
**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

November 6, 2025

AGENDA
Meeting of the Advisory Committee on Criminal Rules
November 6, 2025

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TAB 1

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure (Standing Committee)

Chair

Honorable James C. Dever III
United States District Court
Raleigh, NC

Reporter

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

Honorable Allison H. Eid
United States Court of Appeals
Denver, CO

Reporter

Professor Edward Hartnett
Seton Hall University School of Law
Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair

Honorable Rebecca B. Connelly
United States Bankruptcy Court
Harrisonburg, VA

Reporter

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

Honorable Sarah S. Vance
United States District Court
New Orleans, LA

Reporter

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

Honorable Michael W. Mosman
United States District Court
Portland, OR

Reporter

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

Honorable Jesse M. Furman
United States District Court
New York, NY

Reporter

Professor Daniel J. Capra
Fordham University School of Law
New York, NY

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair		Reporter	
Honorable Michael W. Mosman United States District Court Portland, OR		Professor Sara Sun Beale Duke Law School Durham, NC	
		Associate Reporter	
		Professor Nancy J. King Vanderbilt University Law School Nashville, TN	
Members			
Honorable André Birotte Jr. United States District Court Los Angeles, CA		Honorable Jane Boyle United States District Court Dallas, TX	
Honorable Timothy Burgess United States District Court Anchorage, AK		Honorable Thomas M. Durkin United States District Court Chicago, IL	
Matthew R. Galeotti, Esq. Attorney General (ex officio) United States Department of Justice Washington, DC		Honorable Michael Harvey United States District Court Washington, DC	
Marianne Mariano, Esq. Office of the Federal Public Defender Buffalo, NY		Shazzie Naseem, Esq. Berkowitz Oliver LLP Kansas City, MO	
Honorable Jacqueline H. Nguyen United States Court of Appeals Pasadena, CA		Honorable Carlos A. Samour, Jr. Colorado Supreme Court Denver, CO	
Professor Jenia Turner Southern Methodist University Dedman School of Law Dallas, TX		Mary Jo White, Esq. Debevoise & Plimpton LLP New York, NY	
Liaison			
Honorable Paul J. Barbadoro (<i>Standing</i>) United States District Court Concord, NH			

ADVISORY COMMITTEE ON CRIMINAL RULES

Clerk of Court Representative

Brandy S. Lonchena, Esq.
Clerk
United States District Court
Pittsburgh, PA

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
Michael W. Mosman Chair	D	Oregon	Member: 2024 Chair: 2025	---- 2028
Andre Birotte, Jr.	D	California (Central)	2021	2027
Jane Boyle	D	Texas (Northern)	2021	2027
Timothy Burgess	D	Alaska	2021	2026
Thomas M. Durkin	D	Illinois (Northern)	2025	2028
Matthew R. Galeotti*	DOJ	Washington, DC	---	Open
Michael Harvey	M	District of Columbia	2023	2026
Marianne Mariano	FPD	New York (Western)	2023	2028
Shazzie Naseem	ESQ	Missouri	2024	2027
Jacqueline H. Nguyen	C	Ninth Circuit	2019	2026
Carlos A. Samour, Jr.	JUST	Colorado	2024	2027
Jenia Turner	ACAD	Texas	2025	2028
Mary Jo White	ESQ	New York	2025	2028
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

Rules Committee Staff: Carolyn Dubay, 202-502-1820

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

RULES COMMITTEE LIAISON MEMBERS

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

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Office of the General Counsel—Rules Committee Staff
Staff

Carolyn A. Dubay, Esq.
Chief Counsel

Bridget M. Healy, Esq.
Counsel

Shelly Cox
Management Analyst

Sarah A. Sraders, Esq.
Rules Law Clerk

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. Robin L. Rosenberg
Director

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

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

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

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

Elizabeth Wiggins, Ph.D., J.D.
Division Director

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

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

Timothy Lau, Ph.D., J.D.
Senior Research Associate

TAB 2

**ADVISORY COMMITTEE ON CRIMINAL RULES
SUBCOMMITTEES
(effective November 1, 2025)**

Rule 17 Subpoenas Subcommittee Judge Jacqueline Nguyen, Chair Judge Thomas Durkin Ms. Marianne Mariano Ms. Sonja Ralston (DOJ) Ms. Mary Jo White Judge Michael Mosman	Rule 40 Subcommittee Judge Michael Harvey, Chair Judge Andre Birotte Judge Jane Boyle Ms. Marianne Mariano Ms. Sonja Ralston (DOJ) Judge Michael Mosman
Rule 49.1 Subcommittee Judge Michael Harvey, Chair Judge Andre Birotte Ms. Marianne Mariano Mr. Shazzie Naseem Ms. Sonja Ralston (DOJ) Judge Michael Mosman	Pro Se Filing Subcommittee Judge Timothy Burgess, Chair Judge Michael Harvey Ms. Marianne Mariano Mr. Shazzie Naseem Judge Michael Mosman
Evidence Committee Liaison Judge Thomas Durkin	

TAB 3

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 24, 2025
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (“the Committee”) met on April 24, 2025, in Washington, D.C. The following members, liaisons, reporters, and consultants were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr. (via Teams)
Judge Jane J. Boyle (via Teams)
Judge Timothy Burgess
Dean Roger A. Fairfax, Jr.
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Michael Mosman
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Brandy Lonchena, Esq., Clerk of Court Representative (via Teams)
Catherine M. Recker, Esq.
Justice Carlos Samour
Sonja Ralston, Esq.¹
Judge John D. Bates, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine T. Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee
Kyle Brinker, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Dr. Elizabeth Wiggins, Director, Research Division, Federal Judicial Center

¹ Ms. Ralston represented the Department of Justice.

Opening Business

Judge Dever opened the meeting and welcomed the in-person attendees as well as those participating remotely: Judge Birotte, Judge Boyle, Ms. Lonchena, and Professor Coquillette.

Judge Dever said that several members were completing their second terms, and he briefly highlighted some of the contributions each had made. Judge Nguyen did an extraordinary job as chair of the Rule 17 Subcommittee and a member of the Rule 6 Subcommittee. Dean Fairfax made major contributions to the consideration of amendments to Rules 6 and 16. And Ms. Recker (whose second term had been extended) did extraordinary work on the Criminal Rules Emergency provision, Rule 17, and Rule 6. He said that Judge Nguyen, Dean Fairfax, and Ms. Recker would be invited to make any final comments at the end of the meeting.

Next, Judge Dever recognized Judge John Bates, who was attending his last Criminal Rules meeting as chair of the Standing Committee. He described Judge Bates as an absolute All Star in the federal judiciary and as a public servant. He noted that Judge Bates has performed many important duties for the judicial branch beyond his service as a United States District judge: Director of the Administrative Office of U.S. Courts, Chair of the Advisory Committee on Civil Rules, and Chair of the Standing Committee. He embodies everything that's right about public service in the United States and being a citizen leader. Judge Dever expressed his gratitude for Judge Bates' service.

Others participating in the meeting were recognized next. Judge Dever welcomed Ms. Dubai, the new Chief Counsel and Secretary to the Standing Committee, noting that she brought an extraordinary amount of experience. Ms. Dubai clerked on the Eastern District of New York, practiced at Hunton and Williams, and held a variety of positions with increasing responsibility in the Administrative Office of U.S. Courts, the Federal Judicial Center, and the North Carolina Judicial Standards Commission. Judge Dever also recognized Scott Myers, who would be retiring after twenty years of service at the Administrative Office of U.S. Courts. Judge Dever thanked Kyle Brinker, the Rules Law Clerk, for his extraordinary work, noting that Mr. Brinker would be joining Kirkland and Ellis at the end of his term with the Rules Committees. Finally, Judge Dever acknowledged the members of the public observing the meeting and thanked them for their interest.

A senior inspector with the U.S. Marshals Service provided his contact information and noted the security procedures in the building.

Judge Dever noted that the Committee's next meeting would be November 6, 2025. The location (which would not be Washington) had not yet been determined.

Professor Beale took the floor to note this was Judge Dever's last meeting as chair of the Advisory Committee and to comment on his many contributions. Recalling that Judge Bates had been described as "an All Star," she called Judge Dever "an All Star recidivist." He served six years as a member of the Committee, plus a what he called his "bonus year." During his term as a member, the big lift (in which Ms. Recker also participated actively) was the emergency rule, now Rule 62. It was unlike anything that Professor Beale had participated in before with many,

many, many nighttime calls. Congress was involved, and it was a cross-committee project, but criminal cases are very different than civil cases and the Criminal Rules Advisory Committee had the most difficult assignment. Moreover, Congress gave only two years to get the whole thing done, which required action at warp speed under the Rules Enabling Act process. For Judge Dever's remarkable effort as the chair of that Emergency Rules Subcommittee, he was "rewarded" by shortly thereafter being appointed to serve as chair of the Committee. Another major accomplishment was the completion of a successful amendment to Rule 16 (expert discovery), which was the first substantive expansion of the rule's disclosure obligations in decades.

What characteristics allowed Judge Dever to make these many contributions? Professor Beale quoted Martin Luther King, Jr.'s statement that the ultimate measure of a person is not where he stands in moments of comfort, but where he stands in times of challenge and controversy. She said that was the situation in which Judge Dever really stepped up—not the easy things that all agreed upon, but the harder things, where you need to find true north, try to get agreement on it, and move the group ahead.

Another online source identified three C's of leadership, which Judge Dever has exemplified. The first "C" is competence. Judge Dever has a deep understanding and knowledge of the rules and how they apply in a wide variety of cases and proceedings. The second is commitment. Professor Beale explained that the reporters often emailed and texted with Judge Dever on nights and weekends to get a reaction or approval of a draft or directions on how to move forward. So although all of the members work hard—and the reporters appreciate that hard work—Judge Dever's commitment as chair far surpassed that of any member. The final "C" is character, which is knowing what is right and having the courage to act on it. Judge Dever's character has been inspiring, and Professor Beale expressed her great gratitude for his contributions to the rule of law, fairness, and the improvement of the criminal justice system, and especially his support of and assistance to the reporters.

Professor King began by commenting that the thing about Jim that she had come to appreciate so much was that he had a strong common sense compass that always steered us in the right direction. If we veered around from time to time, he brought us back and that was really special. She also praised his generosity and his forgiving nature. She said he laughed off the reporters' stupid mistakes like addressing him as "Dave" in emails, which she did once. Judge Dever was very patient, and he listened to everyone. Moreover, despite his calm, easygoing manner, he always seemed to keep us on track. In hundreds of meetings and committee calls, Judge Dever always ended on time despite making everybody feel they had been heard. That was magic. She thanked Judge Dever for being such a wonderful leader and during the years he had been on the Committee and then as chair.

Judge Dever responded by expressing gratitude to the reporters, saying that only the chair can appreciate how much they do, and the wisdom, dedication, and intellectual force they bring to the process. He then turned to the main agenda for the meeting, paraphrasing Teddy Roosevelt, who once observed that the greatest professional gift that each of us can receive is the opportunity to work hard at work worth doing. That, Judge Dever said, is what we get to do on the Criminal Rules Advisory Committee. He said it had been his great privilege to serve as a

member of the Advisory Committee, to serve with the reporters, and to serve with all of the members.

Judge Bates asked to speak. First, he thanked Judge Dever for his kind remarks, saying it had been a pleasure to serve in the rules community for many years and to be a part of the Criminal Rules Advisory Committee. He praised the wonderful work that had taken up the Committee's time and efforts over Judge Dever's years as chair. He said it had been especially engaging and enlightening to participate in developing some of the amendments to the criminal rules, particularly Rule 62 and all the other rules that Judge Dever mentioned.

Judge Bates commented that one of the most memorable things that he had been involved with as part of the rules process was actually not a rule amendment but legislation. When COVID hit, in early March 2020, Judge Campbell, Judge Kethledge (then the chair of the Criminal Rules Advisory Committee), Judge Furman (liaison from the Standing Committee to Criminal Rules), and Judge Kaplan, with some help from the reporters, put together legislation that was included in the first CARES Act that went into effect within about three weeks. The legislation enabled the federal criminal justice system to keep running during COVID. Because more than ninety percent of cases are resolved by pleas, then followed by sentencing, the CARES ACT provisions were needed to allow those pleas and sentencings to take place remotely. Judge Bates characterized that as an example of the flexibility that the rules process has and can contribute to the efforts of the federal judiciary.

Judge Bates echoed the comments that have been made about Judge Dever's even disposition, his ability to run a good and timely meeting, and his extraordinary willingness and aptitude to hear from everyone. Chairs also have their own views, and sometimes they have to hear from others before weighing in. He noted that Judge Dever had done that remarkably well and been a contributor to the rules process.

Then Judge Bates announced that Judge Dever would be the new chair of the Standing Committee. So Judge Dever would continue to attend the Criminal Rules Committee, rather than leaving it behind altogether. Judge Bates also announced that Judge Mosman would be the new Criminal Rules chair. He said the Committee would be in good hands, and the work would continue.

After thanking Judge Bates, Judge Dever called for a motion to approve the minutes, with the proviso that would allow the correction of any typographical errors. The motion passed unanimously.

Noting that the agenda book included draft minutes from the Standing Committee meeting at page 60 and the report to the Judicial Conference at page 93, Judge Dever recognized Ms. Dubay for any comments about these materials or the detailed chart tracking the proposed amendments at page 102. Ms. Dubay said just the day before she had the pleasure of delivering her first Congressional package (which did not include any amendments to the criminal rules). She described the process: she hand delivered the package to the Supreme Court and then walked over to Congress and hand delivered it to representatives for the Vice President (as president of the Senate) and to the Speaker of the House.

Judge Dever asked Mr. Brinker if there was anything in particular in the chart on page 109 of pending legislation that would directly or effectively amend the federal rules. Mr. Brinker mentioned two things that were not in the agenda book because the text only very recently became available. They were both bills that were reintroduced from last Congress, and appeared in the November agenda book. First, the Sunshine in the Courtroom act of 2025 would permit court proceedings to be photographed, recorded, broadcast or televised at the discretion of the presiding judge. Second, the Trafficking Survivors Act Survivors Relief Act of 2025 (which he had informed the Committee about in November) would permit a person who had been convicted of a nonviolent federal offense as a result of having been a victim of trafficking to move the convicting court to vacate the judgment and enter judgment of acquittal. Mr. Brinker said no action had been taken on either bill since its introduction, and that the Rules staff would continue to monitor any developments.

Rule 17

Judge Dever then turned to Rule 17, thanked Judge Nguyen for her leadership of the Subcommittee, and asked her to present the Subcommittee's recommendation.

Judge Nguyen expressed appreciation for the full day at the November meeting for discussion of the prior subcommittee draft, saying that the feedback from three panels of speakers and the full Committee had been incredibly useful to the Subcommittee. The Subcommittee attempted to produce a revised draft that would implement the key takeaways, focusing on areas where there appeared to be broad consensus or support expressed by the speakers, as well as by the members of this Committee.

Judge Nguyen framed the discussion by noting several key takeaway points. First, the Subcommittee heard a directive from the committee members to take an incremental approach, a narrower amendment, that would somewhat loosen the *Nixon* standard. So instead of requiring admissibility, the new draft proposes something slightly less restrictive. The Subcommittee recognized that there are multiple districts in which there's no Rule 17(c) problem, and it wanted to leave the practice in those districts alone, not upend them. But in the districts in which there was very limited—or virtually nonexistent—Rule 17(c) practice, loosening the *Nixon* standard will help. She reminded the Committee of prior discussion since the beginning of the Rule 17 project about different districts having very significantly different interpretations of Rule 17(c). The Subcommittee's goal was to bring some limited uniformity to Rule 17(c) practice. So the first point was a slight loosening of the *Nixon* standard (with details to be provided later in the meeting).

The second point was the need to provide for ex parte subpoenas, which judges in some districts had held were not permitted under Rule 17(c).

The third takeaway was the importance of maintaining protections (including motions to quash and strong protective orders) so that the revised rule would not open up the floodgates and increase the burden on already very busy district judges.

Judge Nguyen then directed the Committee's attention to page 2 of the Subcommittee's discussion to sum up the substantive revisions. She noted the agenda book included both the redline and clean drafts.² Focusing on the text of the proposed amendment, Judge Nguyen noted several new provisions. First, (c)(1)(B) essentially clarified and provided that the rule allows subpoenas for proceedings more than just simply trials. Second, (c)(1)(B) and (c)(2)(B) codified the loosened *Nixon* standard. And third, (c)(2)(A) and (c)(3) and (4) address when a motion is required. Under (c)(2) no motion was required unless the subpoena seeks personal and confidential information about a victim, or unless the subpoena is sought by an unrepresented party.

Next, ex parte motions are permitted, and if there is no motion required, there is no requirement of disclosure to the other party unless required by a local rule or court order. Judge Nguyen noted that throughout the changes the Subcommittee tried to leave a lot of discretion for the district judges to order something different than the default provided by Rule 17. So, for example, as provided on line 32 of the clean version, the court may for good cause permit the party to file the motion ex parte. She noted again that (c)(2) clarifies that there is no need to turn over the information to the opposing party absent a court order. Again, this built in discretion for differing practices in the districts that want to have a different rule.

The draft's (c)(5) clarifies when a subpoena recipient must produce the items to the court rather than to a requesting party. And finally, (c)(6) provides that disclosure of information and other items between the parties, including information and items the parties obtained by subpoena, is regulated by Rule 16 and other discovery rules. And that implemented the idea of moving incrementally and not doing a wholesale revision of the rules.

Judge Nguyen then called on the reporters to provide any additional details and comments on the Subcommittee's work.

Professor King thanked Judge Nguyen for her terrific summary and then directed the Committee's attention to language that had been at the root of some of the ambiguity and disputes about how the rule applies, which the proposed amendment would remove. The deleted language, on lines 20-23 of the redline, has been the source of dispute about whether Rule 17(c) applies to more than trial. Other language in the rule has been the source of disputes about where the subpoenaed material has to be produced and to whom. Does the material subpoenaed have to be turned over to the opposing party if you can proceed ex parte?

Ambiguous language in the current rule has been the source of that conflict. So one of the Subcommittee's main missions has been to clarify the provisions that gave rise to those disputes, and provide at least a presumption of what can and cannot be done. The rule often includes an "unless" clause that allows district judges to respond to the particular circumstances of a case or for an individual district to create a rule that's still consistent with the rule but accommodates those particular circumstances.

² All references to line numbers and portions of the draft amendment in these minutes refer to the version in the Committee's April 2025 agenda book.

Professor Beale noted that the draft also attempted to clarify other issues. As previously noted by a number of members and other commenters, the current rule does not always indicate which provisions are applicable to subpoenas for testimony versus subpoenas for the production of material. The Subcommittee's draft tries to clarify that. And the current rule doesn't indicate which provisions are relevant to grand jury subpoenas and which are not. The proposed rule tries to clarify that as well. That clarity would be very helpful to courts and parties moving forward. She also noted that although the Subcommittee was trying to resolve conflicts among the courts, the proposed amendment would also allow for considerable variation in practice, from district to district and judge to judge. But the proposed amendment does set a default that attempts to change the practice in the districts that have provided the least opportunity for the defense to get really important and needed information. She expressed hope that bringing that baseline up would be both acceptable and helpful moving forward.

Before moving to specific discussion, Judge Nguyen sought to get a sense from the Committee members about the general framework, which is different than the draft that was the basis for the discussion at the November meeting. She asked first for comments from members of the Subcommittee.

A defense member said that generally speaking this draft was a vast improvement over every other draft considered over the last three years. She said she was very proud of the work of the Committee, and she liked this framework immensely. She would also have specific comments later. Noting that she was a relatively new member, she said she had joined after a great deal of work had gone into a very expansive change of the rule and a lot of variations on how a subpoena might be obtained in different categories. She thought the Subcommittee had been responsive to the feedback in November, and had a much more reserved and incremental approach. The Subcommittee pivoted and sought to insure that the revisions would not lead to increased litigation and increased work for the courts. She noted there were options within this draft that would do that. And she thought it addressed very cleanly the identified issues. She also noted wryly that joining the Committee halfway through this process had been a little like the nightmare in which you have to take an exam, but you didn't actually go to the class. In her case, she said, she'd been to about half of the classes. She thought it had been a great effort by the Subcommittee both before and after she joined to identify precisely what problem we were trying to address. And, she thought, this draft went a long way toward that.

Judge Dever spoke next, noting that he had not earlier welcomed Sonya Ralston from the Department of Justice. Ms. Tessier, who previously did a wonderful job as the Department's representative, had joined the Colorado Attorney General's office.

Since Ms. Ralston was now a member of the Subcommittee, Judge Dever invited her to make comments. He also noted that the Department's perspective had been tremendously helpful throughout the process, first with Mr. Wroblewski, then Ms. Tessier, and now Ms. Ralston.

Ms. Ralston said it was a real pleasure to participate, noting she shared the previous speaker's feeling about the exam nightmare a little. But fortunately, she had been able to borrow the notes from some excellent "classmates," so she felt pretty well caught up. She agreed that the Department of Justice is happy with the structure that the Subcommittee has worked out. It is

clearer, more specific and provides the type of guidance needed. The Department appreciated the clarity and the specificity of the way the proposed amendment was broken down into the different subsections and the way it was organized, which helps crystallize the issues and make it clear.

A judge member of the Subcommittee agreed that the rule is much better than it was. She was, however, unsure about what proceedings other than trial that the amendment would apply to. Judge Nguyen deferred discussion of that question until later in the meeting.

Noting that she was first seeking general comments before walking through specifics, Judge Nguyen solicited general feedback from other committee members. A judge member commented that this was a slight move towards getting something that is outside of the *Nixon* framework, though we could not know exactly how much looser. But it would definitely be better.

Judge Bates asked for more of an explanation of the Subcommittee's approach, which is a national rule, but one that leaves a lot of flexibility on almost all issues to local courts, and indeed even to individual judges. But the wide variation is, to some extent, the issue that we are trying to address, and this rule would continue to allow that.

Judge Nguyen agreed. The proposed amendment was an attempt to move incrementally to loosen the *Nixon* standard and to clarify that ex parte motions are available for districts that prohibited ex parte practice altogether—which means that the defense attorneys did not obtain the information—and for districts that require in all circumstances that the recipient must turn any information obtained over to the other side, which prohibits both sides from obtaining information, because they did not know what they would get. But there is already a lot of flexibility in other districts. We wanted to maintain that because we recognized that the nature of the criminal cases and the extent of criminal litigation really does vary from district to district. The amendment is not meant to restrict the district judges in the districts where they already have developed a way to work out Rule 17(c) subpoena practice.

Professor Beale commented that the redline version, lines 35-38, provided a good example of this approach. A motion and order are not required before the service of a non-grand-jury subpoena, unless (3) required by the existing victim provisions, or (4) the subpoena is sought by a self-represented defendant or a local rule or a court order requires a motion. So there is a strong nudge towards not requiring a motion except for cases involving victims or self-represented defendants. What we heard at the meeting in November is that it would be far too much trouble to require motions in most cases. The parties don't want them. Judges don't want them. But in some districts, judges may at least consider a local rule requiring motions and court orders. And in some subset of cases (or in many cases), some individual judges may feel strongly about requiring a motion. So the compromise on various points is to set a new baseline but allow for individual judges to vary. That could also be useful in individual cases, or with a certain litigant who's been a real problem and has been abusing subpoenas; a judge might require a motion and order in such cases. The proposed amendment strikes a balance. It will not produce complete uniformity (though it could if no districts adopt any different local rules). Judges would know more than they would ordinarily in their general supervision of a case, and if something

was going really, really wrong, they might require the parties to do something more. That, she said, is one way of thinking about how the Subcommittee responded to that information that we got in November. It would be too much for the courts and for litigants to require a motion and order in broad swaths of kinds of cases. So then the Subcommittee had to decide how to pare back the motion requirement.

Professor King also responded to Judge Bates's question. There are places in the proposed amendment where judges have authority to depart from the default, but there are also places in the rule that correct misunderstandings of the existing language. For example, some judges now say Rule 17 does not allow ex parte subpoenas, or a subpoena for a sentencing. Some interpreted the rule as requiring a return to the court for a subpoena before trial. Some said Rule 17 did not allow a subpoena for impeachment material. She had read one decision in which a magistrate judge thought it would be an ethical violation to order an ex parte subpoena. Although the proposed amendment would not bring consistency to every point where there is now inconsistency, on various points where there had been very restrictive interpretations, it would tell litigants and judges that's not what this rule means. For those points it's much clearer. And then for the places in which the courts want to have more motions, the proposed amendment permits but does not require them. And if you want to be strict about how you interpret good cause for ex parte fine, but the rule doesn't prevent ex parte motions. That's the balance the Subcommittee was trying to strike.

Judge Nguyen noted it would also be useful to focus on another issue: how to handle personal and confidential information. The Subcommittee discussed that issue extensively, and in the prior draft discussed in November there were two categories of information: (1) protected information including personal and confidential, subject to many restrictions and the protections, and (2) everything else. That led us down the path of how much judicial supervision should be involved. At the November meeting there was uniformly an unfavorable response to judicial supervision in all instances for protected information. The camera reviews would dramatically increase litigation and court time. With this particular draft, the Subcommittee also tried to address that issue with very helpful feedback from the Department of Justice. For personal and confidential information about a victim, for example, a motion will continue to be required.

She noted some concern had also been expressed about whether the proposed amendment was an attempt to move the Criminal Rules to something closer to civil discovery. No we are not. She pointed out that certain showings required for the motions, such as identifying the items sought with particularity. So that was the attempt to work out that rule, and we would get into specifics later in the meeting.

Ms. Ralston commented that from the Department of Justice perspective, the proposed amendment addressed two different types of procedure, which she characterized as "when procedure" and the "how procedure." She thought most, perhaps all, of the places where the current draft would leave discretion to the local rules or to the individual judge are on "how" questions, not "when" a subpoena is available. She thought that was an appropriate distinction for those questions of local practice, where it might be more appropriate for a court to say this is "how" we do it here (e.g. about how many motions are required) versus the standard for "when" subpoenas are allowed.

A defense member said he had attended his first meeting in November, and he had been very impressed with the way that the Subcommittee organized the meetings. After hearing the panel in New York and the different perspectives that were presented to us from around the country by witnesses from DOJ, defense attorneys, and professors, the member had wondered how the Committee would be able to take that range of diverse opinions and put something together. It just seemed like an almost impossible task. But after having reviewed this version of the proposed amendment and the comments, he was very impressed. He agreed with a previous speaker that it gathered all of those perspectives and crafted an incremental step forward, but an important one. His overall sense of the clean version was that it was more permissive. He hoped the district courts would see it as giving more permission to be more open with the way that discovery can occur and not necessarily as restricted. And even though the courts could fashion rules for themselves as to how they want to interpret some of these changes, the sense from the Committee (hopefully to be conveyed, not only through the rule but in in the comments) is that we want this process to be more open for defense counsel. It is incremental. The defense bar would like to go to the outside extreme on discovery, to get everything that it needs. But he recognized the need for compromise in terms of how to move forward. He said the proposed amendment encapsulated a compromise between what both sides wanted, and what the judges would recognize as important in the process. As to the Department of Justice, something that he was a little surprised to learn was how much it uses the Rule 17 subpoena process.

Judge Nguyen moved on to the specifics of the rule, using the red line and the memo discussion that tracked it. The first issue on which the Subcommittee sought feedback was on lines 24-27.

Professor King noted that some style changes had altered the lines referred to in the reporters' memo. The reporters noted their gratitude to the style consultants for their reviews of multiple drafts, often overnight and on weekends. Professor Beale added that there were a few additional style changes, not shown in the agenda book, that the reporters had agreed to make. She said that if the Committee did reach agreement on the proposed amendment, it would not need or want to discuss the remaining minor style issues.

For the Committee, and especially new members, Professor Beale quickly sketched out the process. If approved at this meeting, the proposed amendment would be a long way from submission to the Supreme Court. If the Committee approved a draft of the proposed amendment text and committee note, they would go next to the Standing Committee. Standing would have an opportunity to review, comment, and decide whether it is ready to go out for publication. Publication would get more feedback from a broader audience.

Judge Dever emphasized that the beauty of the rules process is getting the perspectives of so many stakeholders: practitioners, judges at every level, academics, and the public, and multiple opportunity to reflect and revise.

Professor Beale turned to Line 26 in the redline, listing the types of proceedings where a non-grand-jury subpoena was available, not only at trial. This was intended to respond to some decisions holding Rule 17(c) subpoenas were available only for trial. We did not think that was

what the rule ever was intended to do, but certainly that was not what it should be doing moving forward.

She continued that the most recent submission we received from NACDL says the draft rule is far too limited in specifying only trials and three or four types of hearings where materials could be subpoenaed. NACDL, she said, had not noted the language “unless the court permits otherwise.” That was, she noted, the kind of language to which Judge Bates referred earlier, leaving discretion to individual courts. The point of the list was to identify things where in 100% of the cases a judge would say absolutely you can get a subpoena for this proceeding. But it also left open the flexibility for subpoenas in other kinds of evidentiary hearings. The Subcommittee discussed the list at length, and members could provide more details about the relatively infrequent but occasionally important need for subpoenas in some of the other very early pretrial proceedings. The idea was to list the proceedings for which the Subcommittee thought subpoenas should be available, and the question was whether revocation should be on that list.

Judge Bates asked the purpose of the “unless the court permits otherwise” language. He asked what the Subcommittee intended. It did not provide for a variation by local rule. Did the omission of local rules mean the Subcommittee was not anticipating that a court could change that by local rule?

Judge Bates said his question was sort of the flip side of expanding, allowing for a subpoena in another type of proceeding, but instead whether a court individually, a judge individually, or by local rule could contract the list. If the amendment includes revocation proceedings, could courts adopt local rules saying no subpoenas are available in revocation proceedings? Could a local rule contract the list?

Judge Nguyen responded the Subcommittee had not construed it that way or discussed that possibility. She said the idea, as the reporters had explained, was to list the common proceedings in addition to trials at which subpoenas had been allowed, including detention, suppression, sentencing—not 2255s. But then what about revocation? It was not meant to be construed in the fashion Judge Bates had suggested. Professor Beale said there is a little implication to the contrary, but it could be stronger. A judge member interjected that she did not favor revising the proposed amendment to allow for a local rule on this point.

Professor Beale commented that there was an implication in the current language: unless the court “permits” is positive. Unless the court “permits” more, subpoenas are available only for these proceedings. That was what the Subcommittee meant. If that implication is not sufficient, it could be made stronger, e.g., “[u]nless the court permits for additional proceedings, non-grand-jury subpoenas available for”

Judge Bates commented that it seemed clear to him that “[u]nless the court permits” in the first sentence did not apply to the rest of the subsection, which sets forth the new non-*Nixon* standard and there’s no ability for a court to change that by local rule or for an individual judge to apply a different standard. The reporters agreed. “[u]nless the court permits” was only in that one sentence. The reporters both said it could be clearer, and agreed with Judge Bates that the “unless” clause does not apply to the loosened Nixon standard stated there.

Professor King responded that in the revocation context the need for greater protection or less protection, different procedures, confrontation, etc., is decided on an individual basis as a due process matter. The Subcommittee did not really talk about local rules in the context of revocations. The Subcommittee had anecdotal information about particular cases in which judges granted subpoenas for evidentiary hearings like a motion for new trial on jury misconduct or whatever. So it did not add local rule here, though it could be added.

Professor King also directed people's attention to the note here, which makes a comment about habeas cases not being included.

Professor Beale noted that on page 133 of the agenda book, starting with line 37 of the committee note, the unless clause explicitly recognized the discretion of the court to permit a Rule 17 subpoena to produce items in other evidentiary hearings not listed in the rule in which a party may be allowed to present witnesses or evidence. Examples include preliminary hearings, new trial hearings, or revocation hearings. If revocation hearing came out of the brackets in the text, that portion of the note would also be revised. The present use of Rule 17 subpoenas in such proceedings is not as common, in part because of difficulties, cost limitations and delay that may arise when subpoena practice is imported into these less formal or more expedited proceedings. And yet in the Subcommittee's discussion, members were able to identify very unusual situations that had arisen where they had been able to get subpoenas and would use them. It was thinking on a case-by-case basis, but that could be changed. Then, as Professor King said, the provisions are not applicable to hearings in 2254 and 2255 proceedings, where a court may apply subpoena provisions of the Federal Rules of Civil Procedure.

A judge member indicated the view that local rules on which proceedings would introduce too much variation.

A member asked if it was the intent of the Subcommittee that the hearings that are specified—trial, suppression, detention—are mandatory, where they have to be available, the court has no discretion?

Professor King replied it was not mandatory in the sense that the court had to grant a subpoena whenever requested. It was meant to convey that the types of hearings listed were not ruled out by the text. But the movant must satisfy the other requirements of the rule. She noted that the word "available" is used several times in the rule—e.g., it's available without a motion or only with the motion—it did not mean that it would be granted, but only that it is possible to get a subpoena.

Judge Dever said that was a great question. And part of it was designed to respond to a line of cases in some districts holding that you can use a Rule 17(c) subpoena only for a trial and nothing else. The amendment tries to address that issue, raising the floor.

A defense member spoke to encourage the inclusion of revocation on the list. She commented that revocations had been more and more important recently. The use of subpoenas had been primarily for witnesses; that would not be affected at all by the current proposal. But both parties might need to subpoena different information, whether from a treatment agency or

an employer. She noted that even probation doesn't necessarily have access to everything because of strict confidentiality laws and the fact that a lot of therapy is group therapy. There had been a number of recent issues in her district, so she suggested including revocation, thinking it was the one area where both the defense and government would need that ability. She thought listing it in the text as opposed to under the unless clause made sense. A judge interjected that she agreed.

The member also addressed one point in the reporter's memo about the ability to subpoena probation. The member thought that would be a waste of time, because probation works for the judge. Her office would never serve probation with a subpoena, but it would use a motion if they thought probation's file would hold information that either the government or defense wants. But it would never occur to them to subpoena probation, because that would in essence be subpoenaing the judge. They could subpoena a probation officer for testimony, but again they are the court's officer. They would just simply be made available or she would be told they're not available.

Ms. Ralston said that the Department did not have strong feelings about this one way or the other. She thought the issue about probation officers was probably the most significant one, and the Department did not have a direct interest in it. That would be up to the judges. Leaving it in the judge's individual discretion would allow for the cases where it is the most significant, like a revocation based on a new law violation where there is additional evidence that would be akin to a criminal charge. But lots of revocations are not that. Because there is so much variation, and the rules of evidence don't apply it is different. But she noted there is evolving case law in different courts about how much evidence is required to sustain a revocation. That may change even outside of the rules.

A judge member said she had recently had many people on probation or supervisory release who beat up their wives. She was aware that was something not all judges dealt with, but she felt it was important to do so and she liked to have the police officers to be subpoenaed. The probation officer would be involved too. She commented forcefully that beating your wife is serious.

A magistrate judge member said they are sometimes referred these matters for reports and recommendations. He had cases where the Justice Department sought to establish new law violations, it became a mini trial, and both sides needed discovery. He had one a few years ago for Judge Bates that involved domestic violence in another jurisdiction. That jurisdiction was not prosecuting the case, but the Justice Department wanted to deal with it as a potential supervised release violation. It was like a trial, and he thought both sides would have liked more discovery than they had. So he supported including revocation.

Ms. Ralston pointed out that the issue was subpoenas for records or documents, not subpoenas for testimony, which would be available. Those are covered in a different part of Rule 17.

Professor Beale said there are no restrictions on subpoenas for testimony and is not being changed. But there might be treatment records or something else that would require a subpoena for production.

A member suggested that a police report could be important. And there are many other documents relevant to domestic violence.

Professor Beale agreed that type of proceeding does occur, is important, and is contested. In this proposal, if the Committee deleted the brackets, then revocation would be included as one of the designated proceedings. Then it would be clear to the parties and the court that subpoenas for production of the reports and so forth would be available.

A judge member not on the Subcommittee said he favored removing the brackets and including revocation proceedings in the rule. If probation officers had documents perhaps a subpoena was not the answer, but he had never experienced that issue. But he had not thought about the concern about underlying information such as local police reports that form the basis of the revocation allegation.

Another member noted that a common piece of evidence that the government often wants is body camera footage from that incident. That would be also a subpoena item.

Judge Bates agreed with the comments that had been made with respect to revocation. Noting he was not expressing his own views, he was confident that there was a body of district and magistrate judges who, more for efficiency's sake than anything else, would ask whether we would be turning revocation proceedings into more than they need to be. He thought that many judges would instinctively feel that way, that we don't need to complicate revocation proceedings and don't need to have subpoenas for records flying around.

A judge member said that the vast majority of the revocations that he had were resolved with a defendant agreeing to plead to one or two. So it is a pretty narrow slice of that practice, because by the time they get to the court are going to plead.

A member noted that the draft committee note groups together revocation and proceedings under Rules 5.1 and 33 on that list of not as common but potential areas where the subpoenas should be permitted. Noting there seemed to be consensus about removing the brackets from revocation, he asked whether there had been further discussion on Rule 5.1 preliminary hearings and new trial motions, and whether there were any other proceedings that were discussed but failed to make that list other than those three.

Judge Nguyen responded that the Subcommittee had considered—with the perspective of the defense attorneys as well as the DOJ—the various types of proceedings that are the one-offs. The listing could get very long if it included all of the one-offs. The Subcommittee thought the “unless the court permits otherwise” language would cover those very rare occasions where a judge might exercise her discretion to allow subpoenas in one particular proceeding. With the brackets removed from revocation, it would be necessary to see if revisions to the committee note would be needed to match any changes the Committee has made in the text.

The member asked, more substantively, because the Subcommittee did select those three proceedings to mention, whether Rule 5.1 and 33 hearings were in a separate category. Here's a long list, but you know those three were highlighted in the committee note. Was there any discussion about those two in particular?

Professor King said preliminary hearings had come up, and the concern was that there was generally not sufficient time for subpoenas. They are rare because the proceedings are so quick. She said there had been little discussion of Rule 33 motions for a new trial.

Judge Dever said there was a discussion about hearings under Rule 5.1. Where there is a preliminary hearing with a detention hearing then they will be able to get a subpoena for the detention hearing. It was just narrowing it down. He recalled some discussion on a preliminary hearing, given the standard that the judge will be applying, as long as their client has not been detained, the defense will use the subpoena later in the process. But again, the proposed amendment leaves the discretion. There was discussion that when the detention hearing and preliminary hearing are combined, the judge obviously has to address the probable cause before she addresses detention. If she doesn't find probable cause, she's not going to reach detention. So to the extent there's a subpoena for that type of hearing the defendant will be able to get it.

Professor Beale commented that if the text passed, then the Committee would also have to vote on the note. There could be changes in the note, and changes in the note would be required if the Committee made changes in the text. If the Committee removed the brackets for revocation hearings, revocation would be removed from the sentence of the note that lists examples of proceedings that are not designated. So if the member thought another proceeding should be listed as an example of the kind of thing that a court might allow a subpoena for on a case-by-case basis, it would be appropriate to include it in the note. But it would not have to be listed, because the examples are not an exhaustive listing.

Judge Nguyen said she thought she was hearing consensus on removing the brackets and including revocations as proceedings for which subpoenas would be available.

Another member asked why detention hearings are on the list in the rule, rather than in the advisory committee notes, meaning they are the type of hearings where presumptively you could receive a subpoena. And there are other proceedings, where a subpoena may be authorized with the court's permission. The member wondered why detention hearings were treated differently than preliminary hearings. Detention hearings are also very early, and they are preliminary. Often they are done by proffer.

Professor King responded that both sides wanted them. Defense attorneys had many anecdotal illustrations of when a subpoena for documents or something else was essential for a detention hearing. And there is something about detention that's more impactful than some of the other proceedings.

Professor Beale recalled that a defense member on the Subcommittee had provided the example of a case in which she had represented a noncitizen in a detention hearing, and invited the member to describe that case.

The member explained that detention hearings do not necessarily happen quickly. She represented a Canadian citizen, and the defense probably filed ten different requests to alter his detention status. She had Canadian experts come and testify. It was very involved. Professor King noted it is not just the initial detention hearing, it's the reconsideration.

Judge Nguyen explained that the inclusion of hearings on line 26 was either produced by consensus, with both sides wanting them, or commonly identified hearings where it comes up often. The committee notes then explained that for the more rare one-off cases, we don't need to list them all. That was the general intent of why certain proceedings were called out in the rule.

Noting that an earlier speaker said it is pretty rare to ask for a subpoena for a revocation hearing, a defense member commented it would be equally rare to ask for a subpoena for a detention hearing. But she thought the Subcommittee included detention hearings because the Bail Reform Act anticipates the ability to present witnesses and evidence at that hearing. That was a congressional decision, so detention hearings made the list because of that statutory authority. But she also noted that subpoenas, even in trial, are kind of rare. Trials are extremely rare. She commented that the Committee was considering an important process, particularly to the defense that has a very limited ability to get certain information in advance of some of these proceedings. But what was put on the list were places where either there was statutory authority to be able to have that access, or where the Subcommittee felt it was common. Including sentencing might not have been intuitive before the passage of the Sentencing Reform Act. But now sentencing is one of (if not the most) important, contentious, and lengthy parts of the process. Having the ability to subpoena information is important often on both sides (since the government can no longer rely on a grand jury). She acknowledged that none of this is extremely common, but what ended up on the list were the proceedings in which subpoenas have been used most often in a rare arena. Professor Beale added it was also a policy judgment that in those designated hearings, it ought to be clear that you can seek a subpoena for documentary evidence.

Judge Bates said he was hearing that subpoenas in detention hearings would be rare. He agreed, saying he had never seen a detention hearing where there was any interest in subpoenaing documents. But he was in a district that does not have a lot of discovery to begin with. And later consideration of changing a detention decision might be a context where a subpoena would be more warranted or more likely to be sought. He wondered whether putting detention in the text of the rule would send a signal to the bar of an expectation subpoenas will be utilized, when that would almost never be true in the initial detention hearings, which have a real time constraint. The timeliness factor for detention hearings does not exist as much with preliminary hearings or suppression hearings, etc. Would we be encouraging something that we don't need to be encouraging for the initial detention hearing?

A defense member responded that the changes to the language that make it seem now that the possibility of a subpoena is more permissive are important. That encourages a permissive attitude toward subpoenas, even for detention hearings and even though that is unlikely because of the time frame. The member agreed that in that initial detention hearing there would be almost no chance that you would use a subpoena. But as an earlier speaker had noted, when there is a motion for reconsideration of the detention hearing, counsel wants to know that subpoenas are available. And perhaps the judge being informed that there is more permission available for the

subpoena process would be influenced later, when the trial process comes up, and is going to have a mindset of permissiveness carried over from that initial part of the process. And so, although practically speaking there will be few subpoenas at these early stages, the overall goal was instilling a mindset of greater permissiveness in the bar and the court. The goal was not that counsel would believe they had to seek subpoenas, but that they would know they could. And the court knows they could, and that informs the rest of the process as well.

To address Judge Bates's concern about sending a signal, a member asked whether it would be helpful to revise the draft committee note, perhaps with a word or phrase like "unusually" or something that's a little stronger than "less often." The note might say "in unusual, very unusual circumstances, subpoenas would be available in detention hearings." The issue could be addressed either by removing detention from the list in the text, but having it listed in the committee note with proceedings under Rules 5.1 and 33, or retaining it in the text, but then modifying with language in the committee note.

Ms. Ralston offered two comments. First, the issue of delay would be a significant deterrent to the party seeking the subpoena because the person whose ox is gored is the person who wants to change the status quo. So whoever is trying to appeal the initial detention would be the person who has the burden to produce the evidence, and the person who is burdened by the delay that would be caused. Those incentives kind of go hand in hand, making it true that this will not happen often. And second, an alternative, if you wanted to be a little more restrictive about it, would be to say "hearings on detention after initial appearance." That would make it clear that it would not apply to all proceedings that would fall within the language of the Bail Reform Act: "upon the appearance before a judicial officer." That language includes the defendant's appearance at arraignment and then there's detention, kind of instantaneously as part of that. The inclusion on the list for availability of subpoenas would be only for a small subset of cases that there is some kind of subsequent detention hearing, like where it's put over for a couple of days or appealed to the district court or something like that.

Responding to Ms. Ralston's point about incentives, a defense member agreed that there would not generally be a need or even an incentive to issue subpoenas when the detention happens at the initial appearance. But just because that initial appearance detention setting only rarely requires subpoena she did not favor limiting the rule to subpoenas for only subsequent detention proceedings. She thought that would be slicing it too fine to accommodate a rare situation. In her experience, if the defense had to parse through a rule that said, well, not for the first time, but subsequent nine hearings, that would overly complicate something that will not generally be much of an issue. She favored leaving detention hearings in the rule and not worrying about the fact that they would very rarely be an issue at the initial stage.

Another member said there was a very varied practice among districts. It was not uncommon when the government moved for detention in her district the defense would take time to prepare their best first pitch to the court. That could happen weeks into the case. There might be an initial detention order pending the hearing, but the hearing had not yet occurred and so there was time to get a subpoena if one was needed. And she certainly could get a subpoena under her district's current practice. She had not personally done so in thirty years, but the availability had not resulted in either party rushing to the court to try to subpoena information

because they want it at this early stage for some reason other than the bail hearing. She said the information sought was often very, very limited. There may be an employer issue, or maybe the file in a case that doesn't involve an immigration criminal violation, but a person whose status is part of that proceeding. Sometimes that is an item the government gets for the defense. She could envision other times trying to subpoena a piece of that. So it is very rare, and she stressed that there are varying practices around the country, and it was not uncommon in her district that the defense has as much time as it needs to make our best first pitch at the first detention hearing.

Another member said it is routine for the government or the defense to seek some time to prepare for the detention hearing. It never happens on the first day, and he thought it would not be helpful to try to draw the between first and subsequent detention hearings. But because subpoenas for detention hearings are rare, he favored not to listing them in the rule, and instead adding them in the committee note to the list of what the court can consider in an appropriate case, rather than have it presumptively be permitted.

Judge Nguyen agreed with Judge Bates that it might send a signal that at the detention hearing maybe you ought to think about getting a subpoena if you have information that relates to the District Court's determination of whether somebody should be detained or not. But she was not troubled by that, because for her it was cabined by the romanette requirements that you must have information that is possessed by the recipient of the subpoena, that is not reasonably available from any other source, and most importantly that you are seeking information that is likely be admissible or to lead to evidence that's admissible in the designated proceedings. And so for her, even though rare, detention is such a big deal in the criminal context that she was not that troubled by having it included in the list.

