COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. James C. Dever III, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Sarah S. Vance, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 5, 2025

Introduction

The Civil Rules Advisory Committee met in Washington D.C., on October 24, 2025. Members of the public attended in person, and public online attendance was also provided. Draft Minutes of that meeting are included in this agenda book. For the convenience of Standing Committee members, the entire agenda book for that Advisory Committee meeting may be accessed via the link below. This report will on occasion refer to parts of that agenda book as a source of additional information.

Civil Rules Committee Agenda Book (October 2025)

As authorized by the Standing Committee, proposed amendments to Civil Rules 7.1, 26, 41, 45, and 81 were published for public comment in August 2025, and a public hearing is scheduled to occur on January 27, 2026.

Part I of this report will present the one action item on which the Advisory Committee voted to recommend publication in August 2026—Rule 55. The proposed amendment replaces the command "must" in Rules 55(a) and (b)(1) regarding entry of default and default judgment by the clerk with "may," offering the clerk the alternative of referring the matter to the court. The amendment proposal is based on an extensive Federal Judicial Center study of default procedures in the district courts, and corresponds to the actual practices in many districts.

Part II of this report provides brief descriptions of the work of various subcommittees of the Advisory Committee. Two of the relevant subcommittees have decided that amending the rules is not warranted, and the Advisory Committee has voted to remove these matters from its agenda. The work of the other two subcommittees is ongoing, but it is not presently certain whether there will be an amendment proposal from either of them.

(a) Remote testimony: The Rule 43/45 Subcommittee's proposed amendment to Rule 45(c) regarding subpoenas for remote trial testimony is out for public comment. Meanwhile, the subcommittee (chaired by Judge M. Hannah Lauck (E.D. Va.)) continues to consider whether to relax the current requirements to permit remote trial testimony in Rule 43(a), focusing in particular on the "compelling circumstances" requirement in the current rule. During the past summer the subcommittee got the benefit of an online conference on the subject, organized by Judge Jeremy Fogel.

(b) Third-party litigation funding: For a decade, the Advisory Committee has had on its agenda a proposal to amend Rule 26(a)(1)(A) to add a requirement that the parties disclose litigation funding. Many submissions favoring and opposing such an amendment have been submitted during this period, and several bills have been introduced in Congress as well. At its October 2024 meeting the Advisory Committee appointed a TPLF Subcommittee chaired by Chief Judge R. David Proctor (N.D. Ala.). That subcommittee has been gathering relevant material and has sent representatives to bar gatherings addressing the subject. Most recently, the subcommittee heard the views of interested parties at a full-day conference about TPLF organized by the George Washington University National Law Center on the day before the Advisory Committee's fall 2025 meeting.

(c) Cross-border discovery: The Cross-border Discovery Subcommittee, chaired by Judge Manish Shah (N.D. Ill.), engaged in extensive outreach to gain information about problems generated by such discovery and whether a rule change would be a desirable response. Based on that input, it concluded that this topic should be removed from the Advisory Committee's agenda, and the Advisory Committee agreed at its fall 2025 meeting.

(d) Filing under seal: The Discovery Subcommittee, chaired by Chief Judge David Godbey (N.D. Tex.), has for several years evaluated various proposals to amend the rules to specify that a protective order under Rule 26(c) regarding materials exchanged through discovery does not of its own force also provide a ground for filing under seal in court, given the different standards

that apply in the two situations. After discussion, the subcommittee's conclusion was that, even though the different standards are not explicitly articulated in the rules, the difference is widely understood and reflected in much caselaw, making a rule amendment unnecessary. Submissions had also proposed imposing a nationally uniform set of procedures for motions to seal, but the subcommittee concluded that doing so would disregard differences between the dockets of various districts and might introduce undue difficulties for at least some districts. The subcommittee therefore recommended removing this item from the Advisory Committee's agenda, and the Advisory Committee agreed with that recommendation during its fall 2025 meeting.

Part III of this report addresses other topics that remain under study but not by a specific subcommittee:

(a) Rule 23 proposals: Important amendments to Rule 23 were made in 2003 and 2018. On each occasion, much effort was involved in evaluating possible rule changes. Recently, the Advisory Committee has received recommendations to consider further amendments dealing with (1) "service" or "incentive" awards to class representatives; (2) revising the superiority provision in Rule 23(b)(3) to authorize the court to consider whether non-litigation alternatives to a class action might be superior to class certification; and (3) whether Rule 23(e) should be revised to call for court approval of a pre-certification settlement or dismissal of a proposed class action. These issues remain under study.

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

Part IV of this report addresses items that the Advisory Committee has concluded do not call for ongoing work and therefore is removing from its agenda:

(a) Cybersecurity concerns regarding material exchanged during discovery: A submission urged that given the increasing cybersecurity risks that attend many activities, special requirements should be added to the discovery and related rules to require parties seeking discovery to ensure that materials turned over will be adequately protected against security breaches.

(b) Reimbursement of nonparties served with subpoenas for the costs of compliance: Though in general nonparties from whom information is sought via subpoena must shoulder the cost of producing the requested material, Rule 45 also directs that parties serving subpoenas avoid imposing an undue burden on such nonparties. Courts may protect against undue burdens, and the requirement that the responding parties shoulder the burden of compliance may serve to prompt them to be frugal. More generally, the question of "requester pays" has been before the Advisory Committee several times in the past, and it has not found such an approach useful.

(c) Permissive filing of discovery requests and responses: The 2000 amendments to Rule 5(d)(1) directed that discovery requests and responses be filed in court only when "used in the proceeding." A submission proposed that this rule change be reversed, or that the rule be revised to permit filing of discovery requests and responses. The justification was that some

attorneys do not consent to service by electronic means of such materials, and that service via the court's CM/ECF system is faster and cheaper than U.S. mail.

(d) Time counting for responses to motions: A submission primarily focused on the Appellate Rules' provisions regarding when responses are due to motions urged that the Civil Rules also be amended to guarantee additional time to respond to a motion when it is filed on a Friday, particularly before a three-day weekend. But this concern does not seem to be prominent in regard to the Civil Rules, and there is a great variety of varying times prescribed already that should make such a change unnecessary.

