ADVISORY COMMITTEE
ON
CIVIL RULES

October 24, 2025

AGENDA
Meeting of the Advisory Committee on Civil Rules
October 24, 2025 | Washington, D.C.

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2. Approval of the Minutes (Action Item)

3. Report of the Rules Committee Staff (RCS)

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5. Amendments Related to Cross-Border Discovery

INFORMATION ITEMS

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SUGGESTIONS TO REMOVE FROM CONSIDERATION

UPDATE

TAB 1

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

Carolyn A. Dubay, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Allison H. Eid United States Court of Appeals Denver, CO	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Sarah S. Vance United States District Court New Orleans, LA	Professor Richard L. Marcus University of California College of the Law, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable Michael W. Mosman United States District Court Portland, OR	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Jesse M. Furman United States District Court New York, NY	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON CIVIL RULES

Chair	Reporter
Honorable Sarah S. Vance United States District Court New Orleans, LA	Professor Richard L. Marcus University of California College of the Law, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Members

Honorable Cathy Bissoon
United States District Court
Pittsburgh, PA

Honorable Jane Bland
Supreme Court of Texas
Austin, Texas

David J. Burman, Esq.
Perkins Coie LLP
Seattle, WA

Honorable Annie Christoff
United States District Court
Memphis, TN

Professor Zachary Clopton
Northwestern University
Pritzker School of Law
Chicago, IL

Honorable David C. Godbey
United States District Court
Dallas, TX

W. Mark Lanier, Esq.
The Lanier Law Firm
Houston, TX

Jocelyn D. Larkin, Esq.
Impact Fund
Berkeley, CA

Honorable M. Hannah Lauck
United States District Court
Richmond, VA

Honorable R. David Proctor
United States District Court
Birmingham, AL

Honorable Marvin Quattlebaum, Jr.
United States Court of Appeals
Greenville, SC

Honorable Manish S. Shah
United States District Court
Chicago, IL

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Assistant Attorney General (ex officio)
United States Department of Justice
Washington, DC

David C. Wright III, Esq.
Robinson, Bradshaw & Hinson, P.A.
Charlotte, NC

Liaisons

Honorable D. Brooks Smith
(*Standing*)
United States Court of Appeals
Duncansville, PA

Honorable Catherine P. McEwen
(*Bankruptcy*)
United States Bankruptcy Court
Tampa, FL

Consultant

Professor Edward H. Cooper
University of Michigan Law School
Ann Arbor, MI

Clerk of Court Representative

Thomas G. Bruton
Clerk
United States District Court
Chicago, IL

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
Sarah S. Vance Chair	D	Louisiana (Eastern)	Member: 2025 Chair: 2025	---- 2028
Cathy Bissoon	D	Pennsylvania (Western)	2021	2027
Jane Bland	JUST	Texas	2022	2028
David J. Burman	ESQ	Washington	2021	2026
Annie Christoff	M	Tennessee (Western)	2024	2027
Zachary D. Clopton	ACAD	Illinois	2023	2026
David C. Godbey	D	Texas (Northern)	2020	2026
W. Mark Lanier	ESQ	Texas	2025	2028
Jocelyn D. Larkin	ESQ	California	2024	2027
M. Hannah Lauck	D	Virginia (Eastern)	2022	2028
R. David Proctor	D	Alabama (Northern)	2021	2027
Marvin Quattlebaum, Jr.	C	Fourth Circuit	2024	2027
Manish S. Shah	D	Illinois (Northern)	2023	2028
Brett A. Shumate*	DOJ	Washington, DC	----	Open
David C. Wright	ESQ	North Carolina	2024	2027
Richard Marcus Reporter	ACAD	California	2023	2028
Andrew Bradt Associate Reporter	ACAD	California	2023	2028

Principal Staff: Carolyn Dubay, 202-502-1820

* *Ex officio* representative on behalf of the Assistant Attorney General, Civil Division

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Administrative Office of the U.S. Courts

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Sarah A. Sraders, Esq.
Rules Law Clerk

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

Federal Judicial Center

Hon. Robin L. Rosenberg
Director

Appellate Rules Committee
Tim Reagan, Ph.D., J.D.
Senior Research Associate

Civil Rules Committee
Emery G. Lee, Ph.D., J.D.
Senior Research Associate

Evidence Rules Committee
Elizabeth Wiggins, Ph.D., J.D.
Division Director

Timothy Lau, Ph.D., J.D.
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Bankruptcy Rules Committee
Carly Giffin, Ph.D., J.D.
Senior Research Associate

Criminal Rules Committee
Brittany Ripper, Ph.D., J.D.
Research Associate

Elizabeth Wiggins, Ph.D., J.D.
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Standing Committee
Tim Reagan, Ph.D., J.D.
Senior Research Associate

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Dean Troy A. McKenzie *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*) TBD (*Criminal*)

TAB 2

ADVISORY COMMITTEE ON CIVIL RULES
SUBCOMMITTEES
(effective October 1, 2025)

Cross-Border Discovery Subcommittee Hon. Manish S. Shah, Chair Prof. Zachary Clopton Hon. Catherine P. McEwen (Liaison)	**Discovery Subcommittee** Hon. David Godbey, Chair Hon. Annie Christoff David Burman, Esq. David Wright, Esq. Thomas Bruton, Clerk
Rule 7.1 Subcommittee Hon. Jane N. Bland, Chair Hon. Manish S. Shah David Burman, Esq.	**Rule 41 Subcommittee** Hon. Cathy Bissoon, Chair Prof. Zachary Clopton David Burman, Esq.
Rule 43/45 Subcommittee Hon. M. Hannah Lauck, Chair Hon. Jane Bland David Burman, Esq. Mark Lanier, Esq. Jocelyn Larkin, Esq. Hon. Benjamin Kahn (Liaison)	**Third-Party Litigation Funding (TPLF) Subcommittee** Hon. R. David Proctor, Chair Prof. Zachary Clopton Mark Lanier, Esq. Jocelyn Larkin, Esq. David Wright, Esq. Hon. A. Marvin Quattlebaum

TAB 3

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

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

Welcoming Remarks

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

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

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

Opening Business

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

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

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

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

Action Items – Proposed Amendments for Publication and Public Comment

Rule 41(a)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 45(b)

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 7.1(a)

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

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

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

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

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

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

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

Intercommittee Reports

Privacy Issues

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

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

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

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

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

Service and E-Filing by Self-Represented Litigants

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

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

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

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

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

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

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

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

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

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

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

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

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

Attorney Admissions

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

Subcommittee Reports

Discovery Subcommittee

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

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

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

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

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

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

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

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

Rule 43/45 Subcommittee

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

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

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

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

Third-Party Litigation Funding Subcommittee

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

Cross-Border Discovery Subcommittee

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

Other Information Items

Rule 55 Default Judgments

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

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

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

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

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

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

Random Case Assignment

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

Items to be Dropped from the Agenda

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

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

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

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

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

Federal Judicial Center Update

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

Recognition of Judge Bates

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

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

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

With that, Judge Rosenberg adjourned the meeting.

TAB 4

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 10, 2025

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in Washington, D.C., on June 10, 2025. All members were present:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Shapiro, Esq.[1]
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Joan N. Ericksen
Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following individuals also attended to support the work of the Standing Committee: Professor Catherine T. Struve, Reporter for the Standing Committee; Carolyn A. Dubay, Secretary to the Standing Committee and Chief Counsel, Rules Committee Staff; Kyle Brinker, Law Clerk to the Standing Committee; and Professor Bryan A. Garner and Professor Joseph Kimble, Style Consultants to the Standing Committee. Professor Daniel R. Coquillette, Consultant to the Standing Committee, attended remotely.

The following individuals attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules:
Judge Allison H. Eid, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules:
Judge Rebecca B. Connelly, Chair
(attended remotely)
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules:
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant
(attended remotely)

Advisory Committee on Criminal Rules:
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules:
Judge Jesse M. Furman, Chair
Professor Daniel J. Capra, Reporter

[1]Ms. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Todd Blanche.

Other attendees at the meeting included: S. Scott Myers, Esq. and Bridget M. Healy, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Laurie Spolidoro, Deputy General Counsel, Administrative Office of the U.S. Courts; John S. Cooke, Director, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC. Guests who attended remotely included: Chief Judge Michael A. Chagares, on behalf of the Executive Committee of the Judicial Conference; and Judge Sarah Vance, as incoming Chair of the Advisory Committee on Civil Rules.

1. OPENING BUSINESS

A. Welcome and Opening Remarks

Judge John D. Bates, Chair of the Standing Committee, called the meeting to order and welcomed the members and participants, including those attending remotely. Judge Bates also recognized members nearing the end of their terms on the Standing Committee, including Judge Jennifer Zipps, Judge Patricia Millett, and Mr. Kosta Stojilkovic.

Judge Bates acknowledged that it was his final meeting as the Chair of the Standing Committee[2] and noted that Judge James Dever, Chair of the Criminal Rules Committee, will serve as the next Chair of the Standing Committee while Judge Michael Mosman will succeed Judge Dever to serve as the next Chair of the Criminal Rules Committee. Judge Bates also informed the members that Judge Sarah Vance will replace Judge Robin Rosenberg as Chair of the Advisory Committee on Civil Rules. Judge Rosenberg will become the new Director of the FJC, replacing John Cooke. Judge Bates congratulated Judge Rosenberg on her selection as FJC Director and thanked her for her service to the Advisory Committee. Judge Bates also thanked John Cooke for his extraordinary service to the FJC.

Judge Bates informed the members about recent changes in the Rules Committee Staff. Ms. Carolyn Dubay is the new Chief Counsel for the Rules Committee Staff and Secretary to the Standing Committee. In addition, Scott Myers, staff attorney with the Rules Committee Staff, will retire at the end of June. Judge Bates thanked Mr. Myers and wished him the best in all his future endeavors after commending his bankruptcy rules expertise and noting that Mr. Myers had been a wonderful member of the staff for many years.

Judge Bates also welcomed members of the public and press, who observed the meeting in-person and remotely.

B. Discussion and Approval of the Meeting Minutes

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved the minutes of the January 7, 2025, meeting.

[2]A summary of remarks offered in tribute to Judge Bates on the occasion of his last meeting as Chair of the Standing Committee is provided in Part 5 of these minutes.

C. Comments on the 2025 Strategic Plan for the Judiciary

Chief Judge Michael Chagares, on behalf of the Executive Committee of the Judicial Conference and in his capacity as Judiciary Planning Coordinator, provided an update on the draft 2025 Strategic Plan for the Judiciary. Chief Judge Chagares noted that the draft 2025 Strategic Plan was sent to all chief judges and all committee chairs for feedback and asked Committee members to submit any feedback by the end of June. Judge Bates requested that Committee members submit their comments to him for coordination of feedback. The draft 2025 Strategic Plan is expected to be submitted to the Judicial Conference for consideration at its September 2025 session.

2. ACTION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

The Standing Committee next heard reports on action items from each of the five Advisory Committees.[3] A summary of changes made by the Standing Committee to proposed amendments presented for final approval are set forth in the Appendix to these minutes.

A. Advisory Committee on Evidence Rules – Judge Jesse M. Furman, Chair

Judge Furman presented three action items on behalf of the Advisory Committee on Evidence Rules, which last met on May 2, 2025, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 55.

1. *Amendments for Final Approval*

a. Amendments to Rule 801(d)(1)(A)

Judge Furman presented the Advisory Committee's request for the Standing Committee to recommend to the Judicial Conference final approval of amendments to Rule 801(d)(1)(A) regarding the hearsay exclusion for prior inconsistent statements of testifying witnesses. The text of the proposed amendment appears on page 64 of the agenda book and the written report begins on page 56. Judge Furman noted the current rule limits admissibility of prior inconsistent statements to those that were given under oath and subject to cross-examination. The amendment eliminates that limitation and provides that all prior inconsistent statements of a testifying witness are admissible over a hearsay objection, regardless of whether the prior statement was given under oath and subject to cross-examination.

Judge Furman reported that during the public comment period, which ran from August 15, 2024, to February 17, 2025, the Advisory Committee received eight comments, which were overwhelmingly positive and included support from the Federal Magistrate Judges Association, the American College of Trial Lawyers, and the National Association of Criminal Defense Lawyers. The comments echoed the reasons put forward by the Advisory Committee for the amendment. Namely, the amendment would eliminate the need for a confusing jury instruction on whether and when prior inconsistent statements can be considered for their truth as opposed to impeachment only. The amendment would also align the rule with Rule 801(d)(1)(B)'s treatment of prior consistent statements. The amendment would further address a perceived imbalance in the rules that favor the government in criminal cases, as most witnesses testify for the prosecution,

[3] Information items presented by the Advisory Committees are set forth in Part 3 of these minutes.

and thus the government is able to secure prior statements under oath by having those witnesses testify before the grand jury. Judge Furman also noted that the Advisory Committee recommended final approval of the amendment to Rule 801(d)(1)(A) by a vote of 8-1.

Judge Furman also informed the Standing Committee of edits made to the committee note after the public comment period. First, the note was updated to observe that the amendment would remove the need for a confusing jury instruction attempting to distinguish between substantive and impeachment uses for prior inconsistent statements. The committee note also points out that the amended rule treats consistent and inconsistent statements similarly. Second, the updated committee note stresses that the rule governs admissibility rather than sufficiency. These changes were already reflected in the committee note set out in the agenda book. Judge Furman noted one additional change not set out in the agenda book: in the committee note, the word "exception" found on page 65, line 32 of the agenda book, should read "objection."

The members then discussed the proposed amendment.

A judge member observed that Rule 613(a) requires a party, on request, to show or disclose the contents of a prior statement to an adverse party's attorney when examining a witness about the prior statement. With the proposed amendment to Rule 801(d)(1)(A) allowing prior statements to be considered for their truth, the judge member asked whether Rule 613(a) should also be changed to require disclosure without a request from the adverse party. Professor Capra explained that Rule 613(a) is inapplicable in those circumstances and Rule 613(b) would apply. Specifically, Rule 613(a) speaks to cross-examination with a prior inconsistent statement, while Rule 613(b) speaks to admitting a prior inconsistent statement. Since the prior statements are offered not for cross-examination but for proof of a fact, a party must introduce evidence of the statement and Rule 613(b) controls.

Judge Bates further asked whether there was substance to a commenter's concern that a "deepfake" (digitally fabricated or altered evidence) might be proffered to try to show a prior inconsistent statement. Professor Capra acknowledged that deepfakes may be a problem in general for any rule of admissibility, but that issue would be addressed with potential rule development regarding deepfakes rather than a rule about prior inconsistent statements. Judge Bates also raised a question about language in the committee note on page 66, line 52 of the agenda book, which provided in part that if statements "are admissible for purposes of proving the witness's credibility, they are admissible as substantive proof." He proposed changing "proving" to "assessing." Judge Furman and Professor Capra agreed to this edit.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee unanimously approved recommending to the Judicial Conference final approval of the amendment to Rule 801(d)(1)(A), with the minor revisions discussed above and indicated in the Appendix.

2. *Preliminary Drafts for Publication for Public Comment*

Judge Furman next presented the Advisory Committee's request that the Standing Committee approve publication for public comment on proposed amendments to Rule 609 and proposed new Rule 707.

a. **Preliminary Draft of Amendments to Rule 609**

Judge Furman first presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 609, which relates to use of prior criminal convictions for impeachment purposes. The text of the proposed amendments begins on page 71 of the agenda book and the written report begins on page 57.

The proposed amendment to Rule 609(a)(1)(B) addresses the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant's character for truthfulness. Judge Furman provided background for the Advisory Committee's request, and noted that in 2023, the Advisory Committee received a proposal to abrogate Rule 609 entirely. The Advisory Committee ultimately decided to proceed with a more modest proposed amendment to the rule text, as well as a shortened committee note. Judge Furman explained that the proposed amendment addresses the concern that district courts were not heeding Congress's intent that the default rule weigh *against* admissibility of prior convictions. Specifically, the proposed amendment adds "substantially" before the word "outweighs" in Rule 609(a)(1)(B).

Judge Furman recounted developments since the Advisory Committee's discussion of the proposed amendments at its fall 2024 meeting. First, additional recent cases indicated that some courts were continuing to admit such evidence, effectively applying a default rule in favor of admissibility of prior convictions. Second, the Department of Justice's original objections and concerns about language in the committee note had been addressed, and DOJ now supports the proposed amendment to Rule 609(a)(1)(B). Third, Judge Furman noted that the New York Council of Defense Lawyers submitted a letter supporting the proposed amendment.

Judge Furman next described the proposed amendment to Rule 609(b), which provides for an exclusionary balancing test for admissibility of convictions where more than 10 years have passed since the later of conviction or release from confinement. The current rule specifies when the 10-year period begins but does not specify when the time-period ends. The proposed amendment addresses a circuit split over when the period ends, and as Judge Furman explained, courts have used several different end dates, including the date of the alleged offense, the date of indictment, the date of trial, and the date of the witness's testimony. The Advisory Committee decided that the date of trial is the best available option because it is the date least subject to manipulation by the parties. The proposed amendment clarifies that the 10-year time-period for the rule's applicability is measured from the date of conviction or end of confinement, whichever is later, until the "date of trial."

Judge Furman noted that the Advisory Committee voted 8-1 to recommend the proposed amendments to Rule 609(a)(1)(B) and 609(b) for publication for public comment.

The members then discussed the proposed amendments.

Regarding Rule 609(a)(1)(B), a judge member asked if adding "substantially" in Rule 609(a) would effectively import the caselaw interpreting "substantially outweigh" in Rule 609(b)(1), which generally does not permit evidence of a prior conviction. Professor Capra responded that this change likely would import that standard; however, he said, a study of cases applying Rule 609(b) indicated that it does not result in automatic exclusion of the convictions to which it applies.

Another judge member asked if the fourth paragraph of the draft committee note, found on page 74 of the agenda book, properly describes as "problematic" the practice of some courts to admit only the fact of a felony conviction to impeach a defendant. Judge Furman responded that the Advisory Committee viewed this practice as problematic; it leaves the jury to guess as to what the felony conviction was. Professor Capra said that the original note was more detailed, and the current draft note reflects a compromise with the DOJ. As to this issue, a practitioner member asked how the paragraph relates to the amendment and thought that describing the practice as "problematic" was gratuitous. Professor Capra said that the paragraph explains that such practice by courts is inappropriate because Rule 609(a)(1)(B)'s balancing test requires weighing the probative value and prejudicial effect of evidence of a particular criminal conviction, not of a generic "felony conviction." The language in the note, he reiterated, is a result of compromise. The judge member said it could be helpful for the committee note to cite an appellate decision that provides guidance about the permissible scope of cross-examination concerning the facts underlying a conviction. Professor Capra commented that the second paragraph of the committee note, starting on page 73, line 54 of the agenda book, addresses this concern. That paragraph observes that the permissible specifics concerning a conviction are governed by Rule 609. Professor Capra explained that, under the caselaw, the jury may know only that the defendant was convicted, what the conviction was for, and the date of the conviction.

Another judge member expressed concern that if the fourth paragraph of the committee note describes the only-the-fact-of-a-felony-conviction compromise as "problematic," that might lead judges to think that the note was saying it was inappropriate to adopt such a compromise even in instances when the defendant affirmatively agrees to the only-the-fact-of-a-felony-conviction approach. Another judge member agreed; she suggested that the issue is a nuanced one where the interests of the defendant will play out differently depending on the circumstances. She argued that the comment should not say flatly that this type of compromise is always bad. Sometimes the defendant wants the jury to know the name of the conviction, but there are times when the name of the conviction is misleading.

A practitioner member suggested changing the sentence on page 74, line 75 of the agenda book, to begin: "Absent agreement by the parties, that solution is problematic…." Professor Capra and Judge Furman agreed. With that change, Judge Furman suggested, the paragraph could be retained in the committee note as published for public comment, and the Advisory Committee would reconsider the committee note with the benefit of comments by the Standing Committee and the public. A judge member asked whether the initial phrase should refer to "agreement by the defendant" rather than "agreement by the parties"; but Judge Furman and Professor Capra preferred "agreement by the parties." Judge Furman accepted a style suggestion to remove the comma after "problematic." In the same sentence of the committee note (page 74, line 79), Judge Bates suggested changing "character of truthfulness" to "character for truthfulness," and this change was agreed to. A judge member proposed changing "is problematic" to "may be problematic." Judge Furman responded that the Advisory Committee's view is that the practice is

problematic, and Professor Capra argued for retaining "is problematic," especially in light of the addition of "Absent agreement by the parties." The practitioner member who had initially questioned the use of the term "problematic" reiterated that the term does not provide actual guidance. Professor Capra reiterated that the language was a compromise with the DOJ. Judge Bates suggested keeping the language "is problematic" for the public comment period to receive feedback.

As to the third paragraph of the committee note, Judge Bates asked if the example starting on page 74, line 63 of the agenda book discusses the application of Rule 403, not Rule 609. If so, Judge Bates asked whether a discussion of how Rule 403 is applied belongs in the committee note to Rule 609. Professor Capra and Judge Furman both stated that they thought the example was helpful but that they would not have strong objections to removing it from the committee note.

Judge Bates raised two additional points. In the last paragraph of the committee note (page 74, line 82), Judge Bates suggested removing "original" or replacing it with "current" because it is not referring to the rule as first promulgated. Several members and consultants then suggested "existing," "prior," and "earlier." Judge Bates, Judge Furman, and Professor Capra agreed to use "existing." Second, Judge Bates observed that the committee note's second paragraph (agenda book page 73, lines 56-57) uses the terms "bad acts" and "specific acts," though these terms do not appear in the Evidence Rules. Rather, the rules use the term "instances of conduct." Professor Capra said that "bad acts" is a very common reference and suggested retaining the term. A judge member proposed using "conduct underlying the conviction." Judge Furman supported using "specific instances of conduct," which is found in Rule 608(b). Professor Capra thought that "conduct" does not distinguish the act from the conviction itself. Judge Bates responded that Rule 608(b) uses the term "conduct." Professor Capra accepted the change to "specific instances of conduct."

Regarding the proposed amendment to Rule 609(b), a judge member asked whether the phrase "the date of trial" (agenda book page 72, line 28) was sufficiently clear. Did it mean the first day of trial? The date jury selection begins? The member asked whether the language should be more specific, such as referring to the date the jury is convened. Judge Furman and Professor Capra offered that any difference in interpretation would likely be a matter of days and ultimately not a material difference. Judge Furman noted that the rule cannot be tethered to a date concerning the jury because the rule would apply in a non-jury trial as well. He said that he was not averse to a different term, but he thought date of trial is clear. Professor Capra asked if the "date that trial is set" is more specific than "date of trial." Another judge member said that there can be a big difference between the date that a trial is initially scheduled and the date that the jury for that trial is impaneled. Professor Capra stressed that the rule was merely being approved for publication for public comment. Judge Bates suggested using "the date that trial commences" as an end date that is more specific and addresses some of the concerns raised. Judge Furman said he is fine with "the date that trial commences" but thought "commences" still introduces ambiguity. Judge Furman and Professor Capra reiterated that the specific end date is likely immaterial because the difference between them would most likely be in terms of days or weeks. Professor Capra said that the goal was certainty and "the date that trial commences" would be fine. Professor Garner noted that "commence" is routinely changed to "begin" throughout the rules. Professor Capra and Judge Bates supported using "begins."

Judge Furman summarized the Standing Committee's revisions to the proposed amendment. In proposed Rule 609(b) "the date of trial" was changed to "the date trial begins," and a conforming change was made to the last sentence of the committee note. In the second paragraph of the committee note, "bad acts" was changed to "specific instances of conduct." The third sentence of the fourth paragraph was changed to read: "Absent agreement by the parties, that solution is problematic because…." Also in the fourth paragraph, "character of truthfulness" was changed to "character for truthfulness." In the fifth paragraph, "original rule" was changed to "existing rule."

Following this discussion, upon motion and a second, with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 609(a) and Rule 609(b), with the revisions discussed above.

b. Preliminary Draft of New Rule 707

Judge Furman next reported on the Advisory Committee's efforts to address two concerns with the increased use of artificial intelligence and machine-generated evidence: (1) authenticity concerns with possible deepfakes,[4] and (2) reliability concerns when machine learning output is offered as evidence. Proposed new Rule 707 addresses the latter concern and sets standards for admissibility of machine-generated evidence offered without an expert witness. The text of proposed Rule 707 begins on page 75 of the agenda book and the written report begins on page 58.

Judge Furman explained that the Advisory Committee viewed the reliability issues attendant to machine-generated output as akin to reliability issues attendant to expert testimony under Rule 702, which applies in situations when a testifying expert uses machine-learning to reach a conclusion. There are circumstances, however, when machine-generated output may be introduced without a testifying expert. As examples, Judge Furman explained how machine-generated output can be used without an expert to find patterns in vast amounts of stock trading data, to assess the complexity of software programs to determine the likelihood that code was misappropriated, or to determine whether two works are substantially similar. In these examples, the machine output could be offered without the use of expert testimony subject to Rule 702, such as through a lay witness or directly with a certification of authenticity under Rule 902(13). Judge Furman noted that the Advisory Committee felt that a new rule to address this situation was preferable to amending Rule 702. Rule 702 was recently amended in 2023, and the Advisory Committee tries to avoid multiple amendments to a single rule over a short time period. Also, Rule 702 is a rule of general applicability, so a separate subdivision dealing with machine-generated evidence would be difficult to draft because of its highly specific application. Therefore, the Advisory Committee recommended a new rule to address machine-generated output that requires the same showing of reliability required for a testifying expert under Rule 702(a)-(d).

Judge Furman noted that the Advisory Committee included an exception to the required showing under new Rule 707 when the output is produced by basic scientific instruments. This exception

[4] The Advisory Committee's efforts to address deepfakes are described in the information items set forth in Section 3 of these minutes.

is designed to avoid litigation over the output of instruments that can be presumed reliable. Given the wide range of potential instruments and technological change, however, the Advisory Committee felt it was better to leave it to judges to determine whether a particular instrument falls within the exception set forth in proposed Rule 707. Judge Furman noted that a prior draft of new Rule 707 included an exception for routinely relied upon commercial software, but the Advisory Committee removed that language because they felt it would create too broad an exception. Judge Furman noted that the Advisory Committee is aware that this topic raises some related issues concerning disclosure requirements (for example, of the source codes that underly machine-generated output), but feels that such disclosure issues are better addressed by the Advisory Committees for the Civil and Criminal Rules.

Judge Furman noted that the Advisory Committee voted 8-1 to recommend proposed new Rule 707 for publication for public comment. The DOJ was the sole dissenting vote. Judge Furman observed that sometimes when the Advisory Committee forwards a proposed rule for publication, it does so on the assumption that the proposal will be on track for future approval. This was not the case here and the Advisory Committee is agnostic as to whether the rule should ultimately gain final approval. But, as this is an area of significant concern and complexity, the Advisory Committee felt it is important to learn from public comment. Professor Capra added that the Advisory Committee has previously held two panels with experts regarding artificial intelligence and its possible impact on the Evidence Rules, and the public comment period will be valuable.

The members then discussed proposed new Rule 707.

Judge Bates commended the Advisory Committee for starting the effort to address this sensitive but important subject. He asked whether the draft rule should affirmatively state that it applies when machine-generated evidence would be subject to Rule 702 if testified to by an "expert" witness, not just any witness. Judge Furman responded that the Advisory Committee initially had the same thought but realized that specifying "expert" would be tautological because Rule 702 applies only to expert testimony.

As to the draft rule's requirement that machine-generated evidence must "satisf[y] the requirements of Rule 702 (a)-(d)," Judge Bates asked whether the specific reference to subdivisions (a)-(d) was necessary. Professor Capra noted that Rule 702 has introductory language dealing with qualifications that the Advisory Committee did not think appropriate to incorporate into new Rule 707. A practitioner member asked how Rule 702(a) would apply to machine-generated evidence alone because Rule 702(a) scrutinizes how an expert's scientific, technical, or other specialized knowledge will help the trier of fact. Judge Furman explained that to the extent that Rule 702(a)-(d)'s requirements are an awkward fit for a machine rather than a person, the Advisory Committee thought the advantage of the courts' familiarity with the standards in Rule 702 outweighed the disadvantages of importing the requirements wholesale. Professor Capra added that public comment might elucidate the instances in which machine-generated evidence would cover obvious points that the jury would already know about on its own.

A judge member observed that while the proposed rule text made an exception for "basic scientific instruments" (agenda book page 72, lines 6-7), the committee note (page 77, line 68) used the term "simple scientific instruments." This member suggested that "simple" captured the idea better than "basic." She asked whether it would be helpful to refer to instruments that were traditionally or

historically employed. Professor Capra and Judge Bates discussed whether the language "simple" is an improvement over "basic" and whether judges would have difficulty determining what fits in that category. Professor Capra agreed to update the draft rule text to refer to "simple" rather than "basic," noting that the language may still change based on public comment.

A judge member expressed enthusiasm about this rulemaking effort and had two comments. First, the committee note (page 77, lines 71-73) states that the rule does not apply when the court can take judicial notice that the machine output is reliable. The member asked if the Advisory Committee would consider deleting that sentence because it may encourage parties to attempt to avoid Rule 702 by asking the court to take judicial notice under Rule 201. Professor Capra said that judges currently take judicial notice of certain artificial intelligence outputs like Google Maps, and he explained that the Advisory Committee had added this passage to the committee note in response to input from a judge on the committee who questioned whether a Rule 707 hearing should be held for something when judicial notice has already been taken of its reliability. Second, the last paragraph of the draft committee note referred to "the notice principles applicable to expert opinion testimony." The member suggested that the language be changed to "the notice principles applicable to expert opinion testimony and reports of examinations and tests…" because machine-generated output is more similar to expert examinations and tests than expert opinion testimony. He said that this would expand the reference to encompass other salutary discovery provisions like a continuing duty to disclose and a district court's regulatory authority. Professor Capra and Judge Furman agreed that the proposed addition could be useful.

Judge Bates cautioned that while the committee note referred to "the notice principles applicable to expert opinion testimony," it was not clear what was intended by "the notice principles." Did this include the notice principles under Civil Rule 26 that include written reports as well as the principles in Criminal Rule 16? Professor Capra said that the Advisory Committee intended the language to be general because adding detailed notice provisions might hinder the efforts of the Civil and Criminal Rules Committees in this area. Ms. Shapiro observed that the DOJ had raised the issue of notice because, if machine-generated evidence is used at trial, the adverse party will need advance notice to prepare to rebut the evidence. More generally, she said that the DOJ's main concerns were that machine-generated evidence is a broad category – far broader than the advisory committee's actual target in this rule, which she took to be focused on addressing expert-opinion-like results produced using generative artificial intelligence. Ms. Shapiro also thought that the Advisory Committee will need to explore the relationship between Rule 902(13) ("Evidence That Is Self-Authenticating; Certified Records Generated by an Electronic Process or System") and this rule. Professor Capra responded that when a judge decides a question of admissibility under Rule 702, the judge applies Rule 104(a) – under which the judge must be persuaded by a preponderance of the evidence that the rule's requirements are met. By contrast, when a party seeks to authenticate evidence under Rules 901(b)(9) or 902(13), the proponent need only make a prima facie showing — enough evidence that a reasonable juror could find the item authentic. Meeting the prima facie test that applies under Rules 901(b)(9) and 902(13) would not suffice under proposed Rule 707.

A practitioner member, responding to Judge Bates, said that it would be difficult for the committee note to be very specific about the notice principles because it depends on the case. He pointed out that the committee note used the word "applicable" ("the notice principles applicable to expert opinion testimony"), and that this directed the reader to consider what kind of case it was and, thus, what rules would apply to such a case. Professor Capra agreed.

A judge member suggested making the notice principles clearer by referencing a particular rule that would be applicable for certain cases. For example, the note could say, "Rule X in civil cases and Rule Y in criminal cases." Professor Capra cautioned against using specific rule numbers because the rules can change. Professor Beale said that the note would have to list several criminal rules, and she advised against it. Professor King agreed that the committee note probably should not cite particular rules but suggested the note could say that "the rules governing discovery and disclosure applicable to expert testimony and reports of examinations and tests should be applied."

Judge Bates observed that the discussion indicated that the notice issue could be a real issue, and that it is difficult to determine what the committee note should say. Professor Capra suggested adding "and reports of examinations and tests" as previously mentioned and ending it there. A practitioner member suggested adding "that would be," thus: "the notice principles that would be applicable …." Professor Capra agreed and also suggested that if the committee wished to make the reference more general, it could refer to "the notice principles applicable under other rules." Judge Furman disagreed with the suggestion to add "under other rules" because there could be a notice principle from caselaw and not tethered to a specific rule that the Advisory Committee would think appropriate to be applied. He also acknowledged that the Advisory Committee views notice as an issue to discuss further, and the Advisory Committee may want to address the issue more with the benefit of public comments.

During this discussion, Judge Furman identified a typographical error in the rule text on page 75, line 5 of the agenda book ("it" and "if" were transposed). Professor Capra summarized the modifications agreed to thus far. In the rule text, "it if" was changed to "if it" and "basic scientific instruments" was changed to "simple scientific instruments." And the last paragraph of the committee note was modified to read in full: "Because Rule 707 applies the requirements of admitting expert testimony under Rule 702 to machine-generated output, the notice principles that would be applicable to expert opinion testimony and reports of examinations and tests should be applied to output offered under this rule."

Judge Bates asked three questions. First, on page 76, line 45, should the committee note say "self-authenticated" rather than simply "authenticated," given that Rule 902(13) concerns self-authentication? Professor Capra said that a party must still file a certificate for evidence to be self-authenticated, so saying "self-authenticated" would be confusing, but he could accept it. Second, on page 76, line 49, could the reference to "The rule" be confusing given that the preceding paragraph discussed Rule 902(13)? Judge Furman said that he would defer to the style consultants. Professor Capra said that the style consultants do not provide guidance for committee notes. He suggested "This rule," and Judge Bates agreed. Third, Judge Bates suggested that the reference on line 51 to "machine evidence" should be changed to "machine-generated evidence" (the term used elsewhere in the note). Professor Capra agreed.

Judge Furman summarized the modifications to the proposal. In the rule text, "it if" became "if it" and "basic scientific instruments" became "simple scientific instruments." In the committee note, at line 45, "authenticated" became "self-authenticated"; at line 49, "The rule" became "This rule"; at line 52, "machine" became "machine-generated"; and at lines 80-82, the end of the last sentence of the note was revised to read "the notice principles that would be applicable to expert opinion testimony and reports of examinations and tests should be applied to output offered under this rule."

Following the discussion, upon motion and a second, and over one objection (by the Department of Justice), the Standing Committee approved publication for public comment on proposed new Rule 707, with the minor revisions discussed above.

B. Advisory Committee on Appellate Rules – Judge Allison H. Eid, Chair

Judge Eid presented the action items on behalf of the Advisory Committee on Appellate Rules, which last met on April 2, 2025, in Atlanta, Georgia. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 101.

1. *Amendments for Final Approval*

Judge Eid reported on the Advisory Committee's request for the Standing Committee to recommend for final approval by the Judicial Conference amendments to Rule 29, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and amendments to Form 4. The text of the proposed amendments begins on page 112 of the agenda book and the written report begins on page 102.

a. Amendments to Rule 29, Rule 32, and the Appendix of Length Limits

Judge Eid first presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rule 29 and conforming amendments to Rule 32 and the Appendix of Length Limits.

Judge Eid began by explaining changes made to the proposed amendments to Rule 29 after publication for public comment. The Advisory Committee received hundreds of comments and held a hearing on the proposed amendments. One item of particular concern during public feedback was a proposed change to Rule 29 made late in the drafting process to eliminate the option to file an amicus brief at the initial hearing stage on consent of the parties. This proposed change to Rule 29 was intended to address concerns about recusal issues caused by amicus filings, and would have required all nongovernmental amici to file a motion seeking the court's permission to file their briefs. Public comment was specifically invited on this point, and the public comments uniformly opposed elimination of the consent option. Commenters stated that the current culture of consent works well, that a motion requirement might change that culture by inviting parties to oppose motions, and that a motion requirement would increase work for lawyers and judges. Moreover, commenters asserted that imposing a motion requirement was not a particularly good solution to the recusal problem. Judge Eid reported that the Advisory Committee found the commenters' arguments persuasive, and ultimately the Advisory Committee unanimously agreed to abandon the proposal to amend Rule 29 to eliminate the consent option for nongovernmental amici.

Judge Eid reported that the public comments also expressed concerns about proposed Rule 29(a)(2)'s statement of the purpose of an amicus brief (which disfavored redundancy in amicus briefs). Public comments indicated that the proposed language was too restrictive and that avoiding redundancy in briefs would pose serious practical problems. This concern is tied to the concern about the proposed motion requirement, with commenters fearing that parties would oppose an amicus filing by asserting that it was redundant. In addition to dropping the proposal to eliminate the party-consent option, the Advisory Committee responded to commenters' concerns by revising

the statement of purpose to closely track that used by the Supreme Court and moved the redundancy language to the committee note.

Judge Eid next discussed the disclosure-related features of the proposal. As to these features, she reported, the public did not speak with one voice. There was considerable opposition to the proposed disclosure requirements, but also notable support. The most controversial provision was proposed Rule 29(b)(4), which in the preliminary draft published for public comment would have required an amicus to disclose whether "a party, its counsel, or any combination of parties, their counsel, or both has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for its prior fiscal year." Opponents of this change argued it would interfere with associational rights and discourage amicus participation, while proponents thought it was an important step to identify parties with influence over the amicus. Judge Eid also noted disagreement over the appropriate threshold for disclosure, with some proponents of the disclosure suggesting a contribution or pledge threshold of 10% rather than 25%. The Advisory Committee ultimately voted 5-4 to remove proposed Rule 29(b)(4) from the set of amendments that it sent forward for final approval. Those who voted to remove proposed Rule 29(b)(4) pointed to the burden of compliance, lack of significant problems, considerable opposition, and the fact that other parts of the proposed rule change (such as proposed Rule 29(a)(4)(E)-(F)) address the problem of entities being created for the sole purpose of an amicus filing. The committee members who voted against removing proposed Rule 29(b)(4) were not swayed by arguments against disclosure by people who would have to make disclosures; those members emphasized that the point of getting this information is to benefit the public and the judges and to support public trust in the judicial system.

Judge Eid reported that the other proposed disclosure requirement that received considerable attention during the comment period was proposed Rule 29(e), dealing with earmarked contributions by nonparties. Much of the critical public comment, however, did not reflect awareness that existing Rule 29(a)(4)(E)(iii) currently requires the disclosure of earmarked contributions by nonparties. Perhaps that is because the current provision is buried deep in an item under a subparagraph, or perhaps it is because it treats both earmarked contributions by a party and earmarked contributions by a nonparty in a single item even though the rest of Rule 29(a)(4)(E) deals only with parties and their counsel. Judge Eid pointed out that one virtue of the proposed amended Rule 29 is that it separates and therefore clarifies the disclosure obligations regarding parties and nonparties. Judge Eid also stated that proposed Rule 29(e) is not a major expansion of the disclosure requirements. In one respect, it reduces the current disclosure requirements for nonparties. Specifically, by setting a $100.00 de minimis threshold, it eliminates the need to disclose modest earmarked contributions that currently must be disclosed. The proposed amendment does, however, expand the disclosure requirements in one respect. The current rule does not require the disclosure of earmarked contributions by members of the amicus, even if they joined the same day they made the contribution to avoid disclosure. The proposed amendment blocks this easy evasion. One commenter noted that requiring that a person be a member "for the prior 12 months" (as the published proposal did) ran the risk that a longtime member who had recently allowed his membership to lapse would lose the protection of the membership exception. To deal with this possibility, the Advisory Committee rephrased this provision to extend the

member protection to a member of the amicus who "first became a member at least 12 months earlier."

The final text of proposed Rule 29(e) can be found on page 119 of the agenda book beginning at line 129. Judge Eid reported that one opponent of proposed Rule 29(b)(4) had noted that the change reflected in Rule 29(e) is a modest tweak to an existing rule that reduces the burden on crowd funding an amicus brief and does not allow evasion of an existing requirement.

Judge Eid noted that the Advisory Committee also wanted to avoid having the expanded disclosure requirements count against a party's word limit. To achieve this, it changed proposed Rule 29(a)(4) to refer to the "disclosure statement," thereby triggering Rule 32(f)'s exclusion of "disclosure statement[s]" from the word count.

Judge Eid observed that although the Advisory Committee had been closely divided regarding the removal of proposed Rule 29(b)(4), it voted unanimously to recommend for final approval the proposed Rule 29 amendments, as amended at its spring meeting, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. Accordingly, the Advisory Committee recommended that the Standing Committee give final approval to the proposed amendments to Rule 29, Rule 32(g), and the Appendix of Length Limits.

Professor Hartnett then noted a few clerical corrections and a style change to the committee note as set forth in the agenda materials. On page 123, line 234, "Rule 29(a)(4)(D)" was changed to "Rule 29(a)(4)." On page 124, line 238, "curiae" was deleted. "Rule 29(a)(4)(E)" was changed to "Rule 29(a)(4)(F)" on page 124, line 245 and on page 127, line 347. And references to Rule 29(a)(4)(D) on page 125, lines 292-93 and on page 127, line 350 were changed to refer to Rule 29(a)(4)(E).

The members then discussed the proposed amendments.

A judge member expressed concern about the proposed amendment to Rule 29(a)(7), which would replace the existing "Except by the court's permission, an amicus curiae may not file a reply brief" with "An amicus may file a reply brief only with the court's permission." The member observed that the proposed amended language would parallel the language in existing Rule 29(a)(8) relating to oral arguments, and he observed that his court gets many requests by amici to participate in oral argument. The member worried that the proposed new phrasing for Rule 29(a)(7) would encourage even more requests by amici to file reply briefs, and he also worried that reply filings by amici would cause logistical problems for the briefing schedule (for instance, the opposing party would want to file a sur-reply to respond to the amicus's reply). Professor Hartnett explained that he had deferred to the style consultants on this proposed change, on the ground that it was purely stylistic. Professor Garner observed that the two phrasings ("Except by permission, may not file" and "may file only with permission") mean the same thing, but he agreed with the judge member that the negative phrasing ("Except by permission, may not file") had more of an admonitory tone ("You may not do it unless"), which might do more to discourage requests. Professor Kimble objected, arguing that the choice was stylistic and that the style guidelines mandate converting double negatives to positives. Professor Beale offered that changing the provision would attract the attention of amici, though she conceded that it would alleviate her concerns if the committee note were to state that the change was purely stylistic. Professor Bartell suggested saying "An amicus

may not file a reply brief except with the court's permission." Professor Hartnett said that he and Judge Eid would be happy with that phrasing. Judge Bates observed that Rules 29(a)(7) and (8) have different language and are viewed differently and treated differently by the bar.

A practitioner member expressed concern with the expansion of the disclosure requirement to include earmarked contributions by new members of organizations, which could require disclosure of a legitimate associational activity, without a showing that the change addresses an existing problem. This member argued that if a person decides to join an organization concurrently with a contribution for an amicus brief by that organization, the explanation could be that they want to become a member of the organization because they see that the organization's work is relevant to them. If the concern behind the disclosure requirement is that the amicus would just say anything the funder told it to say, this member was skeptical that the kinds of amici that judges would lend credence to would actually let a donor tell them what to say. Professor Hartnett responded that the existing disclosure requirement for certain earmarked contributions (in current Rule 29(a)(4)(E)(iii)) is designed to protect against situations where the funder's donation allows it to influence what the amicus says in the brief. He explained that the proposed disclosure requirement for earmarked contributions by new members of an amicus helps make sure that the current disclosure rules cannot be evaded, while the exemption of newly-created amici from that disclosure requirement addresses the concern that new organizations would always have to disclose earmarked contributions by any of their members.

Another practitioner member explained how the proposal had evolved: There was some support at first for requiring disclosure of all earmarked contributions, even by longstanding members of the amicus. But the Advisory Committee gave weight to the concern that such a requirement would disparately impact different kinds of amici, because some amici have large general funds that can support amicus briefs, while smaller amici need to "pass the hat" (solicit donations from their members) any time they want to fund a brief. So the goal was to take a middle road. This member suggested that, in his experience, it is rare for a funder to become a member of the amicus at the eleventh hour unless that funder has a very focused interest in the case.

The members had no comments or suggestions regarding the proposed conforming amendments to Rule 32 and the Appendix of Length Limits.

Professor Hartnett reviewed the changes to Rule 29 – namely, that proposed Rule 29(a)(7) was revised to read "An amicus may not file a reply brief except with the court's permission," and that clerical corrections and a style change were made to the committee note as he had detailed earlier.

Following the discussion, upon motion and a second, with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rule 29, along with the conforming amendments to Rule 32 and the Appendix of Length Limits, with the minor revisions to Rule 29 discussed above and indicated in the Appendix.

b. Amendments to Form 4

Judge Eid next presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Form 4 relating to affidavits accompanying motions to appeal *in forma pauperis*. The goal of the changes is to make

the form simpler and less intrusive. The text of the proposed amendment appears on page 180 of the agenda book, and the written report begins on page 107. Judge Eid reported that the public comments and testimony on the preliminary draft were generally positive, and the Advisory Committee thereafter adopted some suggestions to improve ease of use of the form. Judge Eid also noted that the Advisory Committee unanimously recommended the amendments to Form 4 for final approval.

After an opportunity for discussion, and with no comments from the members, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Form 4.

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Rule 15

Judge Eid next presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 15 relating to appellate review or enforcement of an agency order. The text of the proposed amendment begins on page 186 of the agenda book, and the written report begins on page 108.

Judge Eid provided background to the proposed amendment and explained that it was intended to remove a potential trap for the unwary in Rule 15. The "incurably premature" doctrine holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider. Rule 4, dealing with appeals from district court judgments, used to work in a similar way regarding various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The proposal would make a similar fix to Rule 15 as was previously done for Rule 4. Judge Eid noted that a similar suggestion was considered about twenty-five years ago but was dropped due to strong opposition by judges on the Court of Appeals for the D.C. Circuit. The Advisory Committee has been informed that there is no large opposition from D.C. Circuit judges at this point, though that does not mean there might not be concerns with a particular aspect of the proposal. The proposed amendment to Rule 15 is like the existing Rule 4, but it reflects the party-specific nature of appellate review of administrative decisions, in contrast to the usually case-specific nature of civil appeals. As with civil appeals, the proposed amendment to Rule 15 would require a party that wants to challenge the result of agency reconsideration to file a new or amended petition. Judge Eid reported that the Advisory Committee unanimously recommended publishing the proposed amendment for public comment.

The members then discussed the proposed amendments.

A practitioner member suggested that there was tension between the second and third sentences in draft Rule 15(d): The second sentence says that the prematurely-filed petition for review springs to life when the agency disposes of the last reconsideration request, but the third sentence says that a party intending to challenge an agency's disposition of the reconsideration request must file a new petition for review. Professor Hartnett said that this feature of the proposed rule is parallel to how Rule 4 works – that is, once the motion for reconsideration is decided, the premature notice

becomes effective to review the prior decision, but if the party seeks to also challenge the decision on reconsideration, the party must file a new petition. That is, the difference between the second and third sentences of proposed Rule 15(d) relates to the type of ruling being appealed. Another practitioner member also found the second and third sentences confusing. He suggested that the third sentence read "a party intending to challenge the disposition of the petition for rehearing, reopening, or reconsideration must file a new petition." Professor Hartnett said that the Advisory Committee proposed similar language, but it was changed for style reasons. After further discussion, Professor Kimble suggested saying "If a party intends to challenge the disposition of the petition for rehearing, reopening, or reconsideration, the party must …." Professor Hartnett and Judge Eid agreed, but "the petition" was changed to "a petition."

Following this discussion, upon motion and a second, with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 15, with the revisions discussed above.

C. Advisory Committee on Bankruptcy Rules – Judge Rebecca B. Connelly, Chair

Judge Connelly, who attended the meeting remotely, presented the action items on behalf of the Advisory Committee on Bankruptcy Rules, which last met on April 3, 2025, in Atlanta, Georgia. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 209.

1. *Amendments for Final Approval*

Judge Connelly first presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of proposed new Rule 7043 and proposed amendments to Rules 3018, 9014, 9017, 1007(c), 5009, and 9006.

a. Amendments to Rule 3018

Judge Connelly presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rule 3018, which relates to accepting or rejecting a Chapter 9 or Chapter 11 plan. The text of the proposed amendment appears on page 233 of the agenda book and the written report begins on page 211.

Judge Connelly explained that the proposed amendment would authorize a court in a Chapter 9 or 11 case to treat as an acceptance of a plan a stipulation or oral statement on the record. This change would recognize and encourage the process that occurs in most Chapter 11 cases, whereby the negotiations continue right up to the court date.

Judge Connelly also explained that based upon public comment, the Advisory Committee revised the proposal to clarify that the statement on the record would be by the creditor or equity security holder or its authorized agent or attorney. Nothing in the rule indicates that a creditor is compelled to vote, nor does the amendment address filing objections to confirmation or solicitation of voting; it simply provides an additional means for plan acceptance. Judge Connelly reported that there were no public comments in opposition to the amendment.

After an opportunity for discussion and no comments from the members, and upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rule 3018.

b. Amendments to Rules 9014 and 9017 and New Rule 7043

Judge Connelly presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rules 9014 and 9017 and a new Rule 7043, which pertain to the procedure for a bankruptcy judge to approve remote testimony in certain matters. The text of the proposed amendments appears on pages 242, 246, and 251 of the agenda book and the written report begins on page 211.

Judge Connelly explained that proposed new Rule 7043 would make Civil Rule 43, which governs taking remote testimony in civil trials, applicable in adversary proceedings (which are akin to a civil action in the district court). The amendments to Rules 9014 and 9017 would permit remote testimony in contested matters when there are appropriate safeguards and cause to allow it. Judge Connelly said that "cause" incorporates the concept of good cause. Judge Connelly also reported that in drafting these changes, the Advisory Committee consulted with the Committee on Court Administration and Case Management and the Bankruptcy Committee.

Judge Connelly noted that the public comment period produced few comments, and the comments received were generally supportive and helpful. Based on the comments, the proposed amendments to Rule 9014 were slightly revised to clarify that Rule 9014 is not limited to motions. Professor Bartell explained that "new" Rule 7043 is not in substance a new rule; current Rule 9017 already provides that Civil Rule 43 applies to adversary proceedings.

The members then discussed the proposed new rule and amendments.

With respect to the second sentence of the committee note to Rule 9014, Judge Bates asked whether it was accurate to state that Civil Rule 43 "is no longer generally applicable in a bankruptcy case." He noted that Civil Rule 43 would continue to be applicable in adversary proceedings, and aspects of Rule 43 would also apply in contested matters by virtue of the use of parallel language in Rule 9014. Judge Connelly agreed that much of Civil Rule 43 is adopted into Rule 9014. Professor Bartell explained the goal was to make the point that whereas current Rule 9017 includes Civil Rule 43 on its list of rules that "apply in a bankruptcy case," after the amendments, Civil Rule 43 would no longer be on that list. Rule 43 would be applicable only to adversary proceedings and there would be a different standard for contested matters. Judge Connelly suggested removing the phrase "That rule is no longer generally applicable in a bankruptcy case, and." Professor Gibson supported Judge Connelly's suggestion, and this language was deleted from Rule 9014's committee note.

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rules 9014 and 9017 and proposed new Rule 7043, with the minor revision to Rule 9014's committee note discussed above and indicated in the Appendix.

c. Amendments to Rules 1007(c), 5009, and 9006

Judge Connelly next presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rules 1007(c), 5009, and 9006. The proposed amendments address the problem faced by individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation of their completion of the course. The text of the proposed amendments appears on pages 218, 238, and 243 of the agenda book and the written report begins on page 212.

Judge Connelly explained that the proposed amendments would eliminate Rule 1007(c)'s deadline for filing the certificate of course completion (though not the requirement that it be filed). In addition, the amendment to Rule 5009 would add another reminder notice (about the course-completion-certificate requirement) to improve compliance. Judge Connelly noted that the public comments after publication were generally supportive, and no comments opposed the amendments. Professor Gibson said that this project was spurred by Professor Bartell's research, which showed that a significant number of debtors do not receive a discharge only because they failed to take the course or file the appropriate paperwork.

After an opportunity for discussion and with no comments from the members, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Rules 1007, 5009, and 9006.

d. Amendments to Official Form 410S1

Judge Connelly next presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Official Form 410S1. The purpose of the amendments is to reflect an amendment to Rule 3002.1(b) regarding payment changes in home equity lines of credit (HELOCs). The text of the proposed amendment appears on page 252 of the agenda book and the written report begins on page 213. Judge Connelly also noted that no comments were submitted regarding the proposed amendment during the public comment period.

The members then discussed the amendments.

A judge member asked whether HELOC payments would be included in the upper-right-hand box for "New total payment," or whether HELOC amounts would be reflected in Part 3 only. Professor Gibson explained that the "New total payment" section would not be used for the HELOC amount.

With no further discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the amendments to Official Form 410S1.

e. Amendments to Rule 2007.1(b)(3)(B)

Judge Connelly next presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of a technical amendment to Rule 2007.1(b)(3)(B) to correct a cross-reference. The text of the proposed amendment appears on page

221 of the agenda book and the written report begins on page 213. Judge Connelly explained that Rule 2007.1(b)(3)(B) refers to the previous subsection of the rule as "(A)(i) – (vi)." During the restyling of the Bankruptcy Rules, however, the romanettes in (A) were replaced with bullet points. The technical amendment to Rule 2007.1(b)(3)(B) corrects the reference to the romanettes and replaces them with bullet points. Judge Connelly explained that this is a technical amendment that would not benefit from public comment.

The members then discussed the proposed amendments.

A judge member asked if similar changes are required in Rule 2007.1(c)(1) and (3). Professor Bartell agreed that similar changes are needed in those paragraphs and agreed to make the additional changes. Later in the meeting, a practitioner member observed that conforming changes would be needed to the committee note, and Professor Gibson indicated that the committee note would be revised accordingly.

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the technical amendments to Rule 2007.1(b)(3)(B), along with the conforming amendments to Rule 2007.1(c)(1), and (c)(3) and the committee note as discussed above.

f. Amendments to Rule 3001(c)

Judge Connelly then presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of a technical amendment to Rule 3001(c) to reflect a change to the numbering of the rule. The text of the proposed amendment appears on page 225 of the agenda book and the written report begins on page 214.

Judge Connelly and Professor Bartell explained that Rule 3001(c) addresses the supporting information required for a proof of claim. Prior to the restyling, Rule 3001(c)(2)(D) provided for sanctions if the claim holder "fails to provide any information required by this subdivision (c)." The restyling of Rule 3001 redesignated former subdivision (c)(2)(D)—the sanction provision—as (c)(3) and provided for sanctions for the failure "to provide information required by [(c)](1) or (2)." The restyled Rule's new cross-reference inadvertently failed to encompass former Rule 3001(c)(3), which became Rule 3001(c)(4). The Advisory Committee approved a technical amendment that corrects the error by changing "information required by [(c)](1) or (2)" to read "information required by (c)." At the same time, it accepted a suggestion to reorder the numbered paragraphs in Rule 3001(c) so that the sanctions provision would come after all the provisions that it serves to enforce. Thus, the proposed technical amendments flip the order of what are currently Rules 3001(c)(3) and (4) and also amend what becomes Rule 3001(c)(4) to refer to "information required by (c)." Judge Connelly explained that this technical change is simply carrying out the intent of the rule, and that public comment would be superfluous.

The members then discussed the proposed amendments.

A judge member asked why Rule 3001(c)(3)(B) was not being moved up to become part of (c)(1). What the proposal would renumber as Rule 3001(c)(3)(B) provides that "On a party in interest's written request, the creditor must send a copy of the writing described in (1) to that party within 30 days after the request is sent." Professor Bartell said that the rule had always been that way.

Judge Bates asked whether this suggestion was independent from the proposed change to Rule 3001(c). Judge Connelly said that it was. Professor Struve suggested that the reason that the provision is located in what will become Rule 3001(c)(3)(B), and not in Rule 3001(c)(1), is that the provision is relevant *only* to the type of claim treated in Rule 3001(c)(3)(B) – that is, a claim based on an open-end or revolving consumer-credit agreement; as to other types of claims, Rule 3001(c)(1) already requires the creditor to file a copy of the writing described in Rule 3001(c)(1) with the proof of claim, so there would be no reason to separately require that the creditor send a copy of that writing upon request. Judge Bates said that while the Advisory Committee could separately consider the member's suggestion, it seemed independent from the current proposal, which could move forward in the meantime.

With no further discussion, upon motion and a second, and with no opposition, the Standing Committee approved recommending to the Judicial Conference final approval of the technical amendment to Rule 3001(c).

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Official Form 106C

Judge Connelly next presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Official Form 106C, which relates to property that can be claimed as exempt. The text of the proposed amendment begins on page 255 of the agenda book and the written report begins on page 214.

Judge Connelly reported that the proposed amendment to the form includes a total amount of assets being claimed as exempt. This would help bankruptcy trustees comply with their statutory obligation to report assets exempted. Judge Connelly said that this reporting figure is not taking a position on what property is exempted but strikes a balance between the public's need for information and not being overly burdensome on the parties.

After an opportunity for discussion with no comments from the members, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendment to Official Form 106C.

D. Advisory Committee on Civil Rules – Judge Robin L. Rosenberg, Chair

Judge Robin Rosenberg presented action items on behalf of the Advisory Committee on Civil Rules, which last met on April 1, 2025, in Atlanta, Georgia. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 287.

1. *Amendments for Final Approval*

The Advisory Committee had no requests for final approval.

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Rule 41(a)

Judge Rosenberg began her report with the Advisory Committee's request that the Standing Committee approve publication for public comment on proposed amendments to Rule 41(a) relating to voluntary dismissal of actions. The text of the proposed amendment begins on page 328 of the agenda book and the written report begins on page 290.

Judge Rosenberg explained that the Advisory Committee was proposing two amendments to Rule 41(a). The first proposed amendment clarifies that the rule permits the dismissal of one or more claims in an action rather than only allowing dismissal of the entire action. She noted that many courts already allow such flexibility without problems arising, and permitting partial dismissal is consistent with the policy reflected throughout the rules of narrowing the issues pretrial. The second proposed amendment is necessitated by the first and clarifies that only the signatures of active parties who remain in a case are required to sign a stipulation of dismissal. Judge Rosenberg said that requiring the signatures of nonactive parties creates opportunities for such parties to stymie settlements if they either oppose the stipulation or cannot be found to provide their signature.

Judge Rosenberg reminded the Standing Committee that it had considered the proposed amendments to Rule 41 at its January 2025 meeting. Based on the Standing Committee's feedback at that meeting, the Advisory Committee made several changes. First, the Advisory Committee decided not to propose amending Rule 41(d) to permit a judge to award costs when the plaintiff had previously dismissed and refiled "one or more claims." (Currently, Rule 41(d) provides that the judge may award costs to the defendant "[i]f a plaintiff who previously dismissed an action files an action based on or including the same claim against the same defendant.") Second, the Advisory Committee clarified that the cutoff for unilateral dismissal of a claim is the filing of an answer or a motion for summary judgment by the party opposing the claim. Third, the Advisory Committee decided to retain the proposed language in 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. Although a participant in the January 2025 Standing Committee meeting had raised concerns about the proposed amendment's interaction with Rule 54(b), the Advisory Committee found the language in the text was sufficiently clear but added to the committee note information to clarify the amendment's purpose.

The members then discussed the proposed amendments.

A judge member asked why, under Rule 41(a)(1)(A)(i), a motion for summary judgment cuts off the plaintiff's opportunity to unilaterally dismiss its claims but a Rule 12(b) motion does not. Professor Bradt explained that the existing cutoffs have been part of the rule since 1946. In addition, adding Rule 12(b) motions to the list of events that cut off a plaintiff's right to unilaterally dismiss might create an inconsistency with Rule 15(a), which allows amendment of a complaint after receipt of a motion to dismiss under Rule 12.

Professor Bartell noted that the amendment to Rule 41(a)(1)(A) (page 328, line 6) would change "the plaintiff" to "a plaintiff," and asked whether the amendment would allow a single plaintiff to

dismiss an action unilaterally even if there are other plaintiffs that oppose dismissal. Professor Bradt responded that under the current rule with "the plaintiff," a plaintiff in a multi-plaintiff case can dismiss their own action, so that problem was in the rule before. Judge Bates agreed that the problem would have existed, but the language change makes the problem different. A judge member said that "the plaintiff" could be read as the plaintiff with respect to a particular claim, but "a plaintiff" could be read as broader. Judge Bates suggested the sentence could read "a plaintiff may dismiss *its* action," and a member agreed with the idea of saying "a plaintiff may dismiss its action or one or more of its claims." Professor Bradt commented that this would not require a change to the proposed amendment to Rule 41(a)(2) but would require conforming changes to the first paragraph of the committee note.

Professor Cooper expressed concern about making the text "a plaintiff may dismiss an action." He questioned if it is one plaintiff's action if there are multiple plaintiffs, proposing a better rule could be "a plaintiff may dismiss its part of an action or one or more claims." Professor Bradt said that he was not sure that "part of an action" is a familiar term and that he would be reluctant to add it. Professor Cooper suggested, alternatively, "a plaintiff may dismiss one or more or all of its claims." Professor Bradt said that the Advisory Committee wanted to keep the word "action" in the rule to avoid concerns that the rule no longer permits the dismissal of an entire action.

Professor Struve suggested that the Standing Committee could decide to use "a plaintiff may dismiss its action or one or more of its claims" in the text and clarify about Professor Cooper's point in the committee note. For example, the committee note at line 37 could read: "A plaintiff may accomplish dismissal of either its action—if it is the sole plaintiff—or one or more of its claims in an action that includes additional plaintiffs." Professor Bradt said that a concern with this text is that a sole plaintiff may also dismiss one or more of its claims. Professor Struve responded that one could revise the second part of that note sentence to say, "one or more of its claims, whether it is the only plaintiff or not." Professor Bradt, however, wondered whether this issue would cause real-world confusion and said that the Advisory Committee could learn more in the public comment period.

Judge Rosenberg then asked whether the beginning of the committee note's first paragraph as modified was clear. It read: "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 of its claims' in a multi-claim case. A plaintiff may accomplish dismissal of either its action or one or more of its claims unilaterally …." A practitioner member suggested changing the rule text to "a plaintiff may dismiss one, some, or all of its claims in an action without a court order…." Professor Bradt said he did not object, but that the term "one or more claims" was the result of style revision; a previous draft had said "a claim or claims." Thus, Professor Bradt said he would want advice from the style consultants first.

Another practitioner member asked if there would still be a risk – under the other practitioner member's proposed language – of a court interpreting the reference to "one, some, or all" of a plaintiff's "claims" to mean that a plaintiff could dismiss one or more claims but not the action. Professor Bradt suggested changing the phrase to "a plaintiff may dismiss its action or one, some, or all of its claims." Judge Rosenberg asked if "some" was unnecessary. The practitioner member who had proposed the "one, some, or all" phrasing explained that the goal was to make clear that if it's a multi-plaintiff action, the action itself is not dismissed if one of the plaintiffs dismisses all

of its claims. Judge Rosenberg said that Rule 41's title, Dismissal of Actions, suggests that the rule allows a plaintiff to dismiss its action. Professor Bradt questioned whether the Committee could imagine a judge holding that the proposed "one, some, or all of its claims in an action" phrasing does not allow a plaintiff to dismiss its action. Professor Garner indicated that he could not imagine a textualist judge reading the rule that way.

Professor Struve thought that preserving the idea of dismissal of an action as its own concept could be valuable, since the interpretation of whether an order has triggered the start of the time to appeal might depend on whether the claims have been dismissed or the action has been dismissed. Professor Bradt then proposed that the rule could read: "a plaintiff may dismiss its action or one, some, or all of its claims in the action…." Professor Kimble, however, said he supported "may dismiss its action or one or more of its claims."

Judge Bates reminded the committee that the proposal was going out for public comment and that the goal should be to send out for public comment language that seems acceptable, if the committee cannot think of better language. Professor Coquillette said it was time for public comment and generally supported addressing the issue in the text of the rule. Judge Rosenberg suggested that the text of Rule 41(a)(1)(A) could read in relevant part "a plaintiff may dismiss its action or one or more of its claims without a court order…." The accompanying change to the first paragraph of the committee note would read "a plaintiff may voluntarily dismiss 'one or more of its claims' in a multi-claim case. A plaintiff may accomplish dismissal of either its action or one or more of its claims unilaterally…."

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 41, with the revisions to the text and note summarized by Judge Rosenberg in the preceding paragraph.

b. Preliminary Draft of Proposed Amendments to Rules 45(c) and 26(a)(3)(A)(i)

Judge Rosenberg next presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 45(c) and Rule 26(a)(3)(A)(i). The goal of the proposed amendment to Rule 45 is to permit a court to command a distant witness to provide remote trial testimony. The proposed amendment to Rule 26 provides that the parties' pretrial disclosures must state whether the party expects to present witness testimony by remote means. The text of the proposed amendment to Rule 26 begins on page 325 of the agenda book, the text of the proposed amendment to Rule 45(c) begins on page 337, and the written report for the proposed amendments begins on page 292.

Judge Rosenberg explained that the amendments address *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), which held that the court's authority to issue a subpoena for trial testimony extends only within the "subpoena power" of the court. The *Kirkland* court reached this conclusion despite the 2013 committee note to Rule 45, which had noted the court's authority to command a distant witness to provide remote trial testimony. This decision has even affected cases involving subpoenas issued during discovery rather than subpoenas for trial testimony. She noted that the Standing Committee previously raised a question about whether changing Rule 45(c) would affect the unavailability criterion under Civil Rule 32(a)(4) (addressing use of the deposition of a witness who is unavailable) and Evidence Rule 804(a) (addressing criteria for considering a witness

unavailable for purposes of Rule 804(b)'s hearsay exceptions). The Advisory Committee determined that clarifying the subpoena power does not affect these other rules. Judge Rosenberg said that the proposed changes to Rule 45(c)(2) address remote testimony and set the "place of attendance" as "the location where the person is commanded to appear in person."

Professor Marcus stated that the subcommittee continues to look at questions on remote testimony generally and that this change simply recognizes that – once a court decides that remote testimony is warranted – the court should be able to command the witness to provide that testimony. Rule 45(c) is designed to protect the witness against burdens, but it should not impede the court's ability to order remote testimony when remote testimony is appropriate. Judge Rosenberg added that district courts have disagreed about whether they have the power to command distant trial witnesses to appear by remote testimony. The proposed amendment to Rule 26 complements the proposed amendment to Rule 45(c) by requiring pretrial witness lists to disclose "whether the testimony will be in person or remote." This requirement will lead the parties to discuss remote testimony during the pretrial conference to avoid a surprise closer to trial.

Professor Bartell noted that Rule 45(c)(1) does not use the term "place of attendance," and she suggested that the term was thus not an apt choice for proposed new Rule 45(c)(2). Professor Marcus responded that Rule 45(c)(1) permits a subpoena to "command a person to attend a trial, hearing, or deposition" and proposed Rule 45(c)(2) then defines the place of attendance and this should not be hard to follow. Professor Bartell argued that proposed Rule 45(c)(2) should be rewritten to say something like, "A subpoena may command a person to attend remotely under Rule 45(c)(1) at the location where the person is." Professor Marcus said he did not see a problem with the proposal as drafted, but that public comment would show whether others see a problem. Professor Struve agreed with Professor Marcus and argued that—though Rule 45(c)(1) does not use the specific phrase "place of attendance"—it uses the *concept* of a place of attendance because Rule 45(c)(1)(A) talks about that place being within 100 miles of the person's residence and Rule 45(c)(1)(B) talks about that place being within the state where the person resides.

Judge Bates pointed out that the text of proposed Rule 45(c)(2) uses "the place of attendance for remote testimony is the location where the person is commanded to appear in person," while the committee note's third paragraph instead refers to the "place where the person must appear to provide the remote testimony." He asked if the Advisory Committee intended any difference in these formulations. Professor Marcus thought that the committee note explains the rule clearly.

Professor Marcus noted that the Advisory Committee also recommended a corresponding amendment to Rule 26(a)(3)(A)(i) to add "and whether the testimony will be in person or remote." This would alert everyone in the case to the prospect of remote testimony. In the second sentence of the committee note to Rule 26 – which began "Because the rule presently requires" – Judge Bates suggested changing "the rule" to "this rule" to make clear that the reference is not to Rule 43 (mentioned in the preceding sentence). But after concerns were expressed that "this rule" might also be ambiguous, "the rule" was changed to "Rule 26." After Professor Garner stated that "presently" traditionally meant "in a moment," consensus also favored deleting "presently." At the end of the same sentence, Judge Bates suggested adding "upon court approval." Though a judge member later suggested deleting the note's second sentence, no consensus developed in favor of such a deletion.

Pointing to the last sentence of the Rule 26 committee note – which states that the amendment "alerts the parties and the court that a party expects to present one or more witnesses remotely" – Professor Bartell asked if the court would already be aware of a party's intention to call a remote witness, given that the court's approval would be required in order for remote testimony to occur. Professor Marcus responded that the Rule 26(a) disclosure would alert the court to the fact that somebody proposes to have a witness testify remotely, which would also require court approval. Judge Bates said that he did not think this pretrial disclosure requirement anticipates that there has already been a decision on whether to allow remote testimony. A practitioner member suggested changing "expects" to "proposes." Judge Rosenberg and Professor Marcus agreed. A judge member objected that using "proposes" would cause the committee note to diverge from the text of Rule 26(a)(3)(A)(i), which uses the phrase "expects to present." But the practitioner member pointed out that there is a distinction between the witnesses the party expects to present and the separate issue whether the testimony of those witnesses will be remote: a party can *expect* to present witnesses (because the party gets to choose its witnesses) while only *proposing* to do so remotely. Judge Rosenberg agreed with the distinction drawn by the practitioner member, as did another practitioner member.

Following this discussion, Judge Rosenberg summarized the changes to the committee note. The second sentence of the committee note would read "Because Rule 26 requires disclosure of witnesses a party 'expects to present,' it should be understood to include witnesses who will testify remotely upon court approval." In the third sentence of the committee note, "a party expects" was changed to "a party proposes."

Upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 45(c) and Rule 26(a), with the changes to Rule 26's committee note that were summarized in the preceding paragraph.

c. Preliminary Draft of Proposed Amendment to Rule 45(b)

Judge Rosenberg next presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 45(b)(1). The proposed amendments specify that the methods for service of a subpoena are personal delivery, leaving it at the person's abode with someone of suitable age and discretion who resides there, sending it by mail or commercial carrier if it includes confirmation of receipt, or another method authorized by the court for good cause. The amendment would also add a default 14-day notice period and provide that the tender of witness fees is not required to effect service of the subpoena so long as the fees are tendered upon the witness's appearance. The text of the proposed amendment begins on page 332 of the agenda book and the written report begins on page 296. The members were also provided with a handout highlighting style changes made subsequent to the publication of the agenda book (the handout was incorporated into the agenda book at page 487).

Judge Rosenberg explained that the proposed amendments address comments received by the Advisory Committee over the years about the ambiguity of the requirement in Rule 45(b)(1) of "serving" the witness with a subpoena and also tendering the witness fee to the witness. Specifically, Rule 45(b)(1)'s use of "delivering a copy to the named person" without more created confusion and practical problems.

Focusing on delivery to the named person by "delivering it to the individual personally" under proposed Rule 45(b)(1)(A)(i), Professor Bartell asked if a named person would always be an individual. Professor Marcus responded that a subpoena could initiate a Rule 30(b)(6) examination of an entity. Professor Bartell expressed concern that proposed Rule 45(b)(1)(A)(i)'s use of "individual" suggests that the named person must be an individual.

Judge Bates suggested that, in light of the amendment's goal of clarifying the meaning of *service*, the portion of the rule that precedes the romanette-numbered paragraphs should conclude "Serving a subpoena requires:" rather than "Serving a subpoena requires delivering a copy to the named person by:", as the focus should not be on defining "delivery." Professor Marcus observed that the proposed language shown in the agenda book was borrowed from Rule 4(e)(2). Professor Garner supported Judge Bates's suggestion that the rule say "Serving a subpoena requires: (i) personally delivering a copy to the named person …." Judge Rosenberg agreed and confirmed that romanette (i) would read "personally delivering a copy to the named person," but that the other romanettes would not change. Professor Marcus said that this would address Professor Bartell's concern.

Professor Struve questioned the proposed placement of "personally" before "delivering": the placement created ambiguity because it could be read to require the *server* to deliver the document personally (i.e., to mandate that the lawyer whose subpoena it is cannot delegate the task of service). Rule 4(e)(2(A), she noted, places the "personally" at the end ("to the individual personally"). Judge Bates responded that saying "to the named person personally" would be awkward. After a discussion of whether "personally" could be deleted, the participants concluded that it should not. A judge member said that the meaning of Rule 45(b)(1)(A)(i) depends on the word personal. Professor Garner suggested using the term hand-delivering. Judge Bates agreed that hand delivery was likely what the provision means by "personally." Professor Cooper said that the advantage of "personally" is that it helps provide context for "delivering," which courts have interpreted to have different meanings (e.g., mail), and that "hand-delivering" could create new interpretive problems.

An academic member observed that the proposed amended rule imports language from Rule 4, and he would be nervous about adding language that deviates from Rule 4. Judge Rosenberg confirmed that the idea was to mimic the language in Rule 4. Judge Bates asked whether "personally delivering a copy to the named person" is any different from "delivering a copy to the named person personally." Professor Garner supported using "person personally," even though it may strike some readers as awkward. Professor Hartnett suggested "delivering it personally to the named person" to retain the meaning but move the words slightly away from each other. A judge member supported using "named person personally" to stay consistent with whatever caselaw that has developed. Professor Kimble advocated using the language shown in the agenda book, but Professor Bartell reiterated that Rule 4 applies only to individuals, whereas Rule 45(b) applies to all persons (including business entities), so the term "individual" (used in proposed romanette (i) in the agenda book) would be inappropriate for Rule 45(b). Judge Bates supported using "named person" in order to avoid suggesting there was a substantive change; the remaining question, he noted, was where to put the word "personally."

Judge Bates asked if the Advisory Committee would support revising the second sentence of Rule 45(b)(1)(A) to read: "Serving a subpoena requires: (i) delivering a copy to the named person personally …." Professor Marcus agreed. A judge member asked why "named person" is not

needed in the other romanettes. Professor Garner responded that romanette (i) identifies the target as "the named person" and the subsequent romanettes inherit that meaning (such that repeating "named person" is unnecessary). The judge member asked if a reader would understand that the modifier carries through to the other romanettes just as it would if the modifier were in the introduction. Professor Garner said the Committee had employed this usage frequently.

A practitioner member asked whether a subpoena directed to a business organization could be left at its place of business, and if not, whether "place of business" should be added to romanette (ii). Judge Bates noted that the rule should not permit a party to serve a subpoena to an individual at their place of work. Professor Cooper suggested that "delivering … to the named person personally" under revised romanette (i) should encompass service on a business at its office.

A practitioner member suggested revising the first sentence in the committee note to state that "Rule 45(b)(1) is amended to clarify the means of serving the subpoena." Judge Bates asked whether the reference to "delivery" in the committee note's second paragraph should be changed to refer to service. Professor Marcus suggested the term "effective service," (not in quotation marks), and Judge Bates agreed, as did a judge member.

Judge Rosenberg summarized the changes around which consensus had developed (apart from the style changes highlighted on the handout, which were also adopted by consensus). Rule 45(b)(1)(A)'s second sentence was revised so that it commenced: "Serving a subpoena requires: (i) delivering a copy to the named person personally; …." The first sentence of the committee note was changed to read: "Rule 45(b)(1) is amended to clarify the means of serving a subpoena." In the first sentence of the second paragraph of the committee note, "'delivery'" was changed to "effective service."

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 45(b), with the changes summarized in the preceding paragraph, as well as the style changes shown in the handout.

d. Preliminary Draft of Proposed Amendment to Rule 7.1(a)

Judge Rosenberg next presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 7.1(a). The amendments would mandate disclosure of corporate "grandparents" and "great-grandparents" in which a judge may hold a financial interest that requires recusal. The text of the proposed amendment begins on page 322 of the agenda book and the written report begins on page 298.

Judge Rosenberg explained that the Advisory Committee proposed the amendment not because of concerns that judges have acted in a biased manner, but because a judge presiding over a case in which she has an arguable financial interest can threaten perceptions of the court's legitimacy. To address the perception-of-bias issue and allow judges to make more informed decisions about recusal, there are two proposed changes. First, the proposed amendment replaces references to a "corporate party" with the broader term "business organization." The Advisory Committee viewed "corporations" as too narrow because there are many entities that are not corporations, and "business organizations" is the most common and generally understood term. Second, the

proposed amendment requires disclosure of "a parent business organization" and "any publicly held business organization that directly or indirectly owns 10% or more of" a party. The term "parent" has been part of the various federal disclosure rules since their inception and has not caused significant problems.

