MINUTES
CIVIL RULES ADVISORY COMMITTEE
Washington, DC
October 24, 2025

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 24, 2025. The meeting was open to the public. Participants included Judge Sarah S. Vance, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland, David Burman, Judge Annie Christoff, Dean Zachary Clopton (remotely), Chief Judge David Godbey, Jocelyn Larkin (remotely), Judge M. Hannah Lauck, Mark Lanier, Judge R. David Proctor, Judge Marvin Quattlebaum, 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 James C. Dever III, 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 Department of Justice was represented by Brett Shumate and Elizabeth Shapiro. The Administrative Office (AO) was represented by Chief Counsel to the Rules Committees Carolyn Dubay, Bridget Healy (remotely) Shelly Cox, Rakita Johnson, and law clerk Sarah Sraders. Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Judge Vance opened the meeting by welcoming Committee members, other participants, and observers and thanked them for their participation and interest in the rulemaking process. She also welcomed new Committee member, Mark Lanier, and the new law clerk to the Committee, Sarah Sraders. Judge Vance also thanked her predecessor, Judge Robin Rosenberg, who is now the Director of the Federal Judicial Center (FJC).

Opening Business

The next order of business was approval of the minutes of the April 1, 2025 Advisory Committee meeting held in Atlanta, Georgia. The draft minutes included in the agenda book were approved unanimously, subject to correction by the Reporters as needed.

Carolyn Dubay then provided an update on the proposed amendments to Rules 7.1, 26, 41, 45, and 81(c), which the Advisory Committee approved for publication at the April meeting. She reported that the Standing Committee had approved all of the proposed amendments for a publication period running through February 16, 2026. Two public hearings on the amendments will occur in January 2026, and feedback from both the hearings and any public comments will be discussed at next spring's Advisory Committee meeting. Judge Vance congratulated Judge Rosenberg and the subcommittee chairs on the Standing Committee's approval of the proposed amendments for publication.

Sarah Sraders then updated the Advisory Committee on pending legislation that might affect the civil rules, including two bills directed toward disclosure of third-party litigation funding: the Protecting Our Courts from Foreign Manipulation Act, H.R. 2675, and the

Litigation Transparency Act, H.R. 1109. Other legislation is described in the agenda book at page 101. The AO will continue to track the progress of proposed legislation impacting the civil rules.

Action Items

Rule 55—Role of the Clerk on Entry of Default/Default Judgment

Judge Vance then turned to the meeting's first action item: consideration of a proposed amendment to Rule 55 regarding the role of the clerk of court in entry of defaults and default judgments. In particular, Judge Vance noted the concerns that the rule requiring a clerk to enter a default and a default judgment for a sum certain or a sum that can be made certain by computation, which has remained unchanged since 1938, no longer reflects the practice in most district courts and can require the clerk's office to make unusually complex determinations without involvement of the assigned judge.

Professor Marcus then explained that the starting point for this inquiry was a comment by a judge that the process outlined in Rule 55 is currently followed almost nowhere. The FJC conducted an exhaustive study, included in the agenda materials, that reveals that the district courts' local rules and practices vary considerably when it comes to default judgments. But one consistent theme among the districts is that, contrary to the rule's text, clerks often consult the court before entering defaults, and they rarely if ever enter default judgments without consultation with the assigned judge. Moreover, entry of a default judgment, whether or not for a sum certain, is widely considered a responsibility of the judge and not the clerk.

Also, currently Rule 55(b)(2), addressed to the entry of a default judgment by the court, refers to exceptions for a minor or incompetent person, but not military servicemembers, against whom a default judgment may not be entered without additional protections, pursuant to 50 U.S.C. § 3931.

In light of these findings, Professor Marcus outlined an amendment to Rule 55(a) (page 105 of the agenda book) to give the clerk the option to refer the default determination to the court for directions. He also outlined alternative proposals to amend Rule 55(b)(1) regarding default judgments on claims for a sum certain: abrogating Rule 55(b)(1) regarding default judgments on claims for a sum certain, thereby requiring all applications for a default judgment to be made to the court and not the clerk; or retaining Rule 55(b)(1) in order to preserve the clerk's power to enter a default judgment on a claim for a sum certain but allowing the clerk to seek further instructions from the judge (pages 106-109 of the agenda book). In either case, the amended rule would refer explicitly in its text to the statute providing special protections to active servicemembers.

Several committee members offered comments. One lawyer member agreed that explicitly permitting the clerk to seek guidance from the judge would be desirable but expressed concern that adding a reference to the military-party statute might create confusion, due to the myriad specific requirements of that statute (including appointing a lawyer for the servicemember). Including a specific reference to the statute might create new questions about the interaction between the amended rule and the statute, so perhaps it would be better not to specifically invoke the statute and allow it to operate alongside the revised rule. Professor

Marcus noted that the purpose of including a reference to the statute was only to ensure awareness of it and not to affect the interaction of the rule and statute. He noted that the reference could be removed and the amendment would still accomplish its main objective. A judge member agreed that a reference to the statute might increase confusion, in part because the rule is directed toward a party, while the statute speaks of actions.