I. ACTION ITEMS

Rule 55

Since 1938, Rules 55(a) and (b)(1) have included the command that the clerk "must" enter a default or default judgment in certain circumstances. Actual practice is different. For one thing, there may be questions about whether a defending party has been properly served that may make a command to the clerk to enter a default inappropriate. For another, with regard to a default judgment under Rule 55(b)(1), there may be difficult questions about whether an action is for "a sum certain or a sum that can be made certain by computation." In particular, the possibility that an attorney fee award is justified can present tricky questions that the clerk may be unable to resolve with confidence. Issues can also arise with computing interest.

An extensive study by the Federal Judicial Center revealed that default practices vary considerably among districts. Additional information on those differences can be found at pp. 112-16 of the agenda book for the Advisory Committee's fall 2025 meeting via the link at the beginning of this report. In some courts, a party seeking entry of default or default judgment is required to give advance notice to the defending party. In one district, local rules provide that the clerk must give notice of entry of default. Local rules prescribe different methods for seeking entry of default or default judgment—by motion or otherwise—and prescribe the specific showings that must be included in applications for entry of default or default judgment. At least one local rule directs the clerk independently to verify that the time for response has expired without an answer or appearance from the defendant. Regarding entry of default judgment, one local rule has a meet-and-confer requirement.

Though a nationwide set of rules on such questions might have some utility, the Advisory Committee was not persuaded that altering local practices on all these various matters was warranted. But the command in the rule that the clerk take actions that could impose undue burdens on the clerk is out of step with almost all local practices. So the Advisory Committee's conclusion was to grant the clerk discretion to refer applications for entry of default or default judgment to the court. That discretion is, indeed, included in some local rules and also occurs as a matter of local practice.

In approaching this topic, it is also useful to take account of the decreasing importance of default practice in federal court, particularly in comparison to state courts. As the FJC study demonstrated, the frequency of default judgments in federal civil cases has declined markedly in

the last 20 years, and is now below 2% of civil case terminations. In contrast, the rate of defaults in state courts is very high. *See* Pamela Bookman, *Default Procedures*, 173 U. Pa. L. Rev. 1419, 1419-20 (2025) (reporting that in state courts default judgments are "often over 70% in debt-collection cases * * * down from rates as high as 95% a decade ago"); *see also* Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 Harvard L. Rev. 1704 (2022). A 2020 study by the Pew Charitable Trusts, How Debt Collectors Are Transforming the Business of State Courts, tells a similar story about the state courts, and the American Law Institute has launched a Project on High Volume Litigation addressed to such issues.

Though defaults are a prominent issue in state courts, then, there is no comparable set of issues in federal courts.

In addition, the exercise of discretion ordinarily should be with the court. Thus, 10A *Federal Practice & Procedure* § 2685 emphasizes the role of the court:

> When an application is made to the court under Rule 55(b)(2) for the entry of a judgment by default, the district judge is required to exercise sound judicial discretion in determining whether the judgment should be entered. The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements of Rule 55(b)(2) that an application must be presented to the court for entry of judgment and that notice of the application must be sent to any defaulting party who has appeared.

Additional information about this topic can be found at pp. 105-16 of the agenda book for the Advisory Committee's fall 2025 meeting via the link at the beginning of this report.

Given these considerations, the Advisory Committee approved and the following amendment to Rule 55 for publication for public comment:

Rule 55. Default; Default Judgment

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

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—may ~~must~~:

(A) enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person; or

(B) refer the matter to the court for directions.

(2) ***By the Court.*** In all other cases, a ~~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. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

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

(D) investigate any other matter.

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COMMITTEE NOTE

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

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

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

Rule 55(b)(2). The reference to "the party" has been changed to "a party" for greater clarity. No change in meaning is intended.

II. SUBCOMMITTEE WORK

(a) Remote testimony

The Rule 43/45 Subcommittee has completed its work on a proposed amendment to Rule 45(c) regarding subpoenas requiring remote trial testimony and has begun work on whether Rule 43(a) on remote trial testimony should be relaxed. Rule 43(a) was amended in 1996 to permit remote trial testimony, but only when "compelling circumstances" are presented. The committee note accompanying the 1996 amendment suggested that such circumstances would exist only when some unforeseen last-minute development prevented the in-person appearance of a witness. That note also appeared to endorse a video deposition as superior to remote live testimony.

A great deal has changed since 1996. Technology has fueled one set of changes. When the 1996 amendment was drafted, the method for receiving remote testimony was telephonic. Since then, great technological advances have dramatically changed remote participation in court proceedings. Zoom, Teams, and other services now permit something much more like in-person participation. They are not, of course, a perfect substitute, and nobody suggests abandoning the traditional primacy of in-person testimony.

The other stimulus to change was the Covid pandemic. The pandemic made in-person court appearances risky or impossible in many courts. Employing Zoom, Teams, etc., courts across the country—federal and state—regularly used technology to permit many court proceedings to occur without in-person participation. In some state court systems—notably Texas and Michigan—permitting remote participation improved access to court for self-represented litigants. (Among the members of the subcommittee is Justice Jane Bland of the Supreme Court of Texas.) In many federal district courts, remote participation was often employed for a variety of pretrial events such as motion hearings, status conferences and the like, in response to the pandemic, and has proved very useful in terms of efficiency and reducing litigation expense.

Partly as a result of these developments, the Bankruptcy Rules have been amended to relax the constraints on remote participation in "contested matters," but not adversary proceedings.

The Rule 43/45 Subcommittee's work on this topic is ongoing, and it anticipates receiving further input. It has already had representatives attend special events organized by the American Association for Justice and the Lawyers for Civil Justice. In addition, in July 2025, the subcommittee participated in an online conference organized by retired Judge Jeremy Fogel and Professor Mary Hoopes and involving Judges Marsha Pechman (W.D. Wa.), Chief Judge Mark Hornak (W.D. Pa.), Senior Judge Audrey Felissig (E.D. Mo.), and former Chief Justice Nathan Hecht (Supreme Court of Texas). The subcommittee also reviewed the recent article by Judge Fogel & Professor Hoopes, *The Future of Virtual Proceedings in the Federal Courts*, 101 Ind. L.J. 1 (2025).

