COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE

January 6, 2026

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

AGENDA BOOK
January 6, 2026

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JUDICIAL CONFERENCE OF THE UNITED STATES
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AGENDA

1. Opening Business

A. Welcome and Opening Remarks – Judge James C. Dever III, Chair

- **ACTION:** The Committee will be asked to approve the minutes of the June 2025 Committee meeting.

- **ACTION:** The Committee will be asked to suggest goals from the Strategic Plan for the Federal Judiciary to be prioritized over the next two years.

B. Report from the Rules Committee Staff – Carolyn A. Dubay, Chief Counsel, and Sarah Sraders, Counsel

- Report on Status of Rules Amendments
- Legislative Update

C. Report from the Federal Judicial Center – Judge Robin C. Rosenberg, Director

2. Joint Committee Business

A. Information Items

- Report on electronic filing by self-represented litigants – Professor Cathie Struve, Standing Committee Reporter
- Report of joint subcommittee on attorney admission – Professor Cathie Struve, Standing Committee Reporter (oral report)
- Report on privacy rule issues – Carolyn A. Dubay, Chief Counsel, Rules Committee Staff (oral report)

3. Report of the Advisory Committee on Appellate Rules – Judge Allison H. Eid, Chair

A. Information Items

- Published proposed amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention), designed to remove a potential trap for the unwary.
- Intervention on appeal and the continued consideration of suggestions regarding a possible new rule on intervention.
- Reopening the time to appeal and possible amendments to Rule 3 (Appeal as of Right—How Taken) and Rule 4 (Appeal as of Right—When Taken).

- Administrative stays and the continued consideration of possible amendments to Rule 8 (Stay or Injunction Pending Appeal).
- Consideration of a suggestion related to the treatment of tribes in the Appellate Rules.

4. Report of the Advisory Committee on Bankruptcy Rules – Judge Rebecca B. Connelly, Chair

A. **ACTION:** The Committee will be asked to recommend the following for final approval:

- Retroactive final approval of technical corrections to Official Form 410C13-NR, approved by the Advisory Committee at its Fall 2025 meeting.

B. Information Items

- Report regarding consideration of suggestions to amend Rule 2003 (Meeting of Creditors or Equity Security Holders) regarding the time and location of meetings of creditors.
- Report regarding consideration of suggestions to amend Rule 9031 (Using Masters Not Authorized) regarding the use of masters in bankruptcy cases and proceedings.
- Report on proposed amendments to Rule 8017 (Brief of Amicus Curiae) to conform with proposed amendments to Federal Rule of Appellate Procedure 29 (Brief of Amicus Curiae).

5. Report of the Advisory Committee on Civil Rules – Judge Sarah S. Vance, Chair

A. **ACTION:** The Committee will be asked to approve the following for publication and public comment:

- Rule 55 (Default; Default Judgment).

B. Information Items

- Report on amendments related to cross-border discovery.
- Report on possible national standard or rule regarding filing under seal.
- Report on Rules 43 (Taking Testimony) and 45 (Subpoena) and the criteria for permitting remote testimony.
- Report on third-party litigation funding suggestions.
- Report on Rule 23 (Class Actions)—Superiority; "Service" Awards; Pre-Certification Settlement Approval
- Report on random case assignment and monitoring local court changes related to recent Judicial Conference guidance.
- Report on items removed from consideration.

6. Report of the Advisory Committee on Criminal Rules – Judge Michael W. Mosman, Chair

A. Information Items

- Report on suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) regarding reference to minors by pseudonyms.
- Report on suggestions to amend Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District).
- Report on suggestion to amend Rule 43 (Defendant's Presence) to expand use of video conferencing.
- Report on suggestions to amend Rule 15 (Depositions).
- Rule on suggestions to amend Rule 11 (Pleas).

7. Report of the Advisory Committee on Evidence Rules – Judge Jesse M. Furman, Chair

A. Information Items

- Report regarding preliminary revisions to proposed new Rule 707 (Machine-Learning).
- Report regarding consideration of possible new Rule 901(c) (Authenticating or Identifying Evidence) to address authenticity issues arising from deepfakes.
- Report on suggestions to amend Rule 902 (Evidence That Is Self-Authenticating) to add a reference to federally-recognized Indian tribes and nations.
- Report on suggestions to amend Rule 803(3) (Exceptions to the Rule Against Hearsay—Regardless of Whether the Defendant Is Available as a Witness) regarding the state of mind exception.
- Report on suggestions to amend Rule 703 (Bases of an Expert's Opinion Testimony) in light of *Smith v. Arizona*.
- Report on suggestion to amend Rule 104(a) and (b) (Preliminary Questions).
- Report on suggestion for changes to Rule 803(6) (Exceptions to the Rule Against Hearsay—Regardless of Whether the Defendant Is Available as a Witness) and 901 (Authenticating or Identifying Evidence) to address issues in civil cases.
- Report on commemoration of the 50th Anniversary of the Rules of Evidence.

8. Other Committee Business

A. Recognition of Service to the Rules Committees – Professor Cathie Struve, Professor Ed Hartnett, Mr. Joseph Spaniol.

B. Next Meeting – June 3-4, 2026 in Chicago, IL.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

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

Secretary to the Standing Committee

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

Advisory Committee on Appellate Rules

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

Advisory Committee on Bankruptcy Rules

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

Associate Reporter

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

Advisory Committee on Civil Rules

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

Advisory Committee on Criminal Rules

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

Advisory Committee on Evidence Rules

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

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

Members

Honorable Paul J. Barbadoro United States District Court Concord, NH	Todd Blanche, Esq. Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Elizabeth J. Cabraser, Esq. Lieff Cabraser Heimann & Bernstein, LLP San Francisco, CA	Louis A. Chaiten, Esq. Jones Day Cleveland, OH
Honorable Colm F. Connolly United States District Court Wilmington, DE	Honorable Joan N. Ericksen United States District Court Minneapolis, MN
Honorable Stephen A. Higginson United States Court of Appeals New Orleans, LA	Honorable Edward M. Mansfield Iowa Supreme Court Des Moines, IA
Dean Troy A. McKenzie New York University School of Law New York, NY	Andrew J. Pincus, Esq. Mayer Brown LLP Washington, DC
Honorable Allison J. Rushing United States Court of Appeals Asheville, NC	Honorable D. Brooks Smith United States Court of Appeals Duncansville, PA
Bart H. Williams, Esq. Proskauer Rose LLP Los Angeles, CA	

Consultants

Professor Daniel R. Coquillette Boston College Law School Newton Centre, MA	Professor Bryan A. Garner LawProse, Inc. Dallas, TX
Professor Joseph Kimble Thomas M. Cooley Law School Lansing, MI	

Committee on Rules of Practice and Procedure

Members	Position	District/Circuit	Start Date	End Date
James C. Dever III Chair	D	North Carolina (Eastern)	Member: 2025 Chair: 2025	---- 2028
Paul Barbadoro	D	New Hampshire	2023	2028
Todd Blanche*	DOJ	Washington, DC	----	Open
Elizabeth J. Cabraser	ESQ	California	2021	2027
Louis A. Chaiten	ESQ	Ohio	2023	2026
Colm F. Connolly	D	Delaware	2025	2028
Joan N. Ericksen	D	Minnesota	2024	2027
Stephen A. Higginson	C	Fifth Circuit	2024	2027
Edward M. Mansfield	JUST	Iowa	2023	2026
Troy A. McKenzie	ACAD	New York	2021	2027
Andrew J. Pincus	ESQ	Washington, DC	2022	2028
Allison J. Rushing	C	Fourth Circuit	2025	2028
D. Brooks Smith	C	Third Circuit	2022	2028
Bart H. Williams	ESQ	California	2025	2028
Catherine T. Struve Reporter	ACAD	Pennsylvania	2019	2026

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

* *Ex officio* representative on behalf of the Deputy Attorney General

RULES COMMITTEE LIAISON MEMBERS

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

ADMINISTRATIVE OFFICE OF THE U.S. COURTS
Rules Committee Staff

Carolyn A. Dubay, Esq.
Chief Counsel

Bridget M. Healy, Esq.
Counsel

Sarah A. Sraders, Esq.
Counsel

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. Robin L. Rosenberg
Director

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

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

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

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

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

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

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

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

TAB 1

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 10, 2025

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

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

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

The following individuals attended on behalf of the Advisory Committees:

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

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

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

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

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

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

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

1. OPENING BUSINESS

A. Welcome and Opening Remarks

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

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

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

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

B. Discussion and Approval of the Meeting Minutes

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

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

C. Comments on the 2025 Strategic Plan for the Judiciary

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

2. ACTION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

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

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

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

1. *Amendments for Final Approval*

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

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

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

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

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

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

The members then discussed the proposed amendment.

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

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

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

2. *Preliminary Drafts for Publication for Public Comment*

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

a. Preliminary Draft of Amendments to Rule 609

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

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

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

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

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

The members then discussed the proposed amendments.

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

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

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

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

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

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

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

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

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

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

b. Preliminary Draft of New Rule 707

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

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

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

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

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

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

The members then discussed proposed new Rule 707.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. *Amendments for Final Approval*

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

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

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

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

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

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

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

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

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

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

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

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

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

The members then discussed the proposed amendments.

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

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

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

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

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

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

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

b. Amendments to Form 4

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

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

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

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Rule 15

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

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

The members then discussed the proposed amendments.

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

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

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

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

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

1. *Amendments for Final Approval*

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

a. Amendments to Rule 3018

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

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

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

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

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

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

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

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

The members then discussed the proposed new rule and amendments.

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

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

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

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

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

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

d. Amendments to Official Form 410S1

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

The members then discussed the amendments.

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

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

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

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

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

The members then discussed the proposed amendments.

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

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

f. Amendments to Rule 3001(c)

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

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

The members then discussed the proposed amendments.

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

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

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

2. *Preliminary Drafts for Publication and Public Comment*

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

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

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

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

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

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

1. *Amendments for Final Approval*

The Advisory Committee had no requests for final approval.

2. *Preliminary Drafts for Publication and Public Comment*

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

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

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

Judge Rosenberg reminded the Standing Committee that it had considered the proposed amendments to Rule 41 at its January 2025 meeting. Based on the Standing Committee's feedback at that meeting, the Advisory Committee made several changes. First, the Advisory Committee decided not to propose amending Rule 41(d) to permit a judge to award costs when the plaintiff had previously dismissed and refiled "one or more claims." (Currently, Rule 41(d) provides that the judge may award costs to the defendant "[i]f a plaintiff who previously dismissed an action files an action based on or including the same claim against the same defendant.") Second, the Advisory Committee clarified that the cutoff for unilateral dismissal of a claim is the filing of an answer or a motion for summary judgment by the party opposing the claim. Third, the Advisory Committee decided to retain the proposed language in Rule 41(a)(1)(A)(ii) that would require that a stipulation of dismissal be signed by all parties who have appeared and remain in the action. Although a participant in the January 2025 Standing Committee meeting had raised concerns about the proposed amendment's interaction with Rule 54(b), the Advisory Committee found the language in the text was sufficiently clear but added to the committee note information to clarify the amendment's purpose.

The members then discussed the proposed amendments.

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

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

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

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

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

Judge Rosenberg then asked whether the beginning of the committee note's first paragraph as modified was clear. It read: "Rule 41 is amended in two ways. First, Rule 41(a) has been amended to add language clarifying that a plaintiff may voluntarily dismiss 'one or more of its claims' in a multi-claim case. A plaintiff may accomplish dismissal of either its action or one or more of its claims unilaterally …." A practitioner member suggested changing the rule text to "a plaintiff may dismiss one, some, or all of its claims in an action without a court order…." Professor Bradt said he did not object, but that the term "one or more claims" was the result of style revision; a previous draft had said "a claim or claims." Thus, Professor Bradt said he would want advice from the style consultants first.

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

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

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

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

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

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

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

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

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

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

The members then discussed the proposed amendment.

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

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

Professor Marcus noted that the Advisory Committee also recommended a corresponding amendment to Rule 26(a)(3)(A)(i) to add "and whether the testimony will be in person or remote." This would alert everyone in the case to the prospect of remote testimony. In the second sentence of the committee note to Rule 26 – which began "Because the rule presently requires" – Judge Bates suggested changing "the rule" to "this rule" to make clear that the reference is not to Rule 43 (mentioned in the preceding sentence). But after concerns were expressed that "this rule" might also be ambiguous, "the rule" was changed to "Rule 26." After Professor Garner stated that "presently" traditionally meant "in a moment," consensus also favored deleting "presently." At the end of the same sentence, Judge Bates suggested adding "upon court approval." Though a judge

member later suggested deleting the note's second sentence, no consensus developed in favor of such a deletion.

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

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

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

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

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

Judge Rosenberg explained that the proposed amendments address comments received by the Advisory Committee over the years about the ambiguity of the requirement in Rule 45(b)(1) of "serving" the witness with a subpoena and also tendering the witness fee to the witness.

Specifically, Rule 45(b)(1)'s use of "delivering a copy to the named person" without more created confusion and practical problems.

The members then discussed the proposed amendment.

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

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

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

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

person" in order to avoid suggesting there was a substantive change; the remaining question, he noted, was where to put the word "personally."

Judge Bates asked if the Advisory Committee would support revising the second sentence of Rule 45(b)(1)(A) to read: "Serving a subpoena requires: (i) delivering a copy to the named person personally …." Professor Marcus agreed. A judge member asked why "named person" is not needed in the other romanettes. Professor Garner responded that romanette (i) identifies the target as "the named person" and the subsequent romanettes inherit that meaning (such that repeating "named person" is unnecessary). The judge member asked if a reader would understand that the modifier carries through to the other romanettes just as it would if the modifier were in the introduction. Professor Garner said the Committee had employed this usage frequently.

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

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

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

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

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

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

Judge Rosenberg explained that the Advisory Committee proposed the amendment not because of concerns that judges have acted in a biased manner, but because a judge presiding over a case in which she has an arguable financial interest can threaten perceptions of the court's legitimacy. To

address the perception-of-bias issue and allow judges to make more informed decisions about recusal, there are two proposed changes. First, the proposed amendment replaces references to a "corporate party" with the broader term "business organization." The Advisory Committee viewed "corporations" as too narrow because there are many entities that are not corporations, and "business organizations" is the most common and generally understood term. Second, the proposed amendment requires disclosure of "a parent business organization" and "any publicly held business organization that directly or indirectly owns 10% or more of" a party. The term "parent" has been part of the various federal disclosure rules since their inception and has not caused significant problems.

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

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

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

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

1. *Amendments for Final Approval*

The Advisory Committee presented no requests for final approval.

2. *Preliminary Drafts for Publication and Public Comment*

a. Preliminary Draft of Proposed Amendments to Rule 17

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

Judge Dever explained that this item stems from a 2022 proposal by the New York City Bar Association and letters from the National Association of Criminal Defense Lawyers. Judge Dever also noted that the development of the proposed amendments had taken significant effort, but that

the Advisory Committee voted unanimously to recommend publication of the proposed amendment to Rule 17.

Judge Dever reported that the core of the issue raised by the proposals was that Rule 17 had been largely unchanged since 1944 (apart from some style changes and changes relating to the Crime Victims Rights Act). The proposals focused on the problems, from a defense perspective, entailed in obtaining information from third parties. The Advisory Committee's subcommittee – chaired by Judge Jacqueline Nguyen – had begun by assessing whether there was a problem. The subcommittee held many meetings on the project, and the Advisory Committee had discussed it over the course of six meetings and had consulted widely.

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

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

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

The members then discussed the proposed amendment.

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

this amendment to lead to a proliferation of third-party subpoenas in a whole range of evidentiary hearings.

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

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

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

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

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

change Rule 17(c)(3)(A) to read "only by court order upon motion" rather than "only on motion and by court order."

A judge member asked about Professor Capra's idea to change the title of Rule 17(c)(2)(C) to "Motion and Order Not Ordinarily Required." Judge Bates questioned whether the heading could say "Ordinarily" when that word does not appear in the text of Rule 17(c)(2)(C). Professor Garner responded that "Not Ordinarily Required" was an accurate summary of the provision, which states that the motion and order "are not required … unless." Another judge member suggested titling the provision "Requirement For Motion and Order." Judge Dever, however, expressed a preference for Professor Capra's proposed title, explaining that the Advisory Committee wanted to emphasize that a motion and order is not ordinarily required.

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

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

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

3. INFORMATION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

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

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

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

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

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

1. *Artificial Intelligence (AI) and Deepfakes*

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

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

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

3. *Supreme Court Fellow Project on Rule 706*

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

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

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

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

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

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

Judge Rosenberg and Professor Marcus reported on six information items.

1. *Filing under Seal*

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

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

2. *Remote Testimony*

Judge Rosenberg said that the report for this item begins on page 308 of the agenda book. She reported that this relates to Rules 43(a) and 43(c) and that the Advisory Committee would be

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

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

gathering more information about whether Rule 43(a) should be changed. The Advisory Committee is considering whether to make Rule 43(a) less restrictive.

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

3. *Third-Party Litigation Funding*

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

4. *Cross-Border Discovery Subcommittee*

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

5. *Rule 55 Default and Default Judgment Rule*

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

6. *Random Case Assignment*

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

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

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

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

Judge Dever reported that the Rule 49.1 subcommittee has unanimously agreed to propose an amendment to Rule 49.1 to require references to minors by pseudonyms, and the Standing Committee will likely receive such a proposal at its next meeting. He also reported that a proposal

for the complete redaction of social security numbers in public filings will likely be considered by the Advisory Committee at its fall 2025 meeting.

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

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

4. JOINT COMMITTEE BUSINESS

A. Report on Electronic Filing by Self-Represented Litigants

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

B. Report of Subcommittee on Attorney Admission

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

C. Report on Privacy Issues

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

5. OTHER COMMITTEE BUSINESS

A. Tribute to Judge Bates

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

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

B. Status of Rule Amendments

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

C. Legislative Update

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

D. FJC Update

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

6. CONCLUDING REMARKS AND ADJOURNMENT

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

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

APPENDIX

Summary of Standing Committee Revisions to Final Amendments

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

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

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

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

The Standing Committee discussed and approved one additional change:

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

Appellate Rule 29

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

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

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

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

Bankruptcy Rule 9014

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

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

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

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

TAB 2

Agenda Item
January 2026
Action

Judiciary Strategic Planning

Issue

This item provides the Strategic Plan for the Federal Judiciary (Strategic Plan) that was approved by the Judicial Conference on September 16, 2025. It also requests that the Committee consider recommendations to the Executive Committee regarding the prioritization of the Strategic Plan's goals over the next two years.

Background

On the recommendation of the Executive Committee, the Judicial Conference approved a new Strategic Plan on September 16, 2025. The Strategic Plan is included as Attachment 1.

Consistent with the approach to planning approved by the Judicial Conference in September 2010, efforts to pursue the goals in the updated Strategic Plan will be led by the committees of the Judicial Conference, with facilitation and coordination by the Executive Committee. This includes identifying priorities to guide the implementation of the Strategic Plan.

Discussion

The planning approach for the Conference and its committees, approved by the Conference when the Strategic Plan was first adopted in 2010, assigns the responsibility for priority setting to the Executive Committee, which considers recommendations from Judicial Conference committees (JCUS-SEP 2010, pp. 5-6).

Judicial Conference committees are generally encouraged to incorporate these priorities into committee planning and policy development efforts, paying particular attention to priority core values, strategies, and goals from the Strategic Plan when setting the agendas for future committee meetings and determining which actions and initiatives to pursue. Committees are also asked to consider these priorities when assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures.

> **Recommendation:** That the Committee authorize the Chair, working with the Secretary of the Committee, to recommend to the Executive Committee, through the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares, no more than three goals from the Strategic Plan that should be prioritized for the judiciary over the next two years, including justifications for each goal.

Attachment: Strategic Plan for the Federal Judiciary

JUDICIAL CONFERENCE
OF THE UNITED STATES

Strategic Plan for the Federal Judiciary

Judicial Conference of the United States

September 2025

Strategic Plan for the Federal Judiciary

Judicial Conference of the United States
Robert J. Conrad, Jr., Secretary
Administrative Office of the U.S. Courts
Washington, DC 20544
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www.uscourts.gov

Strategic Plan for the Federal Judiciary

The federal judiciary is respected throughout the United States of America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice.

This plan begins with expressions of the mission and core values of the federal judiciary. Although any plan is by nature aspirational, these are constants that this plan strives to preserve. The aim is to stimulate and promote beneficial change within the federal judiciary that helps fulfill, and is consistent with, the mission and core values.

Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values

Rule of Law: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law.

Equal Justice: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect.

Judicial Independence: the ability to render justice without fear that decisions may threaten tenure, compensation, or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management.

An Exemplary Workplace: a workplace in which everyone is treated with dignity, civility, and respect; consisting of highly qualified and dedicated individuals; and in which diverse viewpoints and backgrounds are valued.

Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; responsible stewardship of public funds and property; effective and efficient use of resources.

Excellence: adherence to the highest jurisprudential and administrative standards; effective recruitment, development, and retention of highly competent judges and employees; commitment to innovative management and administration; availability of sufficient financial and other resources.

Service: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner.

The Plan in Brief

The Strategic Plan for the Federal Judiciary, updated in 2025, continues the judiciary's tradition of meeting challenges and maximizing opportunities while preserving its core values. It takes into consideration various trends and priorities affecting the judiciary, in an effort to continue the judiciary's ability to perform its mission effectively. In addition, this plan recognizes that the future may provide tremendous opportunities for improving the fair and impartial delivery of justice.

This plan anticipates a future in which the federal judiciary remains respected and admired for its accessibility, timeliness, and efficiency; attracts to judicial service the nation's finest legal talent; is an employer of choice, providing an exemplary workplace for a group of highly qualified judges and employees; works effectively with the other branches of government; and enjoys the people's trust and confidence.

This plan serves as an agenda outlining actions aimed at preserving the judiciary's successes and, where appropriate, bringing about positive change. Although its stated goals and strategies do not include every important activity, project, initiative, or study that is underway or being considered, this plan focuses on priorities that affect the judiciary at large and on responding to those matters in ways that benefit the entire judicial branch and the public it serves.

This plan identifies five priorities for the judiciary, providing strategies and goals for meeting each priority. The priorities include providing fair and impartial justice; enhancing the public's trust and confidence in, and understanding of, the federal courts, and the courts' relationships with the other branches of government; efficiently and effectively managing resources; maintaining an exemplary workplace; and realizing technology's value.

Strategic Priorities for the Federal Judiciary

The strategies and goals in this plan are organized around five priorities, which are not listed in order of importance. These are fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values:

Priority 1: **Providing Fair and Impartial Justice**
Priority 2: **Enhancing Public Trust and Strengthening Relationships with Other Branches of Government**
Priority 3: **Efficiently and Effectively Managing Public Resources**
Priority 4: **Maintaining an Exemplary Judiciary Workforce and Workplace**
Priority 5: **Realizing Technology's Full Value and Managing Its Risks**

These priorities also consider the judiciary's organizational culture. The strategies and goals developed to advance these priorities are designed to operate within the judiciary's decentralized systems of governance and administration.