Professor Struve remarked that it was a mystery to her why the statute is not referenced in the rule alongside minors and incompetent persons, in part because the statute requires any party that seeks a default to articulate that the defaulting party is not a servicemember. Perhaps the statute did not exist when the rule was originally drafted. Nevertheless, even expert practitioners may not be aware of the statute, so there may be a benefit to including an explicit reference in the text of the rule, or perhaps the committee note. An academic member added that such a reference might be sensible, but that, if it is included, it should track the language of the statute as closely as possible. Another judge member agreed and suggested developing language that would both track the language of the statute while making clear that the amended rule does not supersede it in any way.

Professor Marcus agreed that these are good points but warned of the dangers of drafting on the fly and suggested that if the Advisory Committee preferred to retain the reference to the statute in the rule, it would be better to draft such language during a break and discuss it later.

Judge Vance agreed and turned the discussion to whether the Advisory Committee members had views on whether to abrogate current subsection (b)(1), thereby requiring all applications for a default judgment to be made to the court and removing the clerk from the process altogether, or to retain (b)(1) with the option for the clerk to seek further direction from the district judge.

One judge expressed a preference for retaining subsection (b)(1) in order to preserve the clerk's power to enter a default judgment in an easy case that may not require participation by the judge. Such flexibility may be salutary. A fellow judge member agreed on the ground that it is consistent with her district's current practice. Another judge disagreed, arguing that removing the option of seeking entry of default judgment by the clerk would clarify and streamline the process, since in all cases the judge would have to be involved. Neither judge felt strongly, but a consensus soon emerged that retaining Rule 55(b)(1) would be preferable, in part because the more modest change would be less likely to upend established practice across the district courts, and because allowing flexibility would facilitate adaptation to varying circumstances.

Discussion then returned to whether to include the reference to the servicemember-party statute in the text of the rule. One judge observed that reference to the statute may not be necessary since many districts have specific local rules for cases involving servicemembers, and litigators experienced in such cases are well aware of the statutory requirements. Another judge asked whether there are other such statutory exceptions to standard procedure and expressed concern about whether the rule must include all such exceptions. Professor Marcus indicated that he was aware of one such exception in the Foreign Sovereign Immunities Act (FSIA), but there might be others. Identifying all of them would be a challenge. Professor Struve expressed her belief that the FSIA would be the only other statute affecting default judgments in civil cases.

She also noted that while some districts have specific local rules for cases involving servicemembers, the FJC study did not find them in a majority of districts.

Another judge suggested that any reference to the statute might be more appropriately located in the committee note. Professor Marcus noted the oft-stated observation that many lawyers don't read the notes, so placing the reference there would be less effective in notifying counsel of the statute. Professor Coquillette added that longstanding practice has counseled against inserting references to statutes in the text of rules. Doing so may provoke questions about whether not including a reference to a statute is intentional, or whether including a statute in one rule means it does not apply when it is not referred to in others the statute may affect. Including a reference to the statute in the committee note creates similar problems, especially if there are other relevant statutes that are left out. The committee note should not be considered a manual for practitioners on how to practice law and cannot be relied upon to inform practitioners of all possibilities.

In light of this discussion, Judge Vance asked whether the Advisory Committee was prepared to vote to submit a proposed amendment to Rule 55 to the Standing Committee, providing that the clerk may seek guidance from the judge on applications for entry of a default or default judgment. This would track the proposed amendment to Rule 55(a) and alternative 2 on subsection (b)(1) but drop the reference to 50 U.S.C. § 3931. A Committee Member so moved, and the Advisory Committee unanimously agreed. The proposed amendment will be presented at the January 2026 Standing Committee Meeting for consideration of publication.

Amendments Related to Cross-Border Discovery

The Cross-Border Discovery Subcommittee, chaired by Judge Manish Shah, was created at the October 2023 Advisory Committee meeting to consider rule amendments to address difficulties that arise when parties attempt to obtain discovery outside the United States. Judge Michael Baylson and Professor Steven Gensler, both former members of the Advisory Committee, have outlined such difficulties in an article and in a submission to the Advisory Committee. Judge Manish Shah reported on behalf of the subcommittee.

Judge Shah acknowledged the complexities of cross-border discovery and outlined the extensive outreach the subcommittee had undertaken to better understand the problem and whether a rule amendment could improve matters. After hearing from several groups, the subcommittee has decided not to recommend a rule amendment at this time. The subcommittee's outreach did not reveal a groundswell of support for rulemaking. Rather, the consistent message from both judges and practitioners was that these issues, while challenging, could typically be sorted out as they arise, case by case. Crafting a rule that would substantially simplify cross-border discovery in all cases in which it may be necessary did not appear feasible.

Professor Marcus added that not only was there little enthusiasm for rulemaking among lawyers and judges, there was a concern that any blanket rule might make sorting these issues out case by case harder. So, although cross-border discovery presents complex problems, a rule amendment might cause more harm than it solves.

Following a motion, the Advisory Committee approved the subcommittee's recommendation to drop this issue from the agenda. Judge Vance thanked the subcommittee for its hard work.

Discovery Subcommittee—Filing Under Seal

For several years, the Discovery Subcommittee has considered various proposals for a uniform nationwide rule on filing under seal. The chair of the subcommittee, Chief Judge David Godbey, explained that after much deliberation, and for the reasons outlined in the agenda materials, that the subcommittee had decided to recommend against any such uniform rule and to remove this project from the agenda.