The original submission urging the Advisory Committee to revise Rule 43(a) to accommodate witnesses unable to attend in person appeared to make the court responsible for ensuring alternative methods for testifying. The subcommittee has not pursued that idea.

But the subcommittee has given serious consideration to relaxing the current limitations on remote trial testimony. It has been informed that the "compelling circumstances" requirement unduly limits use of technology to present trial testimony of witnesses who cannot attend in person. For purposes of discussion, the following rough draft of a possible rule amendment was before the Advisory Committee during its October 2025 meeting:

Rule 43. Taking Testimony

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

* * * * *

COMMITTEE NOTE[1]

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

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

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

Many factors bear on the court's decision. One central concern is the importance of receiving testimony from *this* witness. Evidence Rule 403 permits the court to refuse to hear a witness present in court if that witness's testimony would be "cumulative." The good cause determination under Rule 43(a) might be close to the opposite end of a spectrum—focusing on whether there is no other witness who can provide in-person testimony on an important topic. Similar issues often arise with regard to depositions of high government officials who have no

[1] This is an initial draft of a possible committee note; it is likely to be revised before a draft amendment proposal is completed. As reflected in the minutes of the Advisory Committee's October meeting, the conclusion may be that the draft note is too cautious about remote trial testimony, leaving more latitude to the court. There may also be reason to add similar provisions with regard to motion proceedings under Rule 43(c), though drawing a clear dividing line between trials and other proceedings may present difficulties. Below in this report a possible draft amendment to Rule 43(c) is presented.

unique knowledge, which may justify a protective order preventing those depositions. Remote trial testimony would be similarly unwarranted in most such cases.

On occasion, however, judging the credibility of the remote witness may be critical to the case. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility. That can depend on in-person interaction between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner. Though a video deposition would not afford the finder of fact an opportunity for in-person evaluation of credibility, it would provide an in-person examination by counsel that might be superior to examination via telecommunications of a remote witness. Some states have even recognized a difference between "discovery" depositions and "trial" depositions; something like the latter might be the best choice. If the witness was deposed early in the case, a second deposition might be important.[2]

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

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

When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial. As amended in 2027, Rule 26(a)(3)(A)(i) should call attention to this issue well in advance of trial.

Rule 43(c)

Subcommittee discussions also called attention to Rule 43(c), which deals with evidence on a motion and authorizes use of "affidavits, oral testimony or depositions" without saying anything about whether that oral testimony might be provided remotely. If a Rule 43(a) amendment proposal goes forward, it may be desirable to make a parallel amendment to Rule 43(c):

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

* * * * *

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

The Advisory Committee solicits the views of Standing Committee members on the desirability of such possible amendments. Standing Committee members desiring additional information on these topics may consult pp. 139-81 of the agenda book for the October 2025 Advisory Committee meeting, accessible via the link at the beginning of this report.

(b) Third-party litigation funding

The Advisory Committee first received and considered a proposal from the Chamber of Commerce to amend Rule 26(a)(1)(A) to require disclosure of third-party litigation funding (TPLF) in 2014. At that time, it retained the topic on its agenda but did not take action, in part because such funding activity seemed to be undergoing rapid change. Thereafter, the Advisory Committee monitored the topic and, on occasion, revisited the TPLF issues. Additional background can be found at pp. 183-222 of the agenda book for the Advisory Committee's October 2025 meeting, accessible via the link at the beginning of this report.

Meanwhile, bills in Congress have addressed disclosure of TPLF and also focused on related matters such as exploitation of American litigation by foreign funders and possible taxation imposed on litigation funders. Examples are H.R. 1109, the Litigation Transparency Act of 2025, and H.R. 2675, the Protecting Our Courts from Foreign Manipulation Act of 2025.

At its fall 2024 meeting, the Advisory Committee appointed a TPLF Subcommittee chaired by Chief Judge R. David Proctor (N.D. Ala.). Representatives of that subcommittee have attended special sessions on this topic organized by the Lawyers for Civil Justice and the American Association for Justice. It has also reviewed various bills proposed in Congress.

TPLF has also received substantial attention outside this country. For example, in early 2025 a unit of the EU issued a 700-page report entitled Mapping Third Party Funding in the European Union.

Over time, the TPLF Subcommittee developed a series of questions it was attempting to answer, as reflected in prior agenda books:

> (1) How does one describe in a rule the arrangements that trigger a disclosure obligation? In an era when lawyers and law firms often rely on bank lines of credit to pay the rent, pay salaries, hire expert witnesses, etc., all seem to agree that TPLF disclosure requirements should not apply to such commonplace arrangements.
>
> (2) Is this problem limited to certain kinds of litigation? For example, some see MDL proceedings or "mass tort" litigation as a particular locus. Others regard patent litigation as a source of concern; in the District of Delaware there have been disputes about disclosure of funding in patent infringement litigation. Yet others (including a number of state attorneys general) fear that litigation funding may be vehicle for malign foreign interests to harm this country, or at least hobble American companies when they compete for business abroad.
>
> (3) Should the focus be on "big dollar" funding? One sort of funding is what is called "consumer" funding, often dealing with car crashes and involving relatively modest

amounts of money. "Commercial" funding, on the other hand, is said in some instances to run to millions of dollars.

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

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

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

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

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

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

On October 23, 2025 (the day before the Advisory Committee's fall 2025 meeting), the George Washington University National Law Center hosted an all-day conference addressing the subcommittee's questions. Participants included many involved in funding activities and others who favored adoption of a disclosure rule. The discussion was vigorous and sometimes contentious.

The subcommittee continues to gather information and consider the TPLF topic. It would benefit from learning the views of Standing Committee members on TPLF issues.

(c) Cross-border discovery

The Cross-Border Discovery Subcommittee (chaired by Judge Manish Shah (N.D. Ill.)) was formed in response to a submission from Judge Michael Baylson and Professor Steven Gensler (both former members of the Advisory Committee) urging consideration of rule amendments to deal with cross-border discovery. *See* Baylson & Gensler, *Should the Federal Rules of Civil Procedure Be Amended to Address Cross-Border Discovery?*, 107 Judicature 18 (2023).