1. Providing Fair and Impartial Justice

The judiciary will continue to provide fair and impartial justice in an effective manner and meet new and increasing demands, while adhering to its core values.

Priority Description

Exemplary and independent judges; dedicated employees; conscientious jurors; well-reasoned, accessible, and well-researched rulings; time for deliberation; and attention to individual issues are among the hallmarks of federal court litigation. Equal justice requires fairness and impartiality in the delivery of justice and a commitment to non-discrimination, regardless of race, sex, age, ethnicity, religion, national origin, color, sexual orientation, gender identity, pregnancy, disability status, or political affiliation.

Additionally, courts are open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. Scarce resources, changes in litigation and litigant expectations, and certain changes in the law may challenge the federal judiciary's effective and prompt delivery of justice. The federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. In the criminal context, where most federal criminal defendants are eligible for the appointment of counsel, the judiciary must ensure that the needs of appointed counsel and the clients they represent are met.

This plan includes five strategies that focus on improving performance while ensuring that the judiciary continues to function under conditions that allow for the fair, impartial, and effective administration of justice:

1.1 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

1.2 Continue the delivery of fair and impartial justice on a nationwide basis.

1.3 Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.

1.4 Ensure that the federal judiciary is open and accessible, on a non-discriminatory basis, to all those who participate in the judicial process.

1.5 Promote effective administration of the criminal defense function in the federal courts.

Strategies

1.1. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Background and Commentary

The judiciary faces an uncertain federal budget environment, with anticipated shortfalls in Congress's funding of judiciary requirements. Appropriations that do not meet the judiciary's carefully determined needs adversely affect the administration of justice. The regularity of continuing resolutions also presents significant challenges, creating uncertainty over the timing and amount of appropriations, and harming the ability to plan for and execute the judiciary's mission effectively and efficiently.

Further, the judiciary relies on resources that are within the budgets of executive branch agencies, particularly the U.S. Marshals Service and the General Services Administration. The judiciary must continue to work with these agencies to ensure that the judiciary's resource needs are met.

Another key challenge for the judiciary is to address critical longer-term resource needs. Many appellate, district, and bankruptcy courts have an insufficient number of authorized judgeships. While some temporary judgeships have been converted to permanent status in previous years, Congress has not passed comprehensive judgeship legislation since 1990.

Resources are also needed for jurors. Compensation for jurors is limited, and inadequate compensation creates a financial hardship for many jurors.

While the judiciary has made progress in securing needed space, including the construction of new courthouses and annexes, some court proceedings are still conducted in court facilities that are cramped, poorly configured, and lacking secure corridors separate from inmates appearing in court. As the judiciary's facilities continue to age, additional resources will be needed to provide proper maintenance and sustain courthouse functionality. The judiciary will need to continue apportioning resources based on priorities determined by the consistent application of policies across the courthouse portfolio. Additionally, to maximize space and limited resources, courts are encouraged to consider space optimization projects that would create more efficient workspaces that align with current business needs.

The ability to secure adequate resources is a necessary foundation for the vast majority of the judiciary's plans and strategies. For example, to ensure the well-qualified representation of criminal defendants (Goal 1.2.c), the defender services program requires funding sufficient to accomplish its mission. Additionally, to enhance the management of persons under supervision to reduce recidivism and improve public safety (Goal 1.2.d), probation and pretrial services offices require sufficient funding. Strategy 4.1 and its associated goals focus on the importance of attracting, recruiting, developing, and retaining the competent employees that are required for the effective performance of the judiciary's mission and critical to supporting tomorrow's judges and meeting future workload. Also, a goal under Strategy 5.1 (Goal 5.1.b) urges the judiciary to continue to build and maintain robust and flexible technology systems and applications, requiring a sustained investment in technology.

Implementation Goals

1.1.a Secure needed circuit, district, bankruptcy, and magistrate judgeships.

1.1.b Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.

1.1.c Secure adequate compensation for jurors.

1.1.d Secure adequate resources to provide the judiciary with the employees and resources necessary to meet workload demands.

1.2. Continue the delivery of fair and impartial justice on a nationwide basis.

Background and Commentary

Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of civil case management and has several mechanisms to identify and assist stressed courts. These mechanisms include biannual reports of pending civil cases and motions required under the Civil Justice Reform Act of 1990 to identify stressed courts and the categories of cases with the longest disposition times.

National coordination mechanisms include the work of the Judicial Panel on Multidistrict Litigation, which is authorized to transfer certain civil actions pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The work of chief judges in managing each court's caseload is critical to the timely handling of cases, and these local efforts must be supported at the circuit and national level. Circuit judicial councils have the authority to issue necessary and appropriate orders for the effective and expeditious administration of justice, and the Judicial Conference is responsible for approving changes in policy for the administration of federal courts. Cooperative efforts with state courts have also proven helpful, including the sharing of information about related cases that are pending simultaneously in state and federal courts.

Despite ongoing efforts, some pockets of case delays and backlogs persist in the courts. Some delays are due to external forces beyond the judiciary's control, cannot be avoided, and do not reflect on a court's case management practices. With this understanding, this plan calls for the courts, Judicial Conference committees, and circuit judicial councils to continue to undertake reasonable, concerted, and collaborative efforts to reduce the number and length of preventable case delays and backlogs.

The fair and impartial delivery of justice is also affected by high litigation costs. High costs make the federal courts less accessible. Litigation costs also have the potential to skew the mix of cases that come before the judiciary and may unduly pressure parties towards settlement. Rule 1 of the Federal Rules of Civil Procedure calls for the just, speedy, and inexpensive determination of every action and proceeding, and Rule 2 of the Federal Rules of Criminal Procedure calls for the elimination of unjustifiable expense and delay. This plan includes a goal to avoid unnecessary costs and delays in both civil and criminal cases.

This strategy also includes a goal to ensure that all persons entitled to representation under the Criminal Justice Act are provided well-qualified representation through either a federal defender or a panel attorney. Well-qualified representation requires sufficient resources to assure fair pay, training, and access to investigative, expert, and other necessary services.

In addition, this plan includes a goal to enhance the fair and effective management of all persons under supervision. Probation and pretrial services offices have led judiciary efforts to measure the quality of services to the courts and the community, including the use of evidence-based practices in the management of persons under supervision.

Other efforts to improve the fair and impartial delivery of justice must continue. For example, several significant initiatives to transform the judiciary's use of technology are underway, including the development and deployment of next-generation case management and financial administration systems. The work of the probation and pretrial services offices also has been enhanced using applications that integrate data from other agencies with that of probation and pretrial services to facilitate the analysis and comparison of supervision practices and outcomes among districts.

Implementation Goals

1.2.a Reduce delay through the dissemination and implementation of effective case management methods and the work of circuit judicial councils, chief judges, Judicial Conference committees, and other appropriate entities.

1.2.b Avoid unnecessary costs to litigants consistent with the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

1.2.c Ensure that all persons represented by panel attorneys and federal defender organizations are afforded well-qualified representation consistent with best practices for the representation of all criminal defendants.

1.2.d Continue the management of all persons under supervision to reduce recidivism and improve public safety.

1.2.e Ensure the solemnity of judicial proceedings.

1.3. Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.

Background and Commentary

The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is especially challenging when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, or when judicial processes are not well understood.

To assist with public understanding, rules of practice and procedure are regularly reviewed and revised to reflect changes in law, to simplify and clarify procedures, to encourage random case assignment, and to enhance uniformity across districts.

Rules changes also have been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. National mechanisms to consolidate and coordinate multidistrict litigation have been implemented to avoid duplication of discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel, and the judiciary. In addition, many courts provide settlement conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and pursuing federal litigation can be time consuming and expensive.

Implementation Goals

1.3.a Ensure that court rules, processes, and procedures are published or posted in an accessible manner.

1.3.b Adopt measures designed to provide flexibility in the handling of cases while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.

1.4. Ensure that the federal judiciary is open and accessible, on a non-discriminatory basis, to all those who participate in the judicial process.

Background and Commentary

As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings, including jurors, litigants, bankruptcy participants, witnesses, journalists, and observers, are treated with dignity and respect and understand the process. The judiciary's national website and the websites of individual courts provide the public with information about the courts themselves; court rules, procedures and forms; judicial orders and decisions; and schedules of court proceedings. Court dockets and pleadings are posted on the internet through a judiciary-operated public access system, which must be modernized to provide for more secure operation and better public access. Court forms commonly used by the public have been rewritten to make them clearer and simpler to use, and

court facilities are now designed to provide greater access to persons with disabilities. Some districts offer electronic tools to assist pro se filers in generating civil complaints and bankruptcy petitions. The Judicial Conference is working to enhance citizen participation in juries by improving the degree to which juries are representative of the communities in which they serve, reducing the burden of jury service, and improving juror utilization. In addition, the state courts are a valuable source of innovation and information, and the federal judiciary may benefit from the lessons learned by state courts.

Federal court processes are complex, however, and it is an ongoing challenge to ensure that participants have access to information about court processes and individual court cases, as well as court facilities. Many who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants and bankruptcy participants. Because continued efforts are needed, this strategy has three goals to make courts more accessible for jurors, litigants, bankruptcy participants, witnesses, and others.

Implementation Goals

1.4.a Provide jurors, litigants, bankruptcy participants, witnesses, journalists, and observers with comprehensive, readily accessible information about court cases and the work of the courts.

1.4.b Improve the extent to which juries are representative of the communities in which they serve, reduce the hardships associated with jury service, and improve the experiences of citizens serving as grand and petit jurors.

1.4.c Develop best practices and strategies for handling claims of pro se litigants in civil and bankruptcy cases and ensuring access to the courts for pro se litigants.

1.5. Promote effective administration of the criminal defense function in the federal courts.

Background and Commentary

In the criminal context, access to fair and impartial justice is supported by appointing counsel to represent defendants who cannot afford to pay for their own counsel or other services necessary for their defense. Under the Criminal Justice Act (CJA), the judiciary oversees the provision of these defense services to eligible criminal defendants. The judiciary has completed a series of comprehensive studies to inform the development of national policies that support effective and conflict-free representation for CJA clients. To promote consistent implementation of Judicial Conference policies in districts throughout the country, this strategy includes a goal to encourage local adoption and implementation of those policies. Other goals support adequate resources and training, including training for judges who bear significant responsibilities under the CJA and must stay up to date with current needs and best practices in federal criminal defense representation.

Judges, when exercising their oversight role and acting as neutral arbiters in individual cases, must fairly and reasonably determine the resources available to defendants while respecting the professional independence of appointed counsel. Consistent with the Sixth Amendment,

public defense counsel must be free to exercise professional judgment to advocate within the bounds of the law and consistent with applicable ethics codes, solely for the interests of their client without undue influence or fear of reprisal. To ensure the effective operation of the adversarial system, the judiciary must strive to ensure that CJA practitioners can mount a skilled and vigorous defense of their clients, regardless of race, sex, age, ethnicity, religion, national origin, color, sexual orientation, gender identity, pregnancy, disability status, or political affiliation, so that the rights of individual defendants are safeguarded and enforced.

At the same time, consistent with the recommendations of the Judicial Conference's Ad Hoc Committee to Review the Criminal Justice Act Program, the judiciary must continue to consider improvements to the national administration of the defender services program to ensure that governance structures provide accountability while preserving the professional independence of defense counsel. To that end, this strategy includes goals that reflect values similar to the core value of judicial independence. This strategy supports the judiciary's efforts to pursue improvements in the fair and impartial delivery of justice (Strategy 1.2) and promotes public trust and confidence in the justice system by ensuring fair trials and proceedings (Priority 2).

Implementation Goals

1.5.a Encourage districts to adopt and implement CJA plans based on the judiciary's model CJA plan to ensure compliance with relevant Judicial Conference policies.

1.5.b Ensure that CJA practitioners have the resources to provide effective and conflict-free representation.

1.5.c Provide training regarding best practices for criminal defense representation.

1.5.d Protect the integrity of the lawyer-client relationship and safeguard the ability of CJA counsel to exercise independent professional judgment to advocate for the undivided interests of their clients.

1.5.e Consider alternative governance and oversight structures for the federal public defense program as appropriate.

2. Enhancing Public Trust and Strengthening Relationships with Other Branches of Government

The judiciary, an independent and equal branch of government under the Constitution, will sustain effective relationships with Congress and the executive branch and promote public trust and confidence in the federal courts, while preserving appropriate autonomy in judiciary governance, management, and decision-making.

Priority Description

The judiciary is an independent branch of government with the solemn responsibility of safeguarding constitutional rights and liberties.

The ability of courts to fulfill their mission and perform their functions roots itself in the public's understanding of, and its trust and confidence in, the judiciary. In large part, the judiciary earns that trust and confidence by faithfully performing its duties; adhering to ethical standards; ensuring random case assignment; effectively carrying out internal oversight, review, and governance responsibilities; and maintaining accountability for any failure to observe scrupulous adherence to ethical standards. Transparency in efforts to hold judges and judiciary personnel accountable for any misconduct helps foster public trust and confidence. Public understanding of the judiciary can also be enhanced through civics education.

An effective relationship with Congress is critical to success in securing adequate resources. The judiciary must provide Congress timely and accurate information about issues affecting the administration of justice. The judiciary must also continue to communicate to Congress its comprehensive system of oversight and review, which ensures the integrity of financial information; provides comprehensive financial reporting; and builds upon its foundation of internal controls and methods to prevent and detect fraud, waste, and abuse.

The judiciary's relationship with the executive branch is also critical, particularly in areas where the executive branch has primary administrative or program responsibility, such as reporting on annual government-wide financial activity, judicial security, and facilities management.

Ongoing communication about Judicial Conference goals, policies, and positions may deepen the judiciary's overall relationships with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must continue to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs.

Public perceptions of the judiciary are often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate. Changes in social media and communication will continue to play a key role in how the judiciary is portrayed to and viewed by members of the public.

These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost. However, they also present the challenge of ensuring that judiciary information is complete, accurate, and timely. This challenge is especially difficult because judges are constrained in their ability to participate in public discourse. This plan includes six strategies to enhance public trust in the judiciary and strengthen relations with the other branches of government:

2.1 Assure high standards of conduct and integrity for judges and employees.

2.2 Hold accountable any judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct.

2.3 Continue to implement a comprehensive approach to enhancing relations between the judiciary and Congress.

2.4 Strengthen the judiciary's relations with the executive branch.

2.5 Improve the sharing and delivery of information about the judiciary.

2.6 Encourage involvement in civics education activities by judges and judiciary employees.

Strategies

2.1. Assure high standards of conduct and integrity for judges and employees.

Background and Commentary

Judges and judiciary employees are guided by codes of conduct, internal policies, and robust accountability mechanisms within the judiciary that work together to uphold standards relating to the conduct and management of public resources. These mechanisms include disciplinary action, formal complaint procedures for impacted employees to seek redress, dispute resolution processes, audits, program reviews of judiciary operations, internal control and information technology (IT) self-assessments, and workplace conduct oversight and response processes. The judiciary has adopted several measures, described in Priority 4 of this plan, to ensure an exemplary workplace in which all employees are treated with dignity and respect, and on a non-discriminatory basis.

Accountability mechanisms must continue to address critical risks, keep pace with changes in regulations and business practices, and respond to public and government interest through detailed and accessible information about the judiciary. The regular review and update of policies, along with efforts to ensure that they are accessible to judges and employees, contributes to judiciary compliance and controls. In addition, guidance on current uses of social media and other technologies can help to avoid the inappropriate conveyance of sensitive information.

This strategy emphasizes up-to-date policies, timely education, and relevant guidance about ethics, integrity, and accountability. The strategy also relies upon the effective performance of critical integrated internal controls; governance of judiciary financial information; audit,

investigation, and discipline functions; risk management practices; and self-assessment programs.

Implementation Goals

2.1.a Enhance education and training for judges and judiciary employees on ethical conduct, integrity, accountability, and workplace conduct.

2.1.b Deliver education and training to judges and judiciary employees on mechanisms that strengthen administrative accountability and oversight, including internal controls, audits, and investigations.

2.2. Hold accountable any judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct.

Background and Commentary

The judiciary seeks to ensure accountability by openly receiving information about potential misconduct and following existing procedures to address misconduct. Credible allegations of misconduct will be examined, investigated, and subject to appropriate action in accordance with existing statutory, policy, and other procedures. Individuals who experience or witness possible misconduct should be able to seek redress or satisfy their obligation to take appropriate action by bringing these issues to the attention of an appropriate official without fear of retaliation or adverse consequences.

Transparency, to the extent permissible and possible, demonstrates the judiciary's fidelity to accountability for misconduct. Law and policy related to confidentiality and the legitimate privacy interests of victims, witnesses, and others may limit what information can be made public. The judiciary strives to make public information about misconduct procedures and related actions, where permissible and appropriate.

Implementation Goals

2.2.a Ensure avenues for seeking advice; obtaining assistance as to potential misconduct; obtaining redress, where appropriate; and filing a complaint are easily accessible.

2.2.b Ensure timely action is taken on credible allegations of misconduct according to established procedures, and when the evidence supports it, ensure action is taken with regard to misconduct.

2.2.c Ensure each circuit's website prominently displays actions taken under the Judicial Conduct and Disability Act and Rules for Judicial Conduct and Judicial Disability Procedures, in accordance with the requirements of the Act and the Rules, and summaries of other records or reports of workplace conduct issues, where permissible and appropriate.

2.2.d Consider conducting reviews to identify systemic issues, when appropriate.

2.3. Continue to implement a comprehensive approach to enhancing relations between the judiciary and Congress.

Background and Commentary

This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance ongoing activities and to emphasize the importance of providing information to Congress about the role, responsibilities, duties, and needs of the branch. This type of interbranch communication is crucial in shaping a favorable future for the judiciary. Implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to report measurable progress in meeting goals may also strengthen the judiciary's relationship with Congress. Congressional awareness of the judiciary's ongoing efforts to strengthen its financial oversight, reporting, and workplace conduct, building upon its existing foundation of internal controls and methods to prevent and detect fraud, waste, abuse, and misconduct, is critical to assure oversight bodies, as well as the public, that the judiciary has a robust program of oversight and effective controls in place.

Implementation Goals

2.3.a Maintain early identification of legislative issues to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.

2.3.b Implement effective approaches, including partnerships with legal, academic, and private sector organizations, to achieve the judiciary's public policy and educational goals.

2.3.c Encourage judges to engage with members of their local congressional delegation to foster mutual understanding and respect and to establish lines of communication between the two branches.

2.4. Strengthen the judiciary's relations with the executive branch.

Background and Commentary

The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and procedures that affect the administration of justice. Department of Justice policies and practices have a substantial and direct impact on the administration of the defense function and the resource needs of the judiciary. Continued collaboration with the Department of Justice will be helpful, including on matters related to pretrial detention, discovery management in federal criminal cases, and the administration of the federal death penalty.

The executive branch is also a source of financial reporting requirements for government-wide financial activity. The judiciary's ongoing efforts to transform financial reporting, enhance the judiciary's internal controls programs, and strengthen the integrity of judiciary financial data

provide tangible assurance to judiciary officials, oversight bodies, taxpayers, and others for whom the judiciary holds money in trust. This strategy focuses on enhancing the ability of the judiciary to provide input and information to its executive branch partners.

Implementation Goals

2.4.a Foster communications and working relationships with the executive branch to facilitate greater consideration of policy changes and other solutions that will improve the administration of justice.

2.4.b Encourage judiciary stakeholders to work with the Department of Justice, U.S. Marshals Service, Bureau of Prisons, and others to ensure detained federal criminal defendants have meaningful and confidential access to counsel and to discovery material.

2.5. Improve the sharing and delivery of information about the judiciary.

Background and Commentary

Sources of news, analysis, and information about the federal judiciary continue to change, as do communication tools used by the public. These changes can present challenges to the accurate portrayal of the judiciary and the justice system. Enhanced communication between the federal and state judiciaries and the media is one way to help increase the accuracy of stories about the justice system and clarify public understanding of the courts. Since the media is a source of public information about the judiciary, helping reporters understand court processes is one way to improve the public's understanding of the justice system. Judges can undertake these efforts within the parameters of the Code of Conduct and while avoiding discussion of any specific cases.

Information about the operations of the federal judiciary is of increasing interest to the public, media, and Congress. Transparency regarding judicial branch governance enhances understanding of the judiciary's process and thereby improves public trust and confidence in the judiciary.

Direct communication can improve the public's understanding of the federal judiciary's role and functions. When formulating its own communications practices, the judiciary must keep pace with ongoing changes in how people access news and information.

The federal judiciary also serves as a resource for other countries pursuing judicial excellence, judicial independence, and the delivery of equal justice under the law. The judiciary should continue providing such assistance when appropriate, including working with the executive branch in its foreign assistance and public diplomacy initiatives.

Implementation Goals

2.5.a Implement a communications strategy that considers and incorporates the impact of changes in journalism and electronic communications and the ability of federal judges and employees to communicate directly with the public.

2.5.b Foster relationships between judges and journalists, consistent with the Code of Conduct and not specific to any case, to communicate the judiciary's efforts.

2.5.c Communicate with judges in other countries to share information about the federal judiciary and our system of justice and to support rule-of-law programs around the world.

2.6. Encourage involvement in civics education activities by judges and judiciary employees.

Background and Commentary

The federal judiciary relies on public respect, understanding, and acceptance. Judges and judiciary employees are uniquely situated to provide civics education to the public. A lack of civics knowledge can have an adverse effect on the branch. A civically informed public will also be better inoculated against attempts to undermine trust in the justice system.

Public outreach and civics education efforts by judges and judiciary employees occur inside courthouses, in the community, online and via remote technology or on court websites. These efforts may be facilitated through greater coordination and collaboration between courts and with civics education organizations. Resources to help judges and judiciary employees participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges' associations.

Implementation Goals

2.6.a Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role, structure, and functions of the federal judiciary, its accountability and oversight mechanisms, and its external financial reporting.

2.6.b Facilitate participation by judges and court employees in public outreach and civics education efforts, including programs held in courtrooms, in classrooms, and via remote technology, and development of in-courthouse or online educational resources and exhibits. Support collaboration and the sharing of best practices and ideas across courts and circuits to continue to be responsive to the need for public education and to benefit from locally developed ideas.

2.6.c Support education about the defense function and the critical role it plays in both ensuring fair trials and proceedings and maintaining public confidence in the justice system.

3. Efficiently and Effectively Managing Public Resources

The judiciary will continue to provide justice consistent with its core values while managing limited resources and programs in a manner that reflects workload variances and funding realities.