Although the subcommittee concluded that a rule providing for a uniform national standard or set of procedures for filing under seal would be undesirable, it had also considered whether to amend the rules to explicitly state that the standard for sealing is different from the standards for access under the First Amendment and common law. But after evaluating several alternatives, the subcommittee concluded that such an amendment was undesirable. Judges and lawyers are sufficiently informed of the different standards, so the rule would be little more than a reminder to consult applicable law extrinsic to the rules.

Following a motion, the Advisory Committee unanimously concurred with the subcommittee's recommendation and removed this item from the agenda going forward. Judge Vance thanked the subcommittee for the enormous amount of time and effort it had expended on this issue over several years.

Information Items

Rule 43/45 Subcommittee—Remote Testimony

Judge Lauck reported on the progress of the Rule 43/45 Subcommittee, of which she is the chair. The subcommittee has been hard at work. Its first project, the amendment to Rule 45 regarding subpoenas for remote testimony, is out for publication with hearings scheduled early in 2026. The subcommittee is currently considering possible amendments to Rule 43's provisions for remote testimony. Currently, Rule 43(a) provides the standard for when remote testimony may be used at trial, while Rule 43(c) addresses evidence on a motion but does not explicitly address remote testimony. The subcommittee is focused on what the standard should be for the use of remote testimony, and whether that standard should be the same for trials and hearings. Judge Lauck noted that the Bankruptcy Rules Committee had already approved amendments to permit remote testimony for contested matters (but not adversary proceedings) and has been extremely helpful to the subcommittee.

Judge Lauck informed the Committee that the subcommittee had been engaged in significant outreach on these questions, including attending helpful meetings of the American Association for Justice and the Lawyers for Civil Justice. In addition, the subcommittee heard from several judges about their experiences with remote testimony at an online conference in July. The subcommittee also reviewed a recent article by Judge Jeremy Fogel and Professor Mary Hoopes of Pepperdine Law School on experiences with remote testimony (included in the agenda materials). Judge Lauck reported that many state courts have moved to permit remote testimony more often in response to positive experiences with the technology during the COVID-19 pandemic.

Although the subcommittee continues to gather information, including local and state court rules, it has begun to consider closely whether current requirement of "compelling circumstances" for remote testimony at trial is too high a bar. The current rule, last amended in 1996 when telephones were the technological standard for remote testimony, does not reflect the regular use of modern video-conferencing technology. Nevertheless, two areas of agreement in the subcommittee are that live, in-person testimony should remain the norm, and that the decision whether to allow remote testimony should be in the discretion of the district judge. The key questions are how the rule should guide that discretion and what safeguards should be required to ensure the reliability of the testimony. Overlaying all of this is the question of whether these provisions should be the same at all proceedings where testimony is taken.

Professor Marcus sought feedback from the Advisory Committee as to whether members agree with the subcommittee's developing view that current Rule 43(a) is too restrictive. Perhaps a requirement that all witnesses need to come to the courthouse is unnecessary today, and that "good cause" alone is a sufficient basis to permit remote testimony. One judge opined that the current rule is too restrictive and that different requirements for trials and hearings are unnecessarily confusing. An attorney member agreed, noting that while the "gold standard" should remain live in-court testimony, remote testimony by video is far preferable to reading a deposition transcript to a jury. This member also agreed that the standard should be the same for trials and hearings, since there is little discernible reason to distinguish them. The real issue, in this member's view, is how to provide "adequate safeguards," and noted issues such as how documents should be presented to the witness and who should be allowed to be in the room with the witness.

Another judge member commended the subcommittee on its work and noted that this is an access-to-justice issue, especially in geographically large districts in which court attendance may be onerous for some witnesses. In this member's view, removing the compelling circumstances language, but retaining the "good cause" and "adequate safeguards" mandates would work well. In this member's view, a single standard for trials and hearings would be preferable, and judges and lawyers can tailor the use of remote testimony to the needs of particular proceedings as they arise. Another judge agreed but wondered whether "good cause" should be elaborated in the rule by a set of factors to consider, as opposed to trying to define good cause in the committee note. Professor Marcus noted that there might be resistance to a lengthy committee note to accompany what might be a small change to the text of the rule. Judge Vance asked whether at this time any members were strongly opposed to removing the language requiring compelling circumstances to permit remote testimony, and there appeared to be none.

Professor Marcus then raised a separate issue regarding "apex witnesses." One complaint by defendants is that some witnesses, such as company executives, might find their time monopolized by recurring requirements to appear in person to testify. The subcommittee is trying to balance such concerns with the reasons in-person testimony from such witnesses might be desirable. Judge Lauck noted that often deposition transcripts are read as a substitute, so wide acceptance of remote testimony would be an improvement for jurors. The subcommittee will continue to consider this issue.

Judge Vance thanked the subcommittee for its ongoing work.

Third-Party Litigation Funding (TPLF) Subcommittee

Chief Judge Proctor reported on the progress of the TPLF Subcommittee, of which he is the chair. He explained that the subcommittee continues to gather the information needed to arrive at a recommendation on whether a rule requiring disclosure of TPLF (however it is defined) would be salutary. He also welcomed new Advisory Committee member Mark Lanier to the subcommittee, as he brings a great deal of knowledge and experience on this subject.