The subcommittee engaged in substantial outreach to become informed on the issues involved and whether there was a need to amend the Civil Rules to improve the handling of cross-border discovery. This outreach included having representatives of the subcommittee attend a May 2024 event in Washington, D.C., organized by the Lawyers for Civil Justice, and a July 2024 event in Nashville, Tennessee, organized by the American Association of Justice. In addition, the Sedona Conference organized an online session with some of the members of its Working Group 6 (which focuses on cross-border discovery), and representatives of the subcommittee attended a two-day meeting of Sedona's Working Group 6 in Los Angeles that included a panel addressing possible rule changes. In addition, Dean Zachary Clopton met with a group of transnational discovery experts affiliated with the American Bar Association.

As reported in the minutes of the April 2025 meeting of the Advisory Committee, these outreach efforts did not find that there is widespread enthusiasm for amending the rules. Instead, lawyers regard the current rules as sufficient, and some sectors of the bar find the possibility of a rule change—even the addition of such discovery as a special topic in Rule 26(f)—to be extremely unnerving. Though skepticism about broad American discovery appears to exist in several foreign countries, and tensions can develop as a result, serious challenges could confront any effort to resolve such issues via a rule change.

Under these circumstances, the members of the Cross-Border Discovery Subcommittee recommended that the topic be dropped from the Advisory Committee's agenda for the present; if in the future some development makes a rule change appear desirable it may be that further action is in order.

Standing Committee members interested in additional background may consult pp. 118-20 of the agenda book for the Advisory Committee's fall 2025 meeting via the link at the beginning of this report.

(d) Filing under seal

In 2020, Professor Eugene Volokh (UCLA) and the Reporters' Committee for the Freedom of the Press submitted a recommendation to adopt a new rule regulating motions to seal materials filed in court. The original proposal was fairly elaborate, and included some demanding provisions. For example, no motion to file under seal could be granted sooner than seven days after it was filed, and the motion would have to be posted on a special court website rather than in the file of the given case.

In addition, anyone would be granted a right to intervene to oppose a motion to seal or get a sealing order overturned (thus possibly supplanting Rule 24 on motions to intervene, which has been used in such circumstances, including by Prof. Volokh). *See Mastriano v. Gregory*, 2024 WL 4003343 (W.D. Okla. Aug. 26, 2024) (Prof. Volokh granted leave to intervene to move to unseal two exhibits that were filed under seal and motion to seal granted); *Sealed Appellant v. Sealed Appellee*, 2024 WL 980494 (5th Cir. Mar. 7, 2024) (Prof. Volokh intervened to challenge the sealing of the file after "this case came to his attention after one of the district court's orders turned up in a scheduled daily Westlaw search for cases mentioning sealing and the First Amendment"); *Doe v. Town of Lisbon*, 78 F.4th 38 (1st Cir. 2023) (Prof. Volokh granted intervention to seek identity of police officer who sued seeking to have his name removed from a list of officers found guilty of misconduct, but motion to unseal denied).

Another feature of the proposed rule would impose on the clerk of court the obligation to unseal any materials filed under seal six months after a final decision in the case, even if the case were appealed, and the court of appeals affirmed. That could present monitoring challenges for the court or the clerk.

There followed a number of additional submissions favoring adoption of uniform procedures and pointing out in some detail (one was nearly 100 pages long) that different districts had different procedures. There was also one submission opposing the proposed rule changes.

These differences among district court local rules sometimes could be challenging for attorneys practicing in numerous districts. On the other hand, restrictions on procedures for motions to seal—particularly if they included mandatory waiting periods—could hamstring attorneys who needed to know whether they could file certain materials in connection with pending motions. One possibility might be to permit filing under a "temporary" seal pending decision of the motion to seal. But if that motion were denied, it seemed that there would be no way for the party that filed the materials to take them back. For further details on these difficulties with the proposed rule provisions, see pp. 130-33 in the Advisory Committee's agenda book for the October 2025 meeting, via the link at the beginning of this report.

Initially, the Discovery Subcommittee drafted a possible amendment to Rule 26(c) specifying that granting a protective order does not itself provide a ground for filing under seal. In addition, it attempted to draft a new Rule 5(d)(5) addressing when filing under seal could be ordered. These efforts proved difficult because the various circuits had different locutions for the common law and First Amendment limits on sealing court records. The draft sought to avoid unsettling these rules established in the caselaw.

Then, for a period of time, the project was held in abeyance as the Administrative Office undertook its own project on the handling of materials filed under seal. Eventually, the Advisory Committee was advised that this A.O. project would not bear on motions to seal, and the Discovery Subcommittee resumed work.

At its April 1, 2025 meeting, the Advisory Committee indicated no interest in attempting to prescribe nationally mandatory procedures for motions to seal. Among other things, differences in court dockets in different districts indicated that one size might not easily fit all.

Though prescribing mandatory procedures for motions to seal did not look promising, there remained a question whether an amendment to Rule 26(c) would suffice without any change to Rule 5(d), and whether making a change to Rule 5(d) might be taken to alter common law rights of access to court files or even to affect First Amendment rights of access.

The agenda book for the October 2025 meeting of the Advisory Committee offered four possibilities:

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

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

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

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

The agenda book also advised the full Advisory Committee that the Discovery Subcommittee might be able to meet and make a recommendation to the full Advisory Committee about which course it recommended. The Discovery Subcommittee did meet after the agenda book for the full Advisory Committee meeting was published. Notes for this meeting were added to the agenda book and can be found at pp. 413-14 of the agenda book accessible via the link at the beginning of this report.

The subcommittee's unanimous conclusion was that removing this item from the agenda was the best choice. The adoption of nationally mandatory procedural standards (item 4) received no support. Amending the rules to clarify that the standard for filing under seal is more demanding than the standard for granting a protective order under Rule 26(c) (items 1 and 2) seemed unnecessary. Indeed, the most recent submission received by the Advisory Committee (25-CV-K, from the American Association for Justice and Public Citizen) recognized that "there is a consensus that the standard required for sealing is higher than the good cause standard required for a protective order." At the same time, inserting new provisions in the rule raised the risk of appearing to change existing standards.

