the subpoena context.

The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt. The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. *Cf.* Rule 45(b)(4) (proving service of subpoena). Experience has shown that this method regularly works and is reliable.

The amended rule also authorizes a court order permitting an additional method of serving a subpoena so long as that method is reasonably calculated to give notice. A party seeking such an order must establish good cause, which ordinarily would require at least first resort to the authorized methods of service. The application should also demonstrate that the proposed method is reasonably calculated to give notice.

The amendment adds a requirement that the person served be given at least 14 days notice if the subpoena commands attendance at a trial, hearing, or deposition. Rule 45(a)(4) requires the party serving the subpoena to give notice to the other parties before serving it, but the rule does not presently require any advance notice to the person commanded to appear. Compliance may be difficult without reasonable notice. Providing 14-day notice is a method of avoiding possible burdens on the person served. In addition, emergency motions for relief from a subpoena can burden courts. For good cause, the court may shorten the notice period on application by the serving party.

The amendment also simplifies the task of serving the subpoena by removing the requirement that the witness fee under 28 U.S.C. § 1821 be tendered at the time of service as a prerequisite to effective service. Though tender at the time of service should be done whenever practicable, the amendment permits tender to occur instead at the time and place the subpoena commands the person to appear. The requirement to tender fees at the time of service has in some cases further complicated the process of serving a subpoena, and this alternative should simplify the task.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 45. Subpoena

* * * * *

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person:

[1] New material is underlined in red; matter to be omitted is lined through.

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial or hearing and would not incur substantial expense.

(2) ***For Remote Testimony.*** Under Rule 45(c)(1), the place of attendance for remote testimony is the location where the person is commanded to appear in person.

(32) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

* * * * *

Committee Note

In 2013, Rule 45(a)(2) was amended to provide that a subpoena must issue from the court where the action is pending, and Rule 45(b)(2) now provides that such a subpoena can be served at any place within the United States.

Since the 2013 amendments, however, some courts have concluded that they are without authority to command witnesses to provide remote trial testimony because the witnesses are not within the "subpoena power" of the presiding court. *See, e.g., In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023) (holding that a subpoena can compel remote trial testimony from a witness only if the witness resides or transacts business in person within 100 miles of the court or within the state in which the court sits). Questions have also been raised about whether a subpoena can compel a nonparty to provide discovery if the nonparty witness is located outside the geographical scope of the subpoena power to command the witness to appear in court. *See, e.g., York Holding, Inc. v. Waid*, 345 F.R.D. 626 (D. Nev. 2024) (rejecting the argument that a Nevada district court subpoena could not command production of documents within 100 miles of the nonparty's place of business in New Hampshire).

This amendment clarifies that the court's subpoena power for in-court testimony or to provide discovery extends nationwide so long as a subpoena does not command the

witness to travel farther than the distance authorized under Rule 45(c)(1), which provides protections against undue burdens on persons subject to subpoenas. It specifies that, for purposes of Rule 45(c)(1), the witness "attends" at the place where the person must appear to provide the remote testimony. For purposes of Rule 43 and Rule 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

The amendment does not alter the standards for deciding whether to permit in-court remote testimony. Instead, it applies to any subpoena for witness testimony. Ordinarily, court approval is required for remote testimony in court. Rule 43, for example, authorizes remote testimony in trials and hearings but depends on court permission for such testimony. Rule 26(a)(3)(A)(i) requires that the parties disclose the identities of witnesses whose testimony will be presented, without distinguishing between in-person and remote testimony. Even remote deposition testimony is authorized only by stipulation or court order. See Rule 30(b)(4).

When a subpoena commands a witness to provide remote testimony, it is the responsibility of the serving party to ensure that the necessary technology is available at the remote location for such testimony.