As part of the subcommittee's listening tour, several Advisory Committee members had attended a daylong conference put on by the George Washington University National Law Center the previous day. The conference was illuminating, both with respect to the complexities of this issue and the strong feelings about it on all sides. Ultimately, the subcommittee will have to determine whether a rule could solve any real-world problem with TPLF in its many forms. The subcommittee is investigating an array of issues, such as what must be disclosed and to whom, and whether disclosure is likely to lead to expensive and tangential discovery disputes. The subcommittee has also learned that TPLF works very differently, and presents different potential costs and benefits, in different kinds of litigation, e.g., cases involving mass torts, intellectual property, commercial disputes, consumer protection, and relatively small-dollar cases. Moreover, if TPLF becomes a more widely available investment, the question of whether disclosure is necessary for judges to fulfill their duty to recuse if they hold such an investment would become more salient. Chief Judge Proctor also noted that Congress is considering legislation on TPLF, and the subcommittee has its eye on it. Chief Judge Proctor reported that the subcommittee would meet soon to consider next steps.

Professor Marcus noted that perhaps the most elusive question so far is how to define the scope of what counts as TPLF. He added that the proposed bills in Congress include exceptions for non-profits or loans with minimal interest rates, which the subcommittee may also want to consider.

Other Proposals/Matters Under Committee Consideration

Rule 23 (Class Actions)—Superiority; "Service" Awards; Pre-Certification Settlement Approval

This topic was introduced as involving three matters: (1) "service" or "incentive" awards to class representatives in class actions; (2) possible revision of the "superiority" prong of Rule 23(b)(3); and (3) revisiting the 2003 amendment that made judicial approval of proposed settlements necessary only as to certified classes.

Professor Bradt introduced this set of topics by sketching the evolution of the "modern" class action. That was introduced by the 1966 amendments to the rule. Since then, the class action rule has been on the Advisory Committee's agenda several times. The first time after 1966 was in the 1990s, when a substantial package of proposed amendments went out for public comment in 1996. This package included several proposed amendments to the certification criteria of Rule 23(b) and attracted considerable attention during the public comment period. Ultimately, the Advisory Committee decided to recommend adoption only of a new Rule 23(f), permitting a party to seek discretionary review from the court of appeals of an order granting or denying class certification. Rule 26(f) went into effect on December 1, 1998.

In 2001, the Advisory Committee returned to Rule 23, this time focusing on the procedures for managing class actions rather than the certification criteria. Among the changes to the rule adopted as a result of this amendment episode were (1) a clarification in Rule 23(c) that certification should be decided "at an early practicable time" rather than "as soon as practicable," (2) clarifying in Rule 23(c) that the court may choose to direct notice to class members in class actions under Rules 23(b)(1) and (b)(2) though that is not required under the rule; and (3) adopting in Rule 23(e) the standard the courts had developed for deciding whether to approve a proposed class-action settlement—"fair, reasonable, and adequate."

Of note in connection with the matters on this agenda, as described in the 2003 committee note:

> Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. . . . The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

This specific modification in the rule was adopted after the public comment period; the published draft was different. That background may be pertinent to the third topic on the agenda for this meeting.

The 2003 amendments also added two new rules—Rule 23(g) on appointment of class counsel, and Rule 23(h) on attorney fee awards to class counsel.

In 2018, another set of amendments to the rule were adopted, focusing almost entirely on amplifying the procedures to be used for review of proposed class-action settlements.

Class Representative Incentive/Service Awards

This topic focuses on making awards to class members for the work they have done on behalf of the class in pursuing the class action. Such awards have been commonplace for years. There may be limitations on such payments to class representatives. For example, the Private Securities Litigation Act directs that in securities fraud cases they may be granted such awards only on a showing that they have incurred actual costs or losses of income as a result of their service. *See* 15 U.S.C. §§ 77z-i(a)(4); 78u-4(a)(4).

In 2020, however, a divided panel of the Eleventh Circuit held that two 19th century Supreme Court cases prohibited such awards. Prior to that decision, the courts of appeals had unanimously permitted such awards to class representatives. By a 6-5 vote, the Eleventh Circuit denied rehearing en banc. Since this Eleventh Circuit decision, four other courts of appeals have continued to permit such awards in appropriate cases.

The question whether rulemaking is appropriate to respond to what appears to be an outlier decision is uncertain. The Committee did recently approve an amendment to the subpoena rule to respond to a 2023 Ninth Circuit decision that may have been an outlier but had garnered a following. That prospect affected the decision whether to proceed to recommend an amendment. This situation seems different.

A first question was about the effect of this circuit split. Have filings in the Eleventh Circuit plummeted? The response from one member was that a firm answer to that question would require research by the FJC. But a preliminary reaction is that there is no enormous change. Another member offered the view that it seems that the impact of the Eleventh Circuit rule on an individual's willingness to assume the responsibility of class representative may depend on the type of case.

A question was raised about whether, under the Enabling Act, this Committee can address this question. Should it be considered a substantive rather than procedural issue? Particularly under the 2018 amendments to Rule 23, it is important for the court to ensure that the representatives provide adequate representation. But the Eleventh Circuit ruling may disincentivize the class representatives to make efforts to benefit the class—"Why lift a finger if we get nothing for the effort?" And it is perhaps puzzling to understand how these 19th century Supreme Court decisions can bear on 21st century class actions.