The subcommittee also noted that concerns had recently been raised about whether materials filed under seal might nevertheless be vulnerable due to cybersecurity challenges. The security of court files is not the focus of this subcommittee's mandate, but these developments underscore the need for care in this area.

So the subcommittee recommendation to the full Advisory Committee was to remove this topic from the agenda for the present. It was noted, however, that cybersecurity concerns may arise in the future with regard to the Civil Rules, the Criminal Rules, the Bankruptcy Rules, and the Appellate Rules.

At its October 2025 meeting, the full Advisory Committee accepted the subcommittee's recommendation that the matter be dropped from the agenda.

III. TOPICS THAT REMAIN UNDER STUDY

(a) Rule 23 Proposals

Rule 23 issues of three sorts have been raised separately: (1) "service" or "incentive" awards to class representatives in class actions; (2) possible revision of the "superiority" prong of Rule 23(b)(3); and (3) revisiting the 2003 amendment that made judicial approval of proposed settlements necessary only as to certified classes.

The general background is that there have been three episodes considering Rule 23 amendments in the last three decades. From 1966, when the rule was extensively revised, further amendments were not considered for 30 years. The first amendment effort was in the 1990s, when a substantial package of proposed amendments went out for public comment in 1996. This package included a number of proposed amendments to the certification criteria of Rule 23(b), and attracted considerable attention during the public comment period, much of it adverse to the Rule 23(b) amendment proposals. Ultimately, the Advisory Committee decided to recommend adoption only of a new Rule 23(f), permitting a party to seek discretionary review from the court of appeals of an order granting or denying class certification. Rule 23(f) went into effect on December 1, 1998. That amendment enabled more frequent appellate review of class-certification decisions and may have contributed significantly to a growing body of appellate caselaw on class-certification issues.

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

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

(1) Class Representative Incentive/Service Awards

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

In 2020, however, a divided panel of the Eleventh Circuit held that two 19th century Supreme Court cases (decided long before the modern class action was introduced by the 1966 amendments to Rule 23) prohibited such awards. Prior to that decision, the circuits had unanimously permitted such awards to class representatives. By a 6-5 vote, the Eleventh Circuit denied rehearing en banc. Since this Eleventh Circuit decision, four other circuits have continued to permit such awards in appropriate cases.

A question might be raised about whether, under the Enabling Act, the Advisory Committee has authority by rule to resolve this issue. Should it be considered a substantive rather than procedural issue? On the other hand, it is puzzling to try to understand how these 19th century Supreme Court decisions can bear on 21st century class actions.

But there may be concern about whether addressing this issue is good use of Advisory Committee resources. Any new Rule 23 project would be a demanding undertaking. This topic might be viewed as mainly what one could call a policy-driven issue. That's not usually the sort of thing the Advisory Committee takes on. Compare the early consideration in 2016 about whether a rule amendment could usefully address the *cy pres* issue by directing disposition of "leftover" funds after a class settlement was paid out to class members. One ground of opposition to such a rule provision was that a rule could not appropriately create such a right to recover. Another possible comparison is that when Rule 23(h) was added in 2003, it did not attempt to create a right to recover attorney fees but invoked such a right from other law (including the "common benefit" doctrine).

The Advisory Committee's current view is that these questions deserve further study, but that since other circuits have not followed the Eleventh Circuit's decision in the last five years there may be limited urgency on this issue at present.

(2) Rule 23(b)(3) superiority prong

This topic was brought to the Advisory Committee by the Lawyers for Civil Justice. Compared to the amendment proposals regarding certification criteria addressed in the 1996 amendment package, it is more limited. It is in no way directed to certification under Rule 23(b)(1) or (b)(2). And the superiority prong of 23(b)(3) has been "second banana" to the predominance requirement since the 1966 amendment.

The focus of this proposal is the provision in the rule that says the court should evaluate superiority by comparing a class action to other forms of "adjudication." That would not readily encompass arbitration, recalls of allegedly defective products, refunds, etc. In the academic world proposals for considering these other alternatives to class certification have been circulating. But it may be extremely difficult for the court to evaluate such alternatives at the early point in the litigation when certification must be resolved.

Pursuing this idea might nevertheless be appropriate in light of the reality that sometimes class certification can be outcome determinative. If the judge has discretion to consider these additional alternatives, that could on occasion provide faster or more effective relief to class members. Some courts have taken nonlitigation alternatives into account in the superiority

determination under the "adequacy prong" of Rule 23, which would call into question whether making an amendment is necessary.

(3) Settlement or dismissal before class certification

Before the 2003 amendments to Rule 23, a majority of courts had held that Rule 23(e) judicial review was required for pre-certification settlement or dismissal of every case filed as a putative class action. Under the rule as revised in 2003, there is no judicial control over (or scrutiny of) a pre-certification settlement or dismissal by the class representative. A variety of concerns might justify new attention to a role for the court.

For one thing, generous individual settlements of proposed class actions could invite a form of strike suit involving some sort of cosmetic cover for a payoff to the class attorney or the class representative (or both) calling for defendant take specific actions that seem to address the claim made in the complaint but really provide no significant relief to the class.

Alternatively, there is a pick-off problem: Can the defendant defuse a class action by offering an individual deal to the class representative in order to get that person out of the way? In a way, this can be likened to the first concern—that the suit is being used to extract money from the defendant that does nothing for the class.

The 2003 change in the rule removed an existing provision in Rule 23 that prompted many courts to hold that judicial review of pre-certification settlements required judicial review, at least when there is reason to think that many class members are aware of the suit and, perhaps, relying on it. If so, an individual settlement may upset their legitimate expectations.

One possibility is that, when the filing of the class action has been widely publicized, Rule 23(d) already provides the court with authority to order notice of some sort, and perhaps also to adopt further protective measures. And it may be very rare that any significant number of class members are actually aware of the filing of a class action on their "behalf."