Priority Description

The judiciary obtains its appropriations from Congress on an annual basis and often does not obtain the full amount requested. The judiciary must continue to be a good steward of the money it receives and effectively allocate and manage these funds. The judiciary also should continue to pursue cost containment initiatives to help reduce current and future costs without compromising the mission of the judiciary, including effectively and efficiently using appropriated funds. Cost-containment efforts also help the judiciary demonstrate to Congress that it is an effective steward of public resources, and that its requests for additional resources are well justified (Strategy 1.1).

The judiciary relies upon effective decision-making processes governing the allocation and use of judges, employees, facilities, and funds to ensure the best use of limited resources. These processes must respond to a federal court workload that varies across districts and over time. Developing, evaluating, publicizing, and implementing best practices assists courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices must be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary-wide. This plan includes two strategies to address this priority:

3.1 Allocate and manage resources more efficiently and effectively.

3.2 Allocate and manage resources to strengthen cybersecurity and the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations.

Strategies

3.1. Allocate and manage resources more efficiently and effectively.

Background and Commentary

The judiciary has worked to minimize judiciary costs, and has pursued several studies, initiatives, and reviews of judiciary policy. Cost containment remains a high priority, and the judiciary must challenge all court units to come together to seek common solutions to shared financial challenges. New initiatives to contain cost growth and make better use of resources are being implemented or are under consideration.

Court units throughout the judiciary have developed and implemented alternative approaches for carrying out their operational and administrative functions. These approaches have helped courts maintain the level and quality of services they deliver, and in many instances, have increased efficiencies and controlled costs associated with providing those services. Expansion

of flexible sharing arrangements holds promise for increasing efficiency and is responsive to the diversity of local court cultures and administrative models. These arrangements can be encouraged by creating informational resources to help courts identify sharing opportunities, providing incentives, removing barriers to sharing, fostering a culture of sharing across and between court units, and actively working to address identified areas of institutional mistrust that impact the sharing of resources.

This strategy includes four goals. The first two increase the flexibility of the judiciary in matching resources to workload. The intent is to enable available judges and court employees to assist heavily burdened courts on a temporary basis and to reduce the barriers to such assistance. Supporting these goals is a third goal to ensure that the judiciary utilizes its networks, systems, and space in a manner that supports efficient operations. A fourth goal speaks to the critical need to maintain effective court operations and anticipate alternative delivery of services when disaster strikes.

Implementation Goals

3.1.a Make more effective use of judges to relieve overburdened and congested courts, expand ways to provide both short- and long-term assistance to districts and circuits with demonstrated needs for additional resources, and ensure the effective utilization of magistrate judge resources.

3.1.b Analyze and facilitate the implementation of organizational changes and business practices that make effective use of limited administrative and operational employees, without negatively impacting outcomes or mission, including continuing to explore sharing services across court units, while maintaining the safety of the public, the judiciary, and our employees.

3.1.c Manage the judiciary's infrastructure in a manner that supports effective and efficient operations and provides a safe and secure environment.

3.1.d Plan for and respond to natural disasters, terrorist attacks, pandemics, and other physical threats in an effective manner.

3.2. Allocate and manage resources to strengthen cybersecurity and the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations.

Background and Commentary

Judges must be able to perform their duties in an environment that ensures their personal safety and that of their families. The judiciary works closely with the U.S. Marshals Service to assess and improve the protection provided to courts and individuals. Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.

While judiciary standards for court facilities provide separate hallways and other design features to protect judges, many older court facilities require judges, court personnel, and jurors

to use the same corridors, entrances, and exits as prisoners, criminal defendants, and others in custody.

Assuring safety in these facilities is particularly challenging. Protection for judges must also extend beyond court facilities and include commuting routes, travel destinations, and their homes. The judiciary has focused on raising awareness of security issues, assisting judges in taking steps to protect themselves while away from court facilities, and educating judges on how to minimize the availability of personal information on the internet. Similar security concerns apply to probation and pretrial services officers, who perform much of their work away from court facilities.

Assuring the integrity of electronic files and stored information is also essential to the security and independence of the judiciary.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.1 includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 5.1 includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Implementation Goals

3.2.a Improve the protection of judges, judiciary employees, and the public in all court facilities, as well as the protection of judges and judiciary employees at off-site judicial locations.

3.2.b Improve the protection of judges and their families at home and at non-judicial locations.

3.2.c Provide continued training to raise the awareness of judges and judiciary employees on a broad range of security topics.

3.2.d Improve the interior and exterior security of court facilities through the collaborative efforts of the judiciary, the U.S. Marshals Service, the Federal Protective Service, and the General Services Administration.

3.2.e Work with the U.S. Marshals Service and others to improve the collection, analysis, and dissemination of protective intelligence information concerning individual judges.

3.2.f Maintain the commitment to security training for probation and pretrial services officers.

4. Maintaining an Exemplary Judiciary Workforce and Workplace

The judiciary will continue to attract, develop, and retain a highly competent complement of judges, employees, and CJA attorneys, and ensure an exemplary workplace in which everyone is treated with dignity, civility, and respect.

Priority Description

To retain public trust and confidence and meet workload demands, the judiciary must be comprised of highly competent judges, employees, and CJA attorneys. To attract and retain the most capable people from all parts of society, the branch must maintain a workplace in which all are treated with dignity, civility, and respect and are valued for their contributions regardless of race, sex, age, ethnicity, religion, national origin, color, sexual orientation, gender identity, pregnancy, disability status, or political affiliation.

The judiciary attracts highly qualified judges, employees, and CJA attorneys with meaningful work, job stability, and career development opportunities. Recruiting and retaining highly capable candidates not only requires fair and competitive compensation and benefit packages, but also the assurance of an exemplary workplace. To that end, the judiciary must abide by and enhance, where appropriate, its standards and procedures to assure proper workplace conduct, and must also develop new methods of performing work while addressing continued volatility in workloads.

4.1 Recruit, develop, and retain a talented and dedicated workforce from the diversity of the nation — with differing individual experiences, skills, knowledge, and backgrounds — while addressing the judiciary's future workforce requirements.

4.2 Support a lifetime of service for federal judges.

4.3 Ensure an exemplary workplace in which all are treated with dignity, civility, and respect, which is free from discrimination, harassment, retaliation, and abusive conduct, and in which diverse viewpoints and backgrounds are valued.

Strategies

4.1. Recruit, develop, and retain a talented and dedicated workforce from the diversity of the nation — with differing individual experiences, skills, knowledge, and backgrounds — while addressing the judiciary's future workforce requirements.

Background and Commentary

Public trust and confidence are enhanced when the judiciary's workforce is highly competent and dedicated to the cause of justice. The judiciary can and should strive to recruit and retain the best and the brightest from all backgrounds and life experiences. This includes bankruptcy judges, magistrate judges, federal defenders, CJA panel attorneys, probation and pretrial officers, and court reporters, all of whom occupy positions highly visible to the public. The

judiciary must continue to pursue initiatives that are designed to secure a broad pool of applicants for every position. In casting a broad net for applicants, the judiciary should reach out to individuals of all manner of backgrounds and perspectives, including those who have overcome hardships, challenges, and other disadvantages. In making hiring and promotion decisions, the judiciary should not discriminate based on race, sex, age, ethnicity, religion, national origin, color, sexual orientation, gender identity, pregnancy, disability status, or political affiliation.

The judiciary must also continue to pursue initiatives to maintain its position as an employer of choice. To remain competitive with private and other public sector organizations, especially with hard-to-fill occupations and in geographic areas where employees have many other opportunities, the judiciary must maintain a strong program to attract, recruit, develop, and retain a highly qualified workforce. Through enhanced strategic workforce planning efforts, the judiciary will be positioned to recognize workforce gaps and identify recruitment, development, and retention strategies to ensure that the judiciary's future workforce has the needed skills, competencies, and talent to carry on the judiciary's mission.

Ongoing changes that the judiciary must address include shifting career and work-life expectations, meeting ever-advancing IT enhancements, and the unique challenges faced by IT services, probation and pretrial services, court reporters, and other groups in recruiting, retaining, and training. The judiciary must ensure the physical and mental well-being of all employees. Changes in how employees communicate and interact, and in how and where work is performed, are related to Strategy 3.1, as certain types of changes provide opportunities for the judiciary to reduce its space footprint and rental costs while creating a better and more efficient work environment. The judiciary must continue to invest in technology and explore changes to policy and procedures that allow for an effective mobile workforce. Further, the judiciary must focus on developing the skillsets of the current workforce and nimbly adapting to changes as they occur.

In addition, the judiciary must develop and engage in succession planning for all positions, including the next generation of executives. The management model in federal courts provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The judiciary must maintain a meaningful leadership and executive development training program and create executive relocation programs to ensure a wide pool of qualified internal applicants, while also conducting outreach efforts to attain the most talented field of candidates, including from diverse backgrounds and life experiences that bring different perspectives.

Implementation Goals

4.1.a Maintain and expand outreach efforts and procedures to make individuals from all backgrounds and life experiences aware of employment opportunities in the judiciary, including as judicial officers.

4.1.b Continue to expand and modernize recruitment and outreach to cast a broad net for applicants, one that reaches out to individuals of all manner of backgrounds and perspectives, including those who have overcome hardships, challenges, and other disadvantages, without discriminating based on race, sex, age, ethnicity, religion,

national origin, color, sexual orientation, gender identity, pregnancy, disability status, or political affiliation.

4.1.c Identify current and future workforce challenges and develop and evaluate human capital strategies to enhance the judiciary's standing as an employer of choice while enabling employees to reach their full potential.

4.1.d Deliver leadership, management, and human resources programs and services to help judges, executives, and supervisors develop, assess, and lead employees.

4.1.e Provide training, mentoring, and career advancement opportunities to all employees.

4.1.f Provide resources and develop health and wellness committees to examine and implement policy, practices, and programs that provide judiciary employees a safe, supportive, and healthy work environment.

4.2. Support a lifetime of service for federal judges.

Background and Commentary

It is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior judges, judges recalled to service, and retired judges. Education, training, and orientation programs offered by the Federal Judicial Center and the Administrative Office continue to evolve and adapt. Training and education programs, and other services that enhance the well-being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Implementation Goals

4.2.a Strengthen policies that encourage senior Article III judges to continue handling cases so long as they are willing and able to do so. Judges who were appointed to fixed terms and are recalled to serve after retirement must be provided the support necessary to fully discharge their work-related duties.

4.2.b Seek the views of judges on practices that support their development, retention, and morale, and adapt education, training, and orientation programs to meet the needs of judges.

4.2.c Encourage circuits to develop circuit-wide health and wellness committees to promote health and wellness programs, policies, and practices that provide judges with a supportive environment for the maintenance or restoration of health and wellness in support of a lifetime of service for judges.

4.3. Ensure an exemplary workplace in which all are treated with dignity, civility, and respect, which is free from discrimination, harassment, retaliation, and abusive conduct, and in which diverse viewpoints and backgrounds are valued.

Background and Commentary

Public trust and confidence, as well as workforce morale and productivity, are enhanced when the judiciary provides an exemplary workplace for everyone. There are five keys to achieving an exemplary workplace: committed and engaged leadership; consistent and demonstrated accountability; strong and comprehensive policies; trusted and accessible complaint procedures; and regular interactive training. The judiciary must continue diligently to ensure that it provides an exemplary workplace for all its employees.

Implementation Goals

4.3.a Educate all judges and employees on standards of appropriate and inappropriate conduct, with continuing education on a regular basis, including the codes of conduct, Employment Dispute Resolution (EDR) Plans, and judicial conduct and disability procedures.

4.3.b Educate all judges and employees about the obligation to take appropriate action when they have reliable information about misconduct by a judge or wrongful conduct by non-judges, the available resources for guidance regarding reporting misconduct, and the mechanisms to report misconduct.

4.3.c Provide initial and continuing education for chief judges, executives, supervisors, and managers on listening, communication, building trust, effectively responding to both inappropriate workplace behavior and allegations of wrongful conduct, and fostering a respectful and high-performance workplace that welcomes a variety of viewpoints and backgrounds.

4.3.d Enhance accountability and effective redress, where appropriate, through universal adoption and conscientious application of the Model Employment Dispute Resolution Plan. Be transparent regarding judicial conduct and disability proceedings and other workplace conduct procedures in furtherance of and consistent with the law, related judiciary policy, and legitimate privacy interests.

4.3.e Maintain a national Office of Judicial Integrity to reinforce efforts at the circuit and local levels to ensure an exemplary workplace; ensure policies are developed and enforced consistently throughout the judiciary; and provide training, independent investigative assistance and related support, and advice to chief judges, unit judges, unit executives, and employees. Maintain a director of workplace relations in each circuit, to whom employees within the circuit can report wrongful conduct concerns, and who provides circuit-wide assistance to judges, managers, and employees on workplace conduct issues including training, conflict resolution, and workplace investigations. Ensure that all court EDR coordinators are properly trained and certified.

4.3.f Conduct periodic reviews to identify systemic issues related to workplace conduct at the national, circuit, and district levels, when appropriate, and evaluate whether guidance and procedures designed to foster an exemplary workplace are effective and whether additional action may be needed.

5. Realizing Technology's Full Value and Managing Its Risks

The judiciary will develop, operate, and secure cost-effective national and local systems and infrastructure that meet the needs of court users and the public for information, service, and access to the courts.

Priority Description

Implementing innovative technology applications in a responsible and secure manner adds significant value in meeting the judiciary's mission and helps the judiciary meet the changing needs of judges, judiciary employees, and the public. Technology enhances the productivity of the individual courts and facilitates more efficient work processes across the entire judiciary. For the public, technology improves access to courts, including information about cases, court facilities, and judicial processes. Due to the rapidly evolving and dynamically changing nature of technology, the judiciary must continue to focus on building, maintaining, modernizing, and better securing our IT systems in a timely manner. Reliance on judiciary systems and access to judiciary data by judicial organizations, litigants, and the public will only continue to increase in future years. The security of IT systems must be enhanced, and a requisite level of confidentiality and privacy must be assured, while adversaries mature and evolve their intrusion techniques at a rapid pace. This confidentiality is essential to preserving judicial integrity and independence, protecting the fairness of proceedings, upholding public trust, and safeguarding national security.

Responsibility for delivering major national IT systems, which are critical to the support of judiciary business operations, is shared by several Administrative Office departments and Judicial Conference committees. In addition, local courts have substantial responsibilities for the management and operation of local and national systems, including in appropriate circumstances the ability to customize national applications to meet local needs. The judiciary's approach to developing, managing, and operating national IT systems and applications provides substantial flexibility but also poses challenges for coordination, prioritization, and leadership. A key challenge is to balance the economies of scale that may be achieved through operating as an enterprise with the creative solutions that may result from allowing and fostering a distributed model of IT development and administration.

CJA practitioners need access to emerging technologies, including artificial intelligence (AI) applications, to improve legal research and writing, as well as access to litigation support software to help attorneys keep pace with the proliferation of case-related discovery. Training and support on the ethical, effective, and secure use of those technologies also remain critical.

The successful implementation of these strategic priorities, especially in the area of IT modernization and enhanced cybersecurity, requires substantial resources. Securing those resources and then efficiently managing IT-related investment is itself a top priority, as reflected in Priority 3 of this plan.

Strategy

5.1. Realize the full potential of technology to identify and meet the needs of judiciary users and the public for information, service, and access to the courts.

Background and Commentary

The judiciary uses advanced and evolving IT infrastructure and services. Case management systems are being modernized, while other systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology. In addition, technology allows for exponentially more data to be collected, stored, and managed, leading to increased effectiveness in supporting evidence-based decision making.

The effective use of advanced and intelligent applications and systems will provide critical support for judges and other court users. This plan includes a goal of supporting the continued modernization of the judiciary's technology infrastructure, while encouraging a judiciary-wide perspective for the development of enterprise systems and applications. These efforts all further the judiciary's commitment to the security of judiciary-related records and information. The plan also aligns with the Judiciary IT Modernization and Cybersecurity Strategy, developed in 2022, as a multi-year strategy for modernizing and better securing the judiciary's systems, networks, and data.

The effective use of technology is critical to furthering strategic components of this plan, particularly those essential to judiciary efforts to contain costs, and to effectively allocate and manage resources (Strategy 3.1). Technology also supports improvements in the delivery of justice (Strategy 1.2); the accessibility of the judiciary for litigants and the public (Strategies 1.3, 1.4, and 2.5); judiciary accountability mechanisms (Strategies 2.1, 2.2, and 4.3); efforts to strengthen judicial security (Strategy 3.2); and the delivery of training (Strategies 1.5, 2.1, 3.2, 4.1, 4.2, and 4.3). In addition, the judiciary must be capable of defending against the growing threat of cyberattacks from domestic and foreign actors, including individual and state-backed threats, and ensuring the resiliency and integrity of judiciary IT systems.

An effective technology program is also dependent upon the successful implementation of other strategies in this plan. Our IT modernization and cybersecurity initiatives depend heavily upon securing adequate resources (Strategy 1.1). In a rapidly changing field requiring the support of highly trained people, it is critical that the judiciary succeed in recruiting, developing, and retaining highly competent employees (Strategy 4.1).

Implementation Goals

5.1.a Ensure that court and national systems are covered by the continuous diagnostics and mitigation program, which delivers cybersecurity tools, integration services, and dashboards to help improve the judiciary's security posture.

5.1.b Continue to build, maintain, and enhance robust and flexible technology systems and applications that anticipate and respond to the judiciary's requirements for efficient communications, record-keeping, electronic case filing, public access, case management, and administrative support. Modernize the judiciary IT infrastructure and systems to ensure continuous system up time for the judiciary's enterprise systems and public-facing systems.

5.1.c Ensure that judiciary IT staff have the necessary skillsets in relevant, cutting-edge technologies through ongoing education programs.

5.1.d Establish an AI governance framework to guide responsible adoption of AI and to manage risks and challenges presented by these new and evolving technologies. New AI applications are emerging at a very fast pace, offering substantial opportunities to enhance judiciary operations. AI also presents new challenges and risks that require careful attention. Courts around the United States, and indeed the world, are exploring uses of AI to enhance judicial performance and fairness, and may provide valuable information and experience.

5.1.e Establish a formal Judiciary Innovation Program that encourages active participation in the innovation of IT systems and applications across the judiciary by all members of the judiciary community. The program will focus on facilitating a process to identify innovative ideas and concepts, and through a collaborative process involving both the Administrative Office and court representatives, mature those innovations into contributions to the national IT applications portfolio.

Strategic Planning Approach for the Judicial Conference of the United States and its Committees

Committees of the Judicial Conference are responsible for long-range and strategic planning within their respective subject areas, with the nature and extent of planning activity varying by committee based on its jurisdiction.

The Executive Committee is responsible for facilitating and coordinating planning activities across the committees. Under the guidance of a designated planning coordinator, the Executive Committee hosts long-range planning meetings of committee chairs and asks committees to consider planning issues that cut across committee lines.

At its September 2010 session, the Judicial Conference approved several enhancements to the judiciary planning process:

Coordination: The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator facilitates and coordinates the strategic planning efforts of the Judicial Conference and its committees.

Prioritization: With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee identifies priorities, strategies, or goals to focus on every two years.

Integration: The committees of the Judicial Conference integrate the Strategic Plan for the Federal Judiciary into committee planning and policy activities, including through the development and implementation of committee strategic initiatives — projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the plan.

Assessment of Progress: For every goal in the plan, mechanisms to measure or assess the judiciary's progress are developed.

Substantive changes to the Strategic Plan for the Federal Judiciary require the approval of the Conference, but the Executive Committee has the authority, as needed, to approve technical and non-controversial changes to the plan. A review of the plan takes place every five years. (JCUS-SEP 10, p. 6)

Once approved by the Judicial Conference, updated or revised editions of the Strategic Plan for the Federal Judiciary supersede previous long-range and strategic plans as planning instruments to guide future policy-making and administrative actions within the scope of Conference authority. However, the approval of an updated or revised strategic plan should not necessarily be interpreted as the rescission of the individual policies articulated in the recommendations and implementation strategies of the December 1995 *Long Range Plan for the Federal Courts*.

Acknowledgements

On the recommendation of its Executive Committee, the 2025 edition of the Strategic Plan for the Federal Judiciary was approved by the Judicial Conference of the United States on September 16, 2025. This edition was prepared following an assessment of the implementation of the 2020 Strategic Plan for the Federal Judiciary, an analysis of priorities and trends likely to affect the federal judiciary, and the consideration of updates and revisions proposed by Judicial Conference committees. An Ad Hoc Strategic Planning Group prepared drafts of the revised plan for review by Judicial Conference committees and consideration by the Executive Committee, which facilitates and coordinates strategic planning for the Conference and its committees.