She then raised the question whether to take a straw poll of the Committee whether to retain detention hearings in the list of proceedings in the text.

A member asked whether courts give less weight to something that is in the committee note but not the text. Professor Beale responded that before we get to the courts, the first question might be whether counsel would read the committee note. Would they read the rule and know they could ask for subpoenas? Or if the rule did not list a proceeding, would counsel say it's not listed, so I guess we can't get subpoenas? Either advocates or judges may or may not look at the committee note. We have often heard that people don't know what's in the committee notes, and of course, the rules pamphlet the government produces does not include the committee notes.

Judge Bates said there is a difference between having something in the text and in the committee note, and there are many who feel that counsel won't necessarily look at committee notes. But in this situation, he thought having it in the committee note, not in the text, seemed somewhat consistent with the rarity of the situation. Everyone agreed it was very rare, and he identified four different stages at which it might arise. It may rarely occur in the initial two or three day period, or a longer period than the previous speaker had identified, even for an initial hearing. Or on appeal to a district judge, the defense counsel may want to explore those facts further. And another context was reconsideration of detention. So there are many different contexts, but all of them very rare. And he thought if something was really rare, maybe the better

places was the committee note rather than the text. But he acknowledged there are some who don't look at the committee notes.

Professor Coquillette said he agreed with Judge Bates. It does make a difference whether something is in the committee note or in the text, and traditionally if something is important it should go in the text because many people don't read the committee note. On the other hand, this is obviously a very marginal thing, and so he thought it was a legitimate decision for the Committee.

Professor King reminded the Committee that one of the reasons detention hearings were in the text was because of the statutory authorization for evidentiary hearings. The Committee should take that into account when deciding where to place these hearings in the rule.

Judge Dever followed up on that point. The statute gives the defendant the right to have witnesses and other things. The Subcommittee thought the rule should comport with the statute. And it should be in the text because, as others have said, we hoped everyone who participates, either as an advocate or as a judge, at least reads the text. If they read the committee note, that was a bonus. But the statute authorizes the defense to call witnesses and present evidence. The Subcommittee thought it was worthy of being in the text for that reason though, as everyone said, it is rare.

Ms. Ralston asked a practical question: the Bail Reform Act said that the defendant shall be offered the opportunity to present witnesses, cross examine, and present information by proffer or otherwise. Was the rule's "reasonably likely to be admissible" the same standard as a proffer? Then you don't have to go through the whole subpoena process to get the information, because the thing you would say to get the subpoena is the same thing you would say under the statute to make the showing.

A defense member responded that there may be competing proffers, for example the government saying the defendant is chronically unemployed, and the defense saying the defendant has always had employment. It would be rare, but there are times when proffers alone might not be all you want to present to the judge. And under the Bail Reform Act, one of the defendant's rights is to try to marshal that information. This is the very rare way that a defendant would be able to do that. She said because just because something was rare, that did not make it unimportant. The Bail Reform Act was a drastic shift in how release and detention issues were handled in the country. It is no small proceeding. So that something as rare did not make it less important.

Judge Bates asked what the evidentiary standards are at detention hearings. Because the standard in the proposed amendment is items that would likely be admissible in the designated proceeding. Did the modified *Nixon* standard make sense in a detention hearing? What are the constraints in terms of admissible evidence in detention proceedings?

A member responded that in practice there are very few constraints. You can proceed by proffer. That is an acknowledgment that this is so early and the parties are scrambling. The parties are given a lot of leeway, especially the defense. Counsel make assertions based on what

their clients have told them. And that's entirely legitimate. The rules of hearsay, rules of evidence don't really come into play as a practical matter in detention hearing. So he agreed that Judge Bates had raised an additional issue of what the substantive standards mean when a court or even a litigant was trying to figure it out. The *Nixon* standard was changed by this rule. With respect to a subpoena in a detention hearing, was there any limitation there at all? Ms. Ralston observed that the statute says that the rules of evidence do not apply.

A member responded that under this standard, if you were to get a subpoena, although admissibility is different than it would be at trial because the rules of evidence don't apply—just as they don't apply in suppression hearings and sentencing—but the other prongs incorporating the modified *Nixon* standard do apply. The reason this would be rare is that defense (or government) would have to be able to articulate with particularity what they are seeking under the subpoena. That's part of the *Nixon* standard that was not being changed, and would still apply to this proceeding. The party seeking the subpoena would also have to establish that the person being served has the information being sought. It would be very early in the game to be able to establish that, but it might be possible. And then finally, the party seeking the subpoena must establish that it cannot get it any other way. The defense might be able to get employment records with a release from the defendant. So there are multiple layers and a reason why it is rare. But the admissibility part of the standard is only one part, and the other parts still do apply even in proceedings where the rules of evidence do not apply.

Judge Dever noted there was consensus to leave revocation in, and the question now was having detention in the text or the suggestion of perhaps strengthening the language, recognizing sort of the unusual nature of it in the committee note. He asked for a show of hands of members who favored retaining detention hearings in the text, as reflected on line 26 of the redline version, page 128, and then a show of hands of those who would remove detention from the text. A clear majority of the Committee favored retaining detention hearings in the text.

Judge Dever gave members a ten minute break.

After the break, Judge Nguyen turned to the issue on line 30 of the redline. She noted this was a big issue, and there was no unanimity among Subcommittee members on what *Nixon*'s admissibility standard should be. This was the critical issue that started this whole endeavor of attempting to improve Rule 17(c). The alternatives in brackets were that the item contain information that is "likely to be admissible evidence" or that it is "likely to lead to" admissible evidence? She asked to hear from both DOJ and the defense attorney members of the Subcommittee first to articulate why they thought one standard was better than the other. Also, she asked them to discuss whether, in practice, it would make a difference.

A defense member spoke first, observing that this issue was important and could make a difference. Before the last meeting, the identified problem was that there are districts interpreting *Nixon* so restrictively that there was virtually no opportunity for the defense to subpoena items under Rule 17(c). Last fall, after reviewing a very expansive draft proposal from the Subcommittee, this Committee decided that a more incremental approach would be preferable. It should preserve practice in districts where the defense had access to subpoenas, but it should also provide a loosening of *Nixon* to signal change in the other districts. She pointed out that the

Nixon standard is not just about admissibility. It has a particularity prong, and at the meetings in Arizona and then last fall in New York the witnesses identified problems with both having to state with particularity what they want in a subpoena as well as admissibility. The proposed amendment loosens only admissibility, so it is already a very incremental and narrow approach to the problem the Subcommittee had identified. And consistent with this, as between “likely admissible” and “likely to lead to admissible evidence,” she favored “likely to lead to admissible evidence.” She thought this would move the ball forward in the most meaningful way. And it more accurately reflected the practice in good districts and would not increase subpoena practice in those districts that are already allowing the defense access to 17(c) subpoenas. She asked the Committee to recall that the initial proposal from the New York bar included a fairly expansive standard of allowing the defense in certain circumstances, to subpoena information “material to the preparation of the prosecution or defense.” But that expansive language was rejected. At the November meeting, Lisa Miller, then the Deputy Assistant Attorney General, suggested to the Committee that the Department might be able to support “likely admissible.” The member recognized that there was nothing binding about that conversation. But in addition to suggesting that the Department might be able to support “likely admissible,” Ms. Miller had also suggested the addition of a catch-all “interest of justice” provision. That would have given the courts more flexibility beyond the “likely admissible” standard. The Committee ultimately concluded, though, that “interest of justice” was too undefined, would likely not promote uniformity, and would certainly lead to increase in litigation. But nonetheless, it had been suggested by the Department’s representatives.

In the member’s view, the two standards being considered—“likely admissible” versus “likely to lead to admissible evidence”—were both narrower than what Ms. Miller had suggested. “Likely admissible” might not change the practice in restrictive districts, and it could undercut practice in places where Rule 17 is working well. She thought that “likely to lead to admissible evidence” was a standard that most moderate courts are applying now, so it would not increase subpoena practice in those districts. But it most clearly sent the signal that the amendment is meant to be a change and allow for broader practice in the most restrictive districts. She noted in addition there is a safety net that will allow every district or each individual judge to set their own procedure with respect to subpoenas. She thought it was an overstatement to say that “likely to lead to admissible evidence” was going to blow off the barn doors. To the extent there was a sharp increase in subpoena requests in any given district or before any given judge, she thought that the court would look very closely at why that was occurring and cabin the practice if that was appropriate within their own district. But “likely admissible” would not change much of the current *Nixon* standard in the most restrictive districts.

Another defense member spoke next. She said the New York City Bar Association’s proposal was motivated by the problem that in some districts the “likely to lead to admissible” or even “likely admissible” simply is not practiced. It was important not to do damage to the districts in which the status quo is a standard of “likely to lead to” admissible evidence. But it was equally important to loosen the standard sufficiently for districts—like the member’s—where the biggest obstacle is being able to point to that evidence is admissible. The member said that at the meeting in Phoenix we heard from many of the defense practitioners that the admissibility requirement caused the most difficulty. So if the goal for this rule was to loosen the

standard, then “likely to lead to admissible evidence” would be the most effective way to encourage districts like hers to be more permissive. The member also noted that Ms. Miller said in her testimony in New York that the status quo permits some investigation. But that is the status quo in some districts, not in all. The member said uniformity was a worthy aspirational goal, and a goal that she would like to achieve.

Ms. Ralston responded. First, she challenged the idea that reasonable particularity is a significant limitation. A search warrant requires reasonable particularity, and “all documents containing the defendant’s name” qualifies as reasonably particular. But it was not a significant limitation on the amount of information that was being sought. She thought that was also true in civil discovery, although she had never been a civil practitioner. People fight over the terms that will be searched in an electronic discovery because the search has to be in some sense “particular,” but that didn’t preclude a very lengthy, expensive, and large production of discovery. In criminal cases the government already provides tremendous discovery, and anything that significantly adds to the time and expense and volume of that practice has a cost for speedy justice, which is important not just for defendants, but also for the public and for the goals of criminal justice.

Second, what Ms. Ralston had heard from her colleagues throughout the country, in the U.S. Attorney’s offices, was strong opposition to “likely to lead to.” She thought that opposition indicated that standard was already the practice in very few districts, if anywhere. No one had said that they wanted to really restrict what was happening now, but everyone opposed a vast expansion. So she questioned the factual premise.

Finally, Ms. Ralston expressed concern that “likely to lead to” did not necessarily have a limiting principle. She asked “to lead to” after how many steps? She said it is very easy to tell a story about how the butterfly flapping its wings in Tokyo caused the tornado in Alabama, and that type of “but for” causation is expansive. It would be a large change from the *Nixon* standard stated by the Supreme Court, and from the way it is practiced in most, if not the overwhelming majority of, districts today. The “likely to be admissible” standard leaves room for situations where if the defense were to put on a case, if there were a need for impeachment of some witness, if there is a need for rebuttal, where you won’t know until trial that something is admissible until we have been through more of the proceeding. But it doesn’t relieve you of the necessity of explaining relevance and authenticity, or reasons to believe at least that the thing you’re looking for would meet those standards. She thought that it would be an expansion of the rule as it currently stood, and the Committee in November expressed rather clearly that it was looking for an incremental change. Ms. Ralston contended that “likely to be admissible” was the incremental change that required painting a more specific picture of what you are looking for. To say that is my case, this is the picture puzzle, and this is the missing piece. If I find this information, it will complete the story. And it would not be the fishing expedition that was a large part of the rationale behind the *Nixon* rule.

A member asked Ms. Ralston whether the Department’s concern was that “likely to lead to” would create an exponential increase in documents provided in discovery. He commented that everyone who handled criminal cases had seen an exponential rise in the amount of discovery. But he wondered how to quantify that in regard to this proposed change.

Ms. Ralston responded that the breadth of what the Department was already turning over—the breadth of what the rules required, what the Constitution required, and as a matter of policy, how much beyond that the Department went—indicated that there is not much need for broad, expansive additional discovery authority because so much was already being provided. Beyond that, there were concerns, to be discussed more later, about privacy and about potential intimidation (even if not intentional) discouraging participation in the criminal justice process by witnesses and other members of the public. Ms. Ralston thought it was not necessary for the rule to be that broad, especially at first. But if the Committee adopted the “likely to be admissible” standard and found it had proved insufficient after a number of years, additional change would be possible. Rolling back a broader change would be much more difficult. She said the Department remained unconvinced that there was a problem that needs to be solved, but to the extent the standard was to be loosened, it thought that the more incremental change was most appropriate.

In response to Ms. Ralston, Professor Beale reminded the Committee that discovery from the government was not the issue. The government “discovery” that is now producing these massive amounts of material includes material the government has been able to obtain by search warrants and by grand jury subpoenas and so forth. And everyone appreciated that the volume of material had been increasing. But the proposal concerned material held by third parties. Rule 16 does not cover it, and the argument was that the defense requires things that the government never thought to look for, and so the defense cannot get them from the government. It is not part of existing discovery. And the argument was there are things—data, documents, etcetera—held by third parties, and that a vehicle was needed to obtain them. The speakers in Phoenix expressed concern about the tight interpretation of *Nixon* in some districts that would not allow defense counsel to obtain material to carry out their obligation to prepare the defense. They described the problem of counsel saying “I need to see these records. I don’t know for sure what’s in there. I don’t know if they will help my client or hurt my client. But I know that they are critical to making our case.” Some of those witnesses would say the problem is that they had never seen the material in question, because they had no way to get it from these third parties other than a subpoena. So, Professor Beale said, the question was whether the Committee thought the witnesses had described enough of a problem. And if there was a problem, was this enough of a solution to say the material being sought is “likely to be admissible” when you don’t know what’s in there, because you haven’t been able to get it.

Ms. Ralston responded that “likely” does a lot of work. She likened the idea that it’s unknown to Schrödinger’s box—I don’t know what is in there until I open it. But that does not prevent counsel from saying “I think what’s in the box is X.” For example, I want the video from the convenience store across the street from where the robbery allegedly happened. I think the video will show the robbery, and show it was not my client. That is likely to be admissible because the video likely captured the scene, and whatever it shows, it would probably be admissible. You know it’s going to be relevant. You know it’s going to be specific, and it’s going to be authentic. She thought that type of situation, which had been used as an example of the problem, would be covered by likely to be admissible. Likely to be admissible leaves room for situations in which the defense says I don’t know exactly what’s there, because it would cover cases in which counsel says “if it is as I believe it to be” then it be would admissible.

Judge Bates said he was thinking of the Standing Committee, which does not have the in depth experience of the Subcommittee. He asked for one or two examples of information that the defense would want that might be reached by a “likely to lead to evidence” standard, but not under a “likely to be admissible” standard. He asked for a concrete example of it that you couldn’t get under the more restrictive standard.

A defense member offered two examples, one of material sought by the defense, and the other sought by the prosecution. The defense example arose in a qui tam investigation that led to a prosecution. During the investigation, emails were seized from a business that employed the client as either president or an employee. In criminal discovery, the government provided the emails that had been seized. The defense sought a subpoena for other emails that would have put context to the emails that had been seized by the government. They sought to subpoena the other emails that were critical to the theory of the defense to put context to the emails that had already been provided. The emails were interwoven, in fact, in terms of dates and exchanges. The member said the court denied that request because the defense could not establish how the emails would be admissible, and particularity also came into play a bit because the court expected to be told the verbatim content of the emails. The member thought “likely to lead to admissible evidence” would have produced a different result. And, she said, the defense attorney in that case very much believed it would have produced a different result.

Another member followed up on that example, to further define the “likely admissible” versus “likely to lead to.” In an instance where your defendant might say, I know that other people were involved in e-mail exchanges related to this issue, but I don’t know who they are, the “likely to lead to” admissible allows a defense attorney to first subpoena the business, perhaps to find out who else might have been on e-mail communications, and then potentially issue another subpoena to someone that is now disclosed as part of that group of people that might have been on communications with the defendant. The defendant may not have been involved in the transaction or discussion. It might be a third party now that was involved in that discussion. Perhaps you thought it was only internal company people that were dealing with it, but now you find out a subcontractor may have been involved. So you get a chance to potentially come back to the court and say this developed now and I need to issue another subpoena. The court under a “likely to lead to” standard would be potentially more open to approving such a request, seeing that you had recovered information. It might then allow you to issue another subpoena, because that seems likely now to lead to that information. The member thought that the “likely to lead to” provides more opportunity, more openness to collecting this information on behalf of your client. He did agree that both standards were more expansive than current standards. But given the difficulty of amending the rule, he advocated making the change as broad as possible the first time around, with the likely to lead to versus likely admissible.

The speaker who had offered the first example added that there is some form of open file discovery in many districts. The government has trained on what the member thought was called smart evidence gathering and discovery procedures because in this age of data it is very easy for cases on the government side to be overwhelmed with ESI and other information. In the past, the government seized every computer and every phone in a home, even if it was the teenager’s phone, and whatever you thought was covered by the warrant. But, she said, it is now common practice to be more discerning at the moment of seizure. The two examples just discussed show

that the government's more restrictive seizures limited the defense, when it sought access to what the government had not seized and thus did not turn over in discovery. Because electronically stored evidence is overwhelming everyone, the last thing the member would do is subpoena terabytes of random information, in the hope that it might lead to something. The rest of the requirements—that she was particularly looking for something that was going to be relevant and be admissible or likely lead to admissible evidence—cabined where subpoena practice would go.

Her other example concerned the government seeking information by subpoena. In the member's district, one of their jails did not provide call logs automatically. The government served a subpoena to get them in one of her trials. It was a cold case trial. The member thought the government was hoping there was something on those calls. But the government served the subpoena without making a motion, and the judge who later learned of it expressed surprise. The member presumed, though there was no motion, that the government thought it could satisfy the *Nixon* standard. In that case they asked for recordings of every call that the defendant had made from the jail. She observed that the only standard the government could have met in that situation was "likely to lead to admissible evidence," because the calls could have included clients reading a bedtime story to their kids or calling their mother. So it could only be the hope that the client said something, coded or otherwise, that they could point to as an admission. None of those records were introduced in that particular case, because nothing was there. The member thought the example highlighted the standard that prosecutor must have been operating under. But since the government did not make a motion, it did not put its argument on the record.

A judge member responded to Judge Bates' question, noting that he handled many cases from what is called Indian Country that involve offenses that are rare in other districts, such as sex crimes. In a child sex abuse case it was pretty common to have a defense theory that involved school records as a potential source for further defenses, for other possible perpetrators. For example, there may have been reason to believe that there are complaints about other perpetrators or other caregivers. School records could be very important that way. But if the defense had only the client's statement that another child told him what happened at school, that would not meet the higher standard. It was common in those cases for the defense to seek the school records and follow up on a lead that there was a possible other perpetrator.

A practitioner member provided another possible example. In a complicated Medicare fraud context, the grand jury may subpoena certain categories of data about a patient or about a nursing home resident, but not other categories about that same patient or resident. Those other categories could be very important for the defense to have a broader understanding of that patient or that resident's medical situation that might undermine the government's theory that based on the categories of information they have. But without those records, it would not be possible to present that defense. Of course not all of the records would necessarily support the defense theory, but the defense could not determine that until it saw them. Defense counsel might get a very good idea from the client who had been rendering those services, but without the records, it would not be able to present the defense.

Ms. Ralston asked how those examples fell in the margin between "*likely to be* admissible" and "*likely to lead to* admissible evidence." In each example, it sounded that the

records themselves would (if they showed what the defense thought they would) would likely be admissible. These would be original records, about business documents, business records, public records, things that for that reason would not be hearsay. If they showed what the defense thought they would, they would also be relevant, i.e., “it wasn’t my client,” or “the billing and treatment context shows no mens rea for fraud.” She understood why the defense would want these documents, but not how they were on the margin.

Ms. Ralston noted that the language “would lead to” allowed for more chains of events. Counsel wants the emails in order to get the names, so that counsel can talk to that person, so that counsel can learn more about them, so that counsel can get their personal records. This could go on and on and on. And that the thing you thought would be admissible could be ten steps down the road. Ms. Ralston did not think it was necessary to go that far to solve any of the problems that had been articulated by her colleagues and all the way back to the Phoenix meeting. These are things that could be solved by “likely to be admissible” based upon the understanding that “likely” means if the record says what counsel thinks it will say.

Judge Nguyen asked again whether the choice of “likely to be admissible” or “likely to lead to admissible evidence” really made any practical difference in the end. She noted she was especially interested in hearing from her district court colleagues who had the experience. Because in her view, the particularity requirement was really important. You had to articulate why it is that you needed this information. In the sex crime example, if you had a lead that caused you to believe that these records might be relevant, and if the records showed what you thought, it would bear out the lead. She thought a subpoena was just as likely to be approved under the “likely to be admissible” versus “likely to lead to admissible,” as a practical matter, once the court understood the narrative. The judge could see why you needed it. You’d described it with sufficient particularity. You’ve told the court that you could not get it from any other source. The government didn’t have it to turn it over under Rule 16. And if the lead bore out, it would be “likely to be admissible.” She echoed Ms. Ralston’s point that “likely” does a lot of work. She asked committee members to think whether there would be other judges (at Standing and then multiple stages after that) who would not be as familiar and had not struggled with the very subtle differences between the two options. They might be concerned that “likely to lead to” would put us a little bit too close to civil discovery and an expansive discovery tool. She suggested that the chances of succeeding in this incremental reform might be improved with a loosened *Nixon* standard less permissive than “likely to lead to.”

A judge member expressed the view that “likely to be admissible” was much better than “likely to lead to admissible evidence,” which she said does not make sense and was confusing.

Ms. Ralston asked a follow-up question about particularity. The Department had read “reasonable particularity” to be descriptive of the item, not descriptive of the reason you should get it. The only part of the rule that talks about the reason that you should get it is the admissibility question. The particularity is “I want emails from my client held by the employer.” That is describing the item that you want and not the reason why you think you should get it.

Judge Nguyen agreed and said she had been making the more general point that in an effort to get the subpoena there has to be a reason why you think this relates to whatever defense

you think you're going to craft and if you can meet that standard. She asked if her district court colleagues disagreed and saw a significant difference between the two standards.

One member responded that he was still not sure how he came out on that question. In giving the example concerning school records he had been trying to answer Judge Bates's question. Returning to that example, he imagined a defense attorney came to him with a request seeking school records that named someone else the child complained about at school. The member might ask counsel "do you believe the records will give you the actual name?" Counsel might reply he did not know. And if the judge asked whether counsel believed the records would tell what happened, counsel might again answer he did not know. At that point, the member thought the defense had not identified something that was going to be admissible. But if you said you thought when you got those records, then you would be able to follow up this lead for the defense. Then the answer would be likely be yes. So in that scenario the standard could make a difference. For most production, if you get what you want and then that would take you to what you think will support your theory. There was usually one more step.

Ms. Ralston commented that the rule used the word "item," which it defined to include information. Asking the agent "did you investigate other disclosures the child made about potential perpetrators?" would be a perfectly admissible question. It would be based on the information from the record, even if the record itself was not admissible. She thought that the information contained in the school record, even if not the record itself, would be admissible as a form of cross examination to cast doubt on the government's investigation, to say there is reasonable doubt.

The member who had suggested the example agreed the defense could ask an agent that question. But that would be a lesser defense than following up on a lead that would give you another perpetrator.

Ms. Ralston said she did not read the rule to be saying that if you made the showing to get the school record based on "likely to be admissible" that would preclude using the information in the record you got to follow up in some other way. She was saying that you have to have enough reason to think that the first thing will get will be useful in the proceeding.

The member who provided the example said he was just answering the question whether the typical person seeking records like this could make the showing that what they want was likely to be admissible. In his opinion, typically in the scenario he had described, the answer was no. You could not describe it.

Judge Bates commented that in this scenario he was not sure that the defense counsel must respond "I don't know" to those questions. There had to be a basis, something that lead them to suspect that in those records there would be something. So they had to be able to say "I have received information that someone else has made complaints," something beyond the "I don't know." Why, he asked, wouldn't that be encompassed by "likely to be admissible," rather than "lead to" admissible evidence? The member who provided the example responded that the cue you got to seek more information would be vague. Your client tells you that his daughter told him she'd complained about somebody else at school also or something about that.

Judge Bates said that was what you would be telling the judge. That would be the basis on which you thought there would be information in the records you were seeking. So it not be “I don’t know,” it would be “I suspect based on this information.” Judge Bates thought that “lead to” raises the concern about enabling fishing expeditions. That, he said, was what the Committee needed to consider. Is there a concern about fishing expeditions? He thought there needed to be some specific language that cut off what is commonly called a fishing expedition, where there’s no basis for really seeking the record, so just a hope.

In response to a question whether this could be addressed in the advisory notes, rather than the text, Judge Dever stated the standard must be the same in the text and the note.

A member said he shared the concern about fishing expeditions. Also, more broadly, since we were trying to change the rule to make it broader in different respects, it might be wise not to get overly ambitious. That might be counterproductive in the long run. He noted that there was a section saying for a lot of these subpoenas, you don’t need a motion or an order. So we are already making those kind of changes that loosen the rule, to permit more flexibility. Given that, he thought it might make sense to go with the “be” admissible standard and not with the “lead to” admissible evidence standard.

Another member agreed with the comment that if “likely to lead to” would result in the failure of the amendment, he would certainly support the more conservative approach and say “likely admissible.” His more fundamental question was whether “likely admissible” would be enough to change the mindsets of the courts around the country on this particular issue. Because, he noted, that was ultimately what the Committee was trying to do. The Committee was trying to loosen the *Nixon* standard. He wondered if the district judge members thought “likely admissible” would loosen the *Nixon* standard enough to convince them if defense counsel were standing in front of them that they would be more likely to approve a subpoena. If so, he would support that “likely admissible.” Or was that not enough to move the needle in the restrictive districts? But if “likely to lead to” would push the courts and the Standing Committee too far, and they would not accept it, then he would accept the more incremental approach. So, he asked, would the language do enough to convince the courts where this restrictive practice is in place to loosen the standard?

Judge Nguyen responded that there was no question the proposed amendment would loosen it a little bit, but it was a question of taking an incremental approach or loosening it a lot. She said “likely to lead to” is definitely broader and harder for the judges to apply. There would be questions of how far we go. That was Ms. Ralston’s point: how many steps do we permit in order for the evidence to finally be shown to be likely to be admissible? They both loosen the *Nixon* standard. There was no question about that.

Another member said it was not only the standard, but also what was in the committee notes. The member understood that not everyone reads the notes, and they cannot suggest something in the notes that’s not in the text. But he thought lines 60-74 and 75-87 really explained what the Committee was trying to do with this change, and that *Nixon* has been much too strictly interpreted in some jurisdictions. There is an attempt to loosen that standard and to give some examples of where it has been misapplied in the past. The member said he preferred a

more incremental approach. He thought the “likely to be admissible” combined with what the committee note said the Committee was attempting to do would go a long way to pushing jurisdictions like his own, which traditionally had provided very little discovery, post *Nixon*.

Other district judge members who had not spoken to the issue were invited to respond to Judge Nguyen’s question on the difference “likely to be” versus “likely to lead to.”

One member commented that this had not been one of the issues of greatest concern to him. He had interpreted the term “likely” to be a limiting term that had sufficient meaning to provide a standard that could be administered by district judges. Fishing expeditions were a big concern to him, and he thought he might be attaching more significance to the limiting use of “likely” than others would. If he was misreading the significance of “likely,” then the fishing expedition concern would really bother him.

A judge member expressed the view that “likely” means we are not sure that it would be admissible evidence or would lead to admissible evidence.

Another judge member said he shared the concerns about “likely” and about the possibility of fishing expeditions. If committee members favored a more incremental approach, he thought it might be better not to include “likely,” see how it played out, and revisit it if necessary.

Professor Beale commented that the Committee had been discussing whether the standard should be “likely to be admissible,” or “likely to lead to” admissible evidence. “Likely” was in both tests.

Noting that she was making an argument by analogy from a past Civil Rule, Professor Struve said Civil Rule 26(b) previously included a definition of the scope of discovery, which was bifurcated. It provided for discovery about material that was relevant to any party’s claim or defense. And it also said that for good cause the court may order discovery of any matter relevant to the subject matter of the action. She suggested that if there were hesitation about allowing broad access under the “likely to lead to” standard, the rule could bifurcate it and say “likely to be admissible,” or for a good cause on motion the court could allow a subpoena for material “likely to lead to” admissible evidence. That would be an intermediate option between the binary that the Committee was considering.

A defense member of the Subcommittee commented on fishing expedition concerns. She acknowledged the concern was in the case law. But she said with the advent of ESI, defense attorneys are generally not interested in subpoenaing vast amounts of data in the hope it might lead to something that’s admissible. She wanted to give an example of a one-step request to illustrate the point regarding emails about a particular meeting. The emails themselves might not be admissible, but they might reveal the name of someone who attended a meeting, and that person’s testimony could be subpoenaed. She thought the concept of fishing expeditions clouded the argument with something horrible everyone was afraid of. But defense attorneys did not want to do that. It doesn’t help. A judge responded that the member was a good defense attorney, and she would not do so. But sometimes defense attorneys did so.

Ms. Ralston commented that not everyone had the same incentives to resolve something quickly. But she thought everyone was assuming something that hadn't been specifically stated: the subpoena requester must have a good faith basis to believe that the thing requested will be as they are expecting it to be. That assumption of good faith was doing a lot of the work. It was being read into the "likely to be admissible." She suggested the requirement of a good faith belief might be spelled out more in the note, explaining that the party requesting a subpoena need not know for sure what was in a document before being able to subpoena it, but must have a good faith basis, like the good faith belief to ask a question in court. Good faith, she said, is the general rule for everything. And because it was the general rule, it was being assumed and not made explicit. But when you start to think about "the lead to" it got harder and harder to articulate that reason to believe that the item sought was there. The lack of a requirement in the text that the person seeking the subpoena articulate the basis for belief was one of the reasons the Department viewed "lead to" as particularly dangerous.

On the good faith point, Professor Beale noted that as a matter of style and general rules etiquette good faith requirements are not included in individual rules. Including it in one rule might suggest it was not required in any other rules. In the Subcommittee there was a suggestion to put good faith in the text, but the Subcommittee declined to do so because that would be inconsistent with the general approach in the rules. She knew of nothing prohibiting mentioning good faith in the note. She observed, however, that it could be problematic to mention it for only one particular issue.

Ms. Ralston said the Committee could do it in terms of defining what it means for something to be "likely to be admissible." If you can articulate why you think whatever is there is there.

Noting there had been some discussion of about what the facts have to be and when facts have to support certain things, Professor King pointed out that if there is a motion to quash, the proposed amendment required a showing that each designated item be described with reasonable particularity, and facts must be stated showing that each item satisfies (c)(1)(B)(i)-(iii), which includes the "likely to be possessed." You must show facts supporting whatever standard the Committee came up with, whether it was "likely to be admissible" or "likely to lead to" admissibility. That was lines 39-41 on page 128 of the agenda book.

Judge Bates noted that Professor King was assuming the proposal would retain "state facts" after discussion. Another judge who said she believed in clarity asked if this could be stated clearly, perhaps at the beginning of the rule.

Judge Dever asked for another straw vote of committee members, reminding them that they were not at the end of the process. He suggested that members not let the perfect in their own minds to be the enemy of better. He asked for a show of hands of members who supported the language of "likely to be admissible"? Then he asked for a show of hands on "likely to lead to" admissible evidence.

By a vote of 8 to 4, members supported "likely to be admissible." A member who had voted for "likely to lead to" noted he viewed "likely to be admissible" as the compromise

position, and he would support it if that were necessary to secure approval in the Standing Committee.

Judges Dever and Nguyen noted that they would be calling for a vote on the proposed amendment as a whole at the end of the discussion of particular issues, and Judge Nguyen asked the Committee to consider two interrelated issues together. On lines 48, 51, 53, 57, and 58 the question for the Committee to discuss was whether the motion and order requirement for subpoenas for personal and confidential information should also apply to prospective witnesses, and the notice provision as well. The Subcommittee had bracketed it. Currently the motion, order, and notice requirements applied only to victims. The Department had urged that witnesses have the same privacy interests as victims, and that the rule should provide the same level of protection: a motion and order required before you can seek personal and confidential information pertaining to prospective witnesses, who should also be given notice.

Ms. Ralston thanked the Committee for considering the Department's suggestion, which had been added since the November meeting. She said that the Department thought this addition to the rule was important to protect the integrity of the process and privacy interests in light of the two expansions of subpoena authority being made in the proposed amendment. The first change was the expansion of the *Nixon* standard. In the Department's view, if there were a substantive expansion of the universe of available information, it would be important to restrict the rule with the requirement of a motion. She noted that many districts now require a motion for any subpoena under Rule 17. The proposed amendment would narrow that to a smaller scope of situations in which you need a motion. The Department was proposing that the narrowing of the motion requirement be restricted somewhat. The amended rule would still narrow the times when you needed a motion, but not narrow the motion requirement quite as much as the Subcommittee had previously considered. The Department sought to protect this information for prospective witnesses, she said, for largely the same reasons as the protection of victims. People's knowledge that really sensitive information about them could be disclosed without any intervention from a court and without any notice to the person could really dissuade them from participating in the process. Witness participation is a critical element to meeting the government's burden beyond a reasonable doubt in criminal cases. Anything that would dissuade people from participating would make it that much harder to do justice for victims, for the public, and to serve the ends of the criminal justice system. The Department thought it was important to create a balance. The Department accepted that in appropriate circumstances this information could be obtained by subpoena, but oversight by the court was an appropriate middle ground. As the draft currently stood, it did not require notice, though it permitted the court to order notice in appropriate circumstances. The Department thought that was a very balanced approach, balancing the interests of the witnesses and the needs of defendants to secure this information.

Responding to some of the points in the reporters' memo, Ms. Ralston characterized the issue about legislatures as somewhat of a red herring. The statutes addressing limitations on subpoenas had been focused on the government's use of grand jury subpoenas because the availability of Rule 17 subpoenas had been so limited. The lack of additional protections like those in the CVRA should not be taken as an affirmative statement by Congress that such protection is unwarranted. Rather, it was not necessary at the time to consider it. And the idea that witness credibility is always central proved too much. By that logic, there would always be

an incentive to seek as much personal information about the witness as possible. Their medical records might show that they have some perception impairment or other things. People are rightly sensitive about that information being obtainable without their consent, without their knowledge, and without any intervention by the court. She thought these types of subpoenas would be sought by ex parte motions. The Department was not saying that notice to the government should be required, but it thought that the court should be involved in the process. She thought the concerns about knowing who will be a witness were overblown. The reason a party would want someone's information is because they thought that person would be a witness. Personal information is most likely to be relevant as impeachment information, and there is no need to impeach somebody if they're not going to be a witness. As to defining what personal and confidential means, she noted that was not a unique issue. The Department was seeking to include witnesses in the existing provision governing subpoenas to victims. To the extent there is ambiguity about the term personal and confidential, it was already in the rule and had to be dealt with.

Professor Beale commented that the statutory provisions to which the reporters' memo referred included, among other things, the Stored Communications Act and some of the banking provisions do deal specifically with notice: these people get notice, and these people do not. So there are statutory provisions that do contemplate that type of limitation on notice. These provisions were not included in the current reporters' memo, but had been in earlier memos. Ms. Ralston acknowledged that the proposed amendment does include the language "unless the statute provides otherwise, the court may" Finally, Professor Beale commented that the defense bar felt very strongly about this issue.

A practitioner member responded, noting that over the three years that the Subcommittee had been considering Rule 17, it had met many times, and the reporters and the law clerks had provided numerous, excellent, and sometimes very dense memos. The Subcommittee had spoken by Zoom with experts, including in house and outside counsel to the tech industry, the banking industry, education, healthcare, and billing regarding privacy protections and notice to individuals whose records are being sought. The Subcommittee learned, as Professor Beale suggested, that not all statutory and regulatory regimes treat privacy protections similarly. Some expressly provide for privacy protections and notice, the most prominent being HIPAA and FERPA. Others reflect deliberate policy choices not to require notice. The Stored Communications Act, for example, does not require notice for non-content data, because Congress decided the holders of that data ought to be able to sell it. Still others expressly prohibit notice, such as the Bank Secrecy Act. Specifically with respect to suspicious activity reports, there is an absolute statutory prohibition on notice.

The member said that in all this time, through all these conversations, no one complained about witnesses' personal and confidential information being subpoenaed. In her view, adding prospective witnesses to victim provisions of 17(c)(3) would be a fix for something no one said was broken.

During the three years, the Subcommittee spent considerable time and research looking into what is meant by personal and confidential when we evaluated the protected and unprotected categories of information. Beyond the statutes and regulations that explicitly address protected

information, there was a broad range of personal and confidential information that people hope or expect to keep private that is not protected by law. In one of the memos we had many different examples of that information, and she named some: motor vehicle records, IP addresses, passwords, diaries, calendars, hotel registries, contact lists, death certificates, data records, in cars, and emails between employees and employers.

The member argued that the breadth and indeterminacy of personal and confidential makes adding prospective witnesses to 17(c)(3) burdensome and problematic. In her view, Rule 17 is not the appropriate vehicle to deal with the evolution of privacy interests. Some of the burdens that we identified in Subcommittee meetings include the inability to identify the person or entity whose information is sought, no known contact information for the person whose information is sought, too many people and entities involved, and the possibility that advance notice might lead to the destruction of evidence. Returning to her point that notice to prospective witnesses was a fix for something that was not broken, she commented that the most important thing the Committee learned at the November meeting came from Ms. Miller, the Deputy Assistant Attorney General for the Criminal Division. When asked whether she thought there was a greater risk to victims and witnesses in districts that had interpreted *Nixon* more permissively, Ms. Miller said she had not noticed a trend. Similarly, Mr. Randall, from the U.S. Attorney's Office in the Western District of North Carolina, said he had no sense of current abuses. The member emphasized the Department's proposal would be a very significant addition. The Subcommittee had expended an extraordinary amount of effort trying to understand what personal and confidential meant, and indeed in one of our memos it was referred to as a mystery.

Another defense practitioner began with the observation that in the rule making process the first step was to identify a problem. Personal and confidential information about witnesses had not been identified as a problem. And the next step was determining whether a remedy could be provided by the rule by a rule change consistent with the Rules Enabling Act. She thought the Department's proposal failed on both of those counts. We held two hearings where practitioners were invited to address the Committee. As the prior speaker had highlighted, at the November meeting, it heard from Ms. Miller, who was the Deputy Assistant Attorney General at the time but had practiced in the Southern District of Florida, where there is no motion required to get a subpoena, and from Mr. Randle, who was chief of the Criminal Division in the Western District of North Carolina, which similarly did not currently require a motion to serve a subpoena. In response to Judge Nguyen, both said very clearly that they were not aware of any problem or any trend in this area. And, the member said, there was good reason for the lack of any problems or negative trends. State and federal legislatures have deliberated privacy issues and enacted privacy laws that were already doing the work necessary in this area. They had identified the means by which information can be disclosed. Often it includes the requirement of a court order. That meant the defense would be required, under those privacy laws—regardless of Rule 17—to go to the court, and those laws also stated who had to provide the notice and how. Those were carefully crafted laws across all States and within the federal code. Given the multitude of laws already in place, and in the absence of any articulable problem, the member suggested that adding prospective witnesses here arguably violates the Rules Enabling Act. It would certainly cause confusion and a lack of clarity, leading to disparity among districts, and undoing the primary goal of this work. Instead of fixing the narrow interpretation of *Nixon* in a few districts, it would drastically change the practice in many districts, resulting in extensive—and in the

member's view—unnecessary litigation on the meaning of many things, including what or who a prospective witness is, and when they become that. And every word used to describe privacy would be litigated.

The Committee had suggested that in addition to this incremental approach, another goal would be to limit the work of the courts on the front end. Adding a motion requirement for prospective witnesses, the member said, would not do that. Instead, it would increase the work of the district courts around the country, including districts where the Department had already acknowledged motions were not required now and there was no problem.

Finally, the member responded to the earlier observation that not all defense attorneys—and generally not all attorneys—always act ethically. The member noted that the Federal Defenders represented roughly seventy percent of criminal defendants in federal court, and the CJA panel represented at least an additional twenty percent. These lawyers had their livelihood before the court. They took their ethical obligations as seriously as their counterparts in the U.S. Attorneys' Offices. So, though she understood the concern and respected that there are instances where folks cross a line on both sides of the aisle, the member urged that rule drafting should not address those few instances of that type of conduct, but instead should promote uniformity as much as possible among our very different districts. In her view, the Department's proposed change would undermine all of the work that has been done on Rule 17(c). Under the Rules Enabling Act, the Criminal Rules should neither abridge nor enlarge substantive rights. Privacy laws are vast and varied, and they are honored. To add some additional layer within this rule, in her view seemed to contravene that requirement.

A judicial participant started by saying how helpful the New York meeting had been for him. It expanded his understanding of the problem, and he had come into that meeting with some doubts about whether we could come up with a proposal that he could envision becoming a rule. He characterized the current draft as a tremendous improvement. He agreed with the hope that the Committee would not lose sight of the fact that reform of this rule is badly needed, and this is a really good rule. He said he would express a concern but also his willingness to support the rule whether the Committee made the change he would suggest. He noted that the last thing he would want to do is promote unnecessary motion practice by lawyers. He did not want counsel to have to file motions unnecessarily, and he certainly did not want his judicial colleagues to have to spend time reviewing meaningless motions.

The Department's proposal dealt with the privacy interests of ordinary citizens that have been drawn into a criminal case because they happen to be witnesses. Those privacy interests, the member said, were important. He acknowledged that state and federal laws already provide privacy protections, but they vary a lot from state to state, and there were many legitimate privacy interests not captured by a state or federal privacy law. He was willing to devote his time to reviewing and deciding whether this is the kind of subpoena that should be served or not in this limited class of cases. He recognized there were some dangers, including the danger that the exception of requiring a motion would swallow the general rule. But this rule would give districts that wanted to take a different approach to do so, and even individual judges. He suspected that his district would adopt a local rule requiring a motion for these subpoenas. But he understood why many other districts might not want to do that. And to the Rules Enabling Act

point, the member was generally in favor of trying to find a national consensus approach where that was possible. But this was an area where he expected wide disagreement. Districts that had no experience with granting 17(c) subpoenas, where nobody even tried to get a subpoena, would view this rule as a very substantial change. On the other hand, there were many districts that were used to uninhibited practices and might see this as a constraint. This might be a situation, he thought, where for the time being absolute uniformity was not needed. The argument about the exception swallowing the rule did concern him. And the option allowing districts and judges to do things differently persuaded him that despite his concerns he would rather have this rule in whatever form it is than to have no successful reform. He wanted to express his concern but also acknowledge the other side. And he thought the rule was just an amazing improvement, and a much needed reform. Like a prior speaker, he wanted to see it enacted.

Another judicial member agreed that the proposal would make the rule so much better. She praised the structure, and said it made sense.

Judge Bates asked if this provision left room for variation among districts. It seemed to set a rule that could not be changed by court order or local rule.

Judge Dever responded, pointing to lines 37-38 on page 128 of the materials. The proposal set a general rule when a motion is not required, and then when it can be. He noted that the Subcommittee had discussed the ubiquity in many districts (including his own) of protective orders that get entered at the beginning of the case, the requirement that the lawyers meet and confer about topics if there's a disagreement about some issues—sort of case management of issues as you get closer to trial. He thought the rule was taking all of that into account, giving that discretion to the trial judge to manage that. A one count 18 U.S.C. § 922(g) case is different than a multidefendant human trafficking case. A court will be concerned with different interests in connection with the protective order.

Professor King drew the Committee's attention to the text on page 128, lines 36-38, which states: "A motion and order are not required unless subsection (c)(1)(3) or (4), a local rule or a court requires them."

Judge Bates said it does not say a local rule or court order could not require them. It seemed to him that (c)(3) said a motion is required. Professor King agreed: for a victim, a motion is required. And the Department's proposal would require a motion for a prospective witness as well. She agreed with Judge Bates that if the Committee added witnesses to (c)(3), courts would have no latitude to allow the parties to proceed without a motion. An earlier speaker clarified that he had been talking about latitude for local rules to *add* a requirement of motions for witnesses if it were not included in the rule. He had been explaining why, if he did not prevail in his view that witnesses should be added to (c)(3) he would be able to deal with that by a local rule adding such a requirement.

Judge Nguyen clarified that speaker's district might require a motion when it comes to personal and confidential information for prospective witnesses, but the presumptive rule would require that only for personal and confidential information as to victims. The speaker agreed: assuming that the Committee did not share his concern to the same degree, he understood that a

district could, by local rule, decide to require a motion for personal or confidential information about a witness. That had given him the comfort that if he could get his district to agree, they could do that by local rule. He could live with that while we gained experience with the implementation of the rule. Judge Nguyen confirmed that if the Committee decided not to include a requirement of a motion and notice for prospective witnesses, line 38 would permit the speaker's district to enact a local rule.

Professor King pointed out that the committee note addressed this situation. On lines 106-14, the note to this provision encouraged courts to use protective orders: "Other requirements stated in the rule or otherwise available to the court are adequate to control potential abuse of the subpoena by parties, and districts that have required under the prior language, the rule may continue to do that by local rule or court order." But the key was that judicial oversight before service was no longer required by the revised text of the rule, as it had been under the rule. Some judges read the current rule to require a motion for every subpoena. The Subcommittee draft said that was no longer required by the rule, but you can add a motion requirement in your court—or for this case—if you wanted to do so.

Judge Nguyen commented that expanding the motion and notice requirement to cover perspective witnesses as a presumptive rule would be contrary to the incremental approach, which the Subcommittee had been encouraged to implement.

A member made a similar point: not including that requirement allowed districts to preserve their practice. She said she would not be surprised if her district adopted such a local rule requiring a motion. But it allowed districts that did not now require motions to continue that practice in the absence of showing of any problem. She had previously noted that the Western District of North Carolina and the Southern District of Florida did not require motions according to speakers at the November meeting. At the same meeting Mr. Beirne said that in the District of Massachusetts you did not need a motion once a trial date was set. He said in the Varsity Blues case it was clear there was going to be a lot of discovery raising privacy issues, and there was an extremely well-crafted, restrictive protective order from the beginning of the case. When subpoena practice began closer to trial, they did not need a motion and were still covered by the protective order. So, she said, there were a multitude of different ways that districts were already addressing this issue. It was being dealt with.