Judge Rosenberg also stated that the Rules Law Clerk and Reporters canvassed a wide swath of disclosure requirements, and the two dominant approaches were to use either a broad catch-all term (such as "affiliates") or a lengthy list of various specific business relationships. However, the former approach is overinclusive and results in important information being buried in a vast disclosure. The latter approach can be over- and under-inclusive and requires constant maintenance to account for evolving relationships. The Advisory Committee was also informed by the February 2024 guidance by the Codes of Conduct Committee that directs a judge to focus on whether a parent corporation that does not wholly own a party has control of a party, advising that 10% ownership creates a rebuttable presumption of control. Professor Bradt said that the effort has been to expand the scope of the rule to better comply with the Codes of Conduct Committee guidance and be consistent with the approach taken in the 1998 committee note to Appellate Rule 26.1.

After an opportunity for discussion and no comments from the members, upon motion and a second, and without opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 7.1.

E. Advisory Committee on Criminal Rules – Judge James Dever, Chair

Judge Dever presented one action item on behalf of the Advisory Committee on Criminal Rules, which last met on April 24, 2025, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 357.

1. *Amendments for Final Approval*

The Advisory Committee presented no requests for final approval.

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Rule 17

Judge Dever presented the Advisory Committee's request for the Standing Committee to approve publication for public comment on proposed amendments to Rule 17 relating to subpoenas in criminal cases. The text of the proposed amendment begins on page 373 of the agenda book and the written report begins on page 358.

Judge Dever explained that this item stems from a 2022 proposal by the New York City Bar Association and letters from the National Association of Criminal Defense Lawyers. Judge Dever also noted that the development of the proposed amendments had taken significant effort, but that the Advisory Committee voted unanimously to recommend publication of the proposed amendment to Rule 17.

Judge Dever reported that the core of the issue raised by the proposals was that Rule 17 had been largely unchanged since 1944 (apart from some style changes and changes relating to the Crime

Victims Rights Act). The proposals focused on the problems, from a defense perspective, entailed in obtaining information from third parties. The Advisory Committee's subcommittee – chaired by Judge Jacqueline Nguyen – had begun by assessing whether there was a problem. The subcommittee held many meetings on the project, and the Advisory Committee had discussed it over the course of six meetings and had consulted widely.

The Advisory Committee, Judge Dever noted, had learned that Rule 17 practice varies widely across the country, and in some districts, there is essentially no third-party subpoena practice under Rule 17. One reason for the disparities in Rule 17's application, Judge Dever suggested, was that there were only two U.S. Supreme Court cases on point (*Bowman Dairy v. United States*, 341 U.S. 214 (1951), and *United States v. Nixon*, 418 U.S. 683 (1974)), and those cases contain language that some lower courts have interpreted restrictively. After testing a more expansive proposed rule with defense lawyers and prosecutors, the Advisory Committee determined that it should take a more incremental approach to addressing third-party discovery.

Judge Dever then explained the proposed changes to Rule 17, which were also summarized starting at page 363 of the agenda book. Features of the proposed rule included specifying what proceedings other than trial Rule 17 applies to, codifying a loosened *Nixon* standard, clarifying when a motion and order are required, providing when a party may make its request ex parte, addressing the place of production, preserving Rule 16's disclosure policies, and clarifying which subparts of Rule 17 apply to different proceedings. Judge Dever reiterated that the proposal is for public comment and anticipated that the proposed amendment, if published, would receive helpful comments. He thanked the DOJ and Subcommittee Chair and members for their work.

Professor Beale added that the input from defense and prosecution practitioners was very divergent at first: defense lawyers wanted major changes while the DOJ saw no current problem with Rule 17. It was remarkable that the ultimate proposal attained unanimous support from the Advisory Committee members. It would "raise the floor" of practice in those districts where currently there is no way for the defense to gain information from third parties.

The members then discussed the proposed amendment.

In Rule 17(c)(2)(A) (concerning non-grand-jury subpoenas), Judge Bates suggested inserting "evidentiary" between "additional" and "hearing." Professor Beale agreed. Also in Rule 17(c)(2)(A), Judge Bates pointed out that the placement of the phrase "that the court permits" created ambiguity as to whether it referred to the subpoena or the hearing. Professor Beale stated that the phrase should refer to the subpoena. Consensus formed in favor of revising the last clause of proposed Rule 17(c)(2)(A) to read "or—with the court's permission in an individual case—for any additional evidentiary hearing." A judge member asked whether it was really necessary to require the court's permission in an individual case once the word "evidentiary" was added to the rule. Professors Beale and King said yes, explaining that the Advisory Committee did not want this amendment to lead to a proliferation of third-party subpoenas in a whole range of evidentiary hearings.

Judge Bates also suggested saying "to produce the designated items to the court" rather than "to produce to the court the designated items" in Rule 17(c)(5). Professor Beale agreed. Judge Bates also suggested deleting "stage" from line 441 of the committee note.

Judge Bates observed that an objective of the proposal is to address the variance in subpoena practice. However, he noted, the proposal retains flexibility for individual judges to continue that variance – for example in proposed Rules 17(c)(2)(C) and (F). Judge Dever agreed and explained that the proposal reflects an incremental approach to changing the rule. Professor Beale noted that Judge Bates's comment relates to the ability of judges or districts to opt out. The other side of that is that the proposed rule states a new default rule with substantial leeway to deal with problems in an individual case or certain kinds of cases. Professor King said that the new default is not a strong one: it is a response to decisions that made assumptions about what the language in the current rule means. Just saying what the rule means will reduce some variance, and variance was left where the Advisory Committee heard it was important. Judge Bates thanked Ms. Shapiro and the DOJ for their work during the process and suggested getting comments from the Magistrate Judges Association.

A practitioner member expressed support for the proposed rule but highlighted the phrase "non-grand-jury subpoena" as a new term that is not in the existing rules. He asked whether a grand jury subpoena is a Rule 17 subpoena. The member had not thought that the government needed to follow a particular process when issuing a grand jury subpoena. Professor Beale responded that the Supreme Court had suggested in *Nixon* that Rule 17 applied to grand jury subpoenas, but she stressed that the Advisory Committee did not want to draft a rule regulating grand jury subpoenas for all purposes. The member suggested explaining the term "non-grand-jury subpoena" in the committee note.

A judge member pointed out language in the committee note (on page 387) providing that a "court has discretion to require that those subpoenas be authorized by motion and court order" and said that a subpoena cannot technically be authorized by motion. Rather, the motion would be filed and then the court would enter an order, as indicated by references to filing a motion and obtaining a court order in Rule 17(c)(3) and (4). To make the references consistent, the member suggested changing the committee note to read "the court has discretion to require that those subpoenas be authorized only after filing a motion and obtaining a court order." The member suggested that the language in Rule 17(c)(3)(A) be similarly changed. The judge member also suggested, for clarity, positive phrasing for Rule 17(c)(2)(C), which would read "a motion and order are required before service of a non-grand-jury subpoena in (3) or (4) or if a local rule or court order requires them."

To respond to these suggestions, Professor Beale referenced the earlier discussion about how to phrase Appellate Rule 29(a)(7). She said that this language was drafted to respond to concerns that the rule was requiring too many motions and would cause a burden. Thus, Professor Beale preferred stating that motions "are not required, except…." To help emphasize the point, Professor Capra suggested revising the heading of Rule 17(c)(2)(C) to read "Motion and Order Not Ordinarily Required." Professor Garner suggested "only by court order on motion," which indicates a court cannot do it sua sponte. The judge member agreed. Judge Dever said this would change Rule 17(c)(3)(A) to read "only by court order upon motion" rather than "only on motion and by court order."

A judge member asked about Professor Capra's idea to change the title of Rule 17(c)(2)(C) to "Motion and Order Not Ordinarily Required." Judge Bates questioned whether the heading could say "Ordinarily" when that word does not appear in the text of Rule 17(c)(2)(C). Professor Garner responded that "Not Ordinarily Required" was an accurate summary of the provision, which states

that the motion and order "are not required … unless." Another judge member suggested titling the provision "Requirement For Motion and Order." Judge Dever, however, expressed a preference for Professor Capra's proposed title, explaining that the Advisory Committee wanted to emphasize that a motion and order is not ordinarily required.

A judge member expressed support for the proposed amendment but had a few questions about the text. First, should Rule 17 emulate Rules 16 and 16.1, which explicitly provide authority for the district court to regulate discovery? To this end, in proposed Rule 17(c)(7), he suggested inserting "or on its own" after "On motion made promptly" to indicate that the court can act sua sponte to quash or modify a subpoena. Professor Beale said the Advisory Committee could discuss the idea after public comment. Judge Dever commented that the only way that the subpoena would come to the court's attention would be if there were a motion to quash. Second, the judge member suggested deleting "under these rules" from Rule 17(c)(6) because a right to discovery can have a statutory or constitutional basis. Professor Beale and Judge Dever agreed. Third, the judge member suggested revising Rule 17(h) to refer to "a statement of a trial witness or of a prospective trial witness" because Rule 32(i) provides discretion to deny a witness at sentencing. The member pointed out that Rule 17 was granting the authority to subpoena witnesses for sentencing. Professor King responded that Rule 17(h) refers only to subpoenaing the witness's *statement*, not the witness. Professor King and Judge Dever said that Rule 17(h) is essentially a rules version of the Jencks Act (that is, Rule 17(h) closes off what would otherwise look like a discovery pathway for early discovery of witness statements) but that public comment will be helpful. Professor King clarified that including sentencing in Rule 17 means only that getting a subpoena for sentencing is not prohibited – not that a subpoena will necessarily issue. Another judge member noted that Rule 26.2(g)(2) (applying Rule 26.2 to sentencing) governs production of the witness's prior statement but not the witness themselves. Professor Beale agreed, and summed up that where Rule 17 would allow a subpoena, it does not allow a subpoena to be used as an end-run around the Jencks principle codified in Rule 26.2.

Professor Beale summarized the modifications to the proposed amendment. The modifications changed Rule 17(c)(2)(A) to read "When Available. A non-grand-jury subpoena is available for a trial; for a hearing on detention, suppression, sentencing, or revocation; or—with the court's permission in an individual case—for any additional evidentiary hearing." The caption of Rule 17(c)(2)(C) was changed to "Motion and Order Not Ordinarily Required." In Rule 17(c)(3)(A), "only on motion and by court order" was changed to "only by court order upon motion." In Rule 17(c)(5), "require the recipient to produce to the court the designated items" was changed to "require the recipient to produce the designated items to the court." In Rule 17(c)(6), "under these rules" was deleted. In the committee note at page 387, line 323, "authorized by motion and court order" was changed to "authorized by court order upon motion." On page 391, line 441, "stage" was deleted.

Following the discussion, upon motion and a second, and with no opposition, the Standing Committee approved publication for public comment on the proposed amendments to Rule 17, with the changes discussed in the preceding paragraph.

3. INFORMATION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

Following the Standing Committee's conclusion of the action items, Judge Bates announced that he would have to leave, and asked Judge Dever to preside over the remainder of the meeting. Prior to this transition, Judge Bates clarified for the record that the Standing Committee had approved publication for public comment on proposed Civil Rule 45(c).

Prior to departing, noting that it was his last Standing Committee meeting, Judge Bates also extended his thanks to everyone and appreciation for being on the Standing Committee and offered to be of assistance when needed.

Judge Dever then turned to the information items, noting that the Standing Committee members had read the Advisory Committee reports and that those presenting the information items should defer to those reports and use their time to highlight issues for any comments from the members.

A. Advisory Committee on Evidence Rules – Judge Jesse M. Furman, Chair

Professor Capra, who presented on behalf of the Advisory Committee in light of Judge Furman's departure from the meeting, highlighted several information items. The written report on information items begins on page 59 of the agenda book.

1. *Artificial Intelligence (AI) and Deepfakes*

Professor Capra reported that the Advisory Committee decided to hold off on proposing any rule amendments regarding the issue of deepfakes and that there had not been many identified deepfakes going through the federal courts. The Advisory Committee will continue to monitor whether deepfakes are challenging the courts. In the meantime, it has a working draft set out on page 60 of the agenda book of a proposed Rule 901(c) addressing deepfakes. The draft rule would create a two-step process where the opponent of the evidence must make a showing that the offered evidence is a possible deepfake. The burden then shifts to the proponent to show by a preponderance of the evidence that it is not a deepfake.

2. *Rule 902(1) and Indian Tribes*

Professor Capra reported on the Advisory Committee's consideration of whether Rule 902(1) regarding self-authenticating government records should be amended to include records of federally recognized Indian tribes. The inability to have self-authenticating records from tribes has created certain problems in cases involving proof of Indian status. Professor Capra noted that the DOJ supports the suggestion to add Indian tribes to Rule 902(1), but it was opposed by the public defender representative. Professor Capra said that the Advisory Committee is conducting outreach to learn the views of tribes on the issue.

3. *Supreme Court Fellow Project on Rule 706*

Professor Capra noted that Samantha Smith, a Supreme Court Fellow, made a presentation to the Advisory Committee on research relating to Rule 706, which the Advisory Committee has taken under advisement.

B. Advisory Committee on Appellate Rules – Judge Allison Eid, Chair

Judge Eid reported briefly on three information items. The written report on information items begins on page 109 of the agenda book. First, the issue regarding intervention on appeal is awaiting further research. Second, the Advisory Committee is staying its consideration of the issue regarding reopening the time to appeal under Rule 4(a)(6), pending the Supreme Court's decision in *Parrish v. United States*.[5] Third, the Advisory Committee is looking at limits on administrative stays. A judge member suggested that the Advisory Committee study appeal waivers as well.

C. Advisory Committee on Bankruptcy Rules – Judge Rebecca Connelly, Chair

Judge Connelly referred the Standing Committee to the written materials, beginning on page 215 of the agenda book, for a report on two information items.[6]

D. Advisory Committee on Civil Rules – Judge Robin Rosenberg, Chair

Judge Rosenberg and Professor Marcus reported on six information items.

1. *Filing under Seal*

Judge Rosenberg noted that the report for this item begins on page 304 of the agenda book and directed the Committee's attention to the questions appearing on page 308. The Advisory Committee would welcome the Standing Committee's feedback on three questions: (1) should the Advisory Committee try to develop nationally uniform procedures for handling motions to seal? (2) if so, how could it obtain information to inform a decision about what procedures to set in the rule? and (3) if the Advisory Committee decides not to recommend adoption of a national rule that prescribes procedures, is there value nonetheless in amending the rules to state that the standard for sealing court files differs from that for protective orders?

A judge member suggested that former Judge Gregg Costa would be a good resource on the issue of the prevalence and abuse of sealing.

2. *Remote Testimony*

Judge Rosenberg said that the report for this item begins on page 308 of the agenda book. She reported that this relates to Rules 43(a) and 43(c) and that the Advisory Committee would be gathering more information about whether Rule 43(a) should be changed. The Advisory Committee is considering whether to make Rule 43(a) less restrictive.

A judge member observed that former Texas Supreme Court Chief Justice Nathan Hecht has become a spokesman for the importance of remote testimony and participation.

[5]For purposes of these minutes, it is noted that two days after the Standing Committee meeting, the Supreme Court decided *Parrish.* The citation to the decision is *Parrish v. United States*, 145 S. Ct. 1664 (2025).

[6] As referenced on the meeting agenda, the information items pertain to the withdrawal of a proposed amendment to Rule 1007(h) and two suggestions to allow special masters to be used in bankruptcy cases and proceedings.

3. *Third-Party Litigation Funding*

Judge Rosenberg reported that the Advisory Committee is studying the issue of third-party funding of litigation and has found that there is sharp disagreement over what is meant by "third-party litigation funding." She said that a series of nine questions appears on page 315 of the agenda book and requested the Standing Committee's feedback on them. The threshold question is how to describe the arrangements that might trigger a disclosure obligation.

4. *Cross-Border Discovery Subcommittee*

Judge Rosenberg reported that the Advisory Committee is retaining its cross-border discovery subcommittee, but the subcommittee has exhausted its research and has not found a need for a rule.

5. *Rule 55 Default and Default Judgment Rule*

Professor Marcus reported that a FJC study showed that in practice, Clerks of Court rarely enter default judgments in cases where the rule text seems to direct them to do so. Professor Marcus invited thoughts on the matter.

6. *Random Case Assignment*

Judge Rosenberg reported that the Advisory Committee will continue to monitor implementation of the Judicial Conference's March 2024 guidance on random case assignment. A judge member pointed out Professor Samuel Issacharoff's work on this topic.

E. Advisory Committee on Criminal Rules – Judge James Dever, Chair

Judge Dever reported on information items contained in the Committee Report beginning on page 367 of the agenda book. After Judge Dever reported on these items, a judge member suggested that the Advisory Committee should also look into deferred prosecution agreements, and Judge Dever undertook to mention that suggestion to Judge Mosman (the incoming Chair of the Criminal Rules Committee). The judge member also highlighted the circuit split (grounded in Criminal Rule 32) over whether a mismatch between oral and written sentencing conditions requires resentencing; Judge Dever agreed that there is a circuit split on that issue.

1. *Rule 49.1 - References to Minors by Pseudonyms and Full Redaction of Social Security Numbers*

Judge Dever reported that the Rule 49.1 subcommittee has unanimously agreed to propose an amendment to Rule 49.1 to require references to minors by pseudonyms, and the Standing Committee will likely receive such a proposal at its next meeting. He also reported that a proposal for the complete redaction of social security numbers in public filings will likely be considered by the Advisory Committee at its fall 2025 meeting.

2. *Rule 40 - Clarifying Procedures for Previously Released Defendant Arrested in Different District*

Judge Dever reported that the Advisory Committee received two proposals to clarify the procedures in Rule 40. Rule 40 relates to procedure on arrest of a person on a warrant issued in another district for failure to appear or violation of conditions of release. Judge Dever stated that the consensus of the Rule 40 subcommittee is that the rule can be clarified, and the Advisory Committee will likely take up a proposal on rule amendments at its fall 2025 meeting.

4. JOINT COMMITTEE BUSINESS

A. Report on Electronic Filing by Self-Represented Litigants

Professor Struve referred to her memorandum in the agenda book beginning on page 456 relating to the project on electronic filing and service by self-represented litigants.

B. Report of Subcommittee on Attorney Admission

Professor Struve reported that the subcommittee on attorney admission is also at work on further research.

C. Report on Privacy Issues

Ms. Dubay provided a brief report on the joint project to develop uniform rules on complete redaction of social security numbers and use of pseudonyms in cases involving minors, noting that she would be continuing this project.

5. OTHER COMMITTEE BUSINESS

A. Tribute to Judge Bates

Earlier in the meeting, Professor Struve and Ms. Dubay took a moment to offer thanks to Judge Bates on behalf of the Rules Committees, the Rules Committee Staff, and the Reporters, past and present, for his service as Chair of the Standing Committee, which concludes on September 30, 2025. Professor Coquillette also offered a thoughtful tribute to Judge Bates. Professor Struve read letters of appreciation to Judge Bates from Judge Jeffrey Sutton, Judge David Campbell, and Judge Robert Dow, all former Chairs of Rules Committees. Professor Struve also presented a token of appreciation from the Rules Committee community to Judge Bates in the form of a personalized baseball card noting statistics of the rule amendments undertaken in his tenure.

Following these thanks and tributes, Judge Bates offered brief remarks, noting that it was his privilege to work with everyone and their predecessors as part of the team that makes the rules process work extremely well.

B. Status of Rule Amendments

Ms. Dubay reported that the latest set of proposed rule amendments was transmitted to Congress on April 23, 2025. A list of the rule amendments is included in the agenda book beginning on page 461.

C. Legislative Update

Mr. Brinker, the Rules Law Clerk, provided a legislative update. The legislation tracking chart begins on page 477 of the agenda book. Mr. Brinker noted that no bills identified in the agenda book had received legislative action since being introduced. Ms. Dubay also noted in response to a judge member's question that the Rules Committee Staff monitors only those bills that would directly or effectively amend the rules of practice and procedure.

D. FJC Update

Dr. Reagan indicated that he would rely on the FJC report in the agenda book. Judge Dever remarked that it would be helpful for the FJC to continue educating judges that when rules change, they should not rely on case law interpreting the former rule.

6. CONCLUDING REMARKS AND ADJOURNMENT

Judge Dever noted the upcoming departure of Mr. Brinker as his term as Rules Law Clerk comes to an end, thanked him for his excellent work, and wished him well in his new employment. Judge Dever also recognized Judge Rosenberg for her upcoming role as FJC Director and wished her well.

Judge Dever concluded by thanking the Standing Committee members for their hard work and adjourned the meeting.

APPENDIX

Summary of Standing Committee Revisions to Final Amendments

The following list identifies revisions made at the Standing Committee meeting to amendments presented for final approval, as set forth in the agenda book available on the uscourts.gov website.

Evidence Rule 801(d)(1)(A)

The proposed amendments to Evidence Rule 801(d)(1)(A) begin on page 64 of the agenda book. There were no revisions to the rule text. Prior to discussion by the Standing Committee, the Chair noted one correction to the committee note:

1. Page 65, line 32, "exception" was changed to "objection."

The Standing Committee discussed and approved one additional change:

1. Page 66, line 52, "proving" was changed to "assessing."

Appellate Rule 29

The proposed amendments to Appellate Rule 29 begin on page 112 of the agenda book. The Reporter noted the following corrections to the committee note:

1. Page 123, line 234, "Rule 29(a)(4)(D)" was changed to "Rule 29(a)(4)."
2. Page 124, line 238, "curiae" was deleted.
3. Page 124, line 245, "Rule 29(a)(4)(E)" was changed to "Rule 29(a)(4)(F)."
4. Page 125, line 293, "Rule 29(a)(4)(D)(iii)" was changed to "Rule 29(a)(4)(E)(iii)."
5. Page 127, line 347, "Rule 29(a)(4)(E)" was changed to "Rule 29(a)(4)(F)."
6. Page 127, line 350, "Rule 29(a)(4)(D)" was changed to "Rule 29(a)(4)(E)."

The Standing Committee then discussed and approved one change to the rule text in proposed Rule 29(a)(7):

1. Page 118, lines 105-106, "An amicus may file a reply brief only with the court's permission" was changed to "An amicus may not file a reply brief except with the court's permission."

Bankruptcy Rule 9014

The proposed amendments to Bankruptcy Rule 9014 begin on page 246 of the agenda book. There were no revisions to the rule text. The Standing Committee discussed and approved one change to the committee note:

1. Page 247, lines 26-27, "That rule is no longer generally applicable in a bankruptcy case, and" was deleted so that the second sentence reads "The reference to that rule has been removed from Rule 9017."

Bankruptcy Rule 2007.1(b)(3)(B)

The proposed technical amendments to Bankruptcy Rule 2007.1(b)(3)(B) begin on page 221 of the agenda book. There were no revisions to the rule text. The Standing Committee indicated that conforming technical changes also needed to be made to Rule 2007.1(c)(1) and (3) and the committee note. Those sections of Rule 2007.1 and the committee note were not contained in the agenda book, but the conforming technical amendments to delete the romanettes were approved.

TAB 5

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 29 and 32, the Appendix on Length Limits, and Form 4, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-5

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 2007.1, 3001, 3018, 5009, 9006, 9014, 9017, and new Rule 7043, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

   b. Approve, effective December 1, 2025, the proposed amendment to Official Form 410S1, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 5-9

3. Approve the proposed amendments to Evidence Rule 801 as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 14-16

The remainder of the report is submitted for the record and includes the following items for the information of the Judicial Conference:

- Federal Rules of Civil Procedure ..... pp. 9-11
- Federal Rules of Criminal Procedure ..... pp. 11-13
- Judiciary Strategic Planning ..... p. 16

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 10, 2025. All members participated. Representing the advisory committees were Judge Allison H. Eid (10th Cir.), chair; and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair; Professor S. Elizabeth Gibson, Reporter; and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), chair; Professor Richard L. Marcus, Reporter Professor Andrew Bradt, Associate Reporter; and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III (E.D.N.C.), chair; Professor Sara Sun Beale, Reporter; and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman (S.D.N.Y), chair; and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, Reporter to the Standing Committee; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee, and; Carolyn A. Dubay, Secretary to the Standing Committee; Bridget M. Healy and Scott Myers, Rules Committee Staff Counsel; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan,

Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of the Deputy Attorney General.

In addition to its general business, including a review of pending rule amendments in different stages of the Rules Enabling Act[1] process and an update on pending legislation potentially affecting the rules, the Standing Committee received and responded to reports from its five advisory committees. The Committee also received brief updates on the work of the Standing Committee's subcommittee concerning attorney admissions and on two joint projects among the Bankruptcy, Civil, Criminal, and Appellate Rules Committees—one on electronic filing and service by self-represented litigants and one on privacy issues relating to Social Security numbers (SSNs) and the use of a minor's initials in public court filings. The Committee members were also advised to submit any comments on the draft updated *Strategic Plan for the Federal Judiciary* (*Strategic Plan*) to the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares (3d. Cir.), who also attended the relevant portion of the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Amended Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rule 29 relating to amicus briefs, along with conforming amendments to Rule 32(g) and the Appendix on Length Limits. The Advisory Committee also recommended for final approval amendments to Form 4, the form used by applicants for *in forma pauperis* (IFP) status in appellate proceedings. The Standing Committee unanimously approved the Advisory Committee's recommendations after rephrasing proposed changes to

[1]Please refer to Laws and Procedures Governing Work of the Rules Committees for more information.

Rule 29(a)(7) ("Reply brief") to shift the provision's emphasis (without changing its substance) to more closely resemble the current language in Rule 29(a)(7), as well as approving technical corrections in the committee note to Rule 29.

Rule 29 (Brief of an Amicus Curiae)

The proposed amendments to Rule 29 address several issues with respect to the contents of amicus briefs, particularly as to required disclosures of relationships between the amicus and parties or nonparties. In particular, the amendments require disclosure of whether a party and/or its counsel have a majority ownership interest in or majority control of an amicus. In addition, whereas the current rule requires disclosure of whether any nonparty (other than the amicus, its members, or its counsel) contributed money intended to fund preparation or submission of the brief, the proposed amendments limit this disclosure requirement to instances in which the amount contributed or pledged to be contributed is greater than $100. The proposed amendments also add a broader disclosure concerning the background of the amicus—to include the identity, history, experience, and interest of the amicus, as well as the date of its creation if it has existed for less than 12 months. Finally, the proposed amendments impose an express word limit of 6,500 words on amicus briefs at the initial stage rather than reference to "one-half the maximum length authorized . . . for a party's principal brief."

The approved amendments to Rule 29 reflect several changes to the preliminary draft after public comment and a public hearing on the proposed amendments. Among other changes, the Advisory Committee at its spring meeting removed proposed language that would have eliminated the option for filing an amicus brief based on the parties' consent (and would therefore have required a motion for leave to file a brief) and removed proposed language that would have required disclosure of whether parties and/or their counsel had contributed 25 percent or more of the amicus's revenue for the prior fiscal year. The Advisory Committee

also revised the statement concerning the purpose of amicus briefs to more closely track the similar statement in Supreme Court Rule 37.

Rule 32 (Form of Briefs, Appendices, and Other Papers) and Appendix of Length Limits

The proposed amendment to Rule 32 conforms Rule 32(g)'s cross-references to the updated sections of amended Rule 29. Similarly, the proposed amendments to the Appendix of Length Limits conform the length limits for amicus briefs identified in the Appendix to the proposed amendment to Rule 29.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal IFP)

The proposed amendments to Form 4 are intended to reduce the burden on individuals seeking IFP status by (among other things) reducing the amount of personal financial detail required to be provided, while retaining information that a court of appeals needs when deciding whether to grant IFP status.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 29 and 32, the Appendix on Length Limits, and Form 4, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Rule Amendment Approved for Publication and Public Comment

The Advisory Committee on Appellate Rules also recommended that a proposed amendment to Rule 15 be published for public comment in August 2025. After minor revisions to the proposed amendment to explain a term in greater detail, the Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention)

The proposed amendment to Rule 15 addresses issues that may arise when a petition for review or enforcement of an agency decision is filed prematurely—i.e., before the agency has disposed of a motion for reconsideration that renders the agency decision nonreviewable as to the

petitioner. In circuits that apply the "incurably premature" doctrine, if a pending motion to reconsider an agency decision makes the decision unreviewable in the court of appeals, then a new petition to review that agency decision must be filed in the court of appeals once the agency decision becomes final. The proposed amendments to Rule 15 would eliminate the need to refile the petition and provides that the original petition for review becomes effective upon the agency's disposition of the last reconsideration request. This change would align Rule 15 with Rule 4(a)(4)(B)(i), which relates to the effectiveness of a notice of appeal filed after a judgment is entered or announced in the district court, but before the district court disposes of certain post-judgment motions authorized under the Federal Rules of Civil Procedure.

Information Items

The Advisory Committee on Appellate Rules at its April 2, 2025, meeting also discussed a possible new rule regarding intervention on appeal, as well as possible amendments to Rule 8 (Stay or Injunction Pending Appeal) regarding administrative stays. It preliminarily discussed a suggestion regarding reopening the time to appeal under Rule 4 (Appeal as of Right —When Taken), but decided to hold that item until the decision of a case then pending in the Supreme Court.[2] The Advisory Committee also removed from consideration a suggestion that Rule 26 (Computing and Extending Time) be amended to not count weekends in computing time periods.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Amended Rules and Form and New Rule Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval one new rule, amendments to eight rules, and amendments to one official form: (1) amendments to Rule 3018; (2) amendments to Rules 9014 and 9017, and new Rule 7043; (3) amendments to

[2] *See Parrish v. United States*, No. 24-275, 2025 WL 1657416, at *2 (U.S. June 12, 2025).

Rules 1007, 5009, and 9006; (4) amendments to Official Form 410S1; and (5) technical corrections to Rules 2007.1 and 3001. After a technical correction to Rule 2007.1(c) to conform to the technical correction to Rule 2007.1(b), and a minor revision to the committee note for Rule 9014 shortening the discussion of the amendment to Rule 9017, the Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan)

Whereas current Rule 3018(c) requires that acceptance or rejection of a plan in a chapter 9 or 11 case be in writing, the proposed amendment to the rule authorizes a court to additionally treat as an acceptance of a plan a statement on the record by a creditor or the creditor's attorney or authorized agent. A conforming amendment is also made to subdivision (a). In response to a public comment, the Advisory Committee made minor changes at its spring meeting to clarify that Rule 3018(c)'s statement-on-the-record provision applies to individual creditors (who may be self-represented) as well as to a creditor's attorney or agent.

Rules 9014 (Contested Matters) and 9017 (Evidence) and new Rule 7043 (Taking Testimony)

The proposed amendments (1) amend Rule 9017 to eliminate the general applicability of Fed. R. Civ. P. 43 (Taking Testimony) to all bankruptcy cases; (2) add new Rule 7043 (Taking Testimony), which will retain the applicability of Fed. R. Civ. P. 43 to adversary proceedings (thereby continuing to authorize remote witness testimony in adversary proceedings "for good cause in compelling circumstances and with appropriate safeguards"); and (3) amend Rule 9014 to allow a court in a contested matter to permit remote witness testimony "for cause and with appropriate safeguards" (i.e., eliminating the requirement of "compelling circumstances"). The changes are intended to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters (vs. adversary proceedings), which usually can be resolved less formally and more expeditiously by means of a hearing, often on the basis of uncontested

testimony. After public comment, the Advisory Committee revised the proposed amendment to Rule 9014 to clarify that all testimony in a contested matter would be governed by the rule, not just testimony provided on motions.

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Proposed amendments to Rules 1007(c), 5009(b), and 9006(b) and (c) are intended to reduce the number of individual debtors whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation upon completion of the course. The proposed amendments to Rule 1007 eliminate the deadlines for filing the certificate of course completion, while conforming changes to Rule 9006 eliminate provisions concerning court alteration of those deadlines. The proposed amendment to Rule 5009 provides for two notices (instead of just one) reminding the debtor of the need to take the course and to file the certificate of completion.

Official Form 410S1 (Notice of Mortgage Payment Change)

The proposed amendment to Official Form 410S1 reflects the pending December 1, 2025 changes to Rule 3002.1(b) regarding ongoing payment adjustments to a home equity line of credit (HELOC) over the course of a bankruptcy case. The amended form accommodates amended Rule 3002.1(b)'s new option allowing the holder of a claim under a HELOC agreement to provide an annual notice of payment change (with a reconciliation amount) instead of notices throughout the year each time there is a change.

Rules 2007.1 (Appointing a Trustee or Examiner in a Chapter 11 Case) and 3001 (Proof of Claim)

Technical corrections are required to fix erroneous references in two rules inadvertently made during the restyling of the Bankruptcy Rules. First, the proposed technical amendments to Rule 2007.1(b) and (c) revise references to a numbered list that was restyled as a bulleted list.

Second, the proposed technical amendment to Rule 3001 provides that subdivision (c)'s provision concerning sanctions in an individual-debtor case applies if "a claim holder fails to provide any information required by (c)" (rather than "by (1) or (2)") so as to ensure that the sanctions provision applies to all information required by subdivision (c) (consistent with the pre-restyling version of the rule). Additionally, the proposed technical amendments to Rule 3001(c) reverse the order of what had been paragraphs (c)(3) and (c)(4) so that the sanctions provision (which will become (c)(4)) follows all of the substantive provisions that it enforces. The amendments also make a conforming change to a cross-reference in subdivision (c)(1).

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 2007.1, 3001, 3018, 5009, 9006, 9014, 9017, and new Rule 7043, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve, effective December 1, 2025, the proposed amendment to Official Form 410S1, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Proposed Amendments to Form Approved for Publication and Public Comment

The Advisory Committee on Bankruptcy Rules also recommended that proposed amendments to Official Form 106C be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Official Form 106C (Schedule C: The Property You Claim as Exempt)

The proposed amendments to Form 106C would provide totals for two columns: (1) the specific dollar amounts for each exemption and (2) the value of the debtor's interest in property for which the debtor claims exemptions.

Information Items

The Advisory Committee on Bankruptcy Rules at its April 3, 2025, meeting also discussed suggestions to allow special masters to be used in bankruptcy matters and decided to withdraw a proposed amendment to Rule 1007(h) (Interests in Property Acquired or Arising After the Petition is Filed) that was published for public comment in August 2024. The proposed amendment to Rule 1007(h) would have given a court authority to require the debtor to file a supplemental schedule listing certain property or income that becomes estate property after the case is filed. After considering public comments on the proposal, the Advisory Committee decided not to proceed with it.

FEDERAL RULES OF CIVIL PROCEDURE

Proposed Rule Amendments Approved for Publication and Public Comment

The Advisory Committee on Civil Rules recommended that proposed amendments to Rules 7.1, 26, 41, and 45 be published for public comment in August 2025. After minor revisions to the proposed amendment to Rules 45(b) and 41(a), and minor revisions to the amended committee notes for Rules 45(c), 26, and 41(a), the Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 7.1 (Disclosure Statement)

The proposed amendment to the disclosures required under Rule 7.1(a)(1) requires any party or would-be intervenor that is a private business organization to disclose any publicly held business organization that "directly or indirectly" owns 10 percent or more of the party or intervenor. The proposal responds to concerns raised that the current rule, which requires disclosure only of "any parent corporation and any publicly held corporation owning 10 percent or more of its stock," may result in nondisclosure of a "grandparent" corporation. This change is intended to assist judges in evaluating if recusal is appropriate consistent with updated guidance

in Committee on Codes of Conduct Advisory Opinion No. 57, which explains that corporate ownership of at least 10 percent of a party creates a rebuttable presumption of parental control and that a judge must recuse if they "conclude that a party is controlled by a corporation in which the judge owns stock." Another change substitutes the term "business organization" for the word "corporation" to clarify that the disclosure requirement applies to different forms of business entities.

Rule 41 (Dismissal of Actions)

The proposed amendments to Rule 41 clarify that a plaintiff may obtain a voluntary dismissal of one or more claims raised in a complaint without dismissing the entire action. This change responds to decisions in some courts interpreting the current 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 the rule. The proposed amendments also provide that a stipulation of dismissal need be signed only by parties who remain in the action at the time of the dismissal.

Rule 45(b) (Subpoena – Service)

The proposed amendment to Rule 45(b) clarifies how a subpoena for testimony may be served and whether the witness fee must be tendered simultaneously with service. The proposed amendment borrows two methods of service from Rule 4(e)(2)'s methods for serving a complaint on an individual—personal service or leaving a copy at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there. The proposed amendment also adds an additional method of service through the mail or commercial carrier if confirmation of actual receipt can be provided, and further authorizes the court to approve another means of service for good cause. The proposed amendment also 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.

Rule 45(c) (Subpoena – Remote Testimony)

The proposed amendment to Rule 45(c) adds a new subsection (c)(2) to address subpoenas for remote trial testimony. The proposed new subsection clarifies that the "place of attendance for remote testimony is the location where the person is commanded to appear in person." Under new Rule 45(c)(2), the court's subpoena power for in-court remote testimony extends nationwide so long as the subpoena does not command the witness to travel farther than the distance authorized under Rule 45(c)(1). The proposed amendment does not affect the standards governing whether to permit in-court remote testimony.

Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendment to Rule 26(a) relating to pretrial disclosures requires disclosure of the party's expectation as to whether each of its witnesses' testimony will be in-person or remote.

Information Items

The Advisory Committee on Civil Rules at its April 1, 2025 meeting discussed various information items, including potential rule amendments regarding sealed filings and default judgments. The Advisory Committee also heard updates relating to items concerning third-party litigation funding, cross-border discovery, remote testimony, and random case assignment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Proposed Rule Amendment Approved for Publication and Public Comment

The Advisory Committee on Criminal Rules recommended that proposed amendments to Rule 17 (Subpoena) be published for public comment in August 2025. After minor revisions to

the proposed amendment, the Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 17 (Subpoena)

The proposed amendments focus primarily on Rule 17(c), which governs subpoenas for production. The proposed amendments clarify that third-party subpoenas for production may be issued for proceedings in addition to trial. This includes proceedings where such subpoenas are most likely to be needed or are already used regularly in many districts, as well as proceedings for which there is statutory or rule authority for parties to present evidence (i.e., detention, revocation, suppression, and sentencing). With the court's permission, the rule also authorizes such subpoenas for other evidentiary hearings.

The proposed amendments also set forth a modified version of the test announced in *Nixon v. United States*, 418 U.S. 683 (1974), as the standard for the issuance of third-party subpoenas for production. The modified test as proposed is intended to provide both prosecution and defense with an adequate and more uniform opportunity across jurisdictions to obtain needed evidence from third parties.

Other proposed amendments to Rule 17 clarify when a party must file a motion to serve a subpoena for production of documents—when the subpoena requests personal or confidential information about a victim, when the subpoena is requested by a self-represented party, or when a local rule or court order requires a motion. When no motion is required, a party may serve a subpoena for production on an ex parte basis. When a motion is required, the proposed amendments provide that the court "must" allow a party to file it ex parte if good cause is shown. The proposed amendments further address ex parte subpoena practice—setting a default rule that a party need not disclose its subpoena to another party if no motion is required.

The proposed amendments also clarify the circumstances under which the recipient of the subpoena must produce the designated items to the court rather than directly to the requesting party.

In addition, the amendments address the disclosure of material produced directly to the requesting party, disapproving the practice in some courts in which all subpoenaed items must be provided to the opposing party, regardless of whether the items would be subject to discovery under Rule 16. By providing that a party must disclose to its opponent only items the party obtains by subpoena if the item is otherwise discoverable, the proposed amendments seek to ensure that Rule 17 is not interpreted to disturb policies codified in Rule 16 and other discovery rules regulating disclosure between the parties.

Finally, the proposed amendments clarify, as to each subdivision of Rule 17, whether it applies to subpoenas for testimony, subpoenas for production, or both.

Information Items

The Advisory Committee on Criminal Rules at its meeting on April 24, 2025, also discussed several information items. The Advisory Committee was updated on a subcommittee's work on a possible amendment to Rule 49.1 (Privacy Protection for Filings Made with the Court) to require the use of pseudonyms for minors and the complete redaction of SSNs. The Advisory Committee also heard an update on a potential amendment to Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) that would address instances when a previously released defendant is arrested in one district under a warrant issued in another.

FEDERAL RULES OF EVIDENCE

Amended Rule Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval amendments to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

Current Rule 801(d)(1)(A) excludes from the definition of hearsay a declarant-witness's prior inconsistent statements only if the witness gave the prior statement under penalty of perjury in a prior proceeding or deposition. The proposed amendment to Rule 801 eliminates the requirement that the prior inconsistent statement be offered under penalty of perjury and allows any prior inconsistent statement by a declarant-witness to be admissible as substantive evidence, subject to exclusion under Rule 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons). This proposed amendment conforms Rule 801(d)(1)(A)'s approach to that taken in Rule 801(d)(1)(B) for prior consistent statements and eliminates potential confusion from limiting instructions.

The committee note was revised after publication and public comment to underscore the amended rule's parallel treatment of prior consistent and inconsistent statements and to emphasize that the rule governs admissibility rather than sufficiency of the evidence.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rule 801 as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Rule Amendment and New Rule Approved for Publication and Public Comment

The Advisory Committee on Evidence Rules recommended that a proposed amendment to Rule 609 (Impeachment by Evidence of a Criminal Conviction) and a new Rule 707 (Machine-Generated Evidence) be published for public comment in August 2025.

After minor revisions to the text and committee note of each rule, the Standing Committee unanimously approved the Advisory Committee's recommendation concerning Rule 609 and approved (with one member objecting) the recommendation concerning Rule 707.

Rule 609 (Impeachment by Evidence of a Criminal Conviction)

The proposed amendment to Rule 609(a)(1)(B) addresses the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant's character for truthfulness. Under the proposed amendment, evidence of a non-falsity based prior conviction is not admissible to impeach a criminal defendant unless its probative value "substantially" outweighs the risk of unfair prejudice to the defendant. Under current Rule 609, such evidence must be admitted against a testifying criminal defendant if the probative value merely outweighs its prejudicial effect. With this amendment, the Advisory Committee aims to reduce the risk that Rule 609 will unduly deter criminal defendants from exercising their right to testify. An additional proposed amendment to Rule 609(b) clarifies the time period for older convictions that are subject to a more exclusionary standard. Under the amendment, the 10-year time period for the rule's applicability is measured from the date of conviction or end of confinement, whichever is later, until the date of trial.

New Rule 707 (Machine-Generated Evidence)

The Advisory Committee spent three years considering whether the Evidence Rules sufficiently regulate the reliability and authenticity of evidence created by artificial intelligence (AI). Proposed new Rule 707 sets standards for the admissibility of machine-generated evidence that would be subject to Rule 702's expert-testimony requirements if testified to by a witness.

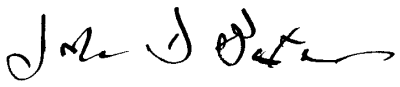
Information Items

The Advisory Committee on Evidence Rules also discussed at its meeting on May 2, 2025, several other issues. This included discussion of a possible new subdivision for Rule 901 (Authenticating or Identifying Evidence) that would set a framework for evaluating contentions that an item of evidence has been fabricated using generative AI (deepfakes). The Advisory Committee also continues its consideration of a suggestion that Rule 902(1) (Evidence That Is Self-Authenticating; Domestic Public Documents That Are Sealed and Signed) be amended to add federally-recognized Indian tribes to the list of entities whose sealed and signed documents are self-authenticating.

JUDICIARY STRATEGIC PLANNING

As noted above, the Committee was asked to provide input on the draft 2025 *Strategic Plan*. The Committee indicated that it had no suggested edits in a letter to Chief Judge Chagares dated June 30, 2025.

Respectfully submitted,



John D. Bates, Chair

Paul J. Barbadoro	Troy A. McKenzie
Todd Blanche	Patricia Ann Millett
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	D. Brooks Smith
Joan N. Ericksen	Kosta Stojilkovic
Stephen A. Higginson	Jennifer G. Zipps
Edward M. Mansfield	

* * * * *

TAB 6

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Congress (Apr 2025)

REA History:

- Transmitted to Supreme Court (Oct 2024)
- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendments to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendments would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Congress (Apr 2025)

REA History:

- Transmitted to Supreme Court (Oct 2024)
- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Approved by Standing Committee (June 2025 unless otherwise noted)

REA History:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendments to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Approved by Standing Committee (June 2025 unless otherwise noted)

REA History:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 9014	The proposed amendments to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule 43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendments to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendments to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 15	The proposed amendment to Rule 15 would remove a potential trap for the unwary in the current rule. The proposed amendment reflects the party-specific nature of appellate review of administrative decisions and would require a party that wants to challenge the result of agency reconsideration to file a new or amended petition.	
BK 2002	The proposed amendment to Rule 2002(o) would provide that the caption of a notice given under Rule 2002 must include the information that Official Form 416B requires.	
BK Official Form 101	The proposed amendment to Question 4 in Part 1 of Form 101 would modify the language to read: "EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."	
BK Official Form 106C	The proposed amendments would amend Form 106C to provide a total of the specific-dollar exemption amounts along with the addition of a space on the form for the total value of the debtor's interest in property for which exemptions are claimed.	
CR 17	The proposed amendments to Rule 17 relate to third-party subpoenas for documents and other items and address seven areas: application to proceedings other than trial; the standard for when such subpoenas are available; when a motion and order are required; when a party may make its request ex parte; the place of production; the preservation of Rule 16's disclosure policies; and which subparts of Rule 17 apply to different proceedings.	
CV 7.1	The proposed amendments to Rule 7.1(a) substitute "business organization" for the term "corporation" and require disclosure of business organizations that "directly or indirectly own 10% or more of" a party rather than disclosure based on ownership of "stock" in a party.	
CV 26	The proposed amendment to Rule 26 adds a pretrial disclosure requirement for parties to state whether any witness they expect to present at trial will testify in person or remotely.	Rule 45(c)
CV 41	The proposed amendments to Rule 41(a) would clarify that: (1) the rule permits the dismissal of one or more claims in an action rather than only allowing dismissal of the entire action; (2) only the signatures of active parties who remain in a case are required to sign a stipulation of dismissal.	
CV 45	The proposed amendments to Rule 45 include amendments to Rule 45(b) relating to service of subpoenas and Rule 45(c) relating to subpoenas for remote testimony. There is a correlating proposed amendment to Rule 26 relating to	Rule 26

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	pretrial disclosures as to whether testimony at trial will be offered in person or by remote means. The proposed amendments to Rule 45(b) specify that the methods for service of a subpoena are personal delivery, leaving it at the person's abode with someone of suitable age and discretion who resides there, sending it by mail or commercial carrier if it includes confirmation of receipt, or another method authorized by the court for good cause. The amendment would also add a default 14-day notice period and provide that the tender of witness fees is not required to effect service of the subpoena so long as the fees are tendered upon the witness's appearance. The proposed amendments to Rule 45(c) adds a "place of compliance" for subpoenas for remote testimony and specifies that it is "the location where the person is commanded to appear in person."	
CV 81	The proposed amendment to Rule 81(c) clarifies whether and when a jury demand must be made after removal and makes clear that Rule 38 applies to removed cases. The proposed amendment also removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required.	
EV 609	There are two proposed amendments to Rule 609. First, the proposed amendment to Rule 609(a)(1)(B) clarifies the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant's character for truthfulness by adding "substantially" before the word "outweighs." Second, the proposed amendment to Rule 609(b) clarifies that the 10-year time-period for the rule's applicability is measured from the date of conviction or end of confinement, whichever is later, until the "date that the trial begins."	
EV 707	Proposed new Rule 707 provides that if machine-generated evidence is introduced without an expert witness, and it would be considered expert testimony if presented by a witness, then the standards of Rule 702(a)-(d) are applicable to that output. The proposed rule further provides that it does not apply to the output of simple scientific instruments.	

TAB 7

Legislation That Directly or Effectively Amends the Federal Rules
119th Congress
(January 3, 2025–January 3, 2027)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Democracy Act	**S. 2838** *Sponsor*: Schiff (D-CA) *Cosponsors*: 8 Democratic Cosponsors	CV – New Rule(s)	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf **Summary:** Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	• 9/17/2025: S. 2838 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs
Lawsuit Abuse Reduction Act of 2025	**H.R. 5258** *Sponsor*: Collins (R-GA) *Cosponsors*: Gill (R-TX) Tiffany (R-WI) Hageman (R-WY)	CV 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf **Summary:** Would amend Civil Rule 11 to require the court to issue sanctions for Rule 11 violations, which shall consist of an order to pay the amount of the reasonable expenses incurred as a direct result of the violation.	• 9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2025	**H.R. 4678** *Sponsor*: Johnson (D-GA) *Cosponsors*: 20 Democratic cosponsors	EV 416	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf **Summary**: Would create a new Evidence Rule (416, Limitation on Admissibility of Defendant's Creative or Artistic Expression) that would make a defendant's creative or artistic expression inadmissible unless the government proves by clear and convincing evidence that one of several exceptions applies.	• 7/23/2025: H.R. 4678 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Rape Shield Enhancement Act of 2025	**H.R. 3596** *Sponsor:* Mace (R-SC)	EV 412; CV 26; CR 16	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf **Summary:** Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	• 5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2025	**S. 1814** *Sponsor*: Whitehouse (D-RI) *Cosponsors*: 26 Democratic and Independent cosponsors	AP 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf **Summary:** Would require the Judicial Conference to prescribe rules of procedure requiring certain amicus disclosures and for prohibiting the filing of or striking an amicus brief that would result in the justice, judge, or magistrate judge's disqualification.	• 5/20/2025: S. 1814 introduced in Senate; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	**H.R. 2675** *Sponsor:* Cline (R-VA)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 4/7/2025: H.R. 2675 introduced in House; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2025	**S. 1133** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf **Summary:** Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 3/26/2025: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Trafficking Survivors Relief Act of 2025	**H.R. 1379** *Sponsor:* Fry (R-SC) *Cosponsors:* 15 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf **Summary:** Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	• 2/14/2025: H.R. 1379 introduced in House; referred to Judiciary Committee
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* 7 Republican cosponsors	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 2/7/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 8

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Rule 55—Role of Clerk on Entry of Default or Default Judgment**

DATE: **October 1, 2025**

During its April 2025 meeting the Advisory Committee discussed Rule 55. Members expressed support for a narrow-gauged amendment to reflect current practice, in particular to remove the command in the current rule that the clerk enter defaults and, in certain cases, enter default judgments. The main thrust was to recognize in the rule that the clerk may refer the question of entry of default or default judgment to the presiding judge. One possibility, suggested in alternative language below, is to remove the clerk's authority to enter default judgments altogether. That could relieve the clerk from having to determine whether the action is for a "sum certain or a sum that can be made certain by computation."

The discussion was illuminated by a thorough FJC study entitled "Default and Default Judgment Practices in the District Courts," which showed considerable variation in local practices in different districts but also that what the rule says is not really done in many districts. A link to that FJC report is included in this agenda book at the end of this memorandum. The various issues that might be addressed with a more aggressive rule amendment were explored in the agenda book for the April 2025 meeting. An attachment to this memorandum reproduces the discussion from the April 2025 Agenda Book.

Based on the FJC study, the discussion in the agenda book for the April 2025 meeting, and the discussion during that meeting (as reflected in the minutes in this agenda book), it may be time to recommend publication for public comment of amendments to Rule 55. Two alternatives are presented below, one abrogating the clerk's authority to enter a default judgment altogether, and the other making clear that the clerk is not required to determine whether a default judgment is appropriate under the rule.

One more introductory point may be justified. As the FJC study shows, the frequency of default judgments has fallen considerably in recent years. The prominence of default judgments in state court actions (often by creditors against unrepresented debtors) does not exist in the federal courts. On this subject Pamela Bookman, *Default Procedures*, 173 U. PA. L. REV. 1419 (2025), illustrates the current divergence, as pointed out in the attachment to this memorandum, drawn from the agenda book for the April 2025 Advisory Committee meeting.

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 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 – 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 2028]

(2) **By the Court.** ~~In all other cases,~~t<u>T</u>he party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person <u>or a person in military service affected by 50 U.S.C. § 3931</u>[1] only if

[1] 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.

(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.

represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

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—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 a person in military service affected by 50 U.S.C. § 3931, or refer the matter to the court for directions.

(2) **By the Court.** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person or a person in military service affected by 50 U.S.C. § 3931 only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

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).

(D) investigate any other matter.

* * * * *

COMMITTEE NOTE

Alternative 1

Rule 55(a). Rule 55(a) is amended to remove the current command in the rule that the clerk enter a default whenever it is contended that a party has failed to plead or otherwise defend. A thorough study of district-court default practices by the Federal Judicial Center showed considerable variety in actual practices, and also that local rules often provide the clerk discretion to refer the matter to the court. *See* Emery G. Lee III & Jason A. Cantone, DEFAULT AND DEFAULT JUDGMENT PRACTICES IN THE DISTRICT COURTS (Fed. Jud. Ctr. Mar. 2024). One goal of this amendment is to bring the rule in line with actual practices. Another is to avoid situations in which clerks may be asked to make close calls on whether a defendant is in fact in default. The amendment therefore recognizes that the clerk may refer the application for entry of default to the court.

Rule 55(b)(1). Rule 55(b)(1) is abrogated to remove the clerk from the process of entering default judgment. Authority for the clerk to enter default judgment has been in the rules since they were originally promulgated. But litigation has become more complex in ways that can often make it challenging to determine whether the claim is "for a sum certain or a sum that can be made certain by computation." One recurrent issue is computation of interest when that may be included. Another is determining the amount of an attorney fee award when that is authorized either by statute or by contract. As reflected in the FJC study cited above, entry of default judgment by the clerk is now rare, and there is considerable reason to direct that the decision to enter judgment should rest with the court.

Rule 55(b)(2). Rule 55(b)(2) is amended to make clear that all applications for entry of default judgment must be to the court.

In addition, reference to 50 U.S.C. § 3931 ("Protection of servicemembers against default judgments") is added to the rule. 50 U.S.C. § 3931(b)(2) provides: "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."

Alternative 2

Rules 55(a) and (b) are amended to remove the command that the clerk enter a default or default judgment whenever they empower the clerk to do so. A thorough study of district-court default practices by the Federal Judicial Center showed considerable variety in actual practices, and also that local rules often provide the clerk discretion to refer the matter to the court. *See* Emery G. Lee III & Jason A. Cantone, DEFAULT AND DEFAULT JUDGMENT PRACTICES IN THE DISTRICT COURTS (Fed. Jud. Ctr. Mar. 2024).

Rule 55(a). Because the clerk may sometimes be uncertain whether the criteria for entry of a default have been satisfied, this amendment recognizes that the clerk may refer these applications for entry of default to the court.

Rule 55(b)(1). Authority for the clerk to enter default judgment has been in the rules since they were originally promulgated. But litigation has become more complex in ways that can make it challenging to determine whether the claim is "for a sum certain or a sum that can be made certain by computation." One recurrent issue is computation of interest when that may be included. Another is determining the amount of an attorney fee award when that is authorized either by statute or by contract. As reflected in the FJC study cited above, entry of default judgment by the clerk is now rare, and the amendment recognizes that the clerk may refer the decision to enter judgment to the court.

Rule 55(b)(1) and (b)(2). In addition, reference to 50 U.S.C. § 3931 ("Protection of servicemembers against default judgments") is added to both Rule 55(b)(1) and Rule 55(b)(2). 50 U.S.C. § 3931(b)(2) provides: "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 the Committee is prepared to elect one of the two alternatives, it can be presented to the Standing Committee at its January meeting, with a recommendation for publication for public comment. If approved in January, that publication will not occur until August 2026. If the Committee is not presently prepared to make a choice between the two alternatives, it would be helpful to know what additional information is needed.

***

Reference Material Link(s):

- Default and Default Judgment Practices in District Courts (Federal Judicial Center Report - March 2024)

Attachment(s):

- Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, April 1, 2025, at 284-91

Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, April 1, 2025, at 284-91:

Because the Committee's discussion raised possible complexities, the conclusion at the October Committee meeting was that there should be additional study and that the Committee could return to this topic at its Spring meeting.

This memorandum provides additional background for that discussion, while leaving open the question whether the current rule has created problems that warrant amendment. On occasion it draws from the compilation of local rule treatment of entry of default and related problems presented in Appendix C to the FJC report. At the end, this memo presents a suggestion for a "bare bones" amendment that would leave many details to local rules rather than imposing nationwide standards.

State court contrast

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.

Prof. Bookman cites "existing procedural reform efforts, such as right-to-counsel movements and active judging" as suitable responses. Id. at 10. But she also recognizes that "state civil courts' default procedures and their implementation diverge markedly from federal courts." Id. at 10-11). She adds:

> The arc of *federal* civil procedure over the last few decades has shown a retrenchment, raising barriers to court access through distrust of plaintiff's lawyers in a variety of defendant-friendly procedural moves. * * * State courts, however, have maintained their ease of court access, yielding a growing procedural gulf between increasingly defendant-friendly federal courts and plaintiff-friendly state courts.

Id. at 8.

So although there may be significant problems with default practices in state court, no such problems appear to bear on the operation of Rule 55. Indeed, as reported in Figures 1 and 2 to the FJC Report included in this agenda book (pp. 24-25), the number of default judgments in federal court has been declining since the 1980s, and is presently below 2% of civil terminations. Compare Bookman, id. at 1-2 (reporting that state-court default rates are "often over 70% in debt-collection cases * * * down from rates as high as 95% a decade ago").

Role of discretion

Because the question of discretion for the Clerk was raised during the October Committee meeting, it may be useful to include what the Federal Practice & Procedure treatise says about the role of discretion for the court under Rule 55(b)(2):

> 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.

Many of these considerations might bear on entry of default judgment by the Clerk even when suit is for a "sum certain." It does not seem that the Clerk should be weighing all these matters, so it might be that one would suggest considering abrogation of Rule 55(b)(1) rather than changing from "must" to "may." Alternatively, as noted below in relation to local rule provisions, it may be preferable to recognize in the rule that the Clerk may refer the question whether to enter default judgment to the court.

Need for national procedures
and clarity for the bar

One concern mentioned at the October 2024 meeting was that counsel do not know what the procedures are when they want to seek entry of default or default judgment. On this topic, Appendix C to the FJC report provides valuable information, including details described under the next heading.

One thing Appendix C shows is that about half the districts have no default-related procedures in their local rules. Whether that is a sign that more national particulars are needed or not may be debated. But at least it shows that in about half the districts adding particulars to the national rules would not, under Rule 83, nullify any existing local rules. On the other hand, the fact so many districts have adopted local rules may show that adding particulars to Rule 55 would be useful. The variation among local rules could show that adopting particulars in the national rule would also invalidate some divergent existing local rules. Perhaps such divergence is warranted by divergent local conditions, but it is not clear why.

Drawing on local rules in various districts, this memorandum introduces a variety of issues that might be addressed in revisions of Rule 55, which has remained relatively unchanged since adoption in 1938. An abiding question is whether to undertake such revisions, or leave these specifics to local rules and local practice.

Issues addressed in local rules

The local rules reported in Appendix C to the FJC report identify a number of possible additions to the national rules. At least some of these local rule provisions are arguably at tension with Rule 83(a)(1), which says that local rules "must be consistent with – but not duplicate" the national rules. But that is not a matter for this Committee. See 28 U.S.C. § 2071(c)(1) (vesting authority to review local rules in the judicial council of the circuit).

Instead, it may be useful to note features of local rules that add to what's in Rule 55. In some instances, the differences may be semantic. The following attempts to identify some ideas found in local rules that might be added to Rule 55 (and therefore – pursuant to Rule 83 – made binding on all districts).

Entry of default – Rule 55(a)

Terminology: Rule 55(a) says that the Clerk must enter default when "failure [to plead or otherwise defend] is shown by affidavit or otherwise." Some local rules, however, speak of an "application" or "request" or "motion" or "unsworn declaration under penalty of perjury" to support entry of default. These differences seem insignificant. In terms of "motion," one might note that Rule 7(b)(1) says that "[a] request for a *court* order must be made by motion." Some local rules refer to an "order" by the Clerk.

Notice: Rule 55(a) does not require notice to the defendant about the entry of default, and Rule 55(b)(1) says the clerk must enter default judgment if the claim is for a sum certain, but does not require notice to the defendant of this request. Unless the defendant is a minor or an incompetent person, the rule directs the clerk to enter judgment without notice. (How the clerk is

to know whether the defendant is a minor or an incompetent person is not spelled out in the rule.) Rule 55(b)(2), applicable in "all other cases," then provides that the plaintiff must "apply to the court for a default judgment." Notice is required under Rule 55(b)(2), however, only when the defendant has "appeared personally or by a representative."

Some local rules require, however, that the party seeking entry of default give notice. Thus, Rule 55.1(a)(1) of the W.D. Mo. says:

> Written notice of the intention to move for entry of default must be provided to counsel or, if counsel is unknown, to the party against whom default is sought, regardless of whether or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of a motion for entry of default.

E.D. Wash. Local Rule 55(a)(1) similarly says such notice is required "regardless of whether counsel or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of the motion for entry of default." Since Rule 55(b)(2) requires notice when a default judgment is sought from the court (not the Clerk) and says notice is only required for parties that have appeared in the action, there might be a challenge to this local rule under Rule 83.

Local Rule 55(a) of the W.D. Wash., on the other hand, says:

> A motion for entry of default need not be served on the defaulting party. However, in the case of a defaulting party who has entered an appearance, the moving party must give the defaulting party written notice of the requesting party's intention to move for entry of default at least fourteen days prior to filing its motion and must provide evidence that such notice has been given in the motion for entry of default.

E.D.N.C. Local Rule 55.1(a) requires a motion and says:

> Following the 21-day response time provided under Local Civil Rule 7.1(f)(1), the motion shall be submitted to the presiding judge if it is opposed or if the allegedly defaulting party has filed a responsive pleading. Otherwise the motion shall be referred to the clerk and if the clerk is satisfied that the moving party has effected service or process, the clerk shall enter a default.

Clerk's notice burden: An alternative method of giving notice appears in M.D. La. Local Rule 55: "The clerk shall provide notice of entry of default to each defendant or the defendant's attorney at the last known address." So this provision puts the onus on the clerk rather than the plaintiff, though how the clerk is to provide notice when the defendant has not appeared could present difficulties.

Contents of showing: Rule 55(a) says only that the Clerk may enter a default when the party "has failed to plead or otherwise defend." Rule 12(a)(1)(A)(i) requires that a defendant serve an answer "within 21 days after being served with the summons or complaint."

Local rules sometimes specify what must be shown. For example, E.D. Mich. Local Rule 55.1 says:

> Requests for, with affidavits in support of, a Clerk's Entry of Default shall contain the following information: (a) A statement identifying the specific defendant who is in default. (b) A statement attesting to the date the summons and complaint were served upon the defendant who is in default. (c) a statement indicating the manner of service and the location where the defendant was served.
>
> D. Utah Local Rule 55-1 says:
>
> To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), a party must file a "motion for entry of default" and a proposed order. The motion must describe with specificity the method by which each allegedly defaulting party was served with process in a manner authorized by Fed. R. Civ. P. 4, that the time for response has expired, and that the party against whom default is sought has failed to plead or otherwise defend. Should the clerk determine that entry of default is not appropriate for any reason, the clerk will issue an order denying entry of default. An order denying entry of default is reviewable by the court upon motion.[2]

Clerk's responsibility: N.D. Ok. Local Rule 55-1(a) says: "Once a proper motion [for entry of default] has been filed, the Court Clerk will prepare and enter default after *independently determining that service has been effected, that the time for response has expired, and that no answer or appearance has been filed*." Such an obligation might sometimes be burdensome for the Clerk.

Rule 41(b) overtones: As indicated in the FJC report, entry of default may link to concerns about failure to prosecute. Thus, N.D. Tex. Local Rule 55.1 provides:

> If a defendant has been in default for 90 days, the presiding judge may require the plaintiff to move for entry of a default and a default judgment. If the plaintiff fails to do so within the prescribed time, the presiding judge will dismiss the action, without prejudice, as to that defendant.
>
> M.D. Fla. Local Rule 1.10 appears to go further:
>
> (a) PROOF OF SERVICE. Within twenty-one days after service of a summons and complaint, a party must file proof of service.
>
> (b) APPLICATION FOR A DEFAULT. Within twenty-eight days after a party's failure to plead or otherwise defend, a party entitled to a default must apply for the default.
>
> (c) APPLICATION FOR A DEFAULT JUDGMENT. Within thirty-five days after entry of a default, the party entitled to a default judgment must apply for the default judgment or must file a paper identifying each unresolved issue – such as liability of another defendant – necessary to entry of the default judgment.

[2] Below, there are examples of local rules recognizing that the Clerk can refer matters to the assigned judge. This local rule seems to be stronger than that.

> (d) FAILURE TO ACT TIMELY. Failure to comply with a deadline set in this rule can result in dismissal of the claim or action without notice and without prejudice.

Reference to court: W.D. Mo. Local Rule 55.1(a)(4) provides: "Notwithstanding the provisions of Federal Rule of Civil Procedure 55(a), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry." Though this provision speaks of default judgment (dealt with in Local Rule 55.1(b)) it seems different from what Rule 55(a) says, and may be reflect uneasiness about the command "must" in the national rule.

Entry of Default Judgment – Rule 55(b)(1)

Entry of default as prerequisite: Rule 55(b)(1) says that the Clerk may enter default judgment only "against a defendant who has been defaulted for not appearing." This sequence has been recognized by courts. See, e.g., *Savoia-McHugh v. Glass*, 95 F.4th 1337, 1340 n. 6 (1st Cir. 2024) ("Entry of the default must precede entry of a default judgment."). Nonetheless, some local rules explicitly require that entry of default be included in the request for entry of default judgment. E.g., D. Utah Local Rule 55-1(2) ("The motion for default judgment must include the clerk's certificate of default").

On the other hand, E.D.N.C. Local Rule 55.1(b)(2) includes the following: "If a party files a motion for default judgment prior to entry of default, the moving party must also serve the party against which default is sought under subsection (a) of this rule [dealing with entry of default]."

Waiting period to seek entry of default judgment: W.D. La. Local Rule 55.1 directs the clerk to mail notice of the entry of default to each defendant and provides: "A judgment of default shall not be entered until 14 calendar days after entry of default."

Notice: Local Rule 55.1(c) of the E.D.N.Y. and S.D.N.Y. provides:

> Unless otherwise ordered by the Court, all papers submitted to the Court pursuant to Local Rules 55.1(a) or (b) shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court. If the mailing is returned, a supplemental affidavit shall be filed with the Court setting forth that fact, together the reason provided for return, if any.

The Committee Note to this local rule acknowledges that the national rule does not require service but says that "experience has shown that mailing notice of such an application is conductive to both fairness and efficiency."

Meet and confer requirement: D. Or. Local Rule 55-1 (applicable to entry of default or default judgment) says that if the opposing party "has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order or judgment of default, then * * * the parties must make a good faith effort to confer before a motion or request for default is filed." An accompanying Practice Tip says that this requirement is "in addition to the requirement in Fed. R. Civ. P. 55(b)(2)" of notice to a party that has appeared.

Contents: Rule 55(b)(2) [but not 55(b)(1)] says that a default judgment must not be entered against a minor or incompetent person. 50 U.S.C. § 3931(b)(1) says that default judgment must not be entered against a person in military service. Some local rules require that such certifications be made to the court. See, e.g., M.D. Tenn. Local Rule 55.01.

Computation of interest: E.D.N.C. Local Rule 55.1(b)(2) directs that a motion seeking default judgment under Rule 55(b)(1) include a "supporting affidavit" including "the principal amount due," "information enabling the principal amount due to be calculated to a sum certain," "information enabling the computation of the interest to the date of judgment" and "the proposed post-judgment interest rate." The affidavit is also to specify "the amount of costs claimed."

Attorney fees: Some local rules address the showing needed to include an award of attorney fees in the default judgment. D. Alaska Local Rule 55.1(b) specifies that "a claim for 'reasonable attorney's fees' is not a claim for a sum certain," and directs submission of "the facts supporting any claim for attorney's fees, including the amount of fees sought, the actual time spent, and actual fees incurred." C.D. Cal. Local Rule 55-3, on the other hand has a "Schedule of Attorneys' Fees" keyed to the amount of the judgment and says: "An attorney claiming a fee in excess of this schedule may file a written request."

Time limit to move for entry of judgment after entry of default: S.D. Cal. Local Rule 55.1 says: "If plaintiff(s) fail(s) to move for default judgment within thirty (30) days of the entry of a default, the Clerk will prepare, with notice, an order to show cause why the complaint against the defaulted party should not be dismissed."

Authority for Clerk to refer matter to court: N.D.N.Y. Local Rule 55.1 specifies what is needed to support entry of default judgment under Rule 55(b)(1), and adds;

> The Clerk shall then enter judgment for principal, interest, and costs. If, however, the Clerk determines, for whatever reason, that it is not proper for a sum certain default judgment to be entered, the Clerk shall forward the documents submitted * * * to the assigned district judge for review. The assigned district judge shall then promptly notify the Clerk as to whether the Clerk shall properly enter a default judgment.

D.Vt. Local Rule 55(b) includes the following:

> Consultation and Referral to District Judge: If the clerk determines that it may not be appropriate to enter a default judgment under Fed. R. Civ. P. 55(b)(1), the clerk may confer with the district judge. The district judge will advise the clerk whether default judgment under Rule 55(b)(1) is appropriate. If such a judgment is not appropriate, the clerk shall so notify the applicant, who may then proceed to move for default judgment under Fed. R. Civ. P. 55(b)(2).

TAB 9

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Cross-Border Discovery Subcommittee Report**

DATE: **October 1, 2025**

The Cross-Border Discovery Subcommittee (now consisting of Judge Shah, Judge McEwen, and Dean Clopton) engaged in considerable outreach to determine whether making rule amendments seemed a promising way to avoid difficulties that sometimes emerged from discovery outside this country for use in litigation before our federal courts. This memorandum will provide additional background. But the consensus is what was reported during the April 2025 Advisory Committee meeting—at present, it seems that there is no groundswell of support for rulemaking on this subject, and any rulemaking effort would present significant challenges. The Subcommittee had remained in listening mode, but has not heard anything that appears to call for present action. Accordingly, it recommended that this topic be removed from the Advisory Committee's agenda.

The Subcommittee's outreach efforts before the April 2025 meeting included the following, among other things: In May 2024, representatives of the Subcommittee met with the Lawyers for Civil Justice in Washington, D.C., to discuss cross-border issues. Then in July 2024, there was a meeting in Nashville with representatives of the American Association for Justice. In August 2024, the Sedona Conference arranged an online session with some of the members of its Working Group 6 (which focuses on cross-border discovery), and during March 2025, representatives of the Subcommittee attended the meeting of Working Group 6 in Los Angeles to continue these discussions. In addition, Dean Clopton has met with a panel of transnational discovery experts affiliated with the ABA. The information-gathering effort continues.

It still appears that there is not 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 such a rule change 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 General Data Protection Regulation 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. 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.

On top of this is the question when any additional rules for "cross-border" discovery apply. In hard-copy days, one could often say fairly confidently that the information sought under Rule 34 was "located" in a specific place—inside or outside this country. With storage "in the cloud," that certainty has largely vanished. Hence it may be that many, if not most, companies with widespread operations including some presence outside the U.S. would be subject to "cross-border discovery" if ordered to respond in the ways an American court would ordinarily order them to respond absent the cross-border complication.

In its *Aerospatiale* decision in 1987, the Supreme Court, by a 5-4 vote, rejected the "first resort" requirement and instead offered a multi-factor analysis district judges should employ in deciding whether to order discovery of information supposedly "located" outside this country. *See Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522 (1987).

There seem to be various views on whether *Aerospatiale* has really been followed by U.S. judges. One view is that—perhaps because they are steeped in the traditions of American litigation—American judges put a thumb on the scale in favor of doing things "our way." So a rule change might take the form of directing judges to do things the "right" way under the *Aerospatiale* analysis.

But at least an undercurrent of pro-amendment argument seems to favor a rule that adheres to Justice Blackmun's partial dissent in *Aerospatiale* (on behalf of four Justices) and direct judges (perhaps under the heading "comity") to give more weight to privacy interests and other concerns emphasized in other countries. Indeed, there may be a tension between the American full-disclosure attitude and the elevation of privacy elsewhere to levels not recognized in this country.

Given all these uncertainties and complications—together with numerous reports that there is not a serious problem that a rule change could solve—the Subcommittee has concluded that this

matter can be removed from the agenda for the present. If in the future something makes a rule change appear desirable, it may be that further action is in order.

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TAB 10

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Discovery Subcommittee Report—Filing Under Seal**

DATE: **October 1, 2025**

The following memorandum offers four possible avenues for moving forward. The second approach itself offers four variations. Finding the most appropriate way to say in the rules something that can seem easy to say otherwise has proved somewhat daunting; hence the four possible locutions. The third approach recognizes that, because there is little uncertainty about the reality that filing under seal is governed by a more exacting legal standard than issuing a protective order limiting the use of confidential materials obtained through discovery, it might be best simply to leave these rules as they are. Finally, the fourth approach involves taking on the multiple difficulties that would result from prescribing in the national rules a binding set of procedures for ruling on motions to seal. Unless there is support for taking on that task, it may be best to conclude that an amendment proposal is not needed.

The Discovery Subcommittee may be able to meet before the full Committee's October 2025 meeting and refine its recommendation for considering a new rule on sealing court records. This memorandum introduces the options as of the time of preparation of the agenda book. If there is full Committee consensus, it may be possible to approve a proposal for submission to the Standing Committee during its January 2026 meeting for publication for public comment. Alternatively, the matter can be presented at the Spring 2026 meeting, and if there is full Committee consensus, it may be possible to submit a rules proposal to the Standing Committee at its June 2026 meeting. If the full Committee decides that there really is no need to amend the rules, the matter could be dropped from the agenda.

The Discovery Subcommittee has since 2020 been considering a proposal (originally made by Professor Volokh and the Reporters' Committee for Freedom of the Press) to recognize in the Civil Rules that granting a motion for a protective order does not automatically justify filing under seal for any materials produced through discovery that are deemed "confidential" under the protective order's provisions. It seems widely recognized that the standards for sealing court files are considerably more demanding than the standards for ordering protection of materials produced through discovery. But that distinction does not appear explicitly in the rules. Having considered the issues, the Subcommittee brings forward four possible approaches.

The original proposal, and some supporting submissions, urged in addition that the rules be amended to impose nationwide procedural requirements for the handling of motions to seal. Presently there is considerable variety among districts in the way they handle motions to seal. Some districts employ local practices that are quite rigorous, while others are not so exacting. After reflection, the Subcommittee tentatively concluded that requiring nationwide adherence to a single method for resolving motions to file under seal is not worth pursuing. Imposing more exacting requirements in all districts might create difficulties for attorneys seeking to meet filing deadlines.

Requiring all districts to handle motions to seal in a manner different from other motions could unnecessarily interfere with the operation of some district courts. And—as mentioned during the Advisory Committee's April 2025 meeting in Atlanta—there is a possibility that there would be an impulse in nationwide rules to adopt the strictest rules, which might make things more difficult for judges and attorneys in many districts.

Meanwhile, questions have been raised both about whether a rule amendment is needed at all, and also whether it might be more prudent to limit the amendment to Rule 26(c).

Accordingly, the Subcommittee brings before the full Committee the following questions, and provides explanatory material about them.

1. Should Rules 26(c) and 5(d) both be amended?

2. Would amending only Rule 26(c) suffice? [There are four alternatives on this score.]

3. Given general recognition that the standard for issuing a protective order regarding material exchanged through discovery is less stringent than the standard for filing documents under seal, is there really a need to put an acknowledgement of that difference into the rules?

4. If some change is needed for rule provisions on the standard for filing under seal, is there any value to considering adding procedural directives?

This memorandum also includes the additional submission we received on this general topic in July 2025 from the American Association for Justice and Public Justice, which is included in the agenda book (25-CV-K). Although this submission endorses a rule change to clarify that the standard for filing under seal is different from the protective-order standard, it does not endorse going further and imposing nationwide procedures for resolving motions to seal.

(1) Amending both Rule 26(c) and 5(d)

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).

COMMITTEE NOTE

Rule 26(c) is amended to recognize what many court decisions confirm—that the standards for filing in court under seal are more exacting than the "good cause" standard for issuance of a protective order under Rule 26(c). An amendment to Rule 5(d) makes clear that the more exacting standard applies when leave is sought to file materials in court under seal.

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is authorized by a federal statute or by these rules, no paper [or other material][3] may be filed under seal unless [the court determines that][4] filing under seal is consistent with the applicable common law and First Amendment rights of public access to court [filings] {records}.

COMMITTEE NOTE

Rule 5(d)(5) is added to recognize in the rules that granting a protective order under Rule 26(c) for good cause involves a decision that is different from the decision whether to authorize filing under seal in court. Both common law and First Amendment considerations apply to filing under seal. The courts have recognized this difference, but it is not specifically acknowledged in the rules. This amendment provides that acknowledgement. An amendment to Rule 26(c) recognizes this difference.

The amendment does not affect filing under seal when authorized by a federal statute or by these rules. A statutory example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F); 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).[5]

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[3] The introduction of electronic filing has raised the question how to describe what we are talking about. Rule 5(d)(1) refers to "[a]ny paper after the complaint." So one might say the added phrase "or other material" is needed to include electronic filings. Rule 5.2(a), on the other hand, uses "an electronic or paper filing." It seems better to stick with the Rule 5(d) approach in Rule 5(d), and that should make the bracketed phrase unnecessary. On that score, it's worth noting that Rule 5(d)(2) refers to "[a] paper not filed electronically." So "paper" as used in Rule 5(d) includes electronic filings.

[4] The bracketed phrase might be unnecessary. It sounds like a findings requirement. One would think that a saying filing under seal is "consistent with the common law and First Amendment rights of public access to court filings" suffices to say that the court must so determine before authorizing filing under seal. The bracketed phrase could be removed. The draft Committee Note makes the point.