Chairs, Committees of the Judicial Conference of the United States September 2025

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U.S. District Court
Middle District of North Carolina

COMMITTEE ON THE BUDGET
Honorable Amy J. St. Eve
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Seventh Circuit

COMMITTEE ON CODES OF CONDUCT
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COMMITTEE ON DEFENDER SERVICES
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September 2025

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Director, Administrative Office of the U.S. Courts

Executive Committee
Judicial Conference of the United States
September 2025

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TAB 3

Effective December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Effective December 1, 2025

REA History:

- Transmitted to Congress (Apr 2025)
- Transmitted to Supreme Court (Oct 2024)
- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

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

Effective December 1, 2025, unless otherwise noted

Current Step in REA Process:

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Rule	Summary of Proposal	Related or Coordinated Amendments
	chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2025)

REA History:

- Approved by Standing Committee (June 2025 unless otherwise noted)
- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would amend Rule 29(a) relating to amicus filings during a court's initial consideration of a case into renumbered Rule 29(a)-(e) and expand the disclosure obligations. Rule 29(f) (formerly Rule 29(b)) would relate to amicus filings during the rehearing stage. The length limit for amicus briefs at the initial stage as set forth in Rule 29(a)(5) would be amended to set a specific word limit of 6,500 words.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendments to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2025)

REA History:

- Approved by Standing Committee (June 2025 unless otherwise noted)
- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

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

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

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

REA History:

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

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

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

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

REA History:

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

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

TAB 4

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

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Courts from Foreign Manipulation Act of 2025	**H.R. 2675** *Sponsor:* Cline (R-VA) *Cosponsors:* 18 bipartisan cosponsors	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 11/20/2025: Ordered to be Reported (Amended) • 11/20/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 4/7/2025: H.R. 2675 introduced in House; referred to Judiciary Committee
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* 24 Republican cosponsors	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 11/19/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 2/7/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	**S. 3180** *Sponsor*: Kennedy (R-LA)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3180/BILLS-119s3180is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 11/18/2025: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Democracy Act	**S. 2838** *Sponsor*: Schiff (D-CA) *Cosponsors*: 9 Democratic and Independent Cosponsors	CV – New Rule(s)	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf **Summary:** Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	• 9/17/2025: S. 2838 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs
Lawsuit Abuse Reduction Act of 2025	**H.R. 5258** *Sponsor*: Collins (R-GA) *Cosponsors*: Gill (R-TX) Tiffany (R-WI) Hageman (R-WY)	CV 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf **Summary:** Would amend Civil Rule 11 to require the court to issue sanctions for Rule 11 violations, which shall consist of an order to pay the amount of the reasonable expenses incurred as a direct result of the violation.	• 9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2025	**H.R. 4678** *Sponsor*: Johnson (D-GA) *Cosponsors*: 20 Democratic cosponsors	EV 416	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf **Summary**: Would create a new Evidence Rule (416, Limitation on Admissibility of Defendant's Creative or Artistic Expression) that would make a defendant's creative or artistic expression inadmissible unless the government proves by clear and convincing evidence that one of several exceptions applies.	• 7/23/2025: H.R. 4678 introduced in House; referred to Judiciary Committee
Rape Shield Enhancement Act of 2025	**H.R. 3596** *Sponsor:* Mace (R-SC)	EV 412; CV 26; CR 16	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf **Summary:** Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	• 5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Supreme Court Ethics, Recusal, and Transparency Act of 2025	**S. 1814** *Sponsor*: Whitehouse (D-RI) *Cosponsors*: 26 Democratic and Independent cosponsors	AP 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf **Summary:** Would require the Judicial Conference to prescribe rules of procedure requiring certain amicus disclosures and for prohibiting the filing of or striking an amicus brief that would result in the justice, judge, or magistrate judge's disqualification.	• 5/20/2025: S. 1814 introduced in Senate; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2025	**S. 1133** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf **Summary:** Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 3/26/2025: Introduced in Senate; referred to Judiciary Committee
Trafficking Survivors Relief Act of 2025	**H.R. 1379** *Sponsor:* Fry (R-SC) *Cosponsors:* 17 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf **Summary:** Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	• 2/14/2025: H.R. 1379 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 5

Agenda E-19 (Summary)
Rules
September 2025

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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

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

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

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

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

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

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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

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

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

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

FEDERAL RULES OF APPELLATE PROCEDURE

Amended Rules and Form Recommended for Approval and Transmission

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

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

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

Rule 29 (Brief of an Amicus Curiae)

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

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

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

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

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

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

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

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

Proposed Rule Amendment Approved for Publication and Public Comment

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

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

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

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

Information Items

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

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

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

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

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

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

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

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

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

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

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

Official Form 410S1 (Notice of Mortgage Payment Change)

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

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

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

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

Recommendation: That the Judicial Conference:

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

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

Proposed Amendments to Form Approved for Publication and Public Comment

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

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

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

Information Items

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

FEDERAL RULES OF CIVIL PROCEDURE

Proposed Rule Amendments Approved for Publication and Public Comment

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

Rule 7.1 (Disclosure Statement)

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

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

Rule 41 (Dismissal of Actions)

The proposed amendments to Rule 41 clarify that a plaintiff may obtain a voluntary dismissal of one or more claims raised in a complaint without dismissing the entire action. This change responds to decisions in some courts interpreting the current language to mean that only an entire case, i.e., all claims against all defendants, or only all claims against one or more defendants, could be dismissed under the rule. The proposed amendments also provide that a stipulation of dismissal need be signed only by parties who remain in the action at the time of the dismissal.

Rule 45(b) (Subpoena – Service)

The proposed amendment to Rule 45(b) clarifies how a subpoena for testimony may be served and whether the witness fee must be tendered simultaneously with service. The proposed amendment borrows two methods of service from Rule 4(e)(2)'s methods for serving a complaint on an individual—personal service or leaving a copy at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there. The proposed amendment also adds an additional method of service through the mail or commercial carrier if confirmation of actual receipt can be provided, and further authorizes the court to approve another means of service for good cause. The proposed amendment also includes two other changes: (1) relaxing the current requirement that witness fees be tendered at the time of service, and (2) providing a

14-day notice period (subject to shortening by the court for good cause) when the subpoena requires attendance at a trial, hearing, or deposition.

Rule 45(c) (Subpoena – Remote Testimony)

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

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

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

Information Items

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

FEDERAL RULES OF CRIMINAL PROCEDURE

Proposed Rule Amendment Approved for Publication and Public Comment

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

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

Rule 17 (Subpoena)

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

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

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

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

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

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

Information Items

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

FEDERAL RULES OF EVIDENCE

Amended Rule Recommended for Approval and Transmission

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

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

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

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

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

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

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

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

Rule 609 (Impeachment by Evidence of a Criminal Conviction)

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

New Rule 707 (Machine-Generated Evidence)

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

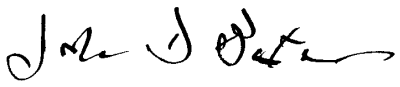
Information Items

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

JUDICIARY STRATEGIC PLANNING

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

Respectfully submitted,



John D. Bates, Chair

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

* * * * *

TAB 6

Federal Judicial Center

Date: December 8, 2025

To: Standing Committee on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes recent efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Completed Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center examined motions to intervene on appeal (www.fjc.gov/content/394353/intervention-federal-courts-appeals). Intervention at the beginning of a case was studied in a two-year filing cohort, and intervention at the end of a case, such as after argument or judgment, was examined in a four-year termination cohort.

Current Research for Rules Committees

Temporary Administrative Stays in the Courts of Appeals

The Appellate Rules Committee has requested research on courts of appeals' issuing temporary administrative stays following motions for stays pending appeals.

Attorney Admissions

The Center provides the standing rules committee's subcommittee on attorney admissions with occasional research support.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Allocating District-Court Case-Weighting Credit for Motions Arising Under 18 U.S.C. § 3582(c)

At the request of the Judicial Resources Committee, the Center developed interim case weights for motions to modify prison sentences. The Center periodically conducts empirical research to prepare quantitative weights for case types, which are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The new weights were approved by the Judicial Conference in September to be used until the next district-court case-weighting study is conducted.

Review of Local District and Appellate Rules Governing Redaction of Private Information in Federal Court Filings

At the request of the Judicial Conference Committee on Court Administration and Case Management, the Center reviewed local rules in the federal district courts and courts of appeals to identify rules requiring redaction of specified private information from court filings (www.fjc.gov/content/394726/review-local-district-and-appellate-rules-governing-redaction-private-information).

Review of Local Bankruptcy Rules, Orders, and Procedures Governing Redaction of Private Information in Federal Court Filings

At the request of the Judicial Conference Committee on Court Administration and Case Management, the Center reviewed local rules in the bankruptcy courts to identify rules requiring redaction of specified private information from court filings (www.fjc.gov/content/394727/review-local-bankruptcy-rules-orders-and-procedures-governing-redaction-private).

Supplemental Analysis of Unredacted Social Security Numbers in Federal Court PACER Documents

The Center examined unredacted Social Security numbers in its 2024 study of public filings to determine whether unredacted personally identifiable information is more common in particular types of court filings and proceedings (www.fjc.gov/content/394725/supplemental-analysis-unredacted-social-security-numbers-federal-court-pacer). The analysis was prepared at the request of the Judicial Conference Committee on Court Administration and Case Management.

Appeals of Sua Sponte Remand Orders in Class Action Fairness Act (CAFA) Removals, 2014–2023

Prepared for the Committee on Federal–State Jurisdiction, this study examines how often sua sponte remands were ordered in putative class actions removed to federal court on Class Action Fairness Act (CAFA) grounds and how often appeals of those sua sponte remand orders were sought (www.fjc.gov/content/393642/appeals-sua-sponte-remand-orders-class-action-fairness-act-cafa-removals-2014-2023).

Current Research for Other Judicial Conference Committees

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Incorporated Into Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts incorporated comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings. The Center presented to the rules committees' privacy working group a related report on the role unredacted Social Security numbers play in civil, criminal, and appellate litigation suggesting that Social Security numbers usually appear in public filings because they appear in documents presented to the courts as exhibits for reasons other than communicating Social Security numbers.

Case Weights for Bankruptcy Courts

The Center is completing analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

Consumer Bankruptcy Law: Chapters 7 & 13, Second Edition

This monograph provides an overview of consumer bankruptcy law and describes the statutory framework for bankruptcy relief under Chapters 7 and 13 of the Bankruptcy Code, Title 11 of the U.S. Code (www.fjc.gov/content/393646/consumer-bankruptcy-law-chapters-7-13-second-edition).

JUDICIAL GUIDES

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Courts

The Center is preparing a seventh edition of its *Benchbook for U.S. District Courts* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Evaluating Historical Evidence

The Center offered judges a six-part, interactive online series that provided tools for managing cases with significant historical evidence. Historians discussed historical methodology and provided practical tips on evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments.

Summer Institute for Teachers

In June 2025, the Center collaborated with the ABA to present a weeklong professional-development conference for teachers, focusing on three famous historical trials: *United States v. Anthony*, the flag-salute cases, and the Chicago Seven trial. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

EDUCATION

Specialized Workshop

Employment Law Workshop 2025

This two-day workshop, comprised of small group discussions and presentations featuring federal judges and seasoned management-side and employment-side attorneys, included information on expeditious and fair

case handling, remedies, and an update on Supreme Court employment-law developments.

Immigration Law for U.S. District Courts

In this two-day seminar, judges discussed the rapidly changing area of immigration law.

Workshop on Science-Informed Decision-Making

Presented in June by the FJC and the Center for Law, Brain & Behavior at Massachusetts General Hospital, this three-day program provided guidance on how judges and probation and pretrial services officers could incorporate behavioral science into their decision-making in criminal cases that unfold outside of the context of problem-solving courts and where diversion may not be an option.

Distance Education

Conducting Judicial Mediations and Settlement Conferences: Ethical Considerations for Bankruptcy Judges

Bankruptcy judges often are asked to mediate in the cases of other judges, and some judges conduct settlement conferences in their own cases. This program discussed navigating the intersection of these roles and activities with the Code of Conduct for U.S. Judges and other relevant sources.

Court Web

This periodic webcast included as a recent episode "Supreme Court Review, October 2024 Term" (featuring Erwin Chemerinsky and Paul Clement).

Term Talk

Each term, the Center presents video podcasts with the nation's top legal scholars discussing what federal judges need to know about the Supreme Court's most impactful decisions (www.fjc.gov/education/fjc-videos-podcasts?category=Supreme-Court).

Supreme Court Term in Review for Bankruptcy Judges

A September 2025 webcast discussed some of the most significant Supreme Court decisions, including key bankruptcy cases.

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges. The 2025 workshop for bankruptcy judges included a plenary session on the application of evidence rules to bankruptcy cases.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on a three-day workshop for Article III judges in the Second Circuit.

Workshop for Federal Court Mediators

In August, the Center held a three-day workshop for court mediators.

National Conference for Appellate Staff Attorneys

The Center put on this three-day workshop in June.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.

TAB 7

MEMORANDUM

DATE: December 12, 2025

TO: Standing Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

I write with a brief update on the project on service and electronic filing by self-represented litigants ("SRLs"), which has two basic goals. As to service, the project's goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a notice of case activity through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

A year ago, the Appellate, Civil, and Criminal Rules Committees appeared open to working in tandem to move forward with proposed amendments, but the Bankruptcy Rules Committee had expressed concerns specific to the bankruptcy context. Based on the Standing Committee's January 2025 discussion, I reported to the advisory committees that the path seemed clear to proceed with consideration of proposed amendments to the Civil, Appellate, and Criminal Rules even if corresponding amendments to the Bankruptcy Rules were not to be proposed.

But in fall 2025, the Bankruptcy Rules Committee further discussed the project and decided that – in light of the fact that the Civil, Criminal, and Appellate Rules Committees were willing to proceed with proposed amendments – the Bankruptcy Rules Committee should attempt to participate as well, at least for purposes of publication. Members of the Bankruptcy Rules Committee did express some continuing reservations, and stated that they would reassess those reservations in the light of public comment. Meanwhile, the Appellate, Civil, and Criminal Rules Committees considered a sketch of potential amendments at their fall 2025 meetings and

discussed a number of subsidiary drafting and policy issues.[1]

A few of those subsidiary issues remain to be worked out, but the goal is for the working group to develop a coordinated set of proposals for consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees at their spring 2026 meetings and (if all goes well) for consideration by the Standing Committee in June 2026, with a view to potential publication for comment in August 2026. Work on this effort will commence in the new year.

1 The sketches and a summary of the issues can be found in the memos for the fall 2025 meetings of the Appellate, Civil, and Criminal Rules Committees. See, e.g., the memo that starts at page 304 of the fall 2025 Civil Rules Committee agenda book, available here: https://www.uscourts.gov/sites/default/files/document/2025-10_civil_agenda_book_final_10-14.pdf .

TAB 8

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. Allison H. Eid, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 12, 2025

I. Introduction

The Advisory Committee on Appellate Rules met on Wednesday, October 15, 2025, in Washington, DC. The draft minutes from the meeting accompany this report.

The Advisory Committee has no action items for the January 2026 meeting.

A proposed amendment to Rule 15, dealing with review of administrative agency decisions, has been published for public comment (Part II of this report).

Other matters under active consideration (Part III of this report) are:

- creating a rule dealing with intervention on appeal;
- addressing issues concerning reopening of the time to appeal under Rule 4(a)(6);
- amending Rule 8 to provide limits on administrative stays;
- adopting a uniform rule for bar admission across the courts of appeals;
- revisiting the treatment of tribes in the Appellate Rules;
- providing greater protection for Social Security numbers in court filings; and
- expanding electronic filing by self-represented litigants.

The Advisory Committee also considered a new suggestion regarding the destination of an appeal and removed it from the Advisory Committee's agenda (Part IV of this report).

II. Item Published for Public Comment

A. "Incurably Premature"—Rule 15 (24-AP-G)

This proposed amendment is designed to remove a potential trap for the unwary in Rule 15. The "incurably premature" doctrine holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Rule 4, dealing with appeals from district court judgments, used to work in a similar way regarding various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The proposal is to do for Rule 15 what was done for Rule 4. The text of the proposed amendment, with accompanying Committee Note, is attached to this report.

At the time of the Advisory Committee meeting, no comments had been received. Since then, we have received one favorable comment. The Advisory

Committee will consider any comments received before the February 16, 2026, deadline. At this point, it anticipates seeking final approval at the June 2026 meeting of the Standing Committee.

III. Items Under Consideration

A. Intervention on Appeal (22-AP-G; 23-AP-C)

The Advisory Committee is continuing its work on the possibility of a new Federal Rule of Appellate Procedure governing intervention on appeal. There is currently no Appellate Rule governing intervention, other than Rule 15 which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee decided not to pursue creating a new rule governing intervention on appeal, fearing that creating such a new rule would invite more motions to intervene on appeal.

The Advisory Committee is exploring both whether there is a sufficient problem to warrant rulemaking and whether it is possible to create a useful rule. The Federal Judicial Center (FJC) conducted extensive research into motions to intervene in the courts of appeals. Based on that report, the Advisory Committee believes that it is worth continuing to work on a new rule, and in June of 2026 it may ask the Standing Committee to publish a proposed new rule for public comment, but it has not yet decided to do so.

Here is the working draft:

Rule 7.1. Intervention on Appeal from a District Court

(a) Motion to Intervene. The preferred method for a nonparty to be heard is participation as an amicus curiae under Rule 29. Intervention on appeal is reserved for exceptional cases. A person may move to intervene on appeal by filing a motion in accordance with Rule 27. The motion must be filed as soon after the docketing of the appeal as practical in the circumstances.

(b) Criteria.

(1) **In General.**

A court of appeals may permit a movant to intervene on appeal who

(A) demonstrates a compelling reason why intervention was not sought at a prior stage of the litigation or, if it was sought

previously, provides a compelling explanation of how circumstances have changed;

(B) has a legal interest that may be affected in the appeal—other than by the precedential effect of a decision;

(C) is so situated that adjudicating the appeal may as a practical matter impair or impede the movant's ability to protect its interest,

(D) shows that existing parties will not adequately protect that interest;

(E) shows that participating as an amicus would be insufficient to protect that interest;

(F) shows that existing parties will not be unfairly prejudiced by permitting intervention; and

(G) in any civil action of which the district courts have original jurisdiction founded solely on section 1332 of title 28, shows that intervention would be consistent with the jurisdictional requirements of section 1367(b) of title 28.

(2) **Governments, Agencies, and Officials.**

(A) The United States, a State, or a tribal government may also move to intervene to defend any law it has enacted or action it or one of its agencies or officers has taken.

(B) An agency or officer of the United States, of a State or of a tribal government may also move to intervene to defend any law it has enacted or action it or one of its agencies or officers has taken, if that agency or officer is authorized by the applicable law to defend the law or action.

(C) The United States may also move to intervene to defend its foreign relations interests.

(c) Disposition of Motion. If the court grants the motion, the intervenor becomes a party for all purposes, unless the court orders otherwise. Denial of a motion to intervene does not preclude participation as an amicus under Rule 29.

A few things to note about this working draft:

- The draft is limited to appeal from district courts. The Advisory Committee thinks, based on the FJC report, that intervention in agency review cases brought directly to the courts of appeals does not appear to present significant problems.

- Drawing on existing case law, intervention on appeal is limited to exceptional cases. The preferred way for a nonparty to be heard is as an amicus curiae, not as a party intervening on appeal.

- No fixed time to move to intervene is set, because of the wide variety of circumstances that might prompt intervention. But the motion must be filed as soon after docketing of the appeal as practical in the circumstances. And the proposed intervenor must also demonstrate a compelling reason why intervention was not sought at a prior stage of the litigation or, if it was sought previously, provide a compelling explanation of how circumstances have changed.

- A proposed intervenor must have a legal interest that may be affected in the appeal. The Advisory Committee considered specifying in some detail what kinds of legal interests support intervention, but at least at this point thinks that such specificity creates a cumbersome and dense rule while risking omitting something that should be included. But the Advisory Committee does think that it is worthwhile to specify that the precedential effect of a decision is not enough to support intervention.

- If the court of appeals grants intervention, the intervenor becomes a party for all purposes, unless the court orders otherwise. That is, the default is set as intervention for all purposes, giving the court discretion to allow a more limited intervention. This approach underscores the distinction between intervention as a party and participating as an amicus.

B. Reopening Time to Appeal—Rule 4 (24-AP-M) The Advisory Committee had geared up to consider a suggestion by Chief Judge Sutton, echoed by Judge Gregory, that the Advisory Committee look into reopening the time to appeal under Rule 4(a)(6). *See Winters v. Taskila*, 88 F.4th 665 (2023); *Parrish v. United States*, 2024 WL 1736340 at *1 (April 23, 2024).

The Supreme Court granted certiorari in *Parrish*. 145 S. Ct. 1122 (2025). The Advisory Committee decided to await the decision in *Parrish* before proceeding further.

In June of 2025, the Supreme Court decided *Parrish* and reversed. *Parrish v. United States*, 145 S. Ct. 1664 (2025). It held:

> A notice of appeal filed after the original deadline but before reopening is late with respect to the original appeal period, but merely early with respect to the reopened one. Precedent teaches that a premature notice of appeal, if otherwise adequate, relates forward to the date of the order making the appeal possible. So a notice filed before reopening relates forward to the date reopening is granted, making a second notice unnecessary.

Id. at 1668. It interpreted 28 U.S.C § 2107(c) against a common law background, under which "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Id*. at 1671 (cleaned up).

The Court pointedly rejected the idea that "once Parrish's filing had been construed as a motion to reopen, it could not simultaneously retain its function as a notice of appeal." *Parrish*, 145 S. Ct. at 1673. The Court observed that it "has repeatedly emphasized . . . that a single filing can serve multiple purposes in just such fashion." *Id*.

It also held that the "Rules of Appellate Procedure . . . are entirely consistent with the relation-forward principle." *Id*. The Court closed by noting, "If the Rules Committee believes a second notice could be . . . useful in the context of reopening, it remains free to recommend a change." *Id*. at 1675.

The Advisory Committee sees no reason to recommend a change that would reject the Supreme Court's holding. It might be appropriate to do nothing and simply rely on the holdings of *Parrish*. The Court has answered not only the question of whether a notice of appeal always has to be filed after the motion to reopen has been granted (no) but also whether a single document can be construed to serve multiple purposes (yes). But the Advisory Committee thinks that courts and litigants (especially incarcerated litigants with greater access to the Rules themselves than to cases interpreting them) would benefit from some clarification of both issues in the text of Rule 4 itself.

Here is the language under consideration:

> If the court grants the motion to reopen, a party who has already filed an otherwise-adequate notice of appeal need not file a new notice of appeal. A document—even if it serves other purposes—may be construed as a notice of appeal if it makes clear

who is appealing, from what judgment, and to which appellate court.

And here is what the proposed amendment would look like in the context of Rule 4:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) **Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the

first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) **Reopening the Time to File an Appeal.**

(A) The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

~~(A)~~(i) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

~~(B)~~(ii) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

~~(C)~~(iii) the court finds that no party would be prejudiced.

(B) If the court grants the motion to reopen, a party who has already filed an otherwise-adequate notice of appeal need not file a new notice of appeal. A document—even if it serves other purposes—may be

construed as a notice of appeal if it makes clear who is appealing, from what judgment, and to which appellate court.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

* * * * *

Committee Note

Rule 4(a)(6) is amended to clarify two issues.

First, if the court grants a motion to reopen the time to appeal, a party who has already filed an otherwise-adequate notice of appeal need not file a new notice of appeal. If the only problem with the prior notice of appeal was that it was late, and the court has reopened the time to appeal, no purpose is served by requiring a duplicative notice of appeal. *See Parrish v. United States*, 145 S. Ct. 1664 (2025).

Second, a document may be construed as a notice of appeal if it makes clear who is appealing, from what judgment, and to which appellate court. *See Becker v. Montgomery*, 532 U.S. 757, 767 (2001); Fed. R. App. P. 3(c)(7). This remains true even if that document also serves other purposes, such as a motion to reopen the time to

appeal, a brief, or a request for a certificate of appealability. *See Parrish*, 145 S. Ct. at 1673.

The Advisory Committee is considering whether the second sentence ("A document—even if it serves other purposes— may be construed as a notice of appeal if it makes clear who is appealing, from what judgment, and to which appellate court.") might be better placed in Rule 3. The principle it announces does not apply only in the reopening context. But the issue appears to arise most frequently in the reopening context. Perhaps placing the language in one Rule and a cross-reference in the other Rule would do the job. Or perhaps placing the language in both Rules would be worth it, particularly for incarcerated unrepresented litigants who may be the most affected.

C. Administrative Stays—Rule 8 (24-AP-L)

The Advisory Committee is continuing to consider a suggestion to amend Rule 8 to provide limits on administrative stays.

One possibility is to expressly authorize administrative orders providing temporary relief while the court receives briefing and deliberates on a party's motion, while making clear that an administrative stay can last no longer than necessary to enable the court to make an informed decision on the motion—and setting an outside limit on the length of an administrative stay (absent party consent).

But administrative stays can arise in a range of cases and circumstances, and the Advisory Committee thinks that more information would be useful to decide how serious the problem is, whether there should be a time limit on administrative stays, how long any such time limit should be, and whether agency cases and immigration cases should be excluded or treated differently.