Ms. Ralston responded to some of these points. First, on the scope of the Rules Enabling Act, the Department was proposing a motion requirement, which was clearly procedural. Second, there had been a suggestion that the Department was seeking to fix something that was not broken. In the Department's view, however, the *Nixon* standard was currently providing a safeguard, so perhaps nothing was "broken" yet. But once you relaxed the *Nixon* standard, then it might be "broken." She asked the Committee to consider the potential unintended consequences of broadening the substantive standard of what you can subpoena and the showing you have to make to do so. That expansion would allow the parties to seek a broader scope of information, which would raise significant and real concerns for people who are involuntarily in this process about very sensitive aspects of their life or information that could put them in danger. Whether the change the Department proposed was incremental would depend on the baseline. A number of courts have said you have to have a motion. Moving from always requiring a motion to rarely

requiring a motion would be a big change. And going from always requiring a motion to requiring a motion slightly more than rarely would be a more incremental change. So how incremental the change would be depended on your baseline. She did not think there had been a comprehensive survey of current practice. But she acknowledged that the proposed amendment did allow for local rules to be more protective, and she suspected that the Department might encourage courts to adopt those more protective local rules.

Professor Beale said that one of the things that gave the Subcommittee confidence and comfort that it would not be suddenly opening the door to new problems by relaxing the *Nixon* standard, was that those new problems did not seem to exist in the districts where subpoena practice had not been restricted. No one at the hearings had identified significant problems where courts had taken a narrow view of *Nixon*. So if you expanded something significantly, which would be happening in some districts, you might expect that they would have the same sort of experience in the districts that presently have more expansive subpoena practice. But the proposed amendment had the safeguard that individual districts that had a greater concern, or who felt that the nature of their caseload or something else demanded more protection, could adopt a local rule. That, she said, is where the Subcommittee came down: both having this ability of individual districts to adopt local rules and the experience in so many districts where this was working well. She observed that Ms. Miller had identified two problem cases. But in response to a follow-up question, Ms. Miller said they arose from Rule 16 discovery. They had nothing to do with subpoenas. As an earlier speaker said, sometimes lawyers don't do what they should, and these problem cases Ms. Miller identified were both clear violations of Rule 16 and protective orders. But there had been no showing that in districts with more permissive subpoena practice there has been a big problem without notice to the witnesses and so forth.

A member followed up, commenting on the people who testified at the November hearing. The Federal Defender in the Southern District of Florida said that he had access to the subpoena on his desktop. It was pretty permissive. But secondly and really importantly, he told us that in his district they had the second highest in volume for trials and indictments. That is the district in which Ms. Miller practiced, and they did not see problems. If there were no problems in the second highest volume district, where the defense attorneys could keep the subpoena form on their desktop, the member thought that was powerful evidence that this was not a problem. The purpose of the mini conference was to assemble people with a wide variety of experience.

A member asked Ms. Ralston what part of the proposed amendment causes the Department concern. She had acknowledged it was not a problem at present, but broadening or loosening the *Nixon* standard was going to lead to a problem. What aspect, specifically, did she think would lead to that problem?

Ms. Ralston responded that moving from evidence that is “admissible” to evidence that is “likely to be admissible” opened a broader category of things to be sought. That widened the potential for subpoenas seeking sensitive information about witnesses. She acknowledged that not every district currently restricted subpoenas narrowly to evidence that would be admissible and that there have not been broadly identified problems in those districts. But even where the local practice was broader than *Nixon*, *Nixon* was the law. There was always the backstop, the opportunity for the person or the government to move to quash a subpoena that was far too

broad. So even in places where it was the practice that you could go broader, everyone was operating against this backstop, and knew it was still there. Once you took away that backstop and changed the standard, what happens might not be the same as the experience in districts that currently have a broader subpoena practice. But she could not predict the future and say there would absolutely be a problem. Ms. Ralston agreed that protective orders go a long way, and that in many situations a motion is required by statute. So she could not say this was a huge category. Ms. Ralston added that as between the requirements of a motion and notice, the motion part was much more important to the Department than notice.

Judge Dever asked for a straw poll for the issue on pages 116-18, lines 48, 51, and 52: whether to add a motion and order requirement for personal confidential information about prospective witnesses as well as a discretionary notice requirement. He noted there was no change in the victim requirements. The proposed additions concerning prospective witnesses failed by a vote of 11 to 1.

Judge Dever said that it was helpful to have the straw polls before taking a vote on the complete draft, and he reminded everyone that if the amendment moved forward, it would be published and the Committee would get a great deal of additional input. He adjourned for a 30 minute lunch break.

Rule 43

After the lunch break, the Committee paused its discussion of Rule 17 to hear the Rule 43 Subcommittee report from Judge Birotte, who was speaking from England and dealing with a significant time difference. The Committee had received a communication from Judge Brett Ludwig asking it to consider amending Rule 43 to extend the courts' authority to use video conferencing beyond initial appearances, arraignments, etc. Judge Ludwig's view was that the courts had learned some important lessons from COVID, and the CARES Act gave the courts a lot of flexibility and some access that had not previously been available. There were several districts throughout the country that either did not have detention centers or were so large that people had to travel many hours to get to court. Video conferencing under the CARES Act was a good remedy for that.

This Committee had dealt with proposals to expand the use of videoconferencing in the past, and it declined to make any changes. But when we received this communication, we thought we should look at it again given the experience under the CARES Act. The reporters had prepared a memo for the Subcommittee identifying potential areas (listed on page 149 of the agenda book) where we might want to consider whether the rule needed to be amended: preliminary hearings, waiver of indictments, suppression hearings, ancillary things and forfeiture, etc.

This had been a difficult issue for him personally, Judge Birotte said, because in his district video conferencing helped, though it was not entirely necessary. His district did not have some of the challenges like those in Alaska, where people travel some 600 miles. He had also heard there were huge distances in other districts, and it took a great deal of effort to get people into court.

But at the end of the day, particularly in consultation with defense members, the Subcommittee concluded that no changes were warranted. Presently Rule 43 allows some flexibility with respect to video conferencing, and he suggested that some judges might need to be more educated about the flexibility that Rule 43 already allows. But the overall sentiment was that given the serious nature and the weight of the proceedings, no expansion of video conferencing was appropriate. Defendants need to understand and appreciate the seriousness of the hearing, and being in person was the preferred method. He invited comments from other members of the Subcommittee in case he had missed anything, but said that the Subcommittee's view was that Rule 43 did not need to be amended at this time.

A subcommittee member said they had gone through the very comprehensive list that the reporters had provided on various types of hearings, and he had thought of another that might qualify. But after very careful consideration, the Subcommittee did not see any room for expanding video participation.

After hearing no other member wished to comment, Judge Dever thanked Judge Birotte for chairing the Subcommittee and also thanked the reporters for their excellent work. He noted a reference in the materials to all the times that the Committee had considered the issue, in 2024, 2020, 2017, and the other dates referenced.

The Subcommittee's recommendation was not to amend Rule 43 or other related rules in the manner suggested by Judge Ludwig. Procedurally, that would mean removing it from the Committee's agenda. Judge Dever asked for a show of hands of those in favor of accepting the Subcommittee's unanimous recommendation to remove the suggestion from the agenda. There was unanimous approval, and Judge Dever said they would inform Judge Ludwig. He thanked Judge Birotte for staying with the Committee, despite Internet issues, and for his excellent work as chair of this Subcommittee. Judge Dever also said as a personal matter it had been a real pleasure working with Judge Birotte.

Judge Birotte responded saying Judge Dever's reputation loomed large and that as chair of Standing he expected Judge Dever would be sure the Criminal Rules Committee minded its Ps and Qs. Judge Birotte asked to be excused at that point.

Rule 17

The Committee then returned to its discussion of Rule 17. Judge Nguyen thanked all present for their patience, saying there were just a few additional issues to discuss which she thought would go more quickly.

On line 64 of the redline, as currently written, a self-represented party could get a subpoena only by way of motion, with the showings discussed earlier and a court order. And then the subpoena return had to be to the court. The question for discussion was whether to include the bracketed language: "unless the court orders otherwise," to give the court some flexibility in determining where the subpoena is going to be returned. For example, sometimes a self-represented party is a lawyer. So did the Committee want the District Court to have discretion to say since you are a lawyer, you can have the return to you directly instead of

returning it to the court, which might feel it was not necessary to review? She asked if there were any strong feelings on this issue about it one way or the other. Before any member commented, Professor Beale noted an error in the agenda book discussion of this issue on page 119. The second bullet against including this provision was included by mistake.

Judge Nguyen noted the other arguments on page 119 for including an unless clause in the text saying that the bracket language will preserve the judge's discretion to determine whether a motion was needed. She asked if the district judges want greater discretion in dealing with subpoenas for self-represented parties, to have greater control. The sense of the room was that the judicial members did favor more discretion.

A member commented that she understood there might be a change from referring to "unrepresented" rather than self-represented people, and she thought self-represented was the right phrase in the criminal context.

Professor Beale noted that Professor Struve had raised this issue because of the interest in uniformity across different sets of rules.

Professor Struve responded that on substantive grounds she supported the use of "self-represented," and she thought it would work perfectly well for the Criminal Rules to use that term. But it would not work as well to try to insert it into the other sets of rules—which is what she had been thinking of proposing—because they had about twenty other places where they already used the term "unrepresented," one of which would be hard to change. If the Criminal Rules would like to use "self-represented" and be a model for best practices, she would support that.

Professor Beale commented that only one Criminal Rule at present used "unrepresented"—Rule 49. This would be largely a consistency and style issue because "unrepresented" includes people who are representing themselves. Professor Struve said that she expected the community that discusses matters affecting self-represented litigants would comment adversely if the other sets of rules were published using the term "unrepresented," which is not the current parlance.

Judge Dever noted that often self-represented defendants have standby counsel. He had cases in which returns went to standby counsel and not to the court. The proposed amendment would give the judge the discretion to do that for self-represented defendants who had standby counsel.

Judge Nguyen clarified that the Committee preferred to retain the term "self-represented" (as opposed to unrepresented), and to delete the brackets because we want to allow discretion in cases involving self-represented defendants.

Ms. Ralston asked whether the amendment should (as it did in other places) add "unless a court order or local rule provides otherwise" to account for the self-represented defendant with standby counsel. Professor King asked if she were envisioning a local rule stating that "if a self-represented party is appointed standby counsel, then in this district..."? That had not been

considered in the Subcommittee. Professor Beale suggested that the Committee could defer consideration. It was a fairly minor issue that had not been discussed, and they had no information about how often rules would deal with the possibility of standby counsel and where returns should be sent. The Committee could come back to that issue after publication when considering possible changes. Alternatively, Professor King suggested, it could put “or local rule” in brackets between the court and orders. The brackets would trigger conversation on this point at Standing and upon publication. Ms. Ralston replied she did not have strong feelings about the issue, but she had wondered if the judges might think that would be more efficient.

A member said she was not sure it would matter in practice. As written, the amendment gave the court a lot more control over that self-represented individual—who might say “this rule says you could give me permission to have it.” She thought it was better to leave it addressing only what the self-represented person’s rights are. An attorney acting as standby counsel is an attorney before the court, and the judge could choose to do anything under Rule 17 that would apply to an attorney. That could become a bartering point: I’ll let your standby counsel have it. So the member suggested that the rule address only what the self-represented person’s rights were, or limitations on them.

Judge Nguyen stated that she understood that the Committee favored removing the bracket from the redline but leaving out local rules for now. Seeing no additional hands, she moved on to the last issue on which the Subcommittee was recommending discussion. She noted it would skip item F, and move to the issue on page 120: should the rule encourage courts to consider protective orders or in camera review for potentially sensitive material? This had been in the background, but the Subcommittee didn’t have a chance to focus on whether it should be addressed explicitly in the rule. As Judge Dever had noted earlier, protective orders are fairly routine. So, she asked, was there a problem that we needed to address by putting that into the rule? Professor King commented that this was indirectly referred to on line 110 of the committee note, which says other requirements in the rule or otherwise available to the court are adequate to control potential abuse of the subpoena process by the parties. Protective orders could be mentioned there. Or there could be a separate provision in the text, but the Subcommittee did not get to that. Professor Beale added that one reason it was not a higher priority on the Subcommittee was that courts generally have authority to use protective orders and use them in lots of different contexts. The question was whether there was a special reason to emphasize that here.

Judge Dever said part of what prompted the Subcommittee’s discussion was hearing a lot at the November meeting in New York about how often the protective orders are in place and these things get negotiated between lawyers. The first question in all rulemaking is whether there is a problem. And the Subcommittee really did not hear that was a problem. But the Subcommittee wanted to know whether the Committee thought that the rule should expressly deal with the topic.

A member said his own view from his practice and familiarity with other judges in the Ninth Circuit was that this was not a problem. He thought there was wide use of protective orders that were easily negotiated. He did not think the Committee needed to address it.

Ms. Ralston asked whether there needed to be some clarification that a protective order governing discovery would also apply to subpoena returns. She understood that at the November meeting there had been many comments that subpoenas are not discovery. She asked whether there was any lack of clarity about that, because she thought it would be obvious. But she was concerned about any ambiguity, because the Department viewed protective orders as very important. One district judge member commented that she did not think there was any ambiguity.

Noting that she was not hearing any problems, Judge Nguyen suggested that the text not be amended to include a measure that nobody was very concerned about. But an addition on line 110-11 of the committee note to identify protective orders as one of the common control tools district courts use would be an option.

Professor King said the note might read: “otherwise available to the court comma, including protective orders, comma are adequate to control.” The whole sentence, beginning on line 109 would read:

Other requirements stated in the rule or otherwise available to the court, including protective orders, are adequate to control potential abuse.

Judge Nguyen noted many heads nodding, and she concluded the Committee favored including that reference to protective orders.

Judge Nguyen asked for any additional comments or concerns.

Judge Bates said he had additional questions, some of which related to the structural points discussed earlier. In (c)(2)(B) the rule stated that a movant must show certain things. It must describe each designated items with reasonable particularity, and “state facts showing...” He asked would it always be “facts”? The Committee note said that was intended to eliminate the possibility of speculation. But as noted in the earlier discussion, sometimes the movant has a reasonable, good faith belief but may not be able to state clear unambiguous facts. He suggested that “state facts” was a little narrower than what the Committee might mean. Did it mean explain why each item satisfies (1)(B)(1) through (3), which would be a little broader than stating facts?

Judge Nguyen stated her view that the Subcommittee intended to say something along the lines of make a showing that satisfies (1)(B)(1) through (3), and that was another way to say it.

Judge Dever commented that in terms of practice with subpoenas in his district and what the member had described, the Subcommittee drafted the rule to say what the court receives. They do say “This is why I need the video: my client was gambling at the casino an hour before any five thousand dollars was seized from him, and the video will show he won the money and it was not drug proceeds. I need the casino video to show that that’s not drug proceeds.” Judge Dever said those are “facts,” instead of just saying the casino might have some information. A judge agreed the court needed facts.

Ms. Ralston said “facts” paralleled the rule under the Fourth Amendment for getting a warrant. Suspicion or speculation is not sufficient. You have to provide reasonably articulable facts. She urged that we not use less specific words in this context.

A member responded that was covered. The amendment required the movant to state a lot of things, one of which was a description of each item with reasonable particularity. The member thought that covered similar language you might find in warrants. The member did not see a big difference or have strong feelings about “state facts.” She thought “make a showing” here would be stating facts. But she thought “state fact showing” was a bit of an awkward way to read that clause of the rule, whereas “make a showing” was a more legalistic way of explaining what the party needs to do.

Judge Nguyen said she did not feel strongly about it because, like the prior speaker, she read “state facts” as make a showing. She did not think it was so restrictive that you could not make a good faith proffer based on belief that you get from your client, as in an earlier example.

A member asked what exactly is “make a showing”? The member thought stating facts was very specific. Judge Nguyen responded that she thought the Committee was inclined to leave the language (“state facts”) as is.

Judge Bates said he had two other points that had to do with local rules. The ex parte provision, line 42, said the court may for good cause permit the party to file the motion ex parte. He asked whether that was intended to mean a court cannot have a local rule inconsistent with that allowing such motions for good cause.

Professor King said she thought Judge Bates was asking whether the amendment prevented a district or an individual judge from having a local rule or standing order that said no ex parte motions in my court. She said that it did. The Subcommittee intended to stop the blanket practice of never allowing ex parte motions. She asked if Judge Bates thought it was ambiguous.

Judge Bates said he was raising the question to understand what that language was doing and he had the same type of question for (c)(6) on the redline version. It said a party must disclose to an opposing party an item the party receives from a subpoenaed recipient only if the item is discoverable under the rules. Did that preclude a conflicting court order or local rule?

Professor Beale replied that the proposed amendment was intended to prohibit what the Subcommittee thought were very unwise court orders and practices that were inconsistent with the fact that Rule 16 and the other discovery rules are the standard for when you have to turn things over. Part of that stemmed from the concerns expressed at our various mini conferences from attorneys in districts that had no subpoena practice. They said requiring disclosure to the other party in those courts essentially meant there was no subpoena practice because the lawyers did not know whether they would end up getting inculpatory—rather than exculpatory—information. They could not take that risk. One defense lawyer said she might have to withdraw if she made a motion and then the court required her to turn the subpoenaed material over because she would have done something so inconsistent with her client’s interests.

A member followed up on Judge Bates’ question about line 42 in subpart (c). The member said that if he were a judge or was in a district that hadn’t allowed ex parte subpoenas, he did not think the rule could be read to prohibit him or his district from maintaining a status quo of not allowing ex parte motions. If there were a recalcitrant district or judge that had not

permitted ex parte subpoenas, they would read the language and say that's not what we're going to do. The member did not think the rule would keep them from maintaining the status quo.

Another member asked if the problem would be solved if “may” were changed to “should” or “shall.” A third member noted he now understood the problem, and asked if changing from “may” to “must for good cause shown” would that address that concern.

The judge who had stated the view that the current language would not preclude a “recalcitrant” judge from continuing to prohibit ex parte filings thought that it would do so. Judge Bates noted he had been trying to raise the issue without stating a view about what it should be.

Judge Nguyen asked if anyone objected to changing “may” to “must.”

Ms. Ralston asked if there was a difference between a party's ex parte filing of a motion and the court's acceptance of it? Could the rule say a party may file the motion with the court, and the court must accept it? Was there a way to express the point that a party has the right to file the thing and the court could not as a blanket policy not consider it? She expressed some concern that changing “may” to “must” somewhat undermines the good cause requirement. It felt like it was giving more control to the party.

Judge Dever commented that the committee note beginning on lines 128, page 136 of the agenda book dealt with this topic. As the Committee did with the *Nixon* standard, he thought it would be easy enough to add a sentence stating that part of what animated the discussion over the last two and a half years was that some courts absolutely prohibited the filing of ex parte motions. If a party tried to file ex parte, the court would say that unless it was served on the other side the court would not consider it. The Subcommittee thought it was important for the parties to have the opportunity to file ex parte motions in some circumstances. Judge Nguyen had touched on one, where the defense lawyer thinks the subpoena will produce exculpatory material, but might also produce something that would be inculpatory. The lawyer would want to file ex parte. He suggested addressing Ms. Ralston's concern with a sentence to make it clear that the purpose of “must” was to make it clear if a party otherwise met the standard, the court must permit the party to file the motion ex parte. The court does not have to grant the motion, but the court cannot return the motion because no ex parte motions are permitted in this court in criminal cases.

Judge Nguyen thought it was a great suggestion to clarify that upon a showing of good cause, the court must allow ex parte application. That was the intent of the Subcommittee. She had not thought about the point Judge Bates had raised, and she noted one could make certain assumptions without realizing that language could be read differently. She asked if there were any objection to changing “may” to “must” and then clarifying that in the committee notes. Hearing no objection, she took that as an informal vote.

Professor Beale said the draft did not include a reference to filing under seal because the practitioners they had asked said they would always file ex parte motions under seal, and no

mention in the text was necessary. Judge Bates asked if it was not needed in the text, why include in the note? The reporters agreed to delete that from the note.

A member said he had previously raised concerns about other laws that would prohibit disclosure of certain information just by through a subpoena. The response at a prior meeting had been that the proposal was not intended to expand what a subpoena could otherwise do. But this was not stated in the text or the note. He recognized that a rule cannot go beyond what the law would otherwise permit. But he noted that examples offered earlier in the day referred to trying to get emails, and it was not clear to him that you could get an e-mail with a subpoena, given the Stored Communications Act. So he asked if the note should say that the rule was not trying to create a super subpoena. Perhaps there was no need to do so, because the law is the law.

Professor Beale responded that at the broadest level every rule could say unless otherwise permitted or otherwise prohibited. But the Committees tend not to do that because then there would be a negative implication if such a statement were omitted from other rules. That was a partial explanation. But she also noted that this had been the Subcommittee's focus much earlier, a long time ago, and had been so much a part of its thinking that it was not recognizing that an entirely new audience was coming into it.

Professor King noted this had not been a problem under the existing rule, and she asked whether there was something about the amendments that would suggest that it could become a problem? In other words, was there something in the amendments that suggest that this could be a greater issue?

Ms. Ralston said that the note on line 20 or 21, page 133, clarifying what can be sought, stated data included other information and recognized the parties subpoena electronically stored information, and other intangible items. That opened the question what kinds of electronically stored information. Emails are one of the most common kinds of electronically stored information. And there is another law that governs emails. She did not want to change anything in the rule, but she suggested that a sentence could be added at the end of that paragraph in the note stating some information may not be available by subpoena if otherwise governed by statute or something. It could be added to line 22.

The member who raised the issue responded to Professor King saying he thought prosecutors already knew or should know what you can get with a subpoena under the Stored Communications Act, and when you need a search warrant. That is part of all their investigatory practices. Magistrate judges were dealing with these issues all of the time, and defense attorneys would learn what you can and cannot get with a Supreme Court, if they did not know it already. So he wanted to have the Committee consider whether it was worth putting that marker right in the note.

Professor Beale commented that “data” and “information” were both already in Rule 17, so the proposed amendment would not authorize subpoenas for kinds of things that you could not already get. That led back to the question whether there was a reason for concern. And she thought the member might be suggesting it would be the change in some districts where defense

lawyers haven't really had a realistic opportunity to obtain subpoenas. They might be coming to this new.

A defense member commented that serving a subpoena for ESI is permissible, and it depends on who you are serving the subpoena on. If you're serving the ISP, the person who holds the data, that was governed by the Stored Communications Act. But everybody else has ESI that gets subpoenaed. She thought defense lawyers generally are not going to serve a subpoena on Google, because they could not get anything. And it was virtually impossible to get the tech industry to respond. In her view, it was such a narrow point that it did not merit inclusion in the note.

The member who raised the issue agreed that Google would not respond to a subpoena, and you could probably subpoena records including emails from someone's phone. But it was not as clear to him that you could subpoena emails from an employer if they fell into an RCS or ECS as defined or obscured communications. Were they providing public services in some way? He thought some employers did, and some did not. He said there was a gray zone, and magistrate judges were often trying to figure out whether a new source of electronic data fell within the Stored Communications Act or not.

Judge Nguyen said the Subcommittee did consider that issue and recognized that the rules can't disrupt statutory or other protections. But it did not drill down too much on the question whether we needed to clarify that issue in the committee note. It did hear from a lawyer representing big banks, big data holders. He said they are well aware of the protections, didn't want to run afoul of them, and would move to quash. And the Subcommittee heard from a professor who talked about the Stored Communications Act. So it was aware of that, had discussed it, but really did not think it was necessary to clarify that in the note. She also raised the question whether other notes clarified similar points. Or did everyone operate under the assumption that if there was a statute it could not be trumped by the rules.

Judge Dever said this was certainly not a super subpoena. As Professor Beale said, the general practice was not to add something like "you have to otherwise comply with the law" to the note. It is implicit that there must be compliance with other laws. But if during the public comment we learned that it was generating concerns of this nature, a clarification to the note could be added.

Professor Beale commented that something like that happened when the Committee amended Rule 41 to deal with electronic searches. A significant number of people thought that the amendment—which dealt with venue—was restricting the protections of the Fourth Amendment. So the Committee added a clarifying statement to the committee note, and she thought it had also revised the caption to try to signal more clearly its limited purpose. Similarly, if this amendment were misunderstood as overriding other laws, the Committee could then figure out the best way to clarify it.

Judge Nguyen asked if there were any more comments or concerns, and seeing none she thought that it would be appropriate to take a vote on the rule. It was helpful to have had the straw votes. She suggested a motion with the strikeouts and removal of brackets that had been

the subject of the straw votes. She asked Professor King to walk through and clarify the changes that had been agreed upon, to serve as a basis for a motion.

Professor King began on page 127 of the agenda book. She said the only change, from style, was moving “data” from the place we had added it in line 19. This put the tangible things together and the intangible things together. Professor King read the language: “... produce any item, including any books, papers, documents, data or other information.” She noted this was a style change. She noted that there might be other style changes later.

On the next page, Professor King noted a substantive change on the next page, lines 24-26, which dealt with which proceedings were covered, and detention. She noted a hard copy had been distributed, and she also shared it on the screen for those attending remotely.

There were several concerns raised about this. The intent here was to say that you can use a subpoena for at least these enumerated proceedings, and the court has discretion to allow in additional proceedings not enumerated. The concern was that “[u]nless the court permits otherwise” was somewhat ambiguous on that point. The proposed change was dividing this into two sentences. The first sentence declared that a non-grand-jury subpoena was available for trial and hearings on detention, suppression, sentencing and revocation. The second stated that a judge could, in an individual case permit a non-grand-jury subpoena for additional hearings.

The first change was separating it into two sentences, making it clear that the enumerated list is the baseline. The discretion allows expanding to additional proceedings on a case by case basis but not restricting subpoenas for the listed proceedings. The courts must permit subpoenas not just for trials but for sentencing, and the other listed proceedings. That policy decision had been made. Judge Nguyen stated this was an attempt to clear up the ambiguity that Judge Bates pointed out.

A member asked about the choice of available versus permissible. Professor King said she had added the permissible because she thought a concern had also been raised that the text suggested that a subpoena must be available every time you ask for it. She thought the word permissible suggested the need to get permission.

Professor Beale responded that “available” did not suggest that the movant did not have to meet the other requirements of the rule. She was not sure “permissible” did more work, but the reporters had been trying to come up with something that would respond to a member’s earlier comment. She suggested that unless they liked “permissible” much better, the Committee should stay with “available.” The member who had raised the earlier concern said he preferred “available” as well, especially with the other changes that made it clearer.

When no one spoke in favor of “permissible,” Professor King said she was deleting it. As to the division into two sentences, one member said she preferred it, and Judge Nguyen noted it cleared up the issue Judge Bates had raised. When no one objected, she said that would be approved as an addition to the draft.

Professor King turned to the bracket, noting it might not be an issue for the Committee. Her concern had been that Rule 12 of the 2254 Rules said, “The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to proceedings.” So one basic reason why Rule 17 subpoenas should not be used in 2254 hearings is because the parties could use the Civil Rules of Procedure to get subpoenas. The concern is that by adding the invitation to judges to authorize Rule 17(c) subpoenas in additional or other proceedings it would preempt or conflict with Rule 12 of the 2254 Rules. She did not think that was a necessary reading, but it was a possible one.

A member suggested that the proposed language in the committee note already did the work in a cleaner way because it was more of a narrative. The member thought the suggested bracketed language was a little confusing.

Judge Nguyen suggested striking the bracketed language from the rule itself unless there was objection. There was no objection. And there was no further objection to the new language from the handout, which substituted for lines 24-26 of the redline.

Professor King then turned to the next change on line 31. The straw poll had favored “are or contain information that is likely to be admissible evidence” in the designated proceeding. (She noted style had a preference for “admissible evidence” rather than evidence that would be admissible.)

The next change on page 128 was on line 42, the provision on ex parte motions in (2)(c). It would read “the court must for good cause....”

The next change was page 129, deleting “or prospective witnesses in brackets” from lines 48, 51, 53, 57, and 58, and deleting the sentence in brackets (“Unless otherwise prohibited by law, the court may require giving notice to a prospective witness.”)

Next, on page 129, line 64, the brackets around “unless the court orders otherwise” were deleted.

Professor King had no other changes to the text of the rule.

After consultation with the reporters regarding the form of the motion, Judge Nguyen asked if anyone would like to move to send the rule to the Standing Committee with a recommendation that it be published for comment. That motion was moved, seconded, and approved unanimously. There was spontaneous applause.

Judge Nguyen then asked Professor King to take the Committee through the changes in the committee note. The first, on page 133 of the agenda book, was based on a handout distributed at the meeting and displayed online. The first sentence clarified that non-grand-jury subpoenas are permitted to produce items for not only for trial but also for the proceedings where subpoenas are most likely to be needed, and presently used regularly in many districts or for which there is statutory or rule authority for parties to present evidence: detention hearings under the Bail Reform Act, sentencing hearings under Rule 32, pretrial suppression hearings, and revocations.

Professor Beale commented that the Committee had used the word “available” in the text, rather than “permissible,” and she suggested using “available” in the note as well. Professor King agreed. There were no other comments on the first sentence.

Professor King returned to the portion of the note that said no other mechanism was available to compel evidence from third parties at these proceedings, even though both parties may need to do so. Some decisions had interpreted the prior text of the rule to bar the use of Rule 17 subpoenas to produce items at any hearing other than grand jury proceedings and trial. This change to the text of the rule expressly authorized the use of a non-grand-jury subpoena to obtain evidence for introduction at the listed hearings. In the draft note, she said, the next sentence had been changed to accommodate the removal of the unless clause. And there was a change taking revocation hearings from those not listed. And, at the bottom was the change about the habeas cases that the Committee had already discussed. Professor King asked if there were any suggestions for changes in this portion of the note.

Judge Bates quoted the language “to produce items in other evidentiary hearings,” noting one of the examples was new trial hearings. He had a hard time imagining a new trial hearing. Professor King responded with the example of a new trial hearing for jury misconduct, or other things that happened at trial, where the judge was trying to find the facts of what occurred. Judge Bates asked if this would expand the record.

Judge Dever said Rob Cary from Williams and Connolly had given an example at the Phoenix meeting from the posttrial proceedings in the Elizabeth Holmes case, where after the trial, there had been was some kind of walk back by a person the defense contended was one of the key witnesses against her, and an effort to subpoena information and documents from this person. He thought the judge actually had a hearing on it. Judge Dever thought that the judge had quashed part of the subpoenas. It was a real-life example of trying to use subpoenas to get a large amount of information to support a theory for a new trial. And the judge pared it back, held a hearing, and then denied the new trial motion. That was one of those rare things that might generate a new trial hearing, along with juror misconduct.

Ms. Ralston commented that the defense might seek additional evidence to support a motion for a new trial on the basis of newly discovered evidence, for example, such as the discovery of evidence that might raise a claim of perjured testimony. In one case, there had been an allegation that there were multiple people with the same name and the government had presented a witness who may have been the wrong person, though the prosecutors were unaware. The defense sought evidence like various driver’s license records to identify pictures of the various people over time. She said this did not happen frequently, but it was allowed by Rule 33.

A judge commented that she could see many reasons why there would be evidence apart from the record in a motion for new trial. She had seen many of them.

Judge Bates noted that this was just committee note language, but he asked whether it was contemplating that a subpoena would be available just upon a motion for a new trial being filed? Or even before the motion was filed to try to find support for filing a motion? Or when a hearing had been set? The note said it was in connection with an evidentiary hearing.

Professor King responded that the amendment preserved that principle that Rule 17 was not for discovery. The first part of the rule said that the subpoena had to identify the designated proceeding. There must be a proceeding, a hearing, to get a subpoena. Judge Bates asked if that meant you could not get a subpoena until the court had set a hearing. Professor King responded that the Subcommittee had not gotten into the weeds of exactly what had to happen before there was a hearing to designate. Neither the text nor the note stated the court had to docket or schedule a hearing before the parties could use subpoenas. Judge Bates replied this was like Congress saying we'll leave it to the judiciary to figure this out.

Professor King said the Subcommittee was always focused on and thinking proceeding, proceeding, proceeding—not discovery.

Judge Nguyen said that there was a little room there for district judges to slightly vary their practice in terms of how strictly to enforce the identified proceeding. The Subcommittee had left that slight ambiguity there on purpose.

Professor King said the next change in the note was on agenda book page 134, line 75, which should read (c)(1)(B)(iii). Judge Bates had caught that error, and a few other points where the same cross reference error had occurred. Next on line 77, the note would be revised to quote the text which style had slightly revised.

On page 135 of the agenda book, line 110, between the words “court” and “are adequate,” “such as protective orders” was inserted with commas on either side.

There were brackets in lines 84-87, and Professor King said they would conform that section to the revised text that had been approved. But two things required decisions: brackets around the word “many” and in the first line “and very.” Should these be retained or omitted? The first bracket was in the sentence stating that impeachment evidence should be available to a party by subpoena for use at trial when a party knows that a witness will or is likely to testify. Or should that be “very likely to testify”? Judge Nguyen said “likely” was preferable. She was not sure how much “very” really added. The other bracket was in the statement that the “likely to be admissible standard” was already used by “many” courts or just by “some courts.” Professor Beale noted they had not done a count of the courts applying that standard, so it would be preferable to say “some,” since they knew that to be correct.

Professor King reviewed the decisions: one line 82, “very” was omitted, line 85, “many” became “some,” and on line 87 the brackets were omitted and the language would be conformed to the revised text.

Then on line 110 was the protective order addition previously mentioned, and on line 121 the corrected cross reference was Rule 17(c)(2)(B)(i).

On page 136 of the agenda book, line 123, it should be (2)(B)(ii), and on line 125 there was another section to conform to the revised text.

Next, on line 128, “may” became “must.”

A member noted line 125 also mentions relevant to and likely. But that was not part of the final language. The reporters replied that would be conformed to the text.

Line 128, “may” became “must.”

Line 129, “and under seal” was deleted.

Two typos were corrected. Line 134 should read “could lead to damage or loss.” And on line 145, it should be “to implement” rather than “to implementing.”

Judge Bates raised a question about line 141. Rule 17(c)(2)(D) actually referred to local rule or court order. Should we say absent a local rule or court order to do so? The reporters agreed the note should conform to the text. Professor King said she recalled that at some point in the past they had concluded that “order” would include both a local rule and a court order. Professor Beale thought that had been in connection with Rule 16. But both agreed it should be spelled out here, particularly since stating both in some parts of the rule would create a negative implication.

There was agreement to remove the highlighted language, which had been included just to draw the Committee’s attention for purposes of the discussion.

One line 146, the bracketed language had been deleted.

Ms. Ralston noted that line 143 refers to subparagraph (A), but the second part of that sentence was now in subparagraph (B). There was agreement to add it at the end of the sentence now in subparagraph (B).

A member returned to the discussion of line 141, where Judge Bates had noted that it was a reference to local rules. He expressed concern that it would not read well if “local rule” were added without rephrasing.

Professor King agreed and said it would be revised to read “unless required by a local rule or court order, a party has no duty to inform when no motion is required.”

Since there were no other changes in the proposed note, Judge Nguyen called for a motion to approve the committee note, as amended, for submission to the Standing Committee, with the recommendation that it be published for public comment.

The motion was made, seconded, and approved unanimously. There was a round of applause.

Professor Beale reminded the Committee that there might be additional style changes which would not require Committee approval, but the reporters would inform members if there were any changes suggested that they viewed as possibly substantive. Styles oversight is continuous and part of the Committee process.

Judge Dever thanked Judge Nguyen, the reporters, the members of the Subcommittee, and finally all Committee members for their work on a project that began when Judge Kethledge appointed Judge Nguyen to chair the subcommittee. The Committee began by trying to discern whether there really was a problem at the meeting in Phoenix two and a half years ago.

Professor Beale suggested that when the rule went out for publication the Committee might write to all the lawyers who had spoken at the Committee's meetings in Phoenix and New York, thanking them for their assistance and asking for their comments. She thought it would be desirable to express the Committee's appreciation to and get further input from people who had put a lot of work into coming to speak to the Committee, as well as those who spoke to the Subcommittee.

Judge Dever said the Committee would proceed very expeditiously through the remainder of the agenda.

Rule 49.1

Judge Harvey reported on the work of the Rule 49.1 Subcommittee. The Subcommittee was considering two primary issues: the use of pseudonyms when referring to minors in public criminal filings, and full redaction of Social Security numbers, rather than inclusion of the last four digits, which the rule presently permitted. The Subcommittee was in agreement that we should make both changes. It had hoped to have draft language to present at this meeting, but it was unable to do so for several reasons. First, the Subcommittee had been presented with language approved by the style consultants. Members were concerned that the proposed language seemed to suggest a larger or more significant change than required by the proposal. Judge Harvey expressed confidence that the reporters would work with style to address those concerns and develop language that the Subcommittee could bring to the November meeting. The other issue was whether to treat taxpayer identification numbers the same as Social Security numbers in any change. At present, Rule 49.1 treats taxpayer identification numbers the same as Social Security numbers. Taxpayer identification numbers are issued to people who are unable to obtain Social Security numbers, and there are millions of them. They are used in the same way as Social Security numbers, and they raise similar privacy interests. The Subcommittee wanted additional research to determine the harm or risks from the inclusion of the last four digits of these numbers in public filings. Judge Harvey thanked Mr. Brinker for his initial research on the effect of including the last four digits of Social Security numbers, and additional research on taxpayer identification numbers. This research would provide the foundation for the Subcommittee to decide whether or not we should be treating tax identification numbers similar to Social Security numbers, requiring that they be fully redacted from any public filing.

Judge Harvey said he hoped to have a final report and recommendation for the next meeting. Professor Beale said they would also work with the sister committees, who also had an interest in these proposals. The Bankruptcy Committee wanted to retain the last four digits of the Social Security number, but it might be possible to get parallel proposals moving forward from the other committees. They expected to address any concerns about uniformity before bringing a recommendation to the Committee.

Rule 40

Next, Judge Harvey provided a report on the Rule 40 Subcommittee, which was considering proposals from Judge Bolitho and the Magistrate Judges Advisory Group (MJAG). The proposals requested clarification of what procedures are required when a defendant is arrested on an out of state warrant alleging a violation of condition of release pretrial, presentence, or while on appeal, or for failure to appear in an issuing district.

The primary focus of the Subcommittee's first meeting had been whether the magistrate judge in the district of arrest may, should, or could hold a detention or release hearing. Such a hearing would give defendants an opportunity to seek their release on the warrant with the condition that they report to the issuing district. Based on the two suggestions and the research to date, it appeared to be the common practice to permit such a hearing to allow a defendant to seek his release in the jurisdiction of arrest. But a very small number of districts, perhaps only in the Seventh Circuit, did not provide an opportunity for defendants in Rule 40 proceedings to seek their release. That potentially was of concern because it could take the marshal's service up to thirty days to deliver the person to the issuing district where they would have their first opportunity to seek release on the warrant. That was the minority position, which appeared to be based on these courts' reading of Rule 40, especially in relationship to Rule 5. He thought there was an emerging consensus that this issue should be addressed and clarified under Rule 40.

Judge Harvey thanked Mr. Brinker for his great research on these proposals as well. He had provided a research memorandum on past versions of Rule 40, focused at least in part on the availability of a hearing in the arresting jurisdiction. Mr. Brinker had concluded that although the rule had never been explicit in that regard, the availability of a hearing was implicit because the rule had routinely referenced the magistrate judge in the district of arrest setting bail. How, Judge Harvey asked, would you set bail unless you have held a hearing?

The proposals also raised other issues, many of which, in Judge Harvey's view, were not particularly controversial and could be easily corrected by amending Rule 40 to mirror Rule 32.1, which addresses violations of supervised release and includes a nice list of what should occur in the arresting jurisdiction when there is a removal proceeding. Although these would hopefully be less controversial, the Subcommittee had not discussed all of them.

The Subcommittee had identified additional issues to be researched in considering those other issues, and he looked forward to reporting more progress on Rule 40 at the next meeting.

Judge Harvey added that another issue had come up. Dean Fairfax suggested getting input from magistrate judges around the country to help the Subcommittee understand what differences in practices that may exist. He thought that was an excellent suggestion, but the Subcommittee would wait to pursue it until its enquiry was more focused.

On the need for more input, Professor Beale commented that one difference between the discussion of this issue and many others that had come before the Committee was that so much of this was squarely and almost exclusively in the bailiwick of the magistrate judges. Naturally, Judge Harvey did not want to be the only one who really could provide that sort of input. The

Subcommittee discussed various ways to get more input, and one possibility would be to plug into meetings scheduled for other purposes, such as the regular semiannual meetings of magistrate judges. She said they would definitely seek to supplement the input and reactions that the Committee was getting so that it would not miss something where it could get more help. For example, the Committee might want input on particular language or a set of particular questions.

Electronic Filing by Self-Represented Litigants

Judge Dever thanked Judge Harvey for chairing the two subcommittees, and turned next to two reports from Professor Struve, one on the electronic filing and service by self-represented litigants, which begins at page 157, and an oral report on the attorney admission proposal.

Judge Burgess, chair of the Subcommittee on pro se filing, began the discussion of this issue, thanking Professor Struve for an outstanding memo about possible rule changes to allow self-represented litigants to utilize the electronic filing system. A major goal of the project was to update the rules to reflect the primacy of service by electronic means in a modern court system. The suggested updates focused on two goals: (1) expanding availability of electronic filing for self-represented litigants except for case opening documents, and (2) updating requirements of service of documents filed by self-represented litigants, eliminating the need for paper service of filings that court staff had already uploaded electronically. The updates also proposed expanding the availability of electronic modes by which self-represented individuals can file documents with the court system.

Judge Burgess noted that Dr. Reagan had just published a Federal Judicial Center report describing the results of a survey of all district courts, which found that nearly two thirds of districts permitted self-represented litigants to file electronically. Indeed, one district required it unless you opted out. A number of districts required the court's permission. So although the approaches varied, many districts, if not most, offered the opportunity for self-represented litigants to seek permission to file electronically.

Judge Burgess said that this issue was very different in the criminal context than in the bankruptcy, civil, and appellate contexts. Because most criminal litigants who were self-represented would be incarcerated, it was difficult (if not a complete bar in many places) for incarcerated self-represented individuals to file electronically. One way around that was to appoint standby counsel, which then allowed use of the electronic case filing system. Judge Burgess then turned the discussion over to Professor Struve.

Professor Struve thanked Judge Burgess for the Subcommittee's work on this, and she thanked Ms. Lonchena who had also been tremendously helpful. Professor Struve said the project was proceeding in tandem with the other advisory committees. She reported that the Bankruptcy Rules Committee had decided at its spring meeting that it wanted to be included in the project, though they would still have some bankruptcy specific concerns. It was forming a subcommittee that would work over the summer in the hopes of solving their concerns and being in the project.

Professor Struve said they were hoping to work over the summer to be able present to this Committee and its counterparts at the fall meetings with proposals along the lines Judge Burgess had suggested. She recognized, as Judge Burgess had mentioned, that the population of self-represented litigants who could be affected by this in the core criminal process was vanishingly small. But the proposal would also affect the Section 2255 proceedings. Even there, as Judge Burgess mentioned, self-represented litigants were not likely to be getting into the CM/ECF system from their institution unless there was some prison library program making that possible. But it still would be very valuable for those litigants to have the relief from having to make paper service and pay for that from their prison account. That is where this project would probably have most of its effect in the settings governed by the Committee's sets of rules.

She asked for feedback going forward and said she expected to be working with Judge Burgess's Subcommittee over the summer if time permitted.

Professor King commented that it might be helpful for the people who had not been involved in that discussion to be aware that the draft rule for the criminal cases switched the presumption. She invited them to compare pages 170 and 173 of the agenda book. It was this particular change that generated the most conversation. The rule currently says a party not represented by an attorney may use electronic filing only if allowed by court order or local rule. The proposed change would be that a self-represented person may use the court's electronic filing system unless the court order or local rule prohibited the person. She asked if anyone had feedback on that, noting that everyone seemed okay with the proposal on service.

A member identified two reasons for permitting participation: the dignity of being a participant in a court proceeding and the efficiency of being able to do so. His final thought was although there were only a small number of self-represented defendants who were not incarcerated and could use electronic filing, since we did not know what would happen in the future, we might want to flip the burden, to encourage this. And then hopefully, as things moved forward, incarcerated defendants would be more able to use electronic case filing system—whether by sending it to the clerk's office by fax or by a court portal that can accept filings.

Judge Dever thanked Professor Struve for her report and continued work on that project.

Formatting of Pleadings, Incorporation of Local Rules, and Creation of a New Set of Common Rules

Next, Judge Dever asked Professor Beale to discuss the suggestions beginning on page 192 of the agenda book from Sai. Professor Beale said Sai had made four separate proposals, which were described briefly in that memo. She said that now the Appellate, Civil, and Bankruptcy Committees had removed these items from their agenda. She said she would briefly describe each, but she noted that the deck was stacked against the proposals because the other committees had already looked at them and decided not to move forward.

The first proposal was to prohibit putting names in pleadings in capitals and require correct diacritics. Sai provided a very thoughtful discussion of how many problems all capitals

and improper use of diacritics might create. It might be culturally insensitive. It might cause mistakes and create confusion between individuals.

But the current Federal Rules of Criminal Procedure did not get into any of these details, though they do say that indictments must be written. Professor Beale said it would be really quite a remarkable change to get into specifying the use of diacritics and capitals. As to the concern about the impact on sovereign citizen slash organized pseudo legal commercial type litigants, she said that the reporters were aware of no special criminal-related concerns from them.

The second proposal would move similar provisions from each set of local rules that govern the subjects to a single set of national rules, so that litigants could look in one place.

The third proposal was aimed at topics addressed in the Civil Rules, the Criminal Rules, and the Bankruptcy Rules. It proposed they be moved to a single set of common federal rules.

Professor Beale commented that the second and third proposals would be enormous projects. Adopting that structure initially might have been a good idea. But at this point, the other committees had all concluded it would be too big a lift for not enough benefit.

Finally, there was a proposal to standardize page equivalents for words and lines, but it appeared to relate only to certain sets of rules that did not include the Criminal Rules.

The question was whether the Committee should, like its counterparts, remove these suggestions from our agenda, or whether there was some enthusiasm for one or more of these proposals.