[5] One might consider including Rules 5.2(d) or (e) on this list. Rule 5.2 is about "privacy protections" for court filings, and addresses such things as Social Security numbers, the year of an individual's birth, the initials of a minor, and the last four digits of a financial-account number.

Rule 5.2 was adopted to comply with the E-Government Act of 2002. *See* 4B Fed. Prac. & Proc. Civ. § 1155 (4th ed.). It has not received much attention since adoption in 2007. Rule 5.2(e) authorizes a protective order requiring redaction of additional information on a showing of good cause. That might be regarded as inconsistent with the proposed amendments; perhaps someone might argue that 5.2(e) somehow nullifies the change being proposed for Rule 26(c). But Rule 5.2 is directed only to very limited concerns

The standards to be applied to a motion to file under seal have been articulated in slightly different ways in different circuits. This amendment does not seek to displace those caselaw interpretations of the common law or First Amendment rights of public access to court files.[6] Accordingly, it calls attention to the "applicable common law and First Amendment rights," meaning the articulation used by the circuit in which the court sits. Unless the court determines that the pertinent standards have been satisfied it should not authorize filing under seal. [The parties' stipulation to filing under seal does not itself satisfy the common law or First Amendment standards.][7]

(2) Amending only Rule 26(c)

It may be unnecessary to amend Rule 5 to achieve the desired objective of calling attention to the existing divergence between the standards for a protective order and for filing under seal. And perhaps there is a potential risk in seeming to adopt a nationwide standard for deciding whether sealing is appropriate, thereby possibly displacing the locutions adopted by some circuits. It may be that such a risk can be avoided by amending only rule 26(c). Here is a possible model:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

that seem quite different from the sorts of materials that have been the source of concerns about filing under seal. Accordingly, it is not included on this list; to cite it in the Note might invite difficulty. And the Note only says that examples of rules that permit filing under seal include the listed rules; it does not claim these are the only such rules.

[6] In some cases, there have been suggestions that "discovery" motions or "non-merits" motions are not subject to the same exacting scrutiny appropriate for "merits" motions like motions for summary judgment or a preliminary injunction. Trying to define in a rule whether there are motions that do not invoke public access rights would probably be quite difficult and might conflict with at least some court of appeals decisions. It seems best to leave that to caselaw development.

[7] Is it worth adding this point to the Note? There has been some controversy under Rule 26(c) about whether the court ought often treat the parties' stipulation to entry of a protective order as sufficient to support entry of the order. Some contend that courts should nevertheless insist on rigorous application of the good cause standard applicable there, and grant the protective order only when that standard is affirmatively justified. But requiring the court to undertake a rigorous review under Rule 26(c) may often not be justified. Filing under seal seems different.

Alternative 1

(4) ***Filing Under Seal.*** Good cause that supports issuance of an order under Rule 26(c)(1) does not itself provide a ground for filing under seal.

Alternative 2

(4) ***Filing Under Seal.*** An order under Rule 26(c)(1) does not support filing under seal unless [the court determines that] filing under seal is consistent with the applicable common law and First Amendment rights of public access to court filings.

Alternative 3

(4) ***Filing Under Seal.*** An order under Rule 26(c)(1) must not provide for filing under seal unless [the court determines that] filing under seal is consistent with the applicable common law and First Amendment rights of public access to court filings.

Alternative 4

(4) ***Filing Under Seal.*** An order under Rule 26(c)(1) that limits the use of information obtained in discovery does not alone warrant filing under seal unless the court orders sealing.

COMMITTEE NOTE

Alternative 1

A wide range of concerns may support a finding of good cause for issuing a protective order against disclosure of some materials exchanged though discovery. But filing such materials in court implicates additional considerations concerning the public right of access to court records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment explicitly recognizes those differences in the Civil Rules.

At the same time, it is important to recognize that various statutory or rule provisions outside Rule 26(c) may authorize filing under seal without regard to the criteria for granting a protective order. A statutory example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F), 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).

Alternative 2

The concerns that affect a decision whether to permit filing in court under seal are distinct from the good cause criteria of Rule 26(c). This amendment recognizes that a decision to permit filing under seal implicates additional considerations concerning the public right of access to court

records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment explicitly recognizes those differences in the Civil Rules.

At the same time, it is important to recognize that various statutory or rule provisions outside Rule 26(c) may authorize filing under seal without regard to the criteria for granting a protective order. An example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F), 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).

Alternative 3

Rule 26(c)(1) protective orders are distinct from orders permitting filing under seal. Without regard to Rule 26(c), various statutory or rule provisions authorize or direct filing under seal without regard to the criteria for granting a protective order. An example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F), 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).

When those provisions apply, there is no need to resort to Rule 26(c) to support filing under seal. When a statute or rule does not apply, a Rule 26(c)(1) protective order does not itself provide a warrant for filing under seal. Filing such materials in court implicates additional considerations concerning the public right of access to court records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment explicitly recognizes those differences in the Civil Rules, and directs that orders for filing under seal may be granted only when the [more exacting] standards for such filing are met.

Alternative 4

Though an order under Rule 26(c)(1) supported by good cause may impose limitations on uses of confidential information obtained through discovery, the good cause standard is different from the standard for filing under seal. Without regard to Rule 26(c), various statutory or rule provisions authorize or direct filing under seal without regard to the criteria for granting a protective order. An example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B); 26(c)(1)(F); Rule 45(e)((2)(B), Rule G(3)(c)(ii)(B); and G(5)(a)(ii)(C)(1).

When those provisions apply, there is no need to resort to Rule 26(c) to support filing under seal. When a statute or rule does not apply, a Rule 26(c)(1) protective order does not itself provide a warrant for filing under seal. Filing such materials in court implicates additional considerations concerning the public right of access to court records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment

explicitly recognizes those differences in the Civil Rules, and directs that orders for filing under seal may be granted only when the [more exacting] standards for such filing are met.

(3) Leaving the rules unamended

Given that it seems almost universally recognized that protective orders may be granted on grounds that would not also support filing materials deemed confidential under Rule 26(c) under seal, it may be that there is no real need to amend the rules at all. As noted below, the somewhat elaborate sealing procedures endorsed by some submissions do not seem to be worth pursuing. It seems worth noting that proposals to modify Rule 26(c) regarding protective orders— particularly stipulated protective orders—have in the past prompted much controversy.[8] If an amendment merely recognizes the status quo under existing caselaw, it may be best to drop this topic from the agenda rather than invite controversy.

It bears note that if the full Committee decides to limit its proposed amendment to Rule 26(c), there would seem to be no need to consider procedures for motions to seal.

(4) Adding procedural requirements

Many of the submissions to the Committee have gone well beyond urging that the rules recognize the diverging standards for protective orders and filing under seal. Indeed, since most recognize that the courts are already aware of this difference in standards, one might say that the main objective of the current proposals is to promote nationally uniform procedures for deciding whether to authorize filing under seal.

At least some judges initially seemed receptive to efforts to standardize the handling of decisions whether to permit filing under seal. Nonetheless, the Subcommittee has tentatively concluded that any advantages that could be achieved by trying to devise a set of mandatory procedures that every district would have to follow are outweighed by the difficulties that would result. The discussion below, therefore, is designed only to acquaint the full Advisory Committee with the issues the Subcommittee has previously discussed. If the full Advisory Committee favors trying to develop such nationwide procedures, the Subcommittee can go back to the drawing board.

***

Attachment(s):

- Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, April 1, 2025, at 241-46
- Suggestion 25-CV-K (American Association for Justice and Public Justice)

[8] In the 1990s, a proposal addressing stipulated protective orders was ultimately withdrawn.

Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, April 1, 2025, at 241-46:

These proposals contain a variety of procedures for handling sealed filings. One submission (22-CV-A from the Sedona Conference) contains a model rule that is about seven pages long. Another (21-CV-T from the Knight First Amendment Institute at Columbia University) attaches a 95-page compilation of local rules regarding sealing from all or almost all district courts. Some of the local rules are quite elaborate, and other districts give little or no attention to procedures for filing under seal in their local rules.

Thus, there does presently seem to be considerable variety in local rules and practices on filing under seal. Adopting a set of nationally uniform procedures could introduce more consistency in the treatment of such issues, but also would likely conflict with the local rules of at least some courts. That might be more important to lawyers who appear in many courts than to those who mainly appear in only one district. And for judges, it might be that an inter-district variation regarding sealing procedures is not too important.

Perhaps for such reasons, the Subcommittee has been uncertain how far to venture into prescribing uniform procedures. Although the various proposals received so far have urged the adoption of a new Rule 5.3 on filing under seal, the Subcommittee's inclination is instead to treat these procedural issues within the framework of existing Rule 5(d). Though there are rules addressed to only one kind of motion (e.g., Rule 37 on motions to compel; Rule 50 on motions for judgment as a matter of law; Rule 56 on motions for summary judgment; and Rule 59 on motions for a new trial), motions to seal do not seem of similar moment, so that a whole rule devoted to them does not seem warranted.

At the same time, the Rule 5(d) approach sketched above could be adapted to include various features suggested by submissions received by the Committee. The following offers a variety of alternative provisions on which the Subcommittee hopes to receive reactions from the full Committee, building on the sketch presented above.

The question at present is how to obtain feedback from the Federal Magistrate Judges Association and also – with the assistance of our Clerk Liaison – from court clerks. It cannot be said that at least some proposed measures identified below could create logistical difficulties.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed 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. The following procedures apply to a motion to seal:

(i) [Unless the court orders otherwise,] The motion must not be filed under seal;

Many urge that motions to seal themselves be included in the public docket and open to public inspection. But there may be circumstances in which even that openness could produce unfortunate results. The bracketed phrase would take account of those situations while retaining the presumption that motions to seal should not themselves be under seal. One example is provided by Rule 5.2(d), which calls for a court order to authorize sealing to protect personal privacy.

The rule could specify something more about what the motion should include, but that seems unnecessary given the rule's invocation of common law and First Amendment limitations in filing in court under seal. A number of submissions provide that sealing orders be "narrowly tailored." But that seems implicit in the invocation of the existing limitations on filing under seal.

In the same vein, the proposal by some that there be "findings" to support an order to seal seems an unnecessary addition. Except for court trials governed by Rule 52, there are few findings requirements in the rules. (Rule [23](b)(3) does seem to have such a requirement because the court may certify a class only if it finds that the predominance and superiority prongs of the rule are satisfied.) Again, once the common law and First Amendment standards are specified as criteria for deciding a motion to seal, adding a findings requirement seems unnecessary. Perhaps it would be useful were frequent appellate review anticipated, but appellate review of discovery-related rulings is rare, and there are no similar findings requirements for such rulings.

A potential problem here is that the party that wants to file the materials may not itself be in a position to make the showing required to justify sealing. For example, if the party that wants to file the materials obtained them through discovery from somebody else, the entity capable of making the required showing is not the one that wants to file these items. (This may often be true.)

One possibility might be to direct that the parties confer about the motion to seal before presenting it to the court, as is presently required for a motion to compel under Rule 37(a)(1). But the motion to seal situation may be quite different from the motion to compel situation. Party agreement is not sufficient to support sealing if the common law or First Amendment requirements are not met, while party agreement is almost always sufficient to resolve discovery disputes. Indeed, party agreement was a motivating factor behind the certification requirements of Rule 37(a)(1).

In a sense, there may often be two antagonistic parties wanting different things. Often the party that wants to make the filing is indifferent to whether it is under seal, perhaps even favoring public filing. It's another party (or perhaps a nonparty that responded to a subpoena) that wants the court to seal the confidential materials. Conferring might simplify the court's task in such circumstances, but it does not promise to relieve the court of the ultimate duty to make a decision on the motion to seal.

(ii) Upon filing a motion to seal, the moving party may file the materials under [temporary] {provisional} seal[, providing that it also files a redacted version of the materials];

Some of the proposals forbid a court ruling on a motion to seal for a set period (say 7 days) after the motion is filed and docketed. But it appears that the reality is that many such filings are in relation to motions or other proceedings that make such a "waiting period" impractical. For example, a seven-day waiting period would seem to dilute the authority Rule 5.2(d) provides for a court order authorizing filing personal identifying information under seal. The filing of a redacted version of the materials sought to be sealed may sometimes provide some measure of public access, however.

> **(iii)** The moving party must give notice to any person who may claim a confidentiality interest in the materials to be filed;

This provision is designed to permit nonparties to be heard on whether the confidential materials should be sealed. Perhaps it should be a requirement of (i) above, and it might also include some sort of meet-and-confer requirement.

Alternative 1

> **(iv)** If the motion to seal is not granted, the moving party may withdraw the materials, but may rely on only the redacted version of the materials;

Alternative 2

> **(iv)** If the motion to seal is not granted, the [temporarily] {provisionally} sealed materials must be unsealed;

The question of what should be done if the motion to seal is denied is tricky. One answer (Alternative 2) is that the temporary seal comes off and the materials are opened to the public. Unless that happens, it would seem that the court could not rely on the sealed portions in deciding the motion or other matter before the court. On the other hand, it seems implicit that if the motion is granted the court can consider the sealed portions in making its rulings. Whether that might somehow change the public access calculus might be debated.

Things get trickier if the motion is denied and the party claiming confidentiality is not the one that wanted to file the materials. To permit that party (or nonparty) claiming confidentiality to snatch back the materials would deprive the party that filed them of the opportunity to pursue the result it sought in filing the materials in the first place.

Discussion at the Subcommittee meeting on Feb. 28 indicated that in CM/ECF era there may actually be no way to "withdraw" temporarily or provisionally sealed materials from the court's files. So the withdrawal option (Alternative 2) may be off the table. That might be a reason to forbid any filing under seal until the court rules on the motion to seal, but such a requirement could introduce frustrating delays in the litigation.

> **(v)** The motion to seal must indicate a date when the sealed material may be unsealed. Unless the court orders otherwise, the materials must be unsealed on that date.

This is a recurrent proposal. It cannot reasonably be adopted along with the alternative (below) that the materials must be returned to party that filed them, or to the one claiming confidentiality, at the termination of the litigation.

> **(vi)** Any [party] {interested person} [member of the public] may move to unseal materials filed under seal.

Various proposals have been submitted along these lines. One caution at the outset is that such a provision seems to overlap with Rule 24's intervention criteria. Rule 24 has been employed to permit intervention by nonparties to seek to unseal sealed materials in the court's files. See 8A Fed. Prac. & Pro. § 2044.1.

Such intervention attempts may sometimes raise standing issues. A recent example is *U.S. ex rel. Hernandez v. Team Finance, L.L.C.*, 80 F.4th 571 (5th Cir. 2023), a False Claims Act case in which the district court denied a motion to intervene by a "health care economist." The intervenor sought to unseal information about health care pricing in an action alleging that defendant routinely billed governments for doctor examinations and care services that did not actually occur. The court of appeals concluded that "violations of the public right to access judicial records and proceedings and to gather news are cognizable injuries-in-fact sufficient to establish standing." But the court also remanded for a determination whether the application to intervene was untimely under Rule 24(b).

Indeed, it is interesting to note that Prof. Volokh (the source of the original submission to the Committee) seems himself to be a rather active intervenor. See, e.g., *Mastriano v. Gregory*, 2024 WL 40003343 (W.D. Okla., Aug. 26, 2024) (Volokh granted leave to intervene to move to unseal two exhibits that were filed under seal, and motion to unseal granted); *Sealed Appellant v. Sealed Appellee*, 2024 WL 980494 (5th Cir., March 7, 2024) (Prof. Volokh intervened to challenge the sealing of the file after "this case came to his attention after one of the district court's orders turned up in a scheduled daily Westlaw search for cases mentioning sealing and the First Amendment"); *Doe v. Town of Lisbon*, 78 F.4th 38 (1st Cir. 2023) (Prof. Volokh granted intervention to seek identity of police officer who sued seeking to have his name removed from list of officers found guilty of misconduct, but motion to unseal denied).

Because there is an existing body of precedent on intervention for these purposes, providing some parallel right by rule looks dubious. On the one hand, the proposal that every "member of the public" can intervene may be too broad. Rule 24(b)(1), which is ordinarily relied upon for such intervention to unseal, also has other requirements that might not be included in a new rule.

The role of nonparty confidentiality claimants (mentioned above) seems distinguishable. Particularly if their confidential information was obtained under the auspices of the court (e.g., by subpoena), it would seem to follow that they should have some avenue to protect those interests when a party sought to file those materials in court. (It might be mentioned that most of the submissions seem to take no notice of the possibility that nonparties might favor filing under seal.)

> **(vii)** Upon final termination of the action, any party that filed sealed materials may retrieve them from the clerk.

A proposal made in at least one submission is that all sealed materials be unsealed within 60 days after "final termination" of the action. If that "final termination" is on appeal, it may be difficult for the district court clerk's office to know when to unseal. Imposing such a duty on the clerk's office, rather than empowering the party that filed the material to request its return based on a showing that final termination of the action has occurred, seems more reasonable.

The question what is a "final termination of the action" might create uncertainty. At least in the district court, that might be said to be the entry of judgment. But not all judgments end the litigation in the district court. For one thing, Rule 54(a) says that "'[j]udgment' as used in these rules means any order from which an appeal lies." So a partial final judgment under Rule 54(b) would seem to be included. And under 28 U.S.C. § 1292 a variety of interlocutory decisions are reviewable immediately. In addition, Rule 23(f) permits a party displeased with a ruling on class certification to seek immediate discretionary review of that decision in the court of appeals. Presumably those interlocutory reviews are not necessarily the "final termination of the action."

Alternatively, as reflected in at least one local rule, the clerk could be directed to destroy the sealed materials after final termination of the action. That would also present the monitoring problem mentioned just above.

But discussion during the Subcommittee's Feb. 28 meeting raises questions about whether the clerk can actually "destroy" materials filed with the court, and whether there is really some way the party that filed the materials can "retrieve" them.

As noted above, these proposals have also prompted at least one submission opposing adoption of any such rule amendments. See 21-CV-G from the Lawyers for Civil Justice, arguing that such amendments would unduly limit judges' discretion regarding confidential information, conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

Discussions during the Advisory Committee's October 2023 meeting stressed the reality that many litigations involve highly confidential technical and competitive information; making filing under seal more difficult could prove very troublesome.

But attorney members of the committee stressed the extreme variety of practices in different districts, sometimes making the lawyers' work much more difficult. Some districts have very elaborate local provisions on filing under seal, and others have few or almost no provisions dealing with the topic. But it was also noted that this divergence might in some instances reflect the sorts of cases that are customary in different districts. There was discussion of the tension between recognizing the need for local latitude in dealing with handling these problems and also recognizing that concerns about perceptions of excessive sealing of court records have continued.

July 2, 2025

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
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RE: Proposed Amendment to FRCP 5 (Filings Under Seal)

The American Association for Justice (AAJ) and Public Justice submit this joint letter to urge the Advisory Committee on Civil Rules (Advisory Committee) to move forward with an amendment to Rule 5, Filings Under Seal. AAJ is a voluntary bar association whose members represent victims injured and killed by defective products, negligent and reckless conduct, and other corporate wrongdoing. Public Justice is a non-profit legal advocacy organization that fights to preserve access to justice for victims of corporate and governmental misconduct and has long conducted a special project devoted to ensuring public access to court records and proceedings.

AAJ and Public Justice support an amended rule clarifying that the standard for sealing documents is more rigorous than the standard for blanket protective orders. Sealing is routinely requested in civil cases where there is no justification other than to keep important information relating to health and safety or governmental misconduct from the press and public. These motions are granted all too often. An amended rule would help protect the well-established presumption that court records are public.

I. Protective Orders Lead to Pervasive, Unnecessary Sealing

In many jurisdictions across the country, courts have standing blanket protective orders. Plaintiffs frequently feel compelled to stipulate to them to keep discovery moving, and because they think judges will *not* be inclined to enter protective orders that contain provisions deviating from past standing orders. In some jurisdictions, protective orders are so broad that they apply to all discovery. They may even prohibit litigants from sharing information with regulators throughout the duration of the litigation even when serious health and safety issues are discovered.[1]

Blanket protective orders also frequently permit automatic sealing of information marked as "confidential." But a protective order granted under a good-cause standard should not automatically

[1] *See, e.g.*, Mike Spector, Jaimi Dowdell, & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public, in Hidden Injustice*, REUTERS (Jan. 16, 2020), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/ ("Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.").

protect information from disclosure once it is filed because the standard for sealing documents is different and often significantly more stringent. Yet parties routinely file motions seeking to seal documents solely on the ground that information is marked "confidential" subject to a protective order. These motions to seal are often granted as a matter of course.[2] While a court could reject a sealing request because it is overbroad, many courts will not take the time to thoroughly evaluate whether information warrants sealing unless a party specifically requests it do so.[3]

And why isn't the plaintiff side objecting? In most instances, the plaintiff lawyer does not want the material sealed, but the lawyer's duty is to zealously represent the client, not to protect the public's access to information. Unfortunately, the two interests are sometimes in conflict. It is almost always more expeditious and financially feasible for the plaintiff to agree to sealing.[4] Civil litigation is time-consuming, and most plaintiffs with life-altering, catastrophic injuries or employment discrimination and other loss of livelihood cannot afford to wait any longer to receive legal relief, such as a settlement that could help pay or provide access to medical care, accessibility services and accommodations, and other needed support to rebuild their lives.

II. Data Confirms that Confidentiality Orders Are Prevalent and Can Cause Significant Harm

The problem of overbroad protective orders and the secrecy they foster is well-documented. In 2019, Reuters released the results of an investigation into the prevalence of protective orders in "Dangerous Secrets: Confronting Confidentiality in the Courts," as part of Reuters' Investigates' "Hidden Injustice" series.[5] Reuters manually reviewed docket entries for 115 of the largest product MDLs going back 15 years to determine the judges' reasoning for sealing. Were parties seeking these orders to protect company trade secrets or individuals' private information, such as social security numbers and personal medical records? Or, were they seeking to shield health and safety information from the public?[6] The investigation found that at least 48% of the 115 MDLs reviewed contained sealed public health and safety evidence. Reuters also checked the court dockets to see if the judge offered any

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[2] Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1260 (2020) (noting that under blanket protective orders, "[a]ccess to the materials designated as confidential is then frequently limited to the court, parties, attorneys, and witnesses").

[3] Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211 (2021), https://scholarship.law.missouri.edu/mlr/vol86/iss1/6.

[4] Reuters' findings confirm what plaintiff lawyers know. The reason plaintiff lawyers go along with entrenched court secrecy, "is their duty to their clients, as spelled out in state bar association rules." Jaimi Dowell & Benjamin Lesser, *These Lawyers Battle Corporate America—And Keep Its Secrets*, *in Hidden Injustice*, REUTERS (Nov. 7, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lawyers/ ("Many plaintiffs have suffered catastrophic injuries and other hardships and literally can't afford to wait for disputes over what can and can't be made public as bills mount.").

[5] *See* Dan Levine, A *Full Accounting: How Transparency in the Courthouse Can Help the Country Heal, in* POUND CIVIL JUST. INST., DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS, https://ncji.org/wp-content/uploads/2020/12/Pound-Report-2020_web.pdf. See all NCJI reports at *Judges Forum Reports*, NCJI, https://ncji.org/content/what-we-do/judges-forum/reports/ (last visited June 4, 2025).

[6] The cases reviewed included nearly 250,000 individual death and injury lawsuits, involving dozens of products used by millions of consumers: drugs, cars, medical devices, and other products. Levine, *supra*, at 66; *see also Hidden Injustice*, *supra* note 4.

justification for the secrecy, finding that in 85% of the cases with sealed health and safety materials, judges offered no reasoning in the court record.[7]

A group of legal scholars recently analyzed the full Reuters data set, which included over 2.2 million federal cases filed between 2005 and 2012. [8] The results provided an empirical answer to a basic question: How prevalent is the use of protective orders? Researchers found that there are an average of 9,000 stipulated protective order cases in federal civil courts per year, a number that has consistently trended upward. The study also confirmed what the Reuters investigation suggested—and anecdotal evidence supports—that many judges are not fulfilling their obligation to ensure transparency by conducting thorough good cause analyses before entering protective orders.[9] The results can be devastating. A primary example is opioids litigation, where pervasive secrecy resulted in hundreds, if not thousands, of deaths that could have been prevented if salient filings had *not* been sealed in 2001.[10] There are many other case law examples of preventable harms caused by unjustified sealings, including cars,[11] toys, household products, and prescription drugs, as well as horrific examples involving child

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[7] Benjamin Lesser, Dan Levine, Lisa Girion, & Jaimi Dowell, *How Judges Added to the Grim Toll of Opioids*, *in Hidden Injustice: A Reuters Investigation*, REUTERS (June 25, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/.

[8] Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 Duke L.J 1 (2024) p. 156-7. The Reuters data set has also been used by Professor Dustin Denham at Texas Tech University School of Law, who documented the use of sealing orders in the Jeffrey Epstein matter. The District Court entered a sealing order that allowed the parties to decide what to seal resulting in prospective sealing requests. *See* Benham, *supra* note *3* at 225 discussing *Brown v. Maxwell*, 929 F.3d 41, 46–51 (2d Cir. 2019) (reversing district court's refusal to unseal materials where original order delegated sealing decisions to parties without further court involvement).

[9] Relatedly, and positively, that study also found that 54% of all stipulated protective order merits-based denials were traceable to the fact that the orders contained provisions that required the court to automatically seal court filings. This finding highlights that the inclusion of automatic sealing provisions is not uncommon. It also shows the importance of a judge's role in protecting the public right of access.

[10] In West Virginia's 2004 lawsuit against Purdue, Judge Booker Stephens, now retired, wrote, "Plaintiff's evidence shows Purdue could have tested the safety and efficacy of OxyContin at eight hours, and could have amended their label, but did not." Harriet Ryan, Lisa Girion, & Scott Glover, *"You Want a Description of Hell?" Oxycontin's 12-Hour Problem*, L.A. TIMES, May 5, 2016, https://www.latimes.com/projects/oxycontin-part1/. On the eve of trial, Purdue agreed to settle the case by paying the state $10 million for programs to discourage drug abuse. All the evidence under seal would remain confidential. *Id.* A week later, Judge Stephens sealed a November 5, 2004, ruling that there was enough evidence against Purdue to warrant a trial.

[11] The classic car example is the Ford/Firestone defective tires which created a dangerous rollover risk. Keith Bradsher, *S.U.V. Tire Defects Were Known in '96 But Not Reported,* N.Y. TIMES, June 24, 2001, http://query.nytimes.com/gst/fullpage.html?res=9A03E2D61230F937A15755C0A9679C8B63. In another well-documented example, GM knew of its ignition switch defective in which over 100 people died, yet did not recall the vehicles or notify regulators. It was only after a lawyer representing the parents of a deceased 29-year-old crash victim violated a protective order and notified regulators that the public was made aware of the problem, and the vehicles were recalled. *See, e.g.*, Mike Spector, Jaimi Dowdell, & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public*, REUTERS (Jan. 16, 2020), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/ ("Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.").

sexual abuse.[12]

III. A Rule Amendment Is Necessary to Protect the Public's Right of Access

While there is a consensus that the standard required for sealing is higher than the good cause standard required for a protective order, document sealing pursuant to a blanket protective order should not be the default. An amended rule that acknowledges the existence of different legal standards, such as draft Rule 5(d)(5), would remind both litigants and the court to consider whether sealing is justified, and consistent with the common law and First Amendment rights of public access to court filings. AAJ and Public Justice do not believe that a lengthy rule is necessary to garner the attention of courts and parties. A rule that provides a prompt to consider which materials require sealing would significantly promote public access to information.

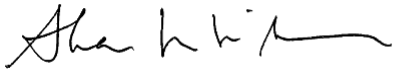
As the Fifth Circuit recently noted, "[e]ntrenched litigation practices harden over time, including overbroad sealing practices that shield judicial records from public view for unconvincing (or unarticulated) reasons. Such stipulated sealings are not uncommon. But they are often unjustified." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 421 (5th Cir. 2021). A rule amendment would help curb the "steady flow of unjustified low-profile sealings" which result in "a gradual, sub silentio erosion of public access to the judiciary, erosion that occurs with such drop-by-drop gentleness as to be imperceptible." *Id.* The need for a rule change is pressing, and the time to change it is now.

Conclusion

Our organizations encourage the Advisory Committee to move forward with a proposed amendment on filings under seal. If we can be of further assistance or provide additional information about how sealing conceals access to important information from the public, please contact Sue Steinman, AAJ's Senior Director of Policy and Senior Counsel (susan.steinman@justice.org), or Jackie Aranda Osorno, Public Justice's Richard Zitrin Anti-Court Secrecy Senior Attorney (JAOsorno@publicjustice.net).

Respectfully Submitted,

Lori Andrus
President
American Association for Justice



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Chief Executive Officer
Public Justice

[12] Animated by the Boston Globe's "Spotlight" series, news organizations brought legal challenges to uncover sealed records of past lawsuits involving sexual abuse and allegations of sexual abuse by Catholic priests. Michael Rezendez, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlrAT25qKGvBuDNM/story.html.

TAB 11

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Rule 43/45 Subcommittee Report—Remote Testimony**

DATE: **October 1, 2025**

The Rule 43/45 Subcommittee has completed its work on amending Rule 45(c) to clarify that a subpoena can compel a distant witness to appear within the geographical limits of that rule to provide remote trial testimony under Rule 43(a). That proposed amendment went out for public comment in August 2025.

The Subcommittee continues to consider whether Rule 43(a) should be amended to relax the "compelling circumstances" requirement for such testimony at trial. That standard was adopted in 1996; before that there was no rule provision for trial testimony by remote means, and the committee note accompanying that amendment strongly emphasized the importance of in-person testimony except in the most dire circumstances. In addition, the possibility of amending Rule 43(c) is introduced below.

Since 1996, partly due to the pandemic and partly due to advances in technology (Zoom, Teams, etc.), familiarity with remote interaction about important subjects has grown. Many court proceedings that in 1996 were almost invariably in-person events are now conducted by remote means.

All the same, the commitment to in-person testimony by witnesses has remained central to the trial process. Nobody suggests shifting to routine reliance on remote witnesses at trial. But many say that the "compelling circumstances" requirement for allowing remote testimony is too exacting when there are strong reasons for allowing a witness whose testimony is important (perhaps central) to the case to testify remotely if the witness cannot be brought to the courtroom to testify in person.

Meanwhile, the Bankruptcy Rules Committee has proposed an amendment to Bankruptcy Rule 9014(d)(1) that would permit remote testimony at "contested matters" based on a showing of good cause. Remote testimony in an adversary proceeding would continue to be subject to the "compelling circumstances" requirement. This amendment could go into effect on December 1, 2026.

The Subcommittee has had very informative sessions on remote testimony with both the Lawyers for Civil Justice and the American Association for Justice.

Members also participated in an online conference on July 30, 2025, organized by the Berkeley Judicial Institute, about judicial experiences—including in state courts—with remote proceedings including trials. Members of the Subcommittee can report on the conference during the October 24 meeting, but a brief introduction could be useful:

The conference focused partly on an article by Judge Jeremy Fogel and Professor Mary Hoopes, which is included in this agenda book. Much of the conference concerned the use of technology to facilitate participation by litigants (particularly self-represented litigants who might otherwise have to take time off from work or travel long distances to get to the courthouse), which may be of more importance in bankruptcy courts and state courts. In the state courts in Texas, for example, there were thousands of remote hearings. And there were also remote trials, including jury trials. But along the way there has also been "every glitch you can think of."

The main point with regard to Rule 43(a) was that the "compelling circumstances" requirement can be an undue constraint. At least some federal judges who experimented with remote proceedings reported positive experiences. Though there were sometimes problems, traditional trials also present problems. And jury selection by online means, with appropriate safeguards, could be much more efficient and less costly. Some proponents stated that even credibility determinations could be more efficient—"Looking at the witness's face on a screen is better than from 35 feet away across the courtroom."

The Subcommittee is not proposing immediate action on this front, but instead continues to gather information. These issues are not ripe for action at the October 2025 Advisory Committee meeting, and the Subcommittee hopes to receive further input from the bench and bar on these topics. Nonetheless, for purposes of discussion only, it seems useful to introduce a possible amendment and very rough draft of a committee note that could accompany it. If an actual amendment proposal results, the "draft" may spark a discussion that assists the Subcommittee as it moves forward.

* * * * *

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~~.

COMMITTEE NOTE

Rule 43(a) was amended in 1996 to permit remote witness testimony at trial, but only if the proponent of the witness presented compelling circumstances why the witness should be permitted to provide remote rather than in-person testimony.

This amendment recognizes that developments since 1996—both in terms of technology and as a result of the COVID-19 pandemic—have provided a basis for relaxing the limits on remote testimony at trial. But the amendment does not in any way represent a retreat from the rules' commitment to the centrality of in-person witness testimony. In this context, the good cause standard has real teeth; a court may authorize remote witness testimony only on finding that the testimony of this witness is essential, or extremely important.

A starting point is that the court is never required to authorize remote trial testimony, even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only when the court is satisfied it is justified.

Many factors bear on the court's decision. One central concern is the importance of receiving testimony from *this* witness. Evidence Rule 403 permits the court to refuse to hear a witness present in court if that witness's testimony would be "cumulative." The good cause determination under Rule 43(a) might be close to the opposite end of a spectrum—when there is no other witness that can provide in-person testimony on an important topic. Similar issues often arise with regard to depositions of high government officials who have no unique knowledge, which may justify a protective order preventing those depositions. Remote trial testimony would be similarly unwarranted in most such cases.

On occasion, however, judging the credibility of the remote witness may be critical to the case. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility. That can depend on in-person interaction between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner. Though a video deposition would not afford the finder of fact an opportunity for in-person evaluation of credibility, it would provide an in-person examination by counsel that might be superior to examination via telecommunications of a remote witness. Some states have even recognized a difference between "discovery" depositions and "trial" depositions; something like the latter might be the best choice. If the witness was deposed early in the case, a second deposition might be important.[9]

Technological difficulties may sometimes prove important. With a witness testifying in the courtroom, those issues are nonexistent or very rare. But when the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony ordinarily should be expected to satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

As recognized in the 1996 amendment, it is also essential that there be appropriate safeguards to protect the reliability of the remote testimony. Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place. On this score, a stipulation by all parties might be important.

When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial. As amended, Rule 26(a)(3)(A)(i) should call attention to this issue well in advance of trial.

* * * * *

As emphasized above, the foregoing is just a mock-up of a committee note. During the October 2025 Committee meeting, the goal will be to consider whether and how to proceed on the

[9] There may be some disagreement within the Subcommittee about whether presenting an absent witness by a video deposition—endorsed by the 1996 committee note—should be preferred to live, though remote, witness testimony.

question of possibly amending Rule 43(a). The Note is rather long for what might be characterized as a two-word deletion from the current rule. But it can be said that this good cause decision calls for consideration of multiple factors that deserve mention.

Another question is whether Rule 43(c)—on motion hearings—ought also to be amended in parallel with an amendment to Rule 43(a). In some ways, Rule 43(c) deals with situations like remote testimony during the "contested hearings" under the new Bankruptcy Rule. But it is not clear how often remote testimony is offered in non-trial hearings under the Civil Rules.

To provide both background and context for this discussion, it seems useful to include the following excerpt about a possible committee note from the Standing Committee's June 2025 Agenda Book.

***

Attachment(s):

- Excerpt from the Agenda Book for the Committee on Rules of Practice and Procedure, June 10, 2025, at 309-14
- Hon. Jeremy Fogel (Ret.) and Mary Hoopes, *The Future of Virtual Proceedings in the Federal Courts*, 101 IND. L.J. 1-34 (2025)

Excerpt from the Agenda Book for the Committee on Rules of Practice and Procedure, June 10, 2025, at 309-14:

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 matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. <u>For good cause and with appropriate safeguards, the court may permit contemporaneous remote oral testimony.</u>

The Future of Virtual Proceedings in the Federal Courts

HON. JEREMY FOGEL (RET). AND MARY HOOPES*

The federal courts are notoriously hesitant to modify their procedures and policies. Much of this "small c" conservatism is driven by a concern that their rules be "trans-substantive" and suited to a wide range of circumstances. For years, they stubbornly resisted allowing remote proceedings and similar uses of technology in the courtroom because of concerns that permitting them could affect the quality of lawyering and decision making, compromise the safety of jurors and witnesses, and diminish the public's perception of the courts. The COVID-19 pandemic abruptly changed this, forcing judges to alter radically the way they conducted proceedings.

Nearly five years later, the legislation allowing courts to make these changes has expired, and many federal courts across the country have returned to the pre-pandemic status quo. However, the courts' rules committees are considering whether to implement longer-term changes. This Essay presents the findings from the first qualitative study of federal judges' experience with virtual proceedings during the pandemic. In twenty-eight in-depth interviews with federal judges and clerks of court, we explored how different district courts adapted to the pandemic, seeking to understand the judges' perceptions of the shift to virtual proceedings and their views as to whether and to what extent the courts should continue to permit them going forward.

Our goal is forward-looking: to understand what lessons were learned from the changes forced upon the courts during the pandemic and which new practices should endure. As others have pointed out, the pandemic presented a unique opportunity for much-needed innovation within the judiciary, and its unexpected and rapid onset forced the courts to bypass the typically glacial pace at which they consider and implement change. We suggest that the Federal Rules of Civil Procedure should be amended to allow judges to rely upon virtual proceedings more frequently. We argue that at least some of the rationale for prohibiting or severely limiting the use of such proceedings has been superseded by advances in technology, and that expanding judges' discretion to permit their use in civil cases would increase access to justice and help to restore the public's perception of the judicial process.

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INTRODUCTION

For decades, the federal courts stubbornly resisted both virtual proceedings and cameras in the courtroom, pointing to fears that either could diminish the quality of both lawyering and judging and ultimately decrease the public's confidence in the courts.[1] In March of 2020, the COVID-19 pandemic intervened and left the courts little choice but to alter their operations radically.[2] In a matter of weeks, nearly all federal courts had discontinued in-person hearings and had moved to virtual proceedings.[3] Then-Chief Justice Bridget Mary McCormack of the Michigan Supreme Court described the change to a congressional subcommittee by saying: "in three months, [courts] have changed more than in the past three decades."[4]

Five years later, many courts have returned to the pre-pandemic status quo. At the same time, there are signs that the courts may not simply revert to tradition. For example, the Advisory Committee on Civil Rules convened in July 2025 to consider possible changes to the rules governing virtual proceedings in civil cases.[5] The time

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1. *See infra* Part II.A; *see also* Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom,* 115 COLUM. L. REV. F. 79, 83 (2015); Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 58 BUFF. L. REV. 1275 (2020).

2. To be sure, this was certainly not the first time the federal courts have responded to an emergency by significantly shifting operations. See *infra* Part II.B.

3. See *infra* Part II.B. and a discussion of the legislation that permitted video and audio access to the courts beginning in March of 2020.

4. FEDERAL COURTS DURING THE COVID-19 PANDEMIC: BEST PRACTICES, OPPORTUNITIES FOR INNOVATION, AND LESSONS FOR THE FUTURE: HEARING BEFORE THE SUBCOMM. ON CTS., INTELL. PROP., & THE INTERNET ON THE JUDICIARY, 116th Cong. 1 (2020) (testimony of Bridget M. McCormack), https://www.govinfo.gov/content/pkg/CHRG-116hhrg42431/pdf/CHRG-116hhrg42431.pdf.

5. While we were invited to contribute to this meeting, the views expressed in this Essay

is ripe to reconsider the federal courts' trajectory moving forward and determine the best way to act upon useful insights from the pandemic. In this Essay, we draw on twenty-eight interviews with federal district judges and clerks of court to provide recommendations for the courts as they begin this task. Our interchanges probed practices and responses across districts and different regions of the country. We sought to understand each judge's experience—including the judge's perceptions of how his or her role was affected by the inability to hold hearings in person—as well as each judge's views on the benefits and disadvantages of virtual hearings and whether they should be permitted long-term. We hope to contribute to a rich conversation among legal scholars, practitioners, and the judiciary about the best way to administer justice in light of the lessons learned from the pandemic.

One of us has argued previously that those lessons justify change. Indeed, "[h]istory teaches that crises can catalyze innovations that endure long after a crisis itself has ended."[6] As the guidelines developed by the Conference of Chief Judges (CCJ) and Conference of State Court Administrators (COSCA) conclude: "The COVID-19 pandemic is not the disruption the courts wanted, but it is the disruption that courts needed: to re-imagine and embrace new ways of operating; and to transform courts into a more accessible, transparent, efficient, and user-friendly branch of government."[7] Judges in our study similarly viewed the pandemic as an opportunity for the court to innovate. One judge encouraged decision makers in the Administrative Office of the United States Courts ("AO") and Judicial Conference of the United States ("JCUS") to look at the situation through the following lens:

> there are very few positive things that can come from a global pandemic, but one of the things that we got out of it as a court was that we were able to look 10-15 years in the future about how we could think about operating things. An unintended gift of a horrible event. So I would urge the decision-makers to seize that and see that we would not have progressed through our incremental way to considering this, and now we've had the gift of doing that.[8]

The judge implored judicial administrators not to "re-ground ourselves in the world as it was" before we knew how many different ways there are to achieve some of a judge's primary tasks.[9] In his view, it was possible to evaluate information, deliberate, and communicate with the parties and the public just as effectively in a virtual format.

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are our own and do not reflect those of the Committee or the judiciary more generally.

6. Jeremy Fogel, *Expanding Electronic Access to the Federal Courts: the Pandemic's Unexpected Opportunity,* Nat'l L. J. (Apr. 21, 2020), https://www.law.com/nationallawjournal/2020/04/21/expanding-electronic-access-to-the-federal-courts-the-pandemics-unexpected-opportunity.

7. Guiding Principles for Post-Pandemic Court Technology (July 16, 2020), https://www.ncsc.org/__data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf (emphasis added).

8. Interview transcripts, at 29 [on file with authors]. We received approval from the University of California, Berkeley Institutional Review Board (IRB) for this project in 2022.

9. *Id*.

To be sure, the courts' historic reluctance to embrace cameras in the courtroom and other uses of remote technology has been grounded in legitimate concerns. Judges' tendency to be reflexively cautious is, in part, a product of the legal system's deep-seated adherence to precedent and the recognition that to be workable, rules and procedures must be well-suited to a wide variety of circumstances.[10] Throughout a longstanding debate over cameras in the courtroom, some worried that increased transparency would come at a high cost—it could compromise security and the safety of witnesses and jurors while also diminishing the quality of lawyering, as attorneys might be tempted to perform for a camera. Concerned about the importance of public trust in the courts, judges also worried that portions of recordings could be taken out of context and used to impugn the integrity of the process.[11] With respect to virtual proceedings generally, judges worried that the format might impair their ability (or that of jurors) to establish a personal connection to witnesses, ascertain nonverbal cues, and assess credibility.[12] The pandemic created an opportunity to test all of these apprehensions. We explore judges' perceptions of what actually happened when the pandemic forced dramatic changes upon the courts.[13]

This Essay proceeds as follows. In Part I, we present our data and methods, describing the sampling procedure and our approach to our semi-structured interviews with twenty-eight stakeholders: twenty-three federal district judges and five clerks of court. In Part II, we situate our study within a larger history of the federal judiciary's engagement with technology, including its reluctance to embrace cameras in the courtroom and remote proceedings. Part III turns to the interviews themselves, describing judges' experiences during the pandemic and their perceptions of how a dramatic shift in operations affected their own roles and the administration of justice.

Drawing on the interviews, Part IV considers the implications of our study and provides recommendations for the federal judiciary's policy moving forward. We suggest that the courts ought to expand—with appropriate safeguards—judges' discretion to conduct virtual proceedings under certain circumstances through modest changes to the Federal Rules of Civil Procedure. We argue that greater use of virtual proceedings is one way to reduce the cost of civil proceedings. As federal courts have acknowledged, the costs of litigation are exceedingly high—many people simply avoid seeking legal remedies at all as a result, and when they do, the outcomes are skewed in favor of parties with greater resources.[14] The federal judiciary's appropriate use of virtual proceedings could begin to close some of this gap by limiting the time that lawyers, litigants and witnesses spend traveling to and from the courthouse. For litigants, this might mean no longer having to take a day off from work, find childcare, or expend resources to travel to the courtroom. It likely would decrease legal fees associated with routine court appearances, as litigants would not need to pay attorneys for the cost of traveling to and from the courthouse, and it could save significant judicial resources as well. We also note, as have many

10. Fogel, *supra* note 6.
11. *Id.*
12. *Id.*
13. *Id.*
14. Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Courts,* 57 WAKE FOREST L. REV. 463 (2022).

others, that the federal courts have suffered a significant decline in public confidence.[15] As one of us has written previously, "[t]ransparency is a powerful antidote to such negativity."[16] Greater reliance on virtual proceedings also could aid in making the courts more accessible to the public generally, thereby enhancing trust.

I. DATA AND METHODS

While the pandemic affected courts at every level, we limited our sample to federal district courts for several reasons. First, state courts varied much more widely in their responses to the pandemic, as each court is governed by a distinct administrative body.[17] By contrast, the AO and JCUS provide a certain level of centralization and uniformity across the entire federal judiciary. That is not to say that the district courts all responded identically—as we explain below, the ability to exercise discretion is an integral part of how the federal courts operate, and we describe the resulting variation that we observed in how individual courts and judges responded to the pandemic. Within the federal judiciary, we chose to focus on the district rather than appellate courts because the exogenous shock of the pandemic in the former was more extreme—the district courts were forced to alter their operations more radically than appellate courts. Rather than simply moving oral arguments by attorneys to a virtual format—something several circuit courts already made available on an ad hoc basis—district courts had to decide whether and how to conduct a wide range of proceedings virtually, often involving the testimony of many witnesses and a high volume of evidence. Judges described wrestling with whether they could adequately adjudicate the credibility of a witness virtually and how this would affect their ability to sentence criminal defendants, conduct plea agreement hearings, and hold both criminal and civil trials.

As we began this study, we were cognizant of the fact that there are very few studies of any kind drawing on in-depth interviews of federal judges. Judges may be reluctant to participate, recognizing that public confidence in the judiciary depends to a large upon its reputation for integrity. A carelessly worded statement, or one taken out of context, might impugn this hard-won reputation.[18] To conduct this study

15. Lindsay Whitehurst, *American's Confidence in Judicial System Drops to Record Low,* PBS NEWS (Dec. 17, 2024); David F. Levi, Thomas B. Griffith, Paul W. Grimm, Nathan Hecht, Bridget Mary MacCormack & Suzanne Spaulding, *Judges Under Siege: Threats, Disinformation, and the Decline of Public Trust in the Judiciary,* 2 JUDICATURE 9 (2024); Shawn Patterson Jr., Matt Levendusky, Ken Winneg & Kathleen Hall Jamieson, *The Withering of Public Confidence in the Courts,* 108 JUDICATURE 23 (2024).

16. Fogel, *Expanding Electronic Access, supra* note 6.

17. While we could not include them in the study, state courts are profoundly important in the administration of justice, accounting for more than 90% of the country's judicial workload. *See* Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1922–23 (2016).

18. For some exceptions, see Jeremy Fogel, Mary Hoopes, & Goodwin Liu, *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts,* 137 HARV. L. REV. 558 (2023)*;* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018); Donald W. Molloy, *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*, 82 LAW &

and overcome judges' potential reluctance to participate, we drew upon the relationships that one of us had as an experienced judge with many peer relationships throughout the judiciary. These relationships likely encouraged judges to participate and also increased the candor and the quality of the information they shared.

In developing our sampling approach, we sought to include a wide range of perspectives. Among other characteristics, we sought variation in geography, age, race, and gender.[19] We recognized that responses to the pandemic might vary by the court's size, location and relevant local public health policies. Within each circuit, we initially divided federal judges into urban and non-urban regions and then randomly sampled a judge from each of these two categories to ensure that we did not exclude judges from rural areas.[20] We also were aware that certain judges had emerged as "thought leaders" in this area and had written and spoken publicly about the courts' responses to the pandemic, and we believed it would be helpful for our study to include their perspectives. Thus, we supplemented our random sampling with invitations to several of these thought leaders, some of whom had been involved directly with the AO and JCUS in formulating a response to the pandemic. This method, often termed "purposeful sampling," supplemented our random sampling of the majority of our respondents. It is widely used within qualitative research to select information-rich sources that would illuminate the phenomenon of interest.[21] In this case, we believed that it would be useful to speak to judges actively involved in shaping the discourse around the courts' responses to the pandemic.

Figure 1 provides a descriptive summary of our judges. The judges spanned twenty-two districts, distributed about evenly between urban and non-urban districts. Approximately one-third of them were either former or current chief judges of their districts, which allowed them to better describe the district's response as a whole. To be sure, our sample is as not representative as we would have hoped. In particular, the disproportionate number of Democratic appointees raises the concern that our sample may understate the proportion of judges that disfavor virtual proceedings. We were limited in selecting the number of variables on which to optimize variation for our small sample, and focused upon the gender and race of the judges and the geographic character of the districts (urban or rural). However, even among judges preferring in-person proceedings to virtual—a group that included both Democratic and Republican appointees—the vast majority of them still favored vesting the decision to conduct less substantive, virtual proceedings in each judge's individual discretion. We discuss this further in Part IV.

CONTEMP. PROBS. 133, 139 (2019).

19. We drew judges' demographic information from the Federal Judicial Center's comprehensive database. *Biographical Directory of Article III Federal Judges, 1789–present*, FED. JUD. CTR., https://www.fjc.gov/history/judges/search/advanced-search.

20. Within each circuit, we categorized districts as either urban or non-urban (including both rural and mixed), drawing on measures of urban density like Citylab's congressional density index. *See* Citylab, Bloomberg, https://www.bloomberg.com/citylab.

21. NICK EMMEL, SAMPLING AND CHOOSING CASES IN QUALITATIVE RESEARCH (2013).

Figure 1: Descriptive Characteristics of Judges

Total respondents	**23**
Gender	
Female	9
Male	14
Race	
White	17
African American, Asian American, or Hispanic	6
Party of Appointing President	
Democrat	17
Republican	6
Geography of District	
Urban	10
Non-urban	12
Number of districts represented	22
Average Age of Judge	66
Mean years of service as a district judge	16.1
Median years of service as a district judge	14
Current or former chief judges	8

These interviews were semi-structured, as we were guided by an interview protocol that ensured that we asked each judge roughly the same set of questions while also enabling us to explore individual perspectives in each interview. We began by asking open-ended questions about judges' experiences during the pandemic and how their districts had responded. We explored which types of hearings they had conducted remotely and asked for details about how they had conducted them. We then moved to each judge's own perception of virtual proceedings, exploring whether the judge thought that he or she was able to assess credibility, how the judge perceived his or her own role during these proceedings, and whether the judge believed that the virtual proceedings had been effective in meeting the court's broader goals of efficiency and fairness. Lastly, we turned our focus to the future, asking each judge what he or she believed would be the best long-term policy for the federal courts.

In many of the interviews, judges reported that their clerks of court had been integral to their district's response to the pandemic. Because clerks would be critical in implementing any future changes, we thought it was important to include their perspectives. As one interviewee explained, a clerk of court is akin to "being the chief operating officer, in charge of all of the areas that are related to case management, which include docket management, customer service, finance, HR, and IT."[22] One described himself as "part fireman … bridging long-term planning and immediate actions during the day."[23]Accordingly, we also interviewed five clerks, across both rural and urban districts, to understand their unique perspectives in organizing and implementing the district's response.

22. Interview transcripts, at 99.
23. *Id.* at 111.

During each interview, one of us took notes that were as close to verbatim as possible; collectively, the notes from these interviews generated more than one hundred pages. Our coding process was iterative and inductive.[24] We first read through the transcripts to identify themes and code the data for these themes, and then refined these codes as new relationships between the emerging themes became apparent. We generated a list of approximately twenty codes, ranging from how the judges conceptualized their own roles as during this time to how they hoped the courts would use the lessons learned moving forward. This process was inductive, as we re-visited the transcripts several times as themes emerged and analyzed them in order to understand patterns and variation across their perspectives.

II. BACKGROUND AND CONTEXT

We begin by situating the circumstances of the pandemic within a longer history of the federal judiciary and its engagement with various forms of technology in the courtroom. We outline the judiciary's reluctance to conduct remote proceedings and embrace cameras in the courtroom over the past two decades, and then describe the legislative response to the pandemic. Finally, we outline the relevant scholarship that informs our study.

A. The Federal Courts' Adherence to Tradition

Unlike many institutions, the federal courts rarely conducted videoconferences prior to the pandemic. As we discuss below, this reflects the federal judiciary's broader cultural conservatism and reluctance to change policies and procedures.[25] Since 1946, Federal Rule of Criminal Procedure 53 has explicitly banned electronic media coverage of criminal proceedings.[26] The Judicial Conference reinforced this policy in 1972, adding a clause to the Code of Conduct for federal judges that prohibited "broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto" in civil and criminal proceedings.[27]

In the fall of 1990, JCUS—the policy-making arm of the federal judiciary—recommended a pilot program[28] that would permit electronic media coverage of civil proceedings.[29] Over the next two decades, JCUS implemented a number of such

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24. Susan Berkowitz, *Analyzing Qualitative Data*, *in* USER-FRIENDLY HANDBOOK FOR MIXED METHOD EVALUATIONS 4-1, 4-2 (Joy Frechtling & Laure Sharp eds., 1997) (describing the analytical process as "a loop-like pattern of multiple rounds of revisiting the data as additional questions emerge, new connections are unearthed, and more complex formulations develop along with a deepening understanding of the material").

25. Guiding Principles, *supra* note 7.

26. FED. R. CRIM. P. 53.

27. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3A(7) (1972).

28. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 103–04 (Sept. 12, 1990), available at https://www.uscourts.gov/sites/default/files/reports_of_the_proceedings_1990-09_0.pdf.

29. The policy permitted broadcasting under limited circumstances, such as presenting evidence or for security purposes. *History of Cameras, Broadcasting, and Remote Public*

programs to explore policy changes in the civil context. In 1991, several courts instituted a three-year pilot program that introduced cameras in the courtroom.[30] The Federal Judicial Center (FJC) found that the majority of judges became more favorable to electronic coverage after experience with the pilot program.[31] Acting on the FJC's conclusions, the Court Administration and Case Management Committee ("CACM") recommended expanding camera coverage in the courtroom.[32] Nonetheless, the Judicial Conference declined to adopt the recommendation.[33] At this point, the JCUS had become comfortable with broadcasting arguments in the circuit courts, but it continued to disfavor it in district courts because of a fear that jurors and witnesses could be intimidated. In 1996, the Conference authorized each Court of Appeal to make its own broadcasting/camera policy within its respective circuit, though it "strongly urge[d]" the circuit courts to prohibit cameras in district courts.[34]

Over the next decade, pressure continued to mount, as both members of Congress and several outspoken lower court judges advocated publicly for cameras in the courtroom.[35] The Conference authorized another pilot program in civil matters in 2010, involving fourteen federal district courts that participated voluntarily. In this pilot program, courtroom proceedings were recorded and placed on the public court website[36] when both parties consented and the judge approved.[37] Each recording was accompanied by a detailed summary of the case and a link to the case's PACER docket.[38] When the district courts posted more than 135 proceedings to an online video library, they were viewed hundreds of thousands of times.[39] Nonetheless, at the conclusion of the study in 2016, the CACM committee recommended that the policy prohibiting broadcasting remain in place. JCUS did permit the Ninth Circuit to continue its own pilot program and continue to provide data to CACM. This program still largely prohibited broadcasting in trial courts, but it *did* permit the live broadcasting of appellate arguments.[40] It still required the consent of the parties and directed judges to ensure that the broadcasting was "consistent with the rights of the

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Access in Courts, U.S. CTS., https://www.uscourts.gov/court-records/access-court-proceedings/remote-public-access-proceedings/history-cameras-broadcasting-and-remote-public-access-courts.

30. *Id.*

31. Molly Treadway Johnson & Carol Krafka, Fed. Jud. Ctr., *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* 12 (1994), https://www.fjc.gov/sites/default/files/2012/elecmediacov.pdf.

32. Funmi E. Olorunnipa, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, Admin. Conf. U.S. (June 17, 2011), https://www.acus.gov/document/agency-use-video-hearings-best-practices-and-possibilities-expansion.

33. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17 (Mar. 12, 1996), https://www.uscourts.gov/sites/default/files/1996-03.pdf.

34. *Id.* at 17.

35. Singer, *supra* note 1, at 83.

36. *Id.* at 84.

37. 1996 Judicial Conference Proceedings, *supra* note 33.

38. Singer, *supra* note 1, at 84.

39. Singer, *supra* note 1, at 79.

40. *Id.*

parties" and would "not otherwise interfere with the administration of justice."[41] In March of 2020, JCUS approved a separate two-year pilot project for live audio streaming of civil and bankruptcy proceedings of public interest, and analysis of the pilot again showed very few challenges from the move to livestream.[42] These pilot studies, along with the lessons learned from the pandemic, culminated in a significant change in September 2023. The Judicial Conference amended the camera policy to permit, in the judge's discretion, live remote public audio access to any portion of a civil or bankruptcy proceeding in which a witness is not testifying.[43] While it was a marked change after a reluctance to permit any live broadcasts during the previous two decades, it was still an incremental one.

Many of the reasons that courts are so reluctant to change are quite sensible. One of us has extensive experience working with federal judges in his former capacity as both a federal judge and as the former Director of the Federal Judicial Center. As he has previously written, the federal judiciary is a "small c" conservative institution.[44] Judges tend to have an immediate focus on the cases in front of them, and are not typically concerned with the structures within which their decisions are made. When they do turn their attention to these larger structures, judges tend to move incrementally and only after sustained and careful deliberation, often producing very modest responses.[45]

There are important reasons why such cultural conservatism is so deeply embedded within the federal courts, particularly with respect to the type of procedural rules that were at stake during the pandemic. As we have emphasized in prior writing, decisional independence is critical to the federal judiciary because it insulates judges from political pressure.[46] But decisional independence has also led to a culture of institutional independence in how judges organize and conduct their work. For example, individual judges have wide discretion in how to manage their dockets.[47] As Elizabeth Thornburg writes, courts and the legal profession tend to be among "the least agile" because inertia is the very essence of the common law, "a system based on precedent."[48] Rules of procedure must be applied in a nearly infinite number of very different situations.[49] A carelessly enacted rule of procedure may result in arbitrariness or injustice. Nonetheless, as several scholars of federal court reform have noted, the fact that courts have followed certain procedures does not mean that we should avoid subjecting them "to thorough examination and potential change."[50] We develop this point further *infra* in Part IV.

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41. *Id.*
42. *Id.*
43. *Id.*
44. Jeremy Fogel, *BJI/CLR Symposium on Charting a Path for Federal Judiciary Reform,* 108 CAL. L. REV. 887, 880 (2020).
45. *Id.*
46. Fogel, Hoopes, & Liu, *supra* note 18, at 598.
47. *Id.*
48. Elizabeth Thornburg, *Observing Online Courts: Lessons from the Pandemic,* 54 FAMILY L. Q. 181 (2020); *see also* Fogel, *supra* note 44.
49. *Id.* at 891.
50. *Id.* at 890; *see also* Jon O. Newman, *The Current Challenge of Federal Court Reform,* 108 CAL. L. REV. 905, 911 (2020); Peter S. Menell & Ryan Vacca, *Revisiting and Confronting*

B. Virtual Proceedings under The CARES Act

The COVID-19 pandemic was not the first time in which federal courts in the U.S. developed a response to an emergency—in response to the September 11, 2001 terrorist attacks, for example, the courts enhanced security procedures. In the wake of Hurricane Katrina, they temporarily moved court proceedings to alternate locations.[51] It is fair to say, though, that the COVID-19 pandemic transformed the federal judiciary's operations to an unprecedented extent and in a drastic manner. In a matter of weeks, courts altered radically the way in which they administered justice.[52]

In 2007, the Department of Justice released a report, *Guidelines for Pandemic Emergency Planning: A Road Map for Courts*.[53] The report warned that a greater reliance on video and teleconferencing would be necessary in the event of a pandemic.[54] In the early days of the COVID-19 pandemic, on March 27, 2020, President Biden signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a portion of which was directed at the federal courts.[55] It provided funding for the courts to respond to the pandemic and expanded courts' ability to conduct virtual proceedings.[56] On March 12, 2020, the federal courts made public the "Judiciary Preparedness for Coronavirus (COVID-19)" plan, which encouraged as many employees as was practicable to telework and limited in-person court proceedings.[57] Five days later, the Northern District of California became the first district court to close its courtrooms to the public,[58] and several other district courts

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the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform, 108 CAL. L. REV. 789 (2020).

51. Lauren E. Aguiar, Brois Bershteyn, Allison M. Brown, Abby Davis, *The Pandemic Brought Some Welcome Innovations to the Justice Process, but Also Many New Challenges* (Jan. 19, 2022), https://www.skadden.com/insights/publications/2022/01/2022-insights/litigation/the-pandemic-brought-some-welcome-innovations.

52. *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations,* PEW (Dec. 1, 2021), https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations.

53. CRIM. CTS. TECH. ASSISTANCE PROJECT, GUIDELINES FOR PANDEMIC EMERGENCY PREPAREDNESS PLANNING: A ROAD MAP FOR COURTS, BUREA. JUST. ASSISTANCE 1 (Apr. 2007), https://www.ojp.gov/ncjrs/virtual-library/abstracts/guidelines-pandemic-emergency-preparedness-planning-road-map-courts; Zoe Niesel, *The AOC in the Age of COVID-Pandemic Preparedness Planning in the Federal Courts,* 52 St. Mary's L. J. 157 (2021).

; 54. *Id.* at 14.

55. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

56. Joanna R. Lampe & Barry J. McMillion, *The Federal Judiciary and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")*, Cong. Res. Service (Apr. 17, 2020), https://crsreports.congress.gov/product/pdf/IN/IN11344

57. Barry J. McMillion, CONG. RSCH. SERV., IN11292, OVERVIEW OF RECENT RESPONSES TO COVID-19 BY THE JUDICIAL CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, AND SELECT COURTS WITHIN THE FEDERAL JUDICIARY 1–2 (2020), https://crsreports.congress.gov/product/pdf/IN/IN11292.

58. Judiciary Preparedness for Coronavirus (COVID-19), Mar. 12, 2020,

followed soon thereafter.[59] The CARES Act allowed videoconferencing for court proceedings, and on March 31, 2020, the Judicial Conference gave temporary authorization for the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings for the duration of the COVID-19 national emergency.[60] Shortly thereafter, in April of 2020, a Texas state court held the nation's first online trial over Zoom.[61]

The was significant variation in the federal courts' responses to the pandemic across jurisdictions—some courts suspended all in-person proceedings, while others continued to conduct many hearings in person.[62] In March 2020, many districts began issuing general orders on court operations, restricting physical access to courthouses.[63] In April 2020, the Supreme Court reversed a long tradition and announced that it would hold arguments remotely and make a live audio of these arguments available to the public.[64] Some districts set a uniform, district-wide policy, while others allowed for individual judges' discretion over procedures.[65] Many courts sought to triage cases by level of importance. While many cases could wait, others could not, including those involving defendants waiting in jails or domestic violence survivors needing restraining orders. Courthouses generally were closed to the public, with most employees working remotely.[66] Despite the fact that many judges had little to no experience conducting proceedings remotely, most courts were conducting virtual proceedings within a matter of weeks. Many districts developed websites with best practices and instructions for litigants appearing by Zoom.[67] Some courts conducted trials virtually, with the judge often the lone person

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https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19.

59. Roy Germano, Timothy Lau, and Kristin Garri, *COVID-19 and the U.S. District Courts: An Empirical Investigation,* FED. JUD. CTR. (Oct. 2022), https://www.fjc.gov/content/374523/covid-19-district-courts-empirical-investigation.

60. *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic* (March 31, 2020), https://www.uscourts.gov/data-news/judiciary-news/2020/03/31/judiciary-authorizes-video-audio-access-during-covid-19-pandemic.

61. Daniel Siegal, Texas Court Pioneers Trial by Zoom in Atty Fee Dispute, LAW360 (Apr. 22, 2020, 10:05 PM), https://www.law360.com/articles/1265459/texas-court-pioneers-trial-by-zoom-in-atty-fee-dispute.

62. *Courts' Responses to the Covid-19 Crisis,* BRENNAN CTR. JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis.

63. The courts maintained a table of relevant orders. *Court Orders and Updates During COVID-19 Pandemic,* U.S. CTS., https://www.uscourts.gov/court-orders-and-updates-during-covid-19-pandemic.

64. Amy Howe, *Courtroom Access: Faced with a Pandemic, the Supreme Court Pivots,* SCOTUS BLOG (Apr. 16, 2020), https://www.scotusblog.com/2020/04/courtroom-access-faced-with-a-pandemic-the-supreme-court-pivots/.

65. Leann Bass, *COVID-19 Focus Groups Summary,* FED. JUD. CTR. (2021), https://www.fjc.gov/sites/default/files/materials/06/COVID-19_Focus_Groups_Summary_2021_Bass.pdf.

66. *Id.*

67. *See, e.g., Guidelines for Zoom Courtroom Proceedings,* N.D. Ca., https://www.cacd.uscourts.gov/clerk-services/courtroom-technology/zoom-courtroom-proceedings;

in the courtroom and everyone else appearing virtually.[68] While many of these were bench trials, several district judge conducted jury trials as well.[69] Later in the pandemic, once they began to resume in-person hearings, courts instituted an elaborate range of protections, including the installation of plexiglass barriers, the provision of personal protective equipment to all staff and jurors, and six-foot distancing with masking.[70]

As the pandemic progressed and courts turned to considering how to reopen, the AO developed guidelines that outlined a set of "gating" criteria for courts to consider as they progressed through four phases, and provided guidance for reversing course if local conditions deteriorated.[71] The guidelines entrusted each district with a great deal of discretion as to when, and whether, to move to each phase, reasoning that they should be guided by the conditions in the local community and advice from local and state public health officials.

The CARES Act provisions were written to expire 30 days after the date on which the national emergency ended, or the date when JCUS found that the federal courts no longer were materially affected, whichever occurred first.[72] After multiple extensions, the Act expired on May 10, 2023, thereby ending the ability of the courts to employ virtual proceedings in criminal cases, and leaving unsettled the extent of their ability to rely on them in civil proceedings (beyond the limited circumstances permitted by the pilot program).[73] As discussed infra, most federal courts largely have returned to the pre-pandemic status quo, with some judges now using virtual proceedings for some status conferences and routine motion practice in civil matters. In April of 2023, the Judicial Conference implemented new F.R.C.P 87, permitting JCUS to declare a "Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."[74] This new Rule applies only in emergencies and does not otherwise enable federal judges to rely more upon virtual proceedings.[75]

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68. *As Pandemic Lingers, Courts Lean Into Virtual Technology,* (Feb. 18, 2021), U.S. CTS., https://www.uscourts.gov/data-news/judiciary-news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology.

69. *Id.*

70. *Id.*

71. *Courts Begin to Consider Guidelines for Reopening,* U.S. CTS., (Apr. 27, 2020), https://www.uscourts.gov/data-news/judiciary-news/2020/04/27/courts-begin-consider-guidelines-reopening.

72. *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic* (March 31, 2020), https://www.uscourts.gov/data-news/judiciary-news/2020/03/31/judiciary-authorizes-video-audio-access-during-covid-19-pandemic.

73. Order, *In re Expiration of the CARES Act,* (D.D.C. May 5, 2023), https://www.dcd.uscourts.gov/sites/dcd/files/Standing%20Order%20in%20re%20expiration%20of%20CARES%20Act.pdf.

74. FED. R. CIV. PRO. 87 (2023).

75. Caroline G. Cox, *Adapting Civil Procedure,* 54 ENVIR. L. 79, 116 (2024) (noting that the rule provides a "simple dichotomy between emergency and normal civil procedure").

C. Relevant Prior Scholarship

While we know of no other study that reports findings from in-depth interviews of federal judges about their experiences during the COVID-19 pandemic,[76] a number of scholars turned their focus to the administration of justice during that time, and their work informs this Essay. David Freeman Engstrom argues that the point at which to judge the effectiveness of the federal courts in meeting the challenges they faced will be long after the immediate crisis has passed. [77] As he observes, courts may be less powerful than the other branches during an emergency, but "their most critical work com[es] after a crisis recedes and attention turns elsewhere."[78] He locates the courts at a crossroads: "Chronically underfunded, increasingly politicized, behind the curve technologically, and shockingly out of touch with the justice needs of ordinary Americans."[79] He posits that the pandemic thus served as an opportunity for much-needed innovation and the potential to re-imagine a more effective justice system.[80] In a detailed essay outlining the courts' initial responses to the pandemic, Helen Hershkoff and Arthur Miller remind us that the courts were grappling with their response to the pandemic at the same time as they were enduring political attacks on their legitimacy.[81] On the whole, they view the courts' responses to the pandemic favorably, praising the courts' ability to quickly pivot to virtual proceedings and attempts to make themselves available as an essential public good.[82] In their view, the political decisions of the President and Congress impeded the federal courts' ability to mitigate some of the pandemic's worst effects.[83] As we argue *infra* in Part IV, this makes the task of restoring public confidence in the judiciary all the more critical.

Empirical work on the courts' pandemic response has pointed to prior studies showing poorer outcomes for vulnerable groups in remote proceedings, including noncitizens and criminal defendants.[84] The majority of this work has focused on state

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76. While distinct from in-depth interviews, an FJC study conducted focus groups involving district judges and clerks of court. *See* Bass, *supra* note 65. This study informed our approach and many of the core findings are in accord with it, as we detail *infra.*

77. David Freeman Engstrom, *Post-COVID Courts,* 68 UCLA L. REV. DISC. 246 (2020).

78. *Id.* at 249.

79. *Id.* at 248.

80. *Id.*

81. Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask,* 23 LEGIS. & PUB. POL'Y 321, 330, 408 (2021); *see also* Julie Marie Baldwin, John M. Eassey & Erika J. Brooke, *Court Operations During the COVID-19 Pandemic,* 45 AMER. J. CRIM. JUST. 743 (2020) (detailing the guidelines and policies adopted by the courts in response to the pandemic).

82. Hershkoff & Miller, *supra* note 81, at 411.

83. *Id.* at 321.

84. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015) (finding paradoxical results: detained televideo litigants were more likely than detained in-person litigants to be deported, but judges did not deny claims in televideo cases at higher rates); Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010) (finding a sharp increase in the amount of bail set in videoconferenced hearings as compared to live ones).

courts. In an ongoing study, Alyx Mark and colleagues analyze more than 10,000 state court orders issued between 2020 and 2023.[85] Drawing from eighty-four interviews with judges and court staff in Massachusetts state treatment courts, Jamie Rowen situates responses to the pandemic within the organizational sociological literature, as a form of strategic adaptation.[86] She argues that judges engaged in two main strategies: buffering—or lessening or moderating the impact of the pandemic on litigants—and innovating, or creating new practices to realize institutional goals.[87] Elizabeth Thornburg observed more than three hundred virtual hearings in a Texas family court.[88] She lauds many of the beneficial aspects of moving online, including resource savings, but also identifies the challenges posed by unequal access to technology and the difficulty of protecting litigant privacy.[89] In examining hybrid courts both before and during the pandemic, Katherine Norton also emphasizes the role of the "digital divide," or the unequal access across socioeconomic groups to necessary technology and internet access, in mediating the effectiveness of virtual proceedings.[90]

While more limited in number, several empirical studies focused on the federal courts. Alicia Bannon and Douglas Keith emphasize the ways in which the digital divide also threatens to limit fairness within the federal courts and propose a set of principles to guide future use of remote technology.[91] Researchers from the FJC conducted focus groups with district court, magistrate, and bankruptcy judges and clerks of court in the first year of the pandemic.[92] Respondents stressed that the most pressing concern was the delay caused by the pandemic in all types of cases, though there was general agreement that allowing virtual proceedings improved access to the courts. Respondents echoed the concerns raised by Bannon and Keith that litigants' varying access to technology and degree of technological savviness could limit any gains in access.[93] Researchers from the FJC also examine case-processing trends in district courts during the pandemic and show that case processing slowed

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85. Alyx Mark, *RAPID: Procedural Changes in State Courts During COVID-19*, NAT'L SCI. FOUND., *at* https://www.nsf.gov/awardsearch/showAward?AWD_ID=2147840; *see also* Colleen F. Shanahan, Alyx Mark, Jessica Steinberg & Anna E. Carpenter, *COVID, Crisis and Courts,* 99 TEX. L. REV. ONLINE 10 (2024).

86. Jamie Rowen, *Strategic Adaptation in a Crisis: Treatment Court Responses to COVID-19,* 49 L. & SOC. INQUIRY 769 (2024).

87. *Id.*

88. Thornburg, *supra* note 48.

89. *Id.* at 212.

90. Katherine L.W. Norton, *Accessing Justice in Hybrid Courts: Addressing the Needs of Low-Income Litigants in Blended in-Person and Virtual Proceedings,* 30 GEO. J. POVERTY & POL'Y 499 (2023); Albert H. Yoon, *The Post-Modern Lawyer: Technology and the Democratization of Legal Representation*, 66 U. TORONTO L.J. 456, 457 (2016) (noting the ways in which technology can ultimately democratize the legal profession).

91. Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond,* 115 Nw. U.L. Rev. 1875 (2021); *see also* Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court,* Brennan Ctr. Just. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court.

92. Bass, *supra* note 65.

93. *Id.* at 30.

significantly during this period, particularly in criminal cases, though the overall trend was offset by the smaller number of cases filed.[94] Importantly, they note a substantial degree of variation among federal courts, noting that districts responded differently to the pandemic.[95] Brandon Garrett and Lee Kovarsky analyzed hundreds of COVID-19 criminal custody cases in federal courts and argue that the judiciary lacks the statutory tools and bureaucratic partners to deal effectively with emergencies like the pandemic.[96] After identifying the challenges in meeting defendants' rights to due process, Jenia Turner develops a constitutional framework for evaluating whether a criminal case is appropriate for a remote proceeding, and further develops it in an article published in this Issue. [97]

III. IN JUDGES' WORDS: EXPERIENCES FROM THE PANDEMIC

In this Section, we draw on our twenty-eight in-depth interviews with judges and clerks of court. While our interviews spanned a wide range of topics, we focus on several that judges mentioned most frequently in our interviews: the process of adjusting to virtual proceedings, judges' conceptions of how their own roles as adjudicators changed, and their perceptions of the benefits and drawbacks of virtual proceedings, including the effects on litigants' access to justice.

A. Logistics at the Start of the Pandemic

We began by asking each interviewee about the logistics of moving to virtual proceedings initially, as these had been rare. As one chief judge explained, his district's "baseline" was to conduct a rare virtual proceeding when it was necessary, when perhaps a key witness was located abroad—a "kind of ad hoc, one-off witness" occurrence, in the judge's words. Accordingly, as one clerk of court explained, there was a very "steep learning curve" for the vast majority of federal judges.[98] Another challenge was ensuring public access. Clerks of court described working hand in hand with prisons to ensure they had the proper technology to conduct arraignments and preliminary hearings with incarcerated defendants, and described their court loaning the prisons equipment and sending out IT teams to assist prison staff.[99] Judges and clerks of court said that the courts quickly developed the technological

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94. Germano, Lau, & Garri, *supra* note 59, at 1-2, 22 (finding 29% fewer criminal defendants and 6% fewer civil cases filed during the first two years of the pandemic).

95. *Id.* at 10.

96. Brandon L. Garrett & Leo Kovarsky, *Viral Injustice,* 110 CALIF. L. REV. 117 (2022). *See also* Sharon Dolovich, *Mass Incarceration, Meet COVID-19,* 87 U. CHI. L. REV. ONLINE 4 (2020) (criticizing the judiciary's "non-response" to urgent petitions from incarcerated individuals).

97. Jenia I. Turner, *The Emerging Constitutional Law of Remote Criminal Justice,* 59 WAKE FOREST L. REV. 753 (2024); Jenia I. Turner, *Rethinking Courtroom Presence in the Virtual Era,* 101 IND. L. J. __ (2025).

98. Interview transcripts, at 92. As we discuss *infra* in Part IV, Federal Rule of Civil Procedure 43(a) discourages remote proceedings, allowing it only in compelling circumstances and with appropriate safeguards.

99. *Id.* at 93.

expertise to make this work effectively. They explained that it was "choppy" and "chaotic" in the first few months, as the tools simply weren't in place to allow fully virtual proceedings. Many of the judges emphasized that the IT department within the courthouse had made all of this possible—as they described, the IT teams "rose to the occasion" and "met the moment."

A few judges described consultation with outside experts in developing the district's response. These districts consulted epidemiologists and campus physicians from local universities and developed protective measures for in-person proceedings, including plastic barriers, regular intense cleanings, and social distancing. As one judge explained, "in retrospect, we can't say if those helped a lot, but I can say that it increased confidence and suggested that the court was concerned and wanted to protect litigants and counsel."[100] A chief judge described convening a working group with "everyone at the table" in order to quickly put the infrastructure in place and enable proceedings to be virtual. In another district, they described having weekly court meetings to re-assess procedures—how they would handle defendant consent to virtual proceedings, how to enable public access, and so forth. Judges in rural districts emphasized that having spotty connections made virtual proceedings more difficult, and several of these judges described returning to chambers as soon as possible because of this difficulty.[101]

Several judges mentioned that their districts operated by consensus and described the judges working together very well to make decisions. Other districts declined to take a uniform approach. As one chief judge described, "[w]hat works in one location won't work in another … we let every courthouse make its own decision about how to do things."[102]

Clerks of court cautioned us that "communication among the stakeholders was key" and that the relationship building aspect was important—as he stressed, it was not the court directing the jail, "this is how we are going to do things."[103] Instead, it was a daily conversation built around consensus. This clerk explained that he had rarely spoken to the warden of a local jail prior to the pandemic, and that they were now in daily communication. The jail initially lacked the resources to conduct hearings virtually, and the court provided the funds for the jail to obtain internet and gave them iPads to use for the hearings. In this way, he emphasized, an effective response to the pandemic necessitated excellent communication between many stakeholders.