Based on its experience with the FJC report regarding intervention, the Advisory Committee has asked for FJC research here. Preliminary indications are that the project is feasible, will involve looking at all stay motions in a filing cohort, and will likely take one or two years, although the funding lapse will add delay.

The Advisory Committee will consider this suggestion, informed by the FJC research.

D. Uniform Bar (25-AP-B)

The Advisory Committee has begun to consider a new suggestion by the National Women's Law Center to adopt a uniform rule for bar admission across the courts of appeals. It points to varying requirements in the circuits regarding which

attorneys on a brief must be admitted to the court's bar, noting that the local rules often do not make these requirements clear. It also observes that courts of appeals differ regarding pro hac vice admission.

Unlike the other sets of rules, the Federal Rules of Appellate Procedure already have a national rule governing admission to the bar of a court of appeals, FRAP 46. This suggestion, then, effectively calls for FRAP 46 to be amended to address more details than it currently does.

An earlier suggestion to establish a rule regarding admission to the district court bars is already under consideration by a joint subcommittee. (23-CV-E). The Advisory Committee considered the possibility of seeking representation on the joint subcommittee but believes that the issues are sufficiently different that doing so would not be effective.

Some members of the Advisory Committee (particularly circuit judges) think that the current system is working fine in the courts of appeals and see no need for change. In their view, it is important for lawyers practicing before a court of appeals to be admitted to that court's bar as an aid to any necessary discipline, and it is not hard to become a member of the bar of their court of appeals. Other members (particularly practicing lawyers), note that the current system is confusing because the circuits have different rules regarding who may be *on* a brief, who may *sign* a brief, and who may *argue* an appeal. While this may be an appropriate situation for allowing circuit variation, some circuits have burdensome requirements, such as requiring a certificate of good standing that is no more than 30 days old and requiring that all lawyers on a brief be admitted. Doing that for several associates who work on a brief, or several organizations who join in filing an amicus brief, can take time and money.

The Advisory Committee will keep the matter on its agenda.

E. Treatment of Tribes (25-AP-D)

The Advisory Committee has begun to consider a new suggestion (submitted as a belated comment on the amicus rule) from the National Tribal Air Association regarding the treatment of tribes. (Agenda book 335).

The Advisory Committee had decided, when considering the treatment of tribes in the amicus rule, to defer that issue because the treatment of tribes cuts across other rules. It has now formed a subcommittee to address the treatment of tribes in the Appellate Rules. It is aware that this issue has been considered in the past but believes that it is time to look at it again.

F. Social Security Numbers in Court Filings—Rule 25 (22-AP-E)

The Advisory Committee defers to the Secretary for the Standing Committee for the update regarding the joint project dealing with full redaction of social security numbers and other privacy matters, but adds the following:

The Advisory Committee thinks that it is appropriate to provide greater privacy protection on appeal. Whatever the needs in trial courts, it is hard to see why an unredacted social security number should be reproduced in a publicly available brief or appendix in a court of appeals. For that reason, the Advisory Committee is considering an amendment along the following lines:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) **Privacy Protection.**

(A) **In General.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(B) **In a Petition Involving the Railroad Retirement Act.** The provisions on remote electronic access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

(C) **Redacting Social-Security Number and Taxpayer Identification Numbers.** Unless the court orders filing under seal, a party or nonparty must fully redact social-security numbers or other taxpayer-identification numbers, including employer-identification numbers, from any filing it makes, despite what the rules in Rule 25(a)(5)(A) allow. But this requirement does not apply to a clerk forwarding or making the

record available under Rule 6(b)(2)(C), Rule 6(c)(2), or Rule 11 or to an agency filing the record under Rule 17.

* * * * *

Committee Note

Subdivision (a). Existing paragraph (5) of subdivision (a) deals with privacy protection. In general, the privacy protection rules that governed below also govern on appeal. But whatever the justification for permitting unredacted or partially redacted social-security numbers or other taxpayer identification numbers in other settings, there is no need for them in the publicly available papers filed by litigants in a court of appeals. For that reason, the amendment adds a new provision broadly requiring a party or nonparty to fully redact those numbers from any filing it makes, despite what the rules mentioned in subparagraph (A) would otherwise allow. If there is a rare case in which it is necessary for the court of appeals to know the number, a court order can permit filing under seal.

This prohibition does not apply to a clerk who forwards or makes the record available under Rule 6(b)(2)(C), Rule 6(c)(2), or Rule 11. Nor does it apply to an agency filing the record under Rule 17. The record can be sent as it is. The prohibition does apply, however, to any litigant who reproduces portions of the record in an appendix under Rule 30.

For clarity, the existing provisions of paragraph (5) are broken into subparagraphs and given headings. The new provision is subparagraph (C).

The Advisory Committee will consider whether some language change might be appropriate to deal with a filing made under seal that is later unsealed. Perhaps, the "unless" clause in Rule 25(a)(5)(C) could be revised to say something like, "Unless the filing is made and remains under seal. . . ."

G. Unrepresented Parties; Filing and Service

The Advisory Committee defers to the Reporter for the Standing Committee for the update regarding the joint project dealing with electronic filing and service by unrepresented parties.

IV. Item Removed from the Advisory Committee Agenda

A. Destination of Appeal—Rule 3 (25-AP-A)

The Advisory Committee considered a new suggestion from Anthony Mallgren regarding the destination of an appeal. Mr. Mallgren appears to suggest that Rule 3 be amended so that the district court clerk, rather than the appellant, be responsible for knowing the appropriate court of appeals. If one thinks only of appeals to the regional courts of appeals, this might seem sensible. But some appeals go to the Court of Appeals for the Federal Circuit, and some even go directly to the Supreme Court. It is not too much to ask that an appellant designate the appropriate appellate court, especially since 28 U.S.C. § 1631 allows for transfer from a court without jurisdiction to the appropriate court.

The Advisory Committee agreed unanimously to remove this item from the agenda.

Rule 15 as Published for Public Comment

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

* * * * *

(d) Premature Petition or Application. This subdivision (d) applies if a party files a petition for review or an application to enforce after an agency announces or enters its order—but before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party. The premature petition or application becomes effective to seek review or enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration. If a party intends to challenge the disposition of a petition for rehearing, reopening, or reconsideration, the party must file a new or amended petition for review or application to enforce in compliance with this Rule 15.

(e)~~(d)~~ Intervention. Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(f)~~(e)~~ Payment of Fees. When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Committee Note

Subdivision (d). Subdivision (d) is new. It is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-reviewable by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023); *Aeromar, C. Por A. v. Dept. of Transp.*, 767 F.2d 1491, 1493 (11th Cir. 1985) (relying on the pre-1993 treatment of notices of appeal and applying the "same principle" to review of agency action). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first

petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (d) removes this trap.

It is modeled after Rule 4(a)(4)(B)(i), as amended in 1993, and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Recognizing that while review of district court orders is generally case based, *see* Fed. R. Civ. P. 54, review of administrative orders is generally party based, subdivision (d) refers to an order that is made "non-reviewable as to that party" by a petition for rehearing, reopening, or reconsideration.

Subdivision (d) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-reviewable as to a party. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. Rather, subdivision (d) provides that when, under governing law, an agency order is non-reviewable as to a particular party because of the filing of a petition for rehearing, reopening, or reconsideration, a premature petition for review or application to enforce that order will be held in abeyance and become effective when the agency disposes of the last such petition—that is, the last petition that renders the order non-reviewable as to that party.

As with appeals in civil cases, *see* Rule 4(a)(4)(B)(ii), the premature petition becomes effective to review the original decision, but a party intending to challenge the disposition of a petition for rehearing, reopening, or reconsideration must file a new or amended petition for review or application to enforce.

Subsequent subdivisions are re-lettered.

TAB 9

Minutes of the Fall Meeting of the

Advisory Committee on Appellate Rules

October 15, 2025

Washington, DC

Judge Allison Eid, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, October 15, 2025, at approximately 9:00 a.m. EDT.

In addition to Judge Eid, the following members of the Advisory Committee on Appellate Rules were present in person: Andrew Adler, Linda Coberley, George Hicks, Professor Bert Huang, and Justice Leondra Kruger. Judge Carl J. Nichols had a judicial obligation and joined the meeting after it began. Judge Richard Wesley and Judge Sidney Thomas attended via Teams. The Solicitor General did not attend or send a representative because of the lapse in funding.

Also present in person were: Judge James Dever III, Chair, Committee on Rules of Practice and Procedure (Standing Committee); Andrew Pincus, Member, Standing Committee and Liaison to the Advisory Committee on Appellate Rules; Carolyn Dubay, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Sarah Sraders, Rules Law Clerk, RCS; Shelly Cox, Management Analyst, RCS; Tim Reagan, Federal Judicial Center (FJC); Professor Catherine T. Struve, Reporter, Standing Committee; and Professor Edward A. Hartnett, Reporter, Advisory Committee on Appellate Rules.

Judge Daniel Bress, Member, Advisory Committee on Bankruptcy Rules and Liaison to the Advisory Committee on Appellate Rules; Christopher Wolpert, Clerk of Court Representative; and Professor Daniel R. Coquillette, Consultant, Standing Committee, attended via Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and welcomed everyone, including the members attending remotely. She particularly welcomed Judge Dever, the new Chair of the Standing Committee, Andrew Adler, a new member of the Advisory Committee, and Sarah Sraders, the new Rules Law Clerk, to their first meeting of this committee. She invited all participants, both in person and remote, to introduce themselves.

Carolyn Dubay directed attention to the rules tracking chart. (Agenda book 16). She noted that the Standing Committee had given final approval to the proposed amendments to Rule 29, dealing with amicus briefs, after making minor changes. In order to make it easier to trace the changes made by the Standing Committee, a new

feature of the report of the Standing Committee to the Judicial Conference has been added: an appendix detailing those changes. (Agenda book 70). The Standing Committee also approved the proposed amendments to Form 4. The Judicial Conference approved both proposed amendments.

Ms. Sraders referred to the pending legislation chart and noted one addition: a proposed Supreme Court Ethics, Recusal and Transparency Act that would require certain amicus disclosures. (Agenda book page 22).

Judge Eid noted the draft minutes of the meeting of the Standing Committee and the Report to the Judicial Conference. (Agenda book page 33).

II. Approval of the Minutes

The minutes of the April 2, 2025, Advisory Committee meeting were approved without dissent, subject to correction of typographical errors. (Agenda book page 91).

III. Discussion of Joint Committee Matters

A. Self-Represented Parties

Professor Struve provided a detailed report regarding electronic filing and service for self-represented parties. (Agenda book page 111). She thanked the Advisory Committee for its input so far.

There are two major aspects of the project. The first is to not require service of paper copies of filings made by non-electronic filers on ECF participants because ECF participants will get it via ECF. This aspect has gotten less airtime but is quite practical.

The second has involved more discussion and would alter the ground rules for self-represented litigants and flip the presumption regarding electronic filing. Civil, Criminal, and Appellate are okay with this change. Bankruptcy is dubious. But it has voted to opt in to the project, at least for purposes of publication. There are still some skeptics, and public comment may lead them to opt out. They are trying to participate but have concerns. In addition, self-represented litigants are least prevalent in bankruptcy.

Professor Struve then walked through the various sections of the report.

(A) At the spring meeting, a member had asked about how the "reasonable exceptions" provision relates to the "reasonable conditions and restrictions" provision. The latest draft is designed to make them complementary. The clerk liaison likes the structure. Alternative drafting suggestions are welcome.

(B) Is ECF sufficiently reliable that there is no need for a provision that service via ECF is not effective if a filer knows that a filing was not received? Or is the risk of a system outage sufficient reason to retain such a provision.

(C) Originally, it was thought not necessary to have a provision in the Appellate Rules for papers that are served but not filed. But there are such papers, so it is in the latest draft.

(D) The latest draft uses the phrase "notice of case activity" rather than "notice of filing," because there are a range of matters entered on the docket that are not filings.

(E) The current rules use the term "unrepresented"; an earlier draft used the term "self-represented." While some prefer the latter term, implementing it in the Appellate Rules would be cumbersome because of the number of rules where the former term is used. On the other hand, Civil is likely to use "self-represented" because there aren't other Civil Rules that would have to be amended. The latest draft includes this different usage in different rule sets. This seems to be a tolerable divergence, but we will see what the Standing Committee thinks.

(F) The current e-filing rules use the phrase "unrepresented person." But if the presumption regarding e-filing is flipped, some might argue that unrepresented non-parties could use electronic filing. For that reason, the latest draft uses the phrase "unrepresented party." Concededly, that would block an unrepresented person who seeks to intervene from using electronic filing. Drafting around that would be cumbersome. The current inclination is not to worry about unrepresented proposed intervenors. Ideas are welcome.

(G) The latest draft explicitly spells out some things in ways that some could view as obvious or redundant. The reason is to help unrepresented parties. Despite the usual preference of the style consultants for concision, they are okay with the extra words here.

(H) It might be worth updating the prison mailbox rule to address the timeliness of documents filed using an electronic filing program in an institution. But the latest draft does not attempt to do so; the thinking is that any such update should be handled as a separate project and treated as outside the scope of this project.

(I) Chris Wolpert has pointed out that we should address case-initiating documents filed in the courts of appeals. We might want to allow electronic filing of such documents but not allow dependence on service via ECF. This is an issue that the Advisory Committee might want to address even apart from this project. The latest draft would allow for a court of appeals, by

local rule, to provide that a paper filed under seal or one that initiates a proceeding in the court of appeals under Rule 5, 15, or 21 must be served by other means. We need to add Rule 6 as well.

(J) At this point, with Bankruptcy on board, there is no need for special rules to deal with bankruptcy appeals.

Professor Struve then turned to another issue that has arisen in the working group discussions: What happens when things go wrong with electronic filing? The current rules provide that a clerk must not refuse to file a paper solely because it is not in proper form, FRAP 25(a)(4), and that a local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply. FRAP 47(a)(2).

Should the current project expand to think about these rules? Someone might file using a method that is not permitted, or in a format that is not permitted, or use ECF but screw it up. Do any of these involve a matter of form? The case law is not uniform. We may want to be careful here. Clerks might be concerned about parties filing willy-nilly. But protecting those who act in good faith and meet a deadline (a deadline that perhaps is jurisdictional) would promote fairness. The Supreme Court has a rule that might serve as a model. Expanding the scope of this project might make clerk's offices worried. An expanded project would reach lawyers, too, some of whom are tech-challenged.

The Reporter read Supreme Court Rule 14.5 and asked if the Committee might be interested in an Appellate Rule along those lines.

Mr. Wolpert stated that it does seem like an elegant solution. But it would open a can of worms in the courts of appeals, which receive things in a wide variety of ways. We are currently considering a proposal that is quite significant. It is a good change that he supports. But it would be better to take on this new, related issue separately, at a later time, after we have first-hand experience with what is already being considered. Don't act in a vacuum or fly blind; it is hard to predict; let's deal with this informed by practical experience.

A judge member found this persuasive. It's a good idea but defer it. Keep it on the agenda for the future. An academic member tended to agree and asked if these were reasons to question the existing project.

Mr. Wolpert responded that the existing project is a major change. It is thoughtful and thorough and leaves enough discretion to craft solutions that work for individual courts. Most if not all his colleagues agree. A big financial challenge is processing paper, most of which comes from pro se litigants. It is important to reduce paper to the extent possible. We should move forward with it. We generally bar filing via email because of its relative unreliability, lack of an audit trail, and difficulties

with receipts and logging. We are trying to craft a separate system for pro se litigants, apart from ECF, but do not want email.

A lawyer member supported the idea of deferring until we have more experience. A filing may trigger a response, but most pro se filings in the Supreme Court need not be responded to. A liaison member added that it would be important to figure out when the time to respond begins to run. In the Supreme Court, it is not until docketing.

The Reporter asked about ECF for case-initiating documents. How is it possible to rely on ECF for service? Perhaps we should have a more general provision for case-initiating documents rather than rely on local rules.

Mr. Wolpert responded that they had a local rule that did it wholesale but had to walk it back for case-initiating filings. Sometimes filings included complete and accurate information about who should be served, but sometimes they didn't. In these cases, we don't have access to the district court docket to see who needs to be served. A liaison member noted that in the Rule 5 context, there is a district court docket, but not in agency review cases.

Professor Struve expressed her appreciation for the committee's support.

B. Privacy

Carolyn Dubay presented a report regarding privacy protections, noting that this joint committee project began in 2022 and that we are at the stage of turning matters over to individual Advisory Committees, with the hope of presenting something at the June 2026 Standing Committee meeting. Bankruptcy, which presents a unique context, is the only Advisory Committee to have met so far this cycle.

There are four major issues. Should complete redaction of social security numbers and tax identification numbers be required? Should EINs also be included? Should the protection of minors switch to the use of pseudonyms rather than initials? Should there be a provision that makes explicit that the requirements apply to exhibits and attachments, where most of the current violations occur.

The Reporter explained that the Appellate Rules piggyback on the privacy rules applicable below, so this committee need not do anything. (Agenda book page 212). However, at the last meeting, there was considerable support for an Appellate Rule that was more protective than the other rules, on the theory that whatever might be necessary below, it is not necessary to be filed publicly on appeal. If social security numbers are needed to identify debtors, they should be identified before any appeal is taken. There was support at the last meeting to get ahead of the other committees and seek publication this past summer, but Judge Bates suggested that

the Standing Committee would prefer to get everything at once. The Reporter added that there is no subcommittee of this Advisory Committee working on this project, and therefore particularly invited comment.

A judge member voiced support for independent protection in the Appellate Rules. A lawyer member asked for (and received) an explanation of the special treatment of Railroad Retirement Act cases in the existing Rule and had no problem with proceeding. An academic member agreed it was a good idea, but wondered what would happen under the draft if a filing were made under seal but later unsealed. The Reporter thought that redaction would be taken care of as part of deciding the unsealing motion.

The Reporter raised the question of what happens when a minor becomes an adult. Should the protection for minors apply only when the person is a minor at the time of filing (as a recent case from the Court of Appeals for the Third Circuit held under the existing rule), or should it apply to any filing for the duration of the litigation, or apply so long as the person was a minor at the time of the underlying events. No member of the Committee voiced a view.

Judge Eid noted that we had skipped over the Federal Judicial Center report and asked Tim Regan if he wanted to say anything. Mr. Regan pointed to the written report. (Agenda book page 212). He added that the report discusses not only what the FJC does for other advisory committees, but also what it does to promote education. Sometimes a committee thinks that education about the existing rules, rather than a rules amendment, is the better approach.

IV. Discussion of Matter Published for Public Comment

A. Premature Petitions—Rule 15 (24-AP-G)

Professor Huang presented the report regarding a proposed amendment to Rule 15 dealing with premature petitions. (Agenda book page 219). The proposed amendment was published for public comment with minor style changes made by the Standing Committee. (Agenda book page 221). We have not yet received any comments, but the comment period is open until February.

The proposed amendment responds to a suggestion by Judge Randolph and is designed to remove a trap for the unwary in the administrative agency context, similar to the way a prior amendment worked for Rule 4. In some circuits, notably the D.C. Circuit, a petition to review (or an application to enforce) can effectively disappear when a motion for reconsideration is filed before the agency, requiring a party to file a second petition or application. The amendment would provide for a premature petition or application to ripen when the time is right. However, if a party wants to challenge, not just the original decision, but the disposition of the motion for reconsideration, a new petition is required.

No member of the Advisory Committee had anything to add at this point.

The Committee took a break for approximately fifteen minutes and resumed at approximately 10:30.

V. Discussion of Matters Before Subcommittees

A. Intervention on Appeal (22-AP-G; 23-AP-C)

The Reporter presented the report of the intervention on appeal subcommittee. (Agenda book page 227). There have been three developments considered by the subcommittee since the last meeting. First, the Federal Judicial Center completed its extensive research into motions to intervene in the courts of appeals and provided a report. Second, the Supreme Court broadly repudiated universal injunctions in *Trump v. CASA, Inc.* Third, the Supreme Court granted intervention in a case before it.

In addition, the subcommittee considered a student note responding to this subcommittee's work and arguing for a liberalized approach to intervention on appeal.

The subcommittee was not persuaded to broadly allow intervention on appeal. Whatever the merits of a broad approach to intervention in the district courts, an appeal should focus on the correctness of the district court decision based on the way the case was shaped by the parties in the district court.

Nor did the subcommittee find much guidance in the Supreme Court's decision to permit intervention. There was no opinion (just an order); the motion was unopposed; and the case involved a constitutional challenge to a federal campaign finance statute that the Solicitor General, as respondent in the Supreme Court, urged the Court to find unconstitutional.

The subcommittee does think that *CASA* will reduce the number of cases where intervention on appeal is sought, but *CASA* will not make them go away. The FJC report confirms that there is some uncertainty and conflict in the courts of appeals regarding intervention on appeal. The subcommittee does not claim that a new rule is urgent but does think that it is worth continuing to discuss.

Based on the FJC report, the subcommittee does not think that there is a significant problem in agency cases, and therefore presents a working draft limited to cases on appeal from district courts.

Based on the feedback from the last Advisory Committee meeting, the subcommittee presented a working draft that is slimmed down from the last draft. It does not attempt to define categories of legal interests that can support intervention.

But because there might still be some interest in doing so, the subcommittee report includes a discussion of what such a provision might look like, itself somewhat simplified from the prior working draft.

The Reporter walked through the working draft. (Agenda book page 230). He asked if the Advisory Committee thinks that the working draft is on the right track. He specifically called attention to the question whether the court of appeals is in the best position to decide whether intervention should be for all purposes or should be more limited.

A lawyer member said that he appreciated having a rule. It would be helpful to have something in writing when dealing with motions to intervene.

A liaison member agreed that these issues aren't going away. The structure seems sensible. It is good to not try to specify what legal interests count; attempting to do so is a trap.

A lawyer member asked about the timing of a motion and whether the provision that describes intervention as for all purposes includes cert. The Reporter responded that intervention for all purposes would include petitioning for cert. and that some people move to intervene for the very purpose of seeking cert. He added that the subcommittee did not attempt to specify the timing more precisely because the need to intervene can arise at various stages, such as when an existing party changes position.

A judge member stated that she was open to listing the interests that support intervention. The subcommittee was unable to come up with a way that was in between, on the one hand, listing those interests specifically and, on the other hand, simply requiring a "legal interest." The subcommittee did, however, eliminate the most complicated kind of interest that had been included in the prior draft.

A liaison member responded that there are a bunch of interests recognized in the FJC report. Listing the interests risks leaving something out. How the list in the subcommittee report would apply to a case where there was universal vacatur under the APA is opaque. Let people spell out their interest and let the court decide.

A lawyer member stated that she likes the default position that intervention is for all purposes. It underscores the difference between being an amicus and a party. If there is a reason to narrow the scope of intervention, courts can do it.

A judge member agreed, noting that this is generally true in the district court and that it would be odd for it to be different in the court of appeals.

A liaison member agreed, noting that questions of standing can arise, and a party is susceptible to discovery.