Hearing no discussion, Judge Dever said he would entertain a motion to remove it from the agenda. The motion to remove the suggestions from the Committee's agenda was moved, seconded, and removal from the agenda was approved unanimously.

Rule 15

Judge Dever recognized Professor Beale to give a report on the suggestions from Michael Kelly and Sergio Acosta, as well as Larry Krantz, who proposed amending Rule 15 to provide the defense with pretrial depositions for discovery. She noted that these two independent proposals were based on the same idea: there ought to be much more availability of depositions in criminal cases. The Kelly and Acosta proposal described in some detail their own experience in a particular case. In that case, they had demonstrated the need for and the value of depositions, but it was only because of a quirk in the particular case that the court authorized them to take depositions. Mr. Krantz came in from a different angle, describing a fairly common hypothetical fraud case and comparing the process depending on whether it was a civil or criminal proceeding. In a civil case, depositions would be available, and the client would be able to develop the evidence to support a defense. But in a criminal case, there would be no depositions, and the defendant would not be able to develop the defense. He argued a person whose liberty is at issue should have at least the same ability to defend himself as if it were just his money.

Both proposals sought at least a limited expansion of the ability to take a pretrial depositions. Kelly and Acosta explicitly sought only defense depositions, arguing that the government has many other means to collect information, including grand jury subpoenas. In exceptional cases, the proposal would permit the court to allow more than five depositions.

Professor Beale noted that the particulars were less important than the general proposal to consider expanding pretrial depositions. She noted that in the case of Rule 17, what the Committee had just adopted was not very close to what the New York bar first brought to the Committee. The question for both proposals was whether the Committee thought there might be a problem, did the Committee think an amendment could address it, and third—from the reporters' point of view—did the Committee have the bandwidth to pursue this now. Should we appoint a subcommittee now? Or would it perhaps be best to continue work on our other large projects and maybe put this off to one side with the ability to come back to it? She asked if Judge Dever might want to speak to that sequencing/scheduling issue.

Judge Dever said that in the past the Committee had placed some proposals on a study agenda to gather information before it made a decision whether to form a subcommittee. Based on the current committee work, he recommended placing these proposals on the study agenda. He noted that a number of states, though less than a majority, permitted depositions, some as a matter of right, and some with court approval, and that Judge Barbadoro had experience with that in New Hampshire.

A member asked what the study agenda was, and noted she had been intrigued to learn that thirteen states already do this. Professor Beale responded that the study agenda put proposals on hold while gathering information but not actively pursuing them, not appointing a subcommittee with a chair, and not setting meetings and deadlines. It would be a slower process, gathering some information while moving ahead with the Committee's other current projects. She observed that you can only do so much at one time, so this project might move more slowly while other projects already on the agenda were being actively pursued. Judge Dever agreed and thought there was time to learn more about the state practice, and once the Committee had more bandwidth to decide where to go with these thoughtful proposals. He noted that the Committee did have the ability to do additional research, and its existing subcommittees had benefitted greatly from Mr. Brinker's research.

Judge Dever asked whether anyone was opposed to placing the Rule 15 suggestions on the study agenda. Hearing no objections, he announced they would be placed on the study agenda.

Federal Judicial Center Report

Next, Judge Dever recognized Dr. Beth Wiggins, Director of the Research Division of the Federal Judicial Center (FJC). She drew the Committee's attention to the memo in the agenda book prepared by Dr. Tim Reagan and others. Its purpose was just to provide flavor of the kind of work the FJC was doing for other rules committees or other judicial conference committees and groups based on the research front, but also some of the educational activities related to the Committee's work. The report that Judge Burgess had described was a recent example. To get

more information about the experiences in various courts of allowing self-represented litigants to e-file, the FJC was preparing a court-to-court program on that issue. As part of that project, Dr. Reagan did an analysis of the local rules addressing the same issues.

Dr. Wiggins invited the Committee to let the FJC know if it wanted it to develop information that could inform its discussions. The FJC does a variety of different kinds of research, ranging from an analysis of local rules to quantitative types of studies, including surveying work.

Attorney Admissions

The Committee turned next to Professor Struve, who began with a brief introduction to the attorney admissions project. It arose from a suggestion to the various advisory committees by Alan Morrison and others, pointing out that among the 94 district courts, there are variations in attorney admission standards. Some districts are quite restrictive in their requirements. The Standing Committee formed a subcommittee, and Professor Struve expressed gratitude for the input Criminal Rules members Ms. Recker and Judge Birotte had provided on that subcommittee. The Subcommittee's research was ongoing, exploring possible national rulemaking responses that could address the more restrictive practices, which in the more restrictive districts required that an attorney be admitted to the state that encompassed the district to which they were seeking admission. That included districts in California, Delaware, and Florida, where that required taking the state bar exam. The Subcommittee has been conducting research on various facets of this, including how Appellate Rule 46 works out in the courts of appeals. It would be conducting outreach to a number of selected district judges to learn more about how things play out under these different approaches. She would have more information at the fall meeting. Judge Dever thanked Professor Struve for her report and her work on that project.

Closing Comments and Recognition of Outgoing Members

Judge Dever noted the last item on the agenda, drawing the Committee's attention to the next meeting on November 6, 2025, at a place to be determined. He thanked the outgoing members, Dean Fairfax, Judge Nguyen, and Ms. Recker, and invited them to make any final remarks.

Dean Fairfax said membership on the Committee had been an honor and a privilege. He expressed gratitude to Chief Justice Roberts for his initial appointment and reappointment, and to Judge Dever and Judge Kethledge for their leadership. The Rules Committee staff have been phenomenal, and he thanked the reporters for their hard work and their example. He said his journey to the Committee began when he clerked for a federal District Judge and a Circuit Judge, and particularly when he was a "baby prosecutor" in the Public Integrity Section at the Justice Department. He spent a lot of time in the grand jury, got very familiar with Rules 6 and 7. In the Eastern District of Virginia with its rocket docket he gained familiarity with many of the other Rules of Criminal Procedure. After working as a line prosecutor, and a stint in private practice,

he became a law professor. For his first article, he did archival research on the promulgation of the original Federal Rules of Criminal Procedure and learned all about this committee process, which was modeled on the Federal Rules of Civil Procedure, which had been adopted just a few years earlier. In his scholarship and teaching he had fallen in love with the Federal Rules of Criminal Procedure and the process for promulgating, studying, and revising them. Serving on the Committee had been a dream come true for him. He said he would miss everyone, and he said they all had an open invitation to the Howard University School of Law. He would love to host a mini conference or even a symposium on the eightieth anniversary of the federal Rules of Criminal Procedure in 2026. Dean Fairfax reiterated how grateful he was for everyone's hard work day in and day out. He said that anyone who was disillusioned about whether there was serious, sober, committed work being done in the public interest need look no further than this Committee.

Judge Dever told a brief story to illustrate Dean Fairfax's dedication. He had participated in one meeting via telephone while attending his daughter's final collegiate track meet. He was in the bleachers, the ultimate multitasker.

Judge Nguyen, noting she felt that the Committee had already heard enough from her for one day, said how thoroughly she had enjoyed her service on the Committee. She thanked everyone, saying it had been quite an education. She added extra thanks to the reporters and Judge Dever for their leadership and the benefit of their wisdom.

Ms. Recker said this was her second farewell speech, and she promised it would be her last one. She expressed gratitude for the six years she spent as a rules romanette member where she had the great fortune and honor to work on Rules 6, 62, and Rule 16 expert discovery. She said Rule 62 was something she would never forget. She was grateful for Judge Dever's and Judge Nguyen's leadership. She also thanked the reporters and expressed appreciation that they always took the time to listen. She was especially grateful for her bonus year. She thought Rule 17(c) exemplified the best of the rules committee process. The Committee drew on lived experience and developed a proposal making incremental changes. Judging by the day's consensus approving the rule unanimously, she thought everyone had a lot to be thankful for and proud of. All of the work would lend credibility, which was more important now than ever before.

Judge Dever again recognized and thanked Judge Bates for his work as Chair of the Standing Committee and his life of public service, noting he had modeled what being a true citizen is. Judge Dever thanked everyone, noting it was the last Criminal Rules meeting he would attend as chair. He reminded the Committee that the work would continue, and he looked forward to being on calls with everyone serving on a subcommittee as work continued over the summer. He expressed his gratitude to all of the former chairs: Judges Raggi, Molloy, and Kethledge on Criminal Rules, and Judges Sutton, Campbell, and Bates on the Standing Committee. He thanked the reporters. He said it had been a privilege to work with everyone for the last ten years, and said like a piece of tape stuck to your shoe he would see everyone at the next meeting but in a different chair.

Professor Beale presented Judge Dever with a card that everyone had signed and said that later he would receive a certificate. She noted everybody around the table wanted some way individually to thank you, and she initiated an enthusiastic round of applause.

Judge Dever congratulated everyone on Rule 17, thanked Judge Nguyen, and adjourned the meeting.

Draft

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. Zipp

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

¹Ms. 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 Zipp, Judge Patricia Millett, and Mr. Kosta Stojilkovic.

Judge Bates acknowledged that it was his final meeting as the Chair of the Standing Committee² 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.

²A 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 Coquillet 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.

⁵For 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](https://uscourts.gov).

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.

Draft

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,

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

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 Act¹ 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

¹Please 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

²See *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,



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* * * * *

TAB 6

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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 amend Rule 29(a) relating to amicus filings during a court’s initial consideration of a case into renumbered Rule 29(a)-(e) and expand the disclosure obligations. Rule 29(f) (formerly Rule 29(b)) would relate to amicus filings during the rehearing stage. The length limit for amicus briefs at the initial stage as set forth in Rule 29(a)(5) would be amended to set a specific word limit of 6,500 words.	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.	
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	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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
	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.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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	<u>S. 2838</u> <i>Sponsor:</i> Schiff (D-CA) <i>Cosponsors:</i> <u>8 Democratic Cosponsors</u>	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	<u>H.R. 5258</u> <i>Sponsor:</i> Collins (R-GA) <i>Cosponsors:</i> 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	<u>H.R. 4678</u> <i>Sponsor:</i> Johnson (D-GA) <i>Cosponsors:</i> <u>20 Democratic cosponsors</u>	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	<u>H.R. 3596</u> <i>Sponsor:</i> 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	<u>S. 1814</u> <i>Sponsor:</i> Whitehouse (D-RI) <i>Cosponsors:</i> <u>26 Democratic and Independent cosponsors</u>	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	<u>H.R. 2675</u> <i>Sponsor:</i> 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 litigation 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	<u>S. 1133</u> <i>Sponsor:</i> Grassley (R-IA) <i>Cosponsors:</i> 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	<u>H.R. 1379</u> <i>Sponsor:</i> Fry (R-SC) <i>Cosponsors:</i> <u>15 bipartisan cosponsors</u>	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	<u>H.R. 1109</u> <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> <u>7 Republican cosponsors</u>	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	<u>H.R. 780</u> <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> Kiley (R-CA) Oberholte (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	<u>H.R. 100</u> <i>Sponsor:</i> 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 Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Reference to Minors by Pseudonyms and Redaction of Social-Security Numbers, Rule 49.1 ([24-CR-A](#) and [24-CR-C](#))

DATE: October 3, 2025

This memorandum presents a discussion draft of amendments to Rule 49.1. We provide a clean version, a redline version, and a draft Committee Note. The discussion draft requires:

- the substitution of pseudonyms (rather than initials) for the names of minors, and
- the omission or redaction of all digits of social-security and other taxpayer-identification numbers, including employer-identification numbers.

The Subcommittee seeks the full Advisory Committee’s input on the policy issues discussed below, as well as any concerns about the language in the discussion draft.

The current Appellate, Bankruptcy, Civil and Criminal Rules privacy rules are the product of a joint E-Government Committee, which was charged with codifying Judicial Conference privacy policy. To the extent possible, the rules are parallel and consistent. Accordingly, we have shared the discussion draft with the reporters for the other Advisory Committees with the request that they get input at their fall meetings.

The Subcommittee hopes to present a revised draft of the text and note at the spring meeting for the Committee to approve and forward to the Standing Committee for publication in August for public comment. We hope it will be possible for the other Advisory Committees to approve parallel proposed amendments at their spring meetings as well, so that a slate of parallel amendments can be forwarded to the Standing Committee for publication at the same time.

I. THE USE OF PSEUDONYMS TO REFER TO MINORS

As explained in the Department’s suggestion (24-CR-A), referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—may be insufficient to ensure the child’s privacy and safety. The Department’s prosecutors and victim-witness personnel have pointed out that child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and they assert that child-exploitation offenders sometimes track federal criminal filings and take other measures to uncover the identity of child victims and contact and harass the minors. The AAJ and NCVBA (24-CR-C) supported the Department’s proposal, but they added the suggestion that the Advisory Committees “consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence.” They state, “the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover.”

The Subcommittee unanimously supports the proposed revision requiring the use of pseudonyms, rather than initials, in public filings. This practice is already well established among federal prosecutors, and members reported that neither defense attorneys nor the courts have experienced any problems. Moreover, Subcommittee members agreed that minor victims are very fearful of being identified, and a change to address this issue would be important. Members also support adding language to the Advisory Committee notes indicating that gender neutral or other non-identifying terms should be considered where possible.

The proposed language reflects a productive collaboration with the style consultants, who sought to streamline the rule but address concerns about unintended consequences resulting from the changes. Some practitioners who had been asked for comments on earlier versions had interpreted the proposed language as requiring them to first include—and then redact—certain information. The discussion draft addresses this concern by the introductory clause “if any of the following types of information appear in the filing, include only ... (B) a pseudonym in place of the name of an individual known to be a minor.” The draft note also emphasizes that a filer has the option of omitting any reference to a minor’s name rather than replacing it with a pseudonym.

After the Subcommittee had approved the attached draft, the reporter for the Advisory Committee on Appellate Rules asked several questions about the meaning of the draft provision. Does the provision protect anyone who was a minor at the time of the underlying incident involved in the litigation? Does a person who is a minor at any time during the pendency of a case retain this privacy protection for the duration of the case? Or does the protection apply only while the person remains a minor, so that once a person turns 18, absent a motion and order, the rule would permit any subsequent filings to include the person's name? The Subcommittee will consider these issues as it moves forward, but it may be useful for the Committee to provide initial input at the fall meeting.

II. COMPLETE REDACTION OF SOCIAL SECURITY NUMBERS AND TAXPAYER-IDENTIFICATION NUMBERS

A. Background and Subcommittee Discussion

Senator Ron Wyden has expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules¹—permit filings to include “the last four digits of the social-security number and taxpayer-identification number.”

B. Social-Security Numbers

As noted at previous meetings, although there has been agreement that neither the prosecution nor the defense need the last four digits of social-security numbers in public filings, the Subcommittee wanted to understand whether there was any harm in including this information.

¹ There is no freestanding appellate privacy rule. Rather, Appellate Rule 25(a)(5) provides that in an appeal in a case in which privacy was governed by the bankruptcy, civil, and criminal privacy rules, those rules govern as well on appeal. Thus Criminal Rule 49.1(a) governs in criminal appeals.

Then-Rules Law Clerk Kyle Brinker provided an excellent research memorandum explaining how this information could be (and is) misused by identify thieves and fraudsters.² Moreover, full redaction is now considered a best practice by a variety of government agencies. The Subcommittee found this analysis very convincing, and it concluded the case had been made for complete redaction of social-security numbers in Rule 49.1.

The Subcommittee unanimously recommends that Rule 49.1 be amended to require the redaction of all digits of any social-security numbers that are included in public pleadings. Note, however, that the discussion draft highlights the filer's option to "omit or completely redact all social-security ...numbers."

C. Other Taxpayer-Identification Numbers

The Subcommittee also unanimously recommends that *all* taxpayer-identification numbers be treated like social-security numbers in public filings, i.e., the filer must either omit or completely redact them.

1. What are taxpayer-identification numbers?

The Internal Revenue Service (IRS) recognizes four principal types of taxpayer identification numbers: Social Security Numbers (SSN), Individual Taxpayer Identification Numbers (ITIN), Adoption Taxpayer Identification Numbers (ATIN), and Employer Identification Numbers (EIN). The IRS website also recognizes a Preparer Tax Identification Number (PTIN) as a type of taxpayer identification number.³

The most common form of taxpayer-identification number other than an SSN is the ITIN. The Internal Revenue Service requires any individuals who is not eligible to get a social security number to apply for an ITIN if they must furnish a taxpayer-identification number for U.S. tax purposes or to file a U.S. federal tax return.⁴ As of December 2023, the IRS had issued 26 million

² To avoid providing any sort of roadmap for misuse of this information, we did not include Mr. Brinker's memorandum in the agenda book.

³ Mr. Brinker's memo also discussed Preparer Tax Identification Numbers (PTINs), noting that these numbers were created to allow tax preparers to shield their own SSNs, and concluding that they do not raise the same privacy issues as ITINs, ATINs, and EINs.

⁴ The IRS website provides the following examples:

- A nonresident alien individual claiming reduced withholding under an applicable income tax treaty for which an ITIN is required (see Regulations section 1.1441-1(e)(4)(vii)(A)). Also see Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.
- A nonresident alien individual not eligible for an SSN who is required to file a U.S. federal tax return or who is filing a U.S. federal tax return to claim a refund or to report income.
- A nonresident alien individual not eligible for an SSN who elects to file a joint U.S. federal tax return with a spouse who is a U.S. citizen or resident alien. See Pub. 519, U.S. Tax Guide for Aliens.
- A U.S. resident alien (based on the number of days present in the United States, known as the "substantial presence" test) who files a U.S. federal tax return but who isn't eligible for an SSN. For information about the substantial presence test, see Pub. 519.
- A nonresident alien student, professor, or researcher who is required to file a U.S. federal tax return but who isn't eligible for an SSN, or who is claiming an exception to the tax return filing requirement. See Pub. 519.
- An alien spouse claimed as an exemption on a U.S. federal tax return who isn't eligible to get an SSN. See Pub. 501, Dependents, Standard Deduction, and Filing Information, and Pub. 519.

ITINs, and there were more than 5.8 million active ITINs.⁵ ITINs are now commonly used for a variety of non-tax purposes, including obtaining drivers' licenses and credit cards, opening bank accounts, and establishing a credit history.⁶

2. The history of the privacy rules and taxpayer-identification-numbers.

The history of the treatment of taxpayer-identification numbers in Rule 49.1 and the parallel Bankruptcy and Civil Rules indicates that the drafters of the rules intended to require redaction of ITINs, but not EINs, and did not consider ATINs.

Although the Department of Justice initially opposed applying the same privacy redaction rules to social security and taxpayer identification numbers, the E-Government Subcommittee concluded in 2004 “that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.”⁷ The E-Government Subcommittee also considered whether EINs should be included as identifiers to be redacted,⁸ and it “discussed whether an EIN raised the same privacy risks as social security or tax identification numbers.”⁹ An E-Government Subcommittee member stated that an EIN “did not present the same privacy concerns” because it “was solely used to file taxes.”¹⁰ The E-Government Subcommittee then agreed and decided not to include EINs in the list of redacted identifiers.¹¹ A “tax identification number” was changed to an “individual’s tax identification number” to clarify that corporate tax identification numbers are not subject to the redaction requirement.¹²

3. Does 49.1(a) currently encompass ITINs, ATINs, or EINs?

Although there is virtually no caselaw interpreting the phrase “an individual’s taxpayer-identification number,” the Subcommittee’s believes it includes ITINs and possibly ATINs. It does not currently include EINs, though they are now receiving privacy protection from the IRS and Tax Court.

...

- An alien individual eligible to be claimed as a dependent on a U.S. federal tax return but who isn’t eligible to get an SSN. Your spouse is never considered your dependent. For more information about whether an alien individual is eligible to be claimed as a dependent on a U.S. federal tax return, see Pubs. 501 and 519.

...

- A dependent/spouse of a nonresident alien U.S. visa holder who isn’t eligible for an SSN. See Pub. 519.”

⁵ Treasury Inspector General for Tax Administration, Administration of the Individual Taxpayer Identification Number Program, December 2023, p. 1, available at <https://www.tigta.gov/sites/default/files/reports/2024-11/2024400012fr.pdf> (last visited Oct. 8, 2025).

⁶ *Id.* at 1-2.

⁷ Admin. Off. of the United States Cts., *Revised Privacy Template* (June 16, 2004), https://www.uscourts.gov/sites/default/files/fr_import/CR2004-10.pdf (page 105 of the Criminal Advisory Committee’s October 2004 meeting agenda book).

⁸ E-Government Subcomm., *Minutes of the Meeting of June 16, 2004*, at 8, https://www.uscourts.gov/sites/default/files/fr_import/CR2004-10.pdf (page 119 of the Criminal Advisory Committee’s October 2004 meeting agenda book).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Revised Privacy Template* (March 16, 2005), https://www.uscourts.gov/sites/default/files/fr_import/CR2005-04.pdf (page 129 of the Criminal Advisory Committee’s April 2005 meeting agenda book).

We have found only one case in which the privacy rules were applied to an ITIN; it assumed that Criminal Rule 49.1(a) covers ITINs.¹³ As noted above, the E-Government Subcommittee in 2014 clearly intended the privacy rules to encompass individual taxpayer identification numbers. Moreover, bankruptcy forms support the view that the parallel privacy rules always intended “individual’s ... taxpayer-identification number” to include ITINs. For example, the Bankruptcy Official Form 21 was amended in 2007 to instruct debtors to state whether the debtor had an “Individual Taxpayer Identification (ITIN) Number(s),” and if so, to provide it.¹⁴ The Committee Note stated that the amendment instructing debtors to provide their ITINs was made “[i]n light of the new [Bankruptcy] Rule 9037 which limits public disclosure to all but the last four digits of any individual taxpayer-identification number[.]”¹⁵ Several Director’s Forms were also changed to require ITIN information “in order to comply with ... [Bankruptcy] Rule 9037.”¹⁶ Current bankruptcy case policy likewise instructs debtors to redact ITINs in order to comply with Bankruptcy Rule 9037. The bankruptcy case policy provides that, “according to the criteria provided in Fed. R. Bankr. P. 9037,” only the last four digits of an ITIN should appear if an individual has an ITIN instead of a social security number.¹⁷

Our research identified no cases considering the application of the phrase “an individual’s taxpayer-identification number” to ATINs and EINs. But without discussing the privacy rules, several courts have included a sole proprietorship’s full EIN in a publicly-available orders, even when the EIN was not necessary.¹⁸ On the other hand, the IRS and the U. S. Tax Court restrict publication or disclosure of EINs. The IRS will not disclose an EIN unless the EIN holder gives its consent, the party requesting the EIN has a material interest in its disclosure, or disclosure by the IRS is otherwise required.¹⁹ The IRS also provides for truncated EINs on statements and other documents.²⁰ Similarly, the U.S. Tax Court requires full redaction of EINs in filings.²¹

4. What are the risks of disclosure of the last four digits of ITINs, ATNs, and EINs?

a. ITINs

The disclosure of *full* ITINs presents privacy risks similar to those arising from the disclosure of SSNs and may provide an opportunity for misuse by persons with fraudulent or malicious purposes. Whether the same risks would follow the inclusion of only the last four digits

¹³ *United States v. Valdez-Morales*, No. 3:15-CR-56, 2016 WL 919029, at *4 (E.D. Tenn. Mar. 4, 2016).

¹⁴ *Official Form 21, Statement of Social Security Number or Individual Taxpayer Identification Number (ITIN)* (December 2008), https://www.uscourts.gov/sites/default/files/fr_import/ST2006-06.pdf (page 794 of the Standing Committee’s June 2006 meeting agenda book).

¹⁵ Admin. Off. of the United States Cts., *Official Form 21 - Cumulative Committee Note* (last visited Oct. 8, 2025), https://www.uscourts.gov/sites/default/files/b_021_cn_cum.pdf.

¹⁶ Jeff Morris, Reporter, *Report by Forms Subcommittee: Amendments to Director’s Procedural Forms* (January 26, 2007), https://www.uscourts.gov/sites/default/files/fr_import/BK2007-03.pdf (page 258 of the Bankruptcy Advisory Committee’s March 2007 meeting agenda book).

¹⁷ *Guide to Judiciary Policy*, Vol. 4, Ch. 8 § 830.50(b) (Required Redaction of Debtor Tax Information).

¹⁸ See, e.g., *Stevenson v. Harford Mut. Ins. Co.*, No. CV 23-1656, 2024 WL 5145893, at *2 (W.D. Pa. Dec. 17, 2024).

¹⁹ See 26 U.S.C. § 6103; *Highland Cap. Mgmt., LP v. Internal Revenue Serv.*, 408 F. Supp. 3d 789, 806 (N.D. Tex. 2019).

²⁰ 26 C.F.R. § 301.6109-4(a)-(b).

²¹ Tax Court Rule 27(a)(1).

of ITINs in public filings is not clear.²² Moreover, it appears that ITINs rarely appear in public case files.

b. ATINs

Although there are privacy interests implicated by ATINs, the public disclosure of the last four digits of an ATIN appears to pose less risk than the disclosure of SSNs and ITINs. ATINs are temporary numbers assigned to a child during adoption to permit the parents to claim tax benefits (such as dependency exemptions and childcare credits), and they are generally soon replaced by an SSN. It is unclear whether they are used for non-tax purposes, and little information is available about them.

c. EINs

Disclosure of a sole proprietorship's EIN would raise some privacy concerns, though perhaps less than the risks of disclosing the last digits of ITINs or ATINs. Unlike other taxpayer identification numbers, and contrary to the E-Government Subcommittee's view that an EIN is "solely used to file taxes,"²³ an EIN can be obtained without a federal tax purpose.²⁴ Like social-security numbers and ITINs, EINs are used for many business needs, including opening a bank account and receiving credit,²⁵ raising a risk of fraudulent use.

The disclosure of EINs is required in some circumstances. Some filers—tax-exempt organizations and public companies—must disclose their EINs in public filings.²⁶ EINs must be provided to employees, and vendors often demand an EIN before conducting transactions.²⁷ But some EIN holders are not affected by these requirements, and, importantly, the IRS treats EINs as confidential information. As noted above, it will not disclose an EIN unless the EIN holder gives its consent, the party requesting the EIN has a material interest in its disclosure, or disclosure by the IRS is otherwise required,²⁸ and it truncates EINs on statements and other documents.²⁹ Similarly, the U.S. Tax Court requires full redaction of EINs in filings.³⁰

²² Mr. Brinker provided a second research memorandum on taxpayer-identification numbers. As with Mr. Brinker's memorandum on social-security numbers, we have not included this memorandum in the agenda book to avoid providing information that could be used for nefarious purposes.

²³ See E-Government Subcomm., *supra* note 8, at 8 (page 119 of the Criminal Advisory Committee's October 2004 meeting).

²⁴ See Internal Revenue Serv., *Employer Identification Number*, <https://www.irs.gov/businesses/employer-identification-number#needs> (last visited Oct. 8, 2025).

²⁵ See *id.*

²⁶ See Internal Revenue Serv., *Public Disclosure and Availability of Exempt Organization Returns and Applications: Public Disclosure Overview*, <https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organization-returns-and-applications-public-disclosure-overview> (last visited Oct. 8, 2025); Secs. and Exch. Comm'n, Off. of Investor Educ. and Advoc., *Investor Bulletin: How To Read a 10-K* (September 2011), <https://www.sec.gov/files/reada10k.pdf>.

²⁷ See Internal Revenue Serv., *About Form W-2, Wage and Tax Statement*, <https://www.irs.gov/forms-pubs/about-form-w-2> (last visited Oct. 8, 2025); Wolters Kluwer, *Do You Need an EIN or FEIN for Your Business?* (June 29, 2023), <https://www.wolterskluwer.com/en/expert-insights/business-ein-your-federal-tax-id-number>.

²⁸ See 26 U.S.C. § 6103; *Highland Cap. Mgmt., LP v. Internal Revenue Serv.*, 408 F. Supp. 3d 789, 806 (N.D. Tex. 2019).

²⁹ 26 C.F.R. § 301.6109-4(a)-(b).

³⁰ Tax Court Rule 27(a)(1).

5. The Subcommittee's views.

As a policy matter, the Subcommittee agreed unanimously that Rule 49.1(a) should afford ITINs, ATINs, and EINs the same protection as social-security numbers, requiring full redaction in public pleadings if any of these taxpayer-identification numbers are included.

Inclusion not needed. Members agreed there was no reason for a party or court to include any part of any taxpayer-identification number in a public filing in a criminal case. Indeed, several members reported that they had never seen ITINs or ATINs in public pleadings, and they could not envision a need for their inclusion. Ms. Ralston commented that she had seen instances where ITINs have been used in public filings, but she did not see why they could not be redacted and filed under seal if need be. No one could identify any need for ATINs or EINs in public pleadings either.

Inclusion poses risks. ITINs pose privacy risks very similar to social security numbers. It is less clear how valuable the last four digits of an ATIN or EIN would be for identity thieves and fraudsters, but the risk of abuse is not zero. Although the E-Government Subcommittee that drafted the privacy rules made a conscious determination not to include EINs, the Subcommittee concluded that as a policy matter EINs should now receive the same protection as social security numbers and ITINs, just as they do now under the Tax Court rules. Contrary to the E-Government Subcommittee's assumptions, EINs do implicate individual privacy, especially when used by individuals and families who employ domestic workers and by sole proprietorships. Moreover, there have been numerous changes since the E-Government Subcommittee completed its work and the privacy rules were adopted. These include:

- the common use of EINs for non-tax purposes such as opening a bank account or applying for a business license, contrary to the assumptions of the E-Government Subcommittee,
- significant changes in technology, such as machine learning, which may make misuse of EINs more problematic,
- the increasing sophistication of fraudulent schemes, and
- changes in the treatment of EINs by other agencies like the Social Security Administration and Tax Court.

In sum, the Subcommittee favors amending Rule 49.1 to limit the potential that parties and others might be adversely affected by public filings in the federal courts. The rules should not assist fraud by allowing the inclusion of full or partial EINs, even if some EINs may be publicly available elsewhere. There is no reason to have a rule that may contribute to fraud, of whatever kind, personal or business. The Criminal Rules, the Subcommittee concluded, should follow the Tax Court's requirement of full redaction of EINs, since there is no necessity for including any part of any taxpayer identification number in public filings in criminal cases.

The Subcommittee recognized, however, that there might be other considerations affecting the parallel privacy rules for civil cases, bankruptcy cases, and appeals. In particular, bankruptcy practice may require more information. Indeed, Bankruptcy Form 101 requires the disclosure of the full EIN. Recognizing that uniformity in the privacy rules is an important goal, the

Subcommittee has shared its views with the reporters for the other Advisory Committees, so that these policy issues can be discussed at the fall meetings.

6. Attachments and exhibits.

The discussion draft requires redaction or omission of “an electronic or paper filing [, including any exhibit or attachment].” The Subcommittee favored including this phrase because the Federal Judicial Center’s research showed that the majority of improperly included social-security numbers appear in attachments or exhibits, not in the main filing. The inclusion in the text would serve as a reminder that counsel must review all exhibits and attachments to ensure compliance with the privacy rule.

The Subcommittee recognized the concern that the explicit inclusion of this phrase might create a negative implication for other rules. That appears not to be a major consideration for the Criminal Rules. Although the word “filing” appears 50 times in the Criminal Rules, all Criminal Rules other than Rule 49.1 use this word as a verb, not as a noun.³¹ When referring to the action of filing, there seems to be little or no chance of confusion arising from this clarification in Rule 49.1.

The brackets were included to generate discussion not only in our Committee but also among the other reporters and then our sister committees.

³¹ We read the word “filing” in Rule 56 as a verb, although it could be interpreted as a noun. It reads, “A district court is considered always open for any filing and for issuing returning process, making a motion, or entering an order.”

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE**

1 **Rule 49.1. Privacy Protection for Filings Made with the**
2 **Court**

3 **(a) Redacted Filings.** Unless the court orders otherwise, a
4 party or nonparty making an electronic or paper filing
5 with the court[, including any exhibit or attachment,]
6 must:

7 (1) omit or completely redact all social-security or
8 other taxpayer-identification numbers, including
9 employer-identification numbers; and

10 (2) if any of the following types of information
11 appear in the filing, include only:

12 (A) the year of an individual's birth;

13 (B) a pseudonym in place of the name of an
14 individual known to be a minor;

15 (C) the last four digits of an individual's
16 financial-account number; and

17 (D) the city and state of an individual's home
18 address.

19

* * * * *

20

Committee Note

21

22 In contrast to the current rule, which allows public filings
23 to contain the last four digits of social-security and taxpayer-
24 identification numbers, the amendment requires the omission or
25 redaction of all digits of social-security and taxpayer-
26 identification numbers in public filings. Recent federal policy
27 guidance recommends avoiding the unnecessary display of any
28 part of these numbers on forms, reports, and computers. The
29 Committee concluded that even partial numbers are useful to
30 identity thieves, and that the omission of these numbers from
31 public filings will impose no hardship on either litigants or the
32 courts. In cases in which this information is pertinent, Rule 49.1(f)
allows a party to file an unredacted copy of a filing under seal.

33

Taxpayer-identification numbers (TINs) are identification
34 numbers used in the administration of tax laws. In addition to
35 Social Security numbers, TINs include individual taxpayer-
36 identification numbers (ITINs), taxpayer-identification numbers
37 for pending U.S. Adoptions (ATINs), and employer-identification
38 numbers (EINs).

39

The amendment's protection for "taxpayer-identification
40 numbers" includes employer-identification numbers as well as
41 individual taxpayer-identification numbers and adoption-
42 identification numbers. Although employer-identification
43 numbers for some corporations may be publicly available, smaller
44 businesses and individuals who employ others have a privacy
45 interest in these numbers, and there is also a potential for their
46 misuse.

47

To enhance the protection of minors' privacy and safety,
48 the amendment also requires the substitution of a pseudonym,
49 rather than initials, in place of a minor's name in public filings.
50 When it is feasible to do so, the use of gender-neutral pseudonyms
51 is preferable. The use of gendered pseudonyms or pronouns,

52 combined with other information contained in public pleadings,
53 may make it easier to uncover the identity of a minor.

54 The requirement for omission or redaction applies to
55 exhibits or attachments. Parties and nonparties who include
56 exhibits or attachments in public filings are required to review
57 them to ensure that they do not contain information protected by
58 the rule.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 49.1. Privacy Protection For Filings Made with**
2 **the Court**

- 3 **(a) Redacted Filings.** Unless the court orders otherwise,
4 ~~in an electronic or paper filing with the court that~~
5 ~~contains an individual's social security number,~~
6 ~~taxpayer identification number, or birth date, the~~
7 ~~name of an individual known to be a minor, a~~
8 ~~financial account number, or the home address of an~~
9 ~~individual, a party or nonparty making the filing may~~
10 ~~include only;~~ an electronic or paper filing with the
11 court [, including any exhibit or attachment,] must:
12 (1) ~~the last four digits of the~~ omit or completely
13 redact all social-security ~~number and~~ or other
14 taxpayer-identification ~~number~~s, including
15 employer-identification numbers; and

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

16 (2) if any of the following types of information
17 appear in the filing, include only:

18 (A) the year of the individual's birth;

19 ~~(3)~~ (B) ~~the minor's initials~~ a pseudonym in
20 place of the name of an individual
21 known to be a minor;

22 ~~(4)~~ (C) the last four digits of ~~the~~
23 an individual's financial-account
24 number; and

25 ~~(5)~~ (D) the city and state of ~~the~~ an
26 individual's home address.

27 (b) **Exemptions from the Redaction Requirement.**

28 The redaction requirement does not apply to the
29 following:

30 (1) a financial-account number or real property
31 address that identifies the property allegedly
32 subject to forfeiture in a forfeiture
33 proceeding;

- 34 (2) the record of an administrative or agency
35 proceeding;
- 36 (3) the official record of a state-court proceeding;
- 37 (4) the record of a court or tribunal, if that record
38 was not subject to the redaction requirement
39 when originally filed;
- 40 (5) a filing covered by Rule 49.1(d);
- 41 (6) a pro se filing in an action brought under 28
42 U.S.C. §§ 2241, 2254, or 2255;
- 43 (7) a court filing that is related to a criminal
44 matter or investigation and that is prepared
45 before the filing of a criminal charge or is not
46 filed as part of any docketed criminal case;
- 47 (8) an arrest or search warrant; and
- 48 (9) a charging document and an affidavit filed in
49 support of any charging document.
- 50 (c) **Immigration Cases.** A filing in an action brought
51 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.

(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.

- 70 **(g) Option for Filing a Reference List.** A filing that
71 contains redacted information may be filed together
72 with a reference list that identifies each item of
73 redacted information and specifies an appropriate
74 identifier that uniquely corresponds to each item
75 listed. The list must be filed under seal and may be
76 amended as of right. Any reference in the case to a
77 listed identifier will be construed to refer to the
78 corresponding item of information.
- 79 **(h) Waiver of Protection of Identifiers.** A person
80 waives the protection of Rule 49.1(a) as to the
81 person's own information by filing it without
82 redaction and not under seal.

TAB 9

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 40—Procedure for Revoking or Modifying Pretrial Release
([23-CR-H](#) and [24-CR-D](#))

DATE: October 10, 2025

I. Introduction

This memo summarizes the Subcommittee’s work since the spring meeting. The Magistrate Judge’s Advisory Group (MJAG) and Judge Zachary Bolitho have recommended clarification of Rule 40, which currently provides:

Rule 40. Arrest for Failing to Appear in Another District or Violating Conditions of Release Set in Another District

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141–3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

(b) Proceedings. The judge must proceed under Rule 5(c)(3) as applicable.

(c) Release or Detention Order. The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.

(d) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

Judge Bolitho suggested that Rule 40 be amended to address two issues:

- Whether a defendant who has been arrested on a petition to revoke pre-trial *or presentencing* release from another district have the right to a detention hearing in the district of arrest; and
- If so, what is the standard that applies in the detention hearing?

MJAG’s more comprehensive proposal identifies seven points of confusion that arise when defendants are arrested for failing to appear in, or for violating conditions of pretrial or presentence release set in, another district. It recommends the Committee draft a new Rule 5.2 “Revoking or Modifying Pretrial Release” that would address each of the seven issues for pretrial release.

- Which parts of Rule 5(c)(3) apply?
- Why does the rule exclude “adjacent district” as an option?
- Why does the rule not address informing the defendant of the alleged violation?
- Why does the rule not address informing the defendant about the right to consult counsel, and how does the previous appointment of counsel in the issuing district affect the right?
- What detention standard applies?
- Under what circumstances would a judge in the arresting district modify a detention order?
- Does a magistrate judge in the issuing district have the authority to modify a detention order by a magistrate judge in the arresting district?

II. The Subcommittee’s Work

The Subcommittee has reached tentative decisions, described below, on most of the principal policy issues that concern arrests for violations of conditions of release pending trial, sentencing, or appeal. Members have agreed unanimously that Rule 40 should be amended to clearly recognize the right to a provisional detention hearing in the arresting district, and that at least some of the additional procedures identified by the MJAG should be considered for potential inclusion in a revised Rule 40.

It has not yet focused on specific language to incorporate those decisions. For example, it has not addressed how to refer to the district that issued the warrant — the “issuing” district, the “charging” district, or the district “with jurisdiction.” For now, in this memo, that district is termed the “issuing district,” and the district in which the person is arrested is termed the “arresting district.”

The Subcommittee also has not yet considered what changes, if any, to recommend to the language in Rule 40(a)(2) that addresses arrests for “failing to appear as required by the terms of that person’s release under 18 U.S.C. §§ 3141–3156 or by a subpoena.” The Subcommittee initially recommended that such arrests should be addressed in a revised Rule 40, but more research will be needed to understand the appropriate procedures to be included in a revised rule.

A. Whether to address Rule 5 as well as Rule 40.

One of the concerns about Rule 40 was that its cross reference to Rule 5 does not make it clear which parts of Rule 5 apply, or how they apply. The Subcommittee decided it should eliminate the cross reference to Rule 5 and instead focus exclusively on Rule 40 for now. Despite some concerns about whether Rule 5 could itself be more precise, practitioners said they had no difficulty with Rule 5, nor have the proposals for revising Rule 40 submitted to the Committee

called for changes to Rule 5. If a preliminary draft of a revised Rule 40 creates confusion about Rule 5 or a need for clarification, the Subcommittee will revisit the question.

B. Right to a hearing in the arresting district on detention or release pending a revocation hearing in the issuing district.

The Subcommittee concluded that a detained person has a right to such a hearing before transfer. This decision agrees with the weight of existing authority, which holds that 18 U.S.C. § 3148(b)¹ does not bar the magistrate judge in the arresting district from releasing the defendant on conditions and allowing the defendant to report in the jurisdiction that issued the warrant. This authority also rejects an interpretation of the cross reference to Rule 5(c)(3) in Rule 40 as requiring continued detention for transfer of any defendant arrested on a warrant for violating a condition of release once the government produces the warrant and proves the arrestee is the person named in the warrant.

The Subcommittee also agreed that the decision at this hearing must be limited to the determination of release or detention pending the person's appearance for further proceedings in the issuing district, typically a revocation hearing on the alleged violation. Members also agreed that the language now in Rule 40(c) may not be sufficiently clear on this point. This memo refers to the limited decision to release on conditions or detain the person pending further proceedings in the issuing district as a "provisional detention hearing" in the arresting district. The Subcommittee has yet to discuss how to phrase this in any draft amendment.

C. Rule 40 should cite the statutory standard to apply in the provisional detention hearing.

The Subcommittee favored a statutory citation without more detail about the burden of proof or showing required. It agreed that:

- the standard in 18 U.S.C. § 3142 applies when the defendant is alleged to have violated a condition of release pending trial in the underlying case,
- the standard in 18 U.S.C. § 3143(a) applies when the defendant's alleged violation occurred while released pending sentencing, and
- the standard in 18 U.S.C. § 3143(b) applies to violations pending appeal.

These three scenarios are also addressed in Rule 46, where only the statutes — without the subsection — are included. Some members suggested that a revised Rule 40 should follow Rule 46 in not specifying which subsections of § 3142 apply.

D. Counsel.

The Subcommittee agreed that a defendant arrested for failing to comply with conditions of release pending trial, sentencing, or appeal, should be informed of the right to consult with

¹ 18 U.S.C. § 3148(b) states that "[a] judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person *shall be brought before a judicial officer in the district in which such person's arrest was ordered for a proceeding in accordance with this section.*" (emphasis added).

counsel if the defendant is already represented, as well as the right to appointment of counsel if the defendant is not already represented. Most defendants arrested for violating a condition of their release will already be represented by trial counsel appointed in the issuing district, so that advice about the opportunity to consult with that counsel would be sufficient. As a practical matter, it is common for the public defender in the arresting district to contact existing counsel in the issuing district prior to the hearing to avoid delay. After such consultation, many defendants consent to having the public defender in the arresting district provide representation at the hearing as “stand in” or “courtesy” counsel. But if the defendant does not do so, it may be necessary to delay the hearing to allow consultation directly between the defendant and existing counsel. Members also suggested the rule or the comment should acknowledge the practice of permitting the Rule 40 hearing to go forward with “stand in” or “courtesy” counsel in the jurisdiction of arrest.

Additionally, because a defendant arrested for violating release may not have counsel, advice about the right to appointment of counsel is also needed. Rule 44(a) allows for the appointment of counsel in a Rule 40 proceeding, which is a “stage of the proceeding from initial appearance through appeal.” Also, advice about the right to counsel in the context of an arrest for violating a condition of supervised release is required in Rule 32.1(a)(3)(B).

E. Proof of warrant and determination of identity.

The rule should include provisions like those in Rule 5(c)(3)(D)(i) and (ii) that require the government to produce proof of the warrant and require the judge to find that the defendant is the same person named in the warrant. Concerns about incarcerating the wrong person and existence of a warrant are present regardless of whether the warrant is executed before or after charge, or before or after conviction. Accordingly, the Subcommittee agreed that Rule 5(c)(3)(D)’s provisions on proof of identity and warrant — which currently apply under Rule 40 — should be spelled out in any revised Rule 40.

F. Notice of violation.

The Subcommittee tentatively agreed that at the provisional detention hearing, a person arrested for violating a condition of release must be informed of the alleged violation prompting the arrest. Members noted that the pretrial services office in the arresting district would ordinarily have access to this information. The Subcommittee will address later whether the rule should require written (not just oral) notice of the violation, and whether the rule should mandate that the defendant receive just “a copy of the warrant” as Rule 5(c)(3)(D)(i) requires, or copies of the “warrant [and] warrant application” as required by Rule 32.1(a)(5)(B)(i).

G. Participation of the defendant by videoconferencing.

The Subcommittee agreed that the defendant should be able to consent to appear by videoconferencing at the provisional detention hearing. Rule 5 allows a video option, and members saw no reason to bar the same at a provisional detention hearing under Rule 40. Rule 40(d) now allows an appearance by video and may not require any change, at least in the context of an arrest for an alleged violation of release. The present language in both Rule 5 and Rule 40 has been interpreted to allow the defendant to appear by video.

The Subcommittee also agreed that the rule should not permit the judge that issued the warrant to appear by video for proceedings in the arresting district, as it would reflect a sea change in current practice and would involve logistical hurdles that would be difficult to overcome. It therefore rejected the suggestion of MJAG that the rule should “enable[e] the *issuing district* to virtually conduct the revocation proceeding with the defendant’s consent.”

H. Transfer of papers/bail.

The Subcommittee agreed that the language in Rule 5(c)(3)(E) requiring the transfer of papers and “any bail” should apply in the Rule 40 context, at least for arrests on violations of pretrial release. The Subcommittee considered the potential ambiguities raised by using the word “bail,” which may be an outdated term, but ultimately concluded that it was best not to change the wording from Rule 5, and that the “any” helped resolve any ambiguity.

I. Advice about release

The Subcommittee agreed that Rule 40 need not include the language in Rule 5(d) that states that the judge must advise the person of “the circumstances, if any, under which the defendant may secure pretrial release.” Expressly notifying a defendant of the right to release was unnecessary, members concluded, because that notice happens organically as the Rule 40 provisional detention hearing is held — a hearing which typically occurs immediately on the defendant’s appearance in the arresting district. Additionally, some members questioned the necessity of the language even in Rule 5, noting that the defendant in a Rule 5 initial appearance is not typically advised specifically about the various Bail Reform Act factors that might be considered by the court in making the release/detention determination.