Another member agreed with these comments. A particularly important issue involves class actions for injunctive relief; it is more difficult to see how special advantages for the class representative can be identified in such cases. There is indeed variation among the courts of appeals about the amount of service award in given cases. That prompted a question—do judges certify classes and then deny class representative awards? The answer was that there are such decisions.

Another member expressed concern about whether addressing this issue is good use of Committee resources. It seems mainly what one could call a policy-driven matter, which is not the sort of issue the Committee usually takes on.

That prompted the question whether it would make sense to look deeper. One reaction was to concentrate on the limits of the Enabling Act. That focus prompted the reaction that during the amendment process leading to the 2018 amendments there was some discussion of whether a rule could usefully address the *cy pres* issue—disposition of leftover funds after a class settlement was paid out to class members. One ground of opposition to such a rule provision was that a rule could not appropriately create such a right to recover. Another possible comparison is that when Rule 23(h) was added in 2003, it did not attempt to create a right to recover attorney fees but invoked such a right from other law (including the "common benefit" doctrine).

Another question was raised about the Eleventh Circuit decision. To the extent it was based on constitutional grounds, would a rule amendment response be practical or effective? A reaction to that was that the question might turn on the historical bounds of equity.

The discussion was summed up as indicating that these questions deserve further study, but that since other courts of appeals have not followed in the last five years there may be limited urgency.

Rule 23(b)(3) Superiority

This topic was brought to the Committee by the Lawyers for Civil Justice (LCJ). Compared to the amendment proposals regarding certification criteria in the 1990s, it is more limited. It is in no way directed to certification under Rule 23(b)(1) or (b)(2). And the superiority prong of 23(b)(3) has been "second banana" to the predominance requirement since the 1966 amendment.

The focus of the LCJ proposal is the provision in the rule that says the court should evaluate superiority by comparing a class action to other forms of "adjudication." That might easily involve a comparison to MDL proceedings. But it would not readily encompass arbitration, recalls, refunds, etc. In the academic world proposals for considering these other alternatives to class certification have been circulating. Perhaps it would make sense to amend the rule to permit the judge to compare such alternatives to class certification as the LCJ proposes. At the same time, it may be extremely difficult for the court in many cases to evaluate such alternatives at the time certification must be resolved. One concern might be called administrability. And such a proposal would likely spark controversy.

A first reaction was that this idea is intriguing. Class certification can be outcome determinative. Given that, there may be much to say in favor of giving the judge discretion to consider these additional alternatives. Perhaps doing so at the certification stage is not necessarily too early in the proceeding.

A judge member reacted that "I'm taken aback by the idea I can't now take account of such things." That drew the reaction that the focus on the word "adjudicating" might be too literal. Another judge had the same reaction, that "of course the court can take account of such considerations in a proper case." The LCJ proposal itself notes that some courts consider non-adjudication remedies despite the language of the rule. Agenda Book for Advisory Committee on Civil Rules, October 24, 2025, at 256 n.56. Further, the Seventh Circuit in *Aqua Dots* endorsed a workaround to consider a non-adjudication remedy in the "adequacy" of representation analysis under Rule 23(a)(4) to deny class certification. Nonetheless, the Seventh Circuit in *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748, 752 (7th Cir. 2011), expressly foreclosed consideration of non-adjudication remedies under the superiority requirement. To the extent that other cases are of this view, this issue is worth further investigation.

Settlement before class certification

This topic was introduced as coming from the ongoing revision effort on the Manual for Complex Litigation. The concern is that, under the rule as revised in 2003, there is no judicial control over (or scrutiny of) a pre-certification settlement by the class representative. A variety of concerns might come into play.

First, individual settlements of proposed class actions could invite a form of strike suit. In order to provide a cosmetic cover for a payoff to the class attorney or the class representative (or both), the settlement might call for the defendant to take specific actions that seem to address the claim made in the complaint but really provide no significant relief. That cosmetic undertaking might be used to support a significant award of attorney fees paid by the settling defendant.

Second, there is a potential pick-off problem: Can the defendant defuse a class action by offering an individual deal to the class representative to get that person out of the way. Efforts to use Rule 68 in this manner have generally been unsuccessful on the ground that the class representative may reject the offer. In a way, this can be likened to the first concern—that the suit is being used to extract money from the defendant that does nothing for the class.

The 2003 change in the rule resulted in large measure from concern that a class representative who made such a deal could not be an adequate representative. In addition, it is difficult to evaluate the individual deal in a meaningful way, particularly if it is struck very early on in a case. On the one hand, if there is reason to think that many class members are aware of the suit and relying on its continued prosecution, an individual settlement may upset their legitimate expectations. Moreover, if the case is dismissed, the statute of limitations is no longer tolled for class members, and the limitations period might run before a class member can refile the case. On the other hand, unless there is reason to suspect such widespread awareness by absent class members who are abstaining from their own actions in reliance on the class representative, individual notice to the class members that the class representative has settled is unlikely to be worth the costs.

One might say this dovetails with the superiority consideration already considered above.

A reaction to the situation in which the filing of the suit has been widely publicized is that Rule 23(d) already provides the court with authority to order notice of some sort.