B. Judges' Conceptions of Their Roles

As we set forth below, judges frequently referenced the ways in which the pandemic, and the abrupt shift to virtual proceedings, affected both their own conceptions of their role as the adjudicator and the parties' conceptions of the judicial process. Many judges described being in court as their "favorite" part of their job.[104] One judge explained that he had "never realized how much [he] needed that human

100. *Id.* at 12.
101. *Id.* at 86.
102. *Id.* at 47.
103. *Id.* at 108.
104. *Id.* at 2.

interaction" prior to the pandemic forcing a shift to virtual proceedings.[105] As he explained, "One of the great things about being a trial judge is that we get to interact with lawyers and human beings all day. I like lawyers, I enjoy their company."[106] Accordingly, for many, moving to virtual proceedings was accompanied by a profound sense of loss. As one described, federal judges are "already somewhat isolated", and this reality was exacerbated by the shift to remote proceedings.[107] While many judges chose to resume coming to the courthouse, they generally did not require their chambers staff to do the same. As a result, many of these judges described working alone each day and said that this too caused a sense of isolation.

Many of the judges with whom we spoke pointed to a loss of formality, or dignity, that was significant in the shift to remote proceedings. "When on a screen, you feel like a bureaucrat. When you come into the courtroom in person, you're in special clothes, everyone rises, you're in the elevated seat, it gives you a sense of dignity. And I think something is lost by having it virtually. Even the fact that everyone is the same size."[108] In part, this stemmed from a sense that someone other than the judge was in control during a video proceeding. As one judge explained, "I feel in charge in the courtroom, and it's because I *am* in charge. When we're doing something electronically, someone else is in charge, someone else is having to run the whole show. The other day I had trouble dealing with something with WebX and it caused this big delay, and it's humiliating."[109] As she concluded, "I end up feeling more like a participant than like the master of ceremonies."[110] Some judges described deciding to resume going into the courthouse just to retain the "formality" of proceedings. Judges stressed that "the court needs to be a place of dignity."[111] This judge described having learned a lesson about the importance of such formality soon after taking the bench; as she explained, she came to appreciate that she could not make jokes from the bench because it would give litigants the impression that she wasn't taking her job seriously. In her view, it is even easier to appear casual on a screen, which detracts from a sense of dignity that is critical to the integrity of the system.

Judges described the lack of formality interfering with defendants' ability to understand the significance of the proceedings. As one judge recounted, "We also had a bunch of supervised release hearings, and you're trying to convey the seriousness of it to the defendant, and he'll just be in his backyard in a lawn chair!"[112] A chief judge described an informality resulting from virtual proceedings that could be both beneficial and detrimental. As he noted, virtual proceedings encouraged defendants to have more of a dialogue with the judge. At times, this was beneficial, but in other instances, he could see the defendants' counsel cringing at what was being shared with the judge.

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105. *Id.* at 44.
106. *Id*.
107. *Id.* at 33.
108. *Id.* at 53.
109. *Id.* at 55 (emphasis added).
110. *Id.*
111. *Id.* at 54.
112. *Id.* at 37.

For some judges, the sense of loss also stemmed from a feeling that virtual proceedings diminished their own roles. Indicating that he agreed with colleagues who had felt that their roles were diminished by being virtual, one judge explained: "Inevitably, I think something is lost. I have a beautiful courtroom that's been in place since the 1940s, and there's something about that that reeks of this being a federal court, an important process, that you can't just get from a court seal in a Zoom call."[113] Judges also worried that their newer colleagues had become too accustomed to doing things virtually. As one described, "I overheard one of [the newer judges] say something about how she would trade trials for summary judgments, because she feels uncomfortable in the courtroom. Well, I think that's a crisis!"[114]

Judges stressed that the need for formality did not stem from a personal need for aggrandizement, or a reflection of their own ego.[115] Rather, they explained, they viewed it as critical to the proper administration of justice. As one judge explained, "I think the formality of the courtroom is not there for a judge's feeling of grandeur, but it's there for a reason. The negative of this informality is that you lose some of the gravitas of being in the courtroom and the gravitas is important."[116] Another judge mentioned a practice of gifting jurors a photograph and certificate at the conclusion of the trial, as a means of "ambassadorship" in which jurors would perceive the courts positively and act as ambassadors for the courts.[117] This practice, she explained, was no longer possible with remote proceedings, and it was an example of the losses that occurred during this time. On the other hand, judges were careful to stress that when they returned to conducting some proceedings in-person while taking various precautions, they wanted to ensure that jurors did not think that judges were above the rules. As judge explained, "We all wore masks during the trial, even I did, even though I was further away. I didn't want the jury to think I was an exception."[118]

Notably, nearly every judge said that the pandemic had negatively affected their relationships with their law clerks. As they explained, law clerks were no longer able to walk casually into the judge's office to ask a simple question and instead had to schedule a meeting. As one judge put it, "[i]t was more much businesslike, so I don't think it was as conducive to the sort of mentoring relationships that are most beneficial."[119] He described efforts to try and "encourage spontaneity," like daily calls, but felt that none of these was a substitute for daily face-to-face interaction.[120] Another judge explained, "The clerks were very unhappy with the experience. They were used to being at the elbow of the judge, and now they were on the phone. In retrospect, I probably wasn't as attentive as I could be to how I could reach out to

113. *Id.* at 2.
114. *Id.* at 56.
115. As Susan Bandes and Neal Feigenson note, "courtrooms are widely believed to imbue adjudication with a mystique of authenticity and legitimacy." Bandes & Feigenson, *supra* note 1, at 1275.
116. Interview transcripts, at 64.
117. *Id.* at 21.
118. *Id.* at 3.
119. *Id.* at 18.
120. *Id*.

them."[121] While judges weren't generally opposed to some flexibility in remote work policies for law clerks, they stressed the importance of regular, in-person interactions.

C. Views on Virtual Proceedings

Most of the judges in our sample described virtual proceedings positively, though they differed on the extent to which they should be used after the pandemic. As one judge explained, "Honestly I thought it all worked well. I can't tell you a civil or criminal virtual proceeding where at the conclusion of it I thought, 'this just isn't working.'"[122] Most judges felt that most routine matters could be resolved virtually. As one judge explained, she grants oral argument "one hundred percent of the time" if a lawyer requests it, and she could not recall a time in which a virtual oral argument was not just as effective. Several judges even said that certain types of proceedings, like claim construction hearings in patent cases, were "*better* on video."[123] A chief judge described most intellectual property ("IP") lawyers as very sophisticated and adept at giving "smooth as silk" virtual presentations.[124] Several judges explained that these cases were very technical, and conducting claim construction hearings virtually meant that the record already included all of the slides and exhibits that would make the judge's review and decision-making easier. Similarly, judges repeatedly stressed ways in which *Markman* (claim construction) hearings were perhaps even more effective virtually. One chief judge said he wouldn't be opposed to always holding such hearings virtually even when all of the parties are local, as the split screen made his review of the technical evidence and presentations so much easier.[125]

Several judges described changing their minds about whether a virtual model could be effective. As one chief explained, "I'll say, right out of the box, I was somewhat skeptical of it. Going into the pandemic, I was not leading the parade and had been resistant to it. But I leapt into it and I had to begrudgingly admit, there were certain things that were better virtually."[126] A few judges indicated a similar shift in their thinking, explaining that for less substantive matters in civil cases, like status conferences and some motion practices, virtual proceedings worked very effectively. One judge explained that he had been an outlier in his district prior to the pandemic, as he required parties to always come in-person to status conferences. He explained that he used to believe it was important for him to see their faces and for the attorneys to meet. Since the pandemic, he says, he sees this requirement as "a luxury we didn't need…I don't think there's anything lost other than knowing an attorney's face when they show up."[127] He estimated that lawyers must have charged their clients hundreds of thousands of dollars to walk over to the courthouse just to get a few minutes in front of the judge; he now believes the cost savings of virtual hearings are worth

121. *Id.* at 65.
122. *Id.* at 2.
123. *Id.* at 52.
124. *Id.* at 54.
125. *Id.* at 61.
126. *Id.* at 62.
127. *Id.* at 76.

more than the benefits of ones conducted in person. He also observed that, "[holding hearings virtually] gives people more time at home, acknowledges that they have lives outside their jobs."[128]

One judge drew a distinction among different types of cases in deciding whether in-person, informal interactions were critical. As he explained, in complicated cases with a lot of attorneys, he believed that virtual was better. But in others, he thought that there was an advantage of being able to have a side conversation with counsel. He continued, "I will sometimes ask to talk to someone, and ask, 'why are you taking this position?' Sometimes you just chat about the case, and you just don't do that virtually. You could, but you don't."[129]

Judges offered more mixed views on whether their ability to assess the credibility of witnesses was impaired in a virtual format. Some judges believed that it had not been diminished. As one judge put it, "Did I think it was better to be in the same room? Yes. But I didn't think it undermined my ability to judge credibility virtually. I felt it was adequate to make that determination."[130] Other judges were quite confident, responding in equivocal terms: "I don't think that [virtual proceedings] affected it at all." A few felt that it was *easier* to judge credibility virtually: "Most of [judging credibility], I think, is sort of shoulder up in the courtroom anyway, because otherwise they would be behind a lectern or seated. And I felt like I actually was able to, especially when I took pleas and sentences, I was able to see the defendant better than I could in the courtroom, see his or her facial expressions, etc." Other judges described making some modifications to ensure that they could adequately judge candor and credibility. One judge explained that she began conducting virtual hearings from the courtroom very early into the pandemic so that witnesses would appear on a large screen. As she explained, "I thought it was important that I see someone fully, not on a small iPad."[131] In her view, having the person on the large screen was just like having "a real live person there" and did not affect her ability to assess credibility.[132]

Other judges offered that it was difficult to establish a connection with a witness virtually and believed that the virtual format did affect their ability to assess credibility. One judge explained, "When they're an arm's length away from me in the courtroom, it's a lot easier for me to see their body language, see how they're responding to the lawyer, see how they're reacting, and virtually it's much more difficult to do that."[133] Many judges stressed that the nonverbal cues were lost online. As one explained, "I do believe that whenever we can be in person on things, even in my own chambers with staff, that there are cues you can receive that are nonverbal when you're together."[134]

While many believed that virtual proceedings worked very well for less substantive civil proceedings, most judges drew the line at trials because they believed that being together, in-person, was essential for a functional jury. While one

128. *Id*. at 77.
129. *Id.* at 39.
130. *Id.* at 4.
131. *Id.* at 31.
132. *Id.*
133. *Id.* at 14.
134. *Id.* at 2.

judge was otherwise very favorable to virtual proceedings and described her transition as "seamless," she felt differently about in-person juries. As she explained: "they interact, develop relationships, and that period when they're in trial and getting to know each other is important in creating some cohesiveness in the jury and allowing them to get along and come to a unanimous verdict in the end. I'm not sure how that would work by video."[135] Another judge opined that even in-person, strict social distancing may have prevented juries from bonding in the way that was necessary for a unanimous verdict. He noted that there were a few cases of hung juries and that he wondered if the physical distancing had affected their cohesiveness and ability to reach consensus.[136]

D. Access to Justice

Nearly every judge mentioned the issue of access to justice, once again framing it as a need to balance competing forces. On the one hand, judges perceived many gains from a move to virtual proceedings—litigants with fewer resources no longer had to take many hours off from work for a short hearing or incur the expenses associated with coming to a courtroom. They also paid considerably less to their lawyers since they were not compensating the lawyers' travel to and from the courthouse. On the other hand, judges worried deeply about the "digital divide" between litigants and the uneven access to technology that threatened to undo any gains made by a move to virtual proceedings.

One judge emphasized that differences in access to technology had a profound impact on access to the courts. She noted that "even lawyers may not have those resources, and that disadvantages people from accessing the courtroom at all."[137] In her view, this was a particular concern for criminal defendants. In her experience, they did not have stable access to internet and "were also distracted by external factors like pets and kids."[138]

Overall, most judges perceived the shift to virtual proceedings as a positive one for litigants with fewer resources. As one judge explained, "[f]amily members could suddenly have access to proceedings that didn't before because of cost and not having to take a lot of time off."[139] In reflecting on how well the virtual proceedings functioned, one chief judge concluded, "The big change was that I saw a lot more participants in the [virtual] courtroom- no worries about daycare, leaving work, traveling, who was taking care of grandma."[140] Another judge recounted a recent jury trial in which the lawyers had recovered approximately $12,000 for the plaintiffs and had then filed a motion for $240,000 in attorneys' fees.[141] This case was emblematic of a larger problem that she said she had not really considered prior to taking the bench. Now, she explained, she does think carefully about how to prevent exorbitant fees, and she believed that this was one positive of the move to virtual proceedings.

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135. *Id.* at 19.
136. *Id.* at 53.
137. *Id.* at 9.
138. *Id.*
139. *Id.* at 26.
140. *Id.* at 31.
141. *Id.* at 39.

One judge explained that a topic at their recent Judicial Conference had been the way in which conducting proceedings virtually had "leveled the playing field for smaller firms going up against bigger ones."[142]

E. Judges' Perceptions of Lawyering

Judges frequently described their perceptions of how lawyering had changed in virtual courtroom proceedings. As one chief judge commented, "I think, though I don't have scientific proof of this, that the histrionics of the lawyers [were] less virtually than in the courtroom."[143] On the other hand, this same judge stressed that he had seen some of the "ancillary benefits" of "standing on your feet" and the "adrenaline rush" of arguing motions in-person had made newer lawyers on the civil side effective.[144] In his view, the pandemic may have been worse for newer lawyers who hadn't already had a lot of practice arguing in a courtroom. Several judges mentioned problems with unprofessionalism online, mentioning people in "various forms of disarray." They recounted stories of lawyers inappropriately dressed and distracted litigants, including a defendant who became very angry at the judge for causing her to lose a game of Candy Crush on her phone during a proceeding.[145] While many judges noticed an increase in unprofessionalism, most judges in our sample did not perceive the problem to be severe. Similarly, these judges had not observed a significant change in the civility of lawyers online, though they did feel that interactions between lawyers were generally better in-person. As one opined, "sometimes it's easier to be not quite as cold and businesslike in person compared to on Zoom."

Many judges stressed the importance of informal interactions between lawyers on opposing sides that did not occur during a virtual proceeding, and felt that a move away from in-person proceedings inhibited the parties' ability to reach consensus. One judge said that lawyers who both chose to come in-person for scheduling conferences were often the best lawyers. As he explained, "They work well together and see the value of seeing a person directly and talking in a way that moves a case along. When I set something down for a conference and both lawyers want to come in, that signals to me that they probably can disagree without being disagreeable."[146] Another judge said that he believed it was "extremely valuable" to hold an initial scheduling conference in person. As he explained, "There's something about getting them together in the same room. I'd leave them alone in there for 5-10 minutes before entering and you can see right away whether the lawyers get along. They're either sitting as far apart from each other as they can, or they're talking about everything."[147] Similarly, another judge observed that she sometimes would leave the courtroom and see the parties working out contested issues. She continued, "This *never* happens if you do it on video. You have the cost savings and convenience, but

142. *Id.* at 89.
143. *Id.* at 63.
144. *Id.* at 64.
145. *Id.* at 32.
146. *Id.* at 67.
147. *Id.* at 43.

you lose the intangibles of having everyone in the room."[148] Another judge stressed that having the attorneys know one another could often reduce the amount of unnecessary posturing down the line in a case. Similarly, a chief judge noted that she regularly told parties to go discuss issues over a cup of coffee; she reported that they typically came back to her with fewer issues.[149] She was dubious that the same kind of interactions could happen online. One judge mentioned a program that his district had conducted with the bar, which found that if lawyers already had a relationship with opposing counsel, they found virtual proceedings easier. Where they did not have a pre-existing relationship, they found them more difficult. This judge stressed, "even at these supposedly uneventful hearings, lawyers would often chat with each other before or after."[150]

One judge described using physical space to influence how the parties perceived the worth of the case and to encourage them to come to a more efficient resolution, and said that he lost the ability to do this when proceedings moved to a virtual format. This judge explained that he separates the parties at mediation and puts the defendant into the "most grand room possible," while putting the plaintiff in "an unseemly attorney's room."[151] He said that this was designed to make the defendant think the case might be worth a significant amount of money and, in turn, to make the plaintiff believe that the case was worth less. This judge believed that a critical part of his role was to enable "parties to find something they can share, some kind of common ground."[152]

IV. IMPLICATIONS

We now shift to a forward-looking perspective, providing suggestions for how the judiciary might best implement the lessons learned from its forced transformation during the pandemic. Drawing heavily on the views and responses that judges shared with us, we propose that federal judges should have the discretion to choose to conduct a range of civil proceedings remotely, with appropriate safeguards for litigants who may lack access to the necessary technology.[153] This shift would bring with it a number of benefits—the primary one being enhancing access to justice, as it would enable more litigants to access the court and reduce the burdens they face

148. *Id.* at 25 (emphasis added).
149. *Id.* at 55.
150. *Id.* at 16.
151. *Id.* at 59.
152. *Id.* at 59.
153. We do not make recommendations about virtual proceedings in criminal matters. Describing sentencing as the most difficult thing they do, judges consistently expressed concerns about preserving the dignity and due process rights of the defendants. Several, however, felt that more routine matters, including initial appearances and arraignments on superseding indictments, could continue to be done virtually (with the consent of the defendants), as this sometimes reduced the burden on defendants. We note that many of these perspectives are in accord with Professor Jenia Turner's analysis and recommendations in *Rethinking Courtroom Presence in the Virtual Era,* published in this Issue. Turner, *supra* note 97.

in connection with in-person proceedings. It likely would reduce the costs associated with retaining a lawyer and improve the well-being and productivity of both lawyers and court staff. This would entail relatively modest changes to the Federal Rules of Civil Procedure, as we outline below.

We emphasize that even modest changes must be accompanied by clear safeguards. The most significant challenge in moving any proceeding to a virtual format is the digital divide, the unequal access to (and knowledge of) technology among and between parties, which if unaddressed could exacerbate rather than remedy procedural unfairness. In making it easier for some proceedings to be conducted virtually, JCUS ought to direct judges to consider carefully the resources of each party and to ensure that both parties have the ability to participate fully through a virtual format. Nor do we mean to suggest that the majority of hearings should be held virtually. As many judges shared with us, there is a fundamental human component to administering justice that would be lost if judges were to rely too much upon virtual proceedings. But we do believe that judges should able to use their discretion in a sensible and limited way to rely on virtual proceedings when it would enhance access to justice and conserve resources without degrading the quality of the proceedings themselves.

A. Perspectives about the Future

We concluded each interview by asking the interviewees how they believed the rules regarding virtual proceedings *should be* changed, if at all, following the expiration of the CARES Act. When asked whether any portion of the CARES Act should remain in place, judges consistently used one word in their response: "discretion." Most of the judges in our sample believed that, at least in civil matters, it was important to entrust decisions to each judge's individual discretion about whether, and when, to rely on virtual proceedings. As one chief judge explained, he would be unlikely to avail himself of the option in most cases, but the circumstances of each case are so different that the decision is best left to a judge's discretion. As he put it, "I think for each case, it's a different collection of things- the stakes of the case, the resources of litigants, the geography, etc. It's a different proposition in a civil rights case where one doesn't have resources than if you have Microsoft or parties like that. And also, the public interest- you may have a big collection of people who want access, and this might allow them to have more."[154] Another judge reported that his court recently had met to discuss what it could do at the expiration of the CARES Act. As he explained, "There are a significant number of judges—I'd say the majority—who want to maintain this option and we're wrestling with that. I think there's an appetite to push the envelope."[155] Another judge opined, "I think civil should be wide open. I think judges with counsel should be open to do anything virtually for a case. If you had a learned counsel sit down with a judge and determine that virtual doesn't make sense in a case, for the most part I think anything could be done virtually and I think it should be up to the discretion of the court and

154. *Id.* at 64.
155. *Id.* at 63.

lawyers."[156] Many judges stressed that expert-heavy cases were especially suited to virtual settings.[157]

Judges stressed that a policy of discretion would align well with existing judicial culture more broadly. As one judge explained, "when I came on the bench, I thought everyone in every district did things the same way. I found out quickly that's not the case. There are cultural differences that are decades old—you don't always do the same thing the same way. Any policy right off the bat should make room for discretion for judges and districts."[158] However, judges also stressed that holding hearings remotely could exacerbate inequalities, improving access for some and making it less equal for others. One judge described the problem of uneven access to justice as "just huge," and emphasized that it was critical for judges to ascertain whether litigants had the requisite resources and access to technology.

Many judges stressed that the pandemic had changed their view about whether virtual hearings could be effective. One judge noted that his district is located in "flyover country," meaning that lawyers in larger civil cases often must travel to appear at routine hearings. While he had previously been opposed to holding hearings remotely, his experience had convinced him that they could often be effective in civil matters. Going forward, he explained, he will simply let out-of-state attorneys argue virtually to spare them the expense and time of coming into the courthouse.[159] Similarly, another judge was hesitant to use video in criminal cases but believed that allowing it in civil cases was an important way of increasing access to justice by reducing the cost to litigants. As she explained, it is an "expensive endeavor" to take time away from work, find childcare, find parking, and pay an attorney for the time to travel to the courthouse. She concluded, "I'm open to having hearings, motions, and Rule 16 conferences on Zoom if everyone is amenable."[160] A chief judge explained that in his district, most judges had moved from always believing that the parties needed to be in front of the judge to get a "feel" for one another to realizing, "You know what, I was wrong. We can do that over Zoom."[161]

Most judges felt that there were important benefits from the procedural changes during the pandemic that should be preserved by continuing to give judges the discretion to hold at least some civil proceedings remotely. The primary benefits were inter-related: cost and time savings and increased access to justice. On the other hand, judges stressed that virtual proceedings could not be a substitute for every interaction. As one judge explained, for lawyers, it was not "an effective way to build a relationship with a client."[162] This was particularly important for criminal defendants, in her view, "and we make a mistake if we think that only has to happen at the beginning of the case."[163] One chief judge stressed that trials should generally be conducted in-person. He observed that, "[t]rying lawsuits is an inherently human process," and he simply didn't believe that the same results were achievable "with

156. *Id.* at 4.
157. *Id.*
158. *Id.* at 50.
159. *Id.* at 24.
160. *Id.* at 20.
161. *Id.* at 29; *see also* Part IV.B, *infra,* discussing proposed changes to Rule 43(a).
162. *Id.* at 23.
163. *Id*.

the restraints of technology."[164] He continued, "I know there are some efficiencies, but we take an oath to do justice—not to be efficient."[165] Similarly, another judge concluded, "[i]t would be a shame to lose [the ability to exercise discretion] completely for those options, but it should be rare to use for regular proceedings and hearings."[166]

Judges also expressed a desire to increase transparency by increasing the public's access to the courts. One judge described herself as "committed to open courts" and as someone who tells people all the time that this is their building."[167] She noted that she generally declines attempts by corporate lawyers to close the court to the public because of confidentiality agreements. And yet, she continued, after watching proceedings like OJ Simpson's criminal trial, she worried that lawyers and judges would "play to the cameras instead of doing what they're supposed to be doing … doing the right thing."[168] In this judge's view, most federal judges could manage this well—as she explained, the vast majority of them would likely be quite skilled at ensuring that lawyers were not letting the presence of the media affect their strategy or performance, but there still was the chance that some small percentage of judges mishandling a high-profile case could profoundly affect the public image of the judiciary.

Even though many judges were opposed to permitting cameras in the courtroom for every proceeding, many believed that an intermediate option would be in the public interest. As one judge said, "closed circuit broadcasting, listening via Zoom, should be an option. In criminal cases, there are family members who can't travel, and it's a real plus to have people who can participate who formerly couldn't tell what was happening to their loved one."[169] One judge described the public as "increasingly mature about understanding" court proceedings online, and opined that the Supreme Court's change to making audio available had given the public a deeper understanding of Justice Thomas, for example, as "a thoughtful person asking thoughtful questions."[170] While overall feeling favorably about broadcasting, this judge cautioned that the details of how it was done would be of utmost importance. As he noted, his district had nearly a thousand people registered to observe a trial online, and it led to various distractions (including one observer not wearing clothes and others making comments to the rest of the observers online) until the court had figured out how to ensure that observers were not visible and could not communicate with others.[171]

B. Our Recommendations

Drawing upon the insights of the judges and clerks of court with whom we spoke, in this section we develop a set of recommendations for the federal courts. The

164. *Id.* at 50.
165. *Id.*
166. *Id.* at 6.
167. *Id.*
168. *Id.* at 6.
169. *Id.* at 64.
170. *Id.* at 71.
171. *Id.* at 70.

CARES Act has expired, and the courts have largely returned to the pre-pandemic status quo. As David Freeman Engstrom argues, the greatest challenge for the courts lies ahead, not behind—they must learn from the changes forced upon them during the pandemic.[172] The federal courts are turning to precisely this task in the months ahead, as the Advisory Committee on Civil Rules convened in July of 2025 to consider whether changes to the rules governing virtual proceedings are warranted. As we argue, a greater reliance on virtual proceedings—implemented in a measured way that is sensitive to the resources of the parties and the nature of the proceeding—would be one means of reducing the justice gap, improving the public's perception of the federal courts, and honoring the goal of Federal Rule of Civil Procedure 1 of achieving "speedy, fair and inexpensive" resolution of civil proceedings.

There was near unanimity among the judges with whom we spoke that the provisions of the CARES Act should be made permanent in the civil context. On the whole, the judges felt strongly that decisions about whether and to what extent to utilize virtual proceedings in civil cases should be left to each judge's direction. This aligns with much of what we understand about judicial culture. As we have written, the federal judiciary is de-centralized by design: judges are accustomed to a high degree of deference and are rarely told how to manage their dockets.[173] Federal judges are reflexively cautious, a product of a system that values precedent and adherence to tradition.[174]

Judges acknowledged this propensity to adhere to tradition in their responses, but urged the leadership of the federal judiciary to resist it. As one judge concluded, "It's easy to stay in the mindset that we've always done it one way, but it's never a reason not to change."[175] Another judge was pessimistic that the federal courts would employ the lessons learned, but nonetheless she urged JCUS to consider changes. In her view, Conference policies were an "impediment," and she hoped that the judiciary would "use this time to really give concerted thought to some of the implications." He hoped that judges would continue using virtual proceedings for more routine matters like status conferences and hoped that the courts collectively could improve their ability to conduct hybrid hearings. As he observed,

> In our family we have changed some of our traditions—we've changed some of our traditions over time because we concluded that they fulfill our aims in a new way. So it's appropriate as a federal judiciary to be cognizant of our traditions, but if we look at it through these lenses now, we should be open to modifying them. Transparency generates confidence, that generates credibility, that generates power. We can't go back because we know things now.[176]

This judge argued that to revert to the pre-pandemic policy would be to "consciously set aside a body of knowledge."[177] He implored judicial administrators to engage in

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172. Engstrom, *supra* note 77, at 249.
173. Fogel, Hoopes, & Liu, *supra* note 18, at 598.
174. Fogel, *Expanding Electronic Access, supra* note 6.
175. Interview Transcripts, at 13.
176. *Id.* at 30.
177. *Id.*

"constant self-examination" in order to ensure that the judiciary maintains integrity and credibility.

Notably, many stakeholders have complained that the courts not only move far too incrementally, but that their deliberation over proposed changes remains insulated from the public and fails to include the relevant parties. One law firm complained that after suggesting to the AO that Rule 53 be changed to permit some broadcasting of criminal trials, a subcommittee convened twice at "undisclosed times and locations," with invitations to "no member of the media" or "any judge or lawyer who has experience with cameras in courts as a result of living in one of the many states that have permitted cameras in courts for decades."[178] Thus, as the courts begin to deliberate proposed rule changes, we suggest that they attend to this issue and attempt to fully include the range of relevant stakeholders.

Formally, we suggest amendments to the Federal Rules of Civil Procedure with guidance from the Civil Rules Advisory Committee. These changes would permit judges to conduct more routine proceedings virtually in civil matters, such as motion practice and status conferences. We also recommend that judges have greater discretion to permit virtual proceedings in more substantive aspects of civil cases, including hearings at which testimony is taken, subject to consideration of relevant factors.

Currently, Federal Rule of Civil Procedure 43(a) permits courts to hear remote testimony virtually when they find "good cause in compelling circumstances," and "with appropriate safeguards."[179] The Advisory Committee note to this rule (which last was amended in 1996, when the most readily available means of virtual participation in court proceedings was by telephone) notes that live testimony should be the strong presumption and that the use of remote testimony solely as a matter of convenience should be discouraged.[180] The Committee worried that the ability to judge demeanor would be diminished, the opposing party could be prejudiced, and that there was a danger of collusion.[181] Rule 30(b)(4) allows—either by stipulation of the parties or by court order—that "a deposition be taken by telephone or other remote means."[182] We suggest that these rules be modified to allow more leeway to judges wishing to conduct hearings remotely. This would involve an amendment to

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178. Leita Walker & Lauren Russell, *Getting Cameras in the Federal Courts Will Take More Than Logic,* NAT'L L. J. (Dec. 2, 2024).

179. FED. R. CIV. PRO. 43(a). Notably, Rule 45 limits the courts' jurisdictional reach to witnesses located within 100 miles of the courtroom, and it is an unsettled question whether courts may compel witnesses located more than 100 miles away when hearing testimony remotely. *See* Mary Margaret Chalk, *Zoom-ing Around the Rules: Courts' Treatment of Remote Trial Testimony in a Virtual World,* 27 STAN. TECH. L. REV. 180 (2024).

180. Hershkoff & Miller, *supra* note 81, at 390; FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment. *See generally* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2414 (3d ed. 2002) (discussing the preference for oral testimony). 323. See Christopher Forbes, *Rule 43(a): Remote Witness Testimony and a Judiciary Resistant to Change*, 24 LEWIS & CLARK L. REV. 299, 321 (2020).

181. See Christopher Forbes, *Rule 43(a): Remote Witness Testimony and a Judiciary Resistant to Change*, 24 LEWIS & CLARK L. REV. 299, 321 (2020).

182. FED. R. CIV. PRO. 30(b)(4).

Rule 43(a) to permit remote testimony in the judge's discretion, in appropriate circumstances. JCUS should provide specific guidance on the factors that judges should consider when deciding whether to conduct a proceeding remotely, most of which were identified by the judges we interviewed. To Rule 30(b)(4), we suggest the addition of a comment indicating that judges should freely grant relief when doing so will not impose an undue burden on either party.

A non-exhaustive list of specific factors a court might consider in deciding whether to hold a proceeding remotely could include the following: (1) each party's access to (and familiarity with) workable remote technology; (2) each party's desire to proceed with a given hearing remotely; (3) the resources of each party; (4) the stakes of the matter at hand; (5) the need to assess credibility of witnesses during the proceeding; (6) the nature of the evidence (if any) involved at the proceeding; and (7) the likelihood that the use of remote proceedings would create an undue burden or benefit for any party. We also suggest that judges exercise caution in any proceeding in which the stakes are high, and in those involving significant credibility assessments. In contrast, we heard from a number of judges that in matters of an extremely technical nature, the presentation of evidence was actually *easier* in a virtual format.

The near consensus among the judges we interviewed that there should be broader discretion to permit the use of virtual proceedings in civil cases was striking. Many of the judges said that this change would go a long way toward reducing resource impediments to accessing the justice system.[183] In charting a path for reform of the federal courts, former Chief Judge Jon O. Newman of the Second Circuit identified the primary concern about the federal court system as "excessive delay and cost."[184] As many scholars have warned for decades, these inter-related factors "drive many out of the federal court system and into arbitration or abandonment of claims, leaving an unacceptably high proportion of the population without opportunity to obtain redress of legitimate grievances."[185]

A well-developed body of scholarship has illuminated the U.S. legal system's dependence upon private civil litigation to enforce public law. As Professors Michalski and Hammond write, "ordinary people, acting as private attorneys general, help protect others—such as consumers, workers, and shareholders—as well as public goods, like the environment, through lawsuits."[186] The system cannot function, they argue, if the courts are not accessible. Yet there is overwhelming evidence that the civil legal system is not accessible to those with limited resources. A wide-reaching study found that 71% of low-income households had experienced a civil legal problem in the previous year, but only 20% of those households sought professional legal help for those problems.[187] Organizations funded by the Legal

183. Engstrom, *supra* note 77, at 262. Marc Galanter famously coined the terms "have" and "have nots" to describe the ways in which our legal system favors repeat players with more resources. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974)

184. See Newman, *supra* note 50, at 906.

185. *Id.*

186. Michalski & Hammond, *supra* note 14, at 469.

187. Legal Servs. Corp., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7 (2017) [hereinafter "The Justice Gap"].

Services Corporation (LSC) have the capacity to serve approximately half of low-income Americans, leaving an estimated 1.1 million eligible legal claims without a remedy.[188] Of the claims that do reach federal court, more than a quarter of those are filed pro se, that is, by litigants without legal representation.[189] This problem, which many refer to as the "justice gap,"[190] is widely considered to be among the most pressing within the legal system, and it is one that a measured reliance on virtual proceedings could reduce. One study of state courts in Arizona found that default judgments, or those rendered because a litigant failed to appear in court, decreased by 8% when proceedings became virtual.[191] The reasons for the justice gap are many, and include the cost of legal services and the time spent attending court hearings. As we have discussed above, permitting judges to hold some hearings virtually would lessen costs in both of these areas—litigants would pay less to their lawyers and would not need to expend the time and resources necessary to be physically present in a courtroom. Notably, the overwhelming majority of state judges appear to be in favor of a similar proposal for state courts.[192] Second, permitting more reliance on virtual proceedings would not only conserve costs for litigants but also conserve judicial resources. While the precise number is difficult to quantify, cost reductions likely would be in the millions within just one state.[193] Finally, as one of the judges in our sample emphasized, it has become increasingly difficult for prospective litigants to find counsel in rural areas. Researchers have coined the term "legal deserts" to describe the shortage of counsel in some areas,[194] and permitting more reliance on virtual proceedings could further close this dimension of the justice gap.

At the same time, we stress that greater use of virtual proceedings actually could *worsen* the justice gap if they are implemented without sensitivity to the digital

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188. *Id.* at 8.

189. Michalski & Hammond, *supra* note 14, at 465. Notably, this estimation excludes prisoner complaints, of which a much higher number are pro se. *Id.*

190. *Id.*; *see also* Michalski & Andrew Hammond, *supra* note 14.

191. PEW, *supra* note 52.

192. STATE OF THE COURTS REPORT 2024, THOMSON REUTERS 25 (2024), https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2024/02/2024-State-of-the-Courts-Report.pdf (reporting that 82% of state judges surveyed believed virtual hearings increase access to justice).

193. As Engstrom points out, the amount of cost savings is difficult to quantify. *Id.* One study, looking only at the cost of transporting defendants in one state over one year, estimates an annual savings of $21 million. Press Release, *Admin. Off. of Pa. Cts., PA Courts Expand Use of Video Conferencing, Saving $21 Million Annually in Defendant Transportation Costs* (June 7, 2011), http://www.pacourts.us/ assets/files/newsrelease-1/file-1396.pdf . If this were to be implemented nationally and expanded to the less substantive proceedings more generally, the figure would be much, much larger. *See also* Bannon & Keith, *supra* note 91, at 1888.

194 Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-state Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 17–24 (2018); Emily Ryo & Reed Humphrey, *Beyond Legal Deserts: Access to Counsel for Immigrants Facing Removal,* 101 N.C. L. REV. 787 (2023).

divide.[195] Litigants are constitutionally entitled to "a fair trial in a fair tribunal."[196] As the judges we interviewed told us repeatedly, for litigants without as many resources (and particularly for those also without legal representation), taking advantage of the courts' newly available tools often was quite difficult. It required a well-functioning computer and high-speed internet, which many litigants lacked. Some of them noted the same problem was present for some attorneys. Accordingly, we urge JCUS and its Rules Committees to provide guidance to judges about how to manage this risk, including consideration of the resources of the parties and attorneys in each case before deciding whether to proceed virtually.[197]

We also recognize that there is a fundamentally human component to trials held in-person. As Susan Bandes and Neal Feigenson articulate, common law societies have venerated the trial for centuries, recognizing that "the whole is greater than the sum of the parts; the trial is credited with helping judges and jurors to transcend their individual interests and 'recognize and act upon what is beyond their ordinary selves.'"[198] We are mindful of research demonstrating a general tendency to process information differently by video that when it is delivered face-to-face.[199] One risk is the possibility that adjudicators may make judgments based on available heuristics instead of the substantive legal arguments. These heuristics may be mediated by one's own implicit biases,[200] and could result in an "empathy deficit" by adjudicators for under-represented witnesses and litigants.[201] Professors Bandes and Feigenson argue that remote proceedings can be designed to mitigate many of these concerns through protocols that enhance "participants' sense of presence," and both judicial education and juror instructions can take this potential risk into account.[202] On the other hand, judges have suggested that virtual formats may have an equalizing effect, as a more vulnerable litigant faces a judge in a virtual box of equal size instead of a robed figure in an imposing courtroom.[203] Nonetheless, we are sensitive to the

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195. Monica Anderson & Madhumitha Kumar, *Digital Divide Persist Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RES. CTR. (May 7, 2019), https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/; Andrew Perrin & Sara Atske, *Americans with Disabilities Less Likely than Those Without to Own Some Digital Devices*, PEW RES. CTR. (Sept. 10, 2021), https://www.pewresearch.org/short-reads/2021/09/10/americans-with-disabilities-less-likely-than-those-without-to-own-some-digital-devices/.

196. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009); *see also* Hershkoff & Miller, *supra* note 81, at 412.

197. In addition, the federal judiciary must ensure that the privacy of litigants is protected. Hershkoff & Miller, *supra* note 81, at 412.

198. Bandes & Feigenson, *supra* note 1, at 1278-79.

199. *See* Angela Chang, *Zoom Trials as the New Normal: A Cautionary Tale,* U. CHI. L. REV. ONLINE (2020); Carlos Ferran & Stephanie Watts, *Videoconferencing in the Field: A Heuristic Processing Model*, 54 MGMT. SCI. 1565, 1565 (2008).

200. Jason Cantone, Jeremy Fogel, & Mary Hoopes, *Judicial Decision-making,* in HANDBOOK OF THE PSYCHOLOGY OF LEGAL DECISION-MAKING (2024).

201. Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings,* 51 SOUTHWESTERN L. REV. 20 (2021).

202. *Id.* at 38; Cantone et al., *supra* note 200.

203. *See* McCormack Testimony, *supra* note 4.

potential risks inherent in making decisions virtually, and we agree with the general principle that reliance on virtual proceedings be measured and occur for the most part in less substantive proceedings.[204]

Increased transparency might be at least one antidote to the ongoing decline in public confidence in the courts. As the AO has acknowledged, public trust and confidence in the judiciary are imperative for the rule of law to survive.[205] The data indicate that the public's trust in the courts is at an all-time low, and that trust is lowest among those in the lowest socioeconomic classes. There is evidence that most of the public *and* the media believe that judges decide most cases on the basis of their ideological leanings.[206] Shawn Patterson and colleagues argue that the erosion of trust in the courts threatens the very premise of our judiciary, as both politicians and the public may become more willing to embrace constraints on the courts' independence and authority.[207]

Finally, and relatedly, permitting some hearings to be virtual, with greater access to the public, could also ensure that the public receives more accurate information about the courts. There is mounting evidence that the public receives more and more of its information about the courts—information that often contains inaccuracies—from social media.[208] Increased availability of information through access to virtual proceedings allows the public to obtain information from firsthand observation of the courts. The routine matters that are likely to be held virtually—status conferences and motion practice—do not involve the same kinds of security concerns as more longer trials, as there are no witnesses, informants, or juries whose identities may need protection. Thus, these more routine hearings provide an ideal opportunity for the public to learn more about what the courts do on a day to day basis.

CONCLUSION

When the Berkeley Judicial Institute convened a meeting of federal judges and scholars to consider the future of federal court reform several years ago, former Chief Judge Jon O. Newman of the Second Circuit urged the judiciary to consider that simply because courts have traditionally followed certain procedures does not exempt them from "thorough examination and potential change."[209] In the intervening years, the pandemic forced an abrupt transformation in how the courts administered justice, enabling the courts to test the accuracy of their apprehensions

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204. In addition, as we discuss *supra* in Part III, judges emphasized a host of other reasons why in-person proceedings were beneficial, as it often enabled informal interactions that could aid in a more efficient resolution of the case.

205. STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, U.S. CTS., at 12 (Sept. 2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf.

206. *See supra* fn. 15 and accompanying text; *see also* Jeremy Fogel, Dahlia Lithwick, D. Brooks Smith & Thelton Henderson, *Civic Education: Sharing the Values of Judicial Independence,* 105 JUDICATURE 21, 24 (2021).

207. Patterson et al., *supra* note 15, at 23.

208. Griffith et al., *supra* note 15, at 11; Norman H. Meyer, Jr., *Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practice Guide for Court Administrators,* 6 INT'L J. COURT ADMIN. 1, 11 (2014).

209. Newman, *supra* note 50, at 911.

about virtual proceedings. As we have argued in this Essay, the judiciary cannot afford to turn its back on the lessons it has learned from the pandemic. As one of the judges in our study said, reverting reflexively to pre-pandemic practice would be to "consciously set aside a body of knowledge."[210]

Our interviews with judges overwhelmingly affirmed our confidence in the federal judiciary, as the judges with whom we spoke had reflected carefully upon their experience with virtual proceedings. Today's courts face several important threats, including an all-time low level of confidence in their integrity from the public and a "justice gap" that means many are left without recourse in the courts due to a lack of resources. Amending the Rules to permit a greater reliance upon virtual proceedings would be a meaningful response to both of these threats.

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210. Transcripts, at 30.

TAB 12

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Third Party Litigation Funding Subcommittee Report**

DATE: **October 1, 2025**

This subcommittee was created at the October 2024 meeting of the Advisory Committee—a year ago. As reported in April, it embarked on a program designed to educate subcommittee members about the issues involved. The topic has been on the Committee's agenda for a long time, so some background is important.

Since the full Committee's April meeting, TPLF has continued to attract attention. The bill in Congress to require disclosure in some cases, the Litigation Transparency Act, remains pending. A copy of that bill is included in this agenda book. Senator Tillis introduced a bill to impose a high tax on funders that was, for a time, included in the omnibus "big beautiful bill," but it was eventually removed from that bill before it passed Congress. That bill, the Tackling Predatory Litigation Funding Act, is included in this agenda book. In early September, Lawyers for Civil Justice (LCJ) submitted a 260-page document about disclosure of TPLF. The first 20 pages of that document are in this agenda book, with a link to the 240 pages of appendices. Finally, in early 2025 an agency of the EU issued a 700-page report on TPLF in the EU. A link to that report is also included at the end of this memorandum.

On October 23, 2025—the day before the full Committee meeting—George Washington National Law Center is holding an all-day conference on contemporary TPLF. Members of the Subcommittee (and perhaps other members of the Advisory Committee) will be attending and should be able to report on the event during the October 24 meeting.

Representatives of the Subcommittee have also attended events organized by LCJ and the American Association for Justice (AAJ) about TPLF and received valuable input at those events.

But for the present, as in April, the Subcommittee remains in its information-receptor mode. So the report this time mirrors what was in the agenda book for the April meeting. The questions raised in that agenda book (and repeated below) have been presented to the organizers of the GW conference as a focus for that event.

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Reference Material Link(s):

- Mapping Third Party Litigation Funding in the European Union

Attachment(s):

- Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, April 1, 2025, at 270-72
- Litigation Transparency Act of 2025, H.R. 1109, 119th Cong. (2025)
- Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025)
- Excerpt from Suggestion 25-CV-L (Lawyers for Civil Justice)

Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, April 1, 2025, at 270-72:

In mid-2014, the Chamber of Commerce proposed that Rule 26(a)(1)(A) be amended to require disclosure of third party funding of cases pending in federal court. At its Fall 2014 meeting, the Committee decided to take no action, in large part because of uncertainty about this relatively new phenomenon. In 2017, the topic was initially assigned to the MDL Subcommittee, but that subcommittee determined that TPLF did not seem to play a prominent role in MDL proceedings. The subject remained on the Committee's agenda, however.

In 2019 – partly in response to inquiries from members of Congress – the full Committee got an extensive report on the fruits of the ongoing monitoring of TPLF and decided to continue to monitor the topic but not otherwise to take action.

Meanwhile, there were 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 copy of 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.

TPLF has also attracted substantial academic attention. There have been several academic conferences in the U.S. focusing on funding. In addition, an academic book published in Europe in late 2024 contained a full section on litigation funding. A symposium issue of the law journal of Tel Aviv University, to be published in 2025, contains papers from many scholars (mainly American, including this Reporter) on American experiences and concerns. There likely are other such symposia out there.

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 as to these developments. On one side, litigation funding is supported in some circles as "unlocking the courthouse door" by facilitating the assertion of valid claims.

On the other hand (as illustrated in connection with the work of the MDL Subcommittee), litigation funding is not supported 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. The arguments presented to the MDL Subcommittee in

support of vigorous "vetting" of claims in MDL proceedings were partly based on this sort of concern.

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 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?

I

119TH CONGRESS
1ST SESSION

H. R. 1109

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2025

Mr. ISSA (for himself, Mr. COLLINS, and Mr. FITZGERALD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Litigation Transparency Act of 2025".

SEC. 2. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY BENEFICIARIES IN CIVIL CASES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Third-party beneficiary disclosure

''(a) IN GENERAL.—Except as provided in subsection (b), in any civil action, a party or any counsel of record for a party shall—

''(1) disclose in writing to the court and all other named parties to the civil action the identity of any person (other than counsel of record) that has a right to receive any payment or thing of value that is contingent on the outcome of the civil action or a group of actions of which the civil action is a part; and

''(2) produce to the court and to each other named party to the civil action, for inspection and copying, any agreement creating a contingent right referred to in paragraph (1), including any ancillary agreement or document, except as otherwise stipulated or ordered by the court.

''(b) EXCEPTION.—The requirements under subsection (a) shall not apply with respect to a person that has a right to receive payment described in subsection (a)(1) if the right to receive payment is solely—

''(1) the repayment of the principal of a loan;

''(2) the repayment of the principal of a loan plus interest that does not exceed the higher of 7 percent or a rate two times the annual average 30-year constant maturity Treasury yield, as published

by the Board of Governors of the Federal Reserve System, for the year preceding the date on which the relevant agreement was executed; or

"(3) the reimbursement of attorney's fees.

"(c) TIMING.—The disclosures required by subsection (a) shall be made not later than the later of—

"(1) 10 days after the execution of any agreement described in subsection (a)(2); or

"(2) the time of the filing of the action before the court.

"(d) DUTY TO CORRECT.—A party or counsel of record that made a disclosure required by this section shall supplement or correct each such disclosure in a timely manner—

"(1) if such party or counsel of record learns that the disclosure is or has become incomplete or incorrect in some material respect, if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

"(2) as ordered by the court.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"1660. Third-party beneficiary disclosure.".

SEC. 3. APPLICABILITY.

The amendments made by this Act shall apply to any civil action pending on or commenced after the date of enactment of this Act.

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II

119TH CONGRESS
1ST SESSION

S. 1821

To amend the Internal Revenue Code of 1986 to establish a tax on income from litigation which is received by third-party entities that provided financing for such litigation.

IN THE SENATE OF THE UNITED STATES

MAY 20, 2025

Mr. TILLIS introduced the following bill; which was read twice and referred to the Committee on Finance

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A BILL

To amend the Internal Revenue Code of 1986 to establish a tax on income from litigation which is received by third-party entities that provided financing for such litigation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tackling Predatory Litigation Funding Act".

SEC. 2. LITIGATION FINANCING.

(a) IN GENERAL.—Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:

"CHAPTER 50B—LITIGATION FINANCING

"SEC. 5000E–1. TAX IMPOSED.

"(a) IN GENERAL.—A tax is hereby imposed for each taxable year in an amount equal to the applicable percentage of any qualified litigation proceeds received by a covered party.

"(b) APPLICABLE PERCENTAGE.—For purposes of subsection (a), with respect to any taxable year, the applicable percentage shall be the amount (expressed as a percentage) equal to the sum of—

"(1) the highest rate of tax imposed by section 1 for such taxable year, plus

"(2) 3.8 percentage points.

"(c) APPLICATION OF TAX FOR PASS-THRU ENTITIES.—In the case of a covered party that is a partnership, S corporation, or other pass-thru entity, the tax imposed under subsection (a) shall be applied at the entity level.

"SEC. 5000E–2. DEFINITIONS.

"In this chapter—

''(1) CIVIL ACTION.—

''(A) IN GENERAL.—The term 'civil action' means any civil action, administrative proceeding, claim, or cause of action.

''(B) MULTIPLE ACTIONS.—The term 'civil action' may, unless otherwise indicated, include more than 1 civil action.

''(2) COVERED PARTY.—

''(A) IN GENERAL.—The term 'covered party' means, with respect to any civil action, any third party (including an individual, corporation, partnership, or sovereign wealth fund) to such action which—

''(i) receives funds pursuant to a litigation financing agreement, and

''(ii) is not an attorney representing a party to such civil action.

''(B) INCLUSION OF DOMESTIC AND FOREIGN ENTITIES.—Subparagraph (A) shall apply to any third party without regard to whether such party is created or organized in the United States or under the law of the United States or of any State.

''(3) LITIGATION FINANCING AGREEMENT.—

"(A) IN GENERAL.—The term 'litigation financing agreement' means, with respect to any civil action, a written agreement—

"(i) whereby a third party agrees to provide funds to one of the named parties or any law firm affiliated with such civil action, and

"(ii) which creates a direct or collateralized interest in the proceeds of such action (by settlement, verdict, judgment or otherwise) which—

"(I) is based, in whole or part, on a funding-based obligation to—

"(aa) such civil action,

"(bb) the appearing counsel,

"(cc) any contractual co-counsel, or

"(dd) the law firm of such counsel or co-counsel, and

"(II) is executed with—

"(aa) any attorney representing a party to such civil action,

"(bb) any co-counsel in the litigation with a contingent fee

interest in the representation of such party,

"(cc) any third party that has a collateral-based interest in the contingency fees of the counsel or co-counsel firm which is related, in whole or part, to the fees derived from representing such party, or

"(dd) any named party in such civil action.

"(B) SUBSTANTIALLY SIMILAR AGREEMENTS.—The term 'litigation financing agreement' shall include any contract (including any option, forward contract, futures contract, short position, swap, or similar contract) or other agreement which, as determined by the Secretary, is substantially similar to an agreement described in subparagraph (A).

"(C) EXCEPTIONS.—The term 'litigation financing agreement' shall not include any agreement—

"(i) under which the total amount of funds described in subparagraph (A)(i)

with respect to an individual civil action is less than $10,000, or

"(ii) in which the third party described in subparagraph (A)—

"(I) has a right to receive proceeds which are derived from, or pursuant to, such agreement that are limited to—

"(aa) repayment of the principal of a loan,

"(bb) repayment of the principal of a loan plus any interest on such loan, provided that the rate of interest does not exceed the greater of—

"(AA) 7 percent, or

"(BB) a rate equal to twice the average annual yield on 30-year United States Treasury securities (as determined for the year preceding the date on which such agreement was executed), or

"(cc) reimbursement of attorney's fees, or

"(II) bears a relationship described in section 267(b) to the named party receiving the payment described in subparagraph (A)(i).

"(4) QUALIFIED LITIGATION PROCEEDS.—

"(A) IN GENERAL.—The term 'qualified litigation proceeds' means, with respect to any taxable year, an amount equal to the realized gains, net income, or other profit received by a covered party during such taxable year which is derived from, or pursuant to, any litigation financing agreement.

"(B) ANTI-NETTING.—Any gains, income, or profit described in subparagraph (A) shall not be reduced or offset by any ordinary or capital loss in the taxable year.

"(C) PROHIBITION ON EXCLUSION OF CERTAIN AMOUNTS.—In determining the amount of realized gain under subparagraph (A), amounts described in section 104(a)(2) and 892(a)(1) shall not be excluded.

"SEC. 5000E–3. SPECIAL RULES.

"(a) WITHHOLDING OF TAX ON LITIGATION PROCEEDS.—Any applicable person having the control, receipt, or custody of any proceeds from a civil action (by settlement, judgment, or otherwise) with respect to which such person had entered into a litigation financing agreement shall deduct and withhold from such proceeds a tax equal to 50 percent of the applicable percentage (as determined under section 5000E–1(b)) of any payments which are required to be made to a third party pursuant to such agreement.

"(b) APPLICABLE PERSON.—For purposes of this section, the term 'applicable person' means any person which—

"(1) is a named party in a civil action or a law firm affiliated with such civil action, and

"(2) has entered into a litigation financing agreement with respect to such civil action.

"(c) APPLICATION OF WITHHOLDING PROVISIONS.—

"(1) LIABILITY FOR WITHHELD TAX.—Every person required to deduct and withhold any tax under this chapter is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.

''(2) WITHHELD TAX AS CREDIT TO RECIPIENT OF QUALIFIED LITIGATION PROCEEDS.—Qualified litigation proceeds on which any tax is required to be withheld at the source under this chapter shall be included in the return of the recipient of such proceeds, but any amount of tax so withheld shall be credited against the amount of tax as computed in such return.

''(3) TAX PAID BY RECIPIENT OF QUALIFIED LITIGATION PROCEEDS.—If—

''(A) any person, in violation of the provisions of this chapter, fails to deduct and withhold any tax under this chapter, and

''(B) thereafter the tax against which such tax may be credited is paid,

the tax so required to be deducted and withheld shall not be collected from such person, but this paragraph shall in no case relieve such person from liability for interest or any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

''(4) REFUNDS AND CREDITS WITH RESPECT TO WITHHELD TAX.—Where there has been an overpayment of tax under this chapter, any refund or credit made under chapter 65 shall be made to the with-

holding agent unless the amount of such tax was actually withheld by the withholding agent.''.

(b) EXCLUSION FROM DEFINITION OF CAPITAL ASSET.—Section 1221(a) of the Internal Revenue Code of 1986 is amended—

(1) in paragraph (7), by striking ''or'' at the end,

(2) in paragraph (8), by striking the period at the end and inserting ''; or'', and

(3) by adding at the end the following new paragraph:

''(9) any financial arrangement created by, or any proceeds derived from, a litigation financing agreement (as defined under section 5000E–2).''.

(c) REMOVAL FROM GROSS INCOME.—Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 139I the following new section:

''SEC. 139J. QUALIFIED LITIGATION PROCEEDS.

''Gross income shall not include any qualified litigation proceeds (as defined in section 5000E–2).''.

(d) CLERICAL AMENDMENTS.—

(1) Section 7701(a)(16) of the Internal Revenue Code of 1986 is amended by inserting ''5000E–3(c)(1),'' before ''1441''.

(2) The table of chapters for subtitle D of the Internal Revenue Code of 1986 is amended by inserting after the item relating to chapter 50A the following new item:

"CHAPTER 50B—LITIGATION FINANCING".

(3) The table of sections for part III of subchapter B of chapter 1 of such Code is amended by inserting after the item relating to section 139I the following new item:

"Sec. 139J. Qualified litigation proceeds.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2025.

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RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
TPLF SUBCOMMITTEE

UNIFORM DISCLOSURE OF THIRD-PARTY LITIGATION FUNDING CONTRACTS IS NECESSARY TO INFORM JUDGES' AND PARTIES' KEY CASE MANAGEMENT DECISIONS

An Examination of TPLF Contracts Reveals Common Control Mechanisms that Can Affect the Litigation Process and Influence Substantive Outcomes

Transparency Doesn't Impose a Burden; It Lifts a Veil

September 3, 2025

Lawyers for Civil Justice ("LCJ")[1] respectfully reiterates its suggestion that the Advisory Committee on Civil Rules ("Advisory Committee") and its TPLF Subcommittee promulgate a rule requiring disclosure of third-party litigation funding ("TPLF") contracts.[2] Disclosure to courts and parties is necessary to inform case management and prevent misunderstandings caused by the control mechanisms in TPLF contracts that can alter the usual dynamics of litigation and resolution. A uniform disclosure rule would also relieve courts of having to expend judicial resources to decipher on an *ad hoc* basis whether a particular agreement should be disclosed in a particular case. The insurance disclosure requirement in Rule 26(a)(1)(A)(iv) is

[1] LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *See* Lawyers for Civil Justice and US Chamber of Commerce Institute for Legal Reform, Rule Suggestion, *It Is Time to Address the Patchwork of Inadequate Practices: How the Lack of FRCP Guidance Is Failing Courts and Parties Who Need a Uniform and Credible Procedure for Understanding Third-Party Litigation Funding Agreements*, Oct. 2, 2024, https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_-_rule_26_tplf.pdf.

the appropriate model. Like insurance agreements, TPLF contracts influence the conduct of litigation generally, far beyond the "claims and defenses" of a particular case.[3] A TPLF disclosure rule would provide judges with clear guidance, help all parties make informed strategic and settlement decisions based on a "realistic appraisal of the case,"[4] and help protect vulnerable plaintiffs, many of whom likely do not understand the instruments of control given to funders when named parties or their lawyers sign TPLF contracts.

The nine TPLF contracts discussed in this Rules Suggestion (and attached as Exhibits A-I) provide clear insights about the funding agreements that are common in federal courts today because they include contracts written and agreed to by the largest funders who are investing billions of dollars in federal court litigation as well as funders with fewer litigation investments.[5] Examining specific provisions—and understanding how they work separately and in combination—reveals how a rule requiring disclosure of TPLF contracts would provide courts and parties critical insight for managing their cases effectively.

Introduction

TPLF agreements give non-party funders specific mechanisms of control or significant influence over litigation and settlement decisions, in addition to the right to a portion of any proceeds from a judgment or settlement. Examining the funders' tools of control in TPLF contracts reveals how funders influence the course and outcomes of lawsuits in ways that courts and parties need to understand in order to manage litigation fairly and efficiently. The potency of these hidden control mechanisms may be startling—even "amazing"[6]—to those who encounter them for the first time, read boilerplate disavowals of control, or hear funders disclaim control over their funded cases.[7]

Some TPLF contracts expressly give non-party funders direct control over the litigation.[8] Other TPLF contracts ensure that funders have indirect—but still powerful—influence by obligating the funded plaintiffs and lawyers to pursue the claims (even if at some point they want to settle), to monetize equitable relief, and by allowing funders the "veto power" of discontinuing funding at any time.[9] Contracts may also give funders significant influence over plaintiffs' counsel, not

[3] The Advisory Committee rejected the notion that Rule 26(b) "relevancy" analysis should limit the disclosure of insurance agreements when it promulgated Rule 26(a)(1)(A)(iv). Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment. At the time, many courts were rejecting discovery requests for insurance agreements "reason[ing] from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence." *Id*. Those courts "avoid[ed] considerations of policy, regarding them as foreclosed." *Id*. The Advisory Committee concluded that the policy considerations transcend "relevancy" and necessitate the disclosure of insurance agreements.

[4] As the Advisory Committee said about disclosure of insurance coverage, a rule requiring disclosure of TPLF contracts "will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment.

[5] *In re Fresh Acquisitions, LLC*, No. 21-30721-SGJ-11, 2025 WL 2231870, at *9 (Bankr. N.D. Tex. Aug. 5, 2025) (observing that even purported TPLF "experts" have "only seen a few actual litigation funding agreements").

[6] *Id.* at *5 ("the Litigation Funding Agreement here seemed rather amazing to the court").

[7] *See infra* Section IV.

[8] *See infra* Section I.

[9] *See infra* Section II.

only in the selection and replacement of counsel, but also by obligating the plaintiff to cooperate with counsel and enabling the sharing of success fees in ways that create and exacerbate conflicts of interest—all of which weaken the ability of often-vulnerable and unsophisticated plaintiffs to participate in, or even understand, their own cases.[10]

The Advisory Committee should take particular notice of provisions that can, unbeknownst to judges, shape substantive outcomes and undermine court orders. The contracts that require the plaintiff to pay the funder the monetary value of any injunctive relief or specific performance awarded[11] impose a strong disincentive against non-monetary relief that can skew the remedies presented to, and ultimately ordered by, the court. Some contracts mandate that the plaintiff and counsel provide all documents obtained in the course of litigation to the funders,[12] a provision inconsistent with most protective orders. And some contracts undermine court orders to pay costs and sanctions by obligating plaintiffs to pay all such penalties[13]—even where the misconduct being sanctioned originated with the funder or its selected-and-controlled counsel, not with the plaintiff. Absent disclosure of TPLF contracts, courts and litigants have no awareness of such provisions and no insight into how they might impact their cases. Indeed, courts and parties may not even know when such provisions are having an effect because TPLF contracts typically prohibit the plaintiff and counsel from divulging the existence of the agreement or discussing its terms. A rule requiring disclosure of TPLF contracts would aid judges by lifting the veil on provisions that courts otherwise do not know about.

The TPLF Subcommittee has asked: "What is the court to do with the information if the disclosure is required?"[14] The answer is: the court would not have to take any action because a rule requiring disclosure of TPLF contracts would provide courts and parties the information needed to manage cases effectively and reach a just result. Courts typically take no action in response to the disclosure of insurance agreements, which similarly inform courts and parties about the interests of a non-party who may have significant control over litigation and settlement decisions. Aristotle observed: "Knowledge of the fact differs from knowledge of the reason for the fact." Knowing that a plaintiff is not responding to settlement offers, or is demanding monetary damages rather than injunctive relief, is different from knowing that a non-party funder is preventing the plaintiff from considering settlement or requiring the plaintiff to pay the funder the monetary value of any non-monetary relief. Simple disclosure of the TPLF contract provides such knowledge, with no burden on judicial resources. In addition, if TPLF-related issues or problems do arise, prior disclosure ensures that courts will have the benefit of open and adversarial briefing in keeping with normal litigation procedure. Absent a disclosure rule, courts will continue to engage in *ex parte* communications about TPLF contracts, which places a heavy burden on judicial resources by putting the onus on judges to understand the agreements and how they work in practice.[15]

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[10] *See infra* Section III.
[11] *See infra* Section II.B.
[12] *See infra* Section V.
[13] *See infra* Section VI.
[14] Advisory Committee on Civil Rules, Agenda Book, Apr. 1, 2025, 272, https://www.uscourts.gov/sites/default/files/2025-03/2025-04-civil-rules-committee-agenda-book-final-updated-3.28.25.pdf.
[15] *See infra* Section VII.

The Subcommittee also asks: Will a disclosure rule cause more discovery motions and battles? The answer, informed by the experience of states with TPLF disclosure rules, as well as the long-term federal judiciary's experience with insurance contracts, is most likely "no." However, it depends on how the rule is written. A simple rule along the lines of Rule 26(a)(1)(A)(iv) requiring disclosure of agreements would provide a clear procedure and relieve courts and parties from disputes over TPLF disclosure. Conversely, a complex rule that lets some TPLF contracts remain secret, includes fact-specific prerequisites for discovery, or suggests a list of factors that weigh differently in every case, would inevitably lead to more litigation.

I. TPLF CONTRACTS CAN GIVE DIRECT CONTROL OVER LITIGATION AND SETTLEMENT TO NON-PARTY FUNDERS, AFFECTING COURTS AND PARTIES

A. Funders' Control Over Litigation Decisions Affects Case Management

Some TPLF agreements expressly give the funder the right to control litigation and direct counsel. For example, the ILP Funding Agreement[16] provides that "the Lawyers and ILP will determine what Claims should be pursued in the Proceedings" and that "ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings and may give binding instructions to the Lawyers and make binding decisions on behalf of the Plaintiff in relation to the Claims."[17] These rights are reinforced by other provisions, including the requirement that the plaintiff instruct the lawyers to "comply with all instructions given by ILP,"[18] that ILP's "management services" include "providing day-to-day instructions to the Lawyers,"[19] and that the funder's discretionary decision to cease funding requires counsel to "discontinue the prosecution of the Claim."[20] The contract also gives ILP discretion over appeals.[21]

The Therium Chevron Funding Agreement[22] permits the lawyers in a class action case to do only three things without Therium's consent—join an additional party, add a new cause of action, and commence additional proceedings. It otherwise requires that "the Proceedings shall be prosecuted in accordance with the Project Plan" and "subject to Therium's prior agreement to any proposed variation of the Project Plan."[23]

[16] Exhibit A, Litigation Funding Agreement between International Litigation Partners Ltd. and Laurence John Bolitho, March 13, 2014, ("ILP Funding Agreement").
[17] *Id*. at §5.1.
[18] *Id*. at §6.3.1 (although this is constrained to some degree by § 13, which restores some rights to the clients in the event that counsel identifies a conflict of interest, except with respect to settlement, which client never controls).
[19] *Id*. at §7.1.
[20] *Id*. at §5.3.
[21] *Id*. at §11.
[22] Exhibit B, Litigation Funding Agreement between Therium Litigation Funding, Jacqueline A. Perry QC, and Neil J. Fraser, Mar. 29, 2016, ("Therium Chevron Funding Agreement").
[23] *Id*. at §7.

The ramifications of such provisions are explicit in the Burford/Sysco Agreement,[24] which provides that, in the event of a breach by the funded plaintiff ("breach" being defined broadly[25]), the funder may take over the conduct and settlement of the litigation, including instructing or replacing counsel.[26] The contract contemplates that the funder will "act in the name of" the plaintiff—and requires the plaintiff to continue to appear "at any hearings" at the direction of the funder.

Disclosure of these types of provisions would help courts and parties understand why the named plaintiff may not be directing—or even participating in—the litigation. It would make courts and parties aware of any control exercised by a non-party with separate financial interests and strategic objectives for the case. Knowing about such an agreement allows the court to anticipate and avoid practical case management problems; for example, if a court knows that a non-party funder has significant control over litigation decisions, it may require the funder to attend status conferences in addition to the plaintiff who might not be able to participate meaningfully. Similarly, should a court impose costs or sanctions for discovery violations, knowledge that the funder was responsible for the sanctionable conduct will ensure that those sanctions will not be borne by a plaintiff who lacked authority under the TPLF contract to prevent the violation.

Further problems can occur when courts and parties are unaware that a TPLF contract may itself be the source of conflict. Courts ignorant of TPLF contractual provisions cannot detect when a disputed contract term, rather than something in the litigation, causes counsel's actions. Disputes between funders and plaintiffs about who gets to make particular litigation decisions may manifest as confusing delays, contradictory positions or statements, or counsel's apparent inability to act or explain an action or decision. A court might attribute such delays to typical client indecision when they actually reflect a covert, three-way struggle between plaintiff, counsel, and the non-party funder over contractual rights and obligations.

A simple disclosure rule for TPLF contracts analogous to that for insurance agreements would provide the necessary information to avoid these problems with no judicial action required. Judges would know not only who is "in the courtroom" but also how the non-party funder's actions may affect the court's case management. Indeed, courts have found good cause for TPLF disclosure when funders are involved in making decisions about the case.[27] In contrast, when TPLF contracts are concealed from the court and the parties, courts may be burdened with time-consuming disputes that could have been addressed early in the process or avoided altogether. Courts that do not consider TPLF contracts may never understand (even in retrospect) how these

[24] Exhibit C, Second Amended and Restated Capital Provision Agreement between The Counterparty and The Capital Providers, Dec. 22, 2020, ("Burford/Sysco Agreement").
[25] *Id*. at §12.2.
[26] *Id*. at §13.1.
[27] *See, e.g., MSP Recovery Claims Series, LLC v. Sanofi-Aventis U.S., LLC,* 2024 WL 4100379 at *6 (D.N.J. Sept. 6, 2024) (finding "good cause" for "discovery into litigation funding" where documents suggest that the funders "have intimate involvement in Plaintiffs' decision-making") (*citing* the holding in *In re: Valsartan NDMA Contamination Litigation*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019), that good cause is satisfied where "a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class are sacrificed or not being protected, or conflicts of interest exist").

contracts can impair the court's ability to execute good case management and thwart the parties' ability to navigate the litigation and resolve their disputes.

B. Funders' Control Over Settlement Affects Parties' Ability to Discuss Resolution—Impeding Proper Judicial Management

Some TPLF contracts expressly give the funder the right to accept or reject settlement offers. In the ILP/Bolitho Funding Agreement, the funded plaintiff cannot "discontinue, abandon, withdraw or settle" the litigation or "reject any Settlement offer made by any Defendant" without prior written consent from ILP.[28] The contract even prevents the funded plaintiff from having "any communication with any Defendant" or defense representative.[29] In the event that the funded plaintiff and the funder disagree about whether to settle the case, the contract provides that counsel will decide[30]—the same counsel who take direction from the funder.[31] Similarly, the Amendment to the Burford/Sysco Agreement[32] provides that the named party "shall not accept a settlement offer without the Capital Providers' prior written consent, which shall not be unreasonably withheld…."[33] A related provision states that the funded plaintiff "shall not … agree to settle or otherwise resolve any separate action, claim, suit, or arbitration" with any defendant in the underlying litigation if doing so would impact the funder's recoveries.[34] In the LMFS Funding Agreement,[35] the plaintiff "gives [funder] full and complete authorization to negotiate and accept any settlements of Claims" and "agrees to cooperate and consent to any settlement deemed reasonably [sic] by [funder]."[36] The agreement requires the plaintiff "to direct his/her attorney to settle Claims as directed by [funder] if so directed,"[37] and requires the funder's consent to dispose of or discontinue the claims.[38]

Most courts consider it good case management to ensure that decision makers are in the room, or at least available, during settlement conferences. Yet many courts do not realize that some TPLF contract provisions not only transfer settlement decisions to funders, but also often create conflicts between the plaintiff's interests and the funder's. The ILP Funding Agreement starkly

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[28] Exhibit A, ILP Funding Agreement at §6.2.
[29] *Id*. at §6.7.
[30] *Id*. at §13.5.
[31] *See infra* Section III.
[32] Exhibit D, Amendment No. 1 to Second Amended and Restated Capital Provision Agreement, Mar. 31, 2022, ("Amendment to Burford/Sysco Agreement").
[33] *See* Amendment to Burford/Sysco Agreement at §7(b)(v). This language is purportedly cabined by language providing that "the Capital Providers (and their respective Affiliates) shall have no right to exercise control over the independent professional judgment of its Nominated Lawyers and shall not seek to impose a commercially unreasonable result with respect to settlement," but *see infra* Section IV for a discussion of why the limitations present in this provision may be illusory. This amendment replaced a provision that required Sysco to give the funder "an opportunity to discuss such settlement offer prior to the Counterparty accepting or rejecting it" and provided that the funder "shall have no right to exercise control over the independent professional judgment of the Counterparty and its Nominated Lawyers and shall not seek to coerce the Counterparty and its Nominated Lawyers with respect to settlement." *See* Exhibit C, Burford/Sysco Agreement at §5.3(b)(v).
[34] Exhibit C, Burford/Sysco Agreement at §5.3(b)(x).
[35] Exhibit E, Litigation Funding Agreement between Litigation Management and Financial Services, LLC, and Vicki Mize, Nov. 1, 2016, ("LMFS Funding Agreement").
[36] *Id*. at §7(b).
[37] *Id*. at §7(c).
[38] *Id*. at §§2(b)(iii) and (iv).

illustrates this problem: the funded plaintiff cannot "discontinue, abandon, withdraw, or settle" litigation without ILP's written consent and is prohibited from having "any communication" with defendants or their representatives. Similarly, the Burford/Sysco agreement's prohibition that the funded party "shall not accept a settlement offer without the Capital Providers' prior written consent" puts the funder in control of settlement and ensures that any settlement meets the funder's definition of success.

Absent disclosure of TPLF contracts, courts cannot appreciate why settlement discussions stall, why plaintiffs are unable to respond to seemingly reasonable offers, or why cases continue to be litigated despite apparent willingness by the named parties to resolve their dispute. Defense counsel cannot effectively negotiate when the person across the table has no settlement authority and undisclosed non-parties with different interests and risk calculations are controlling decisions. Understanding settlement dynamics requires knowing whether funders have veto power over reasonable offers, minimum recovery requirements, or strategic reasons for prolonging litigation that have nothing to do with the underlying dispute (including interests in other "portfolio" cases). Courts and parties might misinterpret delays in responding to settlement offers as negotiating ploys when they actually reflect the time a non-party funder needs to evaluate and approve any potential agreement, or even to arbitrate or litigate disputes about the meaning of the TPLF contract in separate proceedings.

When a court is called upon to ensure that a settlement is fair and reasonable—for example, as Rule 23(e) requires in class actions—it cannot make that determination reliably without knowing whether a significant portion of the proceeds is being paid to a non-party and on what terms. Because the TPLF contract may preclude the plaintiff or counsel from disclosing the existence of funding or any details about the arrangement, mandating disclosure is the only way the court can obtain this important information.

II. TPLF CONTRACTS CAN GIVE NON-PARTY FUNDERS MEANINGFUL INDIRECT CONTROL AND INFLUENCE OVER LITIGATION AND SETTLEMENT

A. Obligating Named Parties to Pursue Claims Can Cause "Zombie Litigation"

Some TPLF agreements require the funded plaintiffs to continue pursuing their claims—in other words, the contracts are the plaintiffs' commitment to keep litigating even if, at some point in the future, they decide it would be time to settle or otherwise end the case. For example, the ILP Funding Agreement and the Therium Dominion Funding Agreement[39] require the plaintiff to "diligently prosecute the Proceedings."[40] Similarly, the Legalist Funding Agreement[41] requires the plaintiff "to continue to conduct its prosecution of the Claim(s)"[42] and the Longford Capital

[39] Exhibit F, Litigation Funding Agreement between Therium Finance AG IC and Dominion Minerals Corp, 2015, ("Therium Dominion Funding Agreement").
[40] Exhibit A, ILP Funding Agreement at §6.1.4; Therium Dominion Funding Agreement at §9.2.6(a).
[41] Exhibit G, Litigation Funding Agreement between Legalist Fund II, L.P. and DiaMedica Therapeutics Inc., Dec. 29, 2019, ("Legalist Funding Agreement").
[42] *Id*. at §6.3.

Agreement[43] requires the plaintiff to prosecute the claims.[44] A robust provision in the LMFS Funding Agreement provides:

> Following termination of this agreement by Claimant, Company, at its own risk and for its sole benefit may continue the proceedings without the participation of Claimant. Company shall be entitled to require Claimant to continue proceedings if Company does not wish to continue proceedings in its own name and if Company does not wish to disclose the fact that the proceedings are being funded.[45]

Such contractual obligations can create "zombie litigation"[46]—lawsuits that continue despite all named parties wanting to settle. Courts and parties need to know about such provisions so they can make informed decisions to prevent cases from "going zombie." For example, a court with this knowledge might require an earlier settlement conference, impose a more aggressive discovery schedule, or set a firm trial date. Opposing parties, factoring in this dynamic, might decide to make earlier and more serious settlement offers, or alternatively understand that settlement is futile and instead prepare for trial.[47] Either way, the court and parties will make better-informed strategic decisions if they understand whether the plaintiff has contracted away its ability to settle and must continue prosecuting the claims until a non-party funder says otherwise. Learning of these provisions by early disclosure is key; finding out after settlement negotiations have failed, or after the third trial date comes and goes, wastes the court's and parties' time while creating unnecessary delay and expense.

B. Obligating Plaintiffs to Monetize Equitable Relief Can Affect Judicial Rulings, Prolong Litigation, and Hinder Resolution

Some TPLF agreements require plaintiffs to maximize monetary recoveries over equitable relief including injunctions, specific performance, restitution, rescission, and declaratory relief. For example, the Litchfield Ventures contract with the Fresh Acquisitions Liquidating Trust[48] provides:

> If Forward Seller supports or accepts (to the extent such acceptance is within Forward Seller's power) any offer to Settle the Litigations that includes non-cash Litigation Proceeds, Forward Seller shall take all actions necessary to move the Court to cause the monetization of all such non-cash Litigation Proceeds, to obtain the cash value of such non-cash Litigation Proceeds as soon as practicable, and to cause the payment of the cash Litigation Proceeds received in accordance with this Agreement.[49]

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[43] Exhibit H, Funding Agreement between Longford Capital Fund I, LP, and Quest Patent Research Corporation, Mar. 11, 2014, ("Longford Capital Agreement").
[44] *Id*. at §8.1(b).
[45] Exhibit E, LMFS Funding Agreement at §6(b).
[46] *See* Steinitz, Maya, *Zombie Litigation: Claim Aggregation, Litigant Autonomy and Funders' Intermeddling* (November 01, 2024). Forthcoming in Cornell Law Review, 2025, Boston Univ. School of Law Research Paper No. 24-40, available at: https://ssrn.com/abstract=5054864 or http://dx.doi.org/10.2139/ssrn.5054864.
[47] Opposing parties might also decide to challenge the enforceability of the agreement.
[48] Exhibit I, Master Prepaid Forward Purchase Agreement by and between Litchfield Ventures, LLC, and Fresh Acquisitions Liquidating Trust, May 3, 2023, ("Litchfield Funding Agreement").
[49] *Id*. at §4.3.