J. Self-incrimination.

Rule 5(d) requires a warning at the initial appearance that the defendant has a “right not to make a statement, and that any statement may be used against the defendant,” but Rule 40 does not. A defendant arrested for violating conditional release will have already received such a warning under Rule 5 at the first appearance on the underlying charge. Defendants continue to have the privilege against compelled self-incrimination at stages of the case following Rule 5, however, and their statements continue to be admissible against them. That said, members noted the defendant in a Rule 40 hearing often will be in an unfamiliar jurisdiction without existing counsel, and that a self-incrimination warning will help the defendant understand the nature and consequences of the provisional detention hearing.

The Subcommittee tentatively decided to include a self-incrimination warning in an amendment to Rule 40, despite one member’s concern that the inclusion of a self-incrimination warning in Rule 40 could inadvertently carry a negative implication for other hearings where it is not expressly included, such as Rule 32.1.

K. Modifications of the order releasing or detaining the defendant entered by the magistrate judge in the arresting district.

The MJAG proposal points out that there is some controversy regarding whether the magistrate judge in the district that issued the arrest warrant may modify the order regarding release or detention entered by the magistrate judge in the arresting district. Subcommittee discussion noted there was confusion about who should adjudicate appeals or requests for modification of these orders under Rules 5 and 32.1 as well. One member suggested that it would be odd to address these issues in an amended Rule 40, but not in Rules 5 or 32.1, where they occur with much higher frequency. Acknowledging that this may require attention later, the Subcommittee agreed that these issues should not be addressed in amended Rule 40.

L. Rule 20.

Rule 5(c)(3)(A) requires the judge to inform the defendant of the possibility under Rule 20 of transferring the case from the charging district to the arresting jurisdiction for purposes of plea and sentencing. Its purpose is to relieve the defendant of “whatever hardship may be involved in removal to the place where the prosecution is pending.” But by the time of the Rule 40 proceeding for a violation during pretrial release, the defendant has already appeared in the charging district before being released, so advising them about Rule 20 would be unnecessary. Moreover, Rule 20 would seem to have no application whatsoever with respect to a defendant who has violated while on release pending sentencing or appeal. The Subcommittee agreed that advice about Rule 20 does not need to be included in amended Rule 40.

M. Preliminary hearing.

MJAG suggested the need for clarification of whether Rule 40 requires a preliminary hearing. Although defendants have the right to a preliminary hearing under Rule 32.1, which is somewhat analogous, the reporters’ research identified many cases holding there is no such right arising from a warrant in the Rule 40 context. Rule 32.1 recognizes such a right because of Supreme Court case law holding there is a right to a preliminary hearing before revocation in the context of probation and parole violations. There is no such case law with respect to violations of conditions of release pending trial, sentencing, or appeal. After reviewing lower court authority rejecting any right to a preliminary hearing in this context, the Subcommittee agreed not to include a right to a preliminary hearing in amended Rule 40.

N. Consular notification.

Rule 5(d)(1)(F) provides for consular notification. Consular notification occurs at the initial appearance, and the Subcommittee concluded there was no need to repeat this information in subsequent Rule 40 proceeding when a defendant has been arrested in another district for a violation of the conditions of release. Accordingly, it agreed not to include consular notification in amended Rule 40.

However, the Subcommittee recognized that there might be a need for consular notification during a Rule 40 hearing arising from a material witness warrant or a warrant for contempt arising

from a subpoena. Discussion of that issue was deferred to a later meeting.

TAB 10

MEMORANDUM

DATE: October 10, 2025

TO: Advisory Committee on Criminal 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 activity¹ 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:

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¹ Also known as a notice of electronic filing.

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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 Criminal 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 the recent 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 Criminal Rules, and I pass lightly over (or omit) issues that pertain only to another set of rules.

Part II.A seeks the Criminal 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.

A. E-filing: Whether to delete item (ii) from proposed Criminal Rule 49(b)(2)(B)

As reflected in the enclosed draft, the e-filing portion of the sketch includes the following components:

(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.

(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.

(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).

During the summer 2025 discussions, a participant suggested deleting item (ii) from proposed Rule 49(b)(2)(B). This participant suggested omitting item (ii) entirely, and adding this wording to item (iii): “, but must not bar access by all self-represented parties without [reasonable] exception.” The argument is that the text of the rule need not refer to alternative modes of electronic access, that reference to such alternative modes is potentially confusing, and that the rule text should be simplified and should focus on barring a blanket prohibition on the use of the court's electronic filing system.

My understanding is that the Criminal Rules Committee's subcommittee discussed and decided not to adopt the proposal to delete item (ii). For what it is worth, my own view is that retaining item (ii) serves an important function: There are a number of courts that have not adopted CM/ECF access for self-represented litigants but that have adopted alternative electronic filing (e.g. upload via a portal, or email submission) and noticing programs. For those courts (and others who might emulate them) I think it is important for the rule to offer both alternatives – reasonable CM/ECF access OR an alternative mode of electronic access – as ways for a court to comply with the rule. That's why item (ii) is its own separate provision, and I think it provides an important avenue for broadening access (and for helping courts to accept the new rule) that would be lost if we were to delete item (ii).

B. 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.”²

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 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

² 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”).

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.]”

C. 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.³ 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.⁴

D. 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.⁵ I sought the working group’s comments on whether these

3 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.

4 See proposed Civil Rule 5(b)(2)(A), proposed Criminal Rule 49(a)(3)(A), and proposed Appellate Rule 25(c)(1)(A).

5 The example was the designation of material for the appendix pursuant to Appellate Rule 30(b)(1).

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 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. Members of the Criminal Rules Committee's subcommittee suggested that input from district clerks would be helpful on this point.⁶

E. 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

⁶ Query, however, whether the district clerks would have much visibility into issues relating to service of papers that are not filed; by definition, wouldn't such interactions happen mostly outside the purview of the clerk's office?

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.

F. “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 Network⁷ 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,” “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

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/>.

8 “Litigant in person” is intriguing, but probably would be too unfamiliar in the United States.

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 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”:

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 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.”)

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

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

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 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.

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 Rules¹⁴ and the Civil Rules,¹⁵ using the term “self-represented” would require conforming amendments to 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.”

In the meantime, the enclosed sketches use “unrepresented” in the Civil and Appellate Rules drafts and “self-represented” in the Criminal Rule draft.

G. Self-represented “person” versus self-represented “party”

In updating the drafts to take account of the spring 2025 discussions, I focused for the

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 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.

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.” Meanwhile, Ed Hartnett helpfully flagged that we should consider how this change would affect would-be intervenors. At first glance, I was tempted to surmise that the topic of intervention is generally not relevant to the Criminal Rules, given that there’s no procedural mechanism for a non-party to seek to “intervene” in a federal criminal prosecution. On the other hand, crime victims can assert certain rights under the Crime Victims’ Rights Act (18 U.S.C. § 3771), including the right to be heard in proceedings; third parties claiming an interest in property subject to forfeiture can assert rights under Criminal Rule 32.2(c); and media organizations sometimes move to intervene for the limited purpose of challenging protective orders, or sealing or gag orders.

I will leave aside the media organizations’ intervention requests because I assume that the media organizations in question typically will be artificial entities represented by lawyers.¹⁷ So it remains to consider people asserting rights under the CVRA or under Rule 32.2(c). As to the latter situation, it seems that a third person asserting rights under Rule 32.2(c) would count as a

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.

17 As to intervention in civil cases, I surmise that the rulemakers 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, so my own take is that the switch to “party” is the best course despite the question of intervenors, but I have flagged this question for the relevant Advisory Committees’ consideration.

“party” to the ancillary proceeding (see, e.g., Criminal Rule 32.2(c)(1)(B), stating that “the court may permit the parties to conduct discovery”).

However, my (untutored) understanding is that a person asserting rights under the CVRA is not viewed as a “party” to the case.¹⁸ So I am flagging the issue here: If the rulemakers 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 asserting rights under the CVRA would still be able to e-file only if affirmatively authorized by the court through local rule or order or local practice. If the Committee wishes the new e-filing access principles to encompass people asserting rights under the CVRA, it could explore wording that would embrace that group as well – such as referring to self-represented parties plus “self-represented persons asserting rights under 18 U.S.C. § 3771.”¹⁹ A question for the Committee is whether self-represented persons make filings under the CVRA with sufficient frequency to warrant this addition to the Rule. (My surmise is that such instances would be a relatively rare exception to the general practice, and would occur mostly in instances where a victim felt that the U.S. Attorney’s office was not adequately presenting that victim’s point of view.)

18 See, e.g., Office of the General Counsel, United States Sentencing Commission, Primer on Crime Victims’ Rights 19 (2023) (“Although the rights accorded under the CVRA are substantial, the statute does not grant victims any formal party status.”), available at https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Crime_Victims.pdf.

19 The portion of the draft that would be affected by this would be proposed Criminal Rule 49(b)(2)(B)(i) – (iii):

(B) By a Self-Represented Party or Victim – When Allowed.

- (i) In General. A self-represented person asserting rights under 18 U.S.C. § 3771 or a self-represented party or 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 or person from doing so.
- (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 persons asserting rights under 18 U.S.C. § 3771 or 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 by self-represented persons asserting rights under 18 U.S.C. § 3771 or self-represented parties.

H. 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.

I. Exclusion of prison-mailbox rules from scope of project

Some participants had noted that it would be useful to consider updating the prison-mailbox rules to address timeliness of documents filed pursuant to an electronic filing program within the institution. This project does not currently encompass such a proposal, but given that this project is extending into another rulemaking cycle, in summer 2025 I asked the working-group participants 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).

All feedback received on this point favored excluding an update of the prison-mailbox rules from the scope of the current project. A participant noted that the issues for filers in institutions are distinct, and that it might be better to wait to address those issues until after we see how the current round of proposed amendments works out.

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.”²⁰ 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.”²¹ The Criminal Rule is similar, but substitutes “unintentional” for “nonwillful.”²²

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 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

20 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”

21 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.”

22 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.”

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).²³ 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 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

²³ 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.”

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 1995.²⁴ 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;²⁵ it explains:

24 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.

25 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 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.”).

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 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)).²⁶ 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.²⁷

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 appeal because of an error in the form of the notice of appeal”).²⁸

26 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.

27 *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.”).

28 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

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,²⁹ 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-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

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).

²⁹ 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.

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)³⁰ – did not require the clerk to accept a self-represented litigant’s document presented on a USB drive.³¹ 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).³² 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)).³³

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.

30 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.

31 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.

32 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).

33 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.

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.³⁴ The Seventh Circuit applied the same principle to an electronically-filed complaint that was automatically rejected by the e-filing system because the filer input the docket number of a prior, closed case.³⁵

34 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).

35 *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”).

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.³⁶ 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.³⁷ (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.³⁸) By contrast, where counsel tried (timely) to e-file the notice of appeal, and electronically paid the filing fee, but “the clerk (or the clerk’s computer system) failed to register

36 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.”).

37 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).

38 See, e.g., Civil Rule 6(a)(3)(A) (“Unless the court orders otherwise, if the clerk’s office is 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.”).

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.³⁹

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 office⁴⁰ 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.

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

39 See *Royall v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 548 F.3d 137, 142-43 (D.C. Cir. 2008).

40 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”).

rule imposing a requirement of form” is “enforced.”⁴¹ 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.⁴² 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?⁴³ 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 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

41 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.”).

42 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.”).

43 See, e.g., proposed Appellate Rule 25(a)(2)(C)(1).

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,⁴⁴ and (2) if so, what policy choices should guide those revisions.

44 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....

I.	Civil Rules: Amendments to Civil Rule 5 (plus a conforming amendment)	1
A.	Civil Rule 5	1
B.	Civil Rule 6	10
II.	Criminal Rules: Amendments to Criminal Rule 49 (plus a conforming amendment)	10
A.	Criminal Rule 49	11
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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:

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2 **(a) Service: When Required.**

3 **(1) In General.** Unless these rules provide otherwise, each of the following papers must

4 be served on every party:

5 (A) an order stating that service is required;

6 (B) a pleading filed after the original complaint, unless the court orders otherwise
7 under Rule 5(c) because there are numerous defendants;

8 (C) a discovery paper required to be served on a party, unless the court orders
9 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 events 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.

54 **(1) Required Filings; Certificate of Service.**

55 **(A) Papers ~~after~~ After the Complaint.** Any paper after the complaint that is
56 required to be served must be filed no later than a reasonable time after
57 service. But disclosures under Rule 26(a)(1) or (2) and the following
58 discovery requests and responses must not be filed until they are used in
59 the proceeding or the court orders filing: depositions, interrogatories,
60 requests for documents or tangible things or to permit entry onto land, and
61 requests for admission.

62 **(B) Certificate of Service.** No certificate of service is required when a paper is
63 served [through the court’s electronic-filing system]¹ under Rule
64 ~~5(b)(2) by filing it with the court’s electronic-filing system.~~ When a paper
65 that is required to be served is served by other means:
66 (i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or
67 within a reasonable time after service; and
68 (ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed,
69 unless filing is required by court order or by local rule.

70 **(2) ~~Nonelectronic Filing.~~** ~~A paper not filed electronically is filed by delivering it:~~

71 ~~(A) to the clerk; or~~

72 ~~(B) to a judge who agrees to accept it for filing, and who must then note the filing~~

73 ~~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.

74 **(3) Electronic Filing and Signing.**

75 **(A) By a Represented Person Represented by Counsel—Generally Required;**

76 **Exceptions.** A person represented by an attorney must file electronically,
77 unless nonelectronic filing is allowed by the court for good cause or is
78 allowed or required by local rule.

79 **(B) By an Unrepresented Person Party—When Allowed or Required.**

80 (i) **In General.** A ~~person~~ party not represented by an attorney: ~~(i) may file~~
81 ~~electronically only if allowed by~~ use the court’s electronic-filing
82 system to file papers and receive notice of activity in the case,
83 unless a court order or by local rule prohibits the party from doing
84 so; and (ii) An unrepresented person may be required to file
85 electronically only by ~~court order~~ in a case, or by a local rule that
86 includes reasonable exceptions.

87 (ii) **Local Provisions Prohibiting Access.** If a local rule – or any other
88 local court provision that extends beyond a particular litigant or
89 case – prohibits unrepresented parties from using the court’s
90 electronic-filing system, the provision must include reasonable
91 exceptions or must permit the use of another electronic method for
92 filing papers and for receiving electronic notice of activity in the
93 case.

94 (iii) **Conditions and Restrictions on Access.** A court may set reasonable
95 conditions and restrictions on unrepresented parties’ access to the

96 court's electronic-filing system.

97 **(iv) Restrictions on a Particular Person.** A court may deny a particular

98 person access to the court's electronic-filing system and may

99 revoke a person's previously granted access for not complying

100 with the conditions authorized in (iii).

101 **(C) Signing.** A filing made through a person's electronic-filing account and
102 authorized by that person, together with that person's name on a signature
103 block, constitutes the person's signature.

104 **(D) Same as a Written Paper.** A paper filed electronically is a written paper for
105 purposes of these rules.

106 **(3) Nonelectronic Filing.** A paper not filed electronically is filed by delivering it:

107 (A) to the clerk; or

108 (B) to a judge who agrees to accept it for filing, and who must then note the filing
109 date on the paper and promptly send it to the clerk.

110 **(4) Acceptance by the Clerk.** The clerk must not refuse to file a paper solely because it
111 is not in the form prescribed by these rules or by a local rule or practice.

112 **Committee Note**

113
114 Rule 5 is amended to address two topics concerning unrepresented parties. (Concurrent
115 amendments are made to [add cites to Bankruptcy Rules],² Criminal Rule 49, and Appellate
116 Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint)
117 filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by
118 court staff into the court's electronic-filing system, there is no need to require separate paper
119 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).

249 Conversely, item (iii)'s authorization for courts to impose reasonable conditions on
250 unrepresented parties' access also informs what counts as a reasonable exception under item (ii).
251 For example, a local rule that generally prohibits unrepresented parties from e-filing might
252 nonetheless provide an exception where the unrepresented party meets conditions similar to
253 those described in item (iii). The two provisions thus establish a flexible, complementary
254 framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures
255 that courts retain authority to structure access responsibly.

256
257 Rule 5(d)(2)(B)(iv) provides that the court may deny a specific unrepresented litigant
258 access to the court's electronic-filing system, and that the court may revoke an unrepresented
259 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:

1 Rule 6. Computing and Extending Time; Time for Motion Papers

2 * * *

3 **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a
4 specified time after being served and service is made under Rule 5(b)(~~23~~)(C) (mail), (D)
5 (leaving with the clerk), or (F) (other means consented to), 3 days are added after the
6 period would otherwise expire under Rule 6(a).

8 Committee Note

9
10 Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule
11 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~~

21 filing, but is not effective if the serving party learns that it did not reach
22 the person to be served.

23 ~~(B) Using Other Electronic Means.~~ A paper may be served by any other
24 electronic means that the person consented to in writing. Service is
25 complete upon transmission, but is not effective if the serving party learns
26 that it did not reach the person to be served.

27 **(4) Service by Nonelectronic Other Means.** A paper may also be served by:

28 (A) handing it to the person;

29 (B) leaving it:

30 (i) at the person's office with a clerk or other person in charge or, if no one
31 is in charge, in a conspicuous place in the office; or

32 (ii) if the person has no office or the office is closed, at the person's
33 dwelling or usual place of abode with someone of suitable age and
34 discretion who resides there;

35 (C) mailing it to the person's last known address – in which event service is
36 complete upon mailing;

37 (D) leaving it with the court clerk if the person has no known address; ~~or~~

38 (E) sending it by electronic means that the person has consented to in writing – in
39 which event service is complete upon sending, but is not effective if the
40 sender learns that it did not reach the person to be served; or

41 ~~(E)~~ (F) delivering it by any other means that the person has consented to in
42 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.

63 (i) In General. A self-represented party may use the court’s electronic-
64 filing system to file papers and receive notice of activity in the
65 case, unless a court order or local rule prohibits the party from
66 doing so.⁴

67 (ii) Local Provisions Prohibiting Access. If a local rule – or any other
68 local court provision that extends beyond a particular litigant or
69 case – prohibits self-represented parties from using the court’s
70 electronic-filing system, the provision must include reasonable
71 exceptions or must permit the use of another electronic method for
72 filing [papers] and for receiving electronic notice [of activity in the
73 case].

74 (iii) Conditions and Restrictions on Access. A court may set reasonable
75 conditions and restrictions on self-represented parties’ access to the
76 court’s electronic-filing system.

77 (iv) Restrictions on a Particular Person. A court may deny a particular
78 person access to the court’s electronic-filing system and may
79 revoke a person’s previously granted access for not complying
80 with the conditions authorized in (iii).

81 (C) Means of Filing. ~~Electronically.~~ A paper is filed electronically by filing it
82 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:

1 Rule 45. Computing and Extending Time

2
3 * * *

4
5 (c) **Additional Time After Certain Kinds of Service.** Whenever a party must or may act within
6 a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and
7 ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

8 Committee Note

9
10 Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E) as Rule
11 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:

1 Rule 25. Filing and Service

2 (a) Filing.

3 (1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals
4 must be filed with the clerk.

5 (2) **Filing: Method and Timeliness.**

6 (A) **Nonelectronic Filing.**

7 (i) **In General.** For a paper not filed electronically, filing may be
8 accomplished by mail addressed to the clerk, but filing is not
9 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).

32 **(B) Electronic Filing and Signing. (i) ~~By~~ by a Represented Person**

33 **Represented by Counsel--Generally Required; Exceptions.** A person
34 represented by an attorney must file electronically, unless nonelectronic
35 filing is allowed by the court for good cause or is allowed or required by
36 local rule.

37 **~~(ii)~~ (C) Electronic Filing by By an Unrepresented Person Party--When**
38 **Allowed or Required.**

39 **(i) In General.** A party ~~person~~ not represented by an attorney~~;~~ ~~may file~~
40 ~~electronically only if allowed by~~ use the court's electronic-filing
41 system to file papers and receive notice of activity in the case,
42 unless a court order or by local rule prohibits the person from
43 doing so~~;~~ ~~and~~ ~~•~~ An unrepresented person may be required to file
44 electronically only by ~~court~~ order in a case, or by a local rule that
45 includes reasonable exceptions.

46 **(ii) Local Provisions Prohibiting Access.** If a local rule – or any other
47 local court provision that extends beyond a particular litigant or
48 case – prohibits unrepresented parties from using the court's
49 electronic-filing system, the provision must include reasonable
50 exceptions or must permit the use of another electronic method for
51 filing papers and for receiving electronic notice of activity in the
52 case.

53 **(iii) Conditions and Restrictions on Access.** A court may set reasonable

54 conditions and restrictions on unrepresented parties' access to the
55 court's electronic-filing system.

56 **(iv) Restrictions on a Particular Person.** A court may deny a particular
57 person access to the court's electronic-filing system and may
58 revoke a person's previously granted access for not complying
59 with the conditions authorized in (iii).

60 **(iii) (D) Signing.** A filing made through a person's electronic-filing account and
61 authorized by that person, together with that person's name on a signature
62 block, constitutes the person's signature.

63 **(iv) (E) Same as a Written Paper.** A paper filed electronically is a written paper
64 for purposes of these rules.

65 **(3) Filing a Motion with a Judge.** *[Not shown in this draft, for brevity.]*

66 **(4) Clerk's Refusal of Documents.** *[Not shown in this draft, for brevity.]*

67 **(5) Privacy Protection.** *[Not shown in this draft, for brevity.]*

68 **(b) Service of All Papers Required.** Unless a rule requires service by the clerk or the paper will
69 be served [through the court's electronic-filing system]⁶ under Rule 25(c)(1), a party
70 must, at or before the time of filing a paper, serve a copy on the other parties to the
71 appeal or review. Service on a party represented by counsel must be made on the party's
72 counsel.

73 **(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.

74 **(1) Service by a Notice of Case Activity Sent Through the Court’s Electronic-Filing**

75 **System.** A notice of case activity sent to a person registered to receive it through
76 the court’s electronic-filing system constitutes service on that person as of the
77 notice’s date. But

78 [(A) such service is not effective if the filer learns that it did not reach the person
79 to be served; and

80 (B)] a court may provide by local rule that, if a paper is filed under seal or
81 initiates a proceeding in the court of appeals under Rule 5, 15, or 21, it
82 must be served by other means.

83 **(2) Service by Other Means.** A paper may also be served under this rule by:

84 ~~Nonelectronic service may be any of the following:~~

85 (A) personal delivery, including delivery to a responsible person at the office of
86 counsel;

87 (B) ~~by~~ mail; ~~or~~

88 (C) ~~by~~ third-party commercial carrier for delivery within 3 days; or

89 (D) . ~~(2) Electronic service of a paper may be made (A) by sending it to a~~
90 ~~registered user by filing it with the court’s electronic filing system or (B)~~
91 ~~by sending it by other electronic means that the person to be served has~~
92 ~~consented to in writing.~~

93 **(3) Considerations in Choosing Other Means.** When reasonable considering such
94 factors as the immediacy of the relief sought, distance, and cost, service on a party
95 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)	1
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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:

1 Rule 5. Serving and Filing Pleadings and Other Papers

2 (a) Service: When Required.

- 3 **(1) In General.** Unless these rules provide otherwise, each of the following papers must
- 4 be served on every party:
- 5 (A) an order stating that service is required;
- 6 (B) a pleading filed after the original complaint, unless the court orders otherwise
- 7 under Rule 5(c) because there are numerous defendants;
- 8 (C) a discovery paper required to be served on a party, unless the court orders
- 9 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 Filing Case Activity Sent Through the Court's Electronic-

Filing System. A notice of filing 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 events 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 Filing Case Activity.” The term “notice of filing 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.

* * *

54 **(d) Filing.**

55 **(1) Required Filings; Certificate of Service.**

56 **(A) Papers after After the Complaint.** Any paper after the complaint that is
57 required to be served must be filed no later than a reasonable time after
58 service. But disclosures under Rule 26(a)(1) or (2) and the following
59 discovery requests and responses must not be filed until they are used in
60 the proceeding or the court orders filing: depositions, interrogatories,
61 requests for documents or tangible things or to permit entry onto land, and
62 requests for admission.

63 **(B) Certificate of Service.** No certificate of service is required when a paper is
64 served [through the court's electronic-filing system]¹ under Rule
65 5(b)(2)~~by filing it with the court's electronic filing system~~. When a paper
66 that is required to be served is served by other means:

- 67 (i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or
68 within a reasonable time after service; and
69 (ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed,
70 unless filing is required by court order or by local rule.

71 **(2) ~~Nonelectronic Filing.~~** ~~A paper not filed electronically is filed by delivering it:~~

72 ~~(A) to the clerk; or~~

73 ~~(B) to a judge who agrees to accept it for filing, and who must then note the filing~~

1 This specification may be advisable now that Rule 5(b)(2) contemplates locally-required "other means" for serving sealed filings.

74 ~~date on the paper and promptly send it to the clerk.~~

75 **(3) Electronic Filing and Signing.**

76 **(A) By a ~~Represented Person~~ Represented by Counsel—Generally Required;**

77 **Exceptions.** A person represented by an attorney must file electronically,
78 unless nonelectronic filing is allowed by the court for good cause or is
79 allowed or required by local rule.

80 **(B) By an Unrepresented ~~a Self-Represented Person~~ Party—When Allowed**
81 **or Required.**

82 **(i) In General.** A ~~self-represented person~~ party not represented by an
83 attorney: ~~(i) may file electronically only if allowed by use the~~
84 ~~court's electronic-filing system [to file papers and receive notice of~~
85 ~~activity in the case], unless a court order or by local rule prohibits~~
86 ~~the person~~ party from doing so; ~~and (ii) A self-represented~~ An
87 unrepresented person may be required to file electronically only by
88 court order in a case, or by a local rule that includes reasonable
89 exceptions.

90 **(ii) Local Provisions Prohibiting Access.** If a local rule – or any other
91 local court provision that extends beyond a particular litigant or
92 case – prohibits self-represented persons unrepresented parties from
93 using the court's electronic-filing system, the provision must
94 include reasonable exceptions or must permit the use of another
95 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~~ persons' **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 ~~self-represented~~

litigants. 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 a ~~self-represented~~ 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 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 ~~self-represented litigants~~ 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 filing 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 filing case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of filing 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.

2 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

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 a ~~litigant~~ litigants who will be filing non-electronically but who ~~wishes~~ wish to effect service on their ~~opponent~~ opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing 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 filing 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 filing 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 filing 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), ~~self-~~

represented litigants 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. If a district wishes to restrict self-represented litigants' (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 ~~persons~~ 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 ~~self-represented litigants~~ unrepresented parties to the court's electronic-filing system, or (2) providing ~~self-represented litigants~~ 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 ~~self-represented~~ 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 self-represented ~~unrepresented~~ litigant access to the court’s electronic-filing system, and that the court may revoke a self-represented ~~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)(23)(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).

7
8 **Committee Note**
9

10 Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule
11 5(b)(3).
12

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

1 **Rule 49. Serving and Filing Papers**

2 **(a) Service on a Party.**

3 **(1) What is Required.** Each of the following must be served on every party: any written
4 motion (other than one to be heard ex parte), written notice, designation of the
5 record on appeal, or similar paper.

6 **(2) Serving a Party's Attorney.** Unless the court orders otherwise, when these rules or a
7 court order requires or permits service on a party represented by an attorney,
8 service must be made on the attorney instead of the party.

9 **(3) Service by ~~Electronic Means~~ a Notice of Filing Case Activity Sent Through the**

10 **Court's Electronic-Filing System.** A notice of ~~filing~~ case activity sent to a

11 person registered to receive it through the court's electronic-filing system

12 constitutes service on that person as of the notice's date. But

13 [(A) such service is not effective if the filer learns that it did not reach the person]

14 to be served; and

15 (B)1 a court may provide by local rule that if a paper is filed under seal, it must
16 be served by other means.

17 ~~(A) Using the Court's Electronic Filing System. A party represented by an~~
18 ~~attorney may serve a paper on a registered user by filing it with the court's~~
19 ~~electronic filing system. A party not represented by an attorney may do so~~
20 ~~only if allowed by court order or local rule. Service is complete upon~~
21 ~~filing, but is not effective if the serving party learns that it did not reach~~
22 ~~the person to be served.~~

23 ~~(B) Using Other Electronic Means. A paper may be served by any other~~
24 ~~electronic means that the person consented to in writing. Service is~~
25 ~~complete upon transmission, but is not effective if the serving party learns~~
26 ~~that it did not reach the person to be served.~~

27 **(4) Service by Nonelectronic Other Means.** A paper may also be served by:

28 (A) handing it to the person;

29 (B) leaving it:

30 (i) at the person's office with a clerk or other person in charge or, if no one
31 is in charge, in a conspicuous place in the office; or

32 (ii) if the person has no office or the office is closed, at the person's
33 dwelling or usual place of abode with someone of suitable age and
34 discretion who resides there;

35 (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 FilingCase Activity.” The term “notice of filingcase
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).

³ This specification may be advisable now that Rule 49(a)(3) contemplates locally-required “other means” for serving sealed filings.

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 ~~Person~~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 ~~Person~~Party – When Allowed or Required.

(i) In General. A self-represented ~~person~~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 ~~person~~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 ~~persons~~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

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.

76 conditions and restrictions on self-represented ~~persons'~~ **parties'**
77 access to the court's electronic-filing system.

78 **(iv) Restrictions on a Particular Person.** A court may deny a particular
79 person access to the court's electronic-filing system and may
80 revoke a person's previously granted access for not complying
81 with the conditions authorized in (iii).

82 **(C) Means of Filing. Electronically.** A paper is filed electronically by filing it
83 with the court's electronic-filing system.

84 **(D) Signature.** A filing made through a person's electronic-filing account and
85 authorized by that person, together with the person's name on a signature
86 block, constitutes the person's signature.

87 **(E) Qualifies as Written Paper.** A paper filed electronically is written or in
88 writing under these rules.

89 **(B) (3) Nonelectronically Filing.** A paper not filed electronically is filed by delivering it:
90 (i) to the clerk; or
91 (ii) to a judge who agrees to accept it for filing, and who must then note
92 the filing date on the paper and promptly send it to the clerk.

93 **(3) Means Used by Represented and Unrepresented Parties.**

94 **(A) Represented Party.** A party ~~represented by an attorney must file~~
95 ~~electronically, unless nonelectronic filing is allowed by the court for good~~
96 ~~cause or is allowed or required by local rule.~~

97 **(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 ~~litigants~~ 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 ~~litigants~~ 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) (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 filing case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of filing 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 a ~~litigant~~ litigants who will be filing non-electronically but who ~~wishes~~ wish to effect service on their ~~opponent~~ opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing case activity).

⁵ The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

160
161 [Subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior
162 rule’s provision that such service is not effective if the sender “learns that it did not reach the
163 person to be served”]; a similar provision is also included in subdivision (a)(3) with respect to
164 service via the court’s electronic-filing system.] [Although new subdivision (a)(4)(E) carries
165 forward – for service by other electronic means – the prior rule’s provision that such service is
166 not effective if the sender “learns that it did not reach the person to be served,” no such proviso is
167 included in new subdivision (a)(3). This is because experience has demonstrated the general
168 reliability of notice and service through the court’s electronic-filing system on those registered to
169 receive notices of electronic filing from that system-.]

170
171 **[Subdivision (a)(5).** New Rule 49(a)(5) addresses service of papers not filed with the
172 court. It makes explicit what is arguably implicit in new Rule 49(a)(3): If a paper is not filed with
173 the court, then the court’s electronic system will never generate a notice of filing case activity, so
174 the sender cannot use Rule 49(a)(3) for service and thus must use Rule 49(a)(4).]

175
176 **Subdivision (a)(6).** New Rule 49(a)(6) defines the term “notice of filing case activity” as
177 any electronic notice provided to case participants through the court’s electronic-filing system to
178 inform them of a filing or other activity on the docket. There are two equivalent terms currently
179 in use: Notice of Electronic Filing and Notice of Docket Activity. “Notice of filing case activity”
180 is intended to encompass both of those terms, as well as any equivalent terms that may come into
181 use in future. The word “electronic” is deleted as superfluous now that electronic filing is the
182 default method.

183
184 **Subdivision (b)(1).** Subdivision (b)(1) previously provided that no certificate of service
185 was required when a paper was served “by filing it with the court’s electronic-filing system.”
186 This phrase is replaced by ““through the court’s electronic-filing system” under Rule 49(a)(3)”
187 in order to conform to the change to subdivision (a)(3).

188
189 **Subdivision (b)(2).** Amended Rule 49(b)(2) governs electronic filing and signing. New
190 Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i),
191 the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is,
192 under new Rule 49(b)(2)(B)(i), self-represented litigants parties are presumptively authorized to
193 use the court’s electronic-filing system to file documents in their case subsequent to the case’s
194 commencement. (The rule grants this presumptive authorization to a self-represented ‘party,’ not
195 a self-represented ‘person’; the rule does not grant nonparty nonlawyers any right to use the
196 court’s e-filing system. See Rule 49(c).) If a district wishes to restrict self-represented
197 litigants’ parties’ access to the court’s electronic-filing system, it must adopt an order or local rule
198 to impose that restriction.

199
200 Under Rule 49(b)(2)(B)(ii), a local rule or general court order that bars persons not
201 represented by an attorney from using the court’s electronic-filing system must include
202 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 ~~litigants~~ parties to the court’s electronic-filing system, or (2) providing self-represented ~~litigants~~ 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).

246
247 Conversely, item (iii)'s authorization for courts to impose reasonable conditions on self-
248 represented parties' access also informs what counts as a reasonable exception under item (ii).
249 For example, a local rule that generally prohibits self-represented parties from e-filing might
250 nonetheless provide an exception where the self-represented party meets conditions similar to
251 those described in item (iii). The two provisions thus establish a flexible, complementary
252 framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures
253 that courts retain authority to structure access responsibly.
254

255 Rule 49(b)(2)(B)(iv) provides that the court may deny a specific self-represented litigant
256 access to the court's electronic-filing system, and that the court may revoke a self-represented
257 litigant's access to the court's electronic-filing system.
258

259 **Subdivision (b)(3).** What had been Rule 49(b)(2)(B) (concerning nonelectronic means of
260 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

* * *

5 **(c) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within
6 a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and
7 ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

10 Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E)
11 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.

3 **(1) Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals
4 must be filed with the clerk.

5 **(2) Filing: Method and Timeliness.**

6 **(A) Nonelectronic Filing.**

7 **(i) In General.** For a paper not filed electronically, filing may be
8 accomplished by mail addressed to the clerk, but filing is not
9 timely unless the clerk receives the papers within the time fixed for
10 filing.

11 **(ii) A Brief or Appendix.** A brief or appendix not filed electronically is
12 timely filed, however, if on or before the last day for filing, it is:
13 • mailed to the clerk by first-class mail, or other class of mail that
14 is at least as expeditious, postage prepaid; or
15 • dispatched to a third-party commercial carrier for delivery to the
16 clerk within 3 days.

17 **(iii) Inmate Filing.** If an institution has a system designed for legal mail,
18 an inmate confined there must use that system to receive the
19 benefit of this Rule 25(a)(2)(A)(iii). A paper not filed
20 electronically by an inmate is timely if it is deposited in the
21 institution's internal mail system on or before the last day for filing
22 and:
23 • it is accompanied by: a declaration in compliance with 28 U.S.C.
24 § 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 ~~a Self-Represented Person _~~

Party--When Allowed or Required.

(i) In General. A ~~self-represented~~ 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 • A self-represented~~ 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.

47 **(ii) Local Provisions Prohibiting Access.** If a local rule – or any other
48 local court provision that extends beyond a particular litigant or
49 case – prohibits self-represented personsunrepresented parties from
50 using the court’s electronic-filing system, the provision must
51 include reasonable exceptions or must permit the use of another
52 electronic method for filing {papers} and for receiving electronic
53 notice {of activity in the case}.

54 **(iii) Conditions and Restrictions on Access.** A court may set reasonable
55 conditions and restrictions on self-represented
56 persons’unrepresented parties’ access to the court’s electronic-
57 filing system.

58 **(iv) Restrictions on a Particular Person.** A court may deny a particular
59 person access to the court’s electronic-filing system and may
60 revoke a person’s previously granted access for not complying
61 with the conditions authorized in (iii).

62 **(iii) (D) Signing.** A filing made through a person's electronic-filing account and
63 authorized by that person, together with that person's name on a signature
64 block, constitutes the person's signature.

65 **(iv) (E) Same as a Written Paper.** A paper filed electronically is a written paper
66 for purposes of these rules.

67 **(3) Filing a Motion with a Judge.** *[Not shown in this draft, for brevity.]*

68 **(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.**

(1) **Service by a Notice of Filing Case Activity Sent Through the Court’s Electronic-
Filing System.** A notice of ~~filing~~ 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 court may provide by local rule that if a paper
is filed under seal, it must be served by other means.~~ 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

⁶ This specification may be advisable now that Rule 25(c)(1) contemplates locally-required “other means” for serving sealed filings.

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 Filing Case Activity." The term "notice of filing 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 ~~self-represented~~ **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 ~~self-represented litigants~~ **unrepresented parties** can file documents with the court and receive notice of filings that others make in the case. Rule 25(c) is

⁷ The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

amended to address service of documents filed by a self-represented 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), ~~self-represented litigants~~ unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case. ~~If a district wishes to restrict self-represented litigants'~~ (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: (1) Allowing reasonable access for ~~self-represented litigants~~ unrepresented parties to the court's electronic-filing system, or (2) providing ~~self-represented litigants~~ 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

178 would meet the Rule’s requirement of “reasonable access” so long as such permission is not
179 unreasonably withheld in practice.] Rule 25(a)(2)(C)(ii) refers to “a local rule – or any other
180 local court provision that extends beyond a particular litigant or case” to make clear that Rule
181 25(a)(2)(C)(ii) does not restrict a court from entering an order barring a specific self-
182 ~~represented~~unrepresented litigant from accessing the court’s electronic-filing system.

183
184 For a court that opts to provide unrepresented parties with an alternative electronic means
185 for filing and an alternative electronic means for receiving notice of court filings and orders, the
186 rule does not require the court to accept emailed or uploaded files in any and all formats. A court
187 is free to set reasonable requirements such as that the files be in PDF format. [But see Appellate
188 Rule 47(a)(2) (“A local rule imposing a requirement of form must not be enforced in a manner
189 that causes a party to lose rights because of a nonwillful failure to comply with the
190 requirement.”).]

191
192 Rules 25(a)(2)(C)(ii) and (iii) are intended to work in tandem. Where a local rule
193 prohibits unrepresented parties from using the court’s e-filing system, the “reasonable
194 exceptions” required by item (ii) should align with the types of “reasonable conditions and
195 restrictions” referenced in item (iii). That is, a local rule may allow unrepresented parties e-filing
196 access only in particular circumstances—such as after completing a training or agreeing to
197 specified formatting standards—provided those requirements are reasonable under item (iii).

198
199 Conversely, item (iii)’s authorization for courts to impose reasonable conditions on
200 unrepresented parties’ access also informs what counts as a reasonable exception under item (ii).
201 For example, a local rule that generally prohibits unrepresented parties from e-filing might
202 nonetheless provide an exception where the unrepresented party meets conditions similar to
203 those described in item (iii). The two provisions thus establish a flexible, complementary
204 framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures
205 that courts retain authority to structure access responsibly.

206
207 Rule 25(a)(2)(C)(iv) provides that the court may deny a specific self-
208 ~~represented~~unrepresented litigant access to the court’s electronic-filing system, and that the court
209 may revoke a self-~~represented~~an unrepresented litigant’s access to the court’s electronic-filing
210 system.

211
212 Former Rules 25(a)(2)(B)(iii) and (iv) are carried forward but renumbered as Rules
213 25(a)(2)(D) and (E).

214
215 **Subdivision (b).** Existing Rule 25(b) generally requires that a party, “at or before the
216 time of filing a paper, [must] serve a copy on the other parties to the appeal or review.” The
217 existing rule exempts from this requirement instances when “a rule requires service by the
218 clerk.” The rule is amended to add a second exemption, for instances when “the paper will be
219 served [through the court’s electronic-filing system] under Rule 25(c)(1).” This amendment is
220 necessary because new Rule 25(c)(1) encompasses service by the notice of ~~filing~~case activity

that results from the clerk’s uploading into the system a paper filing by a ~~self-represented~~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 filing 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 filing case activity from the court’s electronic-filing system. Litigants who are registered to receive a notice of filing 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 a ~~litigant~~litigants who will be filing non-electronically but who ~~wishes~~wish to effect service on their ~~opponent~~opponents before the time when the court will have uploaded the filing into the court’s system (thus generating the notice of filing 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 filing case activity through the court’s electronic-filing system occurs by means of the notice of filing 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 filing 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 filing 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 filing 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 filing 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 filing case activity”

307 is intended to encompass both of those terms, as well as any equivalent terms that may come into
308 use in future. The word “electronic” is deleted as superfluous now that electronic filing is the
309 default method.

TAB 11

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 15—Depositions for Discovery
([25-CR-H](#), [25-CR-J](#), [25-CR-K](#), [25-CR-L](#), [25-CR-M](#), and [25-CR-O](#))

DATE: October 1, 2025

At its spring meeting, the Committee decided to place on its study agenda two suggestions for amendments to Rule 15 to authorize pretrial depositions for discovery—[25-CR-B](#) (Michael Kelly and Sergio Acosta) and [25-CR-E](#) (Larry Krantz).

The Committee has now received six additional proposals that support amending Rule 15 to permit depositions or witness interviews. Several of these proposals explicitly support the Kelly/Acosta proposal. Each new proposal discusses the need for depositions and how the availability of depositions would improve the fairness of the criminal justice process. The new proposals also respond to concerns that depositions might endanger witnesses or result in delay. Several of the proposals draw on the writer’s experiences with cases in Florida, Indiana, and New Mexico, which currently provide for depositions in state prosecutions. A brief description of each suggestion is provided below.

We recommend that these proposals be added to the study agenda to receive further consideration once the Committee’s current work on several other proposals, including changes to Rule 17, is complete.

25-CR-H (John Cline)

John Cline begins with a discussion of the need for depositions, noting that counsel for criminal defendants in federal cases lack the power to obtain pretrial statements from potential witnesses through interviews conducted by the FBI or other government agents, or through preindictment grand jury subpoenas. He observes that potential witnesses are often reluctant to speak to defense counsel. He states that FBI interview notes are not an adequate substitute for a face-to-face interview, since the notes are not verbatim and may be incomplete or inaccurate. This limits defense counsel’s ability to advise clients whether to plead guilty and impairs their ability to cross examine the government’s witnesses.

Mr. Cline argues that the solution is to provide both parties—but particularly the defense—with pretrial access to witnesses by deposition or some other mechanism. Mr. Cline describes his experience with New Mexico’s rules permitting a party to compel any person other than the defendant to give a “statement,” which is an unsworn interview. In his experience, statements are recorded by the parties on their telephone or another device, and a transcript is prepared later if needed for trial. He describes the process as inexpensive and efficient. New Mexico also provides for formal depositions, by agreement of the parties or by order of the court upon a showing it is

“necessary to prevent injustice.” The New Mexico Rules also provide for a variety of protective orders as needed.

Mr. Cline states that in his experience these procedures work well to ensure the fairness of the system, do not lead to concerns about witness safety or witness tampering, do not cause delay, and do not lead to what some have called “trial by deposition.”

25-CR-J (John F. Murphy)

John Murphy, Executive Director of the Federal Defender Program in the Northern District of Illinois, writes to support the Kelly/Acosta proposal on the grounds that it would manifestly improve the truth-finding process. He describes the “recurring problem” that defense lawyers in federal criminal cases are forced to make critical decisions about whether to call a witness at trial without any clear idea what the witness might say, which is akin “to flying blindly.” But forgoing a witness may result in passing over vital exculpatory evidence. Mr. Murphy describes the reasons many potential witnesses decline voluntary interviews, the limited utility of government memoranda of witness interviews, and the structural imbalance of federal criminal practice.

Mr. Murphy argues that limited pretrial depositions, with court supervision, would address these problems, allowing defense counsel to make informed decisions in the best interest of their clients. He notes that the Kelly/Acosta proposal has several advantages. In the absence of exceptional circumstances, it is limited to five depositions. This limitation will minimize costs and focus the defense on the most critical witnesses. It should result in quicker and more efficient case resolutions. It will also address judicial concerns with the reliability of discovery (especially concerns that 302’s may be inaccurate or misleading). Mr. Murphy stresses the Kelly/Acosta proposal’s safeguards to protect witnesses and promote judicial efficiency, including the requirement of a defense motion and a judicial finding that the depositions would be “in the interest of justice.” Courts would also have the authority to impose a variety of limitation and safeguards.

Finally, Mr. Murphy draws attention to the success of depositions in many States, and the determination of a blue ribbon study finding Florida’s depositions were “‘a necessary and valuable part of our criminal justice system’ that ensure ‘fairness and equal administration of justice.’” 25-CR-J at 3.

25-CR-K (David Oscar Marcus)

Mr. Marcus writes “in strong support” of amending Rule 15 to allow discovery depositions as “a matter of basic fairness.” He contends that at present the system is “tilted dramatically in favor of the government,” and “defendants make life-altering decisions about whether to plead guilty without knowing what witnesses will actually say.”

Mr. Marcus urges that decades of experience with depositions in state criminal cases in Florida show there is a better way. He notes that depositions in Florida make the process “fairer and more efficient,” shortening trials, and leading to appropriate resolutions without trial. He states that prosecutors also benefit from the availability of depositions to understand the strengths and weaknesses of their cases, and to avoid being blindsided. Florida’s courts also have ample tools to address concerns about witness safety or intimidation.

25-CR-L (Jonathan Bont)

Jonathan Bont writes in support of the Kelly/Acosta proposal. He describes his experience as a former AUSA and now a private practitioner focusing largely on retained and CJA criminal cases, stating that Indiana is one of several States that allow pretrial depositions in criminal cases, and that as a practitioner he has “experienced firsthand the positive effects of pretrial depositions on the state criminal justice system.” He notes that “[i]n addition to the search for truth that is the goal of our justice system,” depositions serve a variety of practical purposes for the prosecution. He explains that pretrial depositions often lead to plea bargaining or outright dismissals in cases that would otherwise have taken valuable court and jury time. They lead both sides to focus their attention, and they provide a natural setting for the parties to discuss resolving the case when meeting in the same room together without interruptions. Pretrial depositions also allow defendants to evaluate their own cases and reach a result that meets with their perception of justice. He states:

Through deposing the State’s witnesses a defendant obtains a valuable face-to-face confrontation with a witness that not only informs the defendant of the strength or weakness of the State’s case but also gives him or her a sense that they had a fair opportunity to evaluate all of the evidence.