Another possible reaction is endorsed in a 1990 article cited in the agenda book—discard the class representative altogether. The article calls class representatives “decorative figureheads.” Perhaps the rule could recognize that often such suits are really attorney-generated and attorney-controlled.

A member questioned the viability of pre-certification settlement approval. To the extent class-member reliance is the concern, Rule 23(d) already provides a remedy. The customary evaluation of a class settlement under Rule 23(e) is simply not designed to address the pre-certification individual settlement. And it is “very rare” to find that any significant number of class members are aware of the filing of the class actions.

A separate question regarding notice is—who will pay for it? When there is a proposed settlement binding on the class, the defendant often will be willing to pay for notice as a method to make certain that it will be binding on class members if they file additional suits.

Another member expressed disagreement with some of these points. There are situations in which the class-action mechanism has been abused. In some state courts, it is still necessary to get judicial approval for pre-certification “individual” settlements. Having the judge oversee and critique such arrangements has an important prophylactic effect. In the *Alcarez* case in the agenda book, the district court said that the class action device was being used to further “a racket." In state courts that scrutinize such pre-certification deals it is not necessary to do a full class-certification hearing.

A judge reacted that it would not be useful to pursue this idea. Before certification, there really is no entity. "Unless a class is certified, it's not a real class action." Another judge agreed with these points.

Another judge suggested that since the drafters of the new Manual for Complex Litigation invited reactions it would be useful to provide a report on this discussion—give them the history. The question whether this is a significant problem remains uncertain.

The conclusion from the Rule 23 discussion was that all three issues would remain under study.

Privacy Protections for Material Obtained Through Discovery

A recent submission from Lawyers for Civil Justice (25-CV-D) proposes several amendments to the discovery rules intended to require a party receiving discovery to take steps to protect that material from unauthorized access. Professor Marcus explained that while cybersecurity is an important topic, it is less clear whether rulemaking is currently appropriate. For instance, one proposed amendment would require the requesting parties to take reasonable steps to ensure the security of materials received in discovery. In a rapidly changing space, determining what steps are "reasonable" could create significant litigation. Moreover, there is a concern that the burden of taking such steps might deter parties from making discovery requests at all. Professor Marcus also noted that American attitudes toward discovery of otherwise-confidential materials is quite different from other approaches around the world, such as that of the European Union. These are big and complex problems that several groups, including the Sedona Conference, continue to study. Currently, parties can negotiate or seek protections via protective order, so it is an open question whether additional rulemaking would be especially useful.

A judge member noted that there is a large array of cases where these issues arise, and they are best dealt with through protective orders tailored to the specific needs of the case. An attorney member agreed, noting that in his experience lawyers and judges routinely work through these matters case by case and that it would be very complicated to develop a uniform rule. Another judge added that she, too, often handles these matters via protective order.

Another judge member asked whether this was a current real-world problem, or whether the proposal is more of an effort to get ahead of a future problem. An attorney member responded, noting that unauthorized access to discovery materials was not a problem that she had encountered. But a judge member noted that a problem could arise if a producing party could be held liable under EU privacy protections if the produced material was disclosed. He observed that such a party should be able to seek assurances that the material produced is being kept on a secure server.

Professor Marcus suggested that these issues are not going away and that continued monitoring might make sense. Both the law and technology will evolve. The Advisory

Committee may become aware of incidents that support a need to act. In the meantime, the Reporters will continue to monitor the issue.

Rule 45 (Subpoena)—Reimbursement for Cost of Responding to Subpoena

Professor Marcus outlined a recent proposal from Professor Brian Fitzpatrick of Vanderbilt Law School (25-CV-E) suggesting an amendment to Rule 45 that would "make nonparties whole when they respond to production requests from litigants." Professor Fitzpatrick contends, essentially, that parties seeking discovery from third parties will disregard the costs of production because they do not have to bear them. Although the proposal does not contain specific rule language, the thrust would be to shift costs of responding from the third party to the requester. Professor Marcus noted that issues of cost-shifting in discovery were thoroughly vetted by the Discovery Subcommittee when it was chaired by Judge Paul Grimm twelve years ago. The subcommittee rejected cost-shifting for third-party subpoenas in part because they seemed to be a major imposition relatively rarely, and because the current framework incentivizes parties seeking discovery to tailor their requests narrowly so they do not bear the costs of reviewing a mountain of irrelevant material. An attorney member added that in his experience third parties facing an overbroad subpoena are typically successful in seeking a protective order to narrow the scope. Another attorney member added that it is very expensive to review produced material so there are strong reasons for a party to seek only what it needs. The Advisory Committee subsequently agreed to drop this item from its agenda.

Rule 5(d)—Permissive Filing of Discovery Requests and Responses

A recently submitted proposal from Mark Foster (25-CV-J) suggests amending Rule 5(d) to permit, or perhaps require, that discovery requests and responses be filed in court. Such an amendment arguably would make life easier on attorneys in cases where opposing counsel has refused email service, leading to use of U.S. Mail. Currently, Rule 5(d)(1)(A), as amended in 2000, provides that discovery requests must not be filed unless "used in the action." The impetus for the current rule was that, when the amendment was proposed in 1998, clerks' offices were overwhelmed, and in some cases running out of space, due to voluminous filings. Although those concerns may be eased in the era of electronic filing, filing of discovery materials would still create a new burden on clerks. Moreover, it is not clear that there is widespread refusal to consent to electronic service. Requiring filing of discovery materials in court may raise additional concerns about cybersecurity if such materials are filed under seal or spark litigation of protective orders that are currently unnecessary. As a result, the Advisory Committee decided to remove this item from its agenda.