The Therium Dominion Funding Agreement provides that if the plaintiff receives any recoveries "in non-monetary form," then it must pay the funder the market value of those recoveries, which is to be established by an independent expert (whose fees the plaintiff also must pay).[50] The Amendment to Burford/Sysco Agreement requires that the plaintiff "shall take such actions as are reasonable and appropriate to maximize the Proceeds received from each Claim, giving priority to cash Proceeds."[51] Similarly, the Burford/Sysco Agreement requires the named party to "use all commercially reasonable efforts to: (A) pursue such Claim and all of the Counterparty's legal and equitable rights arising in connection with such Claim; (B) bring about the reasonable monetization of such Claim through a Claim Resolution…."[52] The agreement gives effect to this provision by requiring the named party to "retain and remunerate the applicable Nominated Lawyers to prosecute such Claim vigorously in a commercially reasonable manner in order to bring about the reasonable monetization of such Claim through a Claim Resolution" and "cooperate with such Nominated Lawyers in all matters pertaining to such Claim (including providing documents and Information, appearing and causing others within the Counterparty's power to appear for examinations and hearings)."[53] The Legalist Funding Agreement goes even further and requires that the plaintiff "shall … pay … an amount equal to the Non-Monetary Claim Proceeds Fair Market Valuation,"[54] and the Longford Capital Agreement defines "Proceeds" to include the cash value of "injunctions" and non-monetary relief. [55]

These monetization requirements have the effect, and the intent, of skewing the plaintiffs' sought-after relief. If kept secret from the court and parties, they can prevent negotiated resolution and, ultimately, influence the court to fashion suboptimal relief. Judges kept in the dark about these provisions may be unaware that a non-party's interest in cash payments is precluding the parties from presenting options that the court would find just. Courts considering whether to grant equitable remedies need to understand that a TPLF contract may make such relief effectively worthless or even a burden to the nominal plaintiffs. The defending parties may have reasonable settlement offers rejected without knowing that the plaintiff is contractually bound to maximize monetary recovery to the exclusion of other considerations like avoiding future wrongdoing, preserving business relationships, or managing reputational concerns that might otherwise make settlement attractive to the nominal plaintiff. And the plaintiff who wants to accept a reasonable settlement offer—or would prefer less aggressive discovery tactics, streamlined motion practice, or resolution discussions—may be powerless in the face of the funder's insistence not to breach the duty to "maximize" proceeds. These provisions effectively allow funders to reframe any disagreement about settlement terms as a potential breach of contract, creating economic pressure that complicates judicial management, stymies settlement efforts, and supersedes even the plaintiffs' own judgment about the best resolution of the dispute.

[50] Exhibit F, Therium Dominion Funding Agreement at §13.
[51] Exhibit D, Amendment to Burford/Sysco Agreement at §7(a).
[52] Exhibit C, Burford/Sysco Agreement at §5.3(b)(i).
[53] *Id*. at §5.3(b)(ii).
[54] Exhibit G, Legalist Funding Agreement at §3.2.
[55] Exhibit H, Longford Capital Agreement at §2.34.

C. The Funders' Right to Discontinue Funding Allows Funders to Control the Case and Resolution

TPLF contracts may allow the funder to withdraw funding with minimal or no restrictions. For example, the LMFS Funding Agreement states that the "[funder] shall be entitled to terminate this agreement in whole or in part without notice and to cease any further funding of [plaintiff's] Claims."[56] The Therium Dominion Funding Agreement similarly provides the funder with multiple paths to terminate funding. It limits the funder's commitment solely to the first tranche of funding, and gives the funder "sole discretion" to fund subsequent tranches, with a two-month exclusive option to do so.[57] In addition, it gives the funder the right to terminate the agreement unilaterally if it "ceases to be satisfied as to the merits of the Claim" or "reasonably believes that the Claim is no longer commercially viable."[58] It also provides that the funder can decide whether to fund or continue funding based on any "relevant" information whether or not material, giving the funder *carte blanche* to walk away at any time.[59] Some TPLF contracts provide notice, but no other restrictions. For example, the ILP Funding Agreement gives the funder "sole discretion" to "cease to fund any Claim" subject to 14 days written notice to the plaintiff[60] (and gives the funder equal discretion to terminate the funding agreement as a whole[61]) and the Legalist Funding Agreement allows the funder to terminate the agreement for any reason with 30 days written notice.[62]

These provisions, both independently and in conjunction with other control mechanisms, effectively give the funder veto power over every decision in a case, regardless of boilerplate language to the contrary. Plaintiffs and plaintiffs' lawyers who turn to funders to support litigation are vulnerable to threats of discontinued funding since they likely do not have the resources to litigate independently, let alone sue the funder (or defend the funder's suit) for breach of contract.[63] Disclosure of these provisions would inform judges' and parties' ability to manage funded cases because it allows an understanding not only of who is in control but also the ongoing potential for disputes between the named party and its funder—disputes occurring in an environment where plaintiffs may have no choice but to accede to funders' wishes about litigation strategy, settlement terms, or case management to avoid termination and potential breach-of-contract claims.

[56] Exhibit E, LMFS Funding Agreement at §6(c).
[57] Exhibit F, Therium Dominion Funding Agreement at §2.
[58] *Id*. at §16.3.
[59] *Id*. at §6.2.
[60] Exhibit A, ILP Funding Agreement at §5.2.
[61] *Id*. at §18.1.
[62] Exhibit G, Legalist Funding Agreement at §8.2.4.
[63] One feature of some TPLF contracts—a two-month exclusive option to fund future tranches—may effectively preclude plaintiffs from finding alternative funding sources if time is of the essence, further increasing the funder's leverage.

III. TPLF CONTRACTS CAN GIVE NON-PARTY FUNDERS EFFECTIVE CONTROL OVER THE FUNDED PLAINTIFFS' RELATIONSHIP WITH COUNSEL

A. TPLF Contracts Can Interfere with the Attorney-Client Relationship

TPLF agreements can give non-party funders extraordinary powers over the plaintiffs' counsel. The Therium Dominion Funding Agreement obligates the plaintiff to:

- "follow the legal advice" of counsel, "including whether it would be appropriate to make or accept any offer to settle"[64] and makes the client liable for costs incurred "as a result of [the plaintiff's] failure… to co-operate with or follow the advice of" counsel;[65]

- instruct counsel to report to the funder if counsel believes the plaintiff has breached the funding agreement, including by "threatening to cease or ceasing" to engage that counsel, or by "failing to follow the advice" of counsel;[66]

- instruct counsel to provide a letter to the funder stating, *inter alia*, that counsel "has assumed a duty of care to Therium and its shareholders" with respect to information and advice provided to the funder prior to the execution of the funding agreement;[67] and

- instruct counsel to provide Therium with "copies of draft pleadings, witness statements, expert reports, and significant correspondence" prior to issue, clearly contemplating that the funder will have input into the contents of such materials.[68]

These provisions are not unique. The Burford/Sysco Agreement requires the plaintiff to "cooperate" with counsel;[69] the ILP Funding Agreement requires the plaintiff to "follow all reasonable legal advice given by" counsel;[70] and, under the Legalist Funding Agreement, "[t]he Plaintiff agrees to take and follow the legal advice of the Lead Counsel" excluding settlement.[71]

It is not a federal judge's job to police attorney ethics—that function belongs to bar associations and disciplinary authorities. However, courts and parties need to understand and plan for situations where TPLF contracts subvert the usual attorney-client fiduciary relationship. Such

[64] Exhibit F, Therium Dominion Funding Agreement at §§9.2.8-9.
[65] *Id*. at §5.1.1.
[66] *Id*. at §9.3. This provision raises significant ethical duty issues by putting counsel in the position of informing their clients' potential adversaries (here, the funder) of claims the funder may have against counsel's client. In effect, this requires counsel to be more loyal to the funder than the counsel's client if a conflict of interest arises.
[67] *Id*. at §9.2.1 and appendix 2.
[68] *Id*. at §9.2.4.
[69] Exhibit C, Burford/Sysco Agreement at §5.3(b)(ii).
[70] Exhibit A, ILP Funding Agreement at §6.1.1. (mitigated somewhat by provisions that the plaintiff can "override" ILP's instructions to counsel, and in the event that counsel identifies a conflict of interest, the agreement contemplates that counsel will give preference to the plaintiff's interests, §13.
[71] Exhibit G, Legalist Funding Agreement at §6.4.

provisions fundamentally change how litigation decisions are made, creating case management challenges that affect all participants.

When courts issue case management orders, set deadlines and trial dates, or seek to resolve discovery disputes and pre-trial motions, they need to know whether they are dealing with traditional client-directed representation or something altogether different: a non-party-and-attorney-controlled relationship where the nominal plaintiff is out of the loop, lacking meaningful input into litigation strategy or resolution of his or her own case. For the other parties to the case, this scrambling of the traditional attorney-client relationship makes settlement negotiations and case planning far more complex. In class actions, this information is essential for courts making the Rule 23(e)-required determinations about the adequacy of the named plaintiff and the fairness of the proposed settlement.

Defense counsel cannot effectively factor in plaintiff motivations into their settlement evaluations and try to address them when the plaintiff is essentially a bystander, contractually obligated to defer to attorney judgment, particularly when that attorney may be receiving revisions of drafts from non-party funders (why else would the funders require drafts?) and the lawyer is instructed to report the plaintiff's suspected "breaches" of the TPLF contract to funders.[72]

B. Funders' Power to Prevent Change of Counsel Is Potent

TPLF contracts can give funders the ability to "lock in" a specific lawyer or firm, giving funders potent control over the case—since funders frequently provide designated counsel with repeat business or "portfolio" relationships. Most dramatically, the Therium Dominion Funding Agreement requires counsel to report to the funder if the client "breaches its obligations under this Agreement" by "threatening to cease or ceasing to" engage with counsel[73] and gives the funder the right to consent before new lawyers are engaged.[74] The Burford/Sysco Agreement bars the plaintiff from engaging new outside counsel unless it obtains the funder's "prior written consent… which consent shall not unreasonably be withheld."[75] It also bars the plaintiff from renegotiating its economic arrangement with its outside counsel, and further requires the funder's prior written consent to any economic arrangement with replacement counsel unless the terms

[72] Contractual provisions that purport to re-write the attorney-client relationship raise ethical and regulatory issues. Requiring clients to accede to the advice of counsel, rather than the other way around, instructing counsel to report their own ostensible client's possible breaches of a contract to a counterparty, and to provide otherwise privileged drafts of pleadings and other important documents to non-party funders prior to filing, raise serious questions about whether counsel is properly serving client interests. But these ethical issues can be addressed only if the proper authorities know about potentially problematic arrangements. A rule requiring disclosure of TPLF agreements would support the preservation of the ethics of the legal profession. With disclosure, TPLF-related ethical concerns could be identified and handled by appropriate authorities rather than concealed. If the FRCP continue to remain silent on disclosure—or to be understood not to allow it, as some courts interpret Rule 26(b)(1)'s definition of the scope of discovery—then unethical practices will be undetected and unaddressed. Importantly, an FRCP disclosure rule could save judges who discuss or review TPLF contracts *ex parte* from being put in the uncomfortable position of being the only disinterested persons privy to potentially unethical arrangements. Uniform disclosure of TPLF contracts would protect the judiciary by allowing sunshine to serve as a natural deterrent to unethical arrangements, lessening the possibility that funders and lawyers employ problematic control provisions in the first place.
[73] Exhibit F, Therium Dominion Funding Agreement at §9.3.2.
[74] *Id*. at §9.5.
[75] Exhibit C, Burford/Sysco Agreement at §§5.3(d-f).

are identical or inferior to the terms agreed to with previous counsel.[76] Along similar lines, the ILP Funding Agreement restricts the plaintiff from terminating or replacing counsel without the funder's prior written consent;[77] the Legalist Funding Agreement provides that "[t]he Plaintiff … will not engage a new attorney or law firm … to advise and/or represent the Plaintiff in connection with the Claim(s)" without 30 days prior notice and "without giving good faith consideration to the Funder's response;"[78] the Longford Capital Agreement defines replacing counsel as a "Material Adverse Event" that requires plaintiff to obtain Longford's prior written consent and mandates that any replacement counsel will be subject to "the same terms and provisions" as the letter attached to the contract;[79] and the Litchfield Funding Agreement provides:

> If New Counsel is replacing Current Counsel, Forward Seller [plaintiff] shall not engage such New Counsel unless and until such New Counsel and Forward Seller execute and deliver to Forward Purchaser [funder] an instruction letter in substantially the same form as the Current Counsel Instruction Letter or such other form approved by Forward Purchaser in writing in its sole discretion.[80]

Even when new counsel is allowed, TPLF contracts can enable funders to obstruct or delay onboarding of replacement counsel.

A non-party funder's ability to prevent, or dictate the terms of, a plaintiff's choice of new counsel is important for courts and parties to know. Courts managing litigation should be aware of counsel primarily serving the interests of a non-party rather than the named plaintiff in the case. When counsel takes positions seemingly contrary to client interests, courts need the information and tools to evaluate whether this reflects legitimate strategic judgment or funder relationships that the plaintiff cannot overcome. Courts should know that, if a funded plaintiff discovers conflicts of interest or becomes dissatisfied with counsel performance, the funder's contractual control over replacement counsel can prevent the plaintiff from obtaining truly independent representation. Opposing parties also need this information to assess whether they are dealing and negotiating with counsel loyal to the plaintiff, or whether counsel recommendations may be influenced by separate economic relationships with funders that create incentives including to prolong litigation or reject otherwise reasonable settlements.

C. The Sharing of Contingent Fees between Funders and Counsel Can Influence Judicial Management, Affect the Other Parties, and Aggravate Conflicts

Knowing how lawyers and non-parties propose to split contingency fees can be critical for courts and parties trying to avoid making case management and resolution decisions based on incorrect assumptions. Splitting contingency fees can create incentives and conflicts of interest that distort attorney decision-making. The Therium Dominion Funding Agreement's structure, where the client pays the contingent fee to the funder who then "shares" recoveries with counsel through a

[76] *Id*.
[77] Exhibit A, ILP Funding Agreement at §6.2.4.
[78] Exhibit G, Legalist Funding Agreement at §6.7.
[79] Exhibit H, Longford Capital Agreement at §8.3 and Exhibit D thereto.
[80] Exhibit I, Litchfield Funding Agreement at §5.2.

separate undisclosed agreement,[81] fundamentally alters counsel's economic incentives in ways that may diverge from the court's and other parties' expectations, as well as the funded plaintiff's interests. The Therium Chevron Funding Agreement requires the lawyers to "recover the maximum possible Contingency Fee," which is the lawyers' share of the proceeds, not the recovery to the class.[82] Having counsel's compensation depend on funder satisfaction rather than a preset percentage of plaintiff's recovery creates—and is intended to create—a strong financial incentive for counsel to prioritize funder preferences over client objectives.

The ramifications multiply when funders invest in multiple cases involving the same law firm and "cross-collateralize" those investments so profits from one case are used to cover expenses from another. Such payment schemes can aggravate potential conflicts of interest in numerous ways, including the calculation and timing of counsel's contingent fee. Some TPLF agreements diverge from the usual calculation of a contingent fee as a percentage of the overall recovery, with the result that funded counsel could receive a larger fee than normally permitted by ethical rules.[83] When funders cross-collateralize investments across multiple cases involving the same firm, counsel's incentives on any individual case will be skewed by the performance of other funded matters, creating litigation and settlement dynamics that courts and parties cannot understand or address without disclosure of the TPLF contract.

Any facet of litigation and resolution could be affected by TPLF compensation schemes. Funded counsel recommendations will inevitably be influenced towards economic arrangements that make certain outcomes more profitable than others, potentially affecting the timing and terms of settlement offers across multiple otherwise unrelated cases. Courts managing litigation, ordering settlement conferences, and evaluating discovery disputes need to have this information available since counsel's actions can reflect complex economic calculations rather than the case-specific client advocacy that courts ordinarily expect. Opposing parties also need this information since it alters litigation and settlement dynamics.

IV. THE "PROTECTIONS" AGAINST FUNDERS' CONTROL ARE OFTEN ILLUSORY AND CAN MISLEAD JUDGES AND PARTIES

A. Boilerplate Disavowals of Funder Control May Be Contradicted by Specific Contractual Provisions and Are Likely Unenforceable

While TPLF contracts may contain blanket representations that the funder is a passive investor and does not control the litigation or settlement, such provisions are frequently contradicted by other specific powers set forth in the agreement.[84] For example, the Therium Chevron Funding Agreement—the one that permits the lawyers to do only three things without funder consent[85]—states that "[n]othing in this Agreement entitles Therium to control the conduct of the Claim

[81] Exhibit F, Therium Dominion Funding Agreement at Recital C.
[82] Exhibit B, Therium Chevron Funding Agreement at §3.1.3.
[83] The TPLF compensation in *Fresh Acquisitions* was "three multiplied by whatever the litigation funder funds . . ., plus a 12% return." *Fresh Acquisitions*, 2025 WL 2231870, at *5.
[84] A basic rule of contract construction is that "general words do not derogate from special." *Generalia specialibus non derogant,* BLACK'S LAW DICTIONARY (5th ed. 1979).
[85] *See supra* notes 22-23.

and/or the Proceedings." In other words, the disavowal of control in TPLF contracts is likely illusory.

Plaintiffs who seek funding to support their lawsuits are highly unlikely to have the resources to initiate collateral litigation to enforce their contractual rights. And even if the funded party can afford to litigate against the funder, they may not succeed—as happened in the dispute between Burford and Sysco, where an arbitral tribunal restrained Sysco from settling claims without Burford's consent despite multiple affirmations in the funding agreement that Burford did not control resolution.[86] The Burford/Sysco Agreement states that "the Capital Providers are each passive providers of external capital and have not become owners of, partners in, or parties to the claims or any part thereof or acquired any rights as to their control or resolution … the Counterparty remains in full control of the assertion and resolution of the claims." The contract also says that "the Counterparty shall have day-to-day and overall control over the conduct of, and responsibility for, the Claims and neither the Capital Providers nor their respective Affiliates shall exercise, or seek to exercise, any such control over the Claims."[87] In addition, that contract says the funder "shall not be entitled to control or direct the conduct of the Claims, or to require settlement thereof."[88] None of those hortatory phrases prevented Burford from taking legal action to prevent the parties' settlement, nor from undertaking to wrest control of the litigation for itself, in part based on the provisions in the TPLF contract that obligated the funded plaintiff to pursue and monetize the funded claims[89] and empowered the funder to step into the shoes of the plaintiff to control litigation and settlement in the event of a "breach" by the plaintiff.[90] Thus, in practice, the boilerplate disclaimers of control in TPLF contracts are not worth the paper they are printed on.

Yet funders continue to assert that they do not exercise control over the cases they fund. Andrew Cohen of Burford told an audience of judges at the Sixteenth Annual Judicial Symposium on Civil Justice Issues at the George Mason University Antonin Scalia Law School:

> And again, I don't know how to say this any more clearly, we don't control settlement. If we do, I know that Burford Capital as a funder is not subject to ethical rules because we're not a lawyer, but I am a lawyer, and I do take ethical rules seriously, and I would find it really loathsome to misrepresent that to a court.[91]

At the time of this statement, Burford was actively engaged in its high-profile legal campaign to enforce its contractual rights to prevent its client, Sysco, from consummating a settlement

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[86] *See* Behrens, Mark, *Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product that Is Transforming the Civil Justice System*, 34 Cornell J.L. & Pub. Pol'y 1, 8-9 (2024), https://community.lawschool.cornell.edu/wp-content/uploads/2025/03/Behens-final.pdf.
[87] Exhibit C, Burford/Sysco Agreement at §5.2(c).
[88] *Id*. at §5.2(b).
[89] *Id*. at §§5.3(b).
[90] *Id*. at 13.1(b).
[91] GEORGE MASON ANTONIN SCALIA LAW SCHOOL LAW & ECONOMICS CENTER, Judicial Education Program, Sixteenth Annual Judicial Symposium on Civil Justice Issues, *Panel 6: The Evolution of Third-Party Litigation Funding* at 1:08:00-1:08:22 (Oct. 10, 2022), https://masonlec.org/events/sixteenth-annual-judicial-symposium-on-civil-justice-issues/.

agreement in a lawsuit Burford funded.[92] Even today, despite the widespread knowledge of its legal maneuvering in the Sysco litigation, Burford still maintains that "Burford is a passive financier and does not control the legal assets in which we invest, except in extraordinary circumstances agreed to in advance by the client."[93]

Similar to the Burford/Sysco Agreement, the language in the Therium Funding Agreement purports to say "nothing in this Agreement shall permit [the funder] to override any advice" given by counsel to the funded plaintiff,[94] although this disavowal is pointedly "subject to [the funder's] rights to termination"—in other words, the funder always holds over the funded plaintiff's head the looming threat that it can walk away any time it chooses in the event of a dispute. Notably, this provision relates to advice of counsel and does not limit the funder's right to "override" any decision taken by the funded party. Therium nonetheless proclaims that funders "remain passive providers of capital."[95] The recent transfer of Therium's TPLF business also creates uncertainty about what practices new management will undertake.[96]

The current absence of a rule requiring disclosure of TPLF contracts increases the likelihood that federal judges and litigants will be deceived by boilerplate disavowals of funder control. Courts that take such disavowals at face value, or that substitute *ex parte* and *in camera* practices for disclosure of TPLF contracts, run a high risk of misunderstanding the funders' control mechanisms.

B. The Reasonableness Standard Is Ineffectual in Control Disputes

The "reasonableness" standard used in many TPLF contracts is also illusory as a purported limit on a funder's control. For example, the Amendment to Burford/Sysco Agreement provides that the funded plaintiff "shall not accept a settlement offer without the Capital Providers' prior written consent, which shall not be unreasonably withheld...."[97] Yet this provision did not prevent Burford from withholding its consent to a settlement agreement and taking legal action against its client to prevent the settlement,[98] action that a federal judge concluded "threaten[ed] the public policy favoring the settlement of lawsuits."[99] The vagueness of "unreasonably" as a standard for breach of contract makes it impractical to enforce, adding to the unlikelihood that funded plaintiffs would spend limited resources to enforce their interpretation of that word. Moreover, settlement offers typically require a prompt response and may be withdrawn if circumstances change. Thus, disagreements over "reasonableness," particularly if requiring arbitration or litigation, could give funders a "pocket veto" over settlements by delaying

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[92] *See In re Pork Antitrust Litigation*, 2024 WL 511890, at *1 (Mag. D. Minn. Feb. 9, 2024) (describing litigation), *aff'd*, 2024 WL 2819438 (D. Minn. June 3, 2024).
[93] Burford, https://www.burfordcapital.com/introduction-to-legal-finance/#faq (last visited Aug. 6, 2025).
[94] Exhibit F, Therium Dominion Funding Agreement at §9.7.
[95] Therium, https://www.therium.com/blog/litigation-funding-a-useful-tool-for-forward-looking-gcs-and-in-house-lawyers/ (last visited Aug. 6, 2025).
[96] *See Therium Retreats, Fortress Takes Control—Leaving Claimants and Investors Exposed to Financial Realignment* (June 17, 2025) https://knowsulu.ph/the-untold-sulu-story/inside-the-fortress-capital-control-and-the-quiet-collapse-of-therium ("Although Therium remains administratively party to existing contracts, its diminished role leaves claimants and law firms vulnerable to delays, contract revisions, or outright case abandonment").
[97] Exhibit D, Amendment to Burford/Sysco Agreement at §7(b)(v).
[98] Behrens, *supra* note 69, at 8-9.
[99] *Pork Antitrust*, 2024 WL 2819438, at *4.

responses to settlement offers until the window of opportunity has closed. Because the "reasonableness" standard may not be a meaningful check on a funder's ability to control litigation and resolution, it can be understood only in the context of the control mechanisms in the contract.

C. Plaintiffs Are Often Forbidden from Disclosing their Own Funding Arrangements

TPLF contracts often prohibit funded plaintiffs from disclosing the existence of their TPLF contract or its terms—even to the court—absent a court order. For example, the Burford/Sysco Agreement restricts the disclosure of "Confidential Information," which is defined to include "the nature, terms and existence of this Agreement," and "the existence of any relationship between the Counterparty and a Capital Provider or any of its Affiliates or Representatives."[100] In addition, the contract "obligate[s]" "each party … to keep confidential the existence and content of any arbitral proceedings initiated hereunder and any rulings or award"[101] (with limited exceptions). These provisions—gag rules that prevent plaintiffs from speaking up when they no longer control their cases—mean that courts and parties will not ordinarily learn of the existence of TPLF contracts, understand their impact on the case, or know when disputes arise about those contracts.[102] Passively waiting for a plaintiff to give notice about a TPLF contract will not work. A disclosure rule is essential to protect courts, parties, and the funded plaintiff themselves from issues caused by TPLF contract provisions.

V. TPLF CONTRACTS CAN UNDERMINE PROTECTIVE ORDERS BY GIVING NON-PARTY FUNDERS ACCESS TO CONFIDENTIAL DOCUMENTS

Some TPLF contracts give funders access to all documents relevant to the claims, including confidential and privileged documents. Such provisions are likely in conflict with protective orders and party agreements. For example, the Longford Capital Agreement gives Longford "Regular and Timely Disclosure of Important Documents" including "Deposition transcripts and discovery materials," "Key documents related to any material event or change in the prosecution of the Claims," and "Any documents related to possible settlement or other resolution of the Claims."[103] Similarly, the ILP Funding Agreement requires the plaintiff to instruct counsel to give the funder "a copy of all documents obtained from, or provided to, any Defendant in the Proceedings,"[104] and requires the plaintiff to provide "all information, documents and assistance" that the funder reasonably requests.[105] The LMFS Funding Agreement requires the plaintiff "to execute a separate power of attorney which shall entitle [funder] to request and view official and/or court documents."[106] The Therium Dominion Funding Agreement requires the plaintiff to

[100] Exhibit C, Burford/Sysco Agreement at §8.2 and Exhibit A thereto.
[101] *Id*. at §29(g).
[102] For one example, *see Fresh Acquisitions*, 2025 WL 2231870, at *1 ("The court learned somewhat inadvertently—in response to its inquiries—that the Liquidating Trustee entered into a litigation funding agreement. . . . According to certain defendants . . ., this litigation funding agreement was hampering the prospect of settlement. . . . This court was surprised to hear about a litigation funding agreement.").
[103] Exhibit H, Longford Capital Agreement at Exhibit A.
[104] Exhibit A, ILP Funding Agreement at §6.3.5.
[105] *Id*. at §4.2.
[106] Exhibit E, LMFS Funding Agreement at §2(b)(vii).

instruct counsel to give the funder "any documents or information relating to the Claim and Proceedings."[107]

In *Valjakka v. Netflix*,[108] the court found that a lawyer violated its protective order by sharing highly confidential information with a TPLF company, including expert reports, information about source code, and financial data.[109] The lawyer acknowledged that the funder "had full access to [the defendant's] documents produced in discovery," but argued that the disclosures were within the scope of the protective order for reasons including that the funder met the order's definition of "a Professional Vendor."[110] The court found the lawyer's arguments "unavailing," that the defendant's "interests in preventing [the funder's] improper access to its confidential materials are incontestable," and that sanctions were merited.[111]

Courts and parties need to know when TPLF agreements grant non-party funders access to confidential and privileged documents because, as *Valjakka* demonstrates, such provisions undermine the effectiveness of protective orders and party stipulations on information sharing. Courts issuing protective orders, and parties stipulating to them or drafting their terms and scope, need to know when funder access rights exist, and to whom such obligations are owed, to ensure that any proposed stipulation or order is adequate to protect confidential information.

Moreover, parties producing sensitive documents in discovery should have the right to know that the requesting party has promised to share their confidential materials with a non-party litigation funder, especially since funders may have strategic motivations unrelated to the particular lawsuit, such as obtaining information related to other cases or gaining access to competitors' proprietary data and intellectual property. Only disclosure of the TPLF contract can allow producing parties to seek appropriate language in protective orders and to make objections to discovery requests when funder access would create unacceptable risks. Only disclosure of TPLF contracts will allow courts to consider such language and objections based on information rather than speculation.

Additionally, courts enforcing protective orders need to understand these arrangements because confidentiality violations—and any ensuing sanctions—may be the fault of non-party funders, not the nominal parties. Sanctions against non-parties for improper conduct require different enforcement mechanisms and potentially broader relief. An FRCP disclosure rule for TPLF contracts is necessary to provide courts and parties the information needed for fashioning and enforcing appropriate protective orders.

VI. TPLF CONTRACTS CAN INTERFERE WITH COURT RULINGS ABOUT COSTS AND SANCTIONS

Some TPLF contracts require the plaintiff to pay any court-ordered costs or sanctions—even if the plaintiff did not participate and could not prevent the funder and counsel from engaging in the sanctionable conduct. For example, the Therium Dominion Funding Agreement states that

[107] Exhibit F, Therium Dominion Funding Agreement at §9.2.3.
[108] 2025 WL 2263684 (N.D. Cal. July 10, 2025).
[109] *Id*. at *2-3.
[110] *Id*. at 3.
[111] *Id*. at 4.

the funder is not liable for defense costs, fines, or penalties,[112] and requires the plaintiff to indemnify the funder against any amounts that either the client or the funder is ordered to pay to an opponent or becomes liable for by settling or discontinuing the suit.[113] Even more expansively, the Burford/Sysco Agreement provides that the funder shall not have "any obligation to fund any fees, expenses, or other sums in relation to any Claim" including "sums awarded against, or penalties incurred by, the Counterparty, including any costs orders, awards, interest, damages, expenses, or penalties against the Counterparty, nor to fund any legal fees or any other costs whatsoever incurred as a result of defending any counterclaim brought against the Counterparty in relation to any Claim or defending any enforcement or other proceedings against the Counterparty."[114] The Longford Capital Agreement also provides that the funder is not responsible for costs for fees associated with any adverse claims.[115]

These provisions can contravene court orders and undermine their purpose—while at the same time depriving plaintiffs of independent legal representation. By shielding funders who have control or material influence over litigation and settlement decisions from any potential costs and sanctions arising from their decisions, these arrangements can render a court order ineffective, futile, or even manifestly unjust. Such contractual provisions, when unknown to the court and parties, not only undermine the deterrent effect of cost-shifting rules and sanctions but also may encourage irresponsible litigation conduct since funders may benefit from, and cannot be held financially accountable for, discovery violations, frivolous motions, or other sanctionable behavior they may direct.

VII. AN FRCP DISCLOSURE RULE IS SUPERIOR TO *EX PARTE* COMMUNICATIONS ABOUT TPLF CONTRACTS

An FRCP rule requiring disclosure of TPLF contracts is superior to reliance on *ex parte* discussions or written filings about what are often lengthy and complex agreements with contradictory and even deliberately "opaque"[116] provisions. The only way to understand a TPLF contract is to read it, and the adversarial process is the best method for illuminating issues. Due process requires that significant matters be dealt with transparently with all parties having a meaningful opportunity to consider the issues and be heard. A court seeking to comprehend a TPLF contract through a secret, one-sided conversation with counsel for the funded party is highly unlikely to come away with an accurate understanding of how the contract can actually affect the process and substance of the case before it. The lawyer for the funded plaintiff has obvious incentives to emphasize boilerplate language disavowing control while minimizing the significance of the specific control mechanisms, especially where the lawyer has an ongoing relationship with the funder in another matter or even a whole "portfolio" of lawsuits, which is common today. Courts that conclude "there's nothing to see here" after an *ex parte* communication are taking a significant risk to their crediblity if a dispute later develops about the contract or the behavior of the funder or the lawyers, or if something untoward or unethical occurs. The Code of Judicial Conduct's strong admonition against *ex parte* communications reflects that they are inappropriate for substantive legal determinations such as contract

[112] Exhibit F, Therium Dominion Funding Agreement at §5.1.3.
[113] *Id*. at §8.2.
[114] Exhibit C, Burford/Sysco Agreement at §11(a).
[115] Exhibit Longford Capital Agreement at §3.3.
[116] *Fresh Acquisitions*, 2025 WL 2231870, at *9.

interpretation. A disclosure rule would relieve courts from the perceived need, risks, inadequacy, and burdens of *ex parte* communications about TPLF contracts by lifting the veil and, if needed, allowing the parties to advocate their interests related to those contracts in the open in keeping with the traditions of our adversarial system.

Conclusion

The Advisory Committee should promulgate a rule requiring disclosure of TPLF contracts similar to the insurance disclosure requirement in Rule 26(a)(1)(A)(iv). As with insurance contracts, TPLF disclosure is necessary not because it is "relevant" to any particular "claim or defense," but rather because TPLF contracts can affect the conduct of litigation as a whole. A TPLF disclosure rule will provide judges with an essential tool for effective case management: knowledge of how and when a non-party controls litigation and settlement decisions. A uniform rule would eliminate the burden of motion practice where one side seeks, and another party resists, disclosure of the contract, and it would ensure that judges need not examine TPLF contracts unless parties raise specific issues through normal briefing processes. Without Advisory Committee action, judges will continue either to be in the dark about potential problems created by TPLF contracts or will be forced to spend judicial resources (including in the inadequate practice of *ex parte* communications) deciphering complex funding agreements case by case without clear procedural guidance about when disclosure is required. The transparency provided by a rule requiring disclosure of TPLF contracts would lift a veil rather than impose a burden, creating a framework that removes uncertainty and unnecessary process from courts while adding the knowledge necessary for effective case management and successful settlement negotiations.

TAB 13

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Andrew Bradt**

RE: **Rule 23 Proposals**

DATE: **October 1, 2025**

Recently, the Advisory Committee has received several suggestions, of varying complexity, regarding Rule 23. Beyond the particulars of the suggestions, one question for discussion is whether, in light of other priorities, it makes sense to take on any or all of these projects, and perhaps others that the Advisory Committee has not yet been alerted to. Class actions, of course, are a subject of great importance, complexity, and controversy, so reconsidering various aspects of Rule 23, as it has in the past, will require a significant allocation of time, resources, and effort, including perhaps the creation of a new subcommittee. The specific issues that have been brought to our attention are laid out briefly below. One question is whether one or more of the issues could, or should, be handled discretely, or whether tackling them will require a broader examination of Rule 23.

By way of background, the era of the modern class action began with the extensive 1966 amendments to Rule 23, particularly the addition of Rule 23(b)(3), which permits class actions based on predominant questions of law or fact when a class action is superior to other methods of resolving the controversy. Perhaps needless to say, since its adoption, modern Rule 23 has been highly controversial and attracted significant attention. For the first three decades after 1966, the Advisory Committee abstained from proposing amendments to Rule 23. Then, in 1991, it embarked on a five-year period of study that culminated in a preliminary draft of proposed changes to Rule 23(b), along with the addition of Rule 23(f) on interlocutory review of class-certification decisions. The Rule 23(b)(3) proposals generated extensive commentary, and eventually all of those proposals were withdrawn, though Rule 23(f) went forward and was added in 1998. That amendment process produced four full binders of material, collected as the Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23.[1] For review of this period, *see generally* Richard L. Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 917-20 (2018).

After the 1996 experience, the Advisory Committee's focus shifted from the standards for certification under Rule 23(a) and (b) to the procedure for handling class actions found in the remainder of the rule. Following considerable work, in 2003, Rule 23 was amended in several respects, including revisions of the timing of certification decisions under Rule 23(c) and Rule 23(e), adding Rule 23(g) on appointment of class counsel and Rule 23(h) on fee awards to class counsel. Rule 23 was again amended to add several provisions focused on settlement approval procedures in 2018.

[1] Collected at https://www.uscourts.gov/forms-rules/records-rules-committees/fjc-studies-and-related-publications.

As one Advisory Committee member noted the last time Rule 23 was discussed at a meeting, in March 2023, Rule 23 is a "perennial." As a rule of significant salience for attorneys, judges, and academics, there are innumerable potential reform proposals. In addition, there is currently renewed attention being paid by scholars to Rule 23(b)(2) class actions for injunctive relief after Justice Kavanaugh suggested such an approach as an alternative to the nationwide injunctions the Supreme Court rejected in *Trump v. CASA, Inc.*, 606 U.S. 831, 875 (2025) (Kavanaugh, J., concurring). *See, e.g.*, David L. Marcus, *The Class Action After* Trump v. CASA, 73 U.C.L.A. L. REV. (forthcoming 2025).

Moreover, there is often attention from the Congress and the Supreme Court regarding not only the text of Rule 23, but also the constitutional due process requirements for class litigation. As detailed below, there are currently three specific Rule 23 proposals (one from the public, and two referred by judges) on our agenda. Taking on these proposals may prove to be a magnet for additional suggestions, presenting a potential challenge in defining the boundaries of the project, or projects. Ultimately, the question of whether the Advisory Committee believes its resources should be devoted to Rule 23 in the coming years may be as important a question as the merits of any proposed amendments. Reactions from Committee members would be most useful and welcome.

Class Representative Incentive/Service Awards

One issue that has been carried forward on the Advisory Committee's agenda since October 2022 is whether a court may approve a class settlement that provides that the class representative receives an "incentive" or "service" award, typically a few thousand dollars, for her efforts representing the class. Until recently, such awards have not been terribly controversial, and courts have regularly permitted them as a payment from the common fund created by the litigation. *See* William B. Rubenstein, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17.4 (6th ed. 2025) ("An incentive award is paid out of the class's common fund and the class representative, as a member of the class, is, by definition, entitled to a portion of the common fund. So framed, the legal entitlement question is simple and straightforward.").

But, in 2020, a panel of the Eleventh Circuit held, 2-1, in *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), *cert. denied*, 143 S. Ct. 1746 (2023), that such awards were prohibited under two 19th century Supreme Court decisions. The Eleventh Circuit denied rehearing en banc by a 6-5 vote, with several dissents urging efforts to overrule the panel decision by statute or rule. *Johnson v. NPAS Solutions, LLC*, 43 F.4th 1138 (11th Cir. 2022). Judge Proctor first brought this issue to the Advisory Committee's attention at its October 2022 meeting. As reflected in the minutes of that meeting, members were divided as to whether to take the issue on, and it has remained on the agenda since then.

Prior to the Eleventh Circuit's decision in *Johnson*, the circuits unanimously permitted such awards to class representatives. And, in the five years since *Johnson*, no circuit has followed suit

in prohibiting incentive awards. The First,[2] Second,[3] Seventh,[4] and Ninth[5] Circuits have each opted, in published opinions, to continue allowing such service awards. The opinion for the First Circuit in *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022), by Judge Kayatta, a recent Standing Committee member, is perhaps the most in depth.

At the October 2022 Advisory Committee meeting, there was some discussion about whether a rulemaking effort would be appropriate to abrogate an outlier decision, as there may be many such opinions that implicate the Federal Rules. On the other hand, the Advisory Committee did recently undertake such an effort in response to the Ninth Circuit's decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), which involved the proper scope of a subpoena for remote testimony. Unlike *Johnson*, however, *Kirkland* explicitly involved the interpretation of language in Rule 45. In addition, *Kirkland* was the first appellate decision on amended Rule 45, so prompt clarification of that rule may have been particularly beneficial. *Johnson* does not deal with the language of an existing rule; it deals with a practice long allowed as a matter of procedural common law or a judge's inherent or equitable powers. (This may also raise Enabling Act concerns.) That said, were the Advisory Committee interested in taking up several Rule 23 issues at once, the question of whether to amend the rules to explicitly allow or prohibit service awards might be addressed as part of that larger package. This issue could also be addressed as a stand-alone project.

Rule 23(b)(3) Superiority Requirement

The Advisory Committee has received two submissions from Lawyers for Civil Justice (LCJ) (22-CV-L; 23-CV-J) and one from the DRI Center for Law and Public Policy (23-CV-Y) suggesting amendments to the requirement in Rule 23(b)(3) that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Currently, the rule states:

> The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

This proposal was added to the agenda as an information item prior to the March 2023 Advisory Committee meeting, where it was briefly discussed. At that meeting, the committee decided to keep the matter on our agenda, but it has not returned to it since.

[2] *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022).
[3] *Hyland v. Navient Corp.*, 48 F.4th 110, 124 (2d Cir. 2022).
[4] *Scott v. Dart*, 99 F.4th 1076, 1088 (7th Cir. 2024), *reh'g denied*, 108 F.4th 931 (7th Cir. July 23, 2024).
[5] *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786-87 (9th Cir. 2022).

In brief, the proposals seek to expand the comparison required by the superiority requirement beyond "other available methods for ... adjudicating the controversy" to include different, non-litigation methods of resolution, such as refunds, recalls, customer-care programs, and other private approaches to claim resolution. In the proponents' view, the text of the rule limits judges to considering only whether the class action is superior to other forms of litigation, a view with some support in the 1966 committee note, which directs the court to consider class-action alternatives like test cases, MDL, and "allowing the claims to be litigated separately in forums to which they would ordinarily be brought." The proponents maintain that this limitation on considering other alternatives allows too many class actions to go forward that could be resolved privately, resulting in lesser remedies to class members due to costs and attorneys' fees, greater burdens on courts, and reluctance by potential defendants to resolve class members' claims through private initiatives.

LCJ therefore proposes that Rule 23(b)(3) be amended to read:

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

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(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy or otherwise providing redress or remedy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions, including the potential for higher value remedies through individual litigation or arbitration and the potential risk to putative class members of waiver of claims through class proceedings;

(B) the extent and nature of any (i) litigation concerning the controversy already begun by or against class members, (ii) government action, or (iii) remedies otherwise available to putative class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; ~~and~~

(D) the likely difficulties in managing a class action~~.~~;

(E) the relative ease or burden on claimants, including timeliness, of obtaining redress or remedy pursuant to the other available methods; and

(F) the efficiency or inefficiency of the other available methods.

The longtime poster child for this issue, detailed in the proposal, is Judge Easterbrook's opinion in *In the Matter of Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7th Cir. 2011). Aqua Dots were small, brightly colored beads sold as a bath toy for children. Unfortunately, when ingested, these beads metabolized into an acid that could cause nausea, dizziness, unconsciousness, and death. As Judge Easterbrook noted for the Seventh Circuit, "it was inevitable given the age of the audience and the beads' resemblance to candy . . . that some would be eaten." *Id.* at 750. When it learned of the problem, the manufacturer recalled all of the products and honored requests for refunds. More than one million Aqua Dots kits had been sold, and about 600,000 of them were returned, though extrapolating from this example, where return of the product was additionally prompted by an evident risk of harm to the consumer's child, may be risky. In some litigated cases, recalls and refunds are nearly universally successful, as in the *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, while in others, say, those involving mislabeled food products with a very small refund, are not for various reasons.

But some purchasers did not ask for refunds and instead filed a class action against the manufacturer seeking statutory and punitive damages under state consumer-protection statutes. (The class members did not include those who had suffered injuries from ingesting the beads.) The district court, relying on the superiority requirement, denied class certification, concluding that the well-publicized refund program adopted by the defendant meant that "the substantial costs of the legal process make a suit inferior to a recall as a means to set things right." *Id.* at 751.

On appeal, Judge Easterbrook rejected the lower court's reasoning on the ground that Rule 23(b)(3) does not allow a court to deny class certification on the ground that a non-adjudication alternative would be superior: "[Rule 23(b)(3)] poses the question whether a single suit would handle the dispute better than multiple suits. A recall campaign is not a form of 'adjudication' under the committee note." *Id.* at 752.

Although Judge Easterbrook concluded that the district court's superiority analysis was contrary to the rule's text, the court affirmed the district court's denial of certification on different grounds: the manageability challenges of dealing with different states' laws and individual notice, and a failure of adequacy of representation under Rule 23(b)(4) because plaintiffs sought "relief that duplicates a remedy that most buyers have already received, and that remains available to all members of the putative class." *Id.* at 752-53. In sum, Judge Easterbrook wrote: "The principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class's lawyers enough to make them go away; effectual relief for consumers is unlikely." *Id.* at 753.

While Judge Easterbrook's analysis provides a potential workaround to the proponents' specific concern about the rule's text, they claim that it is not available in all cases and that courts do not uniformly follow his reasoning. Research will be necessary to determine the state of play through the circuit and district courts, but proponents contend that such workarounds should not be necessary.[6] It would be better, in their view, to allow the district judge to consider defendant-initiated remedies when considering superiority. Such a change, they predict, would lead to

[6] There is some academic literature on this topic, and a fair bit of case law. *See, e.g.*, D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT L. 91 (2012); Robert G. Bone, *Replacing Class Actions with Private ADR: A Comment on 'Settlement, ADR, and Class Action Superiority'*, 5 J. TORT L. 127 (2012).

potential class-action defendants to initiate such remedial programs on their own with more alacrity.

It may be that the time has come for the Committee to reconsider the certification criteria in Rule 23 for the first time in more than three decades. But while *Aqua Dots* seems like an easy case that was resolved correctly, more complicated circumstances may raise difficulties. The amendment proposal would ask a judge to compare what the defendant offered with what the class action might produce. Since most class actions result in settlements, that might seem to ask the judge to engage in the sort of careful analysis of the proposed alternative non-litigation remedy that would be needed under Rule 23(e) to approve a settlement offering the same thing. Whether a judge in many cases will be able to perform this type of analysis at the time of class certification is debatable. Typically, at the time of settlement, judges will have significantly more information about the case and the relative strengths and weaknesses of the parties' claims and defenses. Requiring a court to determine at the time of certification whether the defendant's unilaterally-devised alternative will be "superior" to the eventual result of the litigation may be asking too much. Similar challenges arise when the court is asked to consider the relative superiority of a class action to government action, or arbitration, or any number of alternatives.

This would be a significant project, and potentially a significant change—much greater and less discrete than a narrow focus on an issue like service awards. It is also conceptually linked to the following issue that has been brought to the Committee's attention: whether Rule 23 ought to require a district court to approve a settlement between the defendant and the class representative prior to certification.

Pre-Certification Settlement Approval

The FJC called our attention to this issue in connection with its ongoing effort to revise the Manual for Complex Litigation and the Seventh Circuit's recent decision in *Alcarez v. Akorn, Inc.*, 99 F.4th 368 (7th Cir. 2024). Currently, Rule 23(e) requires approval of settlements of "claims, issues, or defenses of a *certified class*—or a class *proposed to be certified for purposes of settlement*." (Emphasis added.) The rule does not require approval of a settlement between the defendant and the class representative prior to certification. Some judges and scholars have raised concerns about the ability of the defendant to quash the class action. For instance, in *Alcarez*, Judge Easterbrook highlighted this issue and opined that "[p]erhaps the rules committees of the Judicial Conference should take a look at the question whether judicial approval should be required to settle or dismiss cases brough as class actions, yet not so certified." 99 F.4th at 376.

Alcarez involved a putative securities class action brought by various investors to block a merger on the ground that the proxy statement was insufficient. After several weeks, the defendant supplemented the proxy statement to add additional disclosures, and the plaintiffs subsequently moved to voluntarily dismiss their suits, asserting that the additional disclosures mooted their complaints. The plaintiffs disclosed to the court that any claim to attorneys' fees had been resolved by a $322,500 "mootness fee" paid by the defendants to the plaintiffs' lawyers. One of the defendant's shareholders, Ted Frank (a well-known critic of various aspects of class actions) learned about the settlement and sought to intervene, seeking disgorgement of the fees and an injunction against the plaintiffs' lawyers prohibiting them from filing similar "strike suits," whose

sole goal is allegedly to "yield[] fees for class counsel and nothing for the class." *Id.* at 372. The lower court denied the motion to intervene on the ground that the case was moot. Although the Seventh Circuit noted (as quoted above) the lack of any authority of the district court to review the settlement before class certification, it reversed the lower court's denial of the motion to intervene on the ground that a provision of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(c)(1), requires the court to include in the record a finding that each party's filing complied with Rule 11(b). As a class member, Frank should have been allowed to intervene to seek that the court comply with this statutory duty.

Alcarez involves a specific type of securities class action. But case law reflects broader concerns about collusive settlements, forum shopping, and potential prejudice to putative class members. The question, therefore, is whether to consider amending the rule to allow or require district judges to review pre-certification settlements between defendants and putative class representatives before the class is certified. Moreover, the concern has been raised that the ability to voluntarily dismiss putative class actions permits forum shopping by allowing multiple overlapping suits followed by dismissals in the cases where the judge seems skeptical.

At this point, some history is appropriate. Before the 2003 amendments to Rule 23(e), it was said that "lower courts have overwhelmingly held that even before certification, a 'class' exists for purposes of Rule 23(e) and therefore any settlement, even of individual claims, requires court approval." Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 177 (1990). This meant that the parties would sometimes have to go through a full-dress certification hearing, often with notice to the class, before they could settle the individual plaintiff's claims, on the ground that some judicial review seemed, to many courts, important protection against abuse of the class action device. For an example of a court grappling with these issues, *see Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978); *see also* 81 F.R.D. 637 (W.D.N.C. 1979) (opinion on remand). Some courts took the view that the approval of a pre-certification settlement required some review, but not necessarily notice to the class or the same level of scrutiny demanded by settlements of certified classes that would be preclusive against the class members. *See Diaz v. Tr. Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) (requiring inquiry by the court into whether class members will be prejudiced by the dismissal and whether the settlement was "made by the class representative or counsel in order to further their own interests") (citing *Shelton*, 582 F.2d at 1315).

Initially, the published proposed 2003 amendments to Rule 23 did not suggest changing this state of affairs, but at the May 6-7, 2002 meeting of the Advisory Committee, this changed. As the minutes to that meeting report, the public-comment period revealed several objections to pre-certification settlement approval, largely linked to concerns related to the notice to the class that would seemingly be required for the approval process. Notice is an expensive and time-consuming undertaking, and few class members would even be aware of the case at all at the precertification stage, much less prejudiced by a non-binding dismissal. Since no class members face preclusive effects from an individual settlement with only the representative, the costs of identifying and notifying class members were thought disproportionate to the benefits. Moreover, some commenters took the view that requiring settlement approval of a putative class action was inconsistent with the liberal right to amend a complaint to remove claims when developments in the litigation warrant it. It would not only be costly but would potentially intrude on adversary

preparation of the case to require justification and approval of such amendments. Other concerns involved the challenge for a district judge to determine whether a settlement is fair with very little information about the case, far less than she would have after deciding class certification, even in the case of a settlement class since in that posture there will be notice and potentially objections.

As a result, according to the May 2002 minutes, the Advisory Committee concluded "that it would be better to delete any requirement that the court approve pre-certification dismissal," and it amended Rule 23(e)(1) "to apply the court-approval requirement only to dismissal of the claims, issues, or defenses of a certified class." As the 2003 committee note confirms, "Rule 23(e)(1) is revised to delete the requirement that the parties must win court approval for a precertification dismissal or settlement." As the then-Chair of the Advisory Committee, Judge David F. Levi, noted in his report to the Judicial Conference, "reliance by absent class members seldom occurs, if indeed it ever occurs" and "[a] court cannot effectively coerce continued litigation when all parties have agreed not to litigate further." Report of the Advisory Committee on Civil Rules, in Agenda Book for the Committee on Rules of Practice & Procedure, June 10-11, 2002, at 127.

Whether the 2003 Advisory Committee's action on this score was prudent is an open question. Its decision was not revisited during the most recent round of amendments to Rule 23, in 2018. The question is further complicated by the fact that "pre-certification" settlements can come in several forms. As in *Alcarez*, a case might be settled shortly after filing before even a motion for class certification and bear all the indicia of a strike suit (although this particular type of suit has specific additional procedural requirements to prevent illegitimate coercive suits that are imposed by the PSLRA, as applied in *Alcarez*). But sometimes even quick dismissals may be entirely proper, perhaps if they are based on legitimate remedial actions by the defendant that moot the claims, or to allow another forum with jurisdiction to adjudicate all of the parties' claims. There are also, of course, situations where the named plaintiffs seek to dismiss, but other class members seek to continue the litigation, and situations where the named plaintiffs seek to dismiss and notice to the class is necessary to ensure that the class's claims don't expire after dismissal.

To some degree, there is conceptual overlap with the suggestion that the superiority requirement be amended to permit consideration of non-litigation remedies. In both cases, the court would be asked to decide whether class litigation is preferable to an alternative (settlement or a private remedial scheme) early on in the litigation with very little information. That is, the judge must speculate on whether the class members will be better off if the case is litigated or not. Whether such speculation is feasible or not is a question on which feedback is very welcome.

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Attachment(s):

- *Alcarez v. Akorn, Inc.*, 99 F.4th 368 (7th Cir. 2024)
- Suggestion 22-CV-L (Lawyers for Civil Justice)
- Suggestion 23-CV-J (Lawyers for Civil Justice)

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 18-2220, 18-2221, 18-2225, 18-3307, 19-2401, and 19-2408

JORGE ALCAREZ, *et al*., as representatives of a class,

Plaintiffs-Appellees,

v.

AKORN, INC., *et al*.,

Defendants-Appellees.

Appeals of THEODORE H. FRANK, SHAUN A. HOUSE, and DEMETRIOS PULLOS

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 17 C 5016, 5017, 5018, 5021 & 5026 — **Thomas M. Durkin**, *Judge*.

ARGUED NOVEMBER 6, 2018, and APRIL 14, 2020
— DECIDED APRIL 15, 2024

Before EASTERBROOK and WOOD, *Circuit Judges*.[*]

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[*] Circuit Judge Kanne, a member of the panel, died after the appeals were argued. They are being decided by a quorum. 28 U.S.C. §46(d).

EASTERBROOK, *Circuit Judge*. Six suits, filed under the federal securities laws, present questions about "mootness fees" in federal litigation. Akorn, Inc., asked its investors to approve a merger (valued at more than $4 billion) with Fresenius Kabi AG. Plaintiffs assert that the proxy statement (82 pages long, with 144 pages of exhibits) should have contained additional details, whose absence violated §14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a). Within weeks Akorn amended its proxy statement to add some disclosures, though it insisted that none of these additions was required by law.

All six plaintiffs then moved to dismiss their suits, asserting that the additional disclosures mooted their complaints. They did not notify the proposed classes (five of the six suits had been filed as class actions) or seek judicial approval under Fed. R. Civ. P. 23(e). Different district judges entered orders of dismissal between July 17 and July 25, 2017.

Akorn's shareholders overwhelmingly approved the merger, with only 0.1% of all votes cast against. Many of the proxies had been voted before Akorn's supplemental disclosures; plaintiffs did not protest. On September 15 all six plaintiffs told the district court that any claim to attorneys' fees and costs had been resolved by a payment of $322,500, which counsel would divide. Those are the mootness fees. The proposed merger was abandoned for reasons unrelated to these suits, but that does not affect the dispute about what to do with this money.

Theodore Frank, one of Akorn's shareholders, learned through the press that Akorn had paid mootness fees and on September 18, 2017, filed a motion to intervene. He asked the court to require counsel to disgorge the money as unjust

enrichment (since they had not achieved any benefit for the investors). He also asked the court to enjoin the lawyers who represented the six plaintiffs to stop filing what Frank calls strike suits, whose only goal is to extract money for counsel. Frank contends that the suits amount to abuse of the legal process. Indeed, this court has remarked that litigation "that yields fees for class counsel and nothing for the class is no better than a racket. It must end." *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718, 724 (7th Cir. 2016) (cleaned up). But litigation of this kind has not ended since *Walgreen*.

Delaware, where most suits seeking extra disclosure had been filed, decided that they would be subject to "disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission". *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 898 (Del. Ch. 2016). Delaware already had limited the payment of mootness fees unless the suit was meritorious. *In re Sauer-Danfoss Inc. Shareholders Litigation*, 65 A.3d 1116, 1123 (Del. Ch. 2011). The combination of *Sauer-Danfoss* with *Trulia* initially led to a decline in suits seeking more disclosure for mergers. In 2012 90% of deals worth more than $100 million were challenged in litigation. In 2013 that proportion rose to 96%. *Trulia* knocked it down to 74% in 2016. By 2017 and 2018 the proportion was back to 83%. And the location of the suits changed radically. In 2012 56% of these suits were in Delaware and 34% in federal court. By 2018 only 5% were in Delaware and 92% in federal court. These figures come from Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 Vand. L. Rev. 1777, 1787 (2019). By filing in federal court plaintiffs avoid *Trulia*—for federal courts use their own procedures, whether the claim arises under state or federal law. See, e.g., *Shady Grove Orthopedic Associates, P.A. v. Allstate*

Insurance Co., 559 U.S. 393 (2010); *Gasperini v. Center for Humanities, Inc*., 518 U.S. 415 (1996); *Mayer v. Gary Partners & Co*., 29 F.3d 330 (7th Cir. 1994).

These six cases illustrate the federal practice. Suits are filed as class actions seeking more disclosure but not contending that any of the existing disclosures is false or materially misleading. Such a claim is problematic under federal securities law. See, e.g., *Macquarie Infrastructure Corp. v. Moab Partners, L.P*., No. 22–1165 (U.S. Apr. 12, 2024) (nondisclosure does not violate Rule 10b–5). Counsel for the plaintiffs and counsel for the firms involved agree on additional disclosures. The suits are then dismissed and mootness fees paid. Plaintiffs do not move for class certification, and Rule 23(e), which requires judicial approval only when a certified class action is settled or dismissed, does not come into play. The class is not notified.

Because plaintiffs and defendants agree on the fees, the judge is not asked to award anything. A statute providing that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class", 15 U.S.C. §78u–4(a)(6) (part of the Private Securities Litigation Reform Act or PSLRA), does not apply, because the judge does not "award" fees. And if a class member finds out and objects, as Frank did, he is met with the response that the suit is moot and there is nothing to object *to*. The upshot: money moves from corporate treasuries to plaintiffs' lawyers; the investors get nothing, yet the payment diminishes (though only a little) the market price of each share. That's why *Walgreen* called this "no better than a racket." But with the judiciary and investors cut out of the

process, they cannot do anything about it. Or so class counsel insists.

Frank asked the judge to do something, such as ordering counsel to disgorge unearned money or issuing an injunction blocking mootness fees in future cases. Before the district judge could rule, counsel for three of the six plaintiffs disclaimed their portions of the $322,500. The district judge then denied Frank's motion to intervene in those cases, stating that, because he did not anticipate awarding any of the remedies Frank requested, intervention would be "moot." Frank's appeals were orally argued in November 2018.

We put those appeals on hold pending the disposition of the three remaining cases, in which the lawyers wanted some share of the fund (which one of them was holding for the group's benefit). In these three cases, the district judge again denied Frank's motion to intervene but permitted him to participate as *amicus curiae*. The judge took to heart the admonition in *Walgreen* that suits seeking extra disclosure should be reviewed immediately after being filed. Acknowledging that he had not done that, he reopened the suits, concluded that the complaints were frivolous, and found that the extra disclosures were worthless to investors. In light of that finding the judge ordered counsel to return Akorn's money. *House v. Akorn, Inc.*, 385 F. Supp. 3d 616 (N.D. Ill. 2019). One of the three lawyers accepted that outcome. Two did not and have appealed. (Technically, the would-be representative plaintiffs have appealed, seeking an order that will let their lawyers divvy up the $322,500 pot.) Frank also has appealed, because he is still not a party and wants additional relief. These three final appeals were argued in April 2020, and all six appeals are now ready for decision.

Shaun House and Demetrios Pullos, the two plaintiffs who have appealed, contend that the district court lacked jurisdiction to reopen a dismissed case. The complaints had been dismissed, none of the litigants was unhappy, and there was nothing more for the court to do, they maintain. Although Fed. R. Civ. P. 60(b) allows judges to reopen cases, that must be done "on motion", according to the Rule, and none of the litigants had filed a motion. But this does not take Frank into account. If he should have been allowed to intervene, he will become a party and may file motions.

Plaintiffs insist that Frank lacks standing—and if Frank lacks standing, then House and Pullos also lack standing, for they will not recover a penny or obtain any other relief whether or not the attorneys collect fees. Their lack of interest in the outcome is so clear that we dismiss their appeals. Frank's standing remains to be decided.

Frank suffers some loss from diversion of corporate money, which affects the value of his shares. The diminution is minimal—$322,500 is small beer in a $4 billion transaction, something like 0.008% of the value of Frank's shares. Still, that is a few cents. The Supreme Court tells us that an "identifiable trifle" suffices for standing. *United States v. SCRAP*, 412 U.S. 669, 688–90 & n.14 (1973).

A concrete loss, caused by the complained-of conduct and remediable by the judiciary, supplies standing. See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). So we have held that a small loss caused by a brief inability to use a credit card after a data breach confers standing. See, e.g., *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826 (7th Cir. 2018); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016); *Remijas v.*

Neiman Marcus Group, LLC, 794 F.3d 688 (7th Cir. 2015). We have held that even a few pennies' loss of potential interest (on a small non-interest-bearing deposit), see *Goldberg v. Frerichs*, 912 F.3d 1009 (7th Cir. 2019), or a brief delay in receiving income, *Brown v. CACH, LLC*, 94 F.4th 665 (7th Cir. 2024), amounts to a concrete injury. Only a "de minimis loss" threshold for standing would throw out Frank's contention, and the Supreme Court has not announced such a threshold.

Plaintiffs are mistaken to think that Frank needs to make a demand on the board of directors, and pursue a derivative action, rather than intervene personally. True, the $322,500 is a loss to the corporate treasury, but Frank does not contend that Akorn's directors violated their fiduciary duties. The mootness fees may well have cost Akorn less than what its own lawyers would have billed to defend the suits. This means that the directors did not violate either the duty of care or the duty of loyalty when paying to buy peace. Frank contends that class counsel violated their duties *to him* when they used the class allegations as leverage to obtain private benefits. The existence of duties to class members is clear after a judge certifies a class. See *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011); *Back Doctors Ltd. v. Metropolitan Property & Casualty Insurance Co.*, 637 F.3d 827, 830–31 (7th Cir. 2011); *Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (Sotomayor, J.) (citing *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 331 (1980)). There is no such duty if the judge has definitively ruled against certification. How things stand while certification is an open question is itself an open question. No matter how that question is resolved, however, Frank's contention that the representative plaintiffs and their lawyers owed duties to him, personally,

need not be processed through the mechanism for derivative litigation.

So was the district judge right to deny Frank's motion to intervene? Certainly not for the reason he gave. "I'm planning to reject your proposed remedies, so your request is moot" is not a recognized legal doctrine. A case becomes moot only when it is *impossible* to grant effective relief. See, e.g., *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). It was possible to grant the sort of relief Frank requested. A decision not to do so is one on the merits, not a conclusion that the case does not present a case or controversy under Article III (which is what it means to call it moot). If "you are going to lose, so your claim is moot" were a proper approach, unsuccessful suits would be dismissed as moot rather than on the merits. That's not how things are supposed to work. See, e.g., *Bell v. Hood*, 327 U.S. 678 (1946).

When the representative plaintiffs and the defendants strike a deal, intervention by a member of the class may be essential to protect the class's interests. We have told judges to grant intervention freely when a class member contends that the representatives (or, more realistically, their lawyers) are misbehaving. See, e.g., *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318–19 (7th Cir. 2012). Indeed, under some circumstances, class members are entitled to appellate review without intervention. See *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Just being in the class entitles a dissatisfied member to appellate review of a contention that the putative representative has acted against the class's interests.

Frank sought to intervene both as of right under Fed. R. Civ. P. 24(a) and permissively under Rule 24(b). The motion

is timely; Frank acted soon after learning of the mootness fees. See *Cameron v. EMW Women's Surgical Center, P.S.C.*, 595 U.S. 267, 279–81 (2022). The district court addressed only his proposal to intervene as of right—and then only in three of the six cases. If the district judge had concluded that Frank lacks "a claim or defense that shares with the main action a common question of law or fact" (Rule 24(b)(1)(B)), appellate review would be deferential. But the district judge did not make any findings on this subject. It seems to us that, as an investor in Akorn whose shares' value was affected by the merger and the mootness fees, Frank has a claim in common with the main action; how could it be otherwise? After all, Frank is a member of the proposed classes. And since class counsel and Akorn are looking out for their own interests rather than those of the class, intervention is appropriate. We hold that Frank is entitled to participate as a party. And that could solve any problem with reopening the judgments, because as a party Frank would be entitled to make the motion required for relief under Rule 60(b). He will have that opportunity on remand.

But the remedies that Frank initially proposed, such as disgorgement or an injunction, are not satisfactory. Disgorgement would be appropriate only if the mootness fees had been retained by counsel, yet the district judge has ordered the money returned. An injunction against repetition might be appropriate with respect to the individual plaintiffs, but Frank wants relief against the lawyers, who are repeat players—and the lawyers are not parties, so they would not be proper objects of injunctive relief unless they were added as parties. And Frank recognizes that Rule 23(e) deals only with cases certified as class actions, which these were not. Perhaps the rules committees of the Judicial Conference should take a

look at the question whether judicial approval should be required to settle or dismiss cases brought as class actions, yet not so certified, but we must enforce the rule as it stands.

As this case proceeded, however, Frank turned his attention to the Private Securities Litigation Reform Act. Two of its provisions may affect the proper treatment of suits filed in quest of mootness fees. We have mentioned one—15 U.S.C. §78u–4(a)(6), which says that attorneys' fees "awarded" by a court "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." This rule applies to all securities suits "brought" as class actions, whether or not they are so certified. See §78u–4(a)(1) ("The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure."). See also *Higginbotham v. Baxter International Inc.*, 495 F.3d 753, 756 (7th Cir. 2007). Yet §78u–4(a)(6) does not do any work when the defendant pays fees voluntarily rather than insisting on a judicial award.

The other statute, 15 U.S.C. §78u–4(c)(1), tells us:

> **Mandatory review by court**[.] In any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

"This chapter" means the whole Securities Exchange Act of 1934 (which is Chapter 2B of Title 15), and the six suits invoked that statute. The caption calls this review "mandatory," and the word "shall" tells us that the caption is accurate. The district court must make the required findings whether or not

a litigant asks. *City of Livonia Employees' Retirement System v. Boeing Co.*, 711 F.3d 754, 757, 761 (7th Cir. 2013). Accord, *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 579 F.3d 143, 152 (2d Cir. 2009); *Morris v. Wachovia Securities, Inc.*, 448 F.3d 268, 283–84 (4th Cir. 2006).

The dismissal of each suit was a "final adjudication of the action"; settlements were the reasons for the dismissals, but the statute applies to the judicial action, not to the reason for it. It obliges the judge to determine whether each suit was proper at the moment it was filed. The statute directs the court to the criteria of Fed. R. Civ. P. 11, which entails notice and an opportunity to be heard. Those steps have not been put in motion, given the denial of Frank's motion to intervene, but they should occur on remand.

Rule 11(b) provides:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> >
> > (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

From Frank's perspective, the very purpose of these suits was "needlessly [to] increase the cost of litigation" (Rule 11(b)(1)) in order to induce Akorn to pay the lawyers to go away. He contends that the suits violate the other three paragraphs as well. And that is essentially what the district judge found when he finally looked at the complaints.

On the current record we are inclined to agree with the district judge's analysis. He wrapped up:

> [T]he Court finds that the disclosures sought in the three complaints at issue [the three for which counsel declined to waive their share of the mootness fees] were not "plainly material" and were worthless to the shareholders. Yet, Plaintiffs' attorneys were rewarded for suggesting immaterial changes to the proxy statement. Akorn paid Plaintiffs' attorney's fees to avoid the nuisance of ultimately frivolous lawsuits disrupting the transaction with [Fresenius]. The settlements provided Akorn's shareholders nothing of value, and instead caused the company in which they hold an interest to lose money. The quick settlements obviously took place in an effort to avoid the judicial review this decision imposes. This is the "racket" described in *Walgreen*, which stands the purpose of Rule 23's class mechanism on its head; this sharp practice "must end." 832 F.3d at 724.
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> Plaintiffs' cases should have been "dismissed out of hand." *See id*. at 724. Since the Court failed to take that action, the Court exercises its inherent authority to rectify the injustice that occurred as a result. The settlement agreements are abrogated and the Court orders Plaintiffs' counsel to return to Akorn the attorney's fees provided by the settlement agreements. Plaintiffs' counsel should file a status report by July 8, 2019 certifying that the fees have been returned.

385 F. Supp. 3d at 622–23 (one citation omitted). The district court's reference to "inherent authority" should have been to §78u–4(c)(1) and Rule 11, but with that change the analysis holds. Still, our reference to "the current record" is important; a formal motion under Rule 60(b) is necessary, and counsel are entitled to be heard.

Because Rule 11(c)(4) gives the district judge discretion over the choice of sanction, the court would be entitled to direct counsel who should not have sued at all to surrender the money they extracted from Akorn. But selecting an appropriate remedy (if any) should await resolution of the proceedings under §78u–4(c)(1) and, derivatively, Rule 11.

The orders of the district court denying Frank's motion to intervene are vacated, and the cases are remanded with instructions to treat him as an intervenor, permit him to make a motion under Rule 60(b), and decide what relief, if any, is appropriate in light of that motion should one be made. The appeals by House and Pullos are dismissed for lack of jurisdiction because they have not explained how, if at all, the district court's orders adversely affect them, as opposed to counsel.

22-CV-L

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES

A SUPERIOR DEFINITION OF SUPERIORITY: REMOVING RULE 23(b)(3)'S BAN AGAINST CONSIDERING NON-LITIGATION SOLUTIONS WHEN DECIDING WHETHER A CLASS ACTION IS "SUPERIOR TO OTHER AVAILABLE METHODS"

September 2, 2022

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules ("Committee").

I. INTRODUCTION

Rule 23(b)(3) requires courts considering class certification motions to determine whether "a class action is ***superior*** to other available methods for fairly and efficiently ***adjudicating*** the controversy."[2] According to the Committee Notes, this "superiority" requirement is intended to help ensure that "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[3] Unfortunately, the superiority requirement frequently fails to serve this purpose—and even thwarts it—because the word "adjudicating" is often interpreted to prohibit courts from weighing a class action against non-litigation "other available methods" that provide quick and effective redress to putative class members—such as refunds, warranties, customer care programs, remediation, private claim resolution, and consent judgments. Ignoring these options can lead courts to certify class actions that not only fail to protect class members, but actually hurt them by delaying remedies and reducing plaintiffs' recovery due to litigation costs and attorneys' fees. Such cases also waste judicial resources, discourage companies from taking swift remedial action, and overburden the courts. Numerous published opinions reflect courts' frustration that Rule 23(b)(3) prevents a full and complete

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.
[2] Fed. R. Civ. P. 23(b)(3) (emphasis added). A court also must find that the requirements of Rule 23(a) are satisfied and the predominance requirement is met.
[3] Fed. R. Civ. P. 23, 1966 Committee Note.

determination of whether a particular class action is in fact "superior to other available methods." Some courts are resorting to rule gymnastics to conduct this analysis under Rule 32(a)(4)'s "adequacy" requirement, but this approach should not be necessary. The Committee should amend Rule 23(b)(3) to include consideration of all "other available methods"—whether in or out of court—for resolving the potential class claims as part of determining superiority. A suggested amendment is attached.

II. RULE 23(b)(3) AND THE COMMITTEE NOTES ARE WIDELY INTERPRETED TO PRECLUDE COURTS FROM CONSIDERING NON-LITIGATION REMEDIES WHEN DETERMINING WHETHER CLASS LITIGATION IS "SUPERIOR TO OTHER AVAILABLE METHODS"—SPURRING A CALL TO RULE MAKERS

Some courts presiding over class actions—including class actions that would provide no added value to class members—have held that, because Rule 23(b)(3) speaks of other methods of "adjudicating," the rule prohibits judges from considering remedies already available to putative class members outside of litigation. For example, in *Aqua Dots*[4]—a consumer class action involving a defective toy—the Seventh Circuit held that the language of Rule 23(b)(3) did not permit the District Court to compare the defendant's voluntary recall and refund program to the class action litigation device. While stating that he had no "quarrel with the district court's objective" of avoiding duplicative litigation, Judge Easterbrook wrote that the participants in the rulemaking process—including the Committee—did not use the word adjudication "loosely to mean all ways to redress injuries," but rather drafted Rule 23(b)(3) "with the legal understanding of 'adjudication' in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits."[5] In other words, because the defendant's voluntary recall and refund program did not involve or result from an "adjudication" by a court, it could not be considered in the court's analysis of whether "a class action is superior to other available methods for fairly and efficiently *adjudicating* the controversy."[6]

Similarly, in *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*,[7] the Third Circuit found that the Rule 23(b)(3) superiority requirement "focus[es] on the question whether one suit is preferable to several," and that "the rule was not intended to weigh the superiority of a class action against possible administrative relief.... We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy."[8]

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[4] *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (2011).
[5] *Id.* at 751-52.
[6] *Id.* at 752 (emphasis added).
[7] 478 F.2d 540 (3d Cir. 1973).
[8] *Id.* at 579; *see also de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 346 (S.D.N.Y. 2021) ("Rule 23...was drafted with the legal understanding of adjudication in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.") (internal quotation marks omitted); *Bruzek v. Husky Oil Ops. Ltd.*, 520 F. Supp. 3d 1079, 1099 (W.D. Wis. 2021) (following *Aqua Dots,* and refusing to consider defendant's reimbursement program as an "adjudication"); *Martin v. Monsanto Co.*, No. EDCV162168JFW(SPx), 2017 WL 1115167, at *9 (C.D. Cal. Mar. 24, 2017) ("pursuant to the plain language of Fed. R. Civ. P. 23(b)(3), '[t]he analysis is whether the class action format is superior to other methods of adjudication, not whether a class action is superior

The constraints of this common interpretation of Rule 23(b)(3) have created such "uneasiness" that at least one court has raised a "call to the Rulemakers." In *In re Hannaford Brothers Co. Customer Data Security Breach Litigation,*[9] the court understood that the defendant had already reimbursed its customers for the cost of replacing their credit cards after a data theft incident,[10] and noted the defendant's view that its program "afford[s] class members a comparable or even better remedy than they could hope to achieve in court."[11] Nevertheless, the court refused to consider the program because it was not an "adjudication":

> [As] much as I too favor parties being able to resolve their controversies without expensive litigation, I observe that Rule 23(b)(3) does not address superiority as a matter of abstract economic choice analysis, but asks if a class action is "superior to other available methods for fairly and efficiently *adjudicating* the controversy"—*i.e.*, other possible adjudication methods such as individual lawsuits or a consolidated lawsuit.... [Defendant] Hannaford may or may not have a good program to satisfy aggrieved customers, but [ ] the Hannaford program is not relevant to my superiority determination under the class certification decision.[12]

In arriving at this conclusion, the Court noted that the language of the Rule compelled an outcome that failed to fulfill the policy goals of Rule 23.

> [T]he recovery of generous fees for plaintiffs' attorneys and large cy pres awards with little money going to actual class members call[s] into question the integrity of the class action process for resolving lawsuits.
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to an out-of-court, private settlement program'") (quoting *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 610 (E.D. La. 2006)); *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 672 (C.D. Cal. 2014) (citing *Aqua Dots* with approval in concluding that defendant's refund program did not constitute "superior method for 'adjudicating' the controversy"); *Githieya v. Global Tel*Link Corp.*, No. 1:15-cv-0986-AT, 2020 WL 12948011, at *11 (N.D. Ga. Nov. 30, 2020) (same); *Dean v. Colgate-Palmolive Co.*, No. EDCV 15-00107 JGB, 2018 WL 6265003, at *10 (C.D Cal. Mar. 8, 2018) (in "close issue," finding superiority despite preexisting corporate return policy because definition of "'adjudication'... does not include non-legal forms of adjudication such as a recall campaign, or presumably, a money-back guarantee"), *aff'd*, 772 F. App'x 561 (9th Cir. 2018); *Korolshteyn v. Costco Wholesale Corp.,* No. 3:15-cv-709-CAB-RBB, 2017 WL 1020391, at *8 (S.D. Cal. Mar. 16, 2017) (finding superiority despite preexisting refund program because refund was not "adjudication"); *Melgar v. Zicam LLC*, No. 2:14-CV-00160-MCE-AC, 2016 WL 1267870, at *6 (E.D. Cal. Mar. 31, 2016) (finding that Defendants' refund program was not superior because "it does not comport with the plain language of Rule 23"); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 415 (S.D.N.Y. 2015) ("[a]s an initial matter, the Court is not convinced non-adjudicative forms of redress may even be considered under Rule 23(b)(3)'s superiority analysis," citing to use of word "adjudication"); *Forcellati v. Hyland's, Inc.,* No. 12-1983-GHK (MRWx), 2014 WL 1410264, at *12 (C.D. Cal. Apr. 9, 2014) (finding superiority despite preexisting refund program because Rule 23 "directs courts to consider other available methods of *adjudication*"); *Jovel v. Boiron Inc.*, No. 2:11-CV-10803-SVW-SH, 2013 WL 12162440, at *5 (C.D. Cal. Mar. 28, 2013) ("[T]he Court shares Plaintiff's doubt that such a private refund program even constitutes an alternative form of 'adjudication.'").

[9] 293 F.R.D. 21 (D. Me. 2013).

[10] *Id.* at 34.

[11] *Id.*

[12] *Id.* at 34-35.