Restoring pre-2003 Rule 23(e) review in the pre-certification setting may be a dubious proposition. The customary evaluation of a class settlement under Rule 23(e) may not be well designed to address the pre-certification individual settlement. And assuming the original class representative favors the settlement, there may be substantial questions about whether that person is an adequate class representative.

Rule 23(e) requires notice to class members (individual notice in 23(b)(3) class actions). If that is required before class certification, who will pay for it? When there is a proposed settlement binding on the class, the defendant may be willing to pay for notice to make certain that if the settlement is approved it will be binding on class members if they file additional suits.

But before certification, it could be said that there really is no entity before the court.

* * *

The Advisory Committee's initial conclusion was that all three issues would remain under study, but also that a new Rule 23 project would be a major undertaking. Reactions from Standing Committee members would be helpful to the Advisory Committee as it continues to study these issues. Going forward with those subjects might prompt the presentation of additional amendment ideas.

(b) Random assignment of civil cases

The Advisory Committee began considering this issue in 2023 and reported about the topic to the Standing Committee soon thereafter. In March 2024, the Judicial Conference issued advice to districts about the possible desirability of adjusting assignment of some civil cases in light of the concerns raised. Since then, the Advisory Committee has been monitoring developments. The Advisory Committee will continue to monitor the situation.

IV. TOPICS REMOVED FROM AGENDA

(a) Cybersecurity concerns regarding material exchanged through discovery

Lawyers for Civil Justice submitted 25-CV-D, entitled "Reasonable Steps: Four Critical FRCP Updates for Managing Privacy and Cyber Security." The four proposed rule changes are:

> Rule 26(b)(1): The amendment would add another consideration in the proportionality analysis: "the obligation to protect the privacy rights of parties and non-parties and to minimize the risk of harm from unauthorized access to, or use of, personal or confidential information."
>
> Rule 26(c)(1): The amendment would add a new (I), which would authorize a protective order "requiring that personal and confidential information not be revealed or be revealed only in a specified way, or that reasonable steps be taken to protect against unauthorized access to, or use of, such information."
>
> Rule 34(b)(2)(E): The amendment would add the following new (iv): "A party need not produce documents or electronically stored information in the absence of assurance that reasonable steps have been taken to protect personal information from unauthorized access or use."
>
> Rule 45(d)(1)(B): The amendment would add the following obligation of a party serving a subpoena: "to protect personal or confidential information against unauthorized access or use." Failure to do that would subject the serving party to sanctions including "costs, and expenses incurred by the responding party or any individual person harmed as a result of noncompliance" with this new duty. [Note: the sanction provision might be viewed as akin to a new form of cybersecurity tort liability.]

The submission urges that Rule 34 is "ground zero" for addressing cybersecurity concerns, and that the proposed rule change incorporates the "commonsense presumption that parties making Rule 34 requests have taken or will take reasonable measures to prevent unauthorized access to personal and confidential information." It adds, however, that the other changes are also necessary.

Additional information about this submission can be found at pp. 267-79 of the agenda book for the Advisory Committee's October 2025 meeting, accessible via the link at the beginning of this report.

There is no question that cybersecurity is an important concern. Indeed, as noted in the discussion of the previous item on filing under seal, there are even concerns that filing under seal in court may not prevent some malign actors from accessing the sealed materials.

Litigation reinforces this impression. There are many reports of class actions asserting that defendants have failed to adopt sufficient cybersecurity precautions. Numerous firms offer specialized services to companies to ward off intruders.

But at the same time, lawyers owe their clients duties to guard client confidences. And making all or much discovery depend upon a prior showing that the party asked to provide discovery approves of the requester's cybersecurity precautions could introduce new disputes into the discovery process. For example, the proposed change to Rule 34(b) would seem likely to produce additional delays. Given the rise of cybersecurity consultants, it seems likely that there are many grounds for dispute about the adequacy of protective measures in this regard. Moreover, if materials obtained through discovery are shared with clients, the producing party might refuse to proceed until assured also about the client's cybersecurity precautions. And it may well be that judges are ill-equipped to pass judgment on cybersecurity measures if the disagreement between the parties leads to a motion to compel.

The agenda book for the Advisory Committee's October 2025 meeting (at pp. 269-70) identified ten questions raised by this proposal.

After discussion, the Advisory Committee decided to remove this topic from its agenda during its October 2025 meeting.

(b) Reimbursement of nonparties served with subpoenas for the costs of compliance

Professor Brian Fitzpatrick (Vanderbilt Law School) submitted 25-CV-E, urging that it is "Economics 101" that people who do not have to pay for something will consume too much of it. Given that reality, he urges, Rule 45 should be "amended to make nonparties whole when they respond to production requests from litigants." The submission does not propose a specific rule provision.

Professor Fitzpatrick invokes the original adoption of Rule 45 in the 1930s, when a subpoena could be issued only by the court, and service required presentation of the witness fees for one day's attendance and the "mileage allowed by law." (A preliminary draft of a proposed Rule 45(b) amendment that would no longer require that the witness fees payment be presented to effect service is out for public comment.) As Professor Fitzpatrick notes, the travel costs were probably the main burden borne by those subject to a subpoena—"back then, there were no photocopy machines, let alone computers."

Since the 1930s, subpoena practice and discovery practice have evolved considerably. Now a subpoena can command the production of documents without commanding attendance at a

deposition. Until 1970, Rule 34 requests for production of documents depended on advance judicial approval. And subpoenas could be issued only by the court. But as amended in 1991, Rule 45 authorizes an attorney to issue a subpoena, including a subpoena for production of documents.

Unlike requests for documents under Rule 34, Rule 45(d) affirmatively directs the serving party or attorney to "avoid imposing undue burden or expense on the person subject to the subpoena." When Rule 45 was revised in 2006 to address the challenges of discovery of electronically stored information, the committee note invoked this directive.