Professor Struve noted that this is sensible but wondered whether the mandate would permit a district court to limit intervention once the court of appeals has granted intervention for all purposes. The liaison member added that the intervenor can ask the court of appeals to leave the issue open. In response to questions, he added that there might be issues such as standing that were not raised or adjudicated in the court of appeals that would not be precluded by the mandate.

Judge Dever asked about the language describing intervention on appeal as "reserved for exceptional cases." Other rules, such as Rule 40, describe something as "not favored." Cross-check the language with other rules. The Reporter responded that the language in the draft was not drawn from other rules, but from case law dealing with intervention on appeal. Professor Struve noted that Rule 8 refers to "an exceptional case"; in that context, it refers to time requirements that are impracticable.

Judge Dever asked about the timeliness requirement. The Reporter stated that the movant would have to explain the circumstances. A liaison member noted a concern that perhaps "exceptional cases" puts too much of a thumb on the scale.

The subcommittee will consider this feedback as it continues its work.

B. Reopening Time to Appeal—Rule 4 (24-AP-M)

Judge Nichols was formally appointed the chair of the reopening time to appeal subcommittee and presented its report. (Agenda book page 309). The subcommittee had begun work on this suggestion, but it was put on hold after the Supreme Court granted cert in the *Parrish* case.

In deciding *Parrish*, the Supreme Court held that a party need not file a duplicative notice of appeal after its motion to reopen the time to appeal has been granted. It also held that a single document can serve multiple purposes, such as a motion to reopen time to appeal and a notice of appeal.

The subcommittee saw three basic options. First, do nothing, and simply rely on the Court's decision in *Parrish*. Second, disagree with the Court and revise the rule accordingly. No one on the subcommittee took this position. Third, codify *Parrish*.

The subcommittee unanimously landed on the third option, suggesting the language that appears on page 316 of the agenda book, designed to codify with a little clarification.

A judge member voiced support for codification. It is mostly pro se and prisoners who do not get notice in time. He appreciates the brevity.

Professor Struve raised two concerns. First, she gets a little nervous about changes regarding notices of appeal, tending to be cautious and conservative on that score. She had her doubts about the Rule 3 project but has to say that it was beautifully done and enjoys reading appellate case law implementing it. Second, she likes the second sentence, but perhaps it belongs in Rule 3(c). The principal is not limited to the reopening context, is it? Is there a risk of a negative inference if the principal is stated here but not elsewhere?

Judge Nichols responded that the subcommittee had not thought about that. He would not want to suggest that the principal applies only here. But moving it risks losing the benefit of clarity.

Professor Struve suggested a cross reference to Rule 3. The Reporter suggested the possibility of including the statement in both Rule 3 and here. He added that the Supreme Court had specifically invited a rejection of its approach if the rule makers thought it appropriate; no member of the subcommittee did.

Mr. Wolpert suggested using the clause, "if it complies with Rule 3(c)(1)." Professor Struve added that Rule 3(c)(7) is relevant, too. A liaison member added that (c)(7) does not say anything about a paper serving multiple purposes. Judge Nichols noted that it is a good concept to say in Rule 3. A liaison member added that the concept should not be limited to the reopening context. An academic member suggested that perhaps the phrase "makes clear" should be replaced with "otherwise clear." A judge member observed that repetition would be better than a cross-reference so people will get the benefit from the rule.

Judge Dever said that the discussion reminded him of a discussion that the Evidence Committee had regarding whether to codify a Supreme Court decision regarding an exception allowing juror testimony regarding racial bias. This situation, however, adds the second sentence. The problem typically arises when a party is incarcerated. The party might bring a habeas petition but not get the decision because he has been moved. Expressing the idea of the second sentence in Rule 4 has value because that is the most common situation in which the problem arises.

C. Administrative Stays (24-AP-L)

The Reporter presented the report of the administrative stays subcommittee. (Agenda book page 309). The subcommittee thinks that some concerns raised at the last Advisory Committee meeting can be dealt with fairly easily. In particular, to deal with parties who are in no rush, the phrase "unless the parties agree otherwise" can be added. And concerns about release of criminal defendants can be dealt with by making clear that Rule 8(c), Rule 9, and Criminal Rule 38 deal with stays and release in criminal cases, not the new rule. Similarly, the new rule could make clear that it does not govern custody and release pending appeal in a habeas case, leaving that to Rule 23.

On the other hand, the subcommittee thinks that more information would be useful to decide how serious the problem is, whether there should be a time limit on administrative stays, how long any such time limit should be, and whether agency cases should be excluded. Immigration cases may present their own unique issues.

Based on the experience of the intervention subcommittee and the valuable FJC report in that area, the subcommittee thinks that FJC research here would also be valuable. Judge Eid has already asked the FJC to perform that research.

Mr. Regan stated that he spoke to the prior clerk representative and has begun to look at the data. He thinks the project is feasible. It will require looking at all stay motions, because administrative stays are typically issued sua sponte. It looks like there will be enough data to find unusual cases. He expects to use a 2024 filing cohort and envisions a 1-to-2-year project. This will be delayed if he gets furloughed due to the funding lapse.

A judge member said that he had raised this issue with staff in the Ninth Circuit who reacted with horror at the time limit. He doesn't see any foot dragging. The concerns arise in high profile cases. In the Ninth Circuit, the chief judge sends the stay motion to a merits panel right away. Things are done promptly. No one is complaining. Case by case decisions are appropriate. In environmental cases, it can take months to get the record. Be careful to not create a rule that does more damage. He can't speak for other circuits, but there is no foot dragging in the Ninth Circuit, which hears one-third of appeals and is geographically spread out—unlike the D.C. Circuit where you can walk down the hall. But he does not object to the FJC gathering information; he can provide data from the Ninth Circuit.

The Reporter asked if the Advisory Committee agreed with the subcommittee about the issues that can be managed.

A judge member said that immigration cases are totally separate and should be separated out. A different judge member seconded that.

Yet another judge member noted that there is disagreement among district judges whether they have inherent authority to grant administrative stays. If an Appellate Rule codifies the practice in the courts of appeal, perhaps that could have a negative implication regarding the district courts.

Mr. Regan sought and obtained clarification that the requested FJC research is about administrative stays, understood as stays involving the processing of the case, not stays in cases reviewing administrative agencies—temporary stays or temporary administrative stays. The Reporter added that we have been using "stay" as shorthand and mean to include injunctions pending appeal; plus, some parties do ask for administrative stays as part of their motion for a stay pending appeal. Mr.

Regan acknowledged that as awareness of administrative stays grows, some are asking for them.

VI. Discussion of Recent Suggestions

A. Destination of Appeal (25-AP-A)

The Reporter presented a recent suggestion from Anthony Mallgren regarding the destination of an appeal. (Agenda book page 325). Mr. Mallgren seems to suggest that Rule 3 be amended so that the district court clerk, rather than the appellant, be responsible for knowing the appropriate court of appeals. If one thinks only of appeals to the regional courts of appeals, this might seem sensible. But some appeals go to the Court of Appeals for the Federal Circuit, and some even go directly to the Supreme Court. It is not too much to ask that an appellant designate the appropriate appellate court, especially since 28 U.S.C. § 1631 allows for transfer from a court without jurisdiction to the appropriate court.

A motion to remove the item from the agenda was approved unanimously.

B. Uniform Bar (25-AP-B)

The Reporter presented a recent suggestion from the National Women's Law Center suggesting the adoption of a uniform rule for bar admission across the courts of appeals. (Agenda book page 329). There is a joint subcommittee working on a suggestion for a uniform rule for bar admission in the district courts. That subcommittee surveyed circuit clerks regarding the operation of Appellate Rule 46, and the overall response was that it was working well. The Advisory Committee might consider seeking representation on the joint subcommittee. Or it might consider its own subcommittee to address the suggestion, which focuses on varying requirements across the courts of appeals regarding which attorneys on a brief must be admitted to the court's bar and differing pro hac vice requirements. One possible approach would be the one taken by the Supreme Court: Counsel of record must be a member of the bar of the relevant court.

A lawyer member stated it is confusing because the circuits have different rules regarding who may be *on* a brief, who may *sign* a brief, and who may *argue* an appeal. Perhaps this is an appropriate situation for circuit federalism. We saw that with the filing deadline adopted by the Court of Appeals for the Third Circuit. Joining the existing joint subcommittee would not be effective.

Professor Struve agreed with the latter point. One possibility discussed in the joint subcommittee would be making changes along the lines of what is now in Appellate Rule 46. The issues are different than the ones raised here. In particular, some districts require bar admission in the state where the district court is located.

Judge Eid stated that the circuit judges in the Tenth Circuit would have disparate views on this question. Mr. Wolpert added that there might be some objection because the Court of Appeals for the Tenth Circuit requires that anyone on a brief must be a member of the bar. The brief isn't rejected. Instead, the clerk sends the form and asks the person to pay up. The court wants them to be subject to the court's disciplinary authority. The one exception is an attorney general of a state who relies on assistant attorneys general.

Another judge member concurred. Being admitted is a straightforward procedure. He chairs his court's disciplinary committee.

Another judge member agreed. A court can't discipline a lawyer who is not a member of the bar.

Professor Coquillette also agreed. Different state bar associations will have different views of model rules. Federal courts have their own disciplinary jurisdiction. Someone can get disbarred in one and not in another.

The Reporter, noting the sense of the room, wanted to point out the concerns of the organization making the suggestion. It takes time and money to get every lawyer on a brief—perhaps an amicus brief by a nonprofit organization— admitted to the court's bar. A lawyer member added that it is an issue for for-profit organizations, too. Younger associates want to see their names on briefs; getting four or five people admitted takes time and money.

A judge member suggested thinking about some middle ground. Perhaps parties can be distinguished from amici. Perhaps counsel of record can be distinguished from other lawyers.

Professor Coquillette stated that Rule 46 is already a middle ground. It is easy to get admitted to a court of appeals. By contrast, some district courts require a person to pass the bar in that state. That's a big deal.

A judge member noted that there have been cases where a person applied who had not been admitted anywhere or was disbarred.

Another judge member said that the application for admission to the Court of Appeals for the Second Circuit is one page with four questions. He does four or five a day. He's not trying to keep people out, but some people do inappropriate things. Let each circuit do its thing.

The Reporter suggested either a motion to remove the matter from the agenda or the appointment of a subcommittee. Professor Struve responded that other committees are considering the issue and might think differently.

A lawyer member stated that, in some circuits, a certificate of good standing is required. Maybe there could be some uniformity there? Some are more strenuous than others; we can look at that.

In response to a question, the Reporter clarified that if no motion is made to remove the item from the agenda and no subcommittee is appointed, it simply stays on the agenda.

A different lawyer member suggested perhaps that signatories and counsel of record could be treated differently than everyone else simply on the brief.

Professor Struve added a note of caution. Rule 46(c) authorizes a court to discipline an attorney who practices before it, even if not a member of that court's bar. A judge member responded that this doesn't work.

Mr. Wolpert stated that the Court of Appeals for the Tenth Circuit does not require a certificate of good standing if a member of its own bar serves as a movant.

A judge member reiterated that in his court it is two pages and four questions. Wouldn't associates want to be admitted?

A lawyer member responded that it isn't that easy in all circuits. In the Federal Circuit, a certificate of good standing, no more than 30 days old, is required. A different lawyer member stated that in the Fifth Circuit, a certificate of good standing is required for one lawyer from each organization on a brief.

A judge member stated that the District Court for D.C. requires a person to appear in person to be sworn in. He has objected to this onerous requirement.

The item will remain on the agenda, but no subcommittee was appointed.

C. Treatment of Tribes (25-AP-D)

The Reporter presented a recent suggestion from the National Tribal Air Association regarding the treatment of tribes. (Agenda book 335). It had been submitted as a belated comment regarding the proposed amendments regarding amicus briefs, so it was docketed as a separate suggestion.

The Advisory Committee had decided, when considering the treatment of tribes in the amicus rule, to defer that issue because the treatment of tribes cuts across other rules.

Judge Eid recalled that years ago, when she was a member of the Advisory Committee, it had considered the treatment of tribes in the Appellate Rules and

determined to look again in (as she recalled) five years. Those five years have long passed.

In response to a question, the Reporter noted that the tribes are concerned both about their dignity as sovereigns and about cases in which their interests are affected but they are not heard.

A judge member suggested the formation of a subcommittee. Two other judge members agreed. Judge Eid appointed Justice Kruger, Judge Thomas, Judge Wesley, and Professor Huang.

VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 343). This matter is placed on the agenda to provide an opportunity to discuss whether anybody has noticed things that have gone well or gone poorly with our amendments. No one raised any concerns.

VIII. New Business

No member of the Committee raised new business.

X. Adjournment

Judge Dever thanked the team at the AO. We live in challenging times. The staff does great work and we appreciate it.

The next meeting will be held on April 16, 2026, in Charlotte, NC.

The Committee adjourned at approximately 12:30 p.m.

TAB 10

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. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 8, 2025

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on September 25, 2025. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee reviewed and recommended a new Director's Form 4100C to implement the amendments to Rule 3002.1(g)(4)(C). Those amendments provide for the bankruptcy court—in response to a motion by the trustee or debtor at the end of a chapter 13 case—to enter an order determining whether the debtor has cured all defaults and paid all postpetition amounts on a home mortgage. The new Director's Form provides a form for such an order. The Advisory Committee also recommended amendments to Director's Forms 2000

(Required Lists, Schedules, Statements and Fees) and 2030 (Attorney's Disclosure of Compensation). The new and amended forms were promulgated by the Director on December 1.

The Advisory Committee also approved technical amendments to Official Form 410C13-NR (Response to Trustee's Notice of Disbursements Made), which was scheduled to go into effect on December 1, 2025, and agreed to seek retroactive approval of the amendments from the Standing Committee.

Part II of this report presents that action item.

Part III of this report presents five information items. They relate to proposed amendments to the privacy rules, suggestions to amend Rule 2003 (Meeting of Creditors or Equity Security Holders) regarding the time and location of meetings of creditors, suggestions to allow the use of masters in bankruptcy cases and proceedings, proposed amendments to Rule 8017 to conform with proposed amendments to Appellate Rule 29, and the removal from the agenda of Suggestion 24-BK-P to amend Rule 2006 regarding time counting.

II. Action Item

Item for Final Approval

The Advisory Committee recommends that the following technical form amendments be given retroactive final approval without publication. Bankruptcy Appendix A includes the form discussed below.

Action Item 1. Official Form 410C13-NR (Response to Trustee's Notice of Disbursements Made). An inconsistency in Official Form 410C13-NR (Response to Trustee's Notice of Disbursements Made), which was set to go into effect on December 1, 2025, was called to the Advisory Committee's attention. Two items in Part 2 referred to "the date of this notice." They should have said, "the date of this response," as in the introductory language to that section. These references were inadvertent errors.

The Advisory Committee concluded that it would be best if these errors could be corrected before the form went into effect. In March 2016 the Judicial Conference delegated authority to the Bankruptcy Rules Advisory Committee to make "non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference." The Advisory Committee believes that correction of these errors comes within that authority. They were merely scrivener's errors and were non-substantive. Because both items said, "*this* notice," not "*the* notice," they were referring to the document being completed — i.e. the response — and not the earlier notice.

Accordingly, the Advisory Committee approved the changes to be effective December 1, 2025, and recommends that the Advisory Committee give retroactive approval to the changes and give notice of this action to the Judicial Conference.

III. Information Items

Information Item 1. Possible amendments to the privacy rules. At the fall 2024 Advisory Committee meeting, Tom Byron reported on suggestions that address particular issues relating to the privacy rules, including suggestions regarding redaction of social-security numbers ("SSNs") in federal-court filings and a suggestion relating to initials of known minors in court filings. At the same meeting, the Advisory Committee decided to take no action on a suggestion from Senator Wyden concerning complete redaction of SSNs in bankruptcy court filings. Surveys undertaken by the Federal Judicial Center of debtor attorneys; chapter 7, 12, and 13 trustees; creditor attorneys; various tax authorities; bankruptcy clerks; and representatives of the National Association of Attorneys General indicated that a significant number of bankruptcy specialists oppose the idea of removing the truncated SSN with respect to every form listed.

Since that time the other rules committees have been considering the same issues. When the Advisory Committee met in September, the Rule 49.1 (Privacy Rule) Subcommittee of the Criminal Rules Committee was proposing to its advisory committee amendments to Criminal Rule 49.1(a) that would do three things. First, it would apply the rule not only to filings that include information about individuals, but to non-individuals as well. Second it would require full redaction of SSNs and other tax-identification numbers (TINs), as well as employer-identification numbers (EINs), in all filings, potentially expressly stating its application to all exhibits and attachments. Third, it would require the use of pseudonyms, rather than initials, for minors' names. The Civil Rules Committee was also considering whether to propose similar amendments to Civil Rule 5.2, and the Appellate Rules Committee was thought to be receptive to those changes if proposed.

After discussion of those possible amendments to the privacy rules, the Advisory Committee reached the following conclusions:

- First, the Advisory Committee concluded that it continues to adhere to its prior decision not to amend Bankruptcy Rule 9037(a)(1) to require complete redaction of social-security numbers.
- Second, if the proposal to require the use of pseudonyms rather than initials for minors' names is adopted by the Criminal Rules Committee, the Advisory Committee will propose a conforming change to Bankruptcy Rule 9037(a)(3) to be published at the same time.
- Third, given that the Advisory Committee decided not to require full redaction of SSNs, despite the decision of the Criminal Rules Committee and perhaps other committees, the Advisory Committee also decided that Bankruptcy Rule 9037(a)(1) should continue to treat ITINs in the same way as individual SSNs, thus providing no additional redaction of ITINs or EINs.
- Fourth, given that the Advisory Committee does not choose to amend Rule 9037(a)(1) to require full redaction of SSNs and ITINs, but the Civil and Appellate Rules Committees may modify Civil Rule 5.4(a) and Appellate Rule 25(a)(5) to require full redaction, the Advisory Committee considered which rule should apply in bankruptcy appeals. It concluded that the rules should treat appeals uniformly, regardless of the

rule applied in the bankruptcy court. Assuming that complete redaction will be required in appeals to courts of appeal, implementation of the decision to have uniform rules for appeals would require a new Part VIII privacy rule providing for complete redaction of SSNs and ITINs in appeals from bankruptcy courts to district courts and bankruptcy appellate panels. New language could be added to Rule 8011, which is the counterpart to Appellate Rule 25.

The Advisory Committee's goal is to have amendments to Bankruptcy Rules 8011and 9037 presented to the Standing Committee for publication at the same time as the other advisory committees seek publication of amendments to their privacy rules. Accordingly, proposed language will be presented to the Advisory Committee for approval for publication at its spring meeting.

Information Item 2. Suggestions to amend Rule 2003 (Meeting of Creditors or Equity Security Holders) regarding the time and location of meetings of creditors. The Advisory Committee has received two suggestions proposing amendments to Rule 2003 to take account of the fact that meetings of creditors are now being conducted remotely and to extend the time for conducting the meetings in chapters 12 and 13 cases. At the fall 2024 Advisory Committee meeting, members discussed whether Rule 2003 needs to be amended to expressly recognize the practice of remote meetings that is already well established in all districts. There was little enthusiasm for such an amendment. Members said that the rule seems to be working well in this regard and that a rule change might suggest that the current use of remote meetings is unauthorized.

Related to the issue of conducting meetings of creditors by video is the matter of where the meetings may take place. Currently the rule specifies that the meeting must take place in the district where the bankruptcy case is pending—either at "a regular place for holding court" or any other place that is "convenient for the parties in interest." As the rule has been interpreted for remote meetings, the location requirement applies to where the trustee must be present. Interim regulations of the U.S. Trustee Program generally require the trustees to be physically located within their applicable district and at their primary business location or such other location in the district that is approved by the U.S. trustee. The suggestions for amendments to Rule 2003 would loosen these restrictions on location.

Because some of the concerns raised by the suggestions relate to policies of the Executive Office for U.S. Trustees ("EOUST"), the Advisory Committee suggested that discussions between that office and trustee representatives might be helpful in determining whether a consensus can be reached about the need for possible amendments to Rule 2003. Those discussions are taking place, and it is hoped that the groups will have a proposal that the Advisory Committee can consider at the spring meeting. The Advisory Committee encouraged them to consider which requirements for meetings of creditors are appropriately addressed by a national bankruptcy rule and which ones are better left to EOUST regulations or practices.

Information Item 3. Suggestions to allow masters in bankruptcy cases and proceedings. Two suggestions to amend Bankruptcy Rule 9031 have been submitted to the Advisory Committee proposing amendments that would allow masters to be used in bankruptcy

cases and proceedings. After reviewing the results of a survey of bankruptcy judges conducted by Dr. Carly Giffin of the Federal Judicial Center, the Advisory Committee concluded that there was sufficient interest in allowing masters to be used in bankruptcy cases or proceedings that it should continue to consider the suggestions. It also reviewed a memo produced by Kyle Brinker, the former Rules Law Clerk, which concluded that there is no constitutional or statutory impediment to the appointment of a master by a bankruptcy judge, so long as the judge can review the master's findings of fact and conclusions of law de novo.

The Advisory Committee reviewed a tentative draft of amendments to Rule 9031 and committee note and provided input to the reporters. Amendments to the rule may be presented for approval for publication at the spring meeting of the Advisory Committee.

Information Item 4. Proposed amendments to Rule 8017 to conform with proposed amendments to Appellate Rule 29. At its June 2025 meeting, the Standing Committee gave final approval to amendments to Appellate Rule 29 (Brief of an Amicus Curiae). The bankruptcy equivalent to that rule is Bankruptcy Rule 8017. At its fall meeting, the Advisory Committee considered conforming amendments to Rule 8017. However, Professor Struve suggested that conforming amendments to Rule 8015(h)(1), dealing with the certificate of compliance, and the appendix of length limits should be proposed for publication at the same time. The Advisory Committee agreed and decided to defer until the spring meeting approval for publication of amended Rule 8017, along with amendments to Rule 8015 and the appendix.

Information Item 5. Removal from the agenda of suggestion 24-BK-P to amend Rule 2006 regarding time counting. Jack Metzler, Senior Assistant Disciplinary Counsel at the Office of Disciplinary Counsel, made a suggestion (24-AP-N) that Appellate Rule 26(a)(1) be amended so that periods counted in days would begin with the first day that is not a Saturday, Sunday, or legal holiday. Because the time counting rules are consistent across all the rules sets, the suggestion was also filed with the Bankruptcy Rules (24-BK-P), Criminal Rules (24-CR-I), and Civil Rules (24-CV-Z) Committees.

The Appellate Rules Committee previously decided to remove the suggestion from its agenda. At its fall meeting, the Advisory Committee did the same.

TAB 11

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410C13-NR

Response to Trustee's Notice of Disbursements Made

12/25

The claim holder must respond to the Trustee's Notice of Payments Made within 28 days after it was served. Rule 3002.1(g)(3).