> [M]y concern here that this is a *de minimis* class action where virtually no one will bother to make a claim and that any recovery will serve solely the lawyers (and perhaps some modest measure of corporate deterrence) ***present[s] questions for those who write the class action rules*** and for Congress, not for this individual judge applying the language of the Rule.
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> * * *
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> Although reasonable people can certainly maintain that as a matter of policy other solutions are preferable to litigation, I do not see how that argument has a place in the class certification decision under the current Rule.[13]

As these cases reflect, the term "adjudicating" in Rule 23(b)(3) not only stifles courts' discretion over the scope of their legal analysis, but also results in holdings that do not promote the best interests of class members and are contrary to the Committee's stated policy of ensuring "economies of time, effort, and expense … without sacrificing procedural fairness or bringing about other undesirable results."[14]

The evidence indicates that the Committee did not necessarily intend for Courts to construe the term "adjudication" so narrowly. Indeed, the Committee Notes do not even use the term "adjudication." In discussing the purpose of the superiority requirement in the 1966 amendments, the Committee noted that the court is to consider whether "*another method of handling* the litigious situation may be available which has greater practical advantages."[15] The Committee further noted that the purpose of the superiority requirement is "[t]o reinforce the point that the court with the aid of the parties ought to assess the relative advantages of *alternative procedures for handling the total controversy*."[16] A leading treatise elaborates:

> The rule requires the court to find that the objectives of the class-action procedure really will be achieved in the particular case. In determining whether the answer to this inquiry is to be affirmative, the court initially must consider what other procedures, if any, exist for disposing of the dispute before it. The court must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court. It then must compare the possible alternatives

[13] *Id.* at 26, 29, 34–35 (emphasis added).

[14] Outside of Rule 23, courts have recognized at least one method of out-of-court resolution—arbitration— as "adjudication." *See, e.g., St. Anthony Hosp. v. Eagleson,* 40 F.4th 492, 515 (7th Cir. 2022) (referring to "claim-by-claim adjudication" through arbitration); *Uniformed Fire Officers Ass'n v. Blasio,* 846 Fed.Appx. 25, 30 (2d Cir. 2021) (referring to "adjudication of [unions'] claims in arbitration"); *State v. United States*, 986 F.3d 618, 629 (6th Cir. 2021) (examining whether party "consented to adjudication before the federal arbitration panels"); *Tyler v. U.S. Dept. of Educ. Rehab. Servs. Admin.*, 904 F.3d 1167, 1184 (10th Cir. 2018) (discussing "agency adjudications" before the Federal Maritime Commission). Moreover, longstanding definitions of "adjudication" have broadly included an application of law to facts—but not necessarily by a judge in a court of law. *See, e.g.,* BENJAMIN W. POPE, LEGAL DEFINITIONS (1919–2015) (defining "adjudication" as "[a]n application of the law to the facts and an authoritative declaration of result").

[15] Fed. R. Civ. P. 23, 1966 Committee Note (emphasis added).

[16] *Id.* (emphasis added).

> to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court.[17]

By hampering courts' ability to conduct this fulsome evaluation of alternatives for resolution, the "adjudication" language in Rule 23(b)(3) undermines the Rule's purpose of avoiding prejudice to class members.

III. RULE 23(B)(3), AS CURRENTLY WRITTEN, IS PREVENTING JUDGES FROM FULFILLING THEIR DUTY TO PROTECT THE CLASS BY LIMITING CONSIDERATION OF "OTHER AVAILABLE METHODS" ONLY TO IN-COURT PROCEDURES FOR "ADJUDICATING."

Rule 23 gives judges a broad responsibility to ensure fairness to class members. As the Committee Notes explain, the core of that duty is ensuring that the action delivers a meaningful result for class members, including when a court reviews a proposed settlement ("[t]he relief that the settlement is expected to provide to class members is a central concern"[18]) and when it determines attorneys' fees ("[o]ne fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members"[19]). This duty is highly important at the certification stage as well—arguably even more so given the high stakes of the certification decision.[20]

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[17] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1779 (3d ed. 1998) (footnotes omitted). Indeed, closer to the enactment of the 1966 amendments, at least one court—the 9th Circuit—did not strictly interpret the "adjudication" language. *See, e.g., Kamm v. Calif. City Dev't Co.*, 509 F.2d 205, 212 (1975) (where California Attorney General and Real Estate Commissioner had already reached settlement in state court requiring defendant to provide restitution to purchasers, federal class action not "superior" for several reasons: "(1) A class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level … (3) Significant relief had been realized in the state action … (7) Defending a class action would prove costly to the defendants and duplicate in part the work expended over a considerable period of time in the state action. These factors as a whole support the conclusion of the district court that the class action was not a superior method of resolving the controversy.)"

[18] Fed. R. Civ. P. 23, 2018 Committee Note.

[19] Fed. R. Civ. P. 23, 2003 Committee Note.

[20] Once a class action is certified, it almost always settles. *See* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation,* 95 Cornell L. Rev. 1105, 1138 (2010) ("Settlements, not trials, have long comprised the dominant endgame for class actions . . ."); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC,* 31 F.4th 651, 685 (9th Cir. 2022) (*en banc*) (Lee, J., dissenting) ("If trials these days are rare, class action trials are almost extinct."), *pet. for cert. filed sub. nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, No. 22-131 (U.S. Aug. 10, 2022). Certified class actions almost always end in settlement because of the potential exposure and uncertainty of a class action verdict. *Id.* (Lee, J., dissenting) ("If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses."). The leverage created once a class is certified can "so increase the defendant's potential damages liability and litigation costs that [it] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), superseded by rule on another ground as stated in *Microsoft Corp. v. Baker,* 137 S. Ct. 1702 (2017); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail").

Many courts have recognized that their responsibility to class members includes protecting them from class actions that add little if any value—or even cause them harm.[21] This is especially true when available non-adjudicative remedies already provide class members with full and timely redress, and where litigation would delay recovery, impose significant court costs and attorneys' fees, and consume judicial resources. As one court put it, class members, if asked, "would not choose to litigate a multiyear class action just to procure refunds that are readily available here and now."[22]

Cases driven by attorneys' fees frequently fall in this category of no-value-added cases that harm rather than help class members. For example, in *Conrad v. Boiron, Inc.*[23]—a consumer fraud case arising out of a homeopathic flu remedy where a refund was already available and label changes were already made—the court emphasized that "it is hard to see how the proposed class action benefits anyone but the attorneys who filed it" and observed that "[c]lass actions driven by attorney's fees are notoriously troublesome." Similarly, in considering a class action settlement in *In re Walgreen Co. Stockholder Litig.*,[24] the Seventh Circuit wrote that "[t]he type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket.... [A] class action that seeks only worthless benefits for the class should be dismissed out of hand."). Indeed, there are many class actions where the result does not justify the attorneys' fees[25]—particularly when the remedy sought is already provided through out-of-court means. Courts have an obligation to protect class members from such

[21] The idea that the Rule prohibits consideration of alternative methods has given rise to the further step, taken by some plaintiffs' class action lawyers, of asking courts to *prohibit* defendants from informing consumers of a remedy outside of class action litigation, no matter how agreeable and efficient. *See, e.g., In re Apple Inc. Device Perf. Litig.,* No. 18-md-02827-EJD, 2018 WL 4998142, at *6 (N.D. Cal. Oct. 15, 2018) (plaintiffs in phone battery class action sought order prohibiting Apple's battery-replacement program unless Apple notified recipients of class action); *Tolmasoff v. Gen. Motors, Inc.,* No. 16-11747, 2018 WL 3548219, at *2 (E.D. Mich. June 30, 2016) (plaintiff in fuel economy class action sought order preventing General Motors from notifying potential class members of reimbursement program); *Craft v. N. Seattle Comm. Coll. Found.,* No. 3:07-CV-132(CDL), 2009 WL 424266, at *1-2 (M.D. Ga. Feb. 18, 2009) (plaintiff in fee overcharge class action sought protective order preventing defendant from issuing refund checks to potential class members). Even if the voluntary remedy is permitted, plaintiffs' counsel have encouraged their clients to *not* obtain repairs under their warranties, to forego relief available from a company's voluntary programs, and to refuse to trade in their used vehicles, because doing so would undermine the lawyer's theory of the class action case and their ultimate financial recovery. *See, e.g., Leonard v. Abbott Labs., Inc.*, 2012 WL 764199, at *26-27 (E.D.N.Y. Mar. 5, 2012) (noting plaintiff avoided recall program in order to bring class action).

[22] *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012).

[23] 86 F.3d 536 (7th Cir. 2017).

[24] 832 F.3d 718, 724 (7th Cir. 2016).

[25] *See, e.g., Briseno v. Henderson*, 998 F.3d. 1014, 1019, 1023 (9th Cir. 2021) (cautioning against approving settlements "when counsel receives a disproportionate distribution of the settlement"; in this case, "[c]lass counsel will receive seven times more money than the class members" and the "injunction touted by an expert as worth tens of millions of dollars appear worthless"); *Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (holding that, in assessing the reasonableness of the attorney's fee in a proposed settlement, "the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation"); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 938 (9th Cir. 2011) (holding that class counsel should not have been awarded eight times the value of what the class received in the form of *cy pres* awards; "the disparity between the value of the class recovery and class counsel's compensation raises at least an inference of unfairness, and [] the current record does not adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests").

cases, and should not feel compelled by the Rules to certify them without understanding the class members' full panoply of options for resolution and remedy.

Of course, attorneys' fees are not the only costs of class actions.[26] Class actions—before any decision on the merits is ever made—require notice and administration, which can cost hundreds of thousands of dollars. Although such costs are often a necessary component to class actions and due process, they are unnecessary and therefore harmful when the class members already have a remedy outside of litigation. For example, in *Aqua Dots*, the putative class action involved an allegedly defective toy kit already subject to a broad recall and refund program. The Seventh Circuit observed that the class "[n]otice may well cost more, per kit, than the kits' retail price—and could be ineffectual at any price, since most purchases were anonymous."[27] The Court reasoned that, especially where a recall, refund, or reimbursement program has already been "widely publicized," there is no need to "bear these costs a second time."[28] This is particularly true where the product at issue is sold at a low price because any compensation to a class member would also be low. As the *Conrad* court observed, "[t]he combination of low-value claims and small class size is likely to make this another case in which 'high transaction costs (notice and attorneys' fees)' will leave class members with a negligible award."[29]

Finally, redundant and duplicative litigation not only harms class members—it also takes a toll on the judiciary and defendants as well. Then-Circuit Judge Gorsuch recognized this a decade ago in a case where the court found moot a claim seeking notice and an equitable refund for repairs because an automaker had offered a voluntary recall (through NHTSA) for the same alleged defect.[30] As Judge Gorsuch explained for the Tenth Circuit, "affording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process[,] the duplicative expenditure of finite public resources[, and] ... the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court."[31] Certifying a class action would discourage manufacturers from initiating recalls and add transaction costs, with only the lawyers—and not the consumers— benefiting from the additional "labor[ing] on through certification, summary judgment, and beyond."[32] Courts should not be constrained by Rule 23's "adjudication" language from understanding and expressly considering these dynamics at the certification stage.

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[26] *See In re Aqua Dots*, 654 F.3d at 751 ("The transactions costs of a class action include not only lawyers' fees but also giving notice under Rule 23(c)(2)(B).").
[27] *Id.*
[28] *Id.*
[29] 869 F.3d at 540.
[30] *See Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208 (10th Cir. 2012).
[31] *Id.* at 1211. *See also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1019 (7th Cir. 2002) ("Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with consumer products that are said to be failure-prone.").
[32] *Id.*

IV. FREQUENTLY, NON-JUDICIAL REMEDIES ARE AVAILABLE THAT PROVIDE FASTER, MORE COMPLETE RELIEF THAN THE PROPOSED CLASS ACTION

Putative class members often have access to direct, more efficient redress that is at least equal to and, in many cases, better than, the remedy that a class action can provide. Consumers frequently obtain redress through warranties, refund policies, remediation, voluntary recalls, free software patches or updates, and private claim resolution. These programs provide timely and efficient remedies directly to the customer. Automatic software updates provide quicker relief to impacted consumers than protracted litigation, and recall programs do not require potentially injured customers to split their refunds with attorneys.

Courts should be allowed to consider whether a company's policy of curing a customer's complaints is superior to what can be achieved with the proposed class litigation, which even in the best dockets will dramatically slow resolution as compared to the relief provided through the company's voluntary policies and programs.

In addition to voluntary refund and reimbursement programs put in place by manufacturers and retailers, consumers also often obtain relief from agency administrative action faster and with fewer transaction costs than class litigation,[33] including action by the FDA,[34] NHTSA,[35] CPSC, DOT, or State Attorneys General. For example, automotive manufacturers are required to notify the federal regulator, the National Highway Transportation Safety Administration (NHTSA), of safety-related defects within five days, and NHTSA publicly announces all field actions in a timely manner. NHTSA has statutory authority to order recalls to cure defects.

Yet many class actions are tagalong suits that follow such administrative actions but do not add value to class members. For example, putative class actions were filed after KB Homes entered a settlement with the Florida Attorney General that provided repairs and refunds to homeowners.[36] Similar class actions are routinely filed on behalf of car owners following a recall that provides for repair and compensation.[37] Not only do these suits typically fail to provide any added value to class members, but they harm consumers by delaying and reducing their remedies while also punishing the companies that provide meaningful alternative measures by burdening them with multiple redundant lawsuits.

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[33] For government-supervised relief, there are concerns about "duplicat[ing] the[] efforts" of the government agency. *Winzler,* 681 F.3d at 1211.

[34] *See, e.g., In re Family Dollar Stores, Inc., Pest Infestation Litig.,* MDL No. 3032, 2022 WL 2129050, at *1 (J.P.M.L. June 2, 2022) (consolidating class actions filed in wake of FDA recall); *Coffelt v. Kroger Co.,* No. EDCV 16-1471 JGB (KKx), 2017 WL 10543343, at *2 (C.D. Cal. Jan. 27, 2017) (class action alleging overpayment for contaminated vegetables followed FDA investigation and subsequent recall).

[35] *See, e.g., Cohen v. Subaru of Am., Inc.,* No. 1:20-cv-08442-JHR-AMD, 2022 WL 714795, at *2 (D.N.J. Mar. 10, 2022) (class actions filed in wake of NHTSA-approved recalls of fuel pumps); *Zakikhani v. Hyundai Motor Corp.,* No. 8:20-cv-01584-SB (JDEx), 2022 WL 1740034, at *1-2 (C.D. Cal. Jan. 25, 2022) (class action filed in wake of NHTSA-approved recall of ABS systems).

[36] *See, e.g.*, https://topclassactions.com/lawsuit-settlements/closed-settlements/florida-kb-home-class-action-settlement/ (9/2/2016 announcement of stucco settlement); https://www.clickorlando.com/news/2017/11/11/35-lawsuits-filed-against-kb-home-in-orlando/ (11/2017 discussion of raising same claims).

[37] https://topclassactions.com/lawsuit-settlements/consumer-products/auto-news/vehicle-safety-defect-class-action-lawsuit-investigation/

Non-"adjudication" alternatives often expedite remedies to class members while saving considerable transaction costs, including attorneys' fees. Allowing judicial consideration of voluntary remedies at the certification stage places the incentives where they should be: on encouraging relief to class members in the quickest, most cost-effective and robust way.

V. CLASS MEMBERS' PREFERENCE FOR NON-JUDICIAL REMEDIES IS DEMONSTRATED BY LOW PARTICIPATION RATES IN CLASS ACTION SETTLEMENTS

Objective evidence—consumer participation rates in class action settlements—demonstrates that class actions are often not the superior mechanism for delivering relief from an alleged injury. Two Jones Day white papers[38] examining claims rates in federal class action settlements[39] of cases containing allegations of consumer fraud found that: "(i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys' fee awards even when class members receive little to no monetary recovery; and (iii) in claims-made settlements, class members as a whole receive on average only 23 percent of the settlement amount, with the remainder being consumed by attorneys' fees, expenses, or cy pres distributions…."[40] Jones Day found that "the average participation rate in such settlements was only 4.91 percent and the median participation rate was only 3.90 percent" among settlements in which class members were required to submit a claim form, with only two cases with a claim rate of higher than 15 percent.[41]

The Federal Trade Commission's data on claims rates is similar. In 2019, the FTC published a study of 149 class-action settlements from the years 2013–2015 that covered several types of consumer class actions, including privacy, defective products, debt collection, and banking practices.[42] The study considered various aspects of class action settlement effectiveness, and found that even when direct notice of settlement is provided, claims rates are surprisingly low. The FTC reported that the median overall claims rate (across all industries and direct notice types) was 9 percent, and that the mean claims rate was 4 percent.[43] These findings are

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[38] Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019–2020)* (July 2021) ("2021 Jones Day White Paper Update"), https://www.jonesday.com/en/insights/2021/07/update-an-empirical-analysis-of-federal-consumer-fraud-class-action-settlements-(20192020); Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)* (April 2020) ("2020 Jones Day White Paper"), https://www.jonesday.com/en/insights/2020/04/empirical-analysis-consumer-fraud-class-action.

[39] A total of 141 settlements were reviewed as an initial data set across the two White Papers, out of which 60 contained sufficient data to support the analysis.

[40] 2020 Jones Day White Paper at Cover page. The 2021 Jones Day White Paper Update reported that for settlements between 2019-2020, class members received only 30% of the total settlement amount in claims-made settlements. (2021 Jones Day White Paper Update at 1).

[41] 2021 Jones Day White Paper Update at 1. The participation rate range is consistent when compared with the 2020 Jones Day White Paper, which found the only 6.99% of class members submitted a claim to participate in settlements, with a median participation rate of 3.40%, and only four cases having a claims rate higher than 15%. *See* 2020 Jones Day White Paper at 1.

[42] FTC Staff Report, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns 10, 12 (Sept. 2019) ("FTC Notice Study"), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf

[43] *Id.* at 27. While the FTC ultimately made various recommendations to improve notice understandability and comprehension, it also noted that "several of these results suggest respondents may view class action settlement notices with skepticism." *Id.*at 2.

corroborated by Jones Day, which found that, in cases with direct notice to consumers of settlements, the average claim rate from 2010 to 2020 was 8.32 percent, and the median was 4.45 percent.[44]

These numbers reflect, at least in part, class members' lack of interest in class action lawsuits that force them to wait years for a remedy that they could have accessed immediately and that ultimately turns out to be severely diminished by litigation costs. Single-digit claims rates provide good reason for courts, at the certification stage, to consider whether a class action is "superior to other available methods" including money-back guarantees, product warranties, programs agreed to with regulators, remediation, and other customer satisfaction programs or government actions that offer consumers a direct, quick, and easy remedy.

These low claim rates also serve as a reason that simply relying on the named plaintiff's ability to opt out does not adequately protect the class members. At least one court has rejected concerns that many class members' "interests are better served otherwise (as by an individual lawsuit or by applying for a refund from [the defendant])," by stating that class members "are free to opt out" of the class action.[45] Although such a result might be appropriate to the facts of a particular case, the Committee should not rely on class members' ability to opt out as the reason not to fix Rule 23(b)(3)'s bar against judges' considering the class members' options before deciding whether to certify a class. That is, in the face of single-digit claim rates for those class members who *do not* opt out, the Committee should not conclude that the rule barring judges from considering non-litigation remedies as part of the superiority analysis is justified because class members can read the class notice and opt out if they prefer a no-questions-asked return policy to class litigation.

VI. JUDGES WHO WANT TO CONSIDER "AVAILABLE METHODS" OTHER THAN LITIGATION SHOULD NOT BE FORCED TO PERFORM RULE GYMNASTICS UNDER RULE 23(a)(4)'S "ADEQUACY" REQUIREMENT

Some judges who want to protect classes by considering non-litigation remedies when considering whether a class action is superior are getting around the "adjudication" problem by re-fashioning the "superiority" question to fit within Rule 23(a)(4)'s "adequacy" requirement. For example, the *Aqua Dots* court—after rejecting the district court's denial of class certification under the superiority test—upheld the denial of class certification on the grounds of adequacy of representation because "[a] representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on

[44] 2021 Jones Day White Paper Update at 4-5. This White Paper noted that one of the takeaways from low claims appears to be that "many class members may not consider themselves to have been injured" and "potential class members are simply uninterested in participating in settlements that promise only miniscule awards." *Id.* at 5. *See also id.* ("When potential awards are as low as $0.60 per product purchased . . . the opportunity costs of participating may be too high. Where potential class members must locate proof of purchase, even where proof (such as receipts) may be available, the time required to locate that proof of purchase may be seen as far outweighing the sometimes-paltry awards. What is more, some manufacturers may already offer a money-back guarantee program, providing a full refund to dissatisfied customers. Many consumers may see this as a superior means of addressing their concerns, as they prefer to receive a refund by contacting the manufacturer directly rather than participate in a class action where relief may be delayed or less than a full refund.").

[45] *In re Hannaford*, 293 F.R.D. at 34-35. The court's holding reflects that "adequacy" is an ill-fitting test. *Id.* ("regardless of whether Hannaford customers are better advised to apply directly to Hannaford to reimburse the fees they paid, I find that the named plaintiffs are adequate under the language of the Rule").

offer is not adequately protecting the class members' interests."[46] Other courts have followed suit. In *Waller v. Hewlett-Packard Co.*,[47] the court denied class certification based on the "adequacy" of the named plaintiff because the named plaintiff "isn't fairly and adequately protecting the class's interests under Rule 23(a)(4) by pursuing litigation to obtain a restitution remedy that is already on offer in the form of the software update." Similar reasoning led the court in *Conrad*[48] to deny certification on adequacy grounds because "the remedies already in place for disappointed [ ] customers undermine [plaintiff's] ability to show that he can bring any significant extra value to the absentee class members." And in *Doster Lighting, Inc. v. E-Conolight, LLC*,[49] the court denied certification of a class action—where the defendant had already admitted the problem with its LED light bulbs, redesigned the bulbs, and offered a comprehensive refund and replacement program—due in part to the adequacy of the named plaintiff, who decided to pursue "litigation rather than a remedy already available for replacement or refund."[50]

Despite the apparent logic of these holdings, the Committee should not conclude that the "adequacy" element is an appropriate work-around for the "adjudication"/superiority problem. Adequacy should remain a separate inquiry. Courts generally consider two questions in determining whether the class representative and class counsel are adequate: (1) do they have conflicts of interest with other class members, and (2) will they "prosecute the action vigorously on behalf of the class?"[51] Adequacy thus focuses on the class representative and class counsel, not on the potential remedy.[52] One court has found that denying class certification because non-litigation remedies render a class representative inadequate amounts to a conclusion that *no* class representative or counsel would be adequate to represent the alleged class. The *In re Hannaford Bros.* court explained that "[a] named plaintiff can represent a class *only* by filing a lawsuit; that is what the Federal Rules of Civil Procedure (and Rule 23 in particular) are for."[53] Starting from that premise, the court held that a plaintiff is "hardly [an] adequate representative[ ] of a class by *not* filing a lawsuit, because then they are not class representatives at all!"[54] Similarly, in *In re Scotts EZ Seed Litig.*, the court declined to hold that lead plaintiffs were inadequate representatives because they chose to litigate rather than take advantage of Scotts' "No Quibble Guarantee" refund program. "There are reasons a rational purchaser might choose litigation over a refund," the court stated, "including the availability of statutory and/or punitive damages."[55]

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[46] *In re Aqua Dots*, 654 F.3d at 752.
[47] 295 F.R.D. 472, 490 (S.D. Cal. 2013).
[48] 869 F.3d at 541.
[49] No. 12-C-0023, 2015 WL 3776491 (E.D. Wis. June 17, 2015).
[50] *Id.* at *8.
[51] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.,* 220 F.R.D. 395, 413 (S.D.N.Y. 2004).
[52] *See In re Scotts EZ Seed Litig.*, 304 F.R.D. at 405-07 (in determining adequacy, considering only whether there is a conflict between class members and named plaintiffs, the named plaintiffs' participation in discovery, and qualifications of class counsel).
[53] 293 F.R.D. at 29; *see also id.* at 26, 34-35.
[54] *Id.* at 29.
[55] 304 F.R.D. 397, 407 n.5, 415.

Thus, it is not sufficient to rely on the "adequacy" prong of Rule 23(a)(4) to solve the "adjudication" problem.[56] The Committee instead should disentangle these questions by amending Rule 23(b)(3) to make clear that courts may consider the superiority of the class action to "other available methods" separate from adequacy of class representation.

VII. CONCLUSION

Courts evaluating "superiority" under Rule 23(b)(3) should have the discretion to consider all "other available methods" of providing remedies to putative class members, whether or not that remedy results from an in-court "adjudication." Allowing this discretion via express language in the rule would be consistent with the purpose of Rule 23, which is to ensure that a proposed class action is the superior avenue for protecting class members and resolving parties' disputes, and would promote judicial efficiency and encourage companies to take swift, effective remedial efforts when there is an issue to address. The current language of the rule leads courts reluctantly to certify class actions that harm class members when other available methods for resolving disputes are superior.

The Committee should amend Rule 23(b)(3) along the lines of the attached suggestion to remove what is interpreted as a prohibition on courts' consideration, at the certification stage, of whether available non-litigation alternatives offer class members more efficient and complete remedies than the proposed class litigation. Such an amendment would help judges meet their duty to protect the class, avoid needless drain on judicial resources, encourage the efficient administration of justice, and incentivize defendants to provide full and timely relief to consumers. Prohibiting judges from considering other means of redress leads to class action litigation that fails to protect class members, taxes judicial resources, delays access to remedies, and drives up the costs for those remedies, ultimately harming claimants and courts alike. Where non-"adjudication" alternatives provide faster, robust, and well-publicized remedies that are directly available to consumers, courts should be allowed to evaluate those alternatives—without performing rule gymnastics—when determining whether a class action is the superior method of resolving a particular dispute.

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[56] Some courts deal with the "adjudication" problem by simply ignoring it. In *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 398-99 (S.D.N.Y. 1967), for example, the court recognized that although a defendant's refund program was not an "adjudication," the "broad policy of economy in the use of society's difference-settling machinery" promotes "avoid[ing] creating lawsuits where none previously existed." The *Berley* court ultimately denied certification based on superiority given the already-in-place refund program. *Id.* at 399. Similar findings were made in *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012), where the court held that "a class action is not a superior method" because there was a voluntary recall and refund program available. *See also In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 699 (N.D. Ga. 2008) (class action did not meet superiority requirements because, in part, defendant had instituted a full refund program); *Webb v. Carter's, Inc.*, 272 F.R.D. 489, 505 (C.D. Cal. 2011) (class actions were not superior because the defendant "already offers the very remedy sought in this suit" by "allow[ing] consumers to obtain refunds for the garments, even without a receipt, and reimburs[ing] consumers for out-of-pocket medical costs for treating skin irritation resulting from the tagless labels"); *Daigle v. Ford Motor Co.*, No. 09-3214, 2012 U.S. Dist. LEXIS 106172, at *14 (D. Minn. July 31, 2012) (Ford's voluntary safety recall and refund provides the class with the relief it seeks and a class action is therefore not a superior method of adjudication); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (when a refund and recall program are already established "[i]t makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress").

Suggestion for Rule 23 "Superiority" Amendment

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

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(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy or otherwise providing redress or remedy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions, including the potential for higher value remedies through individual litigation or arbitration and the potential risk to putative class members of waiver of claims through class proceedings;

(B) the extent and nature of any (i) litigation concerning the controversy already begun by or against class members, (ii) government action, or (iii) remedies otherwise available to putative class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; ~~and~~

(D) the likely difficulties in managing a class action~~.~~;

(E) the relative ease or burden on claimants, including timeliness, of obtaining redress or remedy pursuant to the other available methods; and

(F) the efficiency or inefficiency of the other available methods.

23-CV-J

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES

RULE 23's "SUPERIORITY" PROBLEM IS ACUTE, AND THE REMEDY IS NOT COMPLICATED

March 23, 2023

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules ("Committee") related to docket 22-CV-L.

I. INTRODUCTION

Although the Committee's March 28, 2023, agenda book[2] suggests that fixing Rule 23's "superiority" problem is "not ripe for immediate action"[3] and "may present challenges,"[4] the need for a rule amendment is acute and the remedy is much more straightforward than perceived.

II. RULE 23's FAILURE TO ALLOW CONSIDERATION OF NON-JUDICIAL MASS REMEDIES FREQUENTLY *INVITES* INEFFECTIVE FOLLOW-ON CLASS ACTION FILINGS THAT WASTE JUDICIAL RESOURCES.

Today's class action docket is replete with cases that will provide no meaningful remedy to class members despite consuming significant judicial resources. This is happening because Rule 23 is interpreted to bar judicial consideration of non-"adjudicative" remedies in determining the appropriateness of class certification.[5]

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Advisory Committee on Civil Rules, *Agenda Book, Mar. 28, 2023*, *available at:* https://www.uscourts.gov/sites/default/files/2023-03_civil_rules_committee_agenda_book_final_0.pdf

[3] *Id*. at 264.

[4] *Id*. at 262.

[5] *See* Lawyers for Civil Justice, *A Superior Definition of Superiority: Removing Rule 23(B)(3)'s Ban Against Considering Non-Litigation Solutions When Deciding Whether A Class Action Is "Superior To Other Available Methods,"* Sept. 2, 2022, *available at* https://www.uscourts.gov/sites/default/files/22-cv-l_suggestion_from_lcj_-

Recalls, refunds, and similar remedies are widely used and effective means of making consumers whole. When a recall or a refund is not already available to a wronged claimant, class action plaintiffs will often request such relief in their lawsuits.[6] In rare cases where a class action is filed before a planned product recall occurs, the litigation may serve as appropriate grounds for a class-wide settlement program.[7] But what we see most frequently is a business-instituted recall or refund taking place before any litigation. Indeed, this is what policymakers should *want* businesses to do—to make their customers whole in an effective and efficient manner without a need for judicial intervention.

However, even the most robust recalls and refund programs—even if prompted by the wish to avoid class-action litigation[8]—are typically not considered when evaluating whether a class action is superior to other forms of adjudication. The result is that these programs—which policy interests have aligned to promote—are often treated as easy targets for follow-on class litigation because the remedy typically sought (an admission of defect, recall, or reimbursement) has already been announced by the defendant. Follow-on class actions of various types are common; LCJ member Ford Motor Company has asserted in LCJ meetings attended by this Committee's representatives that the most numerous type of class action it now faces is recall follow-on class actions. Just since the beginning of the 2020s, numerous class actions have followed in the wake of government or private action to ameliorate customer issues. For example, there have been at least 21 active class actions following product recalls,[9] three class actions following software

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[6] *See, e.g., Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 577–78 (N.D. Cal. 2020) (seeking refund for product purchased); *Bodle v. Johnson & Johnson, Inc.*, 2022 WL 18495043, at *1 (N.D. Cal. Feb. 24, 2022) (requesting recall of sunscreen products as relief); *Diesel v. Procter & Gamble Co.*, 2022 WL 16948290, at *3 (E.D. Mo. Nov. 15, 2022) (requesting full refund for allegedly mislabeled product); *Vargas v. Ford Motor Co*., 2020 WL 1164066, at *3 (C.D. Cal. Mar. 5, 2020) (refund part of class settlement relief).

[7] *In re Samsung Top-Load Washing Machine Mkgt., Sales Pracs. & Prods. Liab. Litig.*, 2020 WL 2616711, at *2 (W.D. Okla. May 22, 2020) ("Negotiation of the Settlement Agreement followed a recall of the same washing machines at the center of this litigation.") (cleaned up).

[8] *See* P. 263 ("One might speculate that the prospect of a class action might have been one stimulus behind defendant's aggressive efforts to satisfy potential class members by alternative means.")

[9] *See Cherry v. Dometic Corp*., 986 F.3d 1296, 1300 (11th Cir. 2021) (plaintiff filed class action following product recall arguing recall was not broad enough); *Flynn v. FCA US LLC*, 39 F.4th 946, 949 (7th Cir. 2022) (noting class action filed following government-supervised recall where "[f]ederal regulators supervising the recall determined that the patch eliminated the vulnerability"); *Adewol v. Frickenschmidt Foods LLC*, 2022 WL 4130789, at *1 (E.D. Mo. Sep. 12, 2022) (class action filed six days after Department of Agriculture recall of 5,795 pounds of beef due to alleged misbranding); *Cho v. Hyundai Motor Co., Ltd*., --- F. Supp. 3d ----, 2022 WL 16966537, *9 (C.D. Cal. 2022) (class action challenging excessive oil consumption following engine recall); *Cohen v. Subaru of Am., Inc*., 2022 WL 721307, at *1–3 (D.N.J. Mar. 10, 2022) (class action filed following series of fuel pump recalls); *Dukich v. IKEA US Retail, LLC*, 2022 WL 17823684, at *9 (E.D. Pa. Dec. 20, 2022); *Hickman v. Subaru of Am., Inc*., 2022 WL 11021043, at *5 (D.N.J. Oct. 19, 2022) (class action filed following recall); *In re ARC Airbag Inflators Prods. Liab. Litig*., 2022 WL 17843061, at *1 (J.P.M.L. 2022) (consolidating six class actions filed following recall); *In re Chantix (Varenicline) Mktg., Sales Practs. & Prods. Liab. Litig*., 2022 WL 1783104, at *1 (J.P.M.L. Dec. 22, 2022) ("These putative class actions preset common factual questions arising out of allegations that Pfizer voluntarily recalled the smoking cessation drug Chantix in 2021"); *In re Chevrolet Bolt EV Battery Litig*., --- F. Supp. 3d ----, 2022 WL 4686974, at *4–5 (E.D. Mich. 2022) (class action filed following product recalls); *In re FCA US LLC Monostable Elec. Gearshift Lit*g., 2022 WL 4211149, at *5 (E.D. Mich. Sep. 12, 2022) (refusing to decertify class action filed following product recall); *In re Zantac (Ranitidine) Prods. Liab. Litig*., 2022 WL 17480906, at *1 (S.D. Fla. Dec. 6, 2022) (class actions filed following FDA-ordered recall); *Johanneson v. Polaris Indus., Inc*., 450 F. Supp. 3d 931, 982 (class action filed following product recall); *Kaupelis v. Harbor Freight Tools USA, Inc*., 2020 WL 5901116, at *11 (C.D. Cal. Sep. 23, 2020) (certifying class action filed following product recall); *Laroe v. FCA*

patches,[10] two class actions following voluntary financial remediations,[11] two following environmental remediations,[12] one following a stated policy change,[13] and seven following established customer satisfaction programs that included a refund of the purchase price.[14]

Class actions may also follow government agency investigations where in-house experts examine an alleged problem but conclude that a corrective action (or further correction action) is not necessary.[15] In certain types of class actions (like those against automotive manufacturers), cases are often filed in the wake of customer satisfaction or improvement efforts, like after an automotive company issues a Technical Service Bulletin recommending a repair for a newly discovered issue.[16]

US LLC, 2020 WL 1043564, at *1 (D. Kan. Mar. 4, 2020) (class action filed following automotive recall); *Myslivecek v. FCA US LLC*, 2022 WL 17904526, at *1 (E.D. Mich. Dec. 23, 2022) (class action filed following automotive recall); *Rife v. Newell Brands, Inc*., --- F. Supp. 3d ----, 2022 WL 4598666, at *5 (S.D. Fla. 2022) (class action filed following CPSC investigation and subsequent recall); *Rojas v. Bosch Solar Energy Corp*., 2022 WL 717567, at *2 (N.D. Cal. Mar. 9, 2022) (class action filed following recall); *Rose v. Ferrari N. Am.*, 2022 WL 14558880, at *2 (D.N.J. Oct. 25, 2022) (class action filed following recall); *Sharp v. FCA US LLC*, --- F.Supp.3d ----, 2022 WL 14721245, at *7 (E.D. Mich. Oct. 25, 2022) ("Plaintiffs filed this lawsuit within days of FCA and NHTSA initiating investigations of the subject Ram trucks. Within two weeks of the lawsuit being filed, FCA announced a voluntary recall …"); *Weidman v. Ford Motor Co.*, 2022 WL 1071289, at *2 (E.D. Mich. Apr. 8, 2022) (class action filed following recall).

[10] *Hoffman v. Ford Motor Co.*, 2021 WL 3265010, at *8 (C.D. Cal. Mar. 31, 2021) (class action filed following software patch and technical service bulletin); *In re Apple Processor Litig*., 2022 WL 2064975, at *1 (N.D. Cal. Jun. 8, 2022) (class action filed following software patch); *In re Intel Corp. CPU Mktg., Sales Pracs. & Prods. Liab. Litig.*, --- F. Supp. 3d ----, 2022 WL 2528305 (D. Or. 2022) (class action filed following software patch).

[11] *Dawson v. Great Lakes Educ. Loan Servs., Inc.,* 2021 WL 1174726, at *14 (W.D. Wisc. Mar. 29, 2021) (class action filed following financial remediation); *Outzen v. Kapsch TrafficCom USA, Inc.,* 2021 WL 4454112, at *2 (S.D. Ind. Sep. 29, 2021) (class action filed following financial remediation for toll overcharges)

[12] *Morr v. Plains All Am. Pipeline, L.P*., 2021 WL 4554659, at *3 (S.D. Ill. Oct. 5, 2021) (class action filed following environmental remediation); *Mount v. Pulte Home Co.*, *LLC,* 2022 WL 3446217, at *4 (M.D. Fla. Aug. 17, 2022) (class action filed following stormwater remediation).

[13] *Lohman v. United States,* 154 Fed. Cl. 355, 355 (Ct. Fed. Cl. 2021) (class action filed after Army Board for Correction of Military Records' decision announcing certain soldiers eligible for back pay).

[14] *Franco v. Ford Motor Co*., 2022 WL 17726303, at *2–3 (C.D. Cal. Dec. 6, 2022) (class action filed following customer satisfaction campaigns); *Gilbert v. Lands' End, Inc*., 2021 WL 3662448, at *3–4 (W.D. Wis. Aug. 18, 2021) (class action filed despite full refund policy); *Laurens v. Volvo Car USA, LLC*, 2020 WL 10223641, at *8 (D.N.J. 2020) (class action filed despite availability of full refund); *Singh v. Google LLC*, 2022 WL 94985, at *14 (N.D. Cal. Jan. 10, 2022) (class action filed despite presence of refund policy); *Van v. LLR, Inc.*, 2020 WL 4810102, at *7 (D. Alaska Aug. 18, 2020) (class action filed despite presence of refund); *Weinrich v. Toyota Motor Sales, U.S.A., Inc.*, 2023 WL 155610, at *1 (D.S.C. Jan. 11, 2023) (class action filed despite acknowledged "customer support program for corrosion issues"); *Womick v. Kroger Co.*, 2022 WL 1266630, at *5 (S.D. Ill. Apr. 28, 2022) (class action filed despite presence of standard refund offer).

[15] *See, e.g., Flynn,* 39 F.4th at 949 (noting class action filed following government-supervised recall where "[f]ederal regulators supervising the recall determined that the patch eliminated the vulnerability"); *Franco,* 2022 WL 17726303 at *2–3 (class action filed following NHTSA investigation); *Kondahl v. Kia Motors Am.,* 2020 WL 5816228, at *2 (S.D. Ohio Sep. 30, 2020) (class action filed despite NHTSA investigation resulting in no recall action).

[16] *See,e .g., Cashatt v. Ford Motor Co.*, 2020 WL 1987077, at *1 (W.D. Wash. Apr. 27, 2020) (class action filed following Ford Technical Service Bulletins); *Cho*, 2022 WL 16966537 at *9 (class action challenging excessive oil consumption following TSBs); *Cunningham v. Ford Motor Co*., --- F. Supp. 3d ----, 2022 WL 17069563, at *4 (E.D. Mich. Nov. 17, 2022).

How do class actions proceed when a remedy already exists? Post-remedy plaintiffs will usually allege that the recall or customer service effort is not sufficient to provide the relief they seek.[17] Occasionally they will allege that the remedy was deceptive,[18] or negligently performed.[19] Courts may dismiss claims that straightforwardly allege a "negligent recall."[20] But other claims challenging the legitimacy or scope of the remedial action may survive a motion to dismiss.[21] The end result of these kinds of filings are class-action lawsuits that explicitly compare themselves to government-supervised or voluntary mass remedies.

Despite the fact that these mass remedies already exist outside of the court system, courts find that the Rule 23(b)(3) superiority requirement is met and certify a damages class without comparing it to any such mass remedy because they believe Rule 23 does not permit them to do so.[22] At the extreme edge of this practice, some courts—because Rule 23 does not require them to consider whether a government investigation is superior to a jury trial—have expressly held that a jury may overrule a government agency's finding that an alleged defect was not a threat to safety.[23] It is, of course, entirely possible that some mass remedies are not effective, or even deceptively implemented, and therefore inferior to a given class action. It is also possible that a government agency may explicitly invite private litigation to supplement its enforcement efforts.[24] But it is very difficult for a court to determine that a class action is superior to these mass remedies if it does not—or cannot—consider them at the time it evaluates the propriety of

[17] *Cherry*, 986 F.3d 1300 (plaintiff filed class action following product recall arguing recall was not broad enough); *Cohen*, 2022 WL 721307 at *3 ("According to Plaintiffs, these recalls do not capture all Subaru vehicles affected by the Defect."); *Van*, 2020 WL 4810102 at *8 (refund policy would not provide statutory damages).
[18] *Weidman*, 2022 WL 1071289 at *3 ("It is Plaintiffs' contention that the 2016 Recall was not a 'fix' as represented by Ford, but an effort to conceal the full scope and nature of the Brake System Defect …"); *Rose*, 2022 WL 14558880 at *3 ("Plaintiff alleges that Defendants knew of the brake defect since 2015 but failed to disclose the defect to consumers, including Plaintiff, until the NHTSA recall.").
[19] *Cohen,* 2022 WL 721307 at *40.
[20] *Id.* (dismissing negligent recall claim as prudentially mooted).
[21] *See In re Chevrolet Bolt EV Battery Litig.,* 2022 WL 4686974 at *10 (deferring question of whether plaintiffs have standing given product recalls); *Rife*, 2022 WL 4598666 at *5 ("And (the Plaintiffs contend) the Defendants' recall and quick fixes were too little, too late."); *Dukich,* 2022 WL 17823684 at *9 (noting plaintiff sought broader relief than existing recall, and sought "interest and delay damages" in addition to existing full refund offer); *Hickman,* 2022 WL 11021043 at *5 ("Because Plaintiffs have stated claims on the face of their Amended Complaint that go beyond the Recall, the Court will not dismiss the Amended Complaint on that basis."); *Rose*, 2022 WL 14558880 at *3 (declining to dismiss on prudential mootness grounds because "here, Plaintiff seeks more than equitable relief. Plaintiff asserts legal claims, including claims for fraud and an alleged NJCFA violation, and seeks actual, treble, and punitive damages and attorney's fees.").
[22] *Dukich,* 2022 WL 17823684 at *9 (denying certification but finding superiority because "the question of whether administrative remedies should be considered in a Rule 23(b)(3) analysis remains unanswered"); *see also Rojas,* 2022 WL 717567 at *16 (certifying class, noting "[d]istrict courts within the Ninth Circuit are split as to whether private processes should be considered when determining whether a class action is the superior method of adjudicating a controversy").
[23] *Johnson v. Nissan N. Am., Inc.,* 2022 WL 2869528, at *11 (N.D. Cal. Jul. 21, 2022) (certifying class despite NHTSA investigation finding no defect, holding that plaintiff's proposed safety expert "has reasonably articulated the basis for his opinions; Nissan is free to pair them off against NHTSA's, but balancing those potentially competing concerns is a matter for the jury"). *Compare* P. 264 ("Trying to guess whether government action would be a suitable substitute for a class action could pose another major challenge for the judge.").
[24] *See* P. 264 ("Suppose, for example, that the governmental enforcement agency potentially involved told the court 'We favor allowing the class action go forward.' Is the judge to disregard that governmental view?") As we hope this comment makes clear, the judge should *not* disregard that view: it should rigorously evaluate whether any possible alternatives are superior, and the government's express view would be part of that analysis.

the class action and its effectiveness.

III. LCJ's PROPOSED RULE 23(b)(3) AMENDMENT WOULD RESTORE THE ORIGINAL AND APPROPRIATE UNDERSTANDING THAT SUPERIORITY INQUIRIES DO NOT EXCLUDE NON-JUDICIAL RELIEF.

When evaluating superiority, most courts today look primarily (if not exclusively) at whether a class action would be more efficient than multiple small-claim suits. But historically the Rule 23 superiority inquiry has not been exclusively efficiency-driven. Rule 23(b)(3) includes an inquiry into the fairness of the class action procedure as well as its efficiency. Early in the history of class actions, courts would focus equally on the fairness and efficiency prongs when considering superiority.[25] As the Third Circuit held in 1974,

> The superiority finding requires at a minimum (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method.[26]

It also held that these issues should not be looked at only from the point of view of the potential class members. Instead,

> Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. The listing is not necessarily in order of importance of the respective interests. Superiority must also be looked at from the point of view of the issues.[27]

As this shows, courts were more concerned with whether a proposed class action was superior to other remedies as a whole (even those outside the judicial system), justifying the time and money the defendant would spend defending the case and the court would spend overseeing it. This concern has not disappeared. Indeed, some modern legal scholars have expressed concern that piecemeal class-action litigation may actually disrupt government efforts at mass remedies or

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[25] *See, e.g., Katz v. Carte Blanche Corp.,* 496 F.2d 747, 757 (3d Cir. 1974) ("if … the district court has in rejecting alternative available methods of adjudication disregarded possible unfairness of the class action to a particular defendant, its determination is not entitled to such deference"); *Cotchett v. Avis Rent A Car Sys., Inc.,* 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (pro-superiority factors "must be weighed, along with all other benefits to the class, against the costs of such an action, in terms of convenience and fairness to all involved"); *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 16 (D.D.C. 1973) ("The problems of 'judicial economy and fairness to the parties' are certainly present in the case at bar.").

[26] *Katz*, 496 F.2d at 757; *see also* Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 578 (2013) ("'Superiority' is inherently a comparative inquiry: the class action must be compared to other options that a government has established to resolve disputes over legal rights.").

[27] *Katz*, 496 F.2d at 767.

regulatory enforcement.[28]

Early rulings from the Ninth Circuit provide further evidence that, when the Rule took effect, courts believed "that subparagraph (b)(3) read as a whole reflects a broad policy of economy in the use of society's difference settling machinery."[29] To that end, when determining "fairness" as part of the superiority analysis, courts would look into whether the class action provided benefits to the defendant (such as the closure of active claims or lawsuits) as well as the class members.[30] The inquiry, historically, would also focus on whether or not a class trial before a jury was superior to non-jury methods of adjudicating the controversy.[31]

Cases that disagreed with this approach tended to do so on the grounds that Rule 23 "'assumes a bona fide grievance shared to some degree by a group of persons interested in prosecuting their claims,' so that it is not permissible to suggest simply that it would be superior to have no litigation at all."[32] But there is nothing in the text or intent of Rule 23 that embodies that assumption. In fact, the various factors courts must consider under Rule 23 are all aimed at *testing* whether a group of people actually shares the same grievance. If they do, a class may be certified. If not, it cannot, even if the alternative is no litigation at all.

As a result, since as early as 1966, the Ninth Circuit has considered whether administrative relief in the form of agency regulation or government investigation (or other relief like previously-existing consent decrees) might provide the best remedy for potential class-action claimants.[33] So has the Seventh Circuit.[34] Other federal appellate courts, like the Third Circuit, however, have

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[28] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 621 (2013) ("the piecemeal and unyielding nature of profit-motivated private enforcement will deprive regulatory regimes of needed 'coherence' by, among other things, disrupting the subtle cooperative relationships that arise between regulators and regulatory targets"), 637 (discussing "powerful incentives for private enforcers and regulatory targets to trade a larger settlement pot for an unduly wide liability release, compromising future enforcement efforts").

[29] *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974) (quoting *Berley v. Dreyfus Co*., 43 F.R.D. 397, 398 (S.D.N.Y. 1967)).

[30] *See, e.g., Berger v. Purolator Prods., Inc.,* 41 F.R.D. 542 (S.D.N.Y. 1966) (no superiority where "despite the pendency of this litigation for almost three years, [counsel] have received no communication or other inquiries from any other shareholder"); *Shields v. First Nat. Bank of Ariz*., 56 F.R.D. 442, 446 (D. Ariz. 1972) ("the superiority of a class action under these circumstances is inappropriate where the plaintiff can show no damage and the defendant's gain is questionable").

[31] *See, e.g., Cotchett,* 56 F.R.D. at 553 (weighing superiority of jury trial against other methods).

[32] *See In re Tetracycline Cases*, 107 F.R.D. 719, 732 (W.D. Mo. 1985) (quoting 3B MOORE'S FEDERAL PRACTICE 23-339 (1984)).

[33] *Kamm*, 509 F.2d at 211 ("Since the purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy, it seems consistent with that purpose to determine whether any administrative methods of settling the dispute exist.') (quoting WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL§ 1779 (1973 Supp. at 17)); *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1314 (9th Cir. 1977) (consent decree superior).

[34] *In re Bridgestone/Firestone, Inc*., 288 F.3d 1012, 1019 (7th Cir. 2002) ("Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with products that are said to be failure-prone."). The Seventh Circuit limits this consideration of non-adjudicative relief, however, to government action, not private commercial remedies. *In re Aqua Dots Prods. Liab. Litig*., 654 F.3d 748, 752 (7th Cir. 2011)

ruled that administrative relief may not be part of the superiority inquiry based on the text of Rule 23.[35]

IV. ALLOWING COURTS TO CONSIDER NON-JUDICIAL RELIEF IN THE SUPERIORITY INQUIRY IS AN UNCOMPLICATED FIX THAT ALLOWS FOR LESS EXPENSIVE AND FAIRER OUTCOMES.

In light of the historical treatment of Rule 23(b)(3), fixing the ambiguity surrounding the term "adjudication" is a straightforward way to allow courts to stop limiting their inquiry into the superiority of a given class action as compared only to other *judicial* remedies. For example, the Seventh Circuit has held that voluntary action by a defendant may not be considered in the superiority inquiry, even when it provides all the relief asked for at less cost to the claimants, because such relief is not an "adjudication."[36] Other courts have since held similarly.[37]

The unintended consequence of the "adjudication" limitation is that it restricts courts from considering all of the available methods of making the plaintiffs whole, along with their attendant costs and benefits. It also places the judicial system in unintended conflict with the successful work of the administrative state and private industry, rather than limiting the judicial role to adjudicating real disputes. As various appellate courts have recognized, in a class action, the trial court serves as a fiduciary for the potential class at those times (like settlement) when class counsel cannot be trusted to watch out for the class's interest at the expense of their own.[38] Even in an adversarial certification, the superiority determination, like the settlement approval process, is a time when class counsel has little incentive to scrutinize alternative methods of providing relief at lower cost. Therefore, it makes no sense to restrict the court from looking at best practical methods of providing class members with relief. If a pre-existing government or voluntary action exists, then including it in the analysis redounds to the benefit of the class members as well as the defendant. Courts should be able to consider whether the alternative relief is superior in scope, timing, or cost-effectiveness. If the alternative relief is *not* superior, then a court may comfortably certify the class as the best possible relief. In either direction, Rule 23(b)(3) should allow the court to consider all alternatives.

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[35] *See Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.,* 478 F.2d 540, (3d Cir. 1973) (rejecting possible relief from Department of Labor: "As we view it, it would appear that the rule was not intended to weigh the superiority of a class action against possible administrative relief.").

[36] *In re Aqua Dots Prods. Liab. Litig.,* 654 F.3d 748, 751 (7th Cir. 2011). The court still denied certification on the grounds that a plaintiff that would seek a duplicative remedy was not an adequate representative. *Id.* Other courts have largely declined to follow suit.

[37] *See, e.g., Kaupelis*, 2020 WL 5901116 at *10 (certifying class despite evidence that plaintiffs would receive nothing not already offered by existing product recall); *Dean v. Colgate-Palmolive Co*., 2018 WL 6265003, at *10 (C.D Cal. Mar. 8, 2018) (in "close issue," finding superiority despite corporate return policy because definition of "'adjudication'... does not include non-legal forms of adjudication such as a recall campaign, or presumably, a money-back guarantee"), *aff'd*, 772 F. App'x 561 (9th Cir. 2018); *Korolshteyn v. Costco Wholesale Corp*., 2017 WL 1020391, at *8 (S.D. Cal. Mar. 16, 2017) (finding superiority because preexisting refund program was not "adjudication"); *Melgar v. Zicam LLC*, 2016 WL 1267870, at *6 (E.D. Cal. Mar. 31, 2016) (finding defendants' refund program not superior because "it does not comport with the plain language of Rule 23"); *Jovel v. Boiron Inc*., 2013 WL 12162440, at *5 (C.D. Cal. Mar. 28, 2013) ("[T]he Court shares Plaintiff's doubt that such a private refund program even constitutes an alternative form of 'adjudication.'").

[38] *See Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020); *In re Comm. Bank of N. Va.*, 418 F.3d 277, 318 (3d Cir. 2005); *Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002).

V. CONCLUSION

Today's "superiority" problem is widespread, and it causes serious burdens on judicial resources and parties. The language of Rule 23(b)(3) is the cause. Amending the rule is necessary because allowing courts to consider the presence of alternative remedies in their superiority analysis will empower judges to understand, at an early practicable time, whether the case is worth the burdens, while of course preserving the court's discretion to conclude that a class action is appropriate.[39] The Advisory Committee should take up this topic to explore an amendment that will help judges ensure that class actions are well-considered.

[39] *See, e.g., Rojas,* 2022 WL 717567 at *16 ("Assuming without deciding that Bosch's voluntary recall appropriately can be considered when evaluating the Rule 23(b)(3) superiority requirement, the court cannot conclude on this record that the recall is the superior method for adjudicating the claims of class members."); *Van*, 2020 WL 4810102 at *8 (denying motion to strike class allegations; "[a]t this point, the court cannot conclude that the proposed class action is not a superior method of adjudicating the controversy").

TAB 14

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Privacy Protections for Material Obtained Through Discovery**

DATE: **October 1, 2025**

In 2023, the Lawyers for Civil Justice (LCJ) submitted 23-CV-W, entitled FRCP Amendments are Needed to Guide Courts and Litigants in Proactively Managing Their Shared Obligations to Protect Privacy Rights and Avoid Attendant Cyber Security Risks. This submission proposed changes to 13 Civil Rules to respond to the privacy and cyber security concerns that are so prominent in contemporary life. After some consideration, the Chair of the Advisory Committee invited LCJ to refine its proposals.

LCJ has now submitted 25-CV-D: Reasonable Steps: Four Critical FRCP Updates for Managing Privacy and Cyber Security. This submission is included in this agenda book.

The four rule changes are presented in the attachment to this submission. In summary, they are as follows:

> Rule 26(b)(1): The amendment would add another consideration in the proportionality analysis: "the obligation to protect the privacy rights of parties and non-parties and to minimize the risk of harm from unauthorized access to, or use of, personal or confidential information."
>
> Rule 26(c)(1): The amendment would add a new (I), which would authorize a protective order "requiring that personal and confidential information not be revealed or be revealed only in a specified way, or that reasonable steps be taken to protect against unauthorized access to, or use of, such information." [Note that the new material is not all underscored in the attachment to the submission.]
>
> Rule 34(b)(2)(E): The amendment would add the following new (iv): "A party need not produce documents or electronically stored information in the absence of assurance that reasonable steps have been taken to protect personal information from unauthorized access or use."
>
> Rule 45(d)(1): The amendment would add the following obligation of a party serving a subpoena: "to protect personal or confidential information against unauthorized access or use." [Note: this is not underscored in the appendix to the submission.] Failure to do that would subject the serving party to sanctions, including "costs, and expenses incurred by the responding party or any individual person harmed as a result of noncompliance" with this new duty.

The submission urges that there is an "intense conflict between discovery demands and privacy rights of parties and non-parties." It also urges that the "basic notion" that has emerged to deal with these concerns is "the consensus 'reasonable steps' standard for protecting information."

Regarding the proposed amendment to Rule 26(c) "to conform to today's practice," the proposal is to "help courts and parties think proactively about balancing the interests of non-parties." But protective orders require a showing of good cause, and courts need "more tools . . . they need tools for proactively managing" privacy risks.

Regarding the proposed amendment to Rule 26(b)(1)'s proportionality analysis, there is no mention in the current rule or committee note of privacy. It may be that the current version of the rule persuades courts they have no authority to take account of privacy concerns. On that general question, *see* Lee H. Rosenthal & Steven S. Gensler, *The Privacy-Protection Hook in the Federal Rules*, 105 JUDICATURE 77 (2021). The submission urges that excluding consideration of privacy in the proportionality analysis "is at odds with best practice." And protecting privacy can be burdensome and expensive. *See* Hon. James C. Francis IV (Ret.), *Good Intentions Gone Awry: Privacy as Proportionality Under Rule 26(b)(1)*, 59 SAN DIEGO L. REV. 397, 435 (2021) ("[T]he costs of disaggregating data to isolate that which is private, of redacting personal information, or of anonymizing data in order to shield the identity of non-parties are all burdens appropriately included in the proportionality analysis.").

Regarding Rule 34, the submission says it is "ground zero" for addressing privacy concerns. The commonsense solution, it says, is to incorporate the "commonsense presumption that parties making Rule 34 requests have taken or will take reasonable measures to prevent unauthorized access to the personal and confidential information they will receive."

Finally, regarding Rule 45, the submission points out that the rule "does not mention privacy or cyber security, which are now at least as important, if not even more so, than the considerations enumerated in the rule."

Initial reflection easily supports the proposition that the risks and challenges of privacy protection and cyber security have grown enormously in recent years. On almost a daily basis, litigators' inboxes display the results of litigation (often class actions) making privacy claims or seeking to impose liability due to a cyber security breakdown. There seems to be a lively debate on whether—or to what extent—such claims depend on proof of specific harms. As an inbox illustration, a reporter to the Committee recently received an email advertising a webinar in September 2025 by the discovery department of a major law firm on "Cyber Incident Readiness and Response Through a Wider Lens." The pitch was: "Responding to a cyber incident takes more than quick reactions; it requires the right balance of specialized expertise, timely notifications, and long-term strategy."

Probably many organizational entities have gotten in trouble due to their alleged deficiencies in anticipating and overcoming these problems. This legal exposure probably explains the proliferation of information sessions like the one mentioned above. A Google search for "cybersecurity consultants" turns up a very large number touting their specialized expertise. As the "SolarWinds hack" and other unfortunate developments show, even the federal government and judiciary is not proof against cyber security risks.

The question for the Committee is how or whether to integrate these concerns into the discovery rules, whether by pursuing the amendment ideas proposed in this submission or in other ways.

As with other topics in this agenda book, it is likely experienced judges and litigators are better equipped to evaluate these problems than Ivory Tower academics. Some initial questions include:

(1) Given the numerous reported lapses of cyber security and claims that institutional defendants have failed to protect adequately against hackers and other miscreants, is it often true that civil discovery plays a role? For example, how often have those who obtained information through discovery been charged with failing to protect the privacy interests?

(2) Assuming the starting point of these concerns often involves large entities that have been required to turn over information to litigation opponents through discovery, are there examples of liability asserted against them for complying with discovery requirements? Does failure by such an entity to insist on adequate cyber-security measures subject them to liability when their litigation adversary (or adverse counsel) fails to adopt "reasonable steps" to protect private information?

(3) Do such entities raise these concerns during Rule 26(f) conferences with opposing counsel, or make recommendations to the court for protocols? Are judges unwilling to entertain such concerns as important when raised? Do parties seeking discovery refuse to adopt reasonable protective measures?

(4) How readily can judges evaluate security measures? It seems those who market their cyber security services tout the "specialized knowledge" they can offer. It also seems that they are marketing that expertise to entities themselves likely to be somewhat sophisticated in technical matters, with IT staffs and the like. Are federal judges expected to have such expertise? Should they rely on court-appointed experts? *Cf.* Fed. R. Evid. 706.

(5) Reportedly, large entities frequently demand production of social media, medical, and other confidential private information from individual litigants suing them. With some frequency, it seems, the individual litigants object on privacy grounds. What protective measures do those entities install to protect the privacy interests involved when production is ordered?

(6) If Rule 34(b) is amended to excuse production until the demanding party has provided "assurance that reasonable steps have been taken to protect personal or confidential information from unauthorized access or use," how much delay will that introduce into the discovery process? Does that apply to all requested information, or only some of it?

(7) Is it apparent what fits within the category "personal or confidential information"? Will the requesting party be able to make that determination, or must it similarly secure every piece of information produced by its adversary? Note Judge Francis's warning, quoted on page 5 of the submission, about "the costs of disaggregating data to isolate that which is private."

(8) If the Rule 34(b) amendment empowers the producing party to refuse to produce information until it receives adequate assurances of cyber security, should there be consideration

of some provision like Rule 26(b)(5)(A), apprising the requesting party of the nature of the information not produced?

(9) If Rule 45(d)(1) is amended to impose a duty to protect against unauthorized access to "personal or confidential" information, and to impose on the serving party liability to "any individual harmed as a result of noncompliance" with this duty of protecting information, could this be said to be a new form of tort liability? Separate from any rule-based ground for seeking compensation, are there other sources of law to provide a right for compensation? If so, why is there a need to add this provision by rule? If not, is this akin to creating a new tort?

(10) What is the source of the "'reasonable steps' standard"? Footnote 2 in the submission invokes other sources of law. Perhaps, for example, HIPAA would be such a source. Are the rules limited to enforcing such legal protections that originate outside the rules?

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There is surely much more to be learned about the many important challenges of cyber security. An initial question, however, is whether it is time for the rules more directly to address privacy or cyber security. If so, much work will likely need to be done.

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Attachment(s):

- Suggestion 25-CV-D (Lawyers for Civil Justice)

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES

REASONABLE STEPS: FOUR CRITICAL FRCP UPDATES FOR MANAGING PRIVACY AND CYBER SECURITY

March 3, 2025

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules ("Advisory Committee").[2]

INTRODUCTION

The Federal Rules of Civil Procedure ("FRCP") are not providing sufficient direction to courts and parties when navigating the increasingly intense conflict between discovery demands and privacy rights of parties and non-parties—and the need for guidance grows every day. The core idea of "reasonable steps" to protect personal and confidential information[3] is missing from the rules. Rule 26(c), the principal mechanism for handling privacy, does not explicitly authorize protective orders to protect privacy or articulate that a protective order should require reasonable

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] This Rules Suggestion responds to the Advisory Committee's October 10, 2024, discussion expressing interest in a more discrete proposal than the comprehensive set of ideas included in 23-CV-W, Lawyers for Civil Justice, Rules Suggestion, *FRCP Amendments Are Needed to Guide Courts and Litigants in Proactively Managing Their Shared Obligations to Protect Privacy Rights and Avoid Attendant Cyber Security Risks*, Sept. 16, 2023, https://www.uscourts.gov/sites/default/files/23-cv-w_suggestion_from_lawyers_for_civil_justice_-_proposed_rulemaking_on_privacy_rights_and_cybersecurity_risks_0.pdf.

[3] As used herein, the term "personal information," includes any information considered "personally identifiable information," "personal data," or "protected health information," as well as any other information over which a person may have a reasonable expectation of privacy. The term "confidential information" describes any confidential or proprietary information such as trade secrets, sensitive commercial information, or other information subject to a confidentiality agreement whether or not it contains personal information.

steps to protect against data breaches. Rule 26(b)(1)'s "proportionality" test does not mention the obligations and risks of handling personal and confidential information as a factor in whether the "burden or expense of the proposed discovery outweighs its likely benefit," leading courts to shun that proven tool. Rule 34 does not reflect the basic notion that parties who receive information—often, information about people who do not receive subpoenas or any other notice[4]—must take reasonable steps to protect it from unauthorized access or disclosure. And Rule 45, despite acknowledging the need to protect "a person subject to the subpoena,"[5] does not comport with parties' responsibility to safeguard information about non-parties—or the subpoena recipients' duty to safeguard information they hold about other non-parties—information about people who, even with notice, may not be able to defend their privacy rights.[6]

Fortunately, the remedy can be straightforward. Requiring "reasonable steps" to address privacy and cyber security and applying proportionality analysis to these issues are consensus ideas[7] that would integrate easily into the FRCP. The four suggestions discussed below and attached in the appendix would remedy the deficiencies in the FRCP and ensure that courts and parties have basic, essential guidance on how to foresee and manage the complicated and important issues related to privacy and cyber security.

I. RULE 26(c) SHOULD ALLOW PROTECTIVE ORDERS FOR PRIVACY AND ARTICULATE THE "REASONABLE STEPS" STANDARD

Rule 26(c) protective orders are the primary mechanism courts and parties use to safeguard information shared in discovery. However, the rule's effectiveness is constrained by its text. Rule 26(c) neither mentions privacy as a ground for a protective order nor provides guidance as to the consensus "reasonable steps" standard for protecting information. Just as the rule was amended in 1970 to add an express reference to trade secrets and other confidential commercial information,[8] the rule should be amended now to acknowledge expressly that protective orders can be used to protect privacy, and to articulate that such protective orders should do so by

[4] It is now routine for parties to seek and produce, and for courts to order production of, significant amounts of information about non-party individuals—including customers, employees, suppliers, contractors, and members of the general public—without any notice to those individuals that their personal information or other material they consider private or sensitive is being disclosed.

[5] FED. R. CIV. P. 45(d).

[6] Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 CORNELL L. REV. 1101, 1139 (2018) ("Boliek") ("[T]he need to protect the privacy interest is particularly acute when third parties cannot self-protect (opt out of the transaction) and cannot pursue tort remedies in the event of disclosure. As a threshold analysis, therefore, a judge should intervene to protect privacy interests in discovery when certain elements exist because they indicate circumstances when such rights are least likely to be otherwise protected.").

[7] *See* THE SEDONA PRINCIPLES, THIRD EDITION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, 19 SEDONA CONF. J. 1, 147, princ. 10 (2018) ("Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.").

[8] *See* FED. R. CIV. P. 26(c)(1)(G) advisory committee's note to 1970 amendment ("The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.").

requiring reasonable steps to prevent unauthorized access or disclosure of information. Such an amendment would not only conform the rule to current law and practice, but also prompt courts and parties to employ a workable, uniform standard. A rule change would also help courts and parties think proactively about balancing the interests of non-parties, including employees, customers, patients, and contractors who are likely unaware that their personal information is being sought and disclosed.

II. ALTHOUGH NECESSARY, AMENDING RULE 26(c) IS NOT SUFFICIENT

Amending Rule 26(c) to conform to today's practice is necessary but not sufficient. Protective orders cannot shoulder the entire burden of FRCP guidance on privacy and cyber security. They are by nature reactive;[9] by themselves, they do not furnish a structure for considering, avoiding, minimizing, or navigating around the complications of privacy interests and attendant cyber security risks,[10] especially regarding the rights of non-parties who do not receive subpoenas. Additionally, protective orders are limited in effectiveness, particularly as to cyber security risks.[11]

Perhaps most importantly, protective orders are resource-intensive for both courts and parties—they require a showing of "good cause" that can be inappropriate for information that is protected by law.[12] They can require protracted negotiations between parties and, all too often, judicial intervention to resolve disputes before they are entered. Critically, protective orders are not reasonably accessible to non-parties; those who do not receive subpoenas are unaware of the potential risk of prejudice to their privacy rights, and those who do receive subpoenas are often not in a position to seek the court's protection.[13]

For these reasons, courts and parties need more tools than a Rule 26(c) amendment would provide; they need tools for proactively managing—and averting—the complications of privacy rights and the risks of data breaches.

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[9] Boliek at 1128 ("Although courts have always had the authority, in practice, courts rarely limit discovery on privacy grounds on their own motion.").

[10] *Id.* at 1132 ("These orders are not foolproof, however, and cannot replace the initial gatekeeper role of the judge in granting discovery in the first instance.").

[11] *Id*. at 1145 ("protective orders are effective only when the signatories comply with their parameters, and even then information can be misplaced or disclosed inadvertently" and "hackers are hitting well-known law firms—a reminder that a protective order does not protect data from outside threats" (footnote omitted)).

[12] *See* Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 U. KAN. L. REV. 235, 256 (2015) ("McPeak") ("The good cause standard requires particular facts demonstrating potential harm, and not on conclusory allegations. The party seeking the protective order must show a particular need for protection, rather than broad allegations of harm. Further, the harm must be significant." (footnotes omitted); Robert D. Keeling & Ray Mangum, *The Burden of Privacy in Discovery*, 105 JUDICATURE 67, 68 (2021), https://judicature.duke.edu/articles/the-burden-of-privacy-in-discovery/ ("Keeling & Mangum") ("Showing good cause was (and is) often difficult in contested matters.").

[13] Boliek at 1137-38 ("third-party interests are difficult to defend in a court of law because of the cost of intervening in a court case").

III. RULE 26(b)(1)'S PROPORTIONALITY STANDARD SHOULD ENCOMPASS THE BURDENS OF RESPECTING PRIVACY RIGHTS AND MITIGATING THE RISKS OF HARMFUL DISCLOSURE

Rule 26(b)(1)'s proportionality factors are highly germane to courts' and parties' consideration of discovery requests for personal or confidential information. Those factors include whether "the burden or expense of the proposed discovery outweighs its likely benefit" and weighing "the importance of the discovery in resolving the issues."[14]

Unfortunately, neither Rule 26(b)(1) nor the accompanying Committee Notes expressly mentions privacy. This deficiency is depriving courts and parties of the useful "proportionality" tool because of the significant uncertainty over whether the rule contemplates the burdens of navigating privacy issues and cyber security risks. As one observer puts it: "[I]t is difficult to shoehorn privacy interests into any of the factors identified in Rule 26(b)(1)."[15] Another commentator explains that, "[d]espite the courts' preexisting authority to limit discovery based on privacy concerns, the word 'privacy' was curiously absent from this new list of factors."[16] Courts looking at the text and history of the rule are likely to find no basis for applying proportionality analysis to the burdens of privacy.[17]

These interpretations mean that Rule 26(b)(1) is at odds with best practice. The better view, as the Indiana Supreme Court recently held, is that "modern advances in technology—and the accompanying concerns over the security of personal information—further compel us to recognize privacy interests as an integral part of the proportionality analysis."[18] Rule 26(b)(1) could be—and should be—an excellent tool for helping courts and parties consider that "[a]chieving proportional privacy means that the privacy invasion in some cases may outweigh the likely benefits of the discovery."[19] For this reason, "an emerging consensus of courts and commentators considers the invasion of privacy interests a 'burden' to weigh against the 'likely benefit' of discovery."[20] Even critics of Rule 26(b)(1) as a means of balancing privacy interests concede that proportionality analysis is relevant. Judge Francis observes:

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[14] *See* THE SEDONA CONFERENCE PRIMER ON SOCIAL MEDIA, SECOND EDITION, 20 SEDONA CONF. J. 1, 27-28 (2019) ("The proportionality limitation on the scope of discovery includes two factors that implicate privacy concerns, *i.e.,* 'the importance of the discovery in resolving the issues, and whether the burden … of the proposed discovery outweighs its likely benefit'") (citing *Henson v. Turn, Inc*., No. 15-cv-01497-JSW (LB), 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018)).

[15] Hon. James C. Francis IV (Ret.), *Good Intentions Gone Awry: Privacy as Proportionality Under Rule 26(b)(1)*, 59 SAN DIEGO L. REV. 397, 421 (2022) ("Francis").

[16] Boliek, at 1129.

[17] Francis at 420 ("To the extent that courts intend to treat privacy as a true proportionality factor, they are hard-pressed to find a theoretical basis for doing so").

[18] *Jennings v. Smiley*, No. 24S-CT-186, __ N.E.3d __ (Ind., Jan. 24, 2025) (*citing* The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 69 (2018)); *see also* McPeak at 289 ("courts should take privacy burdens into account when determining the proportionality of discovery.").

[19] McPeak at 291.

[20] *Jennings v. Smiley,* __ N.E.3d __.

> Certainly, to the extent that a party is obligated to expend resources to safeguard the privacy interests of itself or of a non-party whose information it holds, those expenditures are properly considered in a traditional proportionality calculation. Thus, the costs of disaggregating data to isolate that which is private, of redacting personal information, or of anonymizing data in order to shield the identity of non-parties are all burdens appropriately included in the proportionality analysis.[21]

Moreover, this "burden" analysis is incomplete unless courts and parties also consider the risk of harm caused by infringing privacy rights or exposing sensitive information to cyber security threats. It may be relatively inexpensive for a party to copy and produce a database containing social media posts and instant messages from millions of non-party individuals, or to produce a database containing detailed plans for sensitive technology, but even though the cost or "burden" of such a production might be low, the risks created by productions that are not accompanied by reasonable protections are very high.

The Advisory Committee should, as Judge Rosenthal and Professor Gensler urge, "take the subject head on" as "[i]t may well be time to rethink some of the rule choices we made in the past."[22] An amendment to Rule 26(b)(1) should end the uncertainty over the availability of proportionality analysis to help determine the scope of discovery concerning personal and confidential information.

IV. RULE 34 SHOULD REQUIRE REASONABLE STEPS TO PROTECT AGAINST DATA BREACHES

Rule 34 is ground zero for managing—and, importantly, avoiding—privacy violations and cyber security risks because it defines the procedure for requesting and objecting to the production of documents, ESI, and tangible things. But the rule is deficient because it is silent as to how courts and parties should navigate these consequential and nearly ubiquitous problems.

Rule 34 should incorporate the commonsense presumption that parties making Rule 34 requests have taken or will take reasonable measures to prevent unauthorized access to the personal and confidential information they will receive—and will abide by their existing responsibilities to absent non-parties.[23] The rule should do so by clarifying that it does not require a party to produce the requested discovery in the absence of adequate assurances that reasonable steps have been taken to protect it.

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[21] Francis at 435.

[22] Steven S. Gensler & Lee H. Rosenthal, *The Privacy-Protection Hook in the Federal Rules*, 105 JUDICATURE 77, 81 (2021).

[23] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 1983) ("a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [third parties]."

V. RULE 45 SHOULD REQUIRE PROTECTION OF PERSONAL AND CONFIDENTIAL INFORMATION

Rule 45 requires "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" and provides sanctions to enforce that duty.[24] However, the rule does not mention privacy or cyber security, which are now at least as important, if not even more so, than the considerations enumerated in the rule. Rule 45 should have a clear standard for privacy protection because it dictates parties' responsibilities to non-parties who receive a subpoena. It is insufficient to put the burden solely on subpoena recipients, particularly those who are innocent bystanders to the litigation, to bring motions to quash whenever a subpoena requests information that is personal or confidential. It is also important to note that subpoenaed non-parties and litigants "may have little incentive to incur security costs to protect third-party information."[25] It is unthinkable for Rule 45 to require the production of private or confidential information to a party that fails to take reasonable steps to protect it. The issuers of subpoenas have a responsibility to exercise due care in the scope of information requests and in the handling of personal and confidential data produced due to their requests. Accordingly, Rule 45 should be amended to clarify that protecting "a person subject to the subpoena" includes taking reasonable steps protect private and confidential information, including information the subpoena recipient holds about other non-parties.

CONCLUSION

The four amendments discussed above and suggested in the attached appendix are necessary to remedy the FRCP's deficiency in providing adequate guidance to courts and parties in balancing the needs of discovery with the burdens of honoring privacy rights and the risks of harm caused by inadequate cyber security. They reflect the consensus standard of "reasonable steps" and today's best practices. They would give courts and parties the basic and much-needed structure for proactively considering, minimizing, and handling the complexities of personal and confidential information in litigation.

[24] FED. R. CIV. P. 45(d).

[25] Boliek at 1108.

Appendix

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Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(b) Discovery Scope And Limits.

(1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the obligation to protect the privacy rights of parties and non-parties and to minimize the risk of harm from unauthorized access to, or use of, personal or confidential information. Information within this scope of discovery need not be admissible in evidence to be discoverable.

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(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way;

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs; and

(I) requiring that personal and confidential information not be revealed or be revealed only in a specified way, or that reasonable steps be taken to protect against unauthorized access to, or use of, such information.

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Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

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(b) Procedure.

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(2) *Responses and Objections*.

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(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.; and

(iv) A party need not produce documents or electronically stored information in the absence of assurance that reasonable steps have been taken to protect personal or confidential information from unauthorized access or use.

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Rule 45. Subpoena

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(d) Protecting A Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions.

(A) A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena, and to protect personal or confidential information against unauthorized access or use.

(B) The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings, ~~and~~ reasonable attorney's fees, costs, and expenses incurred by the responding party or any individual person harmed as a result of noncompliance—on a party or attorney who fails to comply.

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TAB 15

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Rule 45—Reimbursement for Cost of Responding to Subpoena**

DATE: **October 1, 2025**

Professor Brian Fitzpatrick of Vanderbilt submitted 25-CV-E, objecting to the fact that Rule 45 "requires nonparties to foot the bill for expensive document requests and the like from plaintiffs and defendants." The submission does not include a specific amendment proposal, but urges that the rule "should be amended to make nonparties whole when they respond to production requests from litigants."

Professor Fitzpatrick urges that "it is Economics 101 that people who do not pay for something will consume too much of it." Citing a 2008 Sedona Conference report, he urges that "experience has shown that production requests of nonparties are no different."

Drawing on materials from the 1930s and 1940s, Professor Fitzpatrick speculates that having the requester pay "might have been the original design of Rule 45." The rule required the serving party to cover the costs of the nonparty to appear in person to testify, and "this generally made nonparties whole back in 1938."