Mr. Bont concludes that he is unaware of any case where the practice of conducting pretrial depositions in a state criminal case has been abused. To the contrary, he states, he has “been involved in several cases (and am aware of scores more from my colleagues) where pretrial depositions have resulted in guilty pleas or dismissals of charges.”

25-CR-M (Trisha Anderson, HeckerFink)

25-CR-M was signed by Ms. Anderson and 16 other partners at HeckerFink, a firm with offices in New York and Washington, D.C. Their letter states that the “firm includes lawyers with widely varied backgrounds in the federal criminal justice system, including former high-ranking officials in the Department of Justice, line and supervisory federal prosecutors, federal public defenders, and members of the Criminal Justice Act Panel.”

Ms. Anderson and her partners contend “that greater use of depositions would enhance fairness and accuracy in criminal cases.” Their letter describes the firm’s recent representation of a client in parallel civil and criminal securities fraud cases in the Southern District of New York. Because the client was awaiting extradition, the SEC case went to trial first, after robust pretrial discovery, including depositions. Several months after the civil trial concluded, the criminal case moved forward after the client had been extradited. In the criminal case, Rule 16 provided for much more limited discovery, despite the fact the defendant’s liberty was at stake. The extensive civil discovery led to a more efficient outcome in the criminal case, because defense counsel were able to provide their client with advice based on an early and genuine understanding of the facts, and the prosecutors were also aware of the strengths and weaknesses of their case. Accordingly, the case was resolved by a plea agreement well before the anticipated trial date.

Ms. Anderson and her partners also respond to common concerns about allowing depositions. They note States that currently allow depositions have found sensible ways to address all of the common concerns. In terms of concerns about efficiency and costs, Ms. Anderson and

her partners concede that depositions will require some additional time and resources at the front end of a case, but then depositions can greatly narrow issues that may otherwise require extensive investigation or pretrial litigation and streamline courtroom proceedings in the event of a trial. As to concerns about witness safety, Ms. Anderson and her partners emphasize the many safeguards which exist in other areas of discovery could be available for depositions, including protective orders and the ability for courts to restrict who may be deposed or the conditions of the deposition. Indeed, they comment that passions may run higher in civil than criminal cases, and they see “no reason to believe that depositions are less workable in criminal cases than civil.”

Finally, Ms. Anderson and her partners comment that the need for depositions is as great or greater in drug, guns, and immigration prosecutions than in fraud cases, because the key witnesses in those cases are generally “law enforcement agents and officers for whom concerns that might arise with lay witnesses are almost non-existent.”

25-CR-O (Lawrence S. Lustberg)

Lawrence Lustberg writes in support of the Kelly/Acosta proposal, offering his perspective as co-chair of the white collar and investigations section of his law firm, as well as director of its fellowship in public interest and constitutional law. He urges that the Kelly/Acosta proposal is “both fair and practical and would be the unusual provision that promotes both justice and efficiency.” He stresses the need to “level the playing field” by providing the defense with critical discovery, while also offering valuable insights to both parties into the strengths and weakness of their cases. This will, he states, promote the legitimacy of the criminal justice system and reduce the potential for due process claims based on *Brady* violations. The limitations in the proposal are sufficient to prevent misuse and any potential danger to witnesses. Federal courts, like those in the States that already allow depositions, have ample means to assure depositions proceed in an appropriate manner. He urges that post-Covid practitioners have the experience and technology to take and defend depositions, many of which take place remotely. And finally, he notes, depositions would be particularly helpful at a time when an increasing number of cases involve witnesses from around the world who might not be able to travel to the United States.

LAW OFFICE OF **JOHN D. CLINE**

September 2, 2025

VIA EMAIL

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Re: Proposal to Amend Fed. R. Crim. P. 15

Dear Ms. Dubay:

I write in support of amending Fed. R. Crim. P. 15 to permit discovery depositions of potential witnesses. The amendment would promote fairness in federal criminal trials and would provide defendants and their counsel a more informed basis on which to decide whether to plead guilty or go to trial. My views are informed by almost forty years as a federal criminal defense lawyer and by seven years as a defense lawyer in the state courts of New Mexico, where the rules of criminal procedure permit both parties to obtain statements and depositions from potential witnesses. Based on this experience, I strongly urge an amendment to Rule 15.

I. THE PROBLEM.

Federal prosecutors have the power to obtain pretrial statements from potential witnesses, either through interviews conducted with FBI or other law enforcement agents or, if necessary, through preindictment grand jury subpoenas. Prosecutors can grant informal immunity to potential witnesses who otherwise would assert their Fifth Amendment rights or, if necessary, obtain statutory immunity for potential witnesses.

Counsel for federal criminal defendants have no such power. They cannot compel witnesses to provide pretrial testimony or any other form of statement. They cannot grant immunity to witnesses concerned about self-incrimination. Defense counsel can ask potential witnesses to provide voluntary interviews, but many witnesses decline to speak with the defense, either from reluctance to become involved or out of fear that they will incur the wrath of law enforcement. Potential witnesses who are cooperating with the prosecution are especially unlikely to provide voluntary interviews to defense counsel, out of concern that prosecutors will take a dim view of any assistance provided to the defense. Without the ability either to compel testimony or, in most instances, even to conduct interviews, defense counsel generally must gauge the testimony of potential witnesses based on memoranda of interviews prepared by FBI agents or other federal law enforcement officers. (For the sake of simplicity, I will refer to these memoranda

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collectively as "FBI interview memos.") These memoranda usually are not verbatim or substantially verbatim and may be incomplete or inaccurate. Although Fed. R. Crim. P. 26.2 and the Jencks Act require production of grand jury transcripts and other substantially verbatim statements of prosecution trial witnesses, prosecutors rarely put lay witnesses--and especially cooperating witnesses--before the grand jury and thus the defense almost never receives sworn testimony from such witnesses.

The inability to question potential witnesses before trial poses critical problems for the defense. First, because of the non-verbatim nature and limited scope of FBI interview memos, defense counsel often cannot effectively advise clients whether to plead guilty or go to trial. Clients deciding whether to plead want to know how strong the evidence against them will be at trial. Without access to witnesses, counsel cannot provide an accurate answer to that question. Second, many federal judges forbid or sharply limit the use of FBI interview memos for impeaching a witness who testifies contrary to what he or she is reported to have told the government. Even attempts to refresh the witness' recollection run into roadblocks--and if the witness denies that his or her recollection is refreshed by reviewing the FBI interview memo, there is often little defense counsel can do to challenge that testimony. Third, for witnesses whom the government has not interviewed, often including the most likely defense witnesses, the defense does not have even the modest benefit of an FBI interview memo.

The lack of defense access to witnesses thus leads to uninformed decisions whether to plead guilty or go to trial; to trials at which prosecution witnesses cannot be cross-examined effectively because defense counsel do not want to ask questions to which they do not know the witness' answer; and to decisions not to call potentially exculpatory witnesses in the defense case, because the defense cannot be confident the witness will testify favorably. Collectively, these problems call the fairness of the federal criminal process into question.

II. THE SOLUTION.

The solution to these problems is simple: provide both parties--but particularly the defense, given the problems identified above--pretrial access to witnesses, either by deposition or by some other mechanism, enforceable by subpoena if necessary and subject to appropriate protective measures. A number of states allow depositions or other forms of witness access, and these procedures are reported to work well. I will address my own experience in one of those states, New Mexico, where I defended state court criminal cases ranging from fraud to murder.

The New Mexico rules of criminal procedure provide two avenues through which parties can question potential trial witnesses. First, a party may compel any person, other than the defendant, with information subject to discovery to give a "statement." NMRA 5-503(A) (Rule 5-503 is attached as Exhibit A). Statements are unsworn interviews. Typically, the parties record the questions and answers on a phone or other device and prepare a transcript later if needed for trial. In my experience, the vast majority of pretrial

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witness questioning occurs through the inexpensive and efficient mechanism of the "statement." Because a statement lacks the formal trappings of a deposition, witnesses tend to be more relaxed and candid in that setting.

Second, the parties may take formal depositions, either by agreement or, if no agreement can be reached, by order of the court "upon a showing that it is necessary to take the person's deposition to prevent injustice." NMRA 5-503(B). The rules provide detailed requirements for the notice and conduct of depositions. NMRA 5-503(D)-(I), 5-503.1, 5-503.2, 5-504.

A statement or deposition is subject to the court's control, on motion of a party or the witness made before or during the examination. NMRA 5-503(G); NMRA 5-507 (Rule 5-507 is attached as Exhibit B). For "good cause shown," the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals." NMRA 5-507(A) (providing non-exclusive list of protective measures court may impose).

In my experience, these mechanisms--statements, depositions, and protective orders--work well to ensure fairness in the New Mexico criminal justice system. Defendants and their counsel learn before trial what witnesses will say about the underlying facts and how credible those witnesses appear, permitting informed decisions about whether to plead guilty or go to trial. (The prosecution gains similar insight, and may adjust its view of a fair outcome accordingly.) If the case proceeds to trial, defense counsel has the means--in the form of a verbatim transcript or recording--to impeach prosecution witnesses who embellish on the stand. And the defense can determine whether potential defense witnesses are worth calling in the defense case.

The arguments against depositions or other access to witnesses are, in my view, without merit. First, concerns about witness safety and witness tampering are overblown, and, to the extent legitimate, can be readily addressed. In the vast majority of federal criminal cases, the identity of potential prosecution witnesses and the outline of what they will say are known to the defense through the pretrial production of FBI interview memos. Most of those witnesses experience neither threats nor efforts to influence their testimony. That is because federal criminal defendants who may be tempted to threaten or tamper with witnesses are usually deterred by the potential consequences, including revocation of bond and witness tampering or obstruction charges. In the relatively small number of cases where witness safety and tampering present real concerns, despite these deterrents, courts can address those dangers through protective orders, including barring the deposition or other statement entirely.

Second, some have voiced concern that permitting depositions will cause delays in criminal cases. Based on my experience in New Mexico, I do not see this as a problem. The statements and depositions in which I participated proceeded expeditiously. The date, time, and place were agreed among the parties and the witness, and the questioning itself

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focused on the merits of the case. Had a party attempted to use the deposition or statement process to drag out the proceedings, the other party could always have sought a protective order from the court under NMRA 5-507--and lawyers on both sides knew that courts do not take kindly to discovery disputes that the parties should be able to resolve by agreement. And even if depositions were to cause occasional delays in federal criminal cases--contrary to my New Mexico experience--that is a small price to pay for the substantial gain in fairness that pretrial access to witnesses would provide.

Finally, some have argued that granting pretrial access to witnesses will result in "trial by deposition." In my view, this is a fanciful concern. Prior sworn testimony is generally admissible only when the witness is unavailable at trial. Fed. R. Evid. 804(b)(1). Witnesses will rarely become unavailable between deposition and trial; in most instances, the deposition will serve solely as a means of impeachment or refreshing recollection. And unsworn statements (if federal courts were to adopt the New Mexico practice) are even less likely to be admissible for their truth at trial, since they do not fall within Rule 804(b)(1).

III. CONCLUSION.

It is both bizarre and shameful that the parties to a routine civil fraud case, with only money at stake, get to depose the key witnesses while a federal criminal defendant facing fraud charges that threaten decades in prison does not. The states have long been laboratories for criminal justice reform, and here too they have shown how to eliminate this injustice. In my view, the New Mexico approach has much to commend it, but there are undoubtedly other mechanisms that provide similar pretrial access to witnesses. It is past time for the federal courts to adopt one of these mechanisms.

Respectfully submitted,


John D. Cline

Enclosures

EXHIBIT A

5-503 NMRA

Court rules current with updates received by the publisher as of June 20, 2025.

NM - Michie's Annotated Local, State & Federal Court Rules Of New Mexico >
Chapter 5. Rules of Criminal Procedure for the District Courts > ***Article 5. Discovery***

5-503. Depositions; statements.

A. Statements. Any person, other than the defendant, with information which is subject to discovery shall give a statement. A party may obtain the statement of the person by serving a written “notice of statement” upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. If a subpoena is served to secure a witness or materials, a copy of the subpoena shall be served upon each party.

B. Depositions; when allowed. A deposition may be taken pursuant to this rule upon:

- (1) agreement of the parties; or
- (2) order of the court at any time after the filing of the indictment or information or complaint in the district court, upon a showing that it is necessary to take the person's deposition to prevent injustice.

C. Scope of discovery. Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

D. Time and place of deposition. Counsel must make reasonable efforts to confer in good faith regarding scheduling of a deposition or statement before serving a notice of deposition or a notice of statement. Unless agreed to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court. The attendance of witnesses at depositions may be compelled by subpoena as provided in these rules.

E. Notice of examination: general requirements; special notice; notice of non-appearance; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(1) A party taking the deposition of any person upon oral examination pursuant to court order shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party

may arrange for a transcription or copy of the deposition or statement to be made from the recording of a deposition or statement at the party's expense.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders. If the deposition is taken by an official court reporter, the official transcript shall be the transcript prepared by the official court reporter.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 5-503.1 NMRA and shall begin with a statement on the record by the officer that includes:

- (a) the officer's name and business address;
- (b) the date, time, and place of the deposition;
- (c) the name of the deponent;
- (d) the administration of the oath or affirmation to the deponent; and
- (e) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may agree in writing or the court may, upon motion, order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rule 5-503.1(A) NMRA, 5-503.2(A)(1) NMRA and 5-503.2(B)(1) NMRA, a deposition taken by such means is taken in the county and at a place where the witness is to answer questions. The officer taking the deposition must be physically present with the witness.

F. Depositions; examination and cross-examination; record of examination; oath; objections.

Examination and cross-examination of witnesses in depositions may proceed as permitted at trial under the New Mexico Rules of Evidence, except Rule 11-103 NMRA and Rule 11-615 NMRA. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by Paragraph D(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

G. Statements; depositions; motion to terminate or limit examination. At any time during a deposition or statement, on motion of a party, the witness or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the witness or the deponent, the court in which the action is pending, or the court in the county where the deposition or statement is being taken, may order the examination to cease or may limit the scope and manner of the taking of the deposition or statement pursuant to Rule 5-507 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party, the witness or the deponent, the taking of the deposition or statement shall be suspended for the time necessary to make a motion for an order.

H. Depositions; review by witness; changes; signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Paragraph I(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

I. Certification by officer; exhibits; copies; notice of transcription.

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. If the deposition is transcribed, the officer shall provide the original of the deposition or statement to the party ordering the transcription and shall give notice thereof to all parties. The party receiving the original shall maintain it, without alteration, until final disposition of the case in which it was taken or other order of the court. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may:

(a) offer copies to be marked for identification and annexed to the deposition or statement and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

J. Final disposition of depositions. The original deposition may be destroyed as provided in the judicial retention of records schedule.

History

[As amended, effective July 1, 1973; July 1, 1980; September 1, 1981; October 1, 1983; February 1, 1991; August 1, 1992; May 15, 2000; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005.]

Annotations

Notes

EXHIBIT B

5-507 NMRA

Court rules current with updates received by the publisher as of June 20, 2025.

NM - Michie's Annotated Local, State & Federal Court Rules Of New Mexico >
Chapter 5. Rules of Criminal Procedure for the District Courts > ***Article 5. Discovery***

5-507. Depositions; statements; protective orders.

A. Motion. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition or statement, the court in the district where the deposition or statement is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. The order may include one or more of the following restrictions:

- (1) that the deposition or statement requested not be taken;
- (2) that the deposition or statement requested be deferred;
- (3) that the deposition or statement may be had only on specified terms and conditions, including a designation of the time or place;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that the deposition or statement be conducted with no one present except persons designated by the court;
- (6) that a deposition or statement after being sealed be opened only by order of the court;
- (7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

B. Written showing of good cause. Upon motion, the court may permit the showing of good cause required under Paragraph A of this rule to be in the form of a written statement for inspection by the court in camera, if the court concludes from the statement that there is a substantial need for the in camera showing. If the court does not permit the in camera showing, the written statement shall be returned to the movant upon request. If no such request is made, or if the court enters an order granting the relief sought, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court having jurisdiction in the event of an appeal.

C. Denial of order. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

History

[As amended, effective August 1, 1992; May 15, 2000.].

Annotations



FEDERAL DEFENDER PROGRAM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

55 E. MONROE STREET - SUITE 2800
CHICAGO, ILLINOIS 60603

JOHN F. MURPHY
EXECUTIVE DIRECTOR

312.621.8352
FAX 312.621.8399

September 12, 2025

Carolyn A. Dubay, 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 15 of the F.R.Cr.P.

Dear Ms. Dubay:

I write in support of the proposed amendment to Rule 15 of the Federal Rules of Criminal Procedure initially raised on February 24, 2025, by Mr. Sergio Acosta and Mr. Michael Kelly of Akerman LLP. This worthy proposal serves to enhance the interests of criminal justice by manifestly improving the truth-finding process. It ensures that the parties and fact finders are provided with the best, most accurate information. It provides much needed balance in pretrial litigation. It promotes efficiency and strengthens judicial oversight of the discovery process. In short, the proposed amendment ably serves the pursuit of justice in federal criminal cases.

This proposed amendment addresses a core, recurring problem in federal criminal practice: defense counsel is forced to make critical decisions regarding whether to call a witness at trial without having any clear notion of what that witness may say. Putting the witness on the stand in this situation amounts to flying blindly with all its attendant risks. Choosing to forgo a witness because of this evidentiary black hole may result in passing over vital exculpatory information that could turn the outcome of a trial. In these circumstances, not only is a defendant placed at a detriment in the process, but the entire truth-seeking imperative of our justice system suffers immeasurably as well.

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
September 12, 2025

Many potential witnesses in a criminal case—for reasons ranging from reasonable self-protection to fear of incrimination to anxiety over involvement in the legal process—decline voluntary interviews with defense counsel or their investigators. Government agents, due to the perceived power of its law enforcement agencies (to say nothing of the threat of a grand jury subpoena) usually overcome these obstacles and speak to the witnesses. However, these interviews, given the focus of the government’s investigation or its own limitations regarding the facts, often fail to address the most pressing questions a defense counsel needs answers to. The government’s memorandum of the interview, whether detailed in an FD-302, a DEA-6 or some other similar report, almost always presents an incomplete or skewed recitation of information. Bluntly speaking, the agents ask questions and prepare reports with an eye toward confirming their investigatory assumptions which, by the time the interviews occur, usually assumes the guilt of the defendant. In the present practice, defense counsel is left with these reports of limited reliability, or no reports and no witness interviews at all, to make the critical litigation decisions of whether to call a witness at trial.

This problem is compounded by a structural imbalance in federal criminal practice. The government enjoys disparate rights in discovery from defense counsel. Often the threat of issuing a subpoena provides enough leverage to spur a reluctant witness to talk to agents. Certainly, the issuance of a subpoena legally obligates a witness to testify short of the invocation of the witness’s 5th Amendment protections. In essence, the grand jury proceeding amounts to an ex-parte deposition. The defense has no parallel tool available. Limited defense depositions do not replicate the grand jury, but they meaningfully narrow the gap in fact investigation.

Limited pretrial depositions—carefully delineated and court-supervised—directly address the aforementioned problems. They replace speculation with sworn, transcript-based information, allowing counsel to make informed decisions in the best interest of their clients and justice.

Several reasons suggest that depositions enhance the judicial process. First, the amendment adopts a presumptive limit of five depositions, with any expansion conditioned on “exceptional circumstances” and judicial approval. This limitation will minimize costs, prevent unwarranted inquiries or requests, and direct defense toward witnesses who truly matter. Five depositions allows counsel to test a defense theory, verify the accuracy of key government summaries, and make informed strategic decisions.

Second, litigation and trials, rather than increasing due to defense depositions, in fact, should result in a quicker, more efficient judicial resolution. This fact, as will be discussed in more detail later in this letter, has been borne out in states that allow defense depositions. Evidently, when both sides see the same clear record of an important witness's actual testimony, cases that should resolve short of trial will likely do so. When exculpatory facts emerge, the parties can reassess charges and consider stipulations thereby reducing significant judicial resources. When inculpatory evidence emerges from the depositions, defense counsel will have more confidence in proposing a guilty plea to a client and the client will have a much fuller and more accurate understanding of the circumstances in the case. Either way, better information will compress disputes.

Third, the amendment strengthens judicial confidence in the reliability of discovery. Courts have, in the past, recognized that 302s amount to summaries that are often inaccurate or misleading.¹ Allowing targeted depositions ensures that defense decisions rest on sworn testimony rather than mischaracterizations. This reliability improves Brady verification, sharpens impeachment, and bolsters the perceived legitimacy of outcomes.

Fourth, the amendment comes with proven safeguards to protect witnesses and promote judicial efficiency. Every deposition would require a defense motion and a judicial finding that it is "in the interest of justice." Courts can limit scope, length, format, and attendance; deny depositions on witness-safety grounds; and enforce the five-deposition cap absent exceptional circumstances. The court will maintain complete control of the deposition process throughout. These are familiar tools that judges already deploy under Rules 15, 16, and 17.

Finally, the proposal is not new in American criminal practice. States that permit defense depositions report enduring, administrable success under judicial supervision. Florida's Supreme Court, after a blue-ribbon study, held that discovery depositions are "a necessary and valuable part of our criminal justice system" that ensure "fairness and equal administration of justice," retaining them across felony practice while curbing possible overuse through judicial control.² Indiana's appellate courts describe depositions as a "routine component" of criminal practice, while preserving trial-court

¹ *United States v. Bobby Peavler*, Crim. Action No. 1:19-cr-00378-JMS-MJ (S.D. Ind.).

² *In re Amend. To Fla. Rule of Crim. Proc. 3.220 (Discovery)*, 550 So. 2d 1097, 1098 (Fla. 1989); *In re Amend. To Fla. Rule of Crim. Proc. 3.220(h)*, 668 So. 2d 951, 952 (Fla. 1995), supplemented sub nom. *In re Amend. To Fla. Rule of Crim. Proc. 3.220(h) & Fla. Rule of Juv. Proc. 8.060(d)*, 681 So. 2d 666 (Fla. 1996).

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
September 12, 2025

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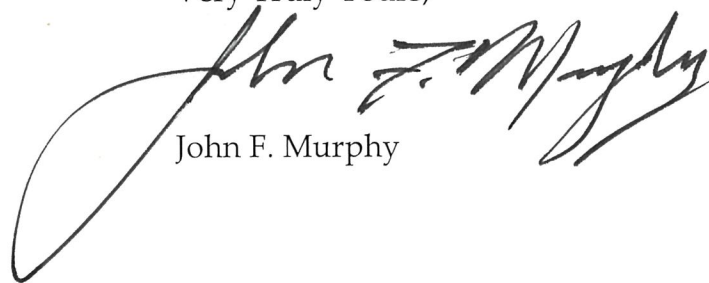
discretion to limit them.³ Other states—including Arizona, Iowa, Missouri, Nebraska, and North Dakota—likewise operate deposition frameworks that pair access with safeguards tailored to specific case needs, including court pre-approval, victim protections, and presence rules that manage costs and safety.⁴ The ongoing theme is evident: limited defense depositions increase accuracy without producing “trials by deposition,” and courts have the tools they need to manage any potential misuse.

Ultimately, the amendment honors an abiding principle of federal criminal procedure: fairness in pursuit of truth. The government retains all of its existing rights and tools, and the defense receives a narrow, court-controlled mechanism to avoid unfair and unanticipated surprises at trial, and to present a defense rooted in facts rather than predictions.

For these reasons, I respectfully urge the Committee to adopt the proposed amendment to Rule 15, authorizing a limited number of defense depositions subject to the district court’s supervision and the interests of justice. This reform will result in the levelling of the playing field. It will reduce excessive litigation, encourage earlier and more accurate resolutions, bolster judicial confidence in the discovery record, and align federal practice with successful models used in many states for years.

Thank you for your careful consideration.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "John F. Murphy", with a large, sweeping loop at the end.

John F. Murphy

/jfm

³ *Hale v. State*, 54 N.E.3d 355, 357 (Ind. 2016).

⁴ ARIZ. R. CRIM. P. 15.3.; IOWA R. CRIM. P. 2.13.; MO. SUP. CT. R. 25.12; NEB. VER. STAT. ANN. § 29-1917.; N.D. R. CRIM. P. 15.

September 13, 2025

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Amend Fed. R. Crim. P. 15

Dear Ms. Dubay:

I write in strong support of amending Federal Rule of Criminal Procedure 15 to allow discovery depositions in federal criminal cases. This is a matter of basic fairness. Right now, the system is tilted dramatically in favor of the government: prosecutors have multiple tools to secure pretrial statements—including interviews, grand jury subpoenas, and immunity orders—while defendants have virtually none. Defense counsel cannot compel a witness to speak, cannot offer immunity, and often must prepare for trial in the dark, relying on government-authored interview summaries that are neither verbatim nor sworn.

This imbalance produces a predictable result: defendants make life-altering decisions about whether to plead guilty without knowing what witnesses will actually say. And at trial, defense lawyers must often avoid asking the hard questions because they cannot be sure what the answers will be. In a system where liberty—sometimes decades of liberty—is at stake, this is unacceptable.

Florida shows that there is a better way. In Florida state courts, criminal defendants and prosecutors have the right to depose witnesses before trial. This practice has been in place for decades. It does not grind the system to a halt, and the courts have not collapsed under the supposed burden. On the contrary, depositions make the process fairer and more efficient. Trials are shorter and more focused because both sides know what the witnesses will say. Discovery disputes are minimized. Surprise testimony is rare. And when a case should resolve short of trial, both sides are able to make that decision with eyes wide open.

Importantly, prosecutors benefit from this practice too. They are able to test their witnesses in advance, understand the strengths and weaknesses of their cases, and avoid being blindsided at trial. Florida prosecutors routinely use depositions to dismiss cases that should not go forward—saving judicial resources—and to refine their trial strategy in those cases that do proceed. Far from undermining the truth-seeking function, depositions advance it.

Concerns about witness safety or intimidation are overstated. Florida courts have ample tools—including protective orders—to address legitimate concerns on a case-by-case basis. And the overwhelming majority of witnesses testify without incident. The federal courts could adopt similar safeguards to protect vulnerable witnesses where necessary, without denying defendants across the board the ability to learn what the evidence will be.

The current federal practice creates the perverse situation where parties in a routine civil case—with only money at stake—can depose key witnesses, but a criminal defendant facing years in prison cannot. That result is not just illogical, it is unjust. The states have been laboratories for reform, and they have shown that this system works.

For all of these reasons, I respectfully urge the Committee to amend Rule 15 to permit discovery depositions in federal criminal cases. This change would promote fairness, encourage efficiency, and enhance confidence in the integrity of our criminal justice system.

Respectfully,

A handwritten signature in black ink, appearing to read 'David Oscar Markus', with a stylized, flowing script.

David Oscar Markus



Jonathan A. Bont

Member

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September 16, 2025

Via Electronic Mail

RulesCommittee_Secretary@ao.uscourts.gov

Carolyn A. Dubay, 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

Dear Ms. Dubay:

I write to you in support of the proposed amendment to Rule 15 of the Federal Rules of Criminal Procedure by Messrs. Acosta and Kelly, which would allow defendants to make a motion to a federal district court to take a limited number of pretrial depositions if the district judge determines the depositions are in the interest of justice. I am a former Assistant United States Attorney in the Southern District of Indiana (2012-2017). I am currently a partner at Frost Brown Todd, LLP, where my practice is comprised of both criminal (approx. 90%) and civil litigation. In addition to retained criminal cases, I routinely accept appointments to represent indigent defendants as a member of the Southern District's Criminal Justice Act panel since 2018. I am also a member of the Board of Directors of the Indiana Federal Community Defenders.

As an attorney practicing criminal defense in Indiana, I have experienced firsthand the positive effects of pretrial depositions on the state criminal justice system. As you are aware, Indiana is one of several States that allow pretrial depositions in criminal cases. In addition to the search for truth that is the goal of our justice system, pretrial depositions serve a number of practical purposes. First, they are often the only time prior to trial that a busy prosecutor has to think deeply about the strengths and weaknesses of his or her case. Most prosecutors do not have the luxury of pondering their case file searching for potential pitfalls in their proof. They cannot prioritize re-interviewing witnesses, instead relying exclusively on often very dated interview summaries by law enforcement officers who are also busy. Pretrial depositions shift the burden of re-interviewing witnesses to the defense. The State benefits by being able to simply show up to a scheduled deposition and sit face-to-face with their witness. As well, the State has the opportunity to cross-examine their witness to develop any testimony left untouched by a crafty or unfocused defense attorney. In these and other ways, pretrial depositions benefit the prosecution.

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Carolyn A. Dubay
 September 16, 2025
 Page 2

Second, pretrial depositions often lead to plea bargaining or outright dismissals in cases that would otherwise have taken valuable court and jury time. In addition to the focused attention that pretrial depositions require of both sides, the parties naturally discuss resolving the case prior to trial when they are in the same room together without interruptions. Understandably, since the COVID-19 pandemic, many attorneys still minimize their exposure to public places like courtrooms and busy offices. The only regular contact a defense attorney may have with a prosecutor prior to trial is at a routine hearing where there is no ability for the prosecutor to discuss the case prior to the next one on his or her docket. By bringing the parties together in a quiet, exclusive setting, pretrial depositions foster effective plea discussions.

Third, pretrial depositions allow a defendant the similar opportunity to evaluate his or her case and reach a result that meets with his or her perception of justice. Interview reports of witness testimony are often met with much deserved skepticism from my federal clients who sometimes have a close personal relationship with the government's witness and feel that they would know best what that person would be likely to say at trial. When a witness will not agree to a pretrial interview from a defense attorney, as is often the case, a defendant is put in a no-win situation. Either proceed to trial and risk harsher penalty if the witness testifies consistent with the government's report or plead guilty with a reasonable doubt as to what the witness would have said under oath. This Hobson's choice is more salient in fraud cases which are often investigated and prosecuted without the use of real time surveillance. In my mind, federal fraud cases share some similarities to state battery cases. Often in a battery case there is no contemporaneous surveillance of the incident at issue, leaving the parties to grapple with emails and text messages that were sent before and after the incident. Through deposing the State's witnesses a defendant obtains a valuable face-to-face confrontation with a witness that not only informs the defendant of the strength or weakness of the State's case but also gives him or her a sense that they had a fair opportunity to evaluate all of the evidence. I believe that one of the biggest practical problems with the lack of depositions in federal criminal cases is that convicted defendants have an open window to attack the process that led to their conviction by arguing that their lawyer did not interview a particular witness or that it was later discovered that a particular interview report did not accurately recount a witness' testimony, which had it been discovered before trial would have affected the outcome of the case. By providing a process to afford defense counsel an opportunity to ask the Court to grant defense depositions, the proposed amendment to Rule 15 would also lead to more efficient post-conviction proceedings in federal court.

Carolyn A. Dubay
September 16, 2025
Page 3

I cannot think of a case that I have heard of where the practice of conducting pretrial depositions in a state criminal case has been abused. To the contrary, I have been involved in several cases (and am aware of scores more from my colleagues) where pretrial depositions have resulted in guilty pleas or dismissals of charges. Please let me know if I can provide any additional information that would be helpful to your consideration of the proposed amendment to Rule 15.

Sincerely,

FROST BROWN TODD LLC

A handwritten signature in black ink, appearing to read 'J. A. Bont'.

Jonathan A. Bont

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Frost Brown Todd LLP | frostbrowntodd.com

September 26, 2025

PRIVILEGED & CONFIDENTIAL

BY EMAIL

Carolyn A. Dubay
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300 Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Amend Fed. R. Crim. P. 15

Dear Ms. Dubay:

We write in support of the proposal to amend Federal Rule of Criminal Procedure 15 to allow for broader use of depositions. Our firm includes lawyers with widely varied backgrounds in the federal criminal justice system, including former high-ranking officials in the Department of Justice, line and supervisory federal prosecutors, federal public defenders, and members of the Criminal Justice Act Panel. We all agree that greater use of depositions would enhance fairness and accuracy in criminal cases.

Last year, we represented a client in a civil securities fraud case brought by the Securities and Exchange Commission in the Southern District of New York. The client had a parallel criminal securities fraud case in the SDNY arising out of the same facts. Unusually, the SEC case proceeded to trial before the criminal case because the client was awaiting extradition. As with all civil cases, the SEC trial occurred after robust pretrial discovery, including depositions. The witnesses who were deposed and testified at trial were the same witnesses who formed the core of the criminal charges. Several months after the civil trial concluded, the client was extradited, and the criminal case began in earnest. But, of course, in that pretrial setting, discovery was limited to the categories of information set forth in Rule 16. The scenario highlighted the seemingly upside-down nature of the rules: when the case was about money and injunctive remedies, discovery was expansive and afforded the parties the ability to engage in detailed fact-finding to minimize surprise at trial; when the case was about liberty, there were few such safeguards.

As it happened, the extensive civil discovery led to a more efficient outcome in the criminal case. We were able to counsel our client with an early and genuine understanding of the facts, rather than making guesses in the dark or waiting until the eve of trial to make difficult decisions. The prosecutors benefited as well: they knew the strengths and weaknesses of the case far better

than usual. The case was resolved with a plea agreement well before the anticipated trial date in large part because the parties were both fully informed about the facts.

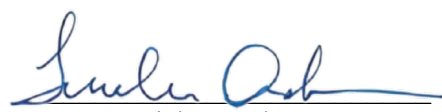
We are aware of the common justifications for not allowing depositions, including efficiency, cost-savings, and witness safety. None should be a barrier to improving Rule 15. As an initial matter, many states allow for depositions in criminal cases, and they have found sensible ways to address those concerns. Although depositions require some additional time and resources at the front end of a case, they can greatly narrow issues that may otherwise require extensive investigation or pretrial litigation and streamline courtroom proceedings in the event of a trial. With respect to witness safety, the many safeguards that exist in other areas of discovery could be available for depositions, including protective orders and the ability for courts to restrict who may be deposed or the conditions of the deposition. Indeed, in our experience, passions often run higher in civil cases, and the concerns about harassment or safety are frequently less present in the criminal context. In short, there is no reason to believe that depositions are less workable in criminal cases than civil.

Our support for depositions is not limited to fraud cases. Indeed, cases involving drugs, guns, immigration violations and other offenses that form the bulk of the federal caseload, typically come with far less discovery than fraud cases and only magnify the need for greater pretrial transparency. And oftentimes the key witnesses in those cases are law enforcement agents and officers for whom concerns that might arise with lay witnesses are almost non-existent. Finally, as with the current system, allowing for additional discovery does not mean the parties will always exercise their rights. There will remain a host of incentives for the parties to reach early dispositions without engaging in depositions. But for the instances where it makes sense to engage in more extensive fact-finding, it ought to be permitted.

We understand the committee is in the early stages of considering the proposal. For that reason, we will not offer views here about the details of what the rule might say or what limitations might be placed on conducting depositions. Suffice it to say, there are many ways to address the concerns that have typically been raised. For now, we offer our robust support for serious consideration of the proposal. Many states have long provided for depositions, and those systems have worked quite well.

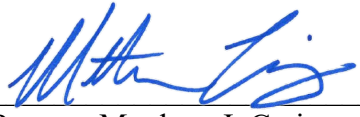
Thank you for considering our views. We would be happy to provide additional input as the process moves forward.

Respectfully submitted,

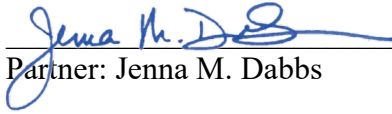
By: 
Partner: Trisha Anderson

Hecker Fink LLP

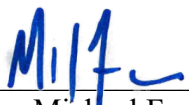
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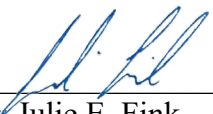
By: 
 Partner: Matthew J. Craig

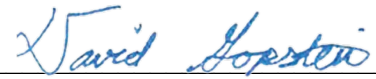
By: 
 Partner: Shawn G. Crowley

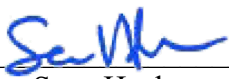
By: 
 Partner: Jenna M. Dabbs

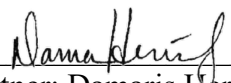
By: 
 Partner: Kate L. Doniger

By: 
 Partner: Michael Ferrara

By: 
 Partner: Julie E. Fink

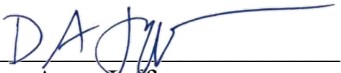
By: 
 Partner: David Gopstein

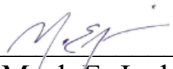
By: 
 Partner: Sean Hecker

By: 
 Partner: Damaris Hernández

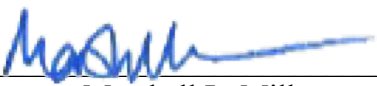
Hecker Fink LLP

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By: 
Partner: Amy Jeffress

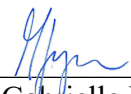
By: 
Partner: Mack E. Jenkins

By: 
Partner: Joshua Matz

By: 
Partner: Marshall L. Miller

By: 
Partner: David Patton

By: 
Partner: John C. Quinn

By: 
Partner: Gabrielle E. Tenzer

October 7, 2025

Carolyn A. Dubay, 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 to RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Amend Federal Rule of Criminal Procedure 15 Rule Suggestion 25-CR-B

Dear Ms. Dubay:

I write to most respectfully support the pending Proposal to Amend Federal Rule of Criminal Procedure 15 to allow criminal defendants, upon motion and in the interests of justice, to take the depositions of prospective witnesses in criminal cases in order to prepare for trial; the Proposal would allow for more than five such depositions only under “exceptional circumstances.” I understand that this Proposal has been placed on the Study Agenda of the Advisory Committee on Criminal Rules and will next be taken up by the Committee on November 6, 2025. I here provide this brief letter to set forth the basis for my support of this appropriate, and indeed wise, Proposal.

First, by way of very brief introduction, I am the long-time Chair and current Co-Chair of the White Collar and Investigations of Gibbons P.C., where I am headquartered in Newark, New Jersey. I am also the long-time Director of the John J. Gibbons Fellowship in Public Interest & Constitutional Law at Gibbons, which has, for the last 35 years, litigated cutting-edge cases including in the criminal arena and more particularly, including cases that presented important issues regarding discovery in criminal cases. Before joining Gibbons, I was an Assistant Federal Public Defender for the District of New Jersey for five years, after clerking in that Court. I have, among many other activities, been President of the Association of Criminal Defense Lawyers of New Jersey and of the Association of the Federal Bar of New Jersey, and Co-Chair of the Criminal Litigation Committee of the American Bar Association, Section on Litigation. My firm bio can be found here. [Lawrence S. Lustberg](#) | [Professionals](#) | [Gibbons P.C.](#)

Second, I have read the very thorough suggestion submitted by Michael Kelly and Sergio Acosta (“the Rule Suggestion”), upon which the Committee acted in placing this matter on the Study Agenda, as well as other correspondence to the Committee from extremely distinguished members of the bar, all supporting that suggestion. These submissions eloquently and effectively set forth the benefits of the proposed amendment to Rule 15 for the system of justice and helpfully document the experience with such depositions in other states.

Most fundamentally and significantly, as these others have written, the proposed Amendment would serve to level the playing field that is the federal criminal justice system. That system has, for some time, been under attack, and is accused by both sides of the political spectrum of being “weaponized” for political purposes. Such allegations gain at least some credibility when the system is one-sided, as ours is when it comes to discovery—indeed, more so when compared to the extremely robust discovery available in civil cases under Federal Rules of Civil Procedure 26 through 37, allowing as they do, not only depositions, Fed. R. Civ. P. 27-32, but also interrogatories, Fed. R. Civ. P. 33, requests for production of documents, Fed. R. Civ. P. 34, physical or mental examinations of parties, Fed. R. Civ. P. 35, and requests for admission. Fed. R. Civ. P. 36. Courts and commentators have, not surprisingly, frequently asked how it could be that a system provides for such extensive discovery—and the resulting pretrial preparation—in civil cases when so little is allowed in criminal cases.

And lest there be any doubt about it, discovery in criminal cases is, as the Committee knows, very limited indeed.¹ Federal Rule of Criminal Procedure 16 allows for only very limited discovery, including the defendant’s statement, Fed. R. Crim. P. 16(a)(1)(A)-(C); the defendant’s prior record, Fed. R. Crim. P. 16(a)(1)(D); certain documents, including documents obtained from the defendant, within the Government’s possession custody or control, Fed. R. Crim. P. 16(a)(1)(E); reports of any examinations or tests, Fed. R. Crim. P. 16(a)(1)(f); and expert disclosures. Fed. R. Crim. P. 16(a)(1)(G). Notably, the Rule specifically provides that reports of Government agents, or of witness statements are not provided in discovery. Fed. R. Crim. P. 16(a)(2). Meanwhile, Federal Rule of Criminal Procedure 17 allows for the pretrial production of subpoenaed materials exclusively with leave of the Court, which is granted only upon a demanding showing that a subpoena is targeted at specifically identified evidence, and that a defendant is unable to properly prepare for trial without those documents. *United States v. Nixon*, 418 U.S. 683 (1974). Bills of particulars, under Federal Rule of Criminal Procedure 7(f), are almost always denied, even when they should not be.² And, most importantly, unlike the procedures in many states (including my home state of New Jersey, *see* N.J.; Ct. R. 3:13(b)(1)(G)-(H), where defendants are entitled to “open file discovery”) in federal cases, witness statements do not have to be provided until after a witness testifies on direct examination, *see* 18 U.S.C. § 3500.³ Though the Government—often at the direction of the Court—provides this “Jencks Act”

¹ *See, e.g., Degen v. United States*, 517 U.S. 820, 825-826 (1996) (noting that a criminal defendant is entitled to limited discovery in comparison to a party in a civil case); *United States v. Pouncy*, No. 23-20262, 2025 U.S. Dist. LEXIS 141922, at *1 (E.D. Mich. July 24, 2025) (“Discovery in criminal cases is more limited than the general discovery that is available to litigants in civil cases.”); *United States v. Sampson*, 898 F.3d 270, 281 n.8 (2d Cir. 2018) (elaborating the “numerous rationales for more calibrated discovery in federal criminal, as opposed to civil, cases); *Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002) (emphasizing the limits on criminal discovery when compared to civil cases).

² Abramowitz & Sack, *The Importance of ‘Particulars’ in Criminal Fraud Cases*, N.Y. Law J. (March 3, 2020) (noting that courts “generally do not order bills of particulars” in contrast to, for example, civil fraud cases, in which plaintiffs must plead fraud with particularity under Fed. R. Civ. P. 9(b)).

³ Moreover, the definition of a “statement” for purposes of the statute is very narrow and does not, for example, include law enforcement memoranda, *see* 18 U.S.C. § 3500 (e), such as FBI 302s, summarizing what a witness said. *See, e.g., United States v. Price*, 542 F.3d 617, 621 (8th Cir. 2008) (holding that absent evidence that the witnesses “approved or adopted” the FBI 302s, “these documents are not discoverable under . . . the Jencks Act”); *United*

Carolyn A. Dubay

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material shortly before trial,⁴ that would not come close to accomplishing what the proposed Amendment to Rule 15 would in terms of providing meaningful discovery to the defense in criminal cases.

Nor is the benefit of this proposed rule limited to defendants. Federal prosecutors, too, often have little visibility into the defense case that they will face until trial.⁵ But given that the Government bears the burden of proving guilt beyond a reasonable doubt, and the lack of any obligation by the defense to produce any defense evidence or put on any defense case,⁶ the impact of the meager discovery provided in the Federal Rules of Criminal Procedure indisputably falls on the defense. After all, the overwhelming majority of any criminal case is always adduced by the Government, which knows what it has, while the defense does not. But beyond at least beginning to redress the disproportionality, and the unfairness which it engenders, the Proposed Amendment to Rule 15 also portends tremendous benefits for the system of justice as a whole.

States v. Jordan, 316 F.3d 1215, 1255 (11th Cir. 2003) (holding that FBI 302s “are not Jencks Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness”).

⁴ See Baldrate, *The Department of Justice’s New Guidance on the Production of Exculpatory and Impeachment Evidence*, Bloomberg Law Reports, at 3, 8-9 (2010) ([Baldrate-DOJNewGuidanceontheProdofExculpatoryandImpeachmentEvidence.pdf](#)) (explaining the requirements of the Jencks Act and noting that “the production of Jencks material varies widely from jurisdiction to jurisdiction, with some jurisdictions requiring the turnover of material months before trial and others requiring the disclosure only at midnight on the day a witness is to testify”). Multiple Circuits have also held that the Jencks Act timetable also applies to exculpatory material that the Government is required to produce under *Brady v. Maryland*, 373 U.S. 83 (1963). See *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979) (“When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control.”); *United States v. Scott*, 524 F.2d 465, 467 (5th Cir. 1975) (holding that prosecutor’s failure to disclose a witness’s exculpatory statement before trial did not violate *Brady*, because such evidence falls under the ambit of the Jencks Act, and “the rule announced in *Brady* . . . was not intended to override the mandate of the Jencks Act”). Specifically, this timetable almost always applies to exculpatory information that falls into the category of impeachment material under *Giglio v. United States*, 405 U.S. 150 (1972). That is, while that information is technically *Brady* information, *United States v. Bagley*, 473 U.S. 667, 679 (1985) (holding that impeachment material qualifies as *Brady* material), Courts, including the Third Circuit where I practice, have held that this information can be turned over on the eve of trial. *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983); *United States v. Pflaumer*, 774 F.2d 1224 (3d Cir. 1985). See also *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988) (“If impeachment evidence is within the ambit of the Jencks Act, then the express provisions of the Jencks Act control discovery of that kind of evidence.”).

⁵ It is, at least in part, for this reason, that the Government, even when under a Court Order to do so, see, e.g., *United States District Court for the District of Columbia Standing Brady Order* ([StandingBradyOrder_November2017.pdf](#)), often fails to provide *Brady* information prior to trial (if it does so at all) because it might not, until it is apprised of the defense, be able to ascertain what is exculpatory.