Part 1: Mortgage Information

Name of claim holder: _____

Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Property address:

_____
Number Street

_____

_____
City State ZIP Code

Part 2: Arrearages

The total amount received to cure any arrearages as of the date of this response: $_____.

Check all that apply:

- ❑ The amount required to cure any prepetition arrearage has been paid in full.
- ❑ The amount required to cure the prepetition arrearage has not been paid in full. Amount of prepetition arrearage remaining unpaid as of the date of this response: $ _____.
- ❑ The amount required to cure any postpetition arrearage has been paid in full.
- ❑ The amount required to cure the postpetition arrearage has not been paid in full. Amount of postpetition arrearage remaining unpaid as of the date of this response: $ _____.

Part 3: Postpetition Payments

(a) *Check all that apply:*

- ❑ The debtor is current on all postpetition payments, including all fees, charges, expenses, escrow, and costs.
- ❑ The debtor is not current on all postpetition payments. The claim holder asserts that the debtor is obligated for the postpetition payment(s) that first became due on: ____/_____/_____.
- ❑ The debtor has fees, charges, expenses, negative escrow amounts, or costs due and owing.

(b) The claim holder attaches a payoff statement and provides the following information as of the date of this response:

i. Date last payment was received on the mortgage: ____/_____/_____

ii. Date next postpetition payment from the debtor is due: ____/_____/_____

iii. Amount of the next postpetition payment that is due: $_____

iv. Unpaid principal balance of the loan: $_____

v. Additional amounts due for any deferred or accrued interest: $_____

vi. Balance of the escrow account: $_____

vii. Balance of unapplied funds or funds held in a suspense account: $_____

viii. Total amount of fees, charges, expenses, negative escrow amounts, or costs remaining unpaid: $_____

Part 4 Itemized Payment History

If the claim holder disagrees that the prepetition arrearage has been paid in full, states that the debtor is not current on all postpetition payments, or states that fees, charges, expenses, escrow, and costs are due and owing, it must attach an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:

- all prepetition and postpetition payments received;
- the application of all payments received;
- all fees, costs, escrow, and expenses that the claim holder asserts are recoverable against the debtor or the debtor's principal residence; and
- all amounts the claim holder contends remain unpaid.

Part 5: Sign Here

The person completing this response must sign it. Check the appropriate box:

❑ I am the claim holder.

❑ I am the claim holder's authorized agent.

I declare under penalty of perjury that the information provided in this response is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

TAB 12

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 25, 2025
Washington, D.C., and on Microsoft Teams

The following members attended the meeting in person:

Alane A. Becket, Esq.
District Judge James O. Browning
Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Sean Day, Esq.
Bankruptcy Judge Benjamin A. Kahn
Bankruptcy Judge Catherine Peek McEwen
Professor Scott F. Norberg
District Judge J. Paul Oetken
Nancy Whaley, Esq.

The following members attended the meeting remotely:

Circuit Judge Daniel A. Bress
Bankruptcy Judge Michelle M. Harner
District Judge Jeffery P. Hopkins
District Judge Joan H. Lefkow
Damian S. Schaible, Esq.

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Ramona D. Elliott, Esq., Director, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Dean Troy McKenzie, liaison from the Standing Committee
Bankruptcy Judge Laurel Isicoff, liaison from the Committee on the Administration of the Bankruptcy System
Bankruptcy Judge Deborah Thorne, incoming liaison from the Committee on the Administration of the Bankruptcy System
Carolyn Dubay, Administrative Office
Bridget M. Healy, Administrative Office
Shelly Cox, Administrative Office
Rakita Johnson, Administrative Office
Sarah Sraders, Rules Law Clerk
Carly E. Giffin, Federal Judicial Center
Rebecca Garcia, Chapter 12 & 13 Trustee
Merril Hirsh, Law Office of Merril Hirsh PLLC

The following persons also attended the meeting remotely:

Professor Daniel R. Coquillette, consultant to the Standing Committee
Susan Jensen, Administrative Office
Tim Reagan, Federal Judicial Center
Hilary Bonial, Bonial & Associates, P.C.
John Hawkinson, journalist
Kaiya Lyons, American Association for Justice
Lisa Mullen, Trott Law
Lauren O'Neil, Shared Services Legal
John Rabiej, Esq., Rabiej Litigation Law Center
Sai
Daniel Steen, Lawyers for Civil Justice
Susan Steinman, American Association for Justice
Samantha Stokes, Distressed Debt reporter
Tracy Updike, Chapter 13 Trustee

Discussion Agenda

1. **Greetings and Introductions**

Judge Rebecca Connelly welcomed the group. She noted that five members of the Advisory Committee are attending remotely—Judges Bress, Harner, Hopkins and Lefkow and Mr. Schaible—as well as Dan Coquillette, consultant to the Standing Committee.

She observed that District Judge J. Paul Oetken will be leaving the Advisory Committee after this meeting and expressed the gratitude of the Committee for his work. She announced that District Judge Leigh Martin May will be taking his place on the Advisory Committee as of Oct. 1. Also leaving is Bankruptcy Judge Laurel Isicoff, who serves as liaison from the Committee on the Administration of the Bankruptcy System. She will be replaced by Bankruptcy Judge Deborah Thorne, who was attending the meeting. Judge Connelly also introduced the new Rules Law Clerk, Sarah Sraders. She also noted that this is the last meeting for District Judge John Bates, who will be leaving as chair of the Standing Committee and thanked him for his valuable contributions to the work of the Advisory Committee.

Judge Connelly thanked the members of the public attending in person or remotely for their interest, and she noted that the meeting would be recorded. She summarized the schedule for the meeting and reviewed meeting etiquette for in-person and virtual attendees. She also provided information about security and emergency procedures.

She asked Carolyn Dubay to review the chart tracking proposed rules amendments, and she did so.

2. Approval of Minutes of Meeting Held on April 3, 2025

The minutes were approved with one amendment—the deletion of the word "Bankruptcy" before the word "Committee" on page 10.

3. Oral Reports on Meetings of Other Committees

(A) *June 10, 2025, Standing Committee Meeting*

Judge Connelly gave the report.

The Standing Committee gave final approval to amendments to Rule 3018 (dealing with acceptance of a Chapter 9 or Chapter 11 plan by stipulation or statement on the record).

The Standing Committee also approved the new rule and set of amendments relating to the use of remote testimony in contested matters. New Rule 7043 incorporates the substance of current Rule 9017 in making Civil Rule 43 applicable to adversary proceedings. Proposed amendments to Rules 9014 (which permits a bankruptcy judge to approver remote proceedings in contested matters for cause), and 9017 (which deleted the reference to Rule Civil Rule 43 as being generally applicable in bankruptcy cases) were approved.

Also approved were amendments to Rules 1007(c), 5009, and 9006, which address the problem faced by individual debtors whose cases are closed because they either failed to take the required course on personal financial management or failed to provide evidence that they did so. Rule 1007(c) is amended to eliminate the deadline for filing the certificate of course completion. Amended Rule 5009 adds another reminder notice about the requirement to take the course. Rule 9006 is amended to delete the references to the eliminated deadline in Rule 1007(c).

The Standing Committee also approved amendments to Official Form 410S1 to reflect the amendment to Rule 3002.1(b) (regarding payment changes in home equity lines of credit) and a technical amendment to Rule 2007.1(b)(3)(B) (dealing with appointment of a trustee or examiner in a Chapter 11 case) to correct a cross-reference. The Standing Committee noted that a similar technical amendment needed to be made to Rule 2007.1(c)(1) and (c)(3), and approved that amendment as well.

The Standing Committee also gave final approval to a technical amendment to Rule 3001(c) (which sets out required supporting information for a proof of claim) to reflect a change in the numbering of the Rule in the restyling process that inadvertently made a substantive change in the coverage of the sanctions provision.

Approved for publication were amendments to Official Form 106C, which provide a total amount of assets being claimed as exempt.

(B) ***Meeting of the Advisory Committee on Appellate Rules***

The Advisory Committee on Appellate Rules was scheduled to meet on October 15, 2025, so there was no report.

(C) ***Meeting of the Advisory Committee on Civil Rules***

The Advisory Committee on Civil Rules was scheduled to meet on October 25, 2025, so there was no report.

(D) ***June 12-13, 2025, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report. She noted that this is her last meeting as liaison to the Advisory Committee because she is stepping down from the Bankruptcy Committee on September 30, but she said she is delighted that she will be succeeded by Bankruptcy Judge Deborah Thorne from the N.D. Ill., whose experience will provide significant benefits to the Advisory Committee as liaison.

Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

As previously reported, the Judicial Conference, on recommendation of the Bankruptcy Committee, has adopted a legislative proposal related to chapter 7 debtors' attorney fees. Not much as progressed since the Administrative Office (AO) transmitted the legislative proposal to Congress, most recently in July 2023, although the Bankruptcy Committee understands that the proposal continues to be reviewed by Congressional staff. Several bankruptcy judges and AO staff continue to make themselves available to members of Congress to answer questions raised in connection with this proposal. If Congress enacts amendments to the Code based on this position, conforming changes to the Bankruptcy Rules would be required. The Bankruptcy Committee will continue to update the Advisory Committee on any progress in this area.

Project on Service and Electronic Filing by Self-Represented Litigants

With respect to the pending suggestions to the various rules committees to allow greater access to electronic filing systems for self-represented litigants, she has previously reported the concerns of several Clerks of Bankruptcy Courts, including her own. Judge Isicoff looks forward to hearing the Advisory Committee's discussion on whether to join the other rules committees that are proceeding with amendments to their respective sets of rules in this area, and how the recent information regarding concerns with CM/ECF will impact those considerations.

The Bankruptcy Committee is also studying issues related to pro se litigants in bankruptcy court. The Bankruptcy Committee has for some years been undertaking a systematic inquiry to identify potential issues that could impact the bankruptcy system in the coming years, intended to provide a long-term framework for identifying suggestions to improve the bankruptcy system. At its December 2024 meeting, as part of this "changing needs" study, it identified for prioritization

the issue related to exploring disparities in self-represented bankruptcy filing levels across districts and identifying and evaluating strategies and procedures for reducing the burden created by self-represented filers on those bankruptcy courts particularly impacted, including assistance in obtaining counsel. The Bankruptcy Committee will receive a report on this issue at its upcoming December meeting.

Masters in Bankruptcy Cases

Appointment of masters in bankruptcy cases is an area in which the Bankruptcy Committee was historically very engaged. Judge Isicoff is interested in the question asked by the Advisory Committee regarding whether there is any constitutional or statutory impediment to authorizing bankruptcy judges to appoint masters because early in her career she actually appointed a special master for a discovery dispute, and it was very successful. If the Advisory Committee is interested in working with the Bankruptcy Committee to evaluate this issue at any stage, the Bankruptcy Committee would be honored and happy to assist.

4. **Report by the Consumer Subcommittee**

(A) ***Further consideration of suggestions to amend Rule 2003 with respect to the timing and location of § 341 meetings***

Judge Harner and Professor Gibson provided the report, which was a status update seeking no action by the Advisory Committee.

Rebecca Garcia, a chapter 12 and chapter 13 trustee, submitted a suggestion (Suggestion 24-BK-G), which she later revised (Suggestion 25-BK-B), to amend Rule 2003(a) and (c) as pertains to the timing, location, and recording of meetings of creditors in chapter 7, 11, 12, and 13 cases. The suggestion was endorsed by the Association of Chapter 12 Trustees (ACTT) and the National Association of Chapter 13 Trustees (NACTT). The National Association of Bankruptcy Trustees (NABT) also submitted a suggestion to amend Rule 2003 to take account of remote meetings of creditors.

In her original suggestion, Ms. Garcia explained that "Section 341 meetings are now largely [conducted] via remote video (Zoom)." The proposed amendments to Rule 2003(a) would provide explicit authority for this practice, thereby no longer calling for meetings to be held only at "a regular place for holding court . . . or any other place in the district that is convenient for the parties in interest."

At the fall 2024 Advisory Committee meeting, members discussed whether Rule 2003 needs to be amended to expressly recognize a practice that is already well established in all districts. There was little enthusiasm for such an amendment. Members said that the rule seems to be working well in this regard and that a rule change might suggest that the current use of remote meetings is unauthorized.

Related to the issue of conducting meetings of creditors by video is the matter of where the meetings may take place. Currently the rule specifies that the meeting must take place in the district—either at "a regular place for holding court" or any other place that is "convenient for the parties in interest." Ms. Garcia suggests eliminating references to where the meeting may be held because the use of videoconferencing makes location irrelevant.

As the rule has been interpreted for remote meetings, the location requirement applies to where the trustee must be present. The Executive Office for U.S. Trustees (EOUST) has interim regulations that provide:

> For purposes of conducting virtual 341 meetings, the trustee should be physically located within their applicable district. The virtual meeting should be located at the trustee's primary business location or such other location in the district that is approved by the UST. The trustee may not conduct 341 meetings from outside their district unless there is prior approval by the UST and appropriate decorum is maintained. If the trustee's office is located in an adjacent district, the trustee may conduct the virtual 341 meeting at their office if approved by the UST.

The second aspect of the suggestion by Ms. Garcia relates to the timing of the § 341 meeting. Currently Rule 3002 prescribes different time limits for setting the meeting of creditors depending on the case's chapter. The time periods are as follows:

Chapter 7 or 11 – no fewer than 21 days and no more than 40 days after the order for relief;

Chapter 12 – no fewer than 21 days and no more than 35 days after the order for relief;

Chapter 13 – no fewer than 21 days and no more than 50 days after the order for relief.

In addition, the rule provides that "[i]f the designated meeting place is not regularly staffed by the United States trustee or an assistant who may preside, the meeting may be held no more than 60 days after the order for relief."

Ms. Garcia's revised suggestion proposes that the time limits in chapter 12 and 13 cases be no fewer than 21 days and no more than 60 days after the order for relief. Subcommittee member Nancy Whaley surveyed chapter 12 and chapter 13 trustees regarding these time limits, among other things. Some trustees said it had caused problems when their caseloads were heavier.

As reported at the spring 2025 Advisory Committee meeting, the Subcommittee concluded that because some of the concerns raised by the suggestions relate to policies of the EOUST, discussions between that office and trustee representatives might be helpful in determining whether a consensus might be reached about the need for possible amendments to Rule 2003. Ms. Elliott and Ms. Whaley agreed with that approach. They reported at the August Subcommittee meeting that one meeting between representatives of the EOUST and the three trustee groups has taken place and that discussions will continue this fall. If a consensus can be reached, they hope to have a proposal to present to the Subcommittee at its winter meeting.

Ms. Elliott reported on the meeting that had taken place and said progress is being made. She has sent a proposal to the various trustee organizations for changes to the EOUST policies for location of the 341 meetings and awaits responses.

Ms. Whaley also reported that a new suggestion is likely to soon be jointly made by the NACTT, NABT and ACTT. Judge Connelly emphasized that a new suggestion cannot be acted on in time to make the next meeting's agenda unless it is proposed by January.

Judge Harner suggested that Ms. Whaley and Ms. Elliott review the Subcommittee's prior discussions to proactively address those issues in any new proposed amendment. Specifically, they should think about whether the rule needs to address the details of the meeting of creditors Deferring to the policies issued by the EOUST may be appropriate and may avoid any negative inferences from changing existing language in the rule to expressly authorize remote meetings, which are already occurring.

Judge Kahn said that he thinks there is a problem with the rule as it is now drafted in that Rule 2003(a)(1) sets definite times for the meetings, but (a)(3) provides for a potential change in the times without being referenced in (a)(1). He thinks all timing rules should be in a single section.

Judge Connelly noted that the rule assumes that the place of holding a meeting is in the district, but in her district some trustees who have been appointed are out-of-district. This creates a potential for violation of the rule, but judges do not control the location of section 341 meetings and therefore cannot enforce this potential violation of the rule. The rule should not discourage people from becoming trustees. Districts may also be combined based on filing levels, and that should not prevent trustees from holding meetings at an appropriate place. Judge Harner again asked whether we shouldn't defer to the EOUST on the issue of location. Ms. Elliott noted the EOUST policy does contemplate sitting in an adjacent district.

5. **Report by the Forms Subcommittee**

(A) ***Consideration of new Director's Form for an Order for Rule 3002.1(g)(4)***

Judge Kahn and Professor Gibson provided the report.

Amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence) are on schedule to go into effect on December 1, 2025, along with six new forms proposed to implement the rule's new provisions. As amended, Rule 3002.1(g)(4)(C) will provide for the court—in response to a motion by the trustee or debtor at the end of the case—to enter an order determining whether the debtor has cured all defaults and paid all postpetition amounts. The Committee Note states that:

> A Director's Form provides guidance on the type of information that should be included in the order.

The Subcommittee presented for approval the proposed Director's Form which appears beginning on p. 127 of the Agenda Book. The Advisory Committee approved the form and requested the Administrative Office to promulgate it by December 1, 2025.

(B) ***Consideration of Suggestion 25-BK-I to revise Director's Form 2030***

Judge Kahn and Professor Bartell provided the report.

In its opinion in *In re* Aquilino, 135 F.4th 119 (3rd Cir. 2025), the court of appeals held that the bankruptcy court did not abuse its discretion in imposing sanctions on debtor's attorney for violating the fee-disclosure provisions of § 329(a) of the Bankruptcy Code and Bankruptcy Rule 2016(b). Counsel made his disclosure by use of Director's Form 2030, and the court noted that the language of the form may have misled counsel. In footnote 16 of its opinion, the court invited the Director of the Administrative Office of the U.S. Courts to consider whether revisions to the form were warranted in that the form:

> "could lead debtors' counsel completing the form to believe that a notation at subsection (e) or a marking on some, but not all, of the other subsections would effectively communicate that the remainder were excluded from the representation and that no additional notations were needed in section 6 …. Clarification of sections 5 and 6 of the standard form could avoid such confusion by debtors' attorneys in the future."

Scott Myers on behalf of the Administrative Office filed a suggestion based on the court's observation.

The Subcommittee recommended amendments to Section 5 of the Director's Form as shown on p. 134-35 of the Agenda Book and changes to the instructions to that form, which appear on p. 133 of the Agenda Book.

Ms. Becket questioned the absence of checked boxes in Section 5 and wondered whether the form indicated that the attorney would be providing all services in Section 5 unless excluded in Section 6. Judge Kahn and Prof. Bartell confirmed that understanding of the revised form. Dean McKenzie also questioned the structure. Ms. Becket asked about the applicability of local rules. Jenny Doling expressed concern that debtor's attorneys will accidentally sign up for representing debtors in adversary proceedings. Nancy Whaley and Judge Thorne also worried about signing up for adversary proceedings inadvertently.

However, given that this is a director's form and will not be used by many districts that have their own disclosure forms, Ms. Whaley said that she is comfortable with it. Her district will just not use it.

Judge Harner thought the revised form is much clearer. Prof. Struve assumes the lawyers will make sure their engagement letter conforms to the disclosure to the court. Prof. Coquillette agreed with Prof. Struve.

Judge Connelly asked whether adversary proceedings should be separated out. Judge Kahn thought no. Dean McKenzie said the current form includes adversary proceedings and perhaps it would be useful to find out how many districts use this form or are confused about the inclusion of adversary proceedings. Jenny Doling said that she uses a long-form exclusion when she files her disclosure form and includes a reference to her fee agreement. Ms. Becket wonders why adversary proceedings are included in the first place.

It was decided that the discussion about the inclusion of adversary proceedings in the list of services in Section 5—which has not been changed from the current version of the form—was not germane to the amendment and could be raised at another time.

The Advisory Committee gave its approval to the amendments to the Director's Form and instructions and requested the Administrative Office to implement them.

(C) ***Consideration of Suggestion 25-BK-H to revise Director's Form 2000***

Judge Kahn and Professor Bartell provided the report.

Nathan Ochsner, clerk of the Bankruptcy Court for the S.D. Tex., suggested a change to the chapter 7, 11, 12, and 13 checklists that comprise Bankruptcy Form 2000 to alert debtors that they must take the credit counseling course required by Bankruptcy Code § 109(h) before filing their bankruptcy petition. At the end of the paragraph dealing with the credit counseling requirement, he suggested language reading: "**An approved Credit Counseling Course must be taken 180 days before the case is filed, (so long as none of the exceptions are applicable)**."

The Subcommittee agreed with the substance of his suggestion but recommended amended language in all versions of Form 2000 that appear beginning on p. 139 of the Agenda Book. The amended language is intended to more closely reflect the statutory language of § 109(h)(1).

Judge McEwan said that she enthusiastically supported the amendment.

The Advisory Committee approved the amended Director's Form and requested the Administrative Office to make the changes.

(D) ***Technical Correction to Official Form 410C13-NR***

Judge Kahn and Professor Gibson provided the report.

An inconsistency in Official Form 410C13-NR (Response to Trustee's Notice of Disbursements Made), which is set to go into effect this December, has been called to the Committee's attention. Two items in Part 2 refer to "the date of this notice." They should say, "the date of this response," as in the introductory language to that section. These references are inadvertent errors.

It would be best if these errors could be corrected before the form goes into effect. In March 2016 the Judicial Conference delegated authority to the Bankruptcy Rules Advisory Committee to make "non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference." The Subcommittee believes that correction of these errors comes within that authority. They are merely scrivener's errors and are non-substantive. Because both items say, "*this* notice," not "*the* notice," they are referring to the document being completed — i.e. the response — and not the earlier notice.

Accordingly, the Subcommittee recommended that the Advisory Committee make the changes as indicated on the form on p. 145 of the Agenda Book, effective December 1, 2025, and then seek retroactive approval from the Standing Committee in January.

The Advisory Committee approved the changes and agreed to seek retroactive approval from the Standing Committee so that the changes can be effective December 1, 2025.

6. **Report of the Technology, Privacy, and Public Access Subcommittee**

(A) ***Consider potential rule amendments regarding electronic filing by self-represented litigants***

Judge Oetken and Professor Gibson provided the report.

In response to suggestions to the Bankruptcy, Civil, Criminal, and Appellate Rules Advisory Committees to allow greater access to electronic filing systems for self-represented litigants ("SRLs"), a working group was formed, chaired by Professor Cathie Struve. Professor Struve has described the SRL project, as it has developed, as having two basic goals: one involving service and the other, filing. As to service, the project's goal is to eliminate the requirement of separate paper service of documents after the case's initial filing on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

Members of the Advisory Committee have previously expressed some concerns about both aspects of the SRL project. With respect to electronic filing by SRLs, some members have said that their past experience—especially during Covid when access to electronic filing was expanded—leads them to worry about SRLs filing inappropriate material or using incompatible formats that will require the clerk's office to download, print, and scan documents before they can be filed. In a time of limited resources, it was said, this could impose an undue burden on clerk's offices.

With respect to service, concerns about the proposal centered around the possibility that there could be multiple SRLs in a bankruptcy case, some of whom do not receive notices of electronic filing, and a SRL filing a paper document might not be able to determine who needs to receive paper service.