As we have seen in regard the pending proposed amendment to Rule 45(b)(1) (now out for public comment), presently the rule directs that the serving party tender the fees for one day's attendance and "the mileage allowed by law." [The proposed amendment would provide that service can be effected without such tender.] That would require some compensation in the 1930s when a subpoena called for production of documents. That should have made the nonparty served with the subpoena whole because, as Professor Fitzpatrick says, "time and travel to appear were probably the main costs of document production back then; there were no photocopy machines, let alone computers."

Back at that time, document production was generally handled differently than it was after the 1970 amendments to the discovery rules. Until those amendments, document production under Rule 34 depended on advance judicial approval. That requirement of advance judicial approval was removed from Rule 34 in 1970. In addition, the subpoena then had to be issued by the court with jurisdiction over the place in which the witness was served and was called upon to appear or testify. All that was changed by the 2013 amendments to Rule 45, as we saw with our work on the Rule 45(c) amendment for trial subpoenas for remote testimony, also out for public comment.

Through successive revisions since 1938, the handling of subpoenas has evolved considerably. For example, as amended in 1991, the rule permits a lawyer to issue a subpoena; an application to the court is not required. According to the committee note accompanying that amendment, "accompanying the evolution of this power of the lawyer as officer of the court is the development of increased responsibility and liability for the misuse of this power."

The 1991 amendments also introduced authority to subpoena for documents only, independent of any requirement for a person to show up with the documents. As the Committee Note observed, "[t]he non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34."

The 1991 amendments included provisions to address burdens imposed on nonparties by subpoenas that now appear in Rule 45(d) ("Protecting a Person Subject to a Subpoena"). Among other things, the 1991 committee note observed that "[a] non-party required to produce documents or material is protected against significant expense resulting from involuntary assistance to the court."

In 2006, Rule 45 was revised to take account of the increasing importance of production of electronically stored information. The committee note accompanying that amendment addressed the changing burden situation that modern litigation can involve:

> As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance.

So the general arrangement of the rule provides more protection to the nonparty witness than to parties. *See, e.g.*, *Sanders v. Scottsdale Ins. Co.*, No. 222103, 2024 WL 3274793, at *1 (E.D. La. July 2, 2024) ("If the plain text of Rule 45(d)(1) is to be given any effect, an attorney must take even greater care in drafting subpoenas duces tecum than when drafting requests for production."). The court can impose sanctions for overreaching or quash a subpoena.

It may be, however, that these provisions are not sufficient in the case of the genuinely "bystander" nonparty. Professor Fitzpatrick quotes a Sedona Conference report saying that "[a] number of respondents have generally found that courts are not sympathetic to undue cost arguments."

If this is a widespread problem, a possible antidote would be to amend Rule 45 to command that the requesting party reimburse every nonparty for all costs it incurs in complying with a subpoena. It is not certain whether Professor Fitzpatrick is urging that, or that on motion the court should make such an award.

One potential difficulty would be to determine what those costs actually are. For example, some large organizations—hospitals might fit this model—have departments that mainly or entirely address subpoenas. It may be that internet companies need such departments to respond to subpoenas regarding user activities. Would the salaries and overhead associated with those departments be the measure of "costs" of complying with subpoenas? Is it only "outside" costs (e.g., fees of outside attorneys who must be employed to supervise the collection of information and review it before production)? On this score, it might be noted that although nonparties are

entitled to withhold from production any privileged materials, Rule 45(e)(2)(A) also requires the preparation of a "privilege log" regarding such withheld items. Compiling that log is a task likely to fall on in-house or outside counsel.

No doubt such determinations of the costs of various litigation activities must presently be computed by courts on occasion. For example, Rule 37(a)(5) says that when a discovery motion is decided, the court must impose on the losing party the prevailing party's "reasonable expenses" in litigating the motion.

"The great operative principle of Rule 37(a)(5) is that the loser pays." 8B Fed. Prac. & Proc. Civ. § 2288 (3d ed.). Whether that often includes time spent by the party's regular employees, as compared with in-house or outside counsel, is not entirely certain. And it does not seem that this rule is enforced as often as the original framers might have expected in the 1930s. But from the beginning, costs were not to be imposed if the court found that the losing party's position were substantially justified. Perhaps courts could be asked to determine whether subpoenas were substantially justified. That could be a challenging undertaking.

A less aggressive approach than requiring that "all" costs incurred in complying with the subpoena might be to amend the rule to direct that the court should impose on the requesting party the "disproportionate" costs of complying with a subpoena. It would seem that imposing disproportionate costs would run afoul of the rule's protection for nonparties. And there is much to be said for affording them more protection than parties, as the rule says is already true.

Determining whether document subpoenas (the focus of the submission) actually often impose undue expenses on nonparties would probably require some effort to obtain empirical evidence, though experience of Advisory Committee members could serve as a starting point. Putting that aside, however, it is not clear how much improvement a rule change would make in current practice, which already states that nonparty witnesses deserve heightened protection from the court.

For one thing, it might be challenging for a court to determine what is "overbroad" or "excessive" in a document subpoena. Of course, under the current rules the court must make that determination when deciding whether to afford protection, perhaps on a motion to quash. There is not at present a large incentive to seek such cost recovery except in egregious cases. So a command to provide reimbursement might be an incentive for more (and larger) requests for reimbursement.

In incentive terms, in addition, there may be something to be said for leaving it to the producing party to be frugal about the costs of production. Routine cost shifting could encourage more expensive production, perhaps as a method of depleting a litigant's war chest.

Another issue would be defining "nonparty." Professor Fitzpatrick is seeking "to make nonparties whole again" (based on his reading of cases from the 1930s and 1940s). But corporate interrelationships might muddy the waters on whether Corporation A is really so separate from Corporation B that a subpoena on Corporation B involves a nonparty to a suit against Corporation A. Suppose A and B are both subsidiaries of Corporation C. Is the nonparty label really appropriate?

Under Rule 34, a party is required to produce all materials under its "possession, custody, or control." There certainly are occasions in which courts are faced with determining whether Corporation A really has the practical ability to obtain and produce materials in the possession of Corporations B and C. So perhaps the "possession, custody, or control" standard solves this problem; a subpoena is only required when that standard does not require the party to produce in response to a Rule 34 request. Perhaps the party seeking the documents would conclude that rather than fighting that fight, it is simpler to serve a subpoena on Corporations B and C. Should that choice produce a mandatory cost shift?

More generally, the "requester pays" notion has had a somewhat checkered career in the Civil Rules. About a dozen years ago, the Discovery Subcommittee of the time (chaired by Judge Paul Grimm) took a careful look at suggestions for adopting a "requester pays" rule for the federal courts. The background on that effort can be found in the agenda book for the November 7-8, 2013, meeting of the Advisory Committee and the minutes of that meeting. Links to those materials are included at the end of this memorandum. Ultimately, that undertaking was not pursued.

Farther in the background was the experience of 1998-99, when the Advisory Committee embraced an amendment to Rule 26(b)(2) to empower the court to imposes costs on a party that insisted on disproportionate discovery. After much discussion, the Judicial Conference rejected that change.

The nonparty subpoena is not the same as these prior rulemaking episodes. But the general difficulties of the "requester pays" idea in a system operating under the American Rule that each side pays its litigation expenses are reasons to pause even in the Rule 45 context.

For the present, the issue is whether to pursue Professor Fitzpatrick's proposal.

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Reference Material Link(s):

- November 2013 agenda book (see pages 189-237)
- April 2014 agenda book (see pages 34-39 for relevant minutes from Nov. 2013 meeting)

Attachment(s):

- Suggestion 25-CV-E (Brian Fitzpatrick)

VANDERBILT
Law School

March 5, 2025

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendment to Rule of Civil Procedure 45

Dear Committee:

I am writing to ask you to consider amending Rule of Civil Procedure 45. The current Rule requires nonparties to foot the bill for expensive document requests and the like from plaintiffs and defendants. This is neither just nor efficient. Whatever justification there might be to saddle an adverse litigant with the expense of your production requests, there is none whatsoever to saddle a third party with it. Moreover, it is Economics 101 that people who do not pay for something will consume too much of it; experience has shown that production requests of nonparties are no different. *See, e.g., The Sedona Conference Commentary on Non-Party Production and Rule 45 Subpoenas*, 9 Sedona Conf. J. 197 (2008). The Rule should be amended to make nonparties whole when they respond to production requests from litigants.

Indeed, I wonder if this might have been the original design of Rule 45 and it was lost to technological advancement and inertia. Unlike the Rules to take discovery from parties, Rule 45 has always required litigants to pay nonparties' costs to appear in person to testify. *See* Fed. R. Civ. P. 45(c) (1938) ("Service of a subpoena upon a person named therein shall be made by . . . tendering to him the fees for one day's attendance and the mileage allowed by law."); Fed. R. Civ. P. 45(b) (same). I suspect this generally made nonparties whole back in 1938. The Rule was built upon the preexisting practices of subpoenas *ad testificandum* and *duces tectum*. *See* Advisory Committee Notes to Fed. R. Civ. P. 45 (1938). The first required a witness to appear to testify; the second required a witness to appear with documents: it literally means "appear and bring with you." I gather witnesses usually produced documents back then by showing up with them in person. *See* George Ragland, Discovery Before Trial 184-88 (1932) (canvassing the document production devices upon which the Federal Rules were built, including subpoena *duces tectum*). This would have enabled nonparties to collect from requesting litigants the same witness fees that would be paid to any other witness. *See* Fed. R. Civ. P. 45(c) (1938). I suspect this usually made nonparties whole because time and travel to appear were probably the main costs of document production back then; there were no photocopy machines, let alone computers. *See* Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. Rev. 691, 743-44 (1998) ("[T]he drafters as a group would be amazed at . . . the advent of copying machines and computers; the huge size of law firms and litigation departments; the many factors leading to the large overhead of many firms . . . ."). But, even when it didn't because

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unusual costs arose, the original Rule further permitted courts to make nonparties whole by requiring "the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents." Fed. R. Civ. P. 45(b) (1938).[1]

Needless to say, the main costs of production are no longer the time and travel to appear with the documents. Although the Rule currently provides a hodgepodge of mechanisms by which nonparties can protect themselves from the cost of responding to requests from litigants,[2] they rarely make nonparties whole anymore. *See, e.g., Sedona, supra,* at 204 ("A number of respondents have generally found that courts are not sympathetic to undue cost arguments . . . ."). Might it be time to revise the Rule to make nonparties whole again?

Thank you for your consideration.

Sincerely,

Brian Fitzpatrick
Milton R. Underwood Chair in Free Enterprise
and Professor of Law

[1] *See also Park Bridge Corp. v. Elias*, 3 F.R.D. 93, 93 (S.D.N.Y. 1943) ("In connection with an examination by [a witness] not a party, a subpoena duces tecum was served . . . . Since the documents are . . . written in a foreign language, . . . the Clerk of the Court [shall] employ a competent person to translate them into English at the expense of the plaintiff."); *Pathe Lab'ys v. Du Pont Film Mfg. Corp.*, 3 F.R.D. 11, 14–15 (S.D.N.Y. 1943) ("The fact that the records are voluminous and cumbersome and are scattered throughout the various plants of E. I. du Pont is troublesome but . . . the plaintiff has offered to send accountants at its own expense . . . to inspect the records in lieu of having them brought before the Special Master. This should eliminate much of the inconvenience and expense to which the witness would otherwise be put.").

[2] *See* Fed. R. Civ. P. 45 (d)(1) (allowing courts to sanction litigants for "imposing undue burden or expense"), (d)(2) (requiring courts to protect objecting persons from "significant expense"), (d)(3) (requiring courts to quash or modify a subpoena that "subjects a person to undue burden"), (e)(1)(D) (allowing courts to order production of even inaccessible materials with "conditions").

TAB 16

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

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

DATE: **October 1, 2025**

As amended in 2000, Rule 5(d)(1)(A) now provides, "disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission."

When this amendment was adopted, many districts had local rules forbidding filing of such materials that arguably were inconsistent with the Civil Rules, which called for filing of discovery requests and responses including deposition transcripts, interrogatory answers, and responses to requests for admissions. (Though Rule 34 requests and responses to those requests were filed, it was not common practice even before electronically stored information (ESI) entered the scene for the actual documents or other materials produced themselves to be routinely filed in court. Even in hard-copy days, very often extremely large volumes of material were produced in response to Rule 34 requests. That sort of practice even generated a label—"dump truck discovery.")

A major concern behind the 2000 rule change (and the local rules that prompted it) was that clerk's file rooms were overloaded with discovery material "junking up" paper court files. As Mr. Foster points out in his Suggestion, 25-CV-J, electronic filing probably has reduced or eliminated that concern.

Mr. Foster's concern is about the time and cost involved in serving discovery papers by U.S. mail. He says that currently service by CM/ECF is much cheaper and faster than U.S. mail, but available only for items filed in court. Accordingly, he would revise Rule 5(d) to permit parties to file materials in court as of old, but now with the CM/ECF service feature avoiding costs and delay that result from service by "snail mail." He notes that such a rule change could also produce environmental benefits.

One reaction is that it seems that service by mail is likely the extreme exception in the federal courts, even for discovery materials. Rule 5(b)(2)(E) permits sending items not filed in the court's electronic-filing system "by other electronic means that the person consented to in writing." At least for lawyers, one would think that usually is the solution to the problem Mr. Foster seeks to solve. But he reports that "there are unfortunately attorneys who refuse to consent to email service (despite regularly receiving equivalent email notice through CM/ECF), and disputes arise in other cases regarding whether or not a party did or did not consent to service by mail."

Permitting parties to overcome such recalcitrance by electing to file in court and rely on CM/ECF might solve significant problems.

Mr. Foster also takes account of self-represented litigants who are not registered in CM/ECF. As it happens, there is presently an inter-committee project addressing whether such litigants should be permitted to use CM/ECF, and also whether they should be directed to serve by mail when CM/ECF effects service of things that must be filed in court. There is no reason to think that Mr. Foster's proposal is incompatible with the inter-committee project, though if both proceed forward some coordination would be advisable given that both proposals would amend Rule 5(d)(1).

Mr. Foster also suggests that an alternative would be to return to the pre-2000 regime of requiring filing in court of discovery requests and responses. Taking that tack "would prevent parties from attempting to gain advantage from delays in receipt associated with traditional mailing."

Evaluating this proposal goes beyond the experience of Ivory Tower academics. Instead, experienced judges and lawyers would be best positioned to evaluate rule changes along these lines. But even an initial review of the submission suggests questions:

(1) Will filing in court be easy for materials now exchanged in discovery? Mr. Foster says in a footnote that PDF filings "generally [do] not involve a large number of pages." On the other hand, he also notes that video depositions or other such materials could present greater difficulties.

(2) Would permitting or requiring filing in court put more pressure on issues related to filing under seal (treated elsewhere in this agenda book)?

(3) Except for self-represented litigants, is there really a widespread problem with attorneys refusing to consent to service by electronic means of discovery materials?

(4) Is it really true that having again to deal with filing of all discovery requests and responses would be manageable for the clerk's office?

(5) What strategic advantages might permission (but not compulsion) to file in court introduce? Presently, discovery materials are to be filed in court only if "used in the proceeding" or the court so orders. Absent filing under seal, that would open them to the world. Perhaps, then, permissive but not required filing in court would enable gamesmanship in terms of exposure to the world of materials not otherwise exposed to the world.

(6) Related to the current topic on filing under seal, would this change heighten pressure on protective order practice under Rule 26(c)? For example, did the previous requirement that discovery be filed in court (before the amendment in 2000) produce more protective order litigation? (Note that, as mentioned above, in many districts local rules forbade filing, so this pressure would not exist in those districts.)

* * * * *

No doubt there are many more questions to be considered. But for purposes of the October Advisory Committee meeting the chief question at present is whether there is reason to pursue this proposal, or instead drop it from the agenda.

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Attachment(s):

- Suggestion 25-CV-J (Mark Foster)

Law Office of Mark N. Foster, PLLC
Mark N. Foster, Attorney at Law[1]
P.O. Box 869, Madisonville, KY 42431
(270) 213-1303

March 28, 2025

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: *Rules Suggestion of Modifying Rule 5(d) to Allow Permissive Filing of Rule 26 Disclosures and Discovery Requests and Responses*

To Whom It May Concern:

I suggest that Rule 5(d) be changed to provide that parties may file Rule 26 disclosures, discovery requests and discovery responses.

The Rules have always required service of these documents. However, since these documents may not be filed under the current Rule, service cannot be accomplished through CM/ECF. Therefore, parties must serve the documents by mail or in-person.

Since Rule 5(d) was last amended in this regard twenty-five years ago, service by traditional United States Postal Service mail has unfortunately become slower and less reliable. During the same period, the cost, speed and reliability of electronic service (and storage of the electronic document) has improved dramatically. See Advisory Committee Note to Year 2000 Amendment to Rule 5(d) (discussing then-varying "present capacities to store filed materials that are not used in an action" only four years after Rule was amended to permit, but not require, electronic filing and before service by electronic means was even permitted).

In essence, the initial purpose of the Rule (and similar Local Rules that preceded it) of avoiding "junking up" paper court files has largely been made obsolete by technological progress. While a similar concern may arise with respect to each action's CM/ECF docket, any "junking up" of those dockets would be minimal and mitigated by the creation of an appropriate CM/ECF event that designates the event (of filing of disclosures or discovery requests prior to the time they are

[1] Licensed in Tennessee and Kentucky.

used in the proceeding) as not requiring Court action. The actual digital memory requirements associated with Court filing would be minimal.[2]

The change would permit a new form of service that is needed and would be beneficial. The comment for the 2018 amendment specifically recognized CM/ECF service or "service through the court's facilities as a uniform national practice," also writing that "[t]he time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney." However, because of the prohibition on filing in Rule 5(d), without the change this letter proposes, CM/ECF service remains impossible for Rule 26 disclosures and discovery requests and responses.

While service by email is possible by consent under current Rule 5(b)(2)(E), there are unfortunately attorneys who refuse to consent to email service (despite regularly receiving the equivalent email notice through CM/ECF), and disputes arise in other cases regarding whether or not a party did or did not consent to service by email. The proposed Rule change would allow a party to serve registered CM/ECF users by filing the documents, which would accomplish electronic service in a manner consistent with registered CM/ECF users' general receipt of court papers and also eliminate disputes about whether and when a document was served.

In addition to improving the efficient progress of civil actions, the Rule change would provide cost and environmental benefits, as parties will not be required to physically print and send through physical space. There are of course financial (postage or process server) costs of sending paper versions of documents. In addition, the current Rule commonly imposes a cost on the recipient of scanning the received paper document into the electronic format in which most law firms now operate. Further, while not large in the global sense, there would be some environmental benefits associated with electronic rather than paper service of documents: less paper used, a smaller carbon footprint due to less transportation of the documents, etc.

I would note that, while the vast majority of affected papers would be in cases solely involving parties represented by counsel who are registered users of CM/ECF, this change would also not adversely affect *pro se* and other parties who are not registered in CM/ECF. The change would allow filing. However, while filing through CM/ECF effects service through CM/ECF on CM/ECF registered users under Rule 5(b)(2)(E), the proposed change would not affect or remove the general requirement of serving persons who are not registered users through other means.

A variation of the change I am proposing would be to require parties to file these documents, rather than to merely remove the prohibition on filing. This would prevent parties from attempting to gain advantage from delays in receipt associated with traditional mailing. While I would also be in favor of this change, the change to simply allow filing I initially suggest above may be the best option as the first step. That change's merits will be demonstrated in its

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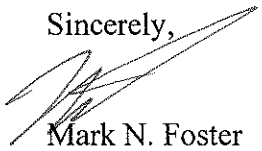
[2] Rule 26 disclosures, discovery requests, and discovery responses will be susceptible to filing in normal PDF format and generally not involve large numbers of pages. It may be beneficial to clarify in making the change that documents produced as responsive to requests for production (as opposed to the response to the request, itself), as well as depositions, both of which could involve more substantial storage requirements (in the cases of depositions, those that involve video components), should continue to not be filed until they are to be used in the proceeding.

operation, and experience under permissive filing will enable better evaluation of whether mandatory filing should be required.

Please let me know if the Committee will consider this change. Should you have any questions, I am happy to discuss further. Thank you.

Sincerely,



Mark N. Foster

TAB 17

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Andrew Bradt**

RE: **Random Case Assignment**

DATE: **October 1, 2025**

Whether the Advisory Committee should pursue a Federal Rule of Civil Procedure covering case assignment in the district courts remains on the agenda. As has been the case since the Advisory Committee began considering this issue in 2023, the reporters are monitoring developments in the district courts in response to the guidance issued by the Judicial Conference to randomly assign cases seeking injunctions against nationwide or statewide actions within a district. At the time the Advisory Committee received suggestions to consider this issue, so-called "universal" or "nationwide" injunctions were a hot topic. The Supreme Court's decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), has changed the state of play. The reporters will continue to monitor the issue as the district courts adapt to this decision and will report further developments at our next meeting.

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TAB 18

MEMORANDUM

TO: Advisory Committee on Civil Rules

FROM: Reporters' Privacy Rules Working Group
Carolyn Dubay, Chief Counsel, Rules Committee Staff
Sarah Sraders, Rules Law Clerk

DATE: October 3, 2025

RE: Status of Potential Privacy-Related Amendments to the Federal Rules of Procedure

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This memorandum provides a brief overview of the status of consideration by the Appellate, Bankruptcy, and Criminal Rules Advisory Committees of potential privacy-related amendments to their respective rule sets. This review is part of a joint committee project initiated in 2022 to consider whether to amend the existing rules of procedure to require complete redaction of social security numbers (SSNs) and to require use of a pseudonym when identifying a minor in public filings in CM-ECF. The goal of the project is to present a package of proposed amendments for public comment across rule sets to the Standing Committee at its June 2026 meeting for approval.

As a brief background, the privacy project initially involved consideration of whether other privacy-related issues arising from public court filings should be addressed along with the issue of SSNs and identification of minors. This included issues related to exemptions from the redaction requirement, the scope of waivers by self-represented litigants who fail to comply with redaction requirements, additional categories of protected information that could be subjected to redaction, and possible protection of other sensitive information. Ultimately, the focus of the privacy project narrowed to potential rule changes related to redaction of individual taxpayer identification numbers and identification of minors.

Some of the issues identified to consider going forward included: (1) whether to also require complete redaction of taxpayer identifying information besides SSNs and individual taxpayer identification numbers (ITINs), to include employer identification numbers (EINs); and (2) whether in certain contexts (such as bankruptcy proceedings) complete redaction of taxpayer identification information would be impracticable and create a host of potential problems in the administration of bankruptcy cases.

The Advisory Committees have also received information from the Federal Judicial Center (FJC) regarding its study on the incidence of unredacted SSNs found in public court records in PACER. *See* Reports & Studies | Federal Judicial Center.

With this background, the Civil Rules Advisory Committee is requested to provide initial feedback on potential amendments to Fed. R. Civ. P. 5.2(a) relating to redaction for privacy concerns. Any potential amendment to Fed. R. Civ. P. 5.2(a) would be in tandem with amendments to Fed. R. Crim. P. 49.1(a) as these two rules parallel each other (except in instances specific to civil or criminal cases).

The Advisory Committee is asked for initial feedback on four issues:

1. *In general, whether complete redaction of individual social security numbers or taxpayer identification numbers is appropriate?*

   This issue has been discussed by the Bankruptcy Rules Advisory Committee at its September 2025 meeting. The Advisory Committee considered recommendations on these issues made by its Technology and Privacy Subcommittee. See below for hyperlink to agenda item. There was consensus that the unique nature of bankruptcy proceedings requires adhering to the existing rule in Rule 9037(a)(1) to redact all but the last four digits of social security numbers and taxpayer identification numbers. With respect to rules governing appeals either to district courts, bankruptcy appellate panels, or courts of appeals, a different redaction rule may be appropriate to ensure uniformity in rules in appeals. Thus, while the Bankruptcy Rules Advisory Committee may not be inclined to require complete redaction under Rule 9037(a)(1), the rules governing appeals in Part VIII of the Bankruptcy Rules, and specifically Rule 8011, may require amendment consistent with action taken by the Appellate Rules, Civil Rules, and Criminal Rules Advisory Committees.

   In this regard, the issue of complete v. partial redaction of social security numbers and taxpayer identification numbers will be discussed by the Appellate Rules Advisory Committee at its October 2025 meeting. An oral update will be provided on those discussions at the Civil Rules Advisory Committee meeting. The Appellate Rules Committee will consider whether to propose an amendment to Rule 25 to provide that a party or nonparty must fully redact a SSN from any filing it makes. Any amendment to Rule 25 would also clarify that the duty to redact does not apply to a clerk who simply submits the record of the proceedings below. See below for hyperlink to agenda item.

2. *Should the redaction requirement also pertain to Employer Identification Numbers (EINs) as suggested in the proposal to be considered by the Criminal Rules Advisory Committee, which as written would include those issued to both entities and individuals?*

   This issue was also discussed by the Bankruptcy Rules Advisory Committee at its September 2025 meeting, with a note in the agenda item that the Criminal Rule 49.1 Subcommittee had determined that the existing language in the rules referring to redaction of an individual's "taxpayer identification number" could be read to include both ITINs and EINs. By expressly including EINs, however, the Bankruptcy Rules Advisory Committee felt that this could expand the original intent of protecting an individual's taxpayer identification number from fraudulent use. EINs, on the other hand, could apply to individuals (e.g., hiring and paying regular household help) and organizations. In addition, there may not be a true risk of fraud arising from the disclosure of EINs. To further complicate the issue in bankruptcy matters, Form 101 requires disclosing the full EIN. The Bankruptcy Rules Advisory Committee sees no policy reason to redact EINs and that EINs are needed in the bankruptcy context. There was some concern expressed that a change in the privacy rules for the other committees suggesting that EINs are included as TINs might cause problems in interpreting Rule 9037.

As to the position of the Appellate Rules Advisory Committee on the issue of EINs, an oral report will be provided to the Civil Rules Advisory Committee.

3. *In general, whether the redaction requirement relating to the names of minors should be changed from initials to pseudonyms?*

   The Bankruptcy Rules Advisory Committee supported an amendment to replace the redaction requirement for minors with a pseudonym in Rule 9037(a)(3) after discussing whether there were any bankruptcy reasons to deviate from the language proposed for Criminal Rule 49.1. An oral update will be provided at the Civil Rules Advisory Committee meeting with respect to the discussion of the Appellate Rules Advisory Committee on this issue.

4. *Should the redaction requirement be clarified to expressly indicate that it applies to both filings, and exhibits and attachments, as suggested in the proposal being considered by the Criminal Rules Advisory Committee?*

   The Bankruptcy Rules Advisory Committee decided that if the other advisory committees decided to include the language, they would consider doing so as well. There was also discussion of how the failure to appropriately redact information in an exhibit or attachment (or filings in general) would be reviewed for compliance with the rule. Laura Bartell further noted that the FJC study shows that unredacted SSNs most often appear in exhibits and attachments, so this could be a beneficial clarification.

   An oral update will be provided at the Civil Rules Advisory Committee meeting with respect to the discussion of the Appellate Rules Advisory Committee on this issue.

For purposes of the Civil Rules Advisory Committee's review and discussion of these issues, the table at the end of this memorandum compares current Civil Rule 5.2 to potential amendments to Criminal Rule 49.1 proposed by the Criminal Rules Committee's subcommittee on privacy (Rule 49.1 Subcommittee) and to be considered at the Criminal Rules Advisory Committee meeting on November 5, 2025. See link below for Criminal Rules Advisory Committee Fall 2025 materials. The potential amendments would pertain only to section (a), although the complete rule text for each rule is provided for reference.

With respect to the proposed amendments to Criminal Rule 49.1 (their privacy rule), the Criminal Rules Advisory Committee's Rule 49.1 Subcommittee, with the assistance of the style consultants, unanimously approved a version of Rule 49.1 that: (1) precludes the use of all digits of social-security numbers and taxpayer-identification numbers; (2) includes employer-identification numbers (EINs) in this protection; (3) requires the use of pseudonyms instead of initials for minors; and (4) explicitly applies these requirements to any exhibits or attachments. These changes are indicated in the redline version of Rule 49.1 included in the table below. More information on the Subcommittee's consideration of these issues is also included in the hyperlinked materials to the Criminal Rules Advisory Committee's Fall 2025 agenda book (available on October 17, 2025).

Current F.R. Civ. P. 5.2	Sketch of Potential Amendments to F.R. Crim. P. 49.1 (to be discussed in November 2025)
(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number.	**(a) Redacted Filings.** Unless the court orders otherwise, ~~in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual,~~ a party or nonparty making ~~the filing may include only;~~ an electronic or paper filing with the court [, including any exhibit or attachment,] must: (1) ~~the last four digits of the~~ omit or completely redact all social-security ~~number and~~ or other taxpayer-identification numbers, including employer-identification numbers; and (2) if any of the following types of information appear in the filing, include only: (A) the year of the individual's birth; ~~(3)~~ (B) ~~the minor's initials~~ a pseudonym in place of the name of an individual known to be a minor; ~~(4)~~ (C) the last four digits of ~~the~~ an individual's financial-account number; and ~~(5)~~ (D) the city and state of ~~the~~ an individual's home address.
(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following: (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; (2) the record of an administrative or agency proceeding; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;	**(b) Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following: (1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; (2) the record of an administrative or agency proceeding; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.	(5) a filing covered by Rule 49.1(d); (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255; (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case; (8) an arrest or search warrant; and (9) a charging document and an affidavit filed in support of any charging document.
(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows: (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record; (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to: (A) the docket maintained by the court; and (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.	**(c) Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.
(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.	**(d) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.
(e) Protective Orders. For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.	**(e) Protective Orders.** For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.	**(f) Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.
(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.	**(g) Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.
(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.	**(h) Waiver of Protection of Identifiers.** A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

Reference Material Link(s):

1. Appellate Rules Committee Agenda Book (Oct. 2025), *see* Reporter's Memorandum at pages 212-216.
2. Bankruptcy Rules Committee Agenda Book (Sep. 2025), *see* Reporter's Memorandum at pages 158-164.
3. Criminal Rules Committee Agenda Book (Nov. 2025), to be published by October 17, 2025.

TAB 19

MEMORANDUM

DATE: September 26, 2025

TO: Advisory Committee on Civil Rules

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

I write to report on the project on service and electronic filing by self-represented litigants, which has two basic goals. As to service, the project's goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a notice of case activity[1] through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit self-represented litigants to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

Part I of this memo summarizes developments to date this year. Part II discusses specific drafting and policy questions on which we would like to get the advisory committees' views. Part III analyzes an issue that newly arose over the summer – namely, what the Rules currently say, and what they ought to say, about the rejection of a proposed filing because it is not submitted in conformity with rules governing electronic filing.

This memo is somewhat lengthy, so I am including a table of contents:

Table of Contents

1 Also known as a notice of electronic filing.

I. Project developments during 2025

At the time of the Standing Committee's January 2025 meeting, the Appellate, Civil, and Criminal Rules Committees appeared open to working in tandem to move forward with proposed amendments, but the Bankruptcy Rules Committee had expressed concerns specific to the bankruptcy context. Based on the Standing Committee's January 2025 discussion, I reported to the advisory committees in spring 2025 that the path seemed clear to proceed with consideration of proposed amendments to the Civil, Appellate, and Criminal Rules even if corresponding amendments to the Bankruptcy Rules were not to be proposed. Accordingly, in memoranda to the advisory committees, I sketched possible amendments to the Civil, Criminal, and Appellate Rules that would achieve the twin goals of the project. I also discussed two different packages of amendments to the Bankruptcy Rules – one that would parallel the proposed amendments that were to be considered by the Civil, Appellate, and Criminal Rules Committees, and an alternative that could be adopted if the Bankruptcy Rules Committee instead were to adhere to its decision not to implement the proposed filing and service changes.

At its spring 2025 meeting, the Bankruptcy Rules Committee further discussed the project and decided that – in light of the fact that the Civil, Criminal, and Appellate Rules Committees were willing to proceed with proposed amendments – the Bankruptcy Rules Committee should attempt to participate as well. The Bankruptcy Rules Committee referred the project to a subcommittee and tasked the subcommittee with attempting to find ways to address the concerns that originally prompted the Bankruptcy Rules Committee to decide that the Bankruptcy Rules should not be included in the project's package of proposed amendments.

In June 2025, I circulated to the project's working group (composed of the Advisory Committee reporters, court clerk liaisons, Rules Office staff, FJC staff, and consultants) a memo reporting on the spring 2025 developments, and I appended an updated draft of the proposed rule sketches. The memo set out a set of questions for consideration by the working group. Part II of this memo incorporates feedback provided over the summer by the working group and by the Criminal Rules Committee's Pro Se Filing Subcommittee. I am greatly indebted to the many participants who carefully and thoughtfully engaged with these questions. Also, Part III of this memo grows out of a question raised during the summer deliberations.

The Bankruptcy Rules Committee's Technology and Privacy Subcommittee considered the project at a meeting in late August 2025. In the fall 2025 agenda book for the Bankruptcy Rules Committee, the Technology and Privacy Subcommittee reported as follows:

> After a full discussion of the options, the Subcommittee voted to recommend that the Advisory Committee opt into both aspects of the SRL project and consider at the spring 2026 meeting amendments to Rules 5005, 8011, and 9036 paralleling those to be proposed by the other advisory committees.
>
> The Subcommittee made this decision for several reasons. First, this approach would keep the Bankruptcy Rules on filing and service consistent with the rules applicable in the district courts and courts of appeal. Doing so might reduce confusion and would eliminate the need to resolve which rules should apply to bankruptcy appeals. Second, having consistent rules would also avoid any questions about why SRLs are treated differently in the bankruptcy courts…. Finally, because at this stage the advisory committees are only proposing publication of the amendments for comment, going all in might allow the Advisory Committee to gauge from the comments how broadly shared are the concerns that have been expressed by committee members. Following publication, the Advisory Committee would be able to decide whether to proceed with the amendments or to opt out of the project in whole or in part based on the comments received.

At its fall 2025 meeting, the Bankruptcy Rules Committee voted to approve the Subcommittee's proposal. Thus, the goal will be to draft a coordinated set of amendments to all the rules – including the Bankruptcy Rules – for consideration at the spring 2026 advisory

committee meetings and publication (it is hoped) in summer 2026. There will be special issues to address for the bankruptcy context (such as how to address the current requirement of "wet signatures" on documents signed by debtors under penalty of perjury), but the other Advisory Committees can now proceed on the assumption that proposals to amend the relevant Bankruptcy Rules provisions will be part of the package of proposed amendments for publication. (The possibility remains that – after publication – the Bankruptcy Rules Committee will decide not to recommend final approval of the Bankruptcy Rules provisions. The consensus that developed in favor of "opting in" relied in significant part on the idea that publication would be an opportunity to learn whether the proposals would be more problematic in the bankruptcy context than elsewhere.)

II. Drafting and policy questions for the fall Civil Rules Committee meeting

This part of the memo collects feedback received during spring and summer 2025. To illustrate the ideas discussed in this memo, I'm enclosing two versions of an updated set of the sketches of the potential draft rules that were included in the spring 2025 advisory committee agenda books; one set is clean, and the other set is redlined to show how the draft rules differ from the versions that were in the spring agenda books. I'm including only the drafts of the Civil, Criminal, and Appellate Rule amendments; the Bankruptcy Rules aspect of the project was sufficiently uncertain (until yesterday's vote by the Bankruptcy Rules Committee) that updating the possible Bankruptcy Rules amendments seemed premature. In this memo, I am highlighting only the issues that seem pertinent to the Civil Rules, and I pass lightly over (or omit) issues that pertain only to another set of rules.[2]

Part II.A seeks the Civil Rules Committee's input on issues relating to reasonable exceptions, conditions, and restrictions concerning e-filing access for self-represented litigants. Part II.B turns to the service provision, and asks whether we should retain the caveat concerning non-receipt. Part II.C asks whether the draft should continue to include the proposed new provision concerning service of unfiled papers. Part II.D notes that consensus has formed in support of the term "notice of case activity" in place of other terms such as "notice of electronic filing." Part II.E notes the question whether the proposed rules should use the term "unrepresented" or "self-represented" and observes that the answer might vary across the rules sets. Part II.F, in turn, observes that consensus developed over the summer in support of referring to self-represented (or unrepresented) "parties" rather than "persons." Part II.G notes broad support among the working-group participants for using longer, more explicit wording where it seems likely to assist self-represented litigants. And Part II.H very briefly notes that the Bankruptcy Rules Committee's fall 2025 decision to participate in the project simplifies the task of dovetailing the provisions that apply to bankruptcy cases at the trial level and on appeal.

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2 The omitted issues include whether it might be worthwhile to expand the project to include an update to the inmate-filing provisions in Appellate Rules 4(c)(1) and 25(a)(2)(A)(iii), and perhaps also those in the Habeas and Section 2255 Rules 3(d); participants who have opined on this issue have all agreed that we should not expand the project to encompass these issues.

A. E-filing: Reasonable exceptions, conditions, and restrictions

During the spring 2025 Civil Rules Committee meeting, a member asked what the phrase "reasonable exceptions" means in the draft e-filing rule. During the Appellate Rules Committee meeting, a member asked how "reasonable exceptions" (in subpart (ii) of the draft e-filing rule) relates to "reasonable conditions and restrictions" (in subpart (iii) of that rule).

The current e-filing rules (other than the Criminal Rule) already employ the concept of "reasonable exceptions." That is, the rules provide that a self-represented litigant "may be required to file electronically only by court order or by a local rule that includes reasonable exceptions." The proposed draft carries this phrase forward in that provision.

The proposed draft rule additionally uses the "reasonable exceptions" phrase in its new provision setting limits on local provisions that prohibit self-represented litigants from using CM/ECF. Proposed Civil Rule 5(d)(2)(B)(ii), as shown in the spring 2025 agenda books, stated: "If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented persons from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the case]."

The draft rule also uses the idea of "reasonable conditions and restrictions." Proposed Civil Rule 5(d)(2)(B)(iii) states: "A court may set reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system."[3]

The proposed draft Committee Note to Civil Rule 5, as it appeared in the spring 2025 agenda books, explained:

> Under Rule 5(d)(2)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5(d)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.
>
> A court can comply with Rules 5(d)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for

3 In quoting the current draft, I incorporate changes discussed later in this memo. See, e.g., infra Parts II.E and II.F (discussing use of "unrepresented" and "party").

receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5(d)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 5(d)(2)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Reflecting on the Civil Rules Committee member's question, I think it would be helpful to clarify in the Committee Note that the "reasonable exceptions" referred to in the Rule text means exceptions that provide the "reasonable access" discussed in the Committee Note. I think we could do this by adding this sentence at the end of the second quoted Note paragraph above: "That is, a local rule generally prohibiting access to the court's electronic-filing system would include 'reasonable exceptions' (within the meaning of the Rule) if it provided reasonable access to the court's electronic-filing system." This addition is shown in the enclosed updated sketches.

As to the Appellate Rules Committee member's question, I think the answer is that "reasonable exceptions" (in subpart (ii)) and "reasonable conditions and restrictions" (in subpart (iii)) are intended to work in tandem, but (iii) is broken out separately to stress the courts' flexibility under the rule (including their ability to impose conditions and restrictions by court order rather than only in a local rule). It may be useful to add language to the Committee Note to explain this at greater length. Something like this might help:

Rules 5(d)(2)(B)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits unrepresented parties from using the court's e-filing system, the "reasonable exceptions" required by item (ii) should align with the types of "reasonable conditions and restrictions" referenced in item (iii). That is, a local rule may allow unrepresented parties e-filing access only in particular circumstances—such as after completing a training or agreeing to specified formatting standards—provided those requirements are reasonable under item (iii).

Conversely, item (iii)'s authorization for courts to impose reasonable conditions on unrepresented parties' access also informs what counts as a reasonable exception under item (ii). For example, a local rule that generally

> prohibits unrepresented parties from e-filing might nonetheless provide an exception where the unrepresented party meets conditions similar to those described in item (iii). The two provisions thus establish a flexible, complementary framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures that courts retain authority to structure access responsibly.

I've added this concept to the sketch of the Committee Note. Suggestions of better ways to clarify these points are welcome.

The Committee Note's discussion of incarcerated litigants came up during the Bankruptcy Rules Committee's conversation – in particular, the Note's statement that denying access to incarcerated litigants would not violate the Rule's concept of "reasonable access." A participant read this to mean that the Note was suggesting that it would be reasonable to deny access to a particular type of self-represented litigant if there were a lot of them – and suggested that by analogy it would be reasonable to deny access to self-represented debtors in bankruptcy because there are a lot of them. That is definitely not what I had in mind when drafting the reference to incarcerated self-represented litigants; it's not their numerosity, but rather the fact that they are incarcerated and lack consistent access to electronic devices and the internet, that justifies treating them differently for purposes of the idea of "reasonable access." The misunderstanding that surfaced in the Bankruptcy Rules Committee discussion suggests that this should be spelled out in the Note. I've done so by adding a parenthetical to the relevant sentence in the Note: "(in light of the distinctive logistical considerations that apply in carceral settings)."

Also during the Bankruptcy Rules Committee's discussion, a member asked whether a court would comply with the rule if it adopted a local rule stating that self-represented litigants can use the court's e-filing system only with leave of court. This seems to me to present a policy question that the Advisory Committees should consider. On one hand, if a district that currently says that no self-represented litigants are ever allowed to use the court's e-filing system switches to saying they can only use it with court permission, one could say that is a step in the right direction. But on the other hand, if a district's local rule *says* court permission is required but *in practice* the court never grants such permission, that would not actually help the self-represented litigants; and arguably, such a local rule, as applied by a court that never grants permission even to well-qualified self-represented litigants, might not count as a rule that "includes reasonable exceptions." Over the summer, a member of the Criminal Rules Committee suggested that language could be added to the Committee Note to address this topic. I have added such language to the enclosed draft, shown in brackets, in order to facilitate discussion: "[Some courts have adopted local rules that permit unrepresented parties to use the court's electronic filing system only if they obtain permission from the judge to whom the case is assigned; such a local rule would meet the Rule's requirement of 'reasonable access' so long as such permission is not unreasonably withheld in practice.]"

B. Service: Whether to retain caveat regarding learning of non-receipt

Under the current service rules, the provision on service by means of CM/ECF has this caveat: "[S]ervice [by CM/ECF] is complete upon filing … , but is not effective if the filer or … learns that it did not reach the person to be served." In the sketches for the spring agenda books, I did not include this caveat in the service-by-CM/ECF provision. The draft Committee Note explained:

> Although [the draft Rule] carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in [the new service-via-CM/ECF provision]. This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

During the spring 2025 discussions, a member of the Criminal Rules Committee expressed wariness about omitting this caveat, so over the summer I flagged this issue for discussion by the working group. Participants voiced varying perspectives on this issue. One participant suggested omitting the caveat from the service-via-CM/ECF provision's text but adding an admonition to the Committee Note that practitioners should alert their opponent if they become aware of a snafu with that service.[4] One of the clerk representatives felt that the caveat should be retained in the provision concerning service by other electronic means – because more could go wrong with service via email, for example – but seemed less convinced that the caveat was necessary for the service-via-CM/ECF provision – because "it is the court that would get the 'bounceback' notice if a NEF/NDA was not received by a party or counsel to whom it was sent, and we would always do something about it (even in the absence of a caveat in the rule)." On the other hand, another clerk representative suggested that system outages could occasionally disrupt normal electronic service via CM/ECF, and that the caveat could be useful in such instances. Accordingly, I have added bracketed language to the rule sketch illustrating how the caveat could be included in the service-via-CM/ECF provision.[5]

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4 The suggested note language would read: "The omission of this provision from this rule does not mean that a filer who learns that notice of case activity has not reached someone should do nothing; professionalism and courtesy require at least alerting the party so that they can correct the problem, which might be at their end or at the court's end." This strikes me as useful language to include in the Note, unless others feel that it is the sort of practice advice that we are discouraged from including in Committee Notes.

5 See proposed Civil Rule 5(b)(2)(A), proposed Criminal Rule 49(a)(3)(A), and proposed Appellate Rule 25(c)(1)(A).

C. Service of un-filed papers

The Civil Rule 5 sketch shown in the spring agenda books included a proposed Civil Rule 5(b)(4) on service of documents not filed with the court: "Rule 5(b)(3) governs service of a paper that is not filed." The Committee Note explains: "New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a notice of filing, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3)."

In revising the rule sketches for comment by the working group in summer 2025, I retained the service-of-papers-not-filed provision as proposed Civil Rule 5(b)(4) and proposed Criminal Rule 49(a)(5), and I also added that provision as proposed Appellate Rule 25(c)(5), because Ed Hartnett had pointed out an example of an item that could be served without being filed in connection with an appeal.[6] I sought the working group's comments on whether these provisions are worth including in the proposed rules.

As background for my inquiry, I noted that the Civil and Criminal Rules take different approaches as to papers that are served but not filed. The Civil Rules take the view that, for example, discovery responses are papers that are served, and so when Civil Rule 5(d)(1) directs that papers after the complaint that must be served must also be filed, it includes an additional sentence listing out items (disclosures, discovery requests, and discovery responses) that mustn't be filed as an initial matter.

Criminal Rule 49, for its part, does not discuss in explicit terms service of, for example, disclosures under Criminal Rule 16 or production of witness statements under Criminal Rule 26.2. It may be that Criminal Rule 49, unlike Civil Rule 5, simply regards such papers as falling outside its ambit. Rule 49(a)(1)'s list of papers that must be served is: "any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper." By contrast, Civil Rule 5(a)(1)'s list of papers that must be served explicitly includes "discovery paper[s] required to be served on a party, unless the court orders otherwise," Civil Rule 5(a)(1)(C).

This difference might lead to a difference concerning proposed Criminal Rule 49(a)(5). Even in Civil Rule 5, it's not clear to me that we really need the served-but-not-filed provision; it simply makes explicit what is already implicit, namely, that if a document is not filed, then it won't be served on anyone via the court's electronic-filing system. Given the different treatment of the topic of served-but-not-filed documents in the Criminal Rules, I wondered whether this provision might be even less useful in the context of the Criminal Rules.

In discussions over the summer, working-group participants from the Appellate Rules

6 The example was the designation of material for the appendix pursuant to Appellate Rule 30(b)(1).

Committee supported including the service-of-papers-not-filed provision, observing that the explicit statement of how to handle such service could be useful guidance for self-represented litigants. (Some participants from the Criminal Rules Committee, by contrast, questioned whether the provision should be included in the Criminal Rule.)

D. Using "notice of case activity" instead of "notice of filing"

The sketches included in the spring agenda books used the term "notice of filing" to denote the notice of electronic filing, and the draft rules defined that term to "include[] a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket."

Since then, we received feedback from CACM advisory groups that suggested that we should instead use the term "notice of case activity." The groups explained "that 'filing' fails to reflect the full spectrum of entries and that the word 'docket' is not in common usage among the public."

In the rule sketches that I circulated to the working group in summer 2025, I updated the terminology to use "notice of case activity," and solicited input on the change. Comment on this from the working group participants (and the Criminal Rules Committee subcommittee) was uniformly positive.

E. "Unrepresented" versus "self-represented"

The current rules use "unrepresented" to refer to a litigant who does not have a lawyer. With the concurrence of the style consultants, I proposed, in the spring 2025 agenda book materials, that we could instead use "self-represented." However, by the time of the spring meetings I was reconsidering that suggestion, because it turned out to be more complicated than I had anticipated. In the updated draft rule amendments circulated to the working group in summer 2025, I maintained the "self-represented" usage that was shown in the spring 2025 agenda books, but I solicited the working group's feedback on this usage.

I noted that for context, it may help to consider the possible range of terms. In summer 2025, participants in the Access to Justice Network[7] listserv discussed at some length the pro's and con's of various possible terms to replace "pro se." One of the few points of consensus was that "pro se" should not be used. Other candidates that were mentioned included "self-represented," "unrepresented," "court user," "litigant / party," "legal consumer," "customer,"

7 "The Access to Justice Network is a community of judges, court managers, attorneys, librarians, researchers, technologists, and community leaders dedicated to closing the justice gap. It is the successor organization to the Self-Represented Litigation Network (SRLN)." https://a2jnetwork.org/.

"needy civil legal aid citizens," "community member / person," "people navigating legal problems," and (from Britain and Canada) "litigants in person." Participants pointed out both advantages and disadvantages of various of these terms, and there was no general consensus as to which term was best – perhaps in part because the choice of term depends on context and audience. In writing to the working group, I suggested that most of these terms would not work in the context of the filing and service rules (where the term must flag that this is a person who is not represented by a lawyer); for those rules, the viable options on this list seem to be "self-represented" and "unrepresented."[8]

I suggested that, if we were writing on a blank slate, I thought "self-represented" would be preferable to "unrepresented." "Self-represented" recognizes that the litigant is advocating on the litigant's own behalf. The Latin term "pro se" means "for oneself," which is closer to "self-represented" than "unrepresented." Courts and legal organizations increasingly use "self-represented" to describe pro se litigants. See, e.g., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/self-represented-litigants. And the entry in Black's Law Dictionary for "pro se litigant" includes "self-represented" but not "unrepresented": "pro se litigant (1857) One who represents oneself in a court proceeding without the assistance of a lawyer <the third case on the court's docket involving a pro se>. — Often shortened to pro se, n. — Also termed pro per; self-represented litigant; litigant in propria persona; litigant pro persona; litigant pro per; litigant in person; (rarely) pro se-er." Black's Law Dictionary (12th ed. 2024) (Bryan A. Garner, Ed. in Chief). The style consultants have indicated that – in the abstract – they do not see a problem with "self-represented."

But, I observed, a complication arises because multiple existing rules already use the term "unrepresented." If we were to update our terminology to use "self-represented," then at least within a given rule set we probably should simultaneously amend other rules that use "unrepresented." Additionally, some rules use the term "represented" to denote having a lawyer – a usage that arguably does not fit well with the idea that a litigant without a lawyer is self-*represented*. (But note that in at least one other context it is normal to state such contrast: we don't think of it as incoherent to say "insured" and "self-insured."[9]) If we view the represented / self-represented contrast as potentially confusing, then we would need to consider replacing those "represented" references.

I provided to the working group (and am including here as an appendix) a chart that collects the rules that seem to me to be potentially relevant to this analysis.[10] The discussion that

8 "Litigant in person" is intriguing, but probably would be too unfamiliar in the United States.
9 I am indebted to Bryan Garner for this point.
10 In compiling this chart, I first searched the rule text for "represented" and "unrepresented." Then, to make sure I wasn't missing a potentially relevant rule, I also searched separately for "attorney," "counsel," or "lawyer." The chart shown in the text includes rules discussing a person's representation by a lawyer as well as rules discussing a person's representation by other

followed suggests to me that the Criminal Rules Committee may decide to use "self-represented" and that the other three Advisory Committees are more likely to use "unrepresented":

1. Criminal Rules

I had suggested to the working group that it makes sense for the Criminal Rule 49 draft to use the term "self-represented" (and, where necessary, "represented by counsel"). The Criminal Rules currently use the terms "represented" and "unrepresented" only in Criminal Rule 49,[11] which of course is the rule for which we are already considering revisions, so it would not be at all cumbersome to update the terminology to "self-represented." Moreover, the Criminal Rules Committee discussed this particular usage question this spring as it prepared its Rule 17 proposal, and purposely used the term "self-represented." And the Standing Committee approved the Rule 17 proposal for publication without changing that term.

Both working-group participants from the Criminal Rules Committee and also the Criminal Rules Committee's subcommittee expressed agreement with this approach.

2. Appellate Rules

I had suggested to the working group that it could also make sense to use the term "self-represented" (and, where necessary, "represented by counsel") in Appellate Rule 25.

But I noted that the cost of doing so would be that – for consistency within the Appellate Rules – we would then also need to update terminology in Appellate Rules 28.1, 30, 31, and 32:[12] "Unrepresented" in Rules 28.1, 30, and 32 would become "self-represented." In Rule 32(d), "represented" would become "represented by counsel." Also, Rules 30 and Rule 31 contain language that could be rephrased to require service of a copy "on each self-represented party and on counsel for each party separately represented by counsel."[13]

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representatives such as guardians. I did not include rules discussing the representation of a litigant's interest by one or more other litigants (as with some Bankruptcy Rules concerning creditors). Nor did I include rules that refer to an attorney but are not characterizing a litigant as represented or not represented, which is the distinction that interests us here. (Examples of omitted rules would be rules referring to, e.g., "the debtor's attorney" or – as in Bankruptcy Rule 2006(b) – communications "from an attorney to a claim owner who is a regular client or who has requested the attorney's representation."

11 In saying this, I do not count Criminal Rules that say things like "represented by counsel," because such phrases (unlike the unadorned single word "represented") are completely compatible with saying "self-represented" in other places.

12 In my view, no update would be needed for Appellate Rule 45.

13 I noted that the latter amendment would helpfully eliminate what looks to me like an inadvertent discrepancy between current Rule 30 – which refers only to service on counsel for

Working-group participants from the Appellate Rules Committee expressed a preference for using "unrepresented," in part because of the multiple conforming changes that would be required if we were to switch to using "self-represented."

3. Bankruptcy and Civil Rules

Discussion among the working-group participants did not focus on the terminology to be used in the Bankruptcy and Civil Rules provisions. But in both the Bankruptcy Rules[14] and the Civil Rules,[15] using the term "self-represented" would require conforming amendments to

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each separately represented party – and current Rule 31 – which refers to service on each unrepresented party and on counsel for each separately represented party. I may be missing something, but it is hard to see a reason why Rule 30 shouldn't require service of the appendix on self-represented litigants as well as represented parties.

14 In the relevant amendments to the Bankruptcy Rules, using the terms "self-represented" (and, where necessary, "represented by counsel") in Rules 5005 and 8011 would necessitate conforming changes to Bankruptcy Rules 3015.1, 8013, 8015, and 9011(b), and perhaps also to Bankruptcy Rule 1004.1. "Unrepresented" would become "self-represented" in Bankruptcy Rules 3015.1, 8013, 8015, and 9011(b). "A represented party" in Bankruptcy Rule 9011 would become "a party represented by counsel."

Bankruptcy Rule 1004.1 has headings ("Represented Infant or Incompetent Person" and "Unrepresented Infant or Incompetent Person") that might at first glance seem to warrant adjustment, but arguably, Rule 1004.1 could be left untouched given that it is manifestly not referring to representation by an attorney. (For obvious reasons, it would not work to substitute "self-represented" for "unrepresented" here or in Civil Rule 17.)

15 In order to use the term "self-represented" in Civil Rule 5, it would be necessary to update terminology in Civil Rules 4, 11, 16, 26, and 32, probably also Rule 27, and perhaps also Civil Rule 17. "Unrepresented" would become "self-represented" in Civil Rule 4 plus the accompanying forms and in Civil Rules 11, 16, and 26. "Represented party" would become "party represented by counsel" in Civil Rules 11 and 16.

If these changes were to be implemented, I also think "represented" in Rule 32(a)(1)(A) should become "represented by counsel," given that Rule 32(a)(5)(B) clearly contemplates representation by a lawyer. That also suggests to me that "not otherwise represented" in Rule 27 should probably become "not otherwise represented by counsel." (But I don't know anything about practice under Rule 27, and without the example of Rule 32, I would feel unsure whether "not otherwise represented" actually refers only to representation by counsel or perhaps also to some situations where the unserved party's interests are somehow represented by another litigant.)

Civil Rule 17's "With a Representative," "Without a Representative," and "unrepresented" present issues analogous to those presented by Bankruptcy Rule 1004.1. Though these terms might at first glance seem to warrant adjustment, arguably Civil Rule 17

multiple additional rules. Given the overall tenor of the terminology discussion, my current surmise is that neither of these Advisory Committees will decide to use "self-represented" – but I look forward to obtaining the Civil Rules Committee's input on this.

In the meantime, the enclosed sketches use "unrepresented" in the Civil and Appellate Rules drafts and "self-represented" in the Criminal Rule draft.

F. Self-represented "person" versus self-represented "party"

In updating the drafts to take account of the spring 2025 discussions, I focused for the first time on whether to update "person" to "party" in the reference to e-filing by self-represented litigants. The current e-filing rules use "unrepresented person," but that has a different valence because they are phrased in the negative – e.g.: "A person not represented by an attorney … may file electronically ***only if*** allowed by court order or by local rule." Once we invert the presumption to say that self-represented litigants may e-file ***unless*** barred by order or local rule, I think we need to change "person" to "party" so that lay people who are not parties to the case don't start citing the rule as granting *them* access to e-filing in the case. I made this change in the updated drafts that I circulated to the working group,[16] and I added to the Committee Notes the following statement: "(The rule grants this presumptive authorization to a self-represented 'party,' not a self-represented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system.)"

The input from working-group participants and from the Criminal Rules Committee subcommittee strongly favored changing "person" to "party." Ed Hartnett helpfully flagged that we should consider how this change would affect would-be intervenors. If we change the e-filing portion of the draft to refer to a self-represented "party," then under the proposed rule – as now – a self-represented person seeking to intervene would be able to e-file only if affirmatively authorized by the court through local rule or order or local practice. Of course, once a self-represented person is granted intervenor status in the district court, they would count as a party.

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could be left untouched given that it is evidently referring to representation by the listed sorts of potential representatives for a minor or incompetent person. For similar reasons, I think Civil Rule 55 would not need to be revised.

16 I have not, however, made this change to the provisions in proposed Civil Rule 5(d)(2)(B)(i) and Appellate Rule 25(a)(2)(C)(i) that state that "A self-represented **person** may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions." It seems appropriate to keep the broader "person" there because it is a provision designed to protect those not represented by counsel from being *required* to file electronically.

I also have not substituted "party" for "person" in proposed Civil Rule 5(d)(2)(B)(iv), which provides that "[a] court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access." That is phrased broadly to avoid any negative implications about the court's ability to deny access to a troublesome would-be user – whether they are a party or not and whether they are a lawyer or a self-represented person.

Given that self-represented would-be intervenors are likely not numerous, and that referring to "parties or those seeking intervention" would be cumbersome, and that we would not wish to invite members of the public to characterize themselves as would-be intervenors any time they really wanted to put in their two cents on a high-profile case, my own take is that the switch to "party" is the best course despite the question of intervenors, but I am flagging this question here for the Advisory Committees' consideration.

G. Explicit wording

In presenting the sketches to the Advisory Committees, I highlighted the issue of spelling things out explicitly, even when the explicit formulation uses more words. So, for example, proposed Civil Rule 5(d)(2)(B)(i), as shown in the spring 2025 agenda books, stated that a self-represented litigant presumptively "may use the court's electronic-filing system [to file papers and receive notice of activity in the case]." The bracketed language adds length but clarifies. Another example is the draft rule's reference to "conditions and restrictions" on self-represented litigants' access to the court's e-filing system. Perhaps the language is redundant, but it is designed to make clear to self-represented litigants the court's authority to impose reasonable limits whether those limits strike the self-represented litigant as conditions *or* restrictions. In the draft that I circulated to the working group in summer 2025, I continued using the phrase "conditions and restrictions." More generally, I solicited the working group's feedback on whether the longer but more explicit language is worthwhile in provisions directed at self-represented litigants.

Responses received from both working-group participants and the Criminal Rules Committee's subcommittee agreed that more explicit language is helpful in this context.

H. Bankruptcy Rules considerations

As noted in Part I, the Bankruptcy Rules Committee voted – at its fall 2025 meeting – to participate in both aspects of the project. Accordingly, proposed amendments to Bankruptcy Rules 5005, 8011, and 9036 will be part of the overall package of proposed amendments. While this expands the overall project, it also simplifies it – in the sense that the drafters of the various rules no longer need to worry about the treatment of bankruptcy cases at the trial level versus on appeal (because under the package of proposals, materially the same e-service and e-filing rules for self-represented litigants will now appear in the Bankruptcy Rules as in the other sets of rules).

III. Rejection of a filing for noncompliance with rules governing electronic filing

This summer, Ed Hartnett pointed out that we should consider how the proposed e-filing rules would interact with two sets of rules. One of those sets – Appellate Rule 25(a)(4), Bankruptcy Rule 5005(a)(1), Civil Rule 5(d)(4), and Criminal Rule 49(b)(5) – comprises what

I'll call the clerk-refusal rules. These rules provide in substance that "[t]he clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice."[17] The second set of rules – Appellate Rule 47(a)(2), Bankruptcy Rule 9029(b), Civil Rule 83(a)(2), and Criminal Rule 57(a)(2) – comprises what I'll call the local-form rules. The Bankruptcy and Civil (and with minor wording differences, Appellate) Rules put this directive in place: "A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply."[18] The Criminal Rule is similar, but substitutes "unintentional" for "nonwillful."[19]

The question whether the clerk-refusal and local-form rules affect limits on e-filing by self-represented litigants is a question that already arises under the current rules. Some self-represented litigants have invoked these rules to try to get around bars on e-filing by self-represented litigants, and while a number of courts have rebuffed those efforts, at least some judges have given the argument weight. After providing in Part III.A a brief history of the relevant rules, I review relevant caselaw in Part III.B.

Part III.C discusses whether any changes in the clerk-refusal and local-form rules should be considered as part of the self-represented-litigant e-filing project. The main question is how the rules do, and how they should, handle situations where a filer either uses the wrong *method* of filing (such as trying to use CM/ECF when not allowed to do so, or trying to file by emailing documents to the court when not allowed to do so) or places their documents in the wrong *electronic form* (such as emailing a Word document to the court when only a PDF submission is

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17 The text quotes Civil Rule 5(d)(4) and Criminal Rule 49(b)(5). Appellate Rule 25(a)(4) similarly provides: "The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice." And Bankruptcy Rule 5005(a)(1) provides: "The clerk must not refuse to accept for filing any petition or other paper solely because it is not in the form required by these rules or by any local rule or practice."

On the meaning of "willful" in Civil Rule 83(a)(2), see Folse v. Hoffman, 122 F.4th 80, 84 (4th Cir. 2024) ("'Willful' means '[d]one wittingly or on purpose, as opposed to accidentally or casually.' Willful, Black's Law Dictionary (12th ed. 2024). Folse did not simply fax his complaint to the district court—he also filed a separate motion asking the court 'to allow him to file the Complaint ... by fax.' ... And this, in turn, suggests that Folse knew he could not file the complaint by fax absent permission to do so.").

As to notices of appeal, see also Appellate Rule 3(c)(7): "An appeal must not be dismissed for informality of form or title of the notice of appeal …."

18 The text quotes Bankruptcy Rule 9029(b) and Civil Rule 83(a)(2). Appellate Rule 47(a)(2) states: "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement."

19 Criminal Rule 57(a)(2) provides: "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement."

permitted). But it also may be useful to take account of how the rules do, and should, handle situations in which a filer who *is* permitted to use the method they're using fails to use it *successfully*.

A. History of the clerk-refusal and local-form rules

The clerk-refusal rules were adopted in 1991, 1993, 1994, and 2018; the local-form rules date from 1995.

1. History of the clerk-refusal rules

The committee notes to the clerk-refusal rules suggest that they were designed to disallow local practices in some courts that had cast the court clerk in the role of enforcer of local form requirements. Only one of those committee notes specifically addressed whether a provision concerning mode of filing would count as a "form" requirement: the 1993 Committee Note to Bankruptcy Rule 5005(a) stressed that the new provision would "not require the clerk to accept for filing papers sent to the clerk's office by facsimile transmission."

The oldest clerk-refusal rule is what is now Civil Rule 5(d)(4), originally adopted into the Civil Rules in 1991 as Civil Rule 5(e).[20] The 1991 Committee Note to then-Civil Rule 5(e) explained:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

The Bankruptcy Rules' clerk-refusal rule was the next to be added, in 1993. Significantly for our purposes, the 1993 Committee Note to Bankruptcy Rule 5005(a) distinguished between enforcing requirements of form – which it assigned to the judge – and refusing papers filed by fax – which it permitted to the clerk:

> Subdivision (a) is amended to conform to the 1991 amendment to Rule 5(e) F.R.Civ.P. It is not a suitable role for the office of the clerk to refuse to

20 Then-Rule 5(e) contained the same substance as the subsequently-restyled version that we now have. In relevant part, then-Rule 5(e) stated: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices."

> accept for filing papers not conforming to requirements of form imposed by these rules or by local rules or practices. The enforcement of these rules and local rules is a role for a judge. This amendment does not require the clerk to accept for filing papers sent to the clerk's office by facsimile transmission.

The following year, a similar provision was added to the Appellate Rules. The 1994 Committee Note to Appellate Rule 25(a) explained:

> Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed.R.Civ.P. 5(e) and Fed.R.Bankr.P. 5005.
>
> The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with the rules and, if the party is willing to correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

When the clerk-refusal provision was added to Criminal Rule 49 in 2018, the Committee Note to Rule 49(b)(5) stated simply: "This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4)."

2. History of the local-form rules

The local-form provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules date from 1995.[21] The 1995 committee notes to those rules do not explicitly address whether rules concerning filing *method* would count as "local rule[s] imposing a requirement of form." The 1995 Committee Note to Civil Rule 83(a)(2) is representative;[22] it explains:

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21 As adopted in 1995, Civil Rule 83(a)(2) and Appellate Rule 47(a)(2) read: "A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." Both rules were subsequently restyled.

22 The 1995 Committee Note to Bankruptcy Rule 9029(a) is similar in relevant part. 1995 Committee Note to Appellate Rule 47(a)(2) is similar, but of course omits the examples concerning jury-demand and summary-judgment practice. And the 1995 Committee Note to

> Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of – or forgetting – a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn – covering only violations attributable to nonwillful failure to comply and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or willfully violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form – for example, a local rule requiring parties to identify evidentiary matters relied upon to support or oppose motions for summary judgment.

B. Caselaw concerning the clerk-refusal and/or local-form rules

The overall question is how the clerk-refusal and local-form rules interact with the e-filing aspect of the self-represented-litigant e-filing and e-service project. Here we should probably disaggregate three types of scenarios: (1) attempts to file using a method that the court does not permit (either in general or for the particular filer) under circumstances where the result is that no filing enters either the court's physical building or the court's electronic system, (2) attempts to file using a permitted method (such as mail or, if locally permitted, email) but submitting the filing in a non-permitted format (such as a mailed USB drive or an emailed file in the wrong format), and (3) attempted but unsuccessful use of CM/ECF by a user who is permitted to use CM/ECF.

1. Non-permitted method

The caselaw concerning non-permitted *methods* is divided. The Second, Sixth, Seventh, and Ninth Circuits have applied the rules so as to protect a filer who uses a non-permitted method, but a divided panel of the D.C Circuit has held to the contrary.

One variant of the "non-permitted method" scenario involves a self-represented litigant trying to file using a method not permitted by the local rules and/or the national rules. For example, in In re Novak, 771 F. App'x 680, 681 (7th Cir. 2019) (nonprecedential opinion), the self-represented would-be plaintiff (who lived in Japan and stated he was housebound) tried to file his complaint with the district court via email but ran afoul of the district court's local rules, which didn't permit that method. Novak sought mandamus from the Seventh Circuit, which

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Criminal Rule 57(a)(2) is similar, but uses a different example ("Nor does it affect the court's power to enforce local rules that involve more than mere matters of form--for example, a local rule requiring that the defendant waive a jury trial within a specified time.").

denied relief on the ground that relief was available from the district court, but noted that – though it wasn't reaching the merits – it saw "a facial conflict between the local electronic filing rules and the Federal Rules of Civil Procedure." *Novak*, 771 F. App'x at 683 n.1 (citing Civil Rule 5(d)(4)).[23] By contrast, in Nelson v. SEC, 138 F.4th 514, 519 (D.C. Cir. 2025), the pro se petitioner had tried and failed to file electronically because the D.C. Circuit requires court permission before a self-represented party can e-file and therefore the PACER system rejected Nelson's attempt to register for e-filing. The panel majority held that Nelson's frustrated attempt at e-filing wasn't a mere problem with "form." It reasoned that the circuit rule requiring court permission "establishes a separate, threshold step at which a party must file a motion and the court must make a determination that electronic filing is appropriate." *Nelson*, 138 F.4th at 521. Accordingly, neither Appellate Rule 25(a)(4) nor Appellate Rule 47 rescued Nelson's attempted filing. Writing separately, Judge Henderson vigorously disagreed, arguing that the ECF system's rejection of Nelson's attempt to e-file his petition violated Appellate Rule 25(a)(4), and that under both that rule and Appellate Rule 47(a)(2), Nelson's petition should be deemed filed as of his attempt to e-file it. *See Nelson*, 138 F.4th at 526-27 (Henderson, J., concurring in the judgment). The local circuit rule, she argued, "imposes a requirement of form—filing 'in paper form'—that the majority enforces in a manner that deprives Nelson of his right to petition for relief because of his nonwillful failure to comply," in violation of Appellate Rule 47(a)(2). Two district court opinions from other circuits agree with the *Nelson* majority.[24]

Another variant of the non-permitted method scenario arises when a represented party files electronically a document that local rules require to be filed in paper form. In the Seventh Circuit, such a filing is effective. See United States v. Harvey, 516 F.3d 553, 556 (7th Cir. 2008) ("Although [Harvey's] submission did not conform to local rules, the difference between a hard copy and an electronic submission is a mere error of form…. Harvey timely filed his notice of appeal when he submitted it electronically to the clerk's office."). The same result holds true in the Second Circuit, at least in cases where the noncompliance with a local rule requiring paper filing was non-willful. See Contino v. United States, 535 F.3d 124, 127 (2d Cir. 2008) (following *Harvey*, citing Rules 5(d)(4) and 83(a)(2), and holding "that Contino should not lose his right to

23 In Folse v. Hoffman, 122 F.4th 80, 82, 84 (4th Cir. 2024), the Fourth Circuit stated that a pro se plaintiff's faxing of the complaint to the court sufficed to toll the running of the statute of limitations, even though the district court had rejected the attempted filing because it did not allow complaints to be filed by fax. But the court of appeals affirmed the district court's dismissal without prejudice of the complaint due to its manner of filing, see id. at 82.

24 See, e.g., Becker v. Hurd, No. 8:23CV208, 2023 WL 5105183, at *1 (D. Neb. Aug. 9, 2023) (rejecting a self-represented litigant's argument that Civil Rule 5(d)(4) gave her the right to file documents by email rather than through CM/ECF); Donaldson v. Normand, No. 5:18-CV-7, 2022 WL 6600855, at *2 (S.D. Ga. June 13, 2022) (holding with respect to attempted email filing by self-represented litigant living in Australia that "the Clerk of Court is free to reject Plaintiff's filings based on his method of filing and doing so would not violate Rule 5(d)(4). In doing so, the Clerk of Court makes no determination about the contents of Plaintiff's filings.").

appeal because of an error in the form of the notice of appeal").[25]

Another variant concerns a represented litigant submitting a filing in paper form despite the requirement in a local rule (and, now, the national rules) that represented litigants file electronically. Here, too, courts have disagreed. The Sixth and Ninth Circuits have held that such a filing is effective notwithstanding a local rule requiring electronic filing, see Pierce v. Ocwen Loan Servicing, LLC, 987 F.3d 577, 579–80 (6th Cir. 2021) (paper notice of appeal placed in court-provided drop box constituted filing despite local rule requiring electronic filing; citing Civil Rules 5(d)(4) and 83(a)(2)); Klemm v. Astrue, 543 F.3d 1139, 1143 (9th Cir. 2008) (citing, inter alia, Civil Rule 5(d)(4) with respect to mailed notice of appeal), and in what I take to be an alternative holding,[26] the Third Circuit agreed, see Han Tak Lee v. Houtzdale SCI, 798 F.3d 159, 164 (3d Cir. 2015) (following *Klemm* and citing Civil Rule 5(d)(4) and Appellate Rule 3(c)(4)). By contrast, in Jones v. Family Health Centers of Baltimore, Inc., 307 F.R.D. 457, 459 (D. Md. 2015), the district court reasoned that "[i]n requiring electronic filing … the Court mandates the *method* by which 'papers' must be delivered to and docketed with the Court. Thus, the Clerk may enforce the Court's long-standing electronic filing requirement without contravening [Civil] Rule 5(d)(4)." The court bolstered this reading by arguing that even if Civil Rule 5(d)(4) did conflict with Civil Rule 5(d)(3) (which at the time permitted local rules to "require electronic filing" so long as "reasonable exceptions are allowed"), Rule 5(d)(3) – which dated from 2006 – prevailed as "the more recently adopted provision," Jones, 307 F.R.D. at 459. And as a further rationale, the court observed that Civil Rule 5(d)(4) only limited the *clerk*'s ability to refuse the filing, and that "[i]f the Clerk had been barred from rejecting Plaintiff's improper paper filing by Rule 5(d)(4), then the Court would have stricken Plaintiff's nonconforming document." Jones, 307 F.R.D. at 459 n.1.

2. Non-permitted format + permitted method

In a scenario where the litigant uses a permitted method but submits the file in a non-

25 I include the caveat "at least in cases where the noncompliance with a local rule requiring paper filing was non-willful" because the Contino court did also say this when applying Civil Rule 83(a)(2): "Here, there is no indication that Contino's failure to submit the notice of appeal on paper was willful and, if the local rule is enforced, Contino would lose the right to appeal." Contino, 535 F.3d at 127. As shown above, the non-willfulness criterion appears in Civil Rule 83(a)(2) but not in Civil Rule 5(d)(4).

26 I view the holding in Han Tak Lee v. Houtzdale SCI, 798 F.3d 159 (3d Cir. 2015), as an alternative holding because, in that case, applying the district court's local rule requiring electronic filing would have made it functionally impossible for the appellant to file the notice of appeal: the appellant's internal financial constraints barred it from any single electronic payment over $ 500 (such as the $ 505 filing fee). Applied in such a case, the court of appeals explained, the local rule requiring electronic filing "would violate the Federal Rules by failing to provide a 'reasonable exception[]' to the local electronic filing requirement, Fed.R.Civ.P. 5(d)(3), and the Commonwealth could not be held responsible for its violation." Han Tak Lee, 798 F.3d at 165.

permitted format, the existing rules are not necessarily well-tailored to the situation. Take a situation where a self-represented litigant mails the court a USB drive and asks the court to file the documents that exist as electronic files on the USB. At least arguably, the self-represented litigant in that hypothetical has used the correct filing method (mail) and the only problem is with the "form" of the filing (an electronic file on the USB). But one can see the difficulty: not only would requiring the clerk's office to review and process files on a USB require personnel time, but also USBs are known vectors of viruses and malware, and requiring a court to connect a USB (a piece of hardware) to its computer system would create a clear security risk.

In light of these practical concerns, the Court of Federal Claims in In re Gallogly, No. 19-MC-1644, 2019 WL 6872051, at *1 (Fed. Cl. Dec. 5, 2019), held that the Court of Federal Claims' clerk-refusal rule – Rule of the United States Court of Federal Claims ("RCFC") 5(d)(4)[27] – did not require the clerk to accept a self-represented litigant's document presented on a USB drive.[28] The court stated that "there is no consensus regarding whether FRCP 5(d)(4) applies to the method of filing a document—in other words, filing by electronic means or on paper." Gallogly, 2019 WL 6872051, at *4 (collecting cases).[29] But it reasoned that "even if FRCP 5(d)(4) applied to the method of filing a document, 'the rule would merely limit the *Clerk's* ability to reject filings, not the Court's.'" Gallogly, 2019 WL 6872051, at *4 (quoting Jones v. Fam. Health Centers of Baltimore, Inc., 307 F.R.D. 457, 459 n.1 (D. Md. 2015)).[30]

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27 RCFC 5(d)(4) provides that "[t]he clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules." The *Gallogly* court's quote of the rule says "by the rules," In re Gallogly, 2019 WL 6872051, at *3, but that appears to be a misquotation.

28 As noted in the text, the litigant in *Gallogly* initially tried to submit her file to the court on a USB; but the Gallogly court's ruling appears to extend to all submissions "in an electronic form—whether on a thumb drive, by electronic mail, or via PACER," see Gallogly, 2019 WL 6872051, at *5.

29 Indeed, at an earlier point in the case, the Federal Circuit had sounded somewhat agnostic on this question when denying Gallogly's request for a writ of mandamus:

> [E]ven if we were to agree that there may be some facial conflict between RCFC 5.5 and Rule 5(d)(4) of the Federal Rules of Civil Procedure and agree that Rule 5(d)(4) is applicable to the Claims Court, we cannot say that Dr. Gallogly has a clear and indisputable right to compel the Clerk to accept submissions via USB drive. Moreover, Dr. Gallogly has an alternative avenue of asking the Claims Court itself to reconsider the action of the Clerk and to offer a more suitable means of electronic filing. We therefore cannot say that mandamus relief is appropriate here.

In re Gallogly, 773 F. App'x 1090, 1091 (Fed. Cir. 2019).

30 The RCFC include a rough analog to Civil Rule 83, but RCFC 83 does not include a provision similar to the national rules' local-form provisions.

3. Unsuccessful or flawed use by permitted electronic filer

I also examined caselaw concerning instances in which one who was permitted to file electronically failed to do so successfully. Here, too, the caselaw is divided.