DRAFT 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. Participants 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, 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. The Administrative Office was represented by Carolyn Dubay, Scott Myers, Rakita Johnson, Shelly Cox (remotely), and law clerk Kyle Brinker. The Federal Judicial Center was represented by Dr. Emery Lee and Dr. Tim Reagan (remotely). Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Judge Rosenberg opened the meeting by welcoming all observers with appreciation for their participation and interest in the rulemaking process. She thanked the staff of both the Rules Committees 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 Chief Counsel to the Rules Committees, 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 and researcher at the Federal Judicial Center, a Supreme Court fellow, and a law clerk for Judge Seybert (E.D.N.Y.). Judge Rosenberg welcomed 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. 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. 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. 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.

Action Items

Review of Minutes

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.

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 making this revision during the lunch hour, the Advisory Committee reconvened and voted unanimously to recommend the amended rule for publication 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. Subsequently, the Advisory Committee voted unanimously to recommend that the amendment package 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. Subsequently, the Advisory Committee approved the amended rule for submission to the Standing Committee for publication.

Rule 7.1(a)

Before the lunch break, Judge Rosenberg 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 Fed. 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. Subsequently, the Advisory Committee voted unanimously to recommend that the amendments be published for public comment.

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.

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.

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.

Adjournment

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.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 45. Subpoena

* * * * *

(b) Service.

(1) ~~***By Whom and How; Tendering***~~ ***Means;***

Notice Period; ***Fees.***

(A) *By Whom and How.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by:

(i) delivering it to the individual personally;

(ii) leaving a copy at the person's dwelling or usual place of

[1] New material is underlined in red; matter to be omitted is lined through.

abode with someone of suitable age and discretion who resides there;

(iii) sending a copy to the person's last known address by a method of United States mail or commercial-carrier delivery, if the selected method provides confirmation of actual receipt; or

(iv) using another means that is authorized by the court for good cause and ~~that~~ is reasonably calculated to give notice.

(B) *Time to Serve if Attendance Is Required; Tendering Fees.* ~~and, i~~If the subpoena requires that the named

person's attendance, a trial, hearing, or deposition, unless the court orders otherwise, the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena requiring the person to attend must tendering the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the time and place the person is commanded to appear. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

* * * * *

Committee Note

Rule 45(b)(1) is amended to clarify what is meant by "delivering" the subpoena. Courts have disagreed about whether the rule requires hand delivery. Though service of a subpoena usually does not present problems—particularly with regard to deposition subpoenas—uncertainty about what the rule requires has on occasion caused delays and imposed costs.

The amendment removes that ambiguity by providing that methods authorized under Rule 4(e)(2)(A) and (B) for service of a summons and complaint constitute "delivery" of a subpoena. Though the issues involved with service of a summons are not identical with service of a subpoena, the basic goal is to give notice and the authorized methods should assure notice. In place of the current rule's use of "delivering," these methods of service also are familiar methods that ought easily adapt to the subpoena context.

The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt. The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. *Cf.* Rule 45(b)(4) (proving service of subpoena). Experience has shown that this method regularly works and is reliable.

The amended rule also authorizes a court order permitting an additional method of serving a subpoena so long as that method is reasonably calculated to give notice. A party seeking such an order must establish good cause, which ordinarily would require at least first resort to the authorized methods of service. The application should also

demonstrate that the proposed method is reasonably calculated to give notice.

The amendment adds a requirement that the person served be given at least 14 days notice if the subpoena commands attendance at a trial, hearing, or deposition. Rule 45(a)(4) requires the party serving the subpoena to give notice to the other parties before serving it, but the rule does not presently require any advance notice to the person commanded to appear. Compliance may be difficult without reasonable notice. Providing 14-day notice is a method of avoiding possible burdens on the person served. In addition, emergency motions for relief from a subpoena can burden courts. For good cause, the court may shorten the notice period on application by the serving party.

The amendment also simplifies the task of serving the subpoena by removing the requirement that the witness fee under 28 U.S.C. § 1821 be tendered at the time of service as a prerequisite to effective service. Though tender at the time of service should be done whenever practicable, the amendment permits tender to occur instead at the time and place the subpoena commands the person to appear. The requirement to tender fees at the time of service has in some cases further complicated the process of serving a subpoena, and this alternative should simplify the task.