⁶ *Nelson v. Colorado*, 581 U.S. 128, 135-36 (2017) (“Axiomatic and elementary, the presumption of innocence lies at the foundation of our criminal law.”) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)); See also Third Cir. Model Jury Instruction 3.06 (“The presumption of innocence means that [a defendant] has no burden or obligation to present any evidence at all or to prove that [he or she] is not guilty. The burden or obligation of proof is on the government to prove that [the defendant] is guilty and this burden stays with the government throughout the trial.”); 8th Cir. Model Jury Instruction § 3:05; 1st Cir. Model Jury Instruction § 3:02, cf., *Griffin v. California*, 380 U.S. 609 (1965) (Government cannot comment on a defendant’s decision not to testify).

First, although, as noted above, the Amendments would level the playing field as between the prosecution and the defense, the truth is that it would provide very significant benefits to the Government as well as defendants: Assistant U.S. Attorneys would be provided with otherwise unavailable insight into the effectiveness and credibility of their witnesses, whose live testimony they would have the opportunity to test in the crucible of cross-examination—"the greatest legal engine ever invented for the discovery of truth"⁷—but without the downside of having this occur for the first time in front of a jury. Indeed, prosecutors would gain the truly extraordinary opportunity to get a preview of not only defense counsel's examination of Government witnesses, but inevitably, the defense approach to the case as a whole.

The result, then, for both sides, is to gain previously unattainable insight in the strengths and weakness of the litigation positions. And, as others have pointed out, that insight holds the potential for—indeed, the inevitability of—the disposition of cases without the necessity of trial, which has obvious benefits for a system of justice in which caseloads are often unmanageable for a judiciary that it already overextended.⁸ Even more profoundly, the benefits in terms of promoting the legitimacy of a system of criminal justice that is, as polls show, more disparaged and less respected than ever before in American history,⁹ are truly invaluable for every participant—judges, attorneys, litigants and witnesses—in that system. Criticism that the system is unfair, allowing for "trial by ambush," and can accordingly be used for political purposes, will be diminished as a result of more robust, and less one-sided, pretrial disclosure. Due process challenges, based upon the kind of unfairness that sometimes is revealed in post-trial *Brady* motions,¹⁰ will be fewer and, given *Brady*'s materiality standard,¹¹ less likely to succeed, thus

⁷ *California v. Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 *Evidence* § 1367, at 29 (3d ed., 1940)).

⁸ U.S. Courts, *Federal Judicial Caseload Statistics 2024*, <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024> (finding that there were 66,035 criminal filings in U.S. district courts in 2024).

⁹ Gallup, *Americans Pass Judgment on Their Courts*. Dec. 16, 2024 (<https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx>) (noting that Americans' confidence in the U.S. judicial system dropped to a record-low 35% in 2024).

¹⁰ See, e.g., *United States v. Rozier*, 746 F. Supp. 3d 569 (N.D. Ind. 2024) (holding that Government's failure to disclose interview of codefendant that contradicted testimony and provided additional details of alleged scheme violated *Brady* obligations, and granting new trial); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149 (2d Cir. 2008) (finding that the Government suppressed material evidence by withholding documents directly relevant to defendant's intent to bribe); *Spicer v. Roxbury Correctional Inst.*, 194 F.3d 547 (4th Cir. 1999) (prosecution failed to disclose witness's prior inconsistent statement that he did not see the defendant); *Schledwitz v. United States*, 169 F.3d 1003 (6th Cir. 1999) (Government witness portrayed as neutral and disinterested had actually been investigating defendant for years); *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (failure to disclose "continuous stream of unlawful favors" given by Government to witness).

¹¹ Favorable evidence is material, and constitutional error results from its suppression by the Government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

serving legitimate interests in finality.¹² And even guilty pleas will be much less subject to challenge—for example, on the basis of ineffective assistance of counsel¹³—if counsel is, as a result of such a process, more fully apprised of the evidence against the defendant; arguments that pleas were coerced would ring much more hollow.

Nor, as others have pointed out, would the Proposed Amendment be so limitless in its application that it would be subject to abuse. By its terms, the Proposed Amendment would allow depositions only upon motion to the Court, which would grant the motion only where justified by the interests of justice. As the Rule Amendment suggestion makes clear, *see* Rule Suggestion at 16, those interests of justice would not be served and a motion would be denied, where for example, identifying and deposing a witness would pose a potential danger to witnesses or to the administration of justice; this, of course, is consistent with existing jurisprudence,¹⁴ as well as with Court’s well-established authority to enter appropriate protective orders to address these, or other appropriate concerns.¹⁵ And, in any event, as with all discovery, depositions would be limited to non-privileged information related to the case.¹⁶ Finally, the proposed Amendment would limit depositions, other than in “exceptional circumstances,” to five (5), further preventing any abuse.

Courts, of course, are more than capable of assuring that any depositions proceed in an appropriate fashion; they have done so for years under Federal Rule of Criminal Procedure as it currently stands, albeit only “in order to preserve testimony for trial,” which occurs primarily in cases, where—whether for health reasons or otherwise—a witness is not otherwise available for trial.¹⁷ Moreover, as the Committee knows from both the Rule Suggestion itself and several of the letters supporting it, a number of states have provisions similar to the Proposed Amendment, whereby depositions may take place, including Florida, Indiana, Arizona, Iowa, Missouri, Nebraska, North Dakota and Vermont. *See* Rule Suggestion at 17-21. *See also* Letter of John D.

¹² *Shinn v. Ramirez*, 596 U.S. 366, 391 (2022) (emphasizing the interest in “finality that is essential to both the retributive and deterrent functions of criminal law”); *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984) (noting the “profound importance of finality in criminal proceedings”).

¹³ *See generally Missouri v. Frye*, 566 U.S. 134, 144 (2012) (holding that the Sixth Amendment right to effective assistance of counsel applies to the entry of a guilty plea).

¹⁴ *See, e.g., Roviato v. United States*, 353 U.S. 53 (1957) (holding that the Government must disclose an informant’s identity if it is essential to a fair defense unless doing so would endanger the informant).

¹⁵ Fed. R. Crim. P. 16(d)(1) (empowering courts to issue protective orders and “deny, restrict, or defer discovery or inspection”); *see also United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) (a court’s ability to enter a protective order derives from its inherent Article III judicial power).

¹⁶ *See, e.g., Fed. R. Crim. P. 26.2(c); 18 U.S.C. § 3500(b)-(c); Fed. R. Evid. 401.*

¹⁷ *See, e.g., United States v. Carter*, 801 F.3d 1199 (9th Cir. 2018) (Rule 15 depositions appropriate where witness was pregnant and could not travel for defendant’s trial); *United States v. Ramos*, 45 F.3d 1519 (11th Cir. 1995) (reversing denial of Rule 15 motion to depose otherwise-unavailable witness in Columbia possessing material evidence); *United States v. Keithan*, 751 F.2d 9 (1st Cir. 1984) (affirming grant of Government’s Rule 15 motion when witness was physically unable to leave their home);.

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Cline (Sept. 2, 2025) (discussing experience in New Mexico where such depositions are permitted); Letter of David Oscar Markus (September 13, 2025) (discussing experience in Florida); Letter of Jonathan A. Bont (September 16 2025) (discussing experience in Indiana). In each of these jurisdictions, not only has there been no evidence of abuse of the process, but the benefits of it (discussed above), have been consistently realized—especially the efficiencies realized by the parties being able to evaluate the strength of their cases, facilitating plea negotiations and ultimately the resolutions of the prosecutions at issue.

Finally, pretrial depositions are today both more practicable and more necessary than ever. They are more practicable because in the wake of the COVID epidemic, more and more depositions whether in civil or in criminal cases take place remotely, using such platforms as Zoom, Teams and Webex, for example. Practitioners are accustomed to taking and defending such depositions and occur more smoothly and with far less inconvenience than ever.¹⁸ The criminal justice system, as well as its civil counterpart can and should take advantage of this technological progress and of lawyers’ facility in proceeding remotely. In sum, depositions in criminal cases ought to occur not only in the interests of fairness but because they are less burdensome than ever.

And they are also more necessary than ever in a world that is ever smaller, and in which federal criminal cases quite frequently involve issues and witnesses from all around the world who might not be willing or able to travel to the United States and to whom access might otherwise be denied without the enormous delay that is almost always occasioned by the use of such problem-plagued and time-consuming alternatives as the use of letters rogatory.¹⁹

The Proposed Amendment, then, is both fair and practical, and would be the unusual provision that promotes both justice and efficiency. We know from experience that it would be workable even as it enhanced the public image of a system of justice that is, these days, often under attack from all sides. Because I am proud of that system of justice, in which I have great faith and in which I have been privileged to participate, I support it this Proposed Amendment and am pleased and honored to do so. And I look forward to criminal practice under rules that allow the kind of transparency and fairness that this Proposed Amendment engender when, as I hope occurs sooner rather than later, it is the law of the land.

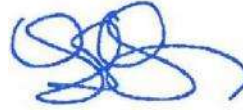
¹⁸ Of course, any inconvenience is exacerbated by the fact that in criminal cases witnesses are subject to nationwide service of subpoenas, Fed. R. Crim. P. 17(e)(1), without the 100-mile limit that reduces such far flung witnesses, which is the law with regard to subpoenas in civil cases, Fed. R. Civ. P. 45(c)(1)(A).

¹⁹ See Rebecca Wexler, *Life, Liberty, and Data Privacy: The Global CLOUD, the Criminally Accused, and Executive Versus Judicial Compulsory Process Powers*, 101 Tex. L. Rev. 1341, 1343, 1361-62 (2023) (“Most treaties for cross-border evidence gathering are exclusive to law enforcement . . . [D]efense investigators are left to use the unreliable, inefficient, and discretionary letters-rogatory process.”). As Professor Wexler notes, this same problem may not present itself to prosecutors, who can avail themselves of Mutual Legal Assistance Treaties (MLATs) with many countries. *Id.*

Carolyn A. Dubay
October 7, 2025
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Thank you for your kind consideration of this submission.

Sincerely yours,

A handwritten signature in blue ink, appearing to be 'LSL' with a stylized flourish extending to the right.

Lawrence S. Lustberg

LSL/ch

TAB 12

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: New Suggestion: “Broadcasting” to Individuals and Good-Cause Exceptions (Rule 53) ([25-CR-I](#))

DATE: October 7, 2025

Judge Edmond Chang has written to request consideration of amendments to Rule 53’s blanket prohibition of broadcasting from the courtroom. He suggest two possible amendments:

- (1) a clarification of Rule 53 to make explicit that the “broadcasting” bar covers transmission to single individuals, not just to the general public; and
- (2) good-cause exceptions that (a) would permit broadcasting to “victims,” as defined in 18 U.S.C. 3771(e)(2), and possibly permit remote participation by victims; and (b) would permit broadcasting to, and remote participation by, third-party custodians at bail hearings.

In 2024 the Rule 53 Subcommittee completed a thorough review of the rule, which considered these issues within a broader framework, and it recommended no change to the rule. At the fall 2024 meeting, the Advisory Committee accepted the Subcommittee’s recommendation that no change be made in Rule 53. The [reporters’ memorandum from the fall 2024 agenda book](#) describes the Subcommittee’s work and its recommendations.

With regard to the specific issue of broadcasting to victims, we note that Congress has recently acted by passing the Lockerbie Victims Access Act, Pub. L. No. 118-37, 138 Stat. 11 (2024). For a discussion of the Act, and the various safeguards the court imposed to provide for secure victim access, see [United States v. Al-Marimi](#), 761 F. Supp. 3d 16 (D. D.C. 2024).

Although there is no strict rule precluding reconsideration only one year after the Committee has declined to pursue a similar proposal, the Committee’s resources are limited. Accordingly, we recommend that the Committee not appoint a subcommittee or undertake a full review of Judge Chang’s proposals at this time.

Hon. Edmond Chang (25-CR-I)

August 28, 2025

Hon. Edmond Chang asked the Advisory Committee in a future amendment cycle to consider (1) a clarification to Rule 53 making explicit that the “broadcasting” bar covers transmission to single individuals, not just to the general public; and (2) at the same time, however, consider good-cause exceptions that (a) would permit broadcasting to “victims,” as defined in 18 U.S.C. 3771(e)(2), and possibly permit remote participation by victims; and (b) would permit broadcasting to, and remote participation by, third-party custodians at bail hearings.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Broadcasting of criminal proceedings (Rule 53) (23-CR-F)

DATE: October 9, 2024

I. Introduction

A coalition of media organizations¹ requested that Rule 53 be revised to permit the broadcasting of criminal proceedings or to at least create an “extraordinary case” exception to the prohibition on broadcasting. Although its submission focused on the importance of broadcasting the “fast-approaching trial in *United States v. Donald J. Trump*, 23-cr-257-TSC (D.D.C.),” the coalition recognized it might not be possible to revise the rule before that trial. Accordingly, it asked “that every effort be made to change the rule as quickly as possible . . . so that a revised rule is in place for the next trial of such significant public interest and concern.”

Judge Dever appointed a subcommittee, which is now composed of Judge Mosman (chair),² Judge Burgess, Judge Harvey, Ms. Mariano, and Ms. Tessier representing the Department of Justice.³

Prior to the Advisory Committee’s April meeting, the Subcommittee reviewed materials detailing the history of Rule 53, including all prior efforts to amend the rule, and it developed a list of issues on which it sought more information. Members expressed great interest in what is happening in the states, including rules and policies now in use, and particularly any studies about the effects of the state procedures allowing broadcasting—especially experience broadcasting in criminal proceedings.

A second topic of concern was coordination with other relevant committees, particularly the Committee on Court Administration and Court Management (CACM). In September 2023, CACM recommended—and the Judicial Conference adopted—a policy permitting audio broadcasting of proceedings in civil and bankruptcy cases when testimony is not being taken. Members expressed interest in learning more about the information CACM relied upon.

¹ The media organizations are Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting, Inc., Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company (operator of Court TV), Los Angeles Times Communications LLC, National Association of Broadcasters, National Cable Satellite Corporation d/b/a C-SPAN, National Press Photographers Association, News/Media Alliance, The New York Times Company, POLITICO LLC, Radio Television Digital News Association, Society of Professional Journalists, TEGNA Inc., Univision Networks & Studios, Inc., and WP Company LLC d/b/a The Washington Post.

² Judge Robert Conrad was the original chair, but he resigned from the Advisory Committee when he was appointed Director of the Administrative Office of U.S. Courts.

³ Jonathan Wroblewski represented the Department of Justice on this subcommittee until his retirement from the Department.

Finally, members discussed the importance of distinguishing remote participation in proceedings by the participants (e.g., the parties and their counsel, witnesses, and victims) from public access. They agreed that any broadening of remote participation (such as that authorized during the pandemic by the CARES Act) may raise different issues than broadening remote public access.

The purpose of this memorandum is to describe the material gathered for the Subcommittee, the Subcommittee's deliberations, and its recommendation.

II. Information gathered by the Subcommittee

A. The expansion of broadcasting under JCUS Policy 420

Judge Dever and the reporters spoke at length with CACM's chair, Judge Gregory F. Van Tatenhove, about the research and the process that led to the expansion of broadcasting under Policy 420. A few key points emerged from the discussion.

First, CACM sharply distinguishes between remote public access by audio or video broadcasting, and remote participation by the parties, counsel, or witnesses. JCUS Policy 420 concerns only remote public access, not remote participation. That dovetails with the discussion in our Subcommittee's March 18 call, in which Judge Dever and other members stressed the importance of that distinction. The proposal to amend Rule 53 concerns only public access, not remote participation.

Second, in light of the absolute prohibition of all broadcasting in Rule 53, CACM did not consider or discuss the advisability of making any change in criminal proceedings.

Third, Judge Van Tatenhove explained that CACM made a policy decision to make a small incremental expansion of public access—giving the courts discretion to permit audio only, and only in civil and bankruptcy proceedings not involving testimony. CACM currently has no plans for further expansion.

B. State experience

Most states permit some form of broadcasting in some judicial proceedings, though the details vary greatly from state to state. Ms. Hooper and her colleagues at the FJC provided the Subcommittee with a comprehensive review of state law and a summary of the academic commentary on the issues raised by providing remote public access to criminal proceedings. Their report is undergoing an internal review process before it can be placed on the public record. A link will be provided when the public document is available.

William Raftery at the National Center for State Courts, who has worked on numerous reports and publications on the topic over the past several years, was especially helpful in tracking down information on the experience of state courts. Mr. Raftery is very knowledgeable about current developments. He advised the reporters that there is very little research into the actual performance of the widely varying state policies on remote public access in criminal

cases, or effort to collect the experiences of judges, attorneys, victims, or the public. The one resource he recommended was the recent work in Minnesota, which had a fairly restrictive court rule regulating the use of remote public access in criminal proceedings. There, the Supreme Court Advisory Committee on Rules of Criminal Procedure conducted an investigation and wrote a report, leading to some amendments to the state's court rule. These informative materials follow this memorandum.

- **Minnesota Supreme Court Orders ADM10-8049 & ADM09-8009 and dissent;**
- **Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure, Report and Proposed Amendment.**

Unfortunately, as the FJC's literature review and the materials gathered by the Minnesota Supreme Court Advisory Committee make clear, there has been very little empirical research evaluating the effect of expanded remote public access. A research memo provided to the Minnesota Advisory Committee concluded:

The methodology of most data on how cameras in the courtroom impact judicial outcomes is flawed. First, the short length of the studies (which generally range from one to three years), and diversity of cases makes it difficult to obtain a representative sample, collect accurate data, and generalize and apply the results. Furthermore, the evaluation design of most studies, self-reporting questionnaires, is defective. As frequently opined by social scientists, self-reporting questionnaires are highly unreliable. Most of the "research" has not been reproduced and is limited in application to that specific trial. There is much room for improvement in the scientific data surrounding cameras in the courtroom.

* * * * *

Current data on the impact of cameras in the courtroom is limited. The studies that exist suffer from low sample sizes, self-reporting bias, and the inability to be replicated. Therefore, the data is generally not applicable to populations other than the exact population that was studied. However, the data is still useful at offering a limited perspective in how cameras in the courtroom impact trials. Most of the data shows that very few negative impacts are realized when cameras are in the courtroom. While further research is necessary, the limited data supports the move towards allowing cameras in the courtroom. However, anecdotal evidence from other jurisdictions may also support a cautionary approach to implementing cameras in the courtroom.

Memorandum to Justice Thissen from Kaitlin Yira, Cameras in the Courtroom Studies (Nov. 1, 2021) (footnote omitted).

III. The Subcommittee's deliberations and recommendation

Subcommittee members stressed the need for a cautious approach to broadcasting in criminal cases. Members emphasized a variety of concerns about broadcasting in criminal cases, and they noted that the very limited empirical research to date did not dispel their concerns.

In general, members thought cameras would have a negative effect on witnesses and victims in criminal cases. One member described his experience in prosecuting cases in Indian Country, where he found that witnesses and victims in cases involving sexual abuse or murders were terrified. They would certainly not want to testify if the case would be broadcast. The member noted this was not unique to these kinds of prosecutions. A bank teller in a robbery case might feel the same way. Indeed, in a recent RICO prosecution it had been necessary to use contempt to compel a FedEx driver to testify about making a delivery. Jurors are afraid of gangs and have heightened fear in certain kinds of cases. And criminal cases often involve confidential informants, whose identity and the assistance provided should not be broadcast. Moreover, even witnesses who do testify may restrict what they are willing to say if they know their testimony will be broadcast.

Another member also expressed concern about what would happen to information that had been broadcast. Where would it remain after the proceedings concluded? For example, it might be possible to capture the image of a person involved in a criminal case and create a narrative around it. This might have very negative consequences for that person.

Referencing comments from the defense bar in the Minnesota report, a member commented that cameras in the courtroom could be very dangerous for lawyers and defense witnesses in criminal cases. She commented that although the FJC had reviewed the limited information now available, she was still concerned about what is not yet known.

Although some Subcommittee members expressed interest in a pilot study of limited broadcasting, limited broadcasting in certain districts would conflict with Rule 53's complete prohibition of broadcasting. Ms. Tessier (who participated in the Subcommittee's discussions but stated that the Department of Justice had not yet taken an official policy position on any of these issues) suggested that it might be helpful to have a new general rule allowing for pilot studies.⁴

The Subcommittee discussed the feasibility of extending JCUS Policy 420, which allows audio broadcasting of proceedings in civil and bankruptcy cases when testimony is not being taken, to criminal cases. Members noted that the policy would have to be modified for criminal cases, because even proceedings that do not involve taking testimony present many of the same concerns as those in which testimony is taken. These include, for example, proffers of the testimony a witness may give, and sentencing proceedings, which frequently include discussions of a defendant's cooperation.

⁴ Ms. Tessier also commented that it would be useful to clarify in the Rule the difference between general broadcasting and closed-circuit access in overflow onsite courtrooms and remote closed-circuit access for victims. Unfortunately, because Committee Notes can be amended only when a rule's text is amended, it would not be possible to make this clarification by amending only the note.

Members also noted that JCUS Policy 420 is very new, and it would be important to study the issues raised by its implementation before considering adapting it to criminal proceedings. If there is continued interest in considering some form of broadcasting in criminal cases, the Committee could return to the issue after enough time has passed to allow a formal review of the impact of JCUS Policy 420, including questions such as who seeks to listen live, in what types of cases, whether there have been capacity issues, and whether there have been issues concerning the recording and rebroadcasting of audio from proceedings.

The Subcommittee recommends no change in Rule 53 at the present time.

over to get to trial.” *Abbas*, 783 F.3d at 1334. Accordingly, in contrast to Mr. Browder’s contention, the Court concludes that *American Studies* does not render *Abbas* and *Tah* abrogated law and declines to stray from the precedent they set. Mr. Browder’s special motion to dismiss is denied.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Mr. Browder’s Motion to Dismiss for Lack of Personal Jurisdiction Under Rule 12(b)(2), ECF No. 55; **DENIES** Mr. Browder’s Motion to Dismiss Under the Anti-SLAPP Act, ECF No. 56; and **DENIES** Mr. Akhmetshin’s request for jurisdictional discovery. The Court **DISMISSES** this case **WITHOUT PREJUDICE**. A separate Order accompanies this Memorandum Opinion.

SO ORDERED.



UNITED STATES of America

v.

**Abu Agila Mohammad Mas’ud Kheir
AL-MARIMI, Defendant.**

Criminal No. 1:22-cr-392 (DLF)

United States District Court,
District of Columbia.

Signed December 23, 2024

Background: Defendant was charged with two counts of destruction of an aircraft resulting in death and one count of destruction of a vehicle used in foreign commerce by means of an explosive, resulting in death, in connection with 1988

bombing of Pan Am Flight 103 over Lockerbie, Scotland. After court denied government’s motion under Crime Victims’ Rights Act to establish call-in telephone line so that victims could listen to proceedings in real time, Congress passed Lockerbie Victims Access Act, and government moved under Act to allow victims remote video and telephonic access to court proceedings.

Holdings: The District Court, Dabney L. Friedrich, J., held that:

- (1) court would permit non-evidentiary pretrial matters to be transmitted to victims over internet and approved telephone lines;
- (2) court would not permit transmission of live video and audio feeds of evidentiary hearings and trial proceedings to victims’ personal electronic devices;
- (3) government’s proposal to use remote monitors to visually verify and confirm that only authorized victims joined internet video conference during evidentiary hearings and trial would not be effective in preventing risk of denial of defendant’s right to fair trial;
- (4) government’s proposal to use watermarks would have limited value in deterring unauthorized dissemination of evidentiary and trial proceedings; and
- (5) court would restrict victims’ remote access to evidentiary and trial proceedings to designated secure viewing locations, such as United States court-houses and embassies.

Motion granted in part and denied in part.

1. Constitutional Law ⇌2106

Criminal Law ⇌635.1

A presumption of openness inheres in the very nature of a criminal trial; this bedrock principle is guaranteed by the United States Constitution: the Sixth

Amendment guarantees criminal defendants the right to a public trial, while the First Amendment guarantees the public the right to access a criminal trial. U.S. Const. Amendments. 1, 6.

2. Constitutional Law ⇌2106, 4557

Criminal Law ⇌635.1, 635.9(5)

The presumption of open criminal proceedings under the First and Sixth Amendments is not absolute—the public’s right of access may be limited to ensure that the defendant’s Fifth and Fourteenth Amendment due process rights are not abridged. U.S. Const. Amendments. 1, 5, 6, 14.

3. Criminal Law ⇌635.10

The broadcasting of criminal proceedings is neither constitutionally prohibited nor mandated.

4. Constitutional Law ⇌2106

Criminal Law ⇌635.3

The requirement of a public trial under the First and Sixth Amendments is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. U.S. Const. Amendments. 1, 6.

5. Constitutional Law ⇌2118

Criminal Law ⇌635.10

To determine whether and how a criminal case should be broadcast, courts balance the public’s interest in expanded access against the risks to the defendant’s constitutional right to a fair trial. U.S. Const. Amendments. 1, 5, 6, 14.

6. Criminal Law ⇌633.1

Judges ⇌11(2)

The Guide to Judiciary Policy is the official medium by which direction as to courtroom procedures and other information are provided to the federal judiciary in support of its day-to-day operation.

7. Criminal Law ⇌633.1

Judges ⇌11(1)

Though the Guide to Judiciary Policy is not binding on courts, it is at the very least entitled to respectful consideration.

8. Criminal Law ⇌635.10

Cameras in the courtroom can also intimidate defendants who, regardless of the merits of the case, might prefer to settle or plead guilty rather than risk damaging accusations in a televised trial and cause witnesses to exhibit bravado and over-dramatization or self-consciousness and under-reaction while testifying, which could impede a jury’s ability to accurately assess that witness’s credibility. Fed. R. Crim. P. 53; Fed. R. Evid. 615.

9. Constitutional Law ⇌4557, 4601

Criminal Law ⇌633.8, 1220

The court has a constitutional duty to give effect to the Lockerbie Victims Access Act, which allows victims of airline bombing to seek remote access to court proceedings, in a manner that adequately protects the defendant’s due process rights, including his right to a fair trial. U.S. Const. Amendments. 5, 14; Pub. L. No. 118-37, 138 Stat. 11.

10. Criminal Law ⇌633.8

Because it is difficult to remedy any violation of the defendant’s constitutional rights after the fact, the criminal justice system permits, and even encourages, trial judges to be over-cautious in ensuring that a defendant will receive a fair trial. U.S. Const. Amendments. 5, 14.

11. Criminal Law ⇌635.10

Granting victims of crimes associated with the bombing of Pan Am Flight 103 remote video and telephonic access to non-evidentiary pretrial matters presented minimal risk to integrity of criminal proceedings against defendant involved in bombing, and thus court would permit

such proceedings to be transmitted to victims over internet and approved telephone lines, subject to restrictions to avoid unauthorized access, recording, or dissemination of audio or video of proceedings; there was low likelihood that unauthorized viewing, recording, or dissemination of non-evidentiary pretrial proceedings will have an adverse impact on witnesses, jurors, or other trial participants, as would potentially harm defendant's right to fair trial. U.S. Const. Amends. 5, 14; Pub. L. No. 118-37, 138 Stat. 11.

12. Criminal Law ⚖️635.10

There was substantial risk that unauthorized third parties could gain access to audio or video broadcasts of evidentiary hearings and trial proceedings and disseminate them, jeopardizing defendant's right to fair trial, and thus court would not permit transmission of live video and audio feeds of these proceedings to victims' personal electronic devices, in proceedings on government's motion to provide victims of crimes associated with bombing of Pan Am Flight 103 remote video and telephonic access to criminal proceedings against defendant involved in bombing; potential jurors could be tainted if they obtained access to recorded evidentiary or trial proceedings, particularly if recordings depicted inculpatory but ultimately inadmissible evidence, rule on excluding witnesses from courtroom could be circumvented, and dissemination of recordings could adversely affect witnesses' willingness to testify and quality of their testimony. U.S. Const. Amends. 5, 14; Pub. L. No. 118-37, 138 Stat. 11; Fed. R. Evid. 615.

13. Criminal Law ⚖️635.10

Government's proposal to use remote monitors to visually verify and confirm that only authorized victims joined internet video conference during evidentiary hearings and trial would not be effective in preventing risk of denial of defendant's

right to fair trial, in proceedings on government's motion to provide international victims of crimes associated with the bombing of Pan Am Flight 103 remote video and telephonic access to criminal proceedings against defendant involved in bombing; remote monitors located in United States could only police what they could observed on camera, such that even in an identified private location, unauthorized third parties outside of camera's field of view would be undetectable by monitors, and monitors' effectiveness could be further impeded by connectivity and other technical issues. U.S. Const. Amends. 5, 14; Pub. L. No. 118-37, 138 Stat. 11.

14. Criminal Law ⚖️635.10

Government's proposal to use watermarks superimposing user's email address onto video or embedding an inaudible sound containing user's identifying information within audio would have limited value in deterring unauthorized dissemination of evidentiary and trial proceedings, and thus would not be effective in preventing risk of denial of defendant's right to fair trial, in proceedings on government's motion to provide international victims of crimes associated with bombing of Pan Am Flight 103 remote video and telephonic access to criminal proceedings against defendant involved in bombing; watermarks would not prevent unauthorized viewing, recording, or later dissemination proceedings, court would not be able to enforce warning against recording of proceedings, and potential consequences of unauthorized viewing or distribution could jeopardize defendant's right to fair trial. U.S. Const. Amends. 5, 14; Pub. L. No. 118-37, 138 Stat. 11.

15. Criminal Law ⚖️635.10

Broadcasting evidentiary and trial proceedings in defendant's prosecution for crimes associated with the bombing of Pan

Am Flight 103 directly to victims' personal devices would entail significant, unmanageable risks to fairness of trial, and thus court would restrict victims' remote access to such proceedings to designated secure viewing locations, such as United States courthouses and embassies; hundreds of victims were located outside United States, such that government's ability to uncover and prosecute violations of order would be severely limited, deterrent effect of court's contempt power would be limited to violators within United States as it was unlikely court could issue contempt order to non-party outside of its territorial jurisdiction, and though Lockerbie Victims Access Act prohibited court from conditioning access based solely on victim's geographical location, Act did not impose affirmative duty to provide victims with access wherever they resided. U.S. Const. Amends. 5, 14; Pub. L. No. 118-37, 138 Stat. 11.

16. Constitutional Law ⚖️4601
Criminal Law ⚖️635.10

In contrast to the court's obligation to balance multiple constitutional rights in fixing policies for remote proceedings and public access to such proceedings during the COVID-19 pandemic, in applying the Lockerbie Victims Access Act, which allows for victims of the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland to seek remote access to court proceedings, only one constitutional right is at stake: the defendant's due process right to a fair trial. U.S. Const. Amends. 5, 14; Pub. L. No. 118-37, 138 Stat. 11.

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Whitney Minter, Todd M. Richman, Public Defender, Office of the Federal Public Defender, Alexandria, VA, Nathaniel C. Wenstrup, Federal Defenders for the Eastern District of Virginia Alexandria, VA, for Defendant.

MEMORANDUM OPINION

DABNEY L. FRIEDRICH, United States District Judge

Before the Court is the government's Motion for Order to Afford Victims Remote Video and Telephonic Access to Court Proceedings in this Case. Dkt. 51. For the following reasons, the motion will be granted in part and denied in part.

I. BACKGROUND

A. Factual and Procedural Background

On December 21, 1988, Pan Am Flight 103 exploded 30,000 feet over the small town of Lockerbie, Scotland. *See* Indictment, at 2, Dkt. 8. The indictment alleges that all 259 people aboard died—including citizens of the United States, the United Kingdom, Switzerland, France, Canada, Israel, Argentina, Sweden, Ireland, Italy, Hungary, South Africa, Germany, Spain, Jamaica, Philippines, India, Belgium, Trinidad and Tobago, Japan, and Bolivia. *Id.* It further alleges that debris from the explosion killed eleven townspeople instantly. *Id.*

On November 29, 2022, the defendant Abu Agila Mohammad Mas'ud Kheir Al-Marimi, was indicted. *Id.* at 1-3. He is charged with two counts of destruction of an aircraft resulting in death, in violation of 18 U.S.C. §§ 32(a)(2), 34, and 2, and one

count of destruction of a vehicle used in foreign commerce by means of an explosive, resulting in death, in violation of 18 U.S.C. § 844(i). *Id.* at 1–14.

On February 9, 2023, the government filed an unopposed motion for alternative procedures under the Crime Victims’ Rights Act, 18 U.S.C. § 3771, requesting, among other things, that the Court establish a call-in telephone line so that victims could listen to the proceedings in real time. Dkt. 23. The Court denied the government’s motion in relevant part, explaining that Rule 53 of the Federal Rules of Criminal Procedure prohibits the broadcasting of criminal court proceedings and that no statutory provision granted the Court authority to provide real-time telephonic access. *See* Minute Order of Feb. 10, 2023.

Thereafter, on January 26, 2024, Congress passed Pub. L. No. 118-37, 138 Stat. 11 (2024) (hereinafter, “Lockerbie Victims Access Act” or “Act”), which directs the Court to order that reasonable efforts be made to provide victims of the Pan Am Flight 103 bombing with remote video and telephonic access to the proceedings in this case.¹ On March 13, 2024, the Court ordered the parties to file proposals to grant the Lockerbie victims access to pretrial

and trial proceedings under the Lockerbie Victims Access Act. *See* Minute Order of March 13, 2024. On May 31, 2024, the government filed the instant motion, Dkt. 51, which the defendant opposes, Dkt. 52. The government also filed a supplement to its motion providing additional information on victims. *See* Gov’t. Supp. Filing, Dkt. 68. To date, the government has identified 417 victims—244 from the United States, 164 from the United Kingdom, two from the Netherlands, and one from each of the following countries: Spain, the Czech Republic, Ireland, Canada, Mozambique, Australia, and Jamaica. *Id.* at 4–5. The United States and United Kingdom victims are geographically dispersed throughout their respective countries. *Id.*

B. The Parties’ Proposals

The government proposes providing victims with real-time video and telephonic access for all pretrial and trial proceedings through the “Zoom for Government” platform. Gov’t. Mot. at 1. Verified victims who meet the statutory definition would sign in using two-factor authentication linked to a verified email account or phone number. *Id.* DOJ employees would serve as remote, virtual monitors to visually verify and con-

1. The Act provides, in relevant part:
[N]otwithstanding any provision of the Federal Rules of Criminal Procedure or other law or rule to the contrary, in order to permit victims of crimes associated with the bombing of Pan Am Flight 103 to access court proceedings in the criminal case against Abu Agila Mohammed Mas’ud Kheir Al-Marimi . . . , the district court of the United States in such a case shall order that reasonable efforts be made to make remote video and telephonic access to proceedings in the case available to victims of crimes associated with the bombing of Pan Am Flight 103.

...

Remote video and telephonic access to proceedings shall be made available . . . to a victim of crimes associated with the bomb-

ing of Pan Am Flight 103 without regard to the location of the victim of crimes associated with the bombing of Pan Am Flight 103. Pub. L. No. 118-37, 138 Stat. 11. The Act further provides that the Court retains the discretion to limit access where necessary to maintain the integrity of the criminal proceedings:

Nothing in this section shall be construed to eliminate or limit the discretion of a district court of the United States to control the manner, circumstances, or availability of remote video or telephonic transmissions where necessary to control the courtroom or protect the integrity of court proceedings or the safety of parties, witnesses, or other participants in the proceedings.

Id.

firm that only authorized victims joined the Zoom video conference or that those attempting to join the meeting by telephone are calling from verified phone numbers. *Id.* Once an individual joins the proceedings, they would be required to keep their camera on. *Id.* at 11–12. According to the government, remote monitors would be able to ensure that no unauthorized individuals are present and that no one is recording the proceedings. *Id.* The government further contends that remote monitors would be able to remove any individual violating this Court’s orders and report any such violations to the Court. *Id.*

To guarantee the security of the proceedings and prevent unauthorized transmissions or recordings, the government proposes using video and audio watermarks. *Id.* at 15. A video watermark would superimpose the user’s email address onto the video that reaches that user, which would then be visible in any recording made of the proceedings. *Id.* at 15–16. Similarly, an audio watermark would embed an inaudible sound containing a user’s identifying information within the audio sent to their device. *Id.* at 16.

The defendant does not object to the government’s proposal to provide victims with video and audio access to non-evidentiary pretrial proceedings. Def.’s Opp’n, at 1, Dkt. 52. But he does oppose providing direct-to-victim Zoom transmission for evidentiary pretrial proceedings and trial itself. *Id.* He contends that the government’s proposal could jeopardize the fairness of his trial because it inadequately protects against the risk that unauthorized third parties may observe, record, or disseminate the video or audio streamed to victims’ personal devices. *Id.* at 4–5. The defendant instead proposes that the Court designate secure remote viewing sites—such as federal courthouses, United States embassies or consu-

lates, or other federal offices—where victims can observe the Zoom transmission in-person, supervised by designated government personnel. *Id.* at 1–2.

II. DISCUSSION

The Lockerbie Victims Access Act directs the Court to “order that reasonable efforts be made” to provide victims of the bombing of Pan Am Flight 103 remote video and telephonic access to proceedings in this case “without regard to [the victims’] location.” Pub. L. No. 118-37, 138 Stat. 11. The Act also acknowledges that the Court has discretion to “control the manner, circumstances, or availability” of transmissions where necessary to “control the courtroom or protect the integrity of court proceedings or the safety of parties, witnesses, or other participants in the proceedings.” *Id.* In interpreting the Act, the Court must balance the victims’ statutory interests against the defendant’s constitutional rights and exercise its discretion to “control the courtroom,” “protect the integrity of court proceedings,” and guarantee the safety of trial participants. *Id.* It must also determine what constitutes “reasonable efforts” to effectuate the statutory directive to make remote access available to victims “without regard to [their] location.” *Id.*

To accomplish these potentially competing ends, the Court does not interpret the Lockerbie Victims Access Act on a blank slate. Although the Act is the first to authorize remote video and telephonic access to victims, it is not the first to grant victims special access to federal criminal proceedings. And the constitutional issues it raises are not novel. Before turning to the Act itself, the Court begins with a discussion of legal precedent addressing the constitutional implications of broadcasting criminal proceedings. Next, it turns to Rule 53 of the Federal Rules of

Criminal Procedure, related precedent, and the Judicial Conference's longstanding policy prohibiting the broadcasting and recording of criminal proceedings. The Court then discusses earlier victims' access legislation. Finally, against this backdrop, the Court interprets the language of the Lockerbie Victims Access Act and effectuates Congress's statutory directive.

A. Constitutional Implications of Broadcasting

[1,2] Since this country's founding, criminal trials have been open to the public. "[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). This bedrock principle is guaranteed by our Constitution: The Sixth Amendment guarantees criminal defendants the right to a public trial, while the First Amendment guarantees the public the right to access a criminal trial. *See id.* at 580, 100 S.Ct. 2814. But this presumption of open criminal proceedings is not absolute—the public's right of access may be limited to ensure that the defendant's Fifth and Fourteenth Amendment due process rights are not abridged. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14–15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986); *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378–79, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The Lockerbie Victims Access Act, which authorizes video and audio broadcasting of proceedings in this criminal case, implicates these competing interests.

The Supreme Court first addressed the broadcasting of criminal proceedings in *Estes v. Texas*. There, the Court reversed a state court defendant's criminal conviction because it found that the televised

broadcasting of the trial had created such a strong likelihood of prejudice that it violated the defendant's due process rights under the Fourteenth Amendment. *Id.* at 542, 85 S.Ct. 1628. The Court noted the "numerous situations in which [televising a trial] might cause actual unfairness—some so subtle as to defy detection by the accused or control of the judge." *Id.* at 545, 85 S.Ct. 1628. In particular, it explained that broadcasting criminal trials might undermine a court's ability to invoke Rule 615 of the Federal Rules of Evidence, which permits the exclusion of potential witnesses from the courtroom to prevent them from being influenced by others' testimony. Broadcasting would enable excluded witnesses to hear others' testimony and adjust their own testimony accordingly. *Id.* at 547, 85 S.Ct. 1628. Likewise, broadcasting would amplify the risk that jurors could be tainted from exposure to the coverage. *Id.* at 545–46, 85 S.Ct. 1628. Finally, the Court noted that cameras in the courtroom could subject trial participants—jurors, witnesses, attorneys, and judges—to psychological pressures from the knowledge that their actions would be reproduced and disseminated publicly, potentially distorting the trial process by causing participants to conduct themselves differently. *Id.* at 545–50, 85 S.Ct. 1628.

Subsequently, in *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981), the Supreme Court clarified that *Estes* did not announce a *per se* constitutional rule against broadcast coverage of criminal trials. 449 U.S. at 573–74, 101 S.Ct. 802. Rather, to prevail on a post-trial due process challenge based on the broadcasting of court proceedings, a defendant must demonstrate specific prejudice in his case. *Id.* at 568, 101 S.Ct. 802. In *Chandler*, the Court rejected the defendant's challenge to the televising of his criminal trial because he failed to show that broadcasting has an inherently prejudicial effect

on the trial process or that the specific broadcasting procedures employed during his trial deprived him of due process. *Id.* In so doing, the Court upheld a canon of the Florida Code of Judicial Conduct which permitted “electronic media and still photography coverage of public judicial proceedings,” subject to certain restrictions, *id.* at 566, 101 S.Ct. 802, and which also granted judges the discretion to deny broadcasting entirely, *id.* at 577, 101 S.Ct. 802.

[3–5] These cases establish that the broadcasting of criminal proceedings is neither constitutionally prohibited nor mandated. As the Supreme Court has explained, neither the Sixth Amendment nor the First Amendment “require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.” *Nixon v. Warner Commc’n*, 435 U.S. 589, 610, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). To determine whether and how a criminal case should be broadcast, courts balance the public’s interest in expanded access against the risks to the defendant’s constitutional right to a fair trial. *Cf. Gannett*, 443 U.S. at 378–79, 99 S.Ct. 2898.

B. The Federal Judiciary’s Approach to Broadcasting

State and federal courts have adopted different approaches to the broadcasting of

court proceedings. While state courts generally have been permissive, *see, e.g., Chandler*, 449 U.S. at 566, 101 S.Ct. 802, the Federal Judiciary has adopted a *per se* ban on broadcasting in criminal proceedings due to the significant risk that broadcasting may infringe on a criminal defendant’s constitutional right to a fair trial.

1. Federal Rule of Criminal Procedure 53

Rule 53 of the Federal Rules of Criminal Procedure categorically forbids the broadcasting of federal criminal proceedings. It provides that “the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”² Fed. R. Crim. P. 53. To the Court’s knowledge, the only legal challenges to Rule 53 have been filed by criminal defendants or media organizations. In each of those cases, courts concluded that Rule 53’s ban on broadcasting is both constitutional and justified given the serious risks broadcasting poses to both the defendant’s and government’s right to a fair trial.

For instance, in *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985), the Seventh Circuit considered a criminal defendant’s First and Sixth Amendment challenges to Rule 53 after a district court had denied his request to record his trial on videotape. 753 F.2d at 617–18. Citing *Estes*, the Seventh Circuit concluded that the “marginal

2. The original Federal Rules of Criminal Procedure were adopted by order of the Supreme Court in 1944, and by Congress in 1945. *See* Fed. R. Crim. P. historical note. Rule 53 first took effect in 1946 as part of the initial Federal Rules of Criminal Procedure. *See History of Cameras, Broadcasting, and Remote Public Access in Courts*, Admin. Off. of the U.S. Cts., <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-broadcasting-and-remote>

(last visited Dec. 20, 2024). Apart from a stylistic change in 2002, *see* Fed. R. Crim. P. 53 advisory committee’s note to 2002 amendment, the Judicial Conference has consistently refrained from amending the rule. *See, e.g.,* Report of the Proceedings of the Judicial Conference of the United States 46–47, 67 (Sept. 1994) (declining to amend the Rule to authorize a pilot program on the broadcasting of criminal cases).

gains from videotaping and broadcasting an already public trial, which members of the public and media will be free to attend and report on” were “outweighed by the risks and uncertainties the procedure . . . entails.” *Id.* at 621. The Seventh Circuit further emphasized that the preservation of a fair trial was a paramount concern, that the risks of broadcasting outweighed the public’s interest in expanded access, and that even the possibility of impending unfairness justified a categorical ban. *See id.* Other circuit courts to have considered the question have reached the same conclusion. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1282–84 (11th Cir. 1983); *United States v. Edwards*, 785 F.2d 1293, 1295–96 (5th Cir. 1986); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988).

These concerns were shared by the district court that later interpreted and effectuated a similar victims access statute, Pub. L. No. 107-206, § 203, 116 Stat. 820, 832 (2002) (hereinafter, “9/11 Victims Access Act”). *See United States v. Moussaoui*, 205 F.R.D. 183 (E.D. Va. 2002); *see also infra* Part II.C.2. Before the enactment of the 9/11 Victims Access Act, the district court considered and rejected media groups’ motion to record and telecast the criminal trial of al-Qaeda member Zacarias Moussaoui. 205 F.R.D. at 184. Denying the motion under Rule 53, the district court made clear that even if the rule were abrogated, it would still deny the groups’ motion “[t]o ensure that both this defendant and the United States receive a fair and orderly trial.” *Id.* at 188. The court noted the significant risk of witness intimidation stemming from “the witness’ knowl-

edge that his or her face or voice may be forever publicly known and available to anyone in the world.” *Id.* at 187. That, in turn, “could lead foreign prosecution witnesses, outside the jurisdiction of the Court, to refuse to testify or withhold their full testimony out of reasonable fears for their personal safety” and “similarly lead witnesses favorable to the defense to refrain from coming forward for fear of being ostracized.” *Id.* Further, the district court explained that any retrial of the highly publicized case “would be rendered extremely difficult if the trial proceedings [were] broadcast” because potential jurors could be tainted if they observed those proceedings. *Id.* And any witnesses who faced recrimination for their testimony in the first trial might be reluctant to testify at any future retrial. *Id.* While the court recognized victims’ legitimate interests in observing the trial, it determined that those interests could not take precedence over the court’s duty to ensure the fair adjudication of the defendant’s guilt or innocence. *Id.* at 188 (“[T]he purpose of this trial is not to provide catharsis to the victims . . . the purpose is to determine the innocence or guilt of this defendant for the specific crimes charged in the Indictment.”).