Requiring 100% reimbursement of all alleged costs of complying with a subpoena when served on a "nonparty" could be difficult for judges and impose considerable expenses on parties seeking discovery. If the shifted costs were limited to "necessary" costs, that might introduce disputes about what was necessary to comply with the subpoena. Mandatory cost-shifting could reduce or eliminate the incentive under the current rule for the producing party to be frugal in arranging for the production. There have often been allegations of "dump truck" responses to Rule 34 requests. And mandatory reimbursement might call for some sort of "billing" for the time spent by full-time employees of the subpoena target (such as a hospital or internet service provider) in complying with the subpoena.

Insulating nonparties against undue cost might be valuable in some instances. But determining which entities should be regarded as "nonparties" could itself prove tricky. Corporate interrelationships, for example, are probably more complicated now than they were when Rule 45 was adopted in the 1930s.

It is worth noting also that a more general "requester pays" attitude (as an exception to the "American rule" that each side must pay its own litigation expenses) was considered about a decade ago by the Advisory Committee and not pursued.

At its October 2025 meeting, the Advisory Committee decided to drop this topic from the agenda.

Further information about this item can be found at pp. 281-86 of the agenda book for the Advisory Committee's October 2025 meeting, accessible via the link at the beginning of this report.

(c) Permissive filing of discovery requests and responses

Mark Foster submitted 25-CV-J, urging that Rule 5(d) be amended to permit, or perhaps to require, that discovery requests and responses be filed in court.

Under Rule 5(d)(1)(A), as amended in 2000, discovery requests and responses and not filed in court unless "used in the action." Though paper filings were then a burden on the clerk's office, as Mr. Foster points out, with electronic filing now that burden should be very significantly reduced.

Mr. Foster says that such an amendment would be welcome on occasion because "there are unfortunately attorneys who refuse to consent to email service." But CM/ECF offers a substitute to the need in such instances to serve by U.S. mail.

But filing discovery materials in court might well prove difficult for clerk's offices. It is not clear that there is widespread refusal to consent to electronic service among attorneys. Also, given the concern about unauthorized access to materials exchanged in discovery (see Discovery Subcommittee report above), there might be more pressure on the courts due to motions to file under seal. There might also be more pressure for protective orders under Rule 26(c). In addition, permissive filing might sometimes enable parties to seek strategic advantage by threatening to file materials obtained via discovery in court (even if subject to a protective order).

At its October 2025 meeting, the Advisory Committee decided to drop this submission from its agenda.

(d) Time counting for responses to motions

Jack Metzler submitted 24-CV-Z, proposing a change to Appellate Rule 26(a)(1)(B) regarding how one counts time with regard to matters in the courts of appeals. Mr. Metzler's proposed change to Appellate Rule 26(a)(1)(B) was to add the following language to that rule:

> (b) count every day, including intermediate Saturdays, Sundays, and legal holidays, starting with the first day that is not a Saturday, Sunday, or legal holiday; and * * *

Rules Committee Staff listed this submission as potentially pertinent also for the Bankruptcy, Civil, and Criminal Rules. Further information about this submission can be found at pp. 401-05 of the agenda book for the Advisory Committee's October 2025 meeting via the link at the beginning of this report.

Mr. Metzler's focus is gamesmanship in regard particularly to motions before the court of appeals. If opposing counsel file a motion late on a Friday, particularly before a three-day weekend, that may impose a time crunch on opposing counsel in making a responsive filing within the time limits.

Though strategic behavior of this sort is an unfortunate feature of all litigation, this sort of concern does not seem important in litigation governed by the Civil Rules. Many or most district courts address notice periods in their local rules. And the Time Counting Project about a decade ago sought to remove anomalies for all time limits of fewer than 28 days.

Beyond that, the Civil Rules are now full of provisions that might be affected by an omnibus time counting rule beyond what's already in the rules. Some examples are listed below:

> Rule 11(c)(2)—motion may be filed only at least 21 days after it is served, and then only if the offending item is not withdrawn (the safe harbor).
>
> Rule 12(b)—pre-answer motion permitted "before pleading if a responsive pleading is allowed."

Rule 12(c)—motion for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial."

Rule 12(e)—motion for more definite statement would ordinarily be made before due date for responsive pleading.

Rule 12(f)—motion to strike "either before responding * * * or, if a response is not allowed, within 21 days."

Rule 23(c)(1)(A)—motion to certify class "[a]t an early practicable time."

Rule 24(a)—motion to intervene must be "timely."

Rule 25(a)(1)—motion for substitution upon death of a party "within 90 days of service of a statement after service of a statement noting the death."

Rule 35(a)—motion for physical or mental examination, without any time limits.

Rule 36(a)(6)—motion to determine sufficiency of answer or objection to request for admission, without any time limits.

Rule 37(a)(1)—motion to compel must certify "that the movant has in good faith conferred or attempted to confer" with wrongdoer so as to avoid need for motion.

Rule 39(b)—if no proper jury demand is made in time, the court may order a jury trial, without any time limits.

Rule 41(b)—motion to dismiss for failure to prosecute or to comply with the rules, without any time limits.

Rule 45(d)(3)(A)—motion to quash subpoena must be "timely."

Rule 50(a)(2)—pre-verdict motion for judgment as a matter of law "at any time before the case is submitted to the jury."

Rule 50(b)—post-verdict motion for judgment as a matter of law no later than 28 days after the entry of judgment.

Rule 54(b)—motion for partial final judgment, without any time limits.

Rule 55(b)(2)—motion for entry of default judgment; defending party that has appeared must receive at least 7 days' notice.

Rule 56(b)—motion for summary judgment, at any time "until 30 days after the close of all discovery."

Rule 59(b)—motion for new trial "no later than 28 days after the entry of judgment."

At its October 2025 meeting, the Advisory Committee decided to remove this item from its agenda.

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

Rule 55. Default; Default Judgment

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

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—may ~~must~~:

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

(A) enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person; or

(B) refer the matter to the court for directions.

(2) ***By the Court.*** In all other cases, a ~~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.

The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

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

(D) investigate any other matter.

* * * * *

Committee Note

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

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

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

Rule 55(b)(2). The reference to "the party" has been changed to "a party" for greater clarity. No change in meaning is intended.