Counting Time

A recent submission by Jack Meltzer (24-CV-Z) proposed a change to Appellate Rule 26(a)(1)(B) regarding how one counts time with regard to matters in the courts of appeals. Mr. Meltzer's proposed change would begin counting time "starting with the first day that is not a Saturday, Sunday, or legal holiday." Rules Committee Staff brought Mr. Meltzer's proposal to our attention as potentially pertinent to the Civil Rules. The purpose of the proposal is to prevent gamesmanship by attorneys filing motions late on Friday, particularly a Friday before a three-day weekend, such that the opposing counsel will face a time crunch in responding after the holiday.

Professor Marcus noted that some gamesmanship around deadlines is an inevitable feature of litigation regardless of how one counts time, and there do not appear to be widespread reports that this is a problem in the district courts. Moreover, many local rules address notice periods, and the Time Counting Project recently sought to remove anomalies across all the rule sets for deadlines of fewer than 28 days. Consequently, this proposal does not seem appropriate for rulemaking. The Advisory Committee agreed with this assessment and removed this item from its agenda.

Random Case Assignment

Professor Bradt reported that the Reporters are continuing to monitor district courts' adoption of guidance issued by the Judicial Conference in March 2024 to assign cases seeking injunctions against federal or state government action randomly among all of the judges in a district. Relatedly, the Reporters are also monitoring the effects of the Supreme Court's recent decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), particularly the filing of class actions under Rule 23(b)(2) seeking injunctive relief. The issue remains on the Advisory Committee's agenda for study and monitoring.

Intercommittee Reports

Privacy Issues Including Disclosure of Social Security Numbers and Use of Pseudonyms for Minors

Carolyn Dubay updated the Advisory Committee on the recent intercommittee effort to consider amendments across the various rule sets that would ensure redaction of Social Security numbers (SSN) and other similar identifiers from public filings. The goal, if possible, is to present proposed amendments for publication to the Standing Committee at its June 2026 meeting. Other advisory committees have been providing feedback, or will provide feedback, on this issue at their fall meetings. Prior to the Civil Rules Advisory Committee meeting, the Bankruptcy Rules Advisory Committee had discussed whether special rules for bankruptcy cases, where SSNs and other identifying information is more pertinent, might be appropriate. The Appellate Rules Advisory Committee also took the issue under consideration and will discuss it further at its spring 2026 meeting.

The central question for Advisory Committee discussion is whether complete redaction of SSNs (and other similar identifiers like Employer Identification Numbers (EIN) or Individual Taxpayer Identification Numbers (ITIN)) in civil filings would be desirable. Professor Marcus noted that he is not aware of any reasons why redaction would present problems, except in bankruptcy cases (which are being studied by the Bankruptcy Rules Committee). The liaison from the Bankruptcy Rules Committee confirmed this, noting that the last four digits of the SSN are necessary because they are tied to financial institutions and credit agencies that need to be efficiently informed that an automatic stay is in effect.

Professor Marcus added that consistency across the rules sets on this issue would be beneficial to clerk's offices. The clerk liaison mostly agreed, while noting that in Social Security appeals there might be some need for the SSN. Professor Marcus noted, however, that there are supplemental rules for appeals from the agency, and the Commissioner of Social Security developed a unique special set of identifiers for those cases. In the mine run of civil cases, there appears to be no persuasive reason for including SSNs and the like.

Judge Dever noted that during his tenure as Chair of the Criminal Rules Advisory Committee, that committee had worked on language to ensure that the judge could get an SSN if need be, but that the number need not be included in any public filing.

A representative from the Department of Justice added that the department had created a subcommittee to study this issue, and it had reached consensus that SSNs could be completely redacted in both civil and criminal cases, as could ITINs. Other numbers, however, such as EINs and numbers identifying tax preparers, should not be redacted because, unlike an SSN or ITIN, they do not identify the individual person. These numbers therefore do not present a risk of identity theft and redacting them would create a significant burden. Ms. Dubay noted that members of the Bankruptcy Rules Committee had said that the EIN is often necessary and that it is possessed by an entity most of the time, so including those numbers in public filings rarely presents any concern about identity theft.

Judge Vance subsequently confirmed that no Advisory Committee members had any objection to redacting SSNs entirely.

Ms. Dubay then sought feedback on a different issue: whether the redaction requirement for minors should be changed from the use of initials to the use of pseudonyms. One judge member wondered who would decide on the appropriate pseudonym and at what point in the litigation. Judge Dever responded that in criminal cases typically the DOJ devises a pseudonym that would first appear in the indictment, but on the civil side it is harder to know.