One possible example of unsuccessful use of CM/ECF is when the filer manages to file something but there are technical errors in the filing. The Second, Sixth, and Seventh Circuits have held that such an act nonetheless can count as a filing.[31] The Seventh Circuit applied the same principle to an electronically-filed complaint that was automatically rejected by the e-filing

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31 See Harrison v. Republic of Sudan, 802 F.3d 399, 402 n.4 (2d Cir. 2015) (notice of appeal submitted on last day for appealing was effective even though appellant "neglected to manually select the orders it was appealing on ECF, triggering a 'filing error' in the docket entry," where "the notice of appeal was accessible on the docket, the notice itself stated in plain language the three orders at issue, and [appellant] corrected the electronic error the next day"), *reversed on other grounds*, 587 U.S. 1 (2019); Shuler v. Garrett, 715 F.3d 185, 186-87 (6th Cir. 2013) (adopting the view that "electronically-filed motions received by the clerk of the court within the specified time period should be considered timely, even when they contain the wrong docket number," at least where there was no prejudice to the opposing party); Vince v. Rock Cnty., Wis., 604 F.3d 391, 392-93 (7th Cir. 2010) (citing Civil Rules 83(a)(2) and 5(d)(4) and Appellate Rule 3(c)(4) and holding that electronically-filed notice of appeal that was "transmitted … using the wrong event code" was effective despite its rejection by the clerk's office); id. at 393 ("There may well be cases in which a filing is so riddled with errors that it cannot fairly be considered a notice of appeal, and therefore its filing, electronic or otherwise, will not vest an appellate court with jurisdiction, United States v. Carelock, 459 F.3d 437 (3d Cir.2006) (an electronically filed notice of appeal that bore incorrect name of defendant, wrong docket number, wrong district court judge's name, and wrong judgment date not sufficient), but that is not the case here.").

There are district court decisions to the same effect. See, e.g., Harrigan v. City of New York, No. 19-CV-3489 (LJL), 2020 WL 2555307, at *1 (S.D.N.Y. May 20, 2020) (noting that the original electronic filing, apparently filed by counsel via CM/ECF, was deficient because "the PDF file containing the complaint was not correctly formatted; not all of the parties were entered on the electronic filing system; and the Plaintiff's electronic selections resulted in the docket text accompanying the complaint indicating that the Original Complaint was pleading claims against Jahumi Harrigan, who in fact is the Plaintiff"); id. at *3 (citing Civil Rule 5(d)(4) and concluding that the original electronic filing counted as commencing the lawsuit for statute of limitations purposes).

See also Pettaway v. Nat'l Recovery Sols., LLC, 955 F.3d 299, 302 & n.1 (2d Cir. 2020) (holding that amended complaint was timely filed when filed in compliance with district court's local rules despite counsel's failure to comply with the court's "online directions during the filing process [that] direct the filer not to use the 'All Defendants' button" to denote whom the complaint is against).

system because the filer input the docket number of a prior, closed case.[32]

However, in a scenario where the would-be electronic filer of a notice of appeal got as far as submitting payment through pay.gov but failed to progress to the final screen for CM/ECF submission, the Second, Tenth, and Federal Circuits have held that the attempted filing did not validly submit the notice of appeal.[33] The Fifth Circuit has likewise held that where counsel "encountered technical problems" in attempting to e-file a notice of appeal on the last day and the court's docket reflected e-filing of the notice appeal only on the subsequent day, it was untimely.[34] (Note that if there is an outage of the electronic filing system, the filer should argue for the application of the relevant time-counting rule concerning inaccessibility of the clerk's office.[35]) By contrast, where counsel tried (timely) to e-file the notice of appeal, and

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32 Farzana K. v. Indiana Dep't of Educ., 473 F.3d 703, 707 (7th Cir. 2007) (applying then-Civil Rule 5(e) and reasoning that "[h]ad a paper copy of the complaint been handed over the counter on July 6, a deputy clerk would have crossed out the old docket number, stamped a new one, and filed the document; there is no reason to throw this suit out of court just because the e-filing system did not know how to take an equivalent step").

33 See Franklin v. McHugh, 804 F.3d 627, 631 (2d Cir. 2015) ("[T]he Eastern District's Local Rules provide no basis for construing [Franklin's] payment—made through an external website, and merely an intermediate step in the filing process—as 'delivery' of a notice of appeal to the Clerk's Office."); Klein v. Olson, 728 F. App'x 846, 848 (10th Cir. 2018) (unpublished opinion) (holding that the notice of appeal wasn't delivered to the clerk within the meaning of the rules and reasoning that "[t]o conclude otherwise would turn the district court's clear and unequivocal electronic filing rules into mere suggestions, and would effectively allow a pleading to be 'filed' without the pleading being docketed and, in turn, without the district court's clerk or the opposing party knowing about it"); Gilda Indus., Inc. v. United States, 511 F.3d 1348, 1350-51 (Fed. Cir. 2008); id. at 1352 (suggesting that an Appellate Rule 4(a)(5) extension on grounds of excusable neglect could be warranted under the facts).

A similar fact pattern may have formed the basis for the Sixth Circuit's unpublished order in Amburgey v. Comm'r of Soc. Sec., No. 16-6479, 2016 WL 10100226, at *1 (6th Cir. Dec. 30, 2016) ("Although Amburgey's counsel paid the filing fee, there is no evidence that the district court received the notice of appeal. Amburgey attached a printout from his attempt to file his notice of appeal, but that printout does not confirm that the district court timely received his notice of appeal."). In *Pierce* (cited supra Part III.B.1) the Sixth Circuit distinguished Amburgey. See Pierce v. Ocwen Loan Servicing, LLC, 987 F.3d 577, 580 (6th Cir. 2021) ("Counsel [in Amburgey] represented in briefs that he had unknowingly stopped a screen short of submitting his electronic notice of appeal, perhaps because of a technical problem. Unsworn excuses about attempted filings are afield from sworn excuses about completed filings.").

34 See Sudduth v. Texas Health & Hum. Servs. Comm'n, 830 F.3d 175, 178-79 (5th Cir. 2016) (following *Franklin* and observing that counsel could have, but did not, move for an extension of the time to appeal).

35 See, e.g., Civil Rule 6(a)(3)(A)(" Unless the court orders otherwise, if the clerk's office is

electronically paid the filing fee, but "the clerk (or the clerk's computer system) failed to register the filing on the docket sheet" until after the appeal deadline had passed, the D.C. Circuit – citing Civil Rule 5(d)(4) – held the appeal timely.[36]

Analogous to the uncompleted-last-step e-filing situation is one where the court's local rules directed that plaintiffs email their complaints to the clerk's office[37] and then follow up with a filing in CM/ECF after the clerk's office opened a new case file in CM/ECF. Where the plaintiff duly emailed their complaint to the court but then (apparently due trouble with electronic payment) didn't manage to file in CM/ECF until after the statute of limitations ran, the Seventh Circuit held that the initial email filing counted for statute of limitations purposes; citing Civil Rules 5(d)(4) and 83(a)(2), it reasoned that "[t]he delay in uploading the complaint was merely a defect in form (in the electronic sense) and did not prevent the e-mailed complaint from tolling the statute of limitations." Farley v. Koepp, 788 F.3d 681, 683 (7th Cir. 2015); *see also id*. at 686 (rejecting the argument "that [Civil] Rule 5(d)(3) authorizes clerks to treat noncomplying electronic filings as invalid").

C. Should the clerk-refusal and/or local-form rules be revised?

I suggest that there are multiple reasons why the Advisory Committees should consider possible revisions to the clerk-refusal and local-form rules. One is that (as shown in Part III.B) there are existing circuit splits concerning their application to e-filing issues – even outside the context of filings by self-represented litigants. Another is that changing the default provisions concerning e-filing by self-represented litigants may change the scope of operation of the local-form provisions. And more basically, the project itself is engaging with questions, such as reasonable conditions on e-filing by self-represented litigants, that implicate the question of who enforces those conditions and how – topics already addressed to some extent by both the clerk-refusal and local-form rules.

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inaccessible: (A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday ….''); 2009 Committee Note to Civil Rule 6(a)(3) ("The text of the rule no longer refers to 'weather or other conditions' as the reason for the inaccessibility of the clerk's office. The reference to 'weather' was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system.").

36 See Royall v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 548 F.3d 137, 142-43 (D.C. Cir. 2008).

37 It seemed key in Farley that the email submission occurred pursuant to an instruction from the clerk's office. See Farley, 788 F.3d at 685 ("Farley's attorney did not simply … send an unsolicited e-mail to a court clerk unequipped to handle e-mailed complaints."); compare Brooks v. SAC Wireless, LLC, 835 F. App'x 137, 139 (7th Cir. 2021) (unpublished opinion) (finding that district judge had not "agreed within the meaning of [Civil] Rule 5(d)(2)(B) to accept Brooks's emailed notice of appeal for filing purposes").

As to the scope of operation of the local-form rules, one point to note is that – by shifting the default principle concerning access to e-filing by self-represented litigants – the proposed new e-filing rule may well increase the range of situations that could trigger the application of the local-form provisions. At present, the national rules bar self-represented litigants from e-filing *unless* a court order or local rule permits them to do so, and so if the relevant court lacks any such local rule, one can view this as an *absence* of a local rule. And the local-form rules aren't triggered by the *absence of* a local rule; read literally, they're only triggered if "[a] local rule imposing a requirement of form" is "enforced."[38] Once the presumption is flipped, the court would have to adopt an order or a local rule in order to bar self-represented litigants from using the court's e-filing system. And if the prohibition were adopted as a local rule, enforcing that local rule against a self-represented litigant could then trigger application of the applicable local-form rule.

Reflecting on this point also brings into focus the fact that the local-form provisions refer only to local rules, and not to standing orders. One might think that standing orders should have no greater ability to impose a form requirement that could trigger the loss of rights than a local rule could.[39] This raises an additional question: Do the draft rules take the right approach by permitting courts to opt out of the default e-filing rule for self-represented litigants *either* by local rule *or* by standing order?[40] Should this local opt-out instead require either a local rule or an order in a case? Originally I had drafted the provision to permit opt-out via a standing order – because my focus was on preserving options for courts – but as we think about how the proposed e-filing rules would operate in tandem with the local-form rules, this question warrants further consideration.

As to *who* should enforce local conditions on self-represented parties' e-filing access, my own initial take on the matter is that what we have heard from our Clerk liaisons illustrates that the rules should allow for clerks' offices to generally enforce ground rules for the method of filing. That is, clerks' offices should not be required to open and process electronic files in unapproved formats, or to permit e-filing by persons who are reasonably barred from using e-filing (such as self-represented litigants who refuse to take a required e-filing training). Unlike defects in the form of a paper filing – which presumably were the focus of the rules committees when they adopted the clerk-refusal rules – submission of a document in an unapproved format

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38 For an opinion making this point, see Folse v. Hoffman, 122 F.4th 80, 84 (4th Cir. 2024) ("Rule 83(a)(2) is inapplicable. The baseline 'requirement' here—i.e., non-represented litigants may not file documents electronically unless permitted by a local rule or court order—comes from the Federal Rules of Civil Procedure rather than from a local rule. There was thus no 'local rule' that was 'enforced in a way that' caused Folse to lose any right that he otherwise would have had absent that rule.").

39 Cf. Civil Rule 83(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.").

40 See, e.g., proposed Appellate Rule 25(a)(2)(C)(1).

or attempted use of the e-filing system by a not-yet-trained user are types of defects as to which the clerk's office probably has greater expertise than the judge does, and as to which it could be disruptive or cause security risks if the clerk's office were required to accept and process the submission.

But as to *how* such conditions should be enforced – and in particular, what the *consequences* of noncompliance should be, that seems to me a different matter. I personally would like for the rules to rescue a person who is facing a dispositive deadline (say, a statute of limitations or the deadline for filing a notice of appeal or a petition for permission to appeal) and who uses a non-compliant filing method. One way to accomplish such a result might be for the clerk-refusal rules to generally permit enforcement of the e-filing ground rules set by the national rules (and by local provisions that comport with the national rules), but for the local-form rules to rescue a litigant who complied with any national rule on e-filing but ran afoul of a local provision on e-filing. The way that this might work in practice would be for the clerk's office to note the attempted filing in the docket (once the clerk's office became aware of it) and to notify the filer that they must re-submit the document using an approved method and format or face sanctions up to and including the striking of the filing. For purposes of meeting a deadline, the original filing date could be employed so long as the filer could demonstrate the contents of the document that they originally (albeit noncompliantly) filed and the date and time of that original filing.

I concede, however, that this is not the way that the rules are currently written; both the clerk-refusal rules and the local-form rules refer to "form," so if one concludes that "form" includes e-filing specifications for purposes of the local-form rules, then that would also suggest "form" includes e-filing specifications for purposes of the clerk-refusal rules. Moreover, I realize that if one interprets or revises the local-form provisions in the way that I suggest, that would have implications not only for filings by self-represented litigants but also for filings by lawyers. And our Clerk liaisons will be quick to point out that there are plenty of lawyers who fail to comply with all the local e-filing requirements.

In sum, clarifying the effect of the clerk-refusal and local-form rules might be a useful thing to do in connection with this project, but we should note at the outset that any such clarification would likely reach well beyond just affecting self-represented litigants. And I expect that not all participants will agree with my above-described policy preferences. So the questions that I'm hoping the Advisory Committees will consider at their fall meetings are (1) whether the project should expand to encompass potential revisions to the clerk-refusal and/or local-form rules,[41] and (2) if so, what policy choices should guide those revisions.

41 It might also be useful to consider whether the rules should explicitly address the effect of automated rejections (for example, by CM/ECF). Cf. Farley v. Koepp, 788 F.3d 681, 686 n.4 (7th Cir. 2015) (stating that "the protections of Rules 5(d)(4) and 83(a)(2) apply to the new e-filing regime" because "these rules apply with equal force both to e-filing systems and human clerks") (citing Farzana K. v. Ind. Dep't of Educ., 473 F.3d 703, 708 (7th Cir. 2007)).

Appendix: Rules with terminology relevant to a possible switch to "self-represented"

Appellate Rule 25	(a) Filing…. (2) Filing: Method and Timeliness…. (B) Electronic Filing and Signing. (i) **By a Represented Person**--Generally Required; Exceptions. A person **represented by an attorney** must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. (ii) **By an Unrepresented Person**--When Allowed or Required. A person **not represented by an attorney**: • may file electronically only if allowed by court order or by local rule; and • may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions…. (b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on **a party represented by counsel** must be made on the party's counsel….
Appellate Rule 28.1	(d) Cover. Except for filings by **unrepresented parties**, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; and intervenor's or amicus curiae's brief, green; and any supplemental brief, tan….
Appellate Rule 30	(a) Appellant's Responsibility…. (3) Time to File; Number of Copies. Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each **party separately represented. An unrepresented party** proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each **separately represented party**…. (e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each **separately represented** party….
Appellate Rule 31	(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on **each unrepresented party** and on counsel for **each separately represented party**. **An unrepresented party** proceeding in forma

	pauperis must file 4 legible copies with the clerk, and one copy must be served on **each unrepresented party** and on counsel for **each separately represented party**….
Appellate Rule 32	(2) Cover. Except for filings by **unrepresented parties**, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan…. (d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, **if the party is represented**, by one of the party's attorneys…. (g) Certificate of Compliance. (1) Briefs and Papers That Require a Certificate. A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)--and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)--must include a certificate by the attorney, **or an unrepresented party**, that the document complies with the type-volume limitation….
Appellate Rule 45	(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on **a party represented by counsel** must be made on counsel….
Bankruptcy Rule 1004.1	(a) **Represented Infant or Incompetent Person**. If **an infant or an incompetent person has a representative**--such as a general guardian, committee, conservator, or similar fiduciary--the representative may file a voluntary petition on behalf of the infant or incompetent person. (b) **Unrepresented Infant or Incompetent Person**. If an infant or an incompetent person **does not have a representative**: (1) a next friend or guardian ad litem may file the petition; and (2) the court must appoint a guardian ad litem or issue any other order needed to protect the interests of the infant debtor or incompetent debtor.
Bankruptcy Rule 3015.1	As an exception to Rule 9029(a)(1), a district may require that a single local form be used for a Chapter 13 plan instead of Form 113 if it: … (e) contains a final paragraph providing a place for: … (2) a certification by the debtor's attorney, **or by an unrepresented debtor**, that the plan does not contain any nonstandard provision except as set out in the final paragraph.
Bankruptcy Rule 5005(a)	(3) Electronic Filing and Signing. (A) **By a Represented Entity**--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless

	nonelectronic filing is allowed by the court for cause or is allowed or required by local rule. (B) **By an Unrepresented Individual**--When Allowed or Required. **An individual not represented by an attorney:** (i) may file electronically only if allowed by court order or local rule; and (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.
Bankruptcy Rule 7004	(g) Serving a Debtor's Attorney. If, when served, a debtor is **represented by an attorney**, the attorney must also be served by any means authorized by Fed. R. Civ. P. 5(b)….
Bankruptcy Rule 8001	(c) Requirement to Send Documents Electronically. Under these Part VIII rules, a document must be sent electronically, unless: (1) it is sent by or to **an individual who is not represented by counsel**;…
Bankruptcy Rule 8011	(a) Filing…. (2) Method and Timeliness…. (B) Electronic Filing. (i) **By a Represented Person**--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless non-electronic filing is allowed by the court for cause or is allowed or required by local rule. (ii) **By an Unrepresented Individual**--When Allowed or Required. **An individual not represented by an attorney:** • may file electronically only if allowed by court order or by local rule; and • may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions…. (b) Service of All Documents Required. Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on **a party represented by counsel** must be made on the party's counsel…. (e) Signature Always Required. (1) Electronic Filing. Every document filed electronically must include the electronic signature of the person filing it **or, if the person is represented**, the counsel's electronic signature. A filing made through a person's electronic-filing account and authorized by that person--together with that person's name on a signature block--constitutes the person's signature. (2) Paper Filing. Every document filed in paper form must be signed by the person filing it **or, if the person is represented**, by

	the person's counsel.
Bankruptcy Rule 8013	(d) Emergency Motion…. (2) Content. An emergency motion must:… (C) include: (i) the email address, office address, and telephone number of the moving counsel; and (ii) when known, the same information as in (i) for opposing counsel and **any unrepresented party to the appeal**; …. (3) Notifying Opposing Parties. Before filing an emergency motion, the movant must make every practicable effort to notify opposing counsel **and any unrepresented party** in time for them to respond….
Bankruptcy Rule 8015	(h) Certificate of Compliance. (1) Briefs and Documents That Require a Certificate. A brief submitted under Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)--and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)--must include a certificate by the attorney, **or an unrepresented party**, that the document complies with the type-volume limitation….
Bankruptcy Rule 9011	(a) Signature. Every petition, pleading, written motion, and other document--except a list, schedule, or statement, or an amendment to one of them--must be signed by at least one attorney of record in the attorney's individual name. **A party not represented by an attorney** must sign all documents…. (b) Representations to the Court. By presenting to the court a petition, pleading, written motion, or other document--whether by signing, filing, submitting, or later advocating it--an attorney **or unrepresented party** certifies that, to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances: … (c) Sanctions… (4) Nature of a Sanction; Limitations…. (B) Limitations on a Monetary Sanction. The court must not impose a monetary sanction: (i) **against a represented party** for violating (b)(2) …
Civil Rule 4	(a) Contents; Amendments. (1) Contents. A summons must:… (C) state the name and address of the plaintiff's attorney or--**if unrepresented**--of the plaintiff;… Notice of a Lawsuit and Request to Waive Service of Summons. (Caption)

	… I certify that this request is being sent to you on the date below. Date: _____ _____ (Signature of the attorney **or unrepresented party**) … Waiver of the Service of Summons. (Caption) To (name the plaintiff's attorney **or the unrepresented plaintiff**): …. Date: _____ _____ (Signature of the attorney **or unrepresented party**) …
Civil Rule 5	(b) Service: How Made. (1) Serving an Attorney. If a party is **represented by an attorney**, service under this rule must be made on the attorney unless the court orders service on the party…. (d) Filing…. (3) Electronic Filing and Signing. (A) **By a Represented Person**--Generally Required; Exceptions. **A person represented by an attorney** must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. (B) **By an Unrepresented Person**--When Allowed or Required. **A person not represented by an attorney**: (i) may file electronically only if allowed by court order or by local rule; and (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions….
Civil Rule 11	(a) Signature. Every pleading, written motion, and other paper must

	be signed by at least one attorney of record in the attorney's name--or by a party personally **if the party is unrepresented**. .... (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney **or unrepresented party** certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: … (c) Sanctions…. (5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction: (A) against **a represented party** for violating Rule 11(b)(2); …
Civil Rule 16	(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys **and any unrepresented parties** to appear for one or more pretrial conferences …. (b) Scheduling…. (1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order: (A) after receiving the parties' report under Rule 26(f); or (B) after consulting with the parties' attorneys **and any unrepresented parties** at a scheduling conference…. (c) Attendance and Matters for Consideration at a Pretrial Conference. (1) Attendance. **A represented party** must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference…. (e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party **and by any unrepresented party**….
Civil Rule 17	(c) Minor or Incompetent Person. (1) **With a Representative**. The following representatives may sue or defend on behalf of a minor or an incompetent person:… (2) **Without a Representative**. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person **who is unrepresented** in an action.
Civil Rule 26	(a) Required Disclosures.

	(1) Initial Disclosure…. (B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:… (iv) **an action brought without an attorney** by a person in the custody of the United States, a state, or a state subdivision; …. (f) Conference of the Parties; Planning for Discovery. (1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). (2) Conference Content; Parties' Responsibilities. …. The attorneys of record and **all unrepresented parties that have appeared in the case** are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan…. (g) Signing Disclosures and Discovery Requests, Responses, and Objections. (1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--**or by the party personally, if unrepresented**--and must state the signer's address, e-mail address, and telephone number….
Civil Rule 27	Rule 27. Depositions to Perpetuate Testimony (a) Before an Action Is Filed…. (2) Notice and Service. …. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent **if an unserved person is not otherwise represented**. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies….
Civil Rule 32	(a) Using Depositions. (1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions: (A) **the party was present or represented at the taking of the deposition** or had reasonable notice of it;…. (5) Limitations on Use…. (B) Unavailable Deponent; Party Could Not Obtain an Attorney. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it **could not**, despite diligent efforts, **obtain an attorney to represent it** at the

	deposition….
Civil Rule 55	(b) Entering a Default Judgment….. (2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person **only if represented by a general guardian, conservator, or other like fiduciary who has appeared**. If the party against whom a default judgment is sought has **appeared personally or by a representative**, that party or its representative must be served with written notice of the application at least 7 days before the hearing….
Supplemental Admiralty and Maritime Claims Rule F	Rule F. Limitation of Liability … (6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or **if the claimant has no attorney** to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of **the claimant's attorney (if the claimant is known to have one)**, (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof….
Criminal Rule 11 [see also Criminal Rules 32.1(a)(3)(B) & 58(b)(2)]	(b) Considering and Accepting a Guilty or Nolo Contendere Plea. (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:… (D) the right to be **represented by counsel**--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding; …
Criminal Rule 43	(b) When Not Required. A defendant need not be present under any of the following circumstances: (1) Organizational Defendant. The defendant is **an organization represented by counsel** who is present….
Criminal Rule 44	(c) Inquiry Into Joint Representation. (1) Joint Representation. Joint representation occurs when: (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and (B) the defendants are **represented by the same counsel**, or counsel who are associated in law practice….
Criminal Rule 49	(a) Service on a Party…. (2) Serving a Party's Attorney. Unless the court orders otherwise,

	when these rules or a court order requires or permits service on a **party represented by an attorney**, service must be made on the attorney instead of the party. (3) Service by Electronic Means. (A) Using the Court's Electronic-Filing System. A party **represented by an attorney** may serve a paper on a registered user by filing it with the court's electronic-filing system. A party **not represented by an attorney** may do so only if allowed by court order or local rule…. (b) Filing…. (3) Means Used by Represented and Unrepresented Parties. (A) **Represented Party. A party represented by an attorney** must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. (B) **Unrepresented Party. A party not represented by an attorney** must file nonelectronically, unless allowed to file electronically by court order or local rule. (4) Signature. Every written motion and other paper must be signed by at least one attorney of record in the attorney's name--or by a person filing a paper **if the person is not represented by an attorney**….

Clean versions of updated self-represented litigants' service and e-filing amendments for the Civil, Criminal, and Appellate Rules, September 21, 2025

I. Civil Rules: Amendments to Civil Rule 5 (plus a conforming amendment)

Here is the updated draft of Civil Rule 5, along with the conforming amendment to Civil Rule 6.

A. Civil Rule 5

Here is the sketch of the Civil Rule 5 amendments:

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But

[(A) such service is not effective if the filer learns that it did not reach the person to be served; and

(B)] a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

(3) Service by Other Means ~~in General~~. A paper ~~is~~ may also be served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's

dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by ~~other~~ electronic means that the person has consented to in writing – in ~~either of~~ which event~~s~~ service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person has consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~ **(4) Serving Papers That Are Not Filed.** Rule 5(b)(3) governs service of a paper that is not filed.

(5) Definition of "Notice of Case Activity." The term "notice of case activity" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers ~~after~~ After the Complaint. Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served [through the court's electronic-filing system][1] under Rule 5(b)(2)~~by filing it with the court's electronic-filing system~~. When a paper that is required to be served is served by other means:

(i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed, unless filing is required by court order or by local rule.

(2) ~~Nonelectronic Filing.~~ ~~A paper not filed electronically is filed by delivering it:~~

~~(A) to the clerk; or~~

~~(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.~~

1 This specification may be advisable now that Rule 5(b)(2) contemplates locally-required "other means" for serving sealed filings.

~~(3)~~ Electronic Filing and Signing.

(A) By a ~~Represented~~ Person Represented by Counsel—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an Unrepresented ~~Person~~ Party—When Allowed or Required.

(i) **In General.** A ~~person~~ party not represented by an attorney~~: (i)~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or ~~by~~ local rule prohibits the party from doing so.~~; and (ii)~~ An unrepresented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) **Local Provisions Prohibiting Access.** If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits unrepresented parties from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing papers and for receiving electronic notice of activity in the case.

(iii) **Conditions and Restrictions on Access.** A court may set reasonable conditions and restrictions on unrepresented parties' access to the

court's electronic-filing system.

(iv) **Restrictions on a Particular Person.** A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(3) Nonelectronic Filing. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Committee Note

Rule 5 is amended to address two topics concerning unrepresented parties. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[2] Criminal Rule 49, and Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the

2 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Also, the order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern primacy of electronic filing.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

[The last sentence of amended Rule 5(b)(2)] [Rule 5(b)(2)(B)] states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

Subdivision (b)(3)(E). The prior reference to "sending [a paper] to a registered user by

filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2).

[Subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served"; a similar provision is also included in subdivision (b)(2) with respect to service via the court's electronic-filing system.] [Although subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (b)(2). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.]

Subdivision (b)(4). New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a notice of case activity, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

Subdivision (b)(5). New Rule 5(b)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(1)(B). Subdivision (d)(1)(B) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "[through the court's electronic-filing system] under Rule 5(b)(2)" in order to conform to the change to subdivision (b)(2).

Subdivision (d)(2)(B). Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. (The rule grants this presumptive authorization to an unrepresented 'party,' not an unrepresented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system.) If a district wishes to restrict unrepresented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(2)(B)(ii), a local rule or general court order that bars parties not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing

documents and receiving electronic notice of activity in the case. But Rule 5(d)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for unrepresented parties to the court's electronic-filing system, or (2) providing unrepresented parties with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). That is, a local rule generally prohibiting access to the court's electronic-filing system would include "reasonable exceptions" (within the meaning of the Rule) if it provided reasonable access to the court's electronic-filing system.

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral settings) and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. [Some courts have adopted local rules that permit unrepresented parties to use the court's electronic filing system only if they obtain permission from the judge to whom the case is assigned; such a local rule would meet the Rule's requirement of "reasonable access" so long as such permission is not unreasonably withheld in practice.] Rule 5(d)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 5(d)(2)(B)(ii) does not restrict a court from entering an order barring a specific unrepresented litigant from accessing the court's electronic-filing system.

For a court that opts to provide unrepresented parties with an alternative electronic means for filing and an alternative electronic means for receiving notice of court filings and orders, the rule does not require the court to accept emailed or uploaded files in any and all formats. A court is free to set reasonable requirements such as that the files be in PDF format. [But see Civil Rule 83(a)(2) ("A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.").]

Rules 5(d)(2)(B)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits unrepresented parties from using the court's e-filing system, the "reasonable exceptions" required by item (ii) should align with the types of "reasonable conditions and restrictions" referenced in item (iii). That is, a local rule may allow unrepresented parties e-filing access only in particular circumstances—such as after completing a training or agreeing to specified formatting standards—provided those requirements are reasonable under item (iii).

Conversely, item (iii)'s authorization for courts to impose reasonable conditions on unrepresented parties' access also informs what counts as a reasonable exception under item (ii). For example, a local rule that generally prohibits unrepresented parties from e-filing might nonetheless provide an exception where the unrepresented party meets conditions similar to those described in item (iii). The two provisions thus establish a flexible, complementary framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures that courts retain authority to structure access responsibly.

Rule 5(d)(2)(B)(iv) provides that the court may deny a specific unrepresented litigant access to the court's electronic-filing system, and that the court may revoke an unrepresented litigant's access to the court's electronic-filing system.

B. Civil Rule 6

This draft of the conforming amendment to Civil Rule 6 has not changed:

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

II. Criminal Rules: Amendments to Criminal Rule 49 (plus a conforming amendment)

Here is the updated sketch of Criminal Rule 49, plus the conforming amendment to Criminal Rule 45.

A. Criminal Rule 49

Rule 49. Serving and Filing Papers

(a) Service on a Party.

(1) What is Required. Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(2) Serving a Party's Attorney. Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(3) Service by ~~Electronic Means~~ a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But

[(A) such service is not effective if the filer learns that it did not reach the person to be served; and

(B)] a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

~~**(A) Using the Court's Electronic-Filing System.** A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon~~

~~filing, but is not effective if the serving party learns that it did not reach the person to be served.~~

~~**(B) Using Other Electronic Means.** A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.~~

(4) Service by ~~Nonelectronic~~ Other Means. A paper may also be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; ~~or~~

(E) sending it by electronic means that the person has consented to in writing – in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or

~~(E)~~ (F) delivering it by any other means that the person has consented to in writing –in which event service is complete when the person making

service delivers it to the agency designated to make delivery.

[(5) Serving Papers That Are Not Filed. Rule 49(a)(4) governs service of a paper that is not filed.]

(6) Definition of "Notice of Case Activity." The term "notice of case activity" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(b) Filing.

(1) When Required; Certificate of Service. Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ [through the court's electronic-filing system][3] under Rule 49(a)(3). When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) ~~Means of~~ Electronic Filing and Signing.

(A) By a Person Represented by Counsel – Generally Required; Exceptions. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By a Self-Represented Party – When Allowed.

3 This specification may be advisable now that Rule 49(a)(3) contemplates locally-required "other means" for serving sealed filings.

(i) In General. A self-represented party may use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or local rule prohibits the party from doing so.[4]

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented parties from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented parties' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

(C) Means of Filing. ~~**Electronically.**~~ A paper is filed electronically by filing it with the court's electronic-filing system.

4 This provision carries forward a feature of current Rule 49(b)(3)(B) – namely, the absence of any reference to local provisions requiring a self-represented person to e-file.

(D) Signature. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature.

(E) Qualifies as Written Paper. A paper filed electronically is written or in writing under these rules.

~~**(B)**~~ **(3) Nonelectronically Filing.** A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

~~**(3) Means Used by Represented and Unrepresented Parties.**~~

~~**(A) Represented Party.** A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.~~

~~**(B) Unrepresented Party.** A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.~~

(4) Signature. Every written motion and other paper must be signed by at least one attorney of record in the attorney's name--or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected

after being called to the attorney's or person's attention.

(5) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve--or authorize the court to relieve--a party's failure to appeal within the allowed time.

Committee Note

Rule 49 is amended to address two topics concerning self-represented parties. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[5] Civil Rule 5, and Appellate Rule 25.) Rule 49(a) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 49(b) is amended to expand the availability of electronic modes by which self-represented parties can file documents with the court and receive notice of filings that others make in the case.

Subdivision (a)(3). Rule 49(a)(3) is revised so that it focuses solely on the service of notice by means of the court's electronic-filing system. What had been Rule 49(a)(3)(B)

5 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

(concerning "other electronic means" of service) is relocated, as revised, to a new Rule 49(a)(4)(E).

Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 49(a)(3)(A)'s provision for service by "on a registered user by filing [the paper] with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

[The last sentence of amended Rule 49(a)(3)] [Rule 49(a)(3)(B)] states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (a)(4). Rule 49(a)(4) is retitled "Service by Other Means" to reflect the relocation into that subdivision – as new Rule 49(a)(4)(E) – of what was previously Rule 49(a)(3)(B). The subdivision's introductory phrase ("A paper may be served by") is amended to read "A paper may also be served by." This locution ensures that Rule 49(a)(4) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

[Subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served"; a similar provision is also included in subdivision (a)(3) with respect to service via the court's electronic-filing system.] [Although new subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (a)(3). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.]

[Subdivision (a)(5). New Rule 49(a)(5) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 49(a)(3): If a paper is not filed with the court, then the court's electronic system will never generate a notice of case activity, so the sender cannot use Rule 49(a)(3) for service and thus must use Rule 49(a)(4).]

Subdivision (a)(6). New Rule 49(a)(6) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (b)(1). Subdivision (b)(1) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "[through the court's electronic-filing system] under Rule 49(a)(3)" in order to conform to the change to subdivision (a)(3).

Subdivision (b)(2). Amended Rule 49(b)(2) governs electronic filing and signing. New Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is, under new Rule 49(b)(2)(B)(i), self-represented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. (The rule grants this presumptive authorization to a self-represented 'party,' not a self-represented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system. See Rule 49(c).) If a district wishes to restrict self-represented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 49(b)(2)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 49(b)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 49(b)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented parties to the court's electronic-filing system, or (2) providing self-represented parties with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). That is, a local rule generally prohibiting access to the court's electronic-filing system would include "reasonable exceptions" (within the meaning of the Rule) if it provided reasonable access to the court's electronic-filing system.

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions

and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral settings) and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. [Some courts have adopted local rules that permit self-represented parties to use the court's electronic filing system only if they obtain permission from the judge to whom the case is assigned; such a local rule would meet the Rule's requirement of "reasonable access" so long as such permission is not unreasonably withheld in practice.] Rule 49(b)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 49(b)(2)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

For a court that opts to provide self-represented parties with an alternative electronic means for filing and an alternative electronic means for receiving notice of court filings and orders, the rule does not require the court to accept emailed or uploaded files in any and all formats. A court is free to set reasonable requirements such as that the files be in PDF format. [But see Criminal Rule 57(a)(2) ("A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.").]

Rules 49(b)(2)(B)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits self-represented parties from using the court's e-filing system, the "reasonable exceptions" required by item (ii) should align with the types of "reasonable conditions and restrictions" referenced in item (iii). That is, a local rule may allow self-represented parties e-filing access only in particular circumstances—such as after completing a training or agreeing to specified formatting standards—provided those requirements are reasonable under item (iii).

Conversely, item (iii)'s authorization for courts to impose reasonable conditions on self-represented parties' access also informs what counts as a reasonable exception under item (ii). For example, a local rule that generally prohibits self-represented parties from e-filing might nonetheless provide an exception where the self-represented party meets conditions similar to those described in item (iii). The two provisions thus establish a flexible, complementary framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures that courts retain authority to structure access responsibly.

Rule 49(b)(2)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (b)(3). What had been Rule 49(b)(2)(B) (concerning nonelectronic means of filing) is carried forward as new Rule 49(b)(3).

B. Criminal Rule 45

This proposed conforming amendment to Criminal Rule 45(c) has not changed:

Rule 45. Computing and Extending Time

* * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E) as Rule 49(a)(4)(F).

III. Appellate Rules: Amendments to Appellate Rule 25

Here is the updated version of the proposed amendments to Appellate Rule 25:

Rule 25. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing: Method and Timeliness.

(A) Nonelectronic Filing.

(i) In General. For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for

filing.

(ii) A Brief or Appendix. A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(iii) Inmate Filing. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or
- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(B) Electronic Filing ~~and Signing. (i) By~~ by a ~~Represented~~ Person

Represented by Counsel--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

~~(ii)~~ (C) Electronic Filing by ~~By~~ an Unrepresented ~~Person~~ Party--When Allowed or Required.

(i) In General. A party ~~person~~ not represented by an attorney~~: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or ~~by~~ local rule prohibits the person from doing so.~~; and •~~ An unrepresented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits unrepresented parties from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing papers and for receiving electronic notice of activity in the case.

(iii) Conditions and Restrictions on Access. A court may set reasonable

conditions and restrictions on unrepresented parties' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

~~**(iii)**~~ **(D) Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

~~**(iv)**~~ **(E) Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) Filing a Motion with a Judge. *[Not shown in this draft, for brevity.]*

(4) Clerk's Refusal of Documents. *[Not shown in this draft, for brevity.]*

(5) Privacy Protection. *[Not shown in this draft, for brevity.]*

(b) Service of All Papers Required. Unless a rule requires service by the clerk or the paper will be served [through the court's electronic-filing system][6] under Rule 25(c)(1), a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

6 This specification may be advisable now that Rule 25(c)(1) contemplates locally-required "other means" for serving sealed filings.

(1) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But

[(A) such service is not effective if the filer learns that it did not reach the person to be served; and

(B)] a court may provide by local rule that, if a paper is filed under seal or initiates a proceeding in the court of appeals under Rule 5, 15, or 21, it must be served by other means.

(2) Service by Other Means. A paper may also be served under this rule by:

~~Nonelectronic service may be any of the following:~~

(A) personal delivery, including delivery to a responsible person at the office of counsel;

(B) ~~by~~ mail; ~~or~~

(C) ~~by~~ third-party commercial carrier for delivery within 3 days; or

(D) ~~. (2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by~~ sending it by ~~other~~ electronic means that the person to be served has consented to in writing.

(3) **Considerations in Choosing Other Means.** When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper

with the court.

(4) **When Service Is Complete.** Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by a notice from the court's electronic-filing system is complete as of the notice's date. Service by other electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

(5) Serving Papers That Are Not Filed. Rule 25(c)(2) governs service of a paper that is not filed.

(6) Definition of "Notice of Case Activity." The term "notice of case activity" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. *[Not shown in this draft, for brevity.]*

Committee Note

Rule 25 is amended to address two topics concerning unrepresented parties. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[7] Civil Rule 5, and Criminal Rule 49.) Rule 25(a)(2) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Rule 25(c) is amended to address service of documents filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 25(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a)(2)(C). Under new Rule 25(a)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 25(a)(2)(B)(ii). That is, under new Rule 25(a)(2)(C)(i), unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case. (The rule grants this presumptive authorization to an unrepresented 'party,' not an unrepresented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system.) If a circuit wishes to restrict unrepresented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 25(a)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 25(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 25(a)(2)(C)(ii) and (iii) by doing either of the following:

7 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

(1) Allowing reasonable access for unrepresented parties to the court's electronic-filing system, or (2) providing unrepresented parties with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). That is, a local rule generally prohibiting access to the court's electronic-filing system would include "reasonable exceptions" (within the meaning of the Rule) if it provided reasonable access to the court's electronic-filing system.

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral settings) and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, filings that commence a proceeding in the court of appeals – cannot be filed by means of the court's electronic-filing system. [Some courts have adopted local rules that permit unrepresented parties to use the court's electronic filing system only if they obtain permission from the court; such a local rule would meet the Rule's requirement of "reasonable access" so long as such permission is not unreasonably withheld in practice.] Rule 25(a)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 25(a)(2)(C)(ii) does not restrict a court from entering an order barring a specific unrepresented litigant from accessing the court's electronic-filing system.

For a court that opts to provide unrepresented parties with an alternative electronic means for filing and an alternative electronic means for receiving notice of court filings and orders, the rule does not require the court to accept emailed or uploaded files in any and all formats. A court is free to set reasonable requirements such as that the files be in PDF format. [But see Appellate Rule 47(a)(2) ("A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.").]

Rules 25(a)(2)(C)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits unrepresented parties from using the court's e-filing system, the "reasonable exceptions" required by item (ii) should align with the types of "reasonable conditions and restrictions" referenced in item (iii). That is, a local rule may allow unrepresented parties e-filing access only in particular circumstances—such as after completing a training or agreeing to specified formatting standards—provided those requirements are reasonable under item (iii).

Conversely, item (iii)'s authorization for courts to impose reasonable conditions on unrepresented parties' access also informs what counts as a reasonable exception under item (ii). For example, a local rule that generally prohibits unrepresented parties from e-filing might nonetheless provide an exception where the unrepresented party meets conditions similar to

those described in item (iii). The two provisions thus establish a flexible, complementary framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures that courts retain authority to structure access responsibly.

Rule 25(a)(2)(C)(iv) provides that the court may deny a specific unrepresented litigant access to the court's electronic-filing system, and that the court may revoke an unrepresented litigant's access to the court's electronic-filing system.

Former Rules 25(a)(2)(B)(iii) and (iv) are carried forward but renumbered as Rules 25(a)(2)(D) and (E).

Subdivision (b). Existing Rule 25(b) generally requires that a party, "at or before the time of filing a paper, [must] serve a copy on the other parties to the appeal or review." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the paper will be served [through the court's electronic-filing system] under Rule 25(c)(1)." This amendment is necessary because new Rule 25(c)(1) encompasses service by the notice of case activity that results from the clerk's uploading into the system a paper filing by an unrepresented litigant. In those circumstances, service will not occur "at or before the time of filing a paper," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (c). Rule 25(c) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in Rule 25(c)(1). Existing Rule 25(c)(1) becomes new Rule 25(c)(2), which continues to address alternative means of service. New Rule 25(c)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 25(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 25(c)(2)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

[The last sentence of amended Rule 25(c)(1)] [Rule 25(c)(1)(B)] states that a court may provide by local rule that if a paper is filed under seal or initiates a proceeding in the court of

appeals under Rule 5, 15, or 21, it must be served by other means. This sentence is designed to account for circuits (if any) in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system. It also accounts for circuits that permit the use of CM/ECF to file case-initiating petitions but that do not wish to permit the filer to rely on CM/ECF for service of such a petition.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of current Rule 25(c)(1), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be any of the following") is amended to read "A paper may also be served under this rule by." This locution reflects the inclusion of other electronic means (apart from service through the court's electronic-filing system) in new Rule 25(c)(2)(D) and also ensures that what will become Rule 25(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 25(c)(1).

Subdivision (c)(4). Amended subdivision (c)(4) carries forward the prior rule's provisions that service by electronic means other than through the court's electronic-filing system is complete on sending unless the party making service is notified that the paper was not received by the party served, and that service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

As to service through the court's electronic-filing system, the amendments make two changes. First, the amended rule provides that such service "is complete as of the notice's date." Under new subdivision (c)(1), when a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a notice of case activity through the court's electronic-filing system occurs by means of the notice of case activity. But that service does not occur "on filing" when the filing is made other than through the court's electronic-filing system. There can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (c)(1) and amended subdivision (c)(4) provide that service by a notice of case activity sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of case activity.

[Second, while subdivision (c)(4) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "is notified that the paper was not received by the party served," the similar provision concerning service via the court's electronic-filing system now appears in subdivision (c)(1)(A).] [Second, although

subdivision (c)(4) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "is notified that the paper was not received by the party served," no such proviso is included in subdivision (c)(1) as to service by a notice of case activity sent to a person registered to receive it through the court's electronic-filing system. This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.]

Subdivision (c)(5). New Rule 25(c)(5) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 25(c)(1): If a paper is not filed with the court, then the court's electronic system will never generate a notice of case activity, so the sender cannot use Rule 25(c)(1) for service and thus must use Rule 25(c)(2).

Subdivision (c)(6). New Rule 25(c)(6) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Redlined versions of updated SRL service and e-filing amendments for the Civil, Criminal, and Appellate Rules, September 21, 2025 (showing changes compared with spring 2025 versions)

I. Civil Rules: Amendments to Civil Rule 5 (plus a conforming amendment)

Here is the updated draft of Civil Rule 5, along with the conforming amendment to Civil Rule 6.

A. Civil Rule 5

Here is the sketch of the Civil Rule 5 amendments:

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But

[(A) such service is not effective if the filer learns that it did not reach the person to be served; and

(B)] a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

(3) Service by Other Means ~~in General~~. A paper ~~is~~ may also be served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's

dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by ~~other~~ electronic means that the person has consented to in writing – in ~~either of~~ which event~~s~~ service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person has consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~ **(4) Serving Papers That Are Not Filed.** Rule 5(b)(3) governs service of a paper that is not filed.

(5) Definition of "Notice of Case Activity." The term "notice of case activity" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers ~~after~~ After the Complaint. Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served [through the court's electronic-filing system][1] under Rule 5(b)(2)~~by filing it with the court's electronic-filing system~~. When a paper that is required to be served is served by other means:

(i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed, unless filing is required by court order or by local rule.

(2) ~~Nonelectronic Filing.~~ ~~A paper not filed electronically is filed by delivering it:~~

~~(A) to the clerk; or~~

~~(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.~~

1 This specification may be advisable now that Rule 5(b)(2) contemplates locally-required "other means" for serving sealed filings.

~~(3)~~ Electronic Filing and Signing.

(A) By a ~~Represented~~ Person Represented by Counsel—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an Unrepresented ~~Person~~ Party—When Allowed or Required.

(i) **In General.** A ~~person~~ party not represented by an attorney~~: (i)~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or ~~by~~ local rule prohibits the party from doing so.~~; and (ii)~~ An unrepresented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) **Local Provisions Prohibiting Access.** If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits unrepresented parties from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing papers and for receiving electronic notice of activity in the case.

(iii) **Conditions and Restrictions on Access.** A court may set reasonable conditions and restrictions on unrepresented parties' access to the

court's electronic-filing system.

(iv) **Restrictions on a Particular Person.** A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(3) Nonelectronic Filing. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Committee Note

Rule 5 is amended to address two topics concerning unrepresented parties. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[2] Criminal Rule 49, and Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the

2 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Also, the order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern primacy of electronic filing.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

[The last sentence of amended Rule 5(b)(2)] [Rule 5(b)(2)(B)] states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

Subdivision (b)(3)(E). The prior reference to "sending [a paper] to a registered user by

filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2).

[Subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served"; a similar provision is also included in subdivision (b)(2) with respect to service via the court's electronic-filing system.] [Although subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (b)(2). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.]

Subdivision (b)(4). New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a notice of case activity, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

Subdivision (b)(5). New Rule 5(b)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(1)(B). Subdivision (d)(1)(B) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "[through the court's electronic-filing system] under Rule 5(b)(2)" in order to conform to the change to subdivision (b)(2).

Subdivision (d)(2)(B). Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. (The rule grants this presumptive authorization to an unrepresented 'party,' not an unrepresented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system.) If a district wishes to restrict unrepresented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(2)(B)(ii), a local rule or general court order that bars parties not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing

documents and receiving electronic notice of activity in the case. But Rule 5(d)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for unrepresented parties to the court's electronic-filing system, or (2) providing unrepresented parties with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). That is, a local rule generally prohibiting access to the court's electronic-filing system would include "reasonable exceptions" (within the meaning of the Rule) if it provided reasonable access to the court's electronic-filing system.

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral settings) and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. [Some courts have adopted local rules that permit unrepresented parties to use the court's electronic filing system only if they obtain permission from the judge to whom the case is assigned; such a local rule would meet the Rule's requirement of "reasonable access" so long as such permission is not unreasonably withheld in practice.] Rule 5(d)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 5(d)(2)(B)(ii) does not restrict a court from entering an order barring a specific unrepresented litigant from accessing the court's electronic-filing system.

For a court that opts to provide unrepresented parties with an alternative electronic means for filing and an alternative electronic means for receiving notice of court filings and orders, the rule does not require the court to accept emailed or uploaded files in any and all formats. A court is free to set reasonable requirements such as that the files be in PDF format. [But see Civil Rule 83(a)(2) ("A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.").]

Rules 5(d)(2)(B)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits unrepresented parties from using the court's e-filing system, the "reasonable exceptions" required by item (ii) should align with the types of "reasonable conditions and restrictions" referenced in item (iii). That is, a local rule may allow unrepresented parties e-filing access only in particular circumstances—such as after completing a training or agreeing to specified formatting standards—provided those requirements are reasonable under item (iii).

Conversely, item (iii)'s authorization for courts to impose reasonable conditions on unrepresented parties' access also informs what counts as a reasonable exception under item (ii). For example, a local rule that generally prohibits unrepresented parties from e-filing might nonetheless provide an exception where the unrepresented party meets conditions similar to those described in item (iii). The two provisions thus establish a flexible, complementary framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures that courts retain authority to structure access responsibly.

Rule 5(d)(2)(B)(iv) provides that the court may deny a specific unrepresented litigant access to the court's electronic-filing system, and that the court may revoke an unrepresented litigant's access to the court's electronic-filing system.

B. Civil Rule 6

As you know, a conforming change to Civil Rule 6 would be necessary in order to update cross-references. That draft has not changed since the version shown in the fall 2024 agenda books:

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

II. Criminal Rules: Amendments to Criminal Rule 49 (plus a conforming amendment)

Here is the updated sketch of Criminal Rule 49, plus the conforming amendment to

Criminal Rule 45.

A. Criminal Rule 49

Rule 49. Serving and Filing Papers

(a) Service on a Party.

(1) What is Required. Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(2) Serving a Party's Attorney. Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(3) Service by ~~Electronic Means~~ a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But

[(A) such service is not effective if the filer learns that it did not reach the person to be served; and

(B)] a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

~~**(A) Using the Court's Electronic-Filing System.** A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so~~

~~only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.~~

~~**(B) Using Other Electronic Means.** A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.~~

(4) Service by ~~Nonelectronic~~ Other Means. A paper may also be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; ~~or~~

(E) sending it by electronic means that the person has consented to in writing – in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or

~~(E)~~ (F) delivering it by any other means that the person has consented to in

writing –in which event service is complete when the person making service delivers it to the agency designated to make delivery.

[(5) Serving Papers That Are Not Filed. Rule 49(a)(4) governs service of a paper that is not filed.]

(6) Definition of "Notice of Case Activity." The term "notice of case activity" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(b) Filing.

(1) When Required; Certificate of Service. Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ [through the court's electronic-filing system][3] under Rule 49(a)(3). When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) ~~Means of~~ Electronic Filing and Signing.

(A) By a Person Represented by Counsel – Generally Required; Exceptions. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

3 This specification may be advisable now that Rule 49(a)(3) contemplates locally-required "other means" for serving sealed filings.

(B) By a Self-Represented Party – When Allowed.

(i) In General. A self-represented party may use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or local rule prohibits the party from doing so.[4]

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented parties from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented parties' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

(C) Means of Filing. ~~**Electronically.**~~ A paper is filed electronically by filing it

4 This provision carries forward a feature of current Rule 49(b)(3)(B) – namely, the absence of any reference to local provisions requiring a self-represented person to e-file.

with the court's electronic-filing system.

(D) Signature. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature.

(E) Qualifies as Written Paper. A paper filed electronically is written or in writing under these rules.

~~**(B)**~~ **(3) Nonelectronic~~ally~~ Filing.** A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

~~**(3) Means Used by Represented and Unrepresented Parties.**~~

~~**(A) Represented Party.** A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.~~

~~**(B) Unrepresented Party.** A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.~~

(4) Signature. Every written motion and other paper must be signed by at least one attorney of record in the attorney's name--or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The

court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve--or authorize the court to relieve--a party's failure to appeal within the allowed time.

Committee Note

Rule 49 is amended to address two topics concerning self-represented parties. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[5] Civil Rule 5, and Appellate Rule 25.) Rule 49(a) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 49(b) is amended to expand the availability of electronic modes by which self-represented parties can file documents with the court and receive notice of filings that others make in the case.

5 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

Subdivision (a)(3). Rule 49(a)(3) is revised so that it focuses solely on the service of notice by means of the court's electronic-filing system. What had been Rule 49(a)(3)(B) (concerning "other electronic means" of service) is relocated, as revised, to a new Rule 49(a)(4)(E).

Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 49(a)(3)(A)'s provision for service by "on a registered user by filing [the paper] with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

[The last sentence of amended Rule 49(a)(3)] [Rule 49(a)(3)(B)] states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (a)(4). Rule 49(a)(4) is retitled "Service by Other Means" to reflect the relocation into that subdivision – as new Rule 49(a)(4)(E) – of what was previously Rule 49(a)(3)(B). The subdivision's introductory phrase ("A paper may be served by") is amended to read "A paper may also be served by." This locution ensures that Rule 49(a)(4) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

[Subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served"; a similar provision is also included in subdivision (a)(3) with respect to service via the court's electronic-filing system.] [Although new subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (a)(3). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.]

[Subdivision (a)(5). New Rule 49(a)(5) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 49(a)(3): If a paper is not filed with

the court, then the court's electronic system will never generate a notice of case activity, so the sender cannot use Rule 49(a)(3) for service and thus must use Rule 49(a)(4).]

Subdivision (a)(6). New Rule 49(a)(6) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (b)(1). Subdivision (b)(1) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "[through the court's electronic-filing system] under Rule 49(a)(3)" in order to conform to the change to subdivision (a)(3).

Subdivision (b)(2). Amended Rule 49(b)(2) governs electronic filing and signing. New Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is, under new Rule 49(b)(2)(B)(i), self-represented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. (The rule grants this presumptive authorization to a self-represented 'party,' not a self-represented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system. See Rule 49(c).) If a district wishes to restrict self-represented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 49(b)(2)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 49(b)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 49(b)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented parties to the court's electronic-filing system, or (2) providing self-represented parties with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). That is, a local rule generally prohibiting access to the court's electronic-filing system would include "reasonable exceptions" (within the meaning of the Rule) if it provided reasonable access to the court's electronic-filing system.

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral settings) and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. [Some courts have adopted local rules that permit self-represented parties to use the court's electronic filing system only if they obtain permission from the judge to whom the case is assigned; such a local rule would meet the Rule's requirement of "reasonable access" so long as such permission is not unreasonably withheld in practice.] Rule 49(b)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 49(b)(2)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

For a court that opts to provide self-represented parties with an alternative electronic means for filing and an alternative electronic means for receiving notice of court filings and orders, the rule does not require the court to accept emailed or uploaded files in any and all formats. A court is free to set reasonable requirements such as that the files be in PDF format. [But see Criminal Rule 57(a)(2) ("A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.").]

Rules 49(b)(2)(B)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits self-represented parties from using the court's e-filing system, the "reasonable exceptions" required by item (ii) should align with the types of "reasonable conditions and restrictions" referenced in item (iii). That is, a local rule may allow self-represented parties e-filing access only in particular circumstances—such as after completing a training or agreeing to specified formatting standards—provided those requirements are reasonable under item (iii).

Conversely, item (iii)'s authorization for courts to impose reasonable conditions on self-represented parties' access also informs what counts as a reasonable exception under item (ii). For example, a local rule that generally prohibits self-represented parties from e-filing might nonetheless provide an exception where the self-represented party meets conditions similar to those described in item (iii). The two provisions thus establish a flexible, complementary framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures that courts retain authority to structure access responsibly.

Rule 49(b)(2)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (b)(3). What had been Rule 49(b)(2)(B) (concerning nonelectronic means of filing) is carried forward as new Rule 49(b)(3).

B. Criminal Rule 45

This proposed conforming amendment to Criminal Rule 45(c) has not changed:

Rule 45. Computing and Extending Time

* * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E) as Rule 49(a)(4)(F).

III. Appellate Rules: Amendments to Appellate Rule 25

Here is the updated version of the proposed amendments to Appellate Rule 25:

Rule 25. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing: Method and Timeliness.

(A) Nonelectronic Filing.

(i) In General. For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not

timely unless the clerk receives the papers within the time fixed for filing.

(ii) A Brief or Appendix. A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(iii) Inmate Filing. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or
- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies

Rule 25(a)(2)(A)(iii).

(B) Electronic Filing ~~and Signing. (i) By~~ by a ~~Represented~~ Person Represented by Counsel--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

~~(ii)~~ (C) Electronic Filing by ~~By~~ an Unrepresented ~~Person~~ Party--When Allowed or Required.

(i) In General. A party ~~person~~ not represented by an attorney~~: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or ~~by~~ local rule prohibits the person from doing so.~~; and •~~ An unrepresented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits unrepresented parties from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing papers and for receiving electronic notice of activity in the case.

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

~~(iii)~~ **(D) Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

~~(iv)~~ **(E) Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) Filing a Motion with a Judge. *[Not shown in this draft, for brevity.]*

(4) Clerk's Refusal of Documents. *[Not shown in this draft, for brevity.]*

(5) Privacy Protection. *[Not shown in this draft, for brevity.]*

(b) Service of All Papers Required. Unless a rule requires service by the clerk or the paper will be served [through the court's electronic-filing system][6] under Rule 25(c)(1), a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

6 This specification may be advisable now that Rule 25(c)(1) contemplates locally-required "other means" for serving sealed filings.

(c) Manner of Service.

(1) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But

[(A) such service is not effective if the filer learns that it did not reach the person to be served; and

(B)] a court may provide by local rule that, if a paper is filed under seal or initiates a proceeding in the court of appeals under Rule 5, 15, or 21, it must be served by other means.

(2) Service by Other Means. A paper may also be served under this rule by:

~~Nonelectronic service may be any of the following:~~

(A) personal delivery, including delivery to a responsible person at the office of counsel;

(B) ~~by~~ mail; ~~or~~

(C) ~~by~~ third-party commercial carrier for delivery within 3 days; or

(D) ~~. (2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by~~ sending it by ~~other~~ electronic means that the person to be served has consented to in writing.

(3) **Considerations in Choosing Other Means.** When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party

must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) **When Service Is Complete.** Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by a notice from the court's electronic-filing system is complete as of the notice's date. Service by other electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

(5) Serving Papers That Are Not Filed. Rule 25(c)(2) governs service of a paper that is not filed.

(6) Definition of "Notice of Case Activity." The term "notice of case activity" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses

of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. *[Not shown in this draft, for brevity.]*

Committee Note

Rule 25 is amended to address two topics concerning unrepresented parties. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[7] Civil Rule 5, and Criminal Rule 49.) Rule 25(a)(2) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Rule 25(c) is amended to address service of documents filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 25(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a)(2)(C). Under new Rule 25(a)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 25(a)(2)(B)(ii). That is, under new Rule 25(a)(2)(C)(i), unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case. (The rule grants this presumptive authorization to an unrepresented 'party,' not an unrepresented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system.) If a circuit wishes to restrict unrepresented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 25(a)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 25(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

7 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

A court can comply with Rules 25(a)(2)(C)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for unrepresented parties to the court's electronic-filing system, or (2) providing unrepresented parties with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). That is, a local rule generally prohibiting access to the court's electronic-filing system would include "reasonable exceptions" (within the meaning of the Rule) if it provided reasonable access to the court's electronic-filing system.

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral settings) and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, filings that commence a proceeding in the court of appeals – cannot be filed by means of the court's electronic-filing system. [Some courts have adopted local rules that permit unrepresented parties to use the court's electronic filing system only if they obtain permission from the court; such a local rule would meet the Rule's requirement of "reasonable access" so long as such permission is not unreasonably withheld in practice.] Rule 25(a)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 25(a)(2)(C)(ii) does not restrict a court from entering an order barring a specific unrepresented litigant from accessing the court's electronic-filing system.

For a court that opts to provide unrepresented parties with an alternative electronic means for filing and an alternative electronic means for receiving notice of court filings and orders, the rule does not require the court to accept emailed or uploaded files in any and all formats. A court is free to set reasonable requirements such as that the files be in PDF format. [But see Appellate Rule 47(a)(2) ("A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.").]

Rules 25(a)(2)(C)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits unrepresented parties from using the court's e-filing system, the "reasonable exceptions" required by item (ii) should align with the types of "reasonable conditions and restrictions" referenced in item (iii). That is, a local rule may allow unrepresented parties e-filing access only in particular circumstances—such as after completing a training or agreeing to specified formatting standards—provided those requirements are reasonable under item (iii).

Conversely, item (iii)'s authorization for courts to impose reasonable conditions on unrepresented parties' access also informs what counts as a reasonable exception under item (ii).

For example, a local rule that generally prohibits unrepresented parties from e-filing might nonetheless provide an exception where the unrepresented party meets conditions similar to those described in item (iii). The two provisions thus establish a flexible, complementary framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures that courts retain authority to structure access responsibly.

Rule 25(a)(2)(C)(iv) provides that the court may deny a specific unrepresented litigant access to the court's electronic-filing system, and that the court may revoke an unrepresented litigant's access to the court's electronic-filing system.

Former Rules 25(a)(2)(B)(iii) and (iv) are carried forward but renumbered as Rules 25(a)(2)(D) and (E).

Subdivision (b). Existing Rule 25(b) generally requires that a party, "at or before the time of filing a paper, [must] serve a copy on the other parties to the appeal or review." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the paper will be served [through the court's electronic-filing system] under Rule 25(c)(1)." This amendment is necessary because new Rule 25(c)(1) encompasses service by the notice of case activity that results from the clerk's uploading into the system a paper filing by an unrepresented litigant. In those circumstances, service will not occur "at or before the time of filing a paper," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (c). Rule 25(c) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in Rule 25(c)(1). Existing Rule 25(c)(1) becomes new Rule 25(c)(2), which continues to address alternative means of service. New Rule 25(c)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 25(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 25(c)(2)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

[The last sentence of amended Rule 25(c)(1)] [Rule 25(c)(1)(B)] states that a court may provide by local rule that if a paper is filed under seal or initiates a proceeding in the court of appeals under Rule 5, 15, or 21, it must be served by other means. This sentence is designed to account for circuits (if any) in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system. It also accounts for circuits that permit the use of CM/ECF to file case-initiating petitions but that do not wish to permit the filer to rely on CM/ECF for service of such a petition.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of current Rule 25(c)(1), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be any of the following") is amended to read "A paper may also be served under this rule by." This locution reflects the inclusion of other electronic means (apart from service through the court's electronic-filing system) in new Rule 25(c)(2)(D) and also ensures that what will become Rule 25(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 25(c)(1).

Subdivision (c)(4). Amended subdivision (c)(4) carries forward the prior rule's provisions that service by electronic means other than through the court's electronic-filing system is complete on sending unless the party making service is notified that the paper was not received by the party served, and that service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

As to service through the court's electronic-filing system, the amendments make two changes. First, the amended rule provides that such service "is complete as of the notice's date." Under new subdivision (c)(1), when a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a notice of case activity through the court's electronic-filing system occurs by means of the notice of case activity. But that service does not occur "on filing" when the filing is made other than through the court's electronic-filing system. There can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (c)(1) and amended subdivision (c)(4) provide that service by a notice of case activity sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of case activity.

[Second, while subdivision (c)(4) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "is notified that the

paper was not received by the party served," the similar provision concerning service via the court's electronic-filing system now appears in subdivision (c)(1)(A).] [Second, although subdivision (c)(4) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "is notified that the paper was not received by the party served," no such proviso is included in subdivision (c)(1) as to service by a notice of case activity sent to a person registered to receive it through the court's electronic-filing system. This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.]

Subdivision (c)(5). New Rule 25(c)(5) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 25(c)(1): If a paper is not filed with the court, then the court's electronic system will never generate a notice of case activity, so the sender cannot use Rule 25(c)(1) for service and thus must use Rule 25(c)(2).

Subdivision (c)(6). New Rule 25(c)(6) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

TAB 20

MEMORANDUM

TO: **Advisory Committee on Civil Rules**

FROM: **Professor Richard Marcus**

RE: **Time Counting for Response to Filing**

DATE: **October 1, 2025**

Jack Metzler submitted a proposal for amending Appellate Rule 26, regarding time counting for filings in the courts of appeals. The proposal was cross-listed for three other sets of rules—Civil, Criminal, and Bankruptcy.

Mr. Metzler's concern is "the pernicious practice of filing motions at the end of the day on Friday, especially before a holiday." Appellate Rule 27(a)(3) gives the opposing party ten days to respond, but that ten-day count includes weekend days. That response time is even shorter if there is a holiday during the ten-day period. "With no holiday, filing on Friday gives the opposing party 6 business days to work with rather than 8 if the motion were filed earlier in the week. When there is a holiday in the period, filing on Friday reduces the available work days by a whopping 37.5% from 7 business days to 5."

No doubt almost all litigators have encountered timing gamesmanship on occasion. It would be good if the rules could prevent that. On that general subject, some time ago there was an inter-committee Time Counting Project designed to (a) devise sensible time limits that would best deal with weekends and holidays, and (b) try to achieve consistency among the various sets of rules on time counting. That effort took a great deal of time and effort, and yielded the current arrangements in the various sets of rules.

In the courts of appeals, it may be that there are special concerns with litigator gamesmanship. One might say that a ten-day time limit invites gamesmanship. But it's not at all clear that a similar situation exists on the civil docket of the district courts.

Probably most district courts address timing in their local rules. To take a home-grown example, in the Northern District of California, absent an order shortening time the moving party must usually give 35 days' notice of a motion, and the opposing party then has 21 days to file an opposition, after which the moving party has 7 days to file a reply. Under such local rules, playing the Friday game probably does not achieve much tactical advantage. It may be that other districts permit more gamesmanship, but it is not clear how the national rules would prevent that. And a national rule could disrupt the established practice in a number of districts, perhaps even most.

Looking at the current Civil Rules, it seems that one may have a "short fuse" problem. Rule 65(b)(2) says that a TRO may remain in effect for no more than 14 days, which theoretically makes it possible to move for a preliminary injunction within that period of time.

Elsewhere in the Civil Rules, there are a lot of directives regarding when things must be done. Indeed, one might say that in the district courts there are simply a lot more litigation events than in the courts of appeals, where the usual big deal is briefing on the merits, and motions are

probably relatively rare (at least as compared to motion practice in standard district-court civil litigation.)

A quick run-through of the Civil Rules shows great diversity of timing requirements:

Rule 11(c)(2)—motion may be filed only at least 21 days after it is served, and then only if the offending item is not withdrawn (the "safe harbor").

Rule 12(b)—pre-answer motion permitted "before pleading if a responsive pleading is allowed."

Rule 12(c)—motion for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial."

Rule 12(e)—motion for more definite statement would ordinarily be made before due date for responsive pleading.

Rule 12(f)—motion to strike "either before responding * * * or, if a response is not allowed, within 21 days after being served with the pleading."

Rule 23(c)(1)(A)—motion to certify class "[a]t an early practicable time."

Rule 24(a)—motion to intervene must be "timely."

Rule 25(a)(1)—motion for substitution upon death of a party "within 90 days of service of a statement noting the death."

Rule 35(a)—motion for physical or mental examination, without any time limits.

Rule 36(a)(6)—motion to determine sufficiency of answer or objection to request for admission, without any time limits.

Rule 37(a)(1)—motion to compel must certify "that the movant has in good faith conferred or attempted to confer" with wrongdoer so as to avoid need for motion.

Rule 39(b)—if no proper jury demand made in time, the court may, on motion, order a jury trial, without any time limits.

Rule 41(b)—motion to dismiss for failure to prosecute or to comply with the rules, without any time limits.

Rule 45(d)(3)(A)—motion to quash subpoena must be "timely."

Rule 50(a)(2)—pre-verdict motion for judgment as a matter of law "at any time before the case is submitted to the jury."

Rule 50(b)—post-verdict motion for judgment as a matter of law no later than 28 days after the entry of judgment.

Rule 54(b)—motion for partial final judgment, without any time limits.

Rule 55(b)(2)—motion for entry of default judgment; defending party that has appeared must receive at least 7 days' notice.

Rule 56(b)—motion for summary judgment "at any time until 30 days after the close of all discovery."

Rule 59(b)—motion for new trial "no later than 28 days after the entry of judgment."

Rule 62.1(a)—motion for relief district court lacks authority to grant because an appeal has been taken must be "timely."

Appellate Rule 26 applies to "any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time." Perhaps many of the Civil Rules listed above are not covered by that description. But seeking to affect the time counting for rules that are covered would introduce potential disputes about whether given rules are covered. And overriding the timing provisions of Civil Rules (and local rules) that are covered could introduce chaos rather than improve the system.

So while all agree that timing gamesmanship is bad, this cure could be worse than the disease. It is suggested that this proposal be dropped from the agenda.

Attachment(s):

- Suggestion 24-CV-Z (Jack Metzler)

Rules Suggestion 24-AP-N, 24-BK-P, 24-CR-I, and 24-CV-Z

From: Jack Metzler
To: RulesCommittee Secretary
Subject: Suggestion for FRAP 26(a)(1)(B)
Date: Thursday, October 10, 2024 4:52:09 PM

Hi Thomas,

I wanted to follow up on our conversation at the Inn of Court the other night, but I seem to have misplaced your business card so I'm sending this to the public facing email. I found the half-written rules proposal I mentioned, which is as follows (new text in red):

Rule 26. Computing and Extending Time
(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
(1) **Period Stated in Days or a Longer Unit.** When the period is stated in days or a longer unit of time:
(A) exclude the day of the event that triggers the period;
(B) count every day, including intermediate Saturdays, Sundays, and legal holidays, starting with the first day that is not a Saturday, Sunday, or legal holiday; and
(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

The intent here is to address the pernicious practice of filing motions at the end of the day on a Friday, especially before a holiday. Under Rule 27(a)(3), the opposing party nominally has 10 days to respond, including weekends and holidays. Since any 10 day period will include at least one weekend, the actual working time to respond is 8 days, but the current rule gives parties the ability to significantly reduce that time by choosing to file on Friday. With no holiday, filing on Friday gives the opposing party 6 business days to work with rather than 8 if the motion were filed earlier in the week. When there is a holiday in the period, filing on Friday reduces the available work days by a whopping 37.5%, from 7 business days to 5. It would be nice if lawyers refrained from such tactics as a matter of professionalism, but experience suggests otherwise. At a minimum, the rules should not enable attorney gamesmanship; the current version of the rule rewards it. If this revision were implemented, attorneys could still file on Friday, but they would not be rewarded for doing so.

The main drawback I foresee is making it slightly more cumbersome to calculate *longer* filing dates, such as for briefs, because one would have to check whether the filing was on a Friday before simply adding 30 days and seeing if the result is a weekend or holiday. That seems like a very minor inconvenience since attorneys are already used to checking whether the last day is a weekend or holiday.

Happy to discuss if you find this interesting.

Best,

JACK METZLER
Senior Assistant Disciplinary Counsel
Office of Disciplinary Counsel
515 5th Street N.W.
Building A, Room 117
Washington, D.C. 20001

TAB 21

Federal Judicial Center

Date: August 28, 2025

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes recent efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Current Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center conducted research on interventions on appeal and submitted its report to a subcommittee.

Attorney Admissions

The Center provides the standing rules committee's subcommittee on attorney admissions with occasional research support.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Review of Local District and Appellate Rules Governing Redaction of Private Information in Federal Court Filings

At the request of the Judicial Conference Committee on Court Administration and Case Management, the Center reviewed local rules in the

federal district courts and courts of appeals to identify rules requiring redaction of specified private information from court filings (www.fjc.gov/content/394726/review-local-district-and-appellate-rules-governing-redaction-private-information).

Review of Local Bankruptcy Rules, Orders, and Procedures Governing Redaction of Private Information in Federal Court Filings

At the request of the Judicial Conference Committee on Court Administration and Case Management, the Center reviewed local rules in the federal bankruptcy courts to identify rules requiring redaction of specified private information from court filings (www.fjc.gov/content/394727/review-local-bankruptcy-rules-orders-and-procedures-governing-redaction-private).

Supplemental Analysis of Unredacted Social Security Numbers in Federal Court PACER Documents

The Center examined unredacted Social Security numbers in its 2024 study of public filings to determine whether unredacted personally identifiable information is more common in particular types of court filings and proceedings (www.fjc.gov/content/394725/supplemental-analysis-unredacted-social-security-numbers-federal-court-pacer). The analysis was prepared at the request of the Judicial Conference Committee on Court Administration and Case Management.

Appeals of Sua Sponte Remand Orders in Class Action Fairness Act (CAFA) Removals, 2014–2023

Prepared for the Committee on Federal–State Jurisdiction, this study examines how often sua sponte remands were ordered in putative class actions removed to federal court on Class Action Fairness Act (CAFA) grounds and how often appeals of those sua sponte remand orders were sought (www.fjc.gov/content/393642/appeals-sua-sponte-remand-orders-class-action-fairness-act-cafa-removals-2014-2023).

Current Research for Other Judicial Conference Committees

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Incorporated Into Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts incorporated comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings. The Center presented to the rules committees' privacy working group a report on the role unredacted Social Security numbers play in civil, criminal, and appellate litigation suggesting that Social Security numbers usually appear in public filings because they appear in documents presented to the courts as exhibits for other reasons.

Case Weights for Bankruptcy Courts

The Center has collected data and is conducting analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

Consumer Bankruptcy Law: Chapters 7 & 13, Second Edition

This monograph provides an overview of consumer bankruptcy law and describes the statutory framework for bankruptcy relief under Chapters 7 and 13 of the Bankruptcy Code, Title 11 of the U.S. Code (www.fjc.gov/content/393646/consumer-bankruptcy-law-chapters-7-13-second-edition).

Condensed Report on 2023 Federal Judiciary Workplace Survey

This condensed report presents a detailed summary of the results of the 2023 Workplace Survey for the Federal Judiciary, which was conducted by the Federal Judicial Center for the Federal Judiciary Workplace Conduct Working Group (www.fjc.gov/content/392606/condensed-report-2023-federal-judiciary-workplace-survey). Center staff prepared this report at the working group's request to provide context for the working group's recommendations stemming from the survey results (*Report of the Federal Judiciary Workplace Conduct Working Group on the Judiciary's 2023 National Workplace Survey*, www.uscourts.gov/administration-policies/workplace-conduct-federal-judiciary#workinggroup). The survey obtained information on the number of employees who said they had experienced wrongful conduct and input about how well the procedures for addressing wrongful conduct are working. It also obtained information about the judiciary's general working environment to inform the working group about the judiciary's progress toward the goal of its strategic plan, updated in 2020, to provide an "exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct," where all employees are treated with dignity and respect.

JUDICIAL GUIDES

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Courts

The Center is preparing a seventh edition of its *Benchbook for U.S. District Courts* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Exhibits

The Center's History website includes comprehensive exhibits, presenting data about the federal judiciary at various points in its evolution, aimed at helping a general-public audience understand these topics (www.fjc.gov/history/exhibits). Two recently posted exhibits are *Prohibition in the Federal Courts: A Timeline* (www.fjc.gov/history/exhibits/prohibition-in-federal-courts-timeline) and *The Judiciary Act of 1801* (www.fjc.gov/history/exhibits/judiciary-act-1801). In addition, the Center has updated *Demography of Article III Judges, 1789–2024* (www.fjc.gov/history/exhibits/graphs-and-maps/demography-article-iii-judges-1789-2024-introduction).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-six short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted is "Supreme Court Meeting Places" (www.fjc.gov/history/spotlight-judicial-history/supreme-court-meeting-places).

Summer Institute for Teachers

In June 2025, the Center collaborated with the ABA to present a weeklong professional-development conference for teachers, focusing on three famous historical trials: *United States v. Anthony*, the flag-salute cases, and the Chicago Seven trial. The Center presents information about these and other

famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

EDUCATION

Specialized Workshops

Workshop on Science-Informed Decision-Making

Presented in June by the FJC and the Center for Law, Brain & Behavior at Massachusetts General Hospital, this three-day program provided guidance on how judges and probation and pretrial services officers could incorporate behavioral science into their decision-making in criminal cases that unfold outside of the context of problem-solving courts and where diversion may not be an option.

Emerging Issues in Neuroscience for Federal Judges

A two-day, in-person judicial seminar held in cooperation with the American Association for the Advancement of Science explored developments in neuroscience and the role that neuroscience may play in making legal determinations, from the admissibility of evidence to decisions about criminal culpability.

Distance Education

Evaluating Historical Evidence

The Center is offering judges a six-part, interactive online series that provides tools for managing cases with significant historical evidence. Historians discuss historical methodology and provide practical tips on evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments. The first four episodes were "An Introduction: What Do Historians Do and How Do They Do It?"; "Researching the Law on the Ground: How Do Historians Research and Come to Understand Encounters with the Courts?"; "The U.S. Government and 'the People': How Do Historians Research Activists' and Administrators' Influence in Shaping Law and Policy in Practice?"; and "How Do Historians Use Context to Move Beyond 'Anecdotes' to Good History?"

Court Web

This periodic webcast included as recent episodes "Supreme Court Review, October 2024 Term" (featuring Erwin Chemerinsky and Paul Clement) and "The Bail Reform Act in Practice" (featuring Central District of Illinois Judge Jonathan E. Hawley and Middle District of Florida Magistrate Judge Anthony Porcelli).

Wm. Matthew Byrne, Jr. Judicial Clerkship Institute for Career Law Clerks

Presented in collaboration with the Wm. Matthew Byrne, Jr. Judicial Clerkship Institute at Pepperdine University's Caruso School of Law, this program was formerly conducted as a two-day, in-person program, but it

was conducted in 2025 as four weekly online sessions. It offered information on managing high-profile cases and serving self-represented parties, and it also offered summaries of pending Supreme Court cases.

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges. The 2025 workshop for bankruptcy judges included a plenary session on the application of evidence rules to bankruptcy cases.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on a three-day workshop for Article III judges in the Second Circuit.

Workshop for Federal Court Mediators

In August, the Center held a three-day workshop for court mediators.

National Conference for Appellate Staff Attorneys

The Center put on this three-day workshop in June.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.