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

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 24, 2025. The meeting was open to the public. Participants included Judge Sarah S. Vance, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland, David Burman, Judge Annie Christoff, Dean Zachary Clopton (remotely), Chief Judge David Godbey, Jocelyn Larkin (remotely), Judge M. Hannah Lauck, Mark Lanier, Judge R. David Proctor, Judge Marvin Quattlebaum, Judge Manish Shah, and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper (remotely) as Consultant. Judge James C. Dever III, Chair, Professor Catherine T. Struve, Reporter, and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated**.** The Department of Justice was represented by Brett Shumate and Elizabeth Shapiro. The Administrative Office (AO) was represented by Chief Counsel to the Rules Committees Carolyn Dubay, Bridget Healy (remotely) Shelly Cox, Rakita Johnson, and law clerk Sarah Sraders. Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

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

Opening Business

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

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

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

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Amendments Related to Cross-Border Discovery

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

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

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

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

Discovery Subcommittee—Filing Under Seal

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

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

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

Information Items

Rule 43/45 Subcommittee—Remote Testimony

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

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

testimony more often in response to positive experiences with the technology during the COVID-19 pandemic.

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

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

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

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

Judge Vance thanked the subcommittee for its ongoing work.

Third-Party Litigation Funding (TPLF) Subcommittee

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

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

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

Other Proposals/Matters Under Committee Consideration

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

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

Professor Bradt introduced this set of topics by sketching the evolution of the "modern" class action. That was introduced by the 1966 amendments to the rule. Since then, the class action rule has been on the Advisory Committee's agenda several times. The first time after 1966 was in the 1990s, when a substantial package of proposed amendments went out for public comment in 1996. This package included several proposed amendments to the certification criteria of Rule 23(b) and attracted considerable attention during the public comment period. Ultimately, the Advisory Committee decided to recommend adoption only of a new Rule 23(f),

permitting a party to seek discretionary review from the court of appeals of an order granting or denying class certification. Rule 26(f) went into effect on December 1, 1998.

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

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

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

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

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

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

Class Representative Incentive/Service Awards

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

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

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

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

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

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

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

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

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

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

Rule 23(b)(3) Superiority

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

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

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

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

Settlement before class certification

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

First, individual settlements of proposed class actions could invite a form of strike suit. In order to provide a cosmetic cover for a payoff to the class attorney or the class representative (or

both), the settlement might call for the defendant to take specific actions that seem to address the claim made in the complaint but really provide no significant relief. That cosmetic undertaking might be used to support a significant award of attorney fees paid by the settling defendant.

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

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

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

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

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

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

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

Another member expressed disagreement with some of these points. There are situations in which the class-action mechanism has been abused. In some state courts, it is still necessary to get judicial approval for pre-certification "individual" settlements. Having the judge oversee and critique such arrangements has an important prophylactic effect. In the *Alcarez* case in the agenda book, the district court said that the class action device was being used to further "a

racket." In state courts that scrutinize such pre-certification deals it is not necessary to do a full class-certification hearing.

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

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

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

Privacy Protections for Material Obtained Through Discovery

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

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

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

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

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

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

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

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

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

Counting Time

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

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

Random Case Assignment

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

Intercommittee Reports

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

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

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

Professor Marcus added that consistency across the rules sets on this issue would be beneficial to clerk's offices. The clerk liaison mostly agreed, while noting that in Social Security appeals there might be some need for the SSN. Professor Marcus noted, however, that there are supplemental rules for appeals from the agency, and the Commissioner of Social Security

developed a unique special set of identifiers for those cases. In the mine run of civil cases, there appears to be no persuasive reason for including SSNs and the like.

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

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

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

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

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

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

Service and E-filing by Self-Represented Litigants

Professor Struve updated the Advisory Committee on efforts to develop rules around self-represented litigants' use of CM/ECF. She explained that the two major parts of the project are: (1) to amend Rule 5(b) to eliminate the requirement of separate paper service on a litigant who is going to receive materials through CM/ECF; and (2) to presumptively permit self-represented litigants to file electronically unless a court or local rule bars them from doing so and to provide that a local rule or general order that bars self-represented litigants from using the court's

electronic filing system must include reasonable exceptions or permit the use of other electronic methods. Each advisory committee has discussed these proposals and have been generally favorable (though bankruptcy cases may have special considerations that necessitate different rules), and Professor Struve reported that there is an emerging consensus that may yield proposed rule amendments in at the spring meetings. But there are still some outstanding questions on which feedback would be helpful.

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

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

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

Attorney Admissions

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

Report from the Federal Judicial Center

Due to the ongoing lapse in appropriations, a representative from the FJC could not attend this meeting. But a report on its recent work is in the agenda materials and it details many

important recent and ongoing projects. Judge Vance thanked the FJC for its comprehensive and meaningful work for the judiciary and the rulemaking process.

Judge Vance then adjourned the meeting.

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

From: Sarah Vance
Sent: Tuesday, December 30, 2025 10:10 AM
Subject: Small Style Change to Rule 55 Action Item

Dear Judge Dever, Standing Committee Members, and Professor Struve,

The sole action item presented by the Advisory Committee on Civil Rules is a recommendation to publish for public comment a preliminary draft of proposed amendments to Rule 55(a) and (b), appearing on pp. 197-98 of the agenda book for the Standing Committee's Jan. 6, 2026, meeting. On recommendation of the Standing Committee Style Consultants, we will be proposing the addition of one word — "either" — after the word "may" to the draft amendment for Rule 55(a) and Rule 55(b)(1). The specific changes are:

p. 198 line 4: " . . . the clerk may **either** ~~must~~ enter the party's default . . . "

p. 198, line 9: " . . . showing the amount due -- may **either** ~~must~~:

A parallel change will be needed on p. 218:

p. 218, line 5: " . . . the clerk may **either** ~~must~~ enter the party's default . . . "

p. 218, line 13: " . . . due -- may **either** ~~must~~: . . . "

There is no change to the draft Committee Note.

It seemed appropriate to alert you to this small change in advance of the Jan. 6 meeting.

Sarah Vance
Chair, Advisory Committee on Civil Rules