Professor Marcus questioned whether the use of the pseudonym should be expanded to discovery materials in which a minor's name would be more likely to appear. If such materials are used as exhibits or attachments to filings then perhaps they should be redacted. A judge member agreed, noting that often a parent's name is not redacted, leaving the minor open to easy identification. Judge Vance added that full names might appear in a document or deposition transcript that might come to light. Judge Dever, however, noted that typically the attorneys can handle these issues by agreement and ensure that a pseudonym is used in public filings. Another judge member added that in family law cases, states have developed workarounds such as a "sensitive data sheet" that details attorneys' agreements on what can be publicly filed and what must be redacted or perhaps filed under seal.

Ms. Dubay thanked the Advisory Committee for its feedback and said she would provide an update, and perhaps proposed action items, at the April 2026 meeting.

Service and E-filing by Self-Represented Litigants

Professor Struve updated the Advisory Committee on efforts to develop rules around self-represented litigants' use of CM/ECF. She explained that the two major parts of the project are: (1) to amend Rule 5(b) to eliminate the requirement of separate paper service on a litigant who is going to receive materials through CM/ECF; and (2) to presumptively permit self-represented litigants to file electronically unless a court or local rule bars them from doing so and to provide that a local rule or general order that bars self-represented litigants from using the court's electronic filing system must include reasonable exceptions or permit the use of other electronic methods. Each advisory committee has discussed these proposals and have been generally favorable (though bankruptcy cases may have special considerations that necessitate different rules), and Professor Struve reported that there is an emerging consensus that may yield proposed rule amendments in at the spring meetings. But there are still some outstanding questions on which feedback would be helpful.

One such question is what "reasonable exceptions" a district court may adopt to the presumption of access to CM/ECF by self-represented litigants. Professor Struve suggested an approach that would require district courts to provide access to self-represented litigants, so long as those litigants complied with various "reasonable conditions," such as CM/ECF training. This would provide flexibility to districts to ensure that CM/ECF is used properly. The bankruptcy liaison queried what the source of funding for such trainings would be. Professor Struve responded that we would hear from districts in the public-comment period about the feasibility of the proposal and noted that currently clerk's offices must deal with (sometimes voluminous) paper filings in cases involving self-represented litigants that would be significantly reduced by use of CM/ECF. The clerk liaison added that in his district his office runs a training (with a quiz at the end) and that it is preferable to dealing with paper files.

Discussion then turned to potential amendments to the service requirements under Rule 5(b). Professor Struve explained that current Rule 5(b)(2)(E) provides that electronic filing suffices for effective service unless the filer learns that the document did not reach the person to be served. The proposed amendment keeps this provision intact but moves it to a new subsection that clarifies that a "notice of case activity" from CM/ECF ordinarily satisfies the service requirement. Professor Marcus inquired about a proposed new Rule 5(b)(3) that provides that service of a paper that is not filed must be by means other than CM/ECF; since a paper that is not filed (such as a Rule 11 motion) must be served by some other method than CM/ECF, such a rule is unnecessary. Professor Marcus also questioned the use of the term "notice of case activity," which does not appear elsewhere in the rules. Professor Struve responded that she would look closely to make sure the use of the term does not supplant any other rule provisions. But she emphasized that some term is necessary, and this seemed most precise.

Professor Struve concluded by noting that work ongoing and that amendment proposals may be forthcoming at the spring meeting.

Attorney Admissions

Professor Struve reported that the intercommittee subcommittee considering admissions to the bars of the district courts continues to study the issue. The subcommittee's chair, Standing Committee member Judge Paul Oetken (S.D.N.Y.), will be departing at the conclusion of his term, so a new chair will need to be appointed. The subcommittee continues its research and outreach and will report on its progress at a future meeting.

Report from the Federal Judicial Center

Due to the ongoing lapse in appropriations, a representative from the FJC could not attend this meeting. But a report on its recent work is in the agenda materials and it details many important recent and ongoing projects. Judge Vance thanked the FJC for its comprehensive and meaningful work for the judiciary and the rulemaking process.

Judge Vance then adjourned the meeting.

List of Public Observers		
First Name	**Last Name**	**Organization, if known**
Thomas	Allman	Professor
John	Beisner	Skadden
Taylor	Bird	Catholic University Law School
Justin	Bouffard	Catholic University Law School
Christopher	Brancart	Brancart LLP
Allison	Bruff	Bailey Glasser
Katherine	Charonko	Bailey Glasser
Andrew	Cohen	Buford Capital
Alex	Dahl	Lawyers for Civil Justice
Thomas	Green	American College of Trial Lawyers
Peter	Harter	
John	Hawkinson	Independent Journalist
William	Holstrom	American Association for Justice
Danielle	Kalil	University of Denver
Lidia	Kekis	Paul, Weiss, Rifkind, Wharton & Garrison LLP
Robert	Levy	Exxon
Leah	Lorber	GSK
Kaiya	Lyons	American Association for Justice
William	Marra	Certum Group
James	McCrystal	Sutter Law
Christopher	Mee	Catholic University Law School
Jeff	Overley	Journalist, Law 360
Rebecca	Pontikes	Pontikes Law
John	Rabiej	Rabiej Litigation Law Center
Joseph	Sellers	Cohen Milstein
Seamus	Smiley	Catholic University Law School
Daniel	Steen	Lawyers for Civil Justice
Susan	Steinman	American Association for Justice
Derek	Webb	Catholic University Law School
John	Welte	Catholic University Law School