2. Judicial Conference Policy

[6, 7] The Judicial Conference of the United States, the principal policymaking body for the federal courts, has long maintained a policy generally prohibiting “either civil or criminal courtroom proceedings in the district courts to be broadcast, televised, recorded, or photographed for the purpose of public dissemination.”³

3. The Guide “is the official medium by which direction as to courtroom procedures and other information are provided to the Federal Judiciary in support of its day-to-day operation.” *In re Sony BMG Music Entertainment*, 564 F.3d 1, 7 (1st Cir. 2009) (citation omit-

ted). The prohibition on broadcasting, initially introduced in 1972 in the Code of Conduct for United States Judges, was subsequently incorporated into the Guide to Judiciary Policy in 1990. *See History of Cameras, Broadcasting*,

Guide to Judiciary Policy, Vol. 10, Ch. 4 § 410.10(a). Though the Guide is not binding, it is “at the very least entitled to respectful consideration.” *Hollingsworth v. Perry*, 558 U.S. 183, 193, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (quotation and citation omitted). This District, like many others, has incorporated the Judicial Conference’s broadcasting policy into its local rules. *See* LCvR 83.1 (“The taking of photographs, recording by audio and video means, broadcasting, and livestreaming of judicial proceedings, are prohibited, unless explicitly permitted under the Federal Rules of Civil Procedure or by the Judicial Conference of the United States.”). In the few instances in which broadcasting and recording is permissible,⁴ Conference policy requires judges to “ensure that it is done in a manner that will: (1) be consistent with the rights of the parties; (2) not unduly distract participants in the proceeding; (3) include measures, consistent with the parties’ responsibilities, to safeguard confidential, sensitive or otherwise protected information; and (4) not otherwise interfere with the administration of justice.” Guide to Judiciary Policy, Vol. 10, Ch. 4 § 420(c).

and Remote Public Access in Courts, *supra* note 3.

4. The initial 1990 policy permitted broadcasting, televising, recording, or taking photographs in the courtroom only “during investigative, naturalization, or other ceremonial proceedings.” *See History of Cameras, Broadcasting, and Remote Public Access in Courts*, *supra* note 3. For non-ceremonial proceedings, judges were authorized to use cameras in the courtroom only
- (a) for the presentation of evidence;
 - (b) for the perpetuation of the record of the proceedings;
 - (c) for security purposes
 - (d) for other purposes of judicial administration; or
 - (e) in accordance with pilot programs approved by the Judicial Conference of the United States.

Id.

[8] Central to the Conference’s policy is the concern—shared by federal courts—that “camera coverage can do irreparable harm to a citizen’s right to a fair and impartial trial.” Letter from Hon. Roslynn R. Mauskopf, Director of the Administrative Office of the United States Courts, to S. Comm. on the Judiciary, at 2 (June 23, 2021). The Conference has explained that broadcasting can hamper a court’s ability to enforce Rule 615 of the Federal Rules of Evidence. *See Sunshine in the Courtroom Act of 2013: Hearing on H.R. 917 Before the Subcomm. on Cts., Intellectual Property & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 38 (2014) (prepared statement of Hon. Julie A. Robinson, U.S. Dist. Judge, Dist. of Kansas). Cameras in the courtroom can also “intimidate defendants who, regardless of the merits of the case, might prefer to settle or plead guilty rather than risk damaging accusations in a televised trial,” *id.* at 28, and cause witnesses to exhibit “bravado and over-dramatization” or “self-consciousness and under-reaction” while testifying, which could impede a jury’s ability to accurately assess that witness’s credibility, *id.* at 36–37.

In the intervening years, the Judicial Conference has incorporated additional exceptions to its policy. In 1996, the Conference authorized courts of appeals to broadcast appellate proceedings. *See* Guide to Judiciary Policy, Vol. 10, Ch. 4 § 410.10(d). Between 2020 and 2023, the Conference temporarily permitted judges to provide the public and media audio access to court proceedings during the COVID-19 pandemic. Report of the Proceedings of the Judicial Conference of the United States 10 (Sept. 2023); *see also* Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 528 (2020). Finally, in 2023, the Conference granted judges the discretion to provide live remote audio access to non-trial, non-testimonial civil and bankruptcy proceedings. *See* Guide to Judiciary Policy, Vol. 10, Ch. 4 § 420(b).

Multiple pilot programs have reinforced the concerns expressed by federal courts and the Judicial Conference. Between 1991 and 1994, for example, the Conference authorized electronic media coverage of certain civil proceedings in six federal district courts and two federal courts of appeals. 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* 4–5 (1994). A substantial proportion of trial judges and attorneys who participated in that pilot program noted adverse impacts on various aspects of the trial process, including witnesses’ willingness to testify and the quality of witnesses’ testimony.⁵ See Report of the Proceedings of the Judicial Conference of the United States 47 (Sept. 1994).

Similarly, in evaluating another pilot program conducted between 2011 and 2015 that permitted courts in fourteen federal districts to record, edit, and make publicly available certain civil proceedings, see Molly Treadway Johnson, Carol Krafka & Donna Stienstra, Fed. Jud. Ctr., *Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project* 1–3 (2016), the Judicial Conference’s Court Administration and Case Management Committee reported “a number of significant concerns,” Jud. Conf. Comm. on Ct. Admin. and Case Mgmt., *Excerpt of Report of the Judicial Conference Committee on Court Administration and Case Management: Cameras Pilot*

Project (Mar. 2016). The “most commonly cited potential harms” reported by participating judges “had to do with influencing the behavior of or putting stress on attorneys, witnesses, and jurors.” *Id.* (quotation omitted). Fifty-nine percent of judges stated that “the video recording distracted witnesses at least to some extent,” and sixty-four percent “found that cameras, at least to some extent, made witnesses more nervous than they otherwise would be.” *Id.* (quotation omitted). Based on this data, the Committee recommended preserving the Judicial Conference’s policy forbidding cameras in the courtroom for any proceedings—civil or criminal. *Id.*

Recently, in October 2024, a Criminal Rules Subcommittee declined to recommend alterations to Rule 53 in response to media organizations’ requests for amendments because of continued concerns that broadcasting criminal trials is likely to have significant negative effects on witnesses and jurors. Memorandum from Profs. Sara Sun Beale and Nancy King to Criminal Rules Advisory Committee Members 1, 4–5 (Oct. 9, 2024) (“Beal & King Memo”). The Subcommittee also considered a proposal to extend Judicial Conference Policy 420—which authorizes judges to provide a public audio line in non-testimonial, non-trial civil and bankruptcy proceedings—to criminal proceedings. *Id.* at 5. Here, too, Subcommittee members were hesitant, explaining that not enough time has passed to determine the impact of the policy, particularly the risk of individuals recording and rebroadcasting such pro-

5. Specifically, the data showed that 32% of attorneys and 41% of trial judges felt that, at least to some extent, broadcasting distracted witnesses; 40% of attorneys and 64% of trial judges felt that, at least to some extent, broadcasting made witnesses more nervous than they otherwise would be; 21% of attorneys and 64% of trial judges felt that, at least to some extent, broadcasting caused attorneys to

be more theatrical in their presentations; 21% of attorneys and 17% of trial judges felt that, at least to some extent, broadcasting disrupted courtroom proceedings; and 46% of trial judges felt that, at least to some extent, broadcasting made witnesses less willing to appear in court. Johnson & Krafka, *supra*, at 14–15, 20–21.

ceedings. *Id.* Ultimately, the Subcommittee “stressed the need for a cautious approach to broadcasting in criminal cases.” *Id.* at 4–5.

C. Earlier Victims Access Legislation

The Lockerbie Victims Access Act is not the first victims’ access legislation to be enacted by Congress. In two other terrorism-related criminal cases, Congress passed legislation that provided federal district courts the statutory authority to permit limited broadcasting, notwithstanding Federal Rule of Criminal Procedure 53. In both instances, Congress respected the “the need for careful guidelines and standards” in authorizing broadcasting by “provid[ing] precise and detailed guidance with respect to the wide range of issues implicated by the broadcast.” *Hollingsworth*, 558 U.S. at 197, 130 S.Ct. 705. Congress also gave trial courts the discretion to effectuate the legislation in a manner that protected the defendants’ due process rights.

1. *Justice for Victims of Terrorism Act*

In 1996, after the District Court for the Western District of Oklahoma transferred the criminal case against Timothy McVeigh to Colorado, Congress enacted a statute that authorized district courts to order closed-circuit televising (“CCTV”) of criminal trial proceedings “in cases where the venue of the trial is changed—(1) out of the State in which the case was initially brought; and (2) more than 350 miles from the location in which those proceedings originally would have taken place.” 34 U.S.C. § 20142 (originally codified at 42 U.S.C. § 10608). Only those persons determined by the court to have a compelling interest in viewing the proceedings and unable to do so due to the inconvenience and expense of a venue change would be permitted to access the CCTV broadcast.

Id. The statute explicitly forbade the public broadcast or dissemination of televised proceedings. *Id.* § 20142(c)(2). It further provided that courts would retain exclusive control over the television signal and that violations of court orders related to the CCTV broadcast would be punishable as contempt of court. *Id.* § 20142(c)(3). To effectuate the legislation, the district court established a victim application process and broadcast the trial via CCTV to an auditorium in Oklahoma City, which was overseen by a retired Colorado state judge. *See* Off. for Victims of Crime, U.S. Dep’t of Just., NCJ 183949, *Responding to Terrorism Victims: Oklahoma City and Beyond* 6 (2000).

2. *September 11 Access Act*

After the September 11, 2001 terrorist attacks, Congress enacted the 9/11 Victims Access Act to permit “victims of crimes associated with the terrorist acts of September 11, 2001, to watch trial proceedings in the criminal case against Zacarias Moussaoui.” Pub. L. No. 107-206, § 203, 116 Stat. 820, 832 (2002). The 9/11 Victims Access Act directed the District Court for the Eastern District of Virginia to order “closed circuit televising of the trial proceedings to convenient locations the trial court determines are reasonably necessary for viewing by those victims.” *Id.* The 9/11 Victims Access Act reincorporated the restrictions contained in 34 U.S.C. § 20142 and further provided that the district court would retain “discretion to control the manner, circumstances, or availability of the broadcast where necessary to control the courtroom or protect the integrity of the trial proceedings or the safety of trial participants.” *Id.*

In giving effect to the 9/11 Victims Access Act, the district court endeavored to maximize victims’ ability to access the trial while ensuring the trial remained orderly, manageable, and fair. To that end, the

court required victims to apply for credentials with the Victim Witness Unit of the United States Attorney's Office for the Eastern District of Virginia. Order of March 11, 2003, in No. 1-cr-455-A (E.D. Va.), Dkt. 39-1. The Victim Witness Unit determined the eligibility of each victim-applicant to access the trial by verifying the information provided in their application. *Id.* For victims deemed ineligible or whose information could not be verified, the Victim Witness Unit transmitted the application to the district court for a judicial determination of eligibility. *Id.*

Once the application process concluded, the district judge ordered that the trial be broadcast over CCTV to six federal court-houses along the east coast of the United States to "reasonably accommodate the majority of victims who have expressed interest in viewing these proceedings." Order of November 22, 2005, in No. 1-cr-455-A, Dkt. 39-2. Although at least 198 victims resided in California, *see* Letter from Paul J. McNulty to Judge Leonie H. Brinkema (Aug. 8, 2002), at 2, Dkt. 43-2, the district court declined to designate a remote viewing site in California because accommodating the three-hour time difference would have significantly burdened court staff, *see* Letter of Judge Leonie H. Brinkema (Feb. 7, 2006), Dkt. 43-4. Finally, the district court ordered that "all CCTV sites [were] deemed extensions of" the federal courtroom in which the *Moussaoui* trial was taking place; prohibited any attendee from bringing in any electronic devices or attempting to record or transmit the criminal proceedings; and required each CCTV courtroom to be monitored by at least two United States Marshals or court security officers. Order of March 1, 2006, in No. 1-cr-455-A, Dkt. 39-3.

D. The Lockerbie Victims Access Act

[9] Under the Lockerbie Victims Access Act, the Court retains discretion to

"control the manner, circumstances, or availability" of video and audio transmissions to ensure the integrity of court proceedings. Relatedly, the Court has a constitutional duty to give effect to the Act in a manner that adequately protects the defendant's due process rights, including his right to a fair trial. *Gannett*, 443 U.S. at 378, 99 S.Ct. 2898 (noting that "a trial judge has an affirmative constitutional duty" to protect a criminal defendant's due process rights); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). Accordingly, under the Act, the Court must "order that reasonable efforts be made" to provide victims of the bombing of Pan Am Flight 103 with "remote video and telephonic access" in this case, where such access does not impair "the integrity of court proceedings" to the detriment of the defendant's due process right to a fair trial. Pub. L. No. 118-37.

[10] Because it is difficult to remedy any violation of the defendant's constitutional rights after the fact, "our criminal justice system permits, and even encourages, trial judges to be over-cautious in ensuring that a defendant will receive a fair trial." *Gannett*, 443 U.S. at 379 n.6, 99 S.Ct. 2898; *see also id.* at 378, 99 S.Ct. 2898 ("And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary."). Informed by a long history of legal precedent, rules, judicial experience, and judiciary policy, the Court will carefully consider the ways in which video and audio broadcasting could potentially impair these proceedings and thereby jeopardize the defendant's right to a fair trial. In giving effect to the Act, the

Court will ensure victims are granted remote access to proceedings in this case in a manner that sufficiently mitigates any such risks.

1. *Non-evidentiary, non-testimonial pretrial hearings*

[11] Heeding those risks, the Court will draw a distinction between non-evidentiary pretrial hearings and trial. The Court agrees with the parties that granting victims remote video and telephonic access to non-evidentiary pretrial matters presents minimal risk to the integrity of these proceedings. *See* Def.'s Response to the Court's Feb. 26, 2024 Order, at 1, Dkt. 44; Gov't. Response to the Court's Feb. 26, 2024 Order, at 9–11, Dkt. 45. There is a low likelihood that the unauthorized viewing, recording, or dissemination of non-evidentiary pretrial proceedings will have an adverse impact on witnesses, jurors, or other trial participants. Even so, the Court will direct the government to take proactive measures to ensure compliance with the Act. Those measures include identifying and verifying victims and requiring victims to sign a sworn certification that acknowledges that unauthorized access, recording, or dissemination of audio or video of the proceedings is strictly prohibited and could result in contempt sanctions. *See* Order of Mar. 11, 2003, in No. 1-cr-455-A. In addition, the government shall use remote monitors and Internet searches, among other methods, to ensure that access is restricted to verified victims, and promptly notify the Court of any violation of its orders. Following input from the parties, the Court will issue a comprehensive order that sets forth the obligations of the government and the victims. Subject to these conditions, the Court will grant the government's motion in part and permit non-evidentiary, pretrial proceedings to be transmitted to victims over Zoom and approved telephone lines.

2. *Evidentiary hearings and trial*

[12] With respect to evidentiary hearings and trial, however, the Court will deny the government's motion to permit transmission of live video and audio feeds of these proceedings to victims' personal electronic devices. *See* Gov't. Mot. at 8–12. The Court shares the defendant's concern that there is a substantial risk that unauthorized third parties could violate the Court's orders by gaining access to evidentiary hearings and trial proceedings and recording and disseminating them. *See* Def.'s Opp'n at 4. Such violations could impair the proceedings and jeopardize the defendant's right to a fair trial in a number of ways. First, potential jurors could be tainted if they obtained access to recorded evidentiary or trial proceedings, particularly if such recordings depicted inculpatory but ultimately inadmissible evidence. *Estes*, 381 U.S. at 545, 85 S.Ct. 1628; *Gannett*, 443 U.S. at 378–79, 99 S.Ct. 2898. That risk is particularly acute when it comes to livestreamed pretrial evidentiary hearings, whose entire purpose is to screen out evidence that may not be introduced to the jury. *Cf. Gannett*, 443 U.S. at 378–79, 99 S.Ct. 2898. Second, the rule on witnesses, Fed. R. Evid. 615, could be circumvented if a witness were exposed to others' testimony. *See Estes*, 381 U.S. at 547, 85 S.Ct. 1628. Third, the dissemination of unauthorized recordings, even audio alone, could adversely affect witnesses' willingness to testify and the quality of their testimony. *See id.*; Beale & King Memo, *supra*, at 4–5; *see also generally supra* Part II.B.2. For example, witnesses might be chilled and otherwise impacted by the Court's inability to protect their testimony from being circulated, perhaps permanently, on the Internet. The resultant harm to the integrity of the proceedings and the defendant's due process

rights would be difficult to detect and could be irreversible and irreparable, warranting the Court's heightened caution. *Cf. Gannett*, 443 U.S. at 378–79, 99 S.Ct. 2898; *Hollingsworth*, 558 U.S. at 195–96, 130 S.Ct. 705.

[13] Although the government proposes various safeguards, none would be effective in preventing those potential harms. *See* Gov't. Mot. at 8–12; Gov't. Reply, at 10 n.6, Dkt. 54. Neither monitors, watermarks, nor pre-identified private locations, *see* Gov't. Mot. at 8–12; Gov't. Reply at 10 n.6, would sufficiently mitigate the risk of unauthorized access to proceedings. First, remote monitors located in the United States would only be able to police what they could observe on camera. *See* Def.'s Opp'n at 4–5. Thus, even in an identified private location, unauthorized third parties outside of the camera's field of view would be undetectable by remote monitors. *See id.* Monitors' effectiveness could be further impeded by connectivity and other technical issues.

[14] Second, identificatory watermarks, *see* Gov't. Mot. at 11–13, would have limited deterrent value. These safeguards would not prevent the unauthorized viewing or recording of court proceedings, much less the later dissemination of any such recording. As Judge Mehta explained in a recent *civil* case in which he denied the parties' request to provide a publicly accessible audio feed of trial proceedings, a court has no ability to enforce a warning against the recording of proceedings. *United States v. Google LLC*, No. 20-cv-3715 (APM), 2023 WL 6291644, at *2 (D.D.C. Sep. 8, 2023). The potential consequences of an authorized viewing or distribution in a criminal case like this one would be far more severe, potentially jeopardizing the defendant's constitutional right to a fair trial.

Third, when it comes to individuals listening in by telephone, the government admittedly offers no safeguards at all. Gov't. Reply at 9 n.5 (acknowledging that “monitors could not observe anyone who listened to the proceedings over a telephone line, and the audio watermark technology would not be available for those who listen via telephone”). With no means of identifying who is listening to or recording an audio feed, the risk of unauthorized observation and rebroadcasting is exponentially magnified.

[15] These risks would be further heightened because hundreds of victims will access audio and video of these proceedings from locations outside the United States. *See* Gov't. Supp. Filing at 9–10. Thus, the government's ability to uncover, investigate, and prosecute violations will be severely limited because evidence of such violations will likely be located outside the jurisdiction of the United States. In international investigations, the government lacks the authority to subpoena records and witnesses overseas and instead must rely on burdensome and protracted MLAT procedures. *See* U.S. Dep't of State, 7 Foreign Affairs Manual § 962.1; *see also, e.g., In re Search of Info.*, No. 16-mj-757 (BAH), 2017 WL 3445634, at *26 & n.28 (D.D.C. July 31, 2017) (discussing the difficulties with gathering evidence located abroad through the MLAT process). And even those mechanisms for evidence gathering do not exist in all foreign countries. *See* Off. of Int'l Affs., U.S. Dep't of Just., Mutual Legal Assistance Treaties of the United States (2022). Thus, as a practical matter, the deterrent effect of the Court's contempt power will be limited to violators within the United States. Moreover, it is unlikely the Court will have the authority to issue an order of contempt on a non-party outside of its territorial jurisdiction. *See, e.g., S.E.C. v. Homa*, 514 F.3d 661,

673–75 (7th Cir. 2008) (a non-party outside the court’s territorial jurisdiction who violates a court’s order may be subject to the court’s contempt power only if the non-party had actual notice of the order and aided and abetted a party in violating that order). Thus, overseas third parties who gain unauthorized access to the proceedings could act with impunity.

[16] The Court recognizes that federal courts conducted remote proceedings and used public-access audio lines during the COVID-19 pandemic. *See* Gov’t. Reply at 13–14; *see also* CARES Act § 15002(b); *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, Admin. Off. of the U.S. Cts. (Apr. 3, 2020), <https://www.uscourts.gov/data-news/judiciary-news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings>. But the circumstances surrounding the use of those authorities were different in several key respects. First, those carefully circumscribed procedures were enacted in response to an unprecedented national emergency that severely limited, if not entirely banned, the public’s access to court-houses. *See* CARES Act § 15002(a); *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, *supra*. Second, the defendant had to consent to remote proceedings. CARES Act § 15002(b)(4). And finally, federal courts were required to balance multiple constitutional rights during the unprecedented national emergency: a defendant’s constitutional (and statutory) right to a speedy trial, *see, e.g., Elms v. United States*, 457 F. Supp. 3d 897, 901–05 (D. Nev. 2020); a defendant’s right to a fair and open trial, *see, e.g., United States v. Allen*, 34 F.4th 789, 797–99 (9th Cir. 2022); and the public’s right to access court proceedings, *see, e.g., 34 F.4th at 797–99*. This calculus was fundamentally different from the interest balancing the Court must apply here. In

applying the Lockerbie Victims Access Act, only one constitutional right is at stake: the defendant’s due process right to a fair trial.

Notably, during the pandemic, federal courts still attempted to adhere to Rule 53’s ban on broadcasting. Courts rarely broadcasted criminal trials and instead allowed a limited number of spectators in the courtroom or permitted the public to view the trials from a separate courthouse room over a live video feed. *See Allen*, 34 F.4th at 798 (collecting cases); *see also, e.g., United States v. Babichenko*, 508 F. Supp. 3d 774, 780–81 (D. Idaho 2020) (permitting limited remote attendance by Zoom only upon a showing of particularized need in light of Rule 53).

That federal courts utilized public audio lines during COVID-19 does not by itself lead the Court to conclude that the government’s proposal would adequately protect the integrity of the proceedings and the defendant’s due process rights. Indeed, the Subcommittee to the Criminal Rules Advisory Committee recently recommended that Rule 53 not be amended to permit publicly accessible audio feeds in part due to the lack of information regarding the issue of illicit recording and rebroadcasting of audio transmissions. *See* Beale & King Memo, *supra*, at 5; *see also* Jud. Conf. Comm. on Ct. Admin. and Case Mgmt., *Report of the Judicial Conference Committee on Court Administration and Case Management* 8 (Sept. 2023) (raising various concerns regarding remote public access to trials or proceedings in which a witness is testifying, including the potential for witness intimidation and complications with witness sequestration). For good reason, the Judicial Conference has consistently urged caution in broadcasting criminal proceedings. *See supra* Part II.B.2.

The Court recognizes that the Lockerbie Victims Access Act grants the Court

broader authority than previous victim access statutes. *See* Gov't. Mot. at 16. But while the Act directs the Court to order that "reasonable efforts be made to make remote video and telephonic access to proceedings to victims" "without regard to the location of the victim," Pub. L. No. 118-37, it does not mandate that the Court provide victims with a video or audio link to access in their homes or offices. In the Act, Congress explicitly acknowledged that the Court retains the discretion to prescribe "the manner, circumstances, or availability" of video or audio transmissions as needed "to protect the integrity of court proceedings." Pub. L. No. 118-37. Accordingly, what constitutes "reasonable efforts" under the Act must take into account the need to adequately protect courtroom proceedings from outside interference so as not to jeopardize the defendant's right to a fair trial. Broadcasting evidentiary and trial proceedings directly to victims' personal devices would entail significant, unmanageable risks to the fairness of this trial, *see supra* pp. 23-31, and would thus be unreasonable to authorize here.

As for location-based limitations on access, *see* Gov't. Mot. at 17, the Act does not impose an affirmative duty on the Court to provide victims with access wherever they reside. Instead, paragraph 2 of the statute, entitled "No Limit on Location," orders that "[r]emote video and telephonic access to proceedings shall be made available under paragraph (1) to a victim . . . without regard to the location of the victim." *Id.* This language means that the Court cannot condition the availability of access to a victim solely on a victim's geographical location. But it does not follow that the Court must remove all location-related burdens on victims' access.⁶ The Act in-

stead directs the Court to ensure that "reasonable efforts be made to make remote video and telephonic access available." Pub. L. No. 118-37. That some victims may, as a practical matter—due to age, health, finances, or other obligations, *see* Gov't. Reply at 2-7—be unable to travel to a remote viewing location does not violate the statute's command so long as "reasonable efforts" are made to facilitate access. Victims routinely travel great distances to view criminal proceedings—even terrorism-related proceedings. *See, e.g.,* Feb. 7, 2006 Letter of Judge Brinkema (declining to designate a remote viewing location in California, where at least 198 victims were located). And while the Act grants victims unprecedented access to proceedings in this case, such access cannot undermine the defendant's constitutional right to a fair trial or the integrity of the proceedings. *Cf. Gannett*, 443 U.S. at 378-79, 99 S.Ct. 2898; *Moussaoui*, 205 F.R.D. at 188.

For these reasons, the Court finds that restricting victims' remote access to evidentiary and trial proceedings to designated secure viewing locations, such as U.S. courthouses and U.S. embassies, sufficiently mitigates the above risks while providing victims throughout this country and around the world with unprecedented access to court proceedings.

E. Implementation Process

To make proceedings promptly accessible to victims without regard to location, Pub. L. No. 118-37, the Court will order the Department of Justice to submit within 60 days a "reasonable," *id.*, and specific implementation proposal that:

6. The government does not appear to dispute that some location-based restrictions are permissible under the statute—in its reply brief, it noted that it "would have no objection to

requiring victims to access the proceedings from a private location," such as their home or office, to minimize the risk of third-party eavesdropping. Gov't. Reply at 10.

(1) Establishes an application process for interested victims similar to the process adopted in *Moussaoui*, see Dkt. 39-1. The proposal shall include a victim notice letter, see Dkt. 39-5, a victim application form, see Dkt. 39-4, and a sworn victim certification form on which victims acknowledge their legal obligations;

(2) Ensures that non-evidentiary pretrial hearings are promptly made available to identified victims by video and audio in accordance with the government's original proposal, see Gov't. Mot. at 6-12;

(3) Ensures that evidentiary and trial proceedings are made accessible to identified victims (a) at courthouses across the United States and (b) at secure locations outside the United States, such as U.S. embassies; and

(4) Ensures that U.S. monitors are trained to supervise victim access in and outside of the United States. Trained monitors shall be subject to the Court's contempt power and shall complete sworn certifications acknowledging their obligations. Among other things, monitors shall ensure that access is restricted to identifiable "victims," as defined in the Act, *id.*; and enforce this Court's orders, including (a) a ban on all cell phones and other electronic devices inside secured viewing locations and (b) a ban on any audio- and video-recordings of court proceedings.

(5) Includes recommendations on how to accomplish these goals in the most reasonable, efficient, and cost-effective manner.

The Court will also take measures to ensure that the general public and the press have maximum access to court proceedings here in this District. In particular, the Clerk's Office will set up multiple overflow courtrooms, as necessary, that will display real-time audio and visual coverage of evidentiary proceedings and trial. The Court will also designate one or more

media rooms to accommodate the press in the courthouse for pretrial and trial proceedings.

* * *

Today's decision interprets the plain language of the Lockerbie Victims Access Act in a manner that effectuates Congress's directive to provide victims of the Lockerbie bombing with remote access to pretrial and trial proceedings, while safeguarding the integrity of those proceedings and the defendant's constitutional right to a fair trial. As a result, victims will have unprecedented access to pretrial and trial proceedings in the criminal case against Abu Agila Mohammad Mas'ud Kheir Al-Marimi.

The Court recognizes that it would be more convenient and less expensive for the Lockerbie bombing victims to access evidentiary and trial proceedings from their homes and offices. But livestreaming such proceedings to individuals' personal devices is fraught with risks of a constitutional dimension. It is impossible to anticipate the numerous ways in which an inadvertent or intentional unauthorized accessing or rebroadcasting of evidentiary or trial proceedings could prejudice the defendant's due process rights. Because witness testimony and other evidence is admitted in real time in the courtroom, even a single breach of procedure could be incurable. In today's Internet age, a rebroadcasted court proceeding could travel around the world and remain electronically preserved forever. See Beale & King Memo, *supra*, at 4 (noting concerns with digital preservation of broadcasted information). Not only would such a breach jeopardize the defendant's right to a fair trial, it could also taint any future retrial. See *Moussaoui*, 205 F.R.D. at 187.

The Court also appreciates that facilitating remote viewing locations will be more costly and administratively burdensome to

the government than allowing U.S. and foreign victims to access evidentiary and trial proceedings from their personal devices. But this is the unfortunate consequence of a crime of this nature being committed overseas. In our legal system, regardless of the scope, date, or circumstances of a crime, the role of the Court is to ensure that the parties, particularly the charged defendant, receive a fair trial. While establishing secure remote viewing locations will be onerous, a mistrial of a months-long trial would be potentially irremediable and far more expensive to the parties and to the Court. *Cf. Moussaoui*, 205 F.R.D. at 187.

To fulfill its constitutional duty to ensure that the defendant receives a fair trial, the Court must mandate effective safeguards to protect the integrity of the proceedings, even if such safeguards come at some cost to the victims of the Pan Am Flight 103 bombing and the government. Consistent with the Act, the Court exercises its statutory authority to grant victims access to non-evidentiary pretrial proceedings from their homes and offices by Zoom and telephone, as well as access to livestreamed video and audio feeds of evidentiary and trial proceedings in courthouses across the United States and other secure, monitored locations around the world. Such access most reasonably furthers the victims' substantial interests in having remote access to pretrial and trial proceedings without undermining the integrity of those proceedings or the defendant's constitutional right to a fair trial.

CONCLUSION

For the reasons stated, the government's Motion for Order to Afford Victims Remote Video and Telephonic Access to Court Proceedings in this Case, Dkt. 51, is granted in part and denied in part. A separate order consistent with this deci-

sion accompanies this memorandum opinion.



Ivy BROWN, et al., Plaintiffs,

v.

DISTRICT OF COLUMBIA, Defendant.

Civil Action No. 10-2250 (PLF)

United States District Court,
District of Columbia.

Signed December 31, 2024

Background: Individuals with physical disabilities, who received Medicaid-funded long-term care, filed class action for declaratory and injunctive relief against District of Columbia, alleging that they had been unjustifiably segregated in nursing facilities in violation of Title II of Americans with Disabilities Act (ADA) and the Rehabilitation Act, and that they were capable of transitioning to home-based and community-based long-term care. After bench trial, the United States District Court for the District of Columbia, Ellen Segal Huvelle, J., 322 F.R.D. 51, granted judgment for District. Individuals appealed. The Court of Appeals, 928 F.3d 1070, reversed and remanded with instructions.

Holdings: After bench trial, the District Court, Paul L. Friedman, J., held that:

- (1) District did not show that it had reliable sense of how many individuals with disabilities were institutionalized and eligible for services in community-based settings, as defense to individuals' requested accommodations;
- (2) District failed to show fundamental-alteration defense to requested accom-

TAB 13

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: New Suggestion: Rule 11—Advice to Defendant ([25-CR-N](#))

DATE: October 8, 2025

Judge Patricia Barksdale has written suggesting that the Advisory Committee to consider amending Rule 11(b)(1)(M) of the Federal Rules of Criminal Procedure to delete “possible departures under the Sentencing Guidelines” to address a pending amendment to the Sentencing Guidelines.

Rule 11(b)(1)(M) current provides:

1 **Rule 11. Pleas**

2 * * * * *

3 **(b) Considering and Accepting a Guilty or Nolo Contendere Plea.**

4 **(1) *Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty
5 or nolo contendere, the defendant may be placed under oath, and the court must
6 address the defendant personally in open court. During this address, the court must
7 inform the defendant of, and determine that the defendant understands, the
8 following:

9 * * * * *

10 (M) in determining a sentence, the court's obligation to calculate the applicable
11 sentencing-guideline range and to consider that range, possible departures
12 under the Sentencing Guidelines, and other sentencing factors under 18
13 U.S.C. §3553(a)....

The U.S. Sentencing Commission has published amendments to the Guidelines Manual that will go into effect November 1, 2025, absent Congressional action. The amendments will simplify the current three-step sentencing process by removing the step that requires courts to consider departures. As amended, U.S.S.G. § 1B1.1(b) will provide:

(b) STEP TWO: CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a).—After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. Specifically,

as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);
- (3) the kinds of sentences available;
- (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (5) the need to provide restitution to any victims of the offense.

The amendment deletes the language in U.S.S.G. § 1B1.1(b) that requires the sentencing court to consider “Parts H and K of Chapter Five, Specific Offender Characteristics and Departures.” It also deletes most departures previously provided throughout the *Guidelines Manual*” and makes changes to Chapter 5. Attached is the Commission’s summary, and the redline version of the amendment to § 1B1.1.

We recommend a brief discussion at the November meeting to determine whether, if the amendment has gone into effect, a revision of Rule 11 would be warranted. If so, an amendment and committee note can be drafted and presented for approval at the April meeting.

5. SIMPLIFICATION OF THREE-STEP PROCESS

Reason for Amendment: This amendment is a result of the Commission’s exploration of ways to simplify the guidelines and to reduce tension between 18 U.S.C. § 3553(a) and the *Guidelines Manual*. Specifically, the amendment removes one of the steps in the current three-step sentencing process, which requires courts to consider departures provided for within the *Guidelines Manual*. As amended, the *Guidelines Manual* now provides a two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the “starting point and initial benchmark” and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–51 (2007).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the portion of 18 U.S.C. § 3553 making the guidelines mandatory was unconstitutional. The Court has further explained that the guideline range, which reflects the defendant’s criminal conduct and the defendant’s criminal history, should continue to be “the starting point and the initial benchmark” in sentencing proceedings. *See Gall*, 552 U.S. at 49; *see also Peugh v. United States*, 569 U.S. 530 (2013) (noting that “the post-*Booker* federal sentencing system adopted procedural measures that make the guidelines the ‘lodestone’ of sentencing”). After determining the kinds of sentence and guideline range provided for by the *Guidelines*, however, the court must also fully consider the factors in 18 U.S.C. § 3553(a), including, among other factors, “the nature and circumstances of the offense and the history and characteristics of the defendant,” to determine a sentence that is sufficient but not greater than necessary. *See Rita v. United States*, 551 U.S. 338, 347–48 (2007).

In the wake of *Booker* and subsequent cases, the *Guidelines Manual* provided a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of §1B1.1 (Application Instructions) (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range and determines the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; (2) the court considers policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and (3) the court considers the applicable factors in 18 U.S.C. § 3553(a) in deciding what sentence to impose (whether within the applicable guideline range, or whether as a departure or as a variance (or as both)).

In the years since *Booker*, the frequency of departures has steadily declined with courts relying to a greater extent on variances in a manner consistent with the statutory requirements in section 3553(a). The shift away from departures deepened as a direct result of the holding in *Irizarry v. United States*, 553 U.S. 708 (2008), in which the Court held that the “reasonable notice” requirement in Rule 32(h) of the Federal Rules of Criminal Procedure does not apply to variances.

To better align the guidelines to practices under current sentencing law and to acknowledge the growing shift away from the use of departures, the amendment revises the guidelines in multiple ways. First, the amendment moves the “Original Introduction to the Guidelines Manual” from Chapter One, Part A to an Appendix of the *Guidelines Manual* as historical background. Second, the amendment revises the application instructions provided in §1B1.1 to reflect the simplification of the three-step process into two steps. At Step One, courts are to calculate the guideline range and determine the sentencing requirements and options under the *Guidelines Manual*. See §1B1.1(a). At Step Two, courts are to consider the section 3553(a) factors. See §1B1.1(b). Section 1B1.1(b) expressly lists the section 3553(a) factors the court must consider. Other conforming changes are made throughout Chapter One. For example, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) is amended to reflect the removal of departures. The Commission does not intend this conforming amendment to substantively change the operation of the calculation of the amended guideline range in §1B1.10.

In addition, the amendment seeks to better address the distinction between the statutory limitations on the Commission’s ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. § 3553(a). More specifically, the amendment revises §1A3.1 (Authority), which sets forth the Commission’s authority in developing the guidelines. First, the provision is redesignated as §1A1.1 and, for clarity, is retitled as “Commission’s Authority.” Second, in addition to referring to 28 U.S.C. § 994(a) as the basis of the Commission’s authority to promulgate guidelines, policy statements, and commentary, the provision explains how the Commission has complied with the requirements placed on it by Congress, noting what is not considered by the Commission in formulating the guidelines. This ensures that the Commission has addressed the provisions of sections 994(c), (d), and (e).

A new background commentary to this section explains that the requirements and limitations imposed upon the Commission by 28 U.S.C. § 994 do not apply to sentencing courts. Instead, the factors set forth by Congress in 18 U.S.C. § 3553(a) “permit a sentencing court to consider the ‘widest possible breadth of information’ about a defendant ensuring the court is in ‘possession of the fullest information possible concerning the defendant’s life and characteristics.’” See *Pepper v. United States*, 562 U.S. 476, 488 (2011); see also *Concepcion v. United States*, 597 U.S. 481, 493 (2022). The new background commentary concludes by noting that the application instructions set forth in §1B1.1 are structured to reflect a two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the “starting point and initial benchmark” and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).

Consistent with the revised approach, the amendment deletes most departures previously provided throughout the *Guidelines Manual*. Changes are made throughout the *Guidelines Manual* by deleting the departure provisions contained in commentary to various

guidelines. However, some provisions, originally promulgated in response to congressional directives, are retained in another form. First, Application Note 1 of §2X7.2 (Submersible and Semi-Submersible Vessels) is revised to remove the language pertaining to a departure and instead indicates that the listed factors, which were identified by Congress in section 103 of Public Law 110–407, may warrant consideration in imposing a sentence. Similarly, Application Note 2 of §1B1.9 (Class B or C Misdemeanors and Infractions), which addresses Class B and C misdemeanors and infractions, is revised to add a reference to the aggravating nature of committing an offense while wearing or displaying insignia and uniform in violation of 18 U.S.C. § 716 (a class B misdemeanor). This guidance was previously set forth in a departure provision at §5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform).

The amendment also makes several changes to Chapter Five. The chapter is retitled “Determining the Sentencing Range and Options Under the Guidelines” to focus on the rules pertaining to the calculation of the guideline range, and the introductory commentary is revised to better reflect the chapter’s purpose by noting that “a sentence is within the guidelines if it complies with each applicable section of this chapter.” All provisions previously contained in Chapter Five, Part H (Specific Offender Characteristics), and most of the provisions in Chapter Five, Part K (Departures), are deleted. Only the provisions pertaining to substantial assistance are retained under §5K1.1, and the provision pertaining to early disposition programs is moved from §5K3.1 to Chapter Three, Part F.

Chapter Five is also amended at §5B1.1 (Imposition of a Term of Probation), §5D1.1 (Imposition of a Term of Supervised Release), and §5D1.3 (Conditions of Supervised Release) to emphasize the factors courts are statutorily required to consider in determining the conditions of probation and supervised release. The commentary is further revised to retain factors that the Commission had previously identified as relevant in Chapter Five, Part H pursuant to the congressional guidance provided to the Commission in 28 U.S.C. § 994(d) and (e).

Changes are also made to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment) in response to comment urging the Commission to retain the guidance regarding certain undischarged or discharged terms of imprisonment currently contained in §5G1.3, Application Note 4(E), and §5K2.23 (Discharged Terms of Imprisonment (Policy Statement)). These procedural aspects of imposing a sentence are particularly complex and at times confusing for courts given the intersection of a court’s authority to sentence and the Bureau of Prisons’ authority to execute that sentence. The amendment thus makes several changes to the commentary in §5G1.3 to ensure courts continue to receive guidance on the treatment of undischarged and discharged sentences not otherwise addressed in the guideline. First, a new application note is added at Application Note 4(E), which would provide that where the court accounts for an undischarged term of imprisonment covered by subsection (d), the court should clearly state that the sentence was imposed pursuant to 18 U.S.C. § 3553(a), rather than as a credit for time served, to avoid confusion with the Federal Bureau of Prisons’ exclusive authority under 18 U.S.C. § 3585(b) to grant credit for

time served under certain circumstances. Similarly, a new Application Note 5 would provide similar guidance on the court's authority to consider an already discharged term of imprisonment that would, if undischarged, qualify for consideration under §5G1.3(b). This new Application Note would preserve the concept previously addressed in §5K2.23.

Finally, in conjunction with the amendment, the Commission plans to compile the deleted departure provisions, as they were last provided in the 2024 edition of the *Guidelines Manual*, in a new Part III of Appendix B. At the time these departure provisions were promulgated, they represented grounds that the Commission expressly authorized in the *Guidelines Manual* as a basis for a sentence outside of the otherwise applicable guideline range. These provisions, which were based on various circumstances of the offense, specific personal characteristics, and certain procedural history of the case, reflected the Commission's determination that such circumstances were outside of the heartland of offenses addressed by the guidelines and warranted the court's consideration in imposing sentence. Because the Commission envisions this amendment to be outcome neutral, the introduction to the compilation of deleted departure provisions explains that the removal of departures from the *Guidelines Manual* does not reflect a determination by the Commission that the rationale underlying the deleted departure provisions is no longer informative and does not serve as a limit to the information courts may consider in imposing a sentence. It is the Commission's intent that judges who would have relied upon facts previously identified as a basis for a departure will continue to have the authority to rely upon such facts, or any other relevant factors, to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a).

Amendment:

[For ease and clarity of presentation, the amendment shows the complete 2024 *Guidelines Manual* with revision marks redlining the specific provisions impacted. The amendment is set forth in the following pages.]

PART B — GENERAL APPLICATION PRINCIPLES

§1B1.1. Application Instructions

- (a) STEP ONE: CALCULATION OF GUIDELINE RANGE AND DETERMINATION OF SENTENCING REQUIREMENTS AND OPTIONS UNDER THE GUIDELINES MANUAL.— The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:
- (1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* §1B1.2.
 - (2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
 - (3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
 - (4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
 - (5) Apply the adjustment ~~as appropriate~~ for the defendant's acceptance of responsibility and the reduction pursuant to an early disposition program, as appropriate, from Parts E and F of Chapter Three.
 - (6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Parts B and C of Chapter Four any other applicable adjustments.
 - (7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
 - (8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
 - (9) Apply, as appropriate, Part K of Chapter Five.

- ~~(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. See 18 U.S.C. § 3553(a)(5).~~
- ~~(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. See 18 U.S.C. § 3553(a).~~
- (b) STEP TWO: CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a).— After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);
 - (3) the kinds of sentences available;
 - (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (5) the need to provide restitution to any victims of the offense.

Commentary

Application Notes:

1. **Frequently Used Terms Defined.**—The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):
 - (A) **“Abducted”** means that a victim was forced to accompany an offender to a different location. For example, a bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.
 - (B) **“Bodily injury”** means any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.
 - (C) **“Brandished”** with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

§1B1.1

- (D) “**Court protection order**” means “protection order” as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).
- (E) “**Dangerous weapon**” means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).
- ~~(F) “**Departure**” means (i) for purposes other than those specified in clause (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. “**Depart**” means grant a departure.~~
- ~~“**Downward departure**” means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. “**Depart downward**” means grant a downward departure.~~
- ~~“**Upward departure**” means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. “**Depart upward**” means grant an upward departure.~~
- (~~G~~F) “**Destructive device**” means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas — (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).
- (~~H~~G) “**Firearm**” means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a “BB” or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.
- (~~I~~H) “**Offense**” means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term “**instant**” is used in connection with “offense,” “federal offense,” or “offense of conviction,” as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (*e.g.*, an offense before a state court involving the same underlying conduct).
- (~~J~~I) “**Otherwise used**” with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.
- (~~K~~J) “**Permanent or life-threatening bodily injury**” means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (*e.g.*, by denial of food or medical care) would constitute life-threatening bodily injury.

([L](#))([K](#)) “**Physically restrained**” means the forcible restraint of the victim such as by being tied, bound, or locked up.

([M](#))([L](#)) “**Serious bodily injury**” means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

2. **Definition of Additional Terms.**—Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case-by-case basis.

The term “*includes*” is not exhaustive; the term “*e.g.*” is merely illustrative.

3. **List of Statutory Provisions.**—The list of “Statutory Provisions” in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.

4. **Cumulative Application of Multiple Adjustments.**—

(A) **Cumulative Application of Multiple Adjustments within One Guideline.**—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subparagraphs (A) – (E)) are not added together.

(B) **Cumulative Application of Multiple Adjustments from Multiple Guidelines.**—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.

5. **Two or More Guideline Provisions Equally Applicable.**—Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. *E.g.*, in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.

6. **Use of Abbreviated Guideline Titles.**—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline’s heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery;

§1B1.2

Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).

Background: The court must impose a sentence “sufficient, but not greater than necessary,” to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). ~~Subsections (a), (b), and (c) are structured to reflect the three step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a “variance”. *See Irizarry v. United States*, 553 U.S. 708, 709–16 (2008) (describing within range sentences and departures as “sentences imposed under the framework set out in the Guidelines”).~~ This guideline is structured to reflect the advisory sentencing scheme established following the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), by setting forth both essential steps of the court’s inquiry in making this determination.

Originally, the guidelines were mandatory, with limited exceptions. *See* 18 U.S.C. § 3553(b). Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker*, district courts are first required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that “the post-*Booker* federal sentencing system adopted procedural measures that make the guidelines the ‘lodestone’ of sentencing”). Step one sets forth the steps for properly calculating the guidelines.

District courts are then required to fully and carefully consider the additional factors set forth in 18 U.S.C. § 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2); (3) the kinds of sentence available; (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (5) the need to provide restitution to any victims of the offense. *See Rita*, 551 U.S. at 351. Step two, as set forth in subsection (b), reflects this step of the sentencing process.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 1); November 1, 1989 (amendments 69–72 and 303); November 1, 1990 (amendment 361); November 1, 1991 (amendment 388); November 1, 1993 (amendment 497); November 1, 1997 (amendments 545 and 546); November 1, 2000 (amendments 591 and 601); November 1, 2001 (amendment 617); October 27, 2003 (amendment 651); November 1, 2003 (amendment 661); November 1, 2006 (amendment 684); November 1, 2010 (amendment 741); November 1, 2014 (amendment 789); November 1, 2018 (amendment 805); November 1, 2023 (amendment 824); November 1, 2024 (amendment 831).

§1B1.2. Applicable Guidelines

- (a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more

TAB 14



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.