The Civil, Criminal, and Appellate Rules Advisory Committees have indicated support for the project and a desire to proceed with the amendments. At their upcoming fall meetings, which all will occur after the meeting of the Bankruptcy Advisory Committee, they will consider refinements to the drafts of their respective rule amendments with the goal of arriving at parallel sets of amendments for publication next summer. On this schedule, the spring 2026 meetings will be available for any final revisions the advisory committees wish to make to the proposed amendments prior to publication.

The Bankruptcy Advisory Committee, by contrast, is a step behind the others. At this meeting the Advisory Committee needs to reach a decision about whether to propose a set of amendments parallel to those proposed by the other committees or to opt out of the project in part or completely. In the latter case, amendments to the Bankruptcy Rules will still need to be considered to provide for bankruptcy's different approach.

Even if the Advisory Committee decides to join in the project, it is probably premature at this point to worry about wording refinements. There remain some open issues about terminology and the content of the amendments and committee notes that the other advisory committees will consider this fall. Those details can be considered at the spring Advisory Committee meeting if need be. For now, the question about the SRL project is whether the Bankruptcy Advisory Committee is in or out.

After a full discussion of the options, the Subcommittee voted to recommend that the Advisory Committee opt into both aspects of the SRL project and consider at the spring 2026 meeting amendments to Rules 5005, 7005, 8011, and 9036 paralleling those to be proposed by the other advisory committees. Although there is tentative proposed language for amendments to Rules 5005 and 7005 in the Agenda Book on pp. 151-152 (and similar amendments would be made to Rule 8011 and conforming amendments to Rule 9036), the Subcommittee did not request approval of any rule amendments at this meeting.

The Subcommittee recommended that the Advisory Committee join the other committees in the project for several reasons. First, this approach would keep the Bankruptcy Rules on filing and service consistent with the rules applicable in the district courts and courts of appeal. Doing so might reduce confusion and would eliminate the need to resolve which rules should apply to bankruptcy appeals. Second, having consistent rules would also avoid any questions (by the Standing Committee and others) about why SRLs are treated differently in the bankruptcy courts. Finally, because at this stage the advisory committees are only proposing publication of the amendments for comment, going along with the other committees might allow the Advisory Committee to gauge from the comments how broadly shared are the concerns that have been expressed by committee members. Following publication, the Advisory Committee would be able

to decide whether to proceed with the amendments or to opt out of the project in whole or in part based on the comments received.

Judge McEwan asked what would be a "reasonable exception" to a rule that allows SRLs to file? She also expressed concern about accepting filings from SRLs that are not in an appropriate form. Will an alternative platform be developed for SRLs to provide a gateway function for filing? State courts in Florida have such a platform. If a gateway platform will be developed or purchased, she supports the proposal. Judge Kahn said that allowing the SRLs to file electronically means the court will never get the original documents, which is a big advantage. Judge McEwan said we should not propose a rule that depends on a gateway function that we do not have. Judge Oetken said inappropriate filings occur now, and anything that is filed that is inappropriate can be struck, and it is better if it on the record electronically. Judge Isicoff said she wanted to be sure that nothing in the rule impacts the ability of court to restrict filings for any reason. Judge Harner said that she agrees with the comments made by others, but said the best way to inform ourselves on these issues is to put it out for public comment. Prof. Struve responded to Judge McEwan's questions, saying that she doesn't know about the technology of gateway programs. As to what constitutes a "reasonable exception," the proposed committee note provides examples but additional ideas can be incorporated.

Judge Bates said that CM/ECF is going to be history soon, so there will be a new system and that new system may handle filings differently. The primary driver of the new system is security, so there might be resistance to adding things to it. There is someone at the AO who is working on cyber security. Judge Connelly said she thinks the revisions to CM/ECF are on track and will be implemented gradually. The developers are aware of the need to provide limited access to some users, like to SRLs. There has been a filtering system in effect today to the extent that some courts allow e-filing by e-mail.

Ken Gardner said we should not let technology overcome what is the right thing to do. He worries more about the requirement of wet signature and thinks Rule 9011should be amended to allow electronic signatures. But he also supports publishing the rule amendments involved in this proposal as the best way to get information through the comment process. He said he is confident that we will resolve the technology, but he cannot resolve the need for a wet signature. Prof. Gibson said the Justice Department and the FBI have continued to push back on any proposal to eliminate the requirement for wet signatures because they believe these wet signatures are necessary for prosecution of bankruptcy fraud.

The Advisory Committee agreed with the recommendation of the Subcommittee to proceed with both aspects of the project and invited the Subcommittee to present proposed amendments for publication at the spring meeting of the Advisory Committee after reviewing the discussions of the other committees and the drafts that they produce.

(B) ***Consider possible amendments related to privacy issues***

Judge Oetken and Professor Bartell provided the report.

At the Advisory Committee meeting on September 12, 2024, Tom Byron reported on suggestions that address particular issues relating to the privacy rules, including suggestions regarding redaction of social-security numbers in federal-court filings and a suggestion relating to initials of known minors in court filings. At the same meeting, the Advisory Committee decided to take no action on the suggestion from Senator Wyden concerning complete redaction of social-security numbers in bankruptcy court filings.

Since that time the other rules committees have been considering the same issues. The Rule 49.1 (Privacy Rule) Subcommittee of the Criminal Rules Committee is proposing to its advisory committee amendments to Criminal Rule 49.1(a) that would do three things. First, it would apply the rule not only to filings that include information about individuals but to non-individuals as well. Second it would require full redaction of SSNs and other tax-identification numbers (TINs), as well as employer-identification numbers (EINs), in all filings, potentially expressly stating its application to all exhibits and attachments. Third, it would require the use of pseudonyms, rather than initials, for minors' names. The proposed language of amended Criminal Rule 49.1(a) appears in the Agenda Book at p. 158. The Civil Rules Committee is considering whether to propose similar amendments to Civil Rule 5.2, and the Appellate Rules Committee will likely be receptive to those changes if proposed.

Four issues are before the Advisory Committee. First, a new suggestion has been filed by the American Association for Justice renewing its suggestion that the Civil Rules and Criminal Rules require the full redaction of SSNs in public filings. (The suggestion was also filed with the other Committees, including as 25-BK-F). If the Criminal Rules Committee, Civil Rules Committee and Appellate Rules Committee decide to require full redaction of an individual's SSN in federal-court filings, does the Advisory Committee continue to adhere to its position declining to amend Bankruptcy Rules 9037(a)(1)?

The decision to take no action on the suggestion of Sen. Ron Wyden was made only after considerable deliberation and analysis of a privacy study conducted by the Federal Judicial Center and a survey of bankruptcy debtor attorneys, chapter 7, 12, and 13 trustees, creditor attorneys, various tax authorities and representatives of the National Association of Attorneys General. The survey showed that a significant number of bankruptcy specialists oppose the idea of removing the truncated SSN on every form they were asked about. The Advisory Committee then concluded that it seems unwise to pursue changes that are both unnecessary and potentially unpopular.

Even if, as seems likely, the Criminal Rules Committee and Civil Rules Committee decide to require full redaction of SSNs in their rules, the Advisory Committee concluded that it continues to adhere to its prior decision not to amend Bankruptcy Rule 9037(a)(1) to require complete redaction.

The Rule 49.1 (Privacy Rule) Subcommittee of the Criminal Rules Committee is also considering adding language to Criminal Rule 49.1 that would emphasize that redaction would apply to any filing, "including an exhibit or attachment." This stems from the conclusion of the privacy study that a high percentage of SSNs that are now improperly including in filings in unredacted form are in attachments and exhibits, not the main document. If the Criminal Rules

Committee and Civil Rules Committee decide to propose the addition of that language in Criminal Rule 49.1 and Civil Rule 5.2, the Advisory Committee said it was open to adding similar language to Bankruptcy Rule 9037(a).

Judge Connelly later asked whether adding language referring to exhibits and attachments would impose an additional policing function on the clerks' offices. Prof. Bartell said that, first, it is not yet certain whether the other committees will endorse adding that language and we should wait to see what they do, and second, even if the language is added the clerks' offices do not have a policing function with respect to the redaction requirement under the current rule so the language would not impose a heightened policing function.

The second issue before the Advisory Committee is whether to amend Bankruptcy Rule 9037(a)(3)—which currently permits filings to include a minor's initials—to require the use of pseudonyms instead. This suggestion was filed with the Criminal Rules Committee (and the other Committees as well) by the Department of Justice (DOJ) and supported by the American Association for Justice (AAJ) and the National Crime Victim Bar Association, and as is included in the proposed revised Criminal Rule 49.1(a). The AAJ submitted another suggestion expanding on its initial suggestion earlier this year. The DOJ's suggestion explained that referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—may be insufficient to ensure the child's privacy and safety.

The Rule 49.1 (Privacy) Subcommittee of the Criminal Rules Committee is proposing a change to Criminal Rule 49.1(a)(3) to replace the requirement for use of initials of known minors with a requirement for use of pseudonyms instead. If the proposal is adopted by the Criminal Rules Committee, the Subcommittee recommended a conforming change to Bankruptcy Rule 9037(a)(3) be made for publication at the same time. The Advisory Committee agreed and invited the Subcommittee to bring an amendment to the Advisory Committee at its next meeting.

Third, Bankruptcy Rule 9037(a)(1) treats individual taxpayer-identification numbers (ITINs) the same way as individual social-security numbers, requiring use of the last four digits only. It does not explicitly require redaction of employer-identification numbers. Should any amendment be made to the rule to require different treatment of ITINs?

Given that the Advisory Committee decided not to require full redaction of SSNs, despite the decision of the Criminal Rules Committee and perhaps other committees, the Subcommittee recommended that Bankruptcy Rule 9037(a)(1) should continue to treat ITINs in the same way as individual SSNs, and provide no additional protection for TINs or EINs. There is no policy reason to provide increased protection to ITINs over that provided to SSNs; indeed, the redacted ITIN probably creates less of a risk of improper appropriation than does a redacted SSN, and the need for appropriate debtor identification is the same in both cases. There is no demonstrated need for redaction of the EIN, nor has such a suggestion been made to the Advisory Committee. Unless there is a problem that needs to be addressed, the Subcommittee suggests no change to Rule 9037 in this regard. The Advisory Committee agreed with that recommendation.

Prof. Gibson expressed concern about whether, if amended Criminal Rule 49.1 characterizes ITINs as including employer-identification numbers, will that create issues about Bankruptcy Rule 9037 in which the reference to ITINs is not intended to include EINs. Prof. Struve emphasized that amendments to Criminal Rule 49.1 were not yet finalized, so we should wait to see what happens with that rule.

Fourth, given that the Advisory Committee does not choose to amend Rule 9037(a)(1) to require full redaction of SSNs and ITINs but the Civil and Appellate Rules Committees may modify Civil Rule 5.4(a) and Appellate Rule 25(a)(5) to require full redaction, which rule should apply to bankruptcy appeals to the district court, bankruptcy appellate panel, and court of appeals?

Under Appellate Rule 25(a)(5), "[a]n appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal." The Appellate Rules govern bankruptcy appeals in the courts of appeals. Part VIII of the Bankruptcy Rules governs appeals to district courts and BAPs. Although Part VIII does not cross-reference Bankruptcy Rule 9037, as a general provision in Part IX of the rules, Rule 9037 applies to bankruptcy appeals covered by Part VIII. Civil Rule 81(a)(2) provides that the Civil Rules "apply to bankruptcy proceedings" only "to the extent provided by the Federal Rules of Bankruptcy Procedure," and nothing in the Bankruptcy Rules applies Civil Rule 5.2 to bankruptcy appeals to the district court.

If the Civil Rules are amended to preclude the use of the last four digits of the social-security number, there will be a lack of uniformity with Bankruptcy Rule 9037(a)(1). In an appeal to the district court from a bankruptcy court, should the same privacy rule that otherwise applies in the district court (for civil and criminal cases) apply—thus requiring further redaction—or should the bankruptcy rule continue to apply? And likewise for appeals to the court of appeals: should the same rule that applies to civil and criminal appeals (complete redaction) apply, or should the bankruptcy rule be applicable? Which would cause less confusion—a unique rule for bankruptcy appeals in the district court and court of appeals, or changing rules for a bankruptcy case as it proceeds through the appellate process?

The Appellate Rules Committee is considering an amendment to Appellate Rule 25(a)(5) that would resolve that issue for the courts of appeals. The proposed revision would require full redaction of SSNs for all appeals, but would not apply to clerks forwarding the record. If Appellate Rule 25(a)(5) were to be so amended, the issue becomes whether Part VIII of the Bankruptcy Rules should take the same approach for appeals to district courts and perhaps BAPs. The reporters have previously expressed their view to the Advisory Committee that they believe the rules should treat appeals uniformly, without regard to where they are made. The Subcommittee agrees and the Advisory Committee also expressed its support of that position.

To implement that decision, a new Part VIII privacy rule will be required. New language could be added to Rule 8011, which is the counterpart to Appellate Rule 25. Suggested language appears in the Agenda Book at p. 164, but the Advisory Committee is not being asked to approve any amendment at this time; the goal would be to have amendments to Appellate Rule 25(a)(5)

and Bankruptcy Rule 8011 presented to the Standing Committee for publication at the same time. Therefore, proposed language would be presented to the Advisory Committee for approval for publication at the spring meeting.

7. **Report of the Business Subcommittee**

(A) ***Report concerning Suggestions 24-BK-A and 24-BK-C to Allow Masters in Bankruptcy Cases and Proceedings***

Judge McEwen and Professor Gibson provided the report.

Professor Gibson noted that this is a status report on a matter that has come to the Advisory Committee before. Two suggestions to amend Rule 9031 have been submitted to the Advisory Committee, one by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey (24-BK-A) and the other by the American Bar Association (24-BK-C). These suggestions propose amendments that would allow masters to be used in bankruptcy cases and proceedings, a matter that the Advisory Committee has considered several times in the past and declined to propose.

At its spring 2025 meeting, the Subcommittee presented the results of a survey of bankruptcy judges conducted by Dr. Carly Giffin of the Federal Judicial Center to learn whether the judges thought the rules should allow masters to be used in bankruptcy cases and in what circumstances, if any, they had ever needed such assistance. The Advisory Committee agreed with the Subcommittee that there was sufficient interest in allowing masters to be used in bankruptcy cases or proceedings that it should continue to consider the Kaplan and ABA suggestions. It identified as next steps researching whether there is any constitutional or statutory impediment to authorizing bankruptcy judges to appoint masters and considering drafts of possible rule amendments to authorize their use.

Kyle Brinker, the former Rules Law Clerk, was asked to research the constitutional and statutory issues, and he prepared a thorough memo. Mr. Brinker concluded that there is no constitutional or statutory impediment to the appointment of a master by a bankruptcy judge, so long as the judge can review the master's findings of fact and conclusions of law de novo. He points out, among other things, that "magistrate judges have appointed masters on many occasions, and the constitutional authority to do so has not been questioned." He does, however, question whether the Bankruptcy Code authorizes payment of a master, while noting that expert witnesses, fee examiners, and mediators have been paid in bankruptcy cases despite the lack of specific authorization in the Bankruptcy Code.

Prof. Gibson reviewed the language proposed by those who made suggestions on the topic., and a tentative draft and committee note she prepared which appears on pp. 168-171 of the Agenda Book. The Subcommittee was not seeking approval of the tentative draft at this meeting, but asked the Advisory Committee for input on several issues raised in the footnotes of the tentative draft and on three broader questions:

- Should Rule 53(a)-(g) be made applicable in its entirety, or should it be tailored specifically for the bankruptcy context?
- Should the rule for masters be different in adversary proceedings than in contested matters or in the context of administration of a bankruptcy case?
- Should the rule have different provisions depending on whether parties or the estate will be paying for the master's compensation?

Prof. Gibson walked through her tentative draft to ask the Advisory Committee for guidance.

Title. She suggested following whatever designation (master or court-appointed neutral) appears in Civil Rule 53.

Clause (a)(1) Scope. She invited discussion on what duties a master should be able to perform. Judge Harner agreed with excluding the language "with consent of the parties" that is used in the civil rule and thought the draft was a great start. She also asked whether fee examiners and others who are currently performing some of the roles described for a master would be treated as masters under the amended rule. Judge Kahn said that mediators should not be considered "masters." Prof. Gibson said that perhaps we can look to the district court on the type of appointments that are made that are not "masters." Judge Browning said that when he has appointed masters, it has been as a result of a settlement between the parties and eliminating that language ("with consent of the parties") would limit flexibility. Judge Oetken said that in his district there is a panel of approved mediators. Judge Kahn directed attention to the law review article cited in the memo in the agenda book. Judge Harner asked whether we want a flexible rule or a tailored rule for bankruptcy purposes.

Dean McKenzie asked about the goal of the existing Rule 9031. Prof. Gibson said that the expressed concern was about cronyism. That does not seem to be a concern today. But there may be a concern that this level of referral may dilute the authority of bankruptcy judges.

Judge Kahn supports the language "hold hearings." Judge Lefkow asked whether we should explicitly mention discovery disputes. Prof. Gibson said that would be covered by clause (a)(1)(B). Judge Hopkins would like to empower the bankruptcy judge to appoint a master and use them in any way the bankruptcy judge wishes. Judge Bates asked whether "an award of attorneys' fees" has to be specifically mentioned, given that it isn't in the civil rule. Judge Kahn again invited examination of the suggested language in the law review article cited. Mr. Schaible emphasized that he would like the court to have control rather than the parties, and he thinks the judges should be able to determine there is an exceptional case. Judge McEwen points out that Rule 7023 adopts Rule 23 which contemplates appointment of a special master for fees, so there is explicit authority to appoint a master under Rule 7023 for attorneys' fees. Judge Kahn said that the parties can consent to a proposed appointment made by the judge.

Sean Day said that the Department of Justice is looking at the issue of appointment of masters by bankruptcy judges and has not reached a firm decision about whether there is a

constitutional problem to appointment. Prof. Gibson invited the Justice Department to express its views earlier rather than later.

Clause (a)(2) Disqualification. This clause tracks the civil rule with respect to disqualification. Is there any reason the bankruptcy rule should be different? Judge Browning distinguished disqualification from application of the Judicial Code of Conduct. He did not think this would be different from district courts. Judge Bates asked whether everything in 28 U.S.C. §455 is waivable. He expressed his view that the problem of cronyism has not gone away.

Clause (a)(3) Possible Expense or Delay; Preservation of the Estate. This clause requires consideration of expense and delay. If the cost of the master is to be paid by the estate, the language suggests that the activity must benefit the estate. This provides a basis for claiming the expenses of a master are administrative expenses. Ms. Elliott asked whether there a concern that this standard will apply to others who are appointed by the bankruptcy judge like fee examiners. Prof. Gibson said the overall question is whether there is a need for a master, or do we want to limit these other appointees by this new role. Judge McEwen said we have to trust the judge to use discretion on when the case can support the expense.

Clause (b) Application of Civil Rule 53. Certain specific provisions are carved out in this clause from applicability of Rule 53. Judge Bates and Judge Browning confirmed that when someone is hired as a master, it is assumed that the master's employees will be included. Judge Kahn said that this paragraph is making sure the professional persons hired by a master are given the same treatment as other professional persons in the case.

Clause (c) Compensation. Compensation for a master can come from any of three sources. This draft adds reference to the estate to the two other sources contained in Rule 53.

Judge McEwen complimented Prof. Gibson for a good draft.

Judge Bates asked whether lawyers and judges who are not bankruptcy judges think bankruptcy judges should be able to appoint masters. Prof. Gibson pointed out that the ABA made the suggestion. Judge Kahn said that bankruptcy judges themselves are of mixed views, but there are certainly a lot of articles being written supporting an amendment permitting such appointments. Mr. Schaible said there is a clear need in large, MDL type cases. But he doesn't think it should be limited to that context.

The Advisory Committee directed the Subcommittee to take the comments back and work on revised language.

8. **Report of the Appellate Rules and Cross Border Subcommittee**

(A) ***Consider Suggestion 24-BK-P from Jack Meltzer to amend Rule 2006 regarding time counting***

Judge Bress and Professor Bartell provided the report.

Jack Metzler, Senior Assistant Disciplinary Counsel at the Office of Disciplinary Counsel, made a suggestion (24-AP-N) that Appellate Rule 26(a)(1) be amended so that periods counted in days would begin with the first day that is not a Saturday, Sunday, or legal holiday. Because the time counting rules are consistent across all the rules sets, the suggestion was also filed with the Bankruptcy Rules (24-BK-P), Criminal Rules (24-CR-I) and Civil Rules (24-CV-Z).

The Appellate Rules Committee decided to remove the suggestion from its agenda. The Subcommittee recommends that the Advisory Committee do the same.

The Advisory Committee agreed with the recommendation and removed the suggestion from its agenda.

(B) ***Proposed amendments to Rule 8017 to conform with proposed amendments to Appellate Rule 29***

Judge Bress and Professor Bartell provided the report.

At its June meeting the Standing Committee gave final approval to amendments to Appellate Rule 29 (Brief of an Amicus Curiae). The bankruptcy equivalent to that rule is Bankruptcy Rule 8017. The Subcommittee recommended that the Advisory Committee recommend conforming amendments to Rule 8017 to the Standing Committee for publication. The form of the amended Rule is on p. 178 in redlined form, and p. 184 in clean form.

Prof. Struve suggested that conforming amendments to Rule 8015(h)(1) dealing with the certificate of compliance and the appendix of length limits should be proposed for publication at the same time. The Advisory Committee agreed and decided to defer approval of amended Rule 8017 until the conforming amendments were also presented for approval.

9. **New Business**

There was no new business.

10. **Future Meetings**

The spring 2025 meeting will be held on April 15, 2026, in Charlotte, North Carolina.

11. **Adjournment**

The meeting was adjourned at 2:05 p.m.

TAB 13

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.

* * * * *

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.

TAB 14

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.

TAB 15

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

TAB 16

MEMORANDUM

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

FROM: Hon. Michael W. Mosman, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 12, 2025

I. INTRODUCTION

The Advisory Committee on Criminal Rules met virtually on November 6, 2025. Draft minutes of the meeting are attached.

This report presents several information items, but no action items. The information items include updates from two subcommittees, the addition of one item to the Advisory Committee's agenda, the removal of another item, and the addition of one set of proposals to related proposals already on the Advisory Committee's study agenda. Finally, the Advisory Committee heard reports on the continuing cross-committee work on attorney admissions and electronic filing by self-represented individuals.

II. SUBCOMMITTEE REPORTS

A. Rule 49.1, Reference to Minors by Pseudonyms (24-CR-A and 24-CR-C); Full Redaction of Social-Security Numbers (22-CR-B)

The Rule 49.1 Subcommittee was charged with responding to suggestions concerning references to minors and social-security numbers in public filings. At the Advisory Committee's fall meeting, the subcommittee presented a discussion draft and solicited feedback on the policy decisions reflected in the draft as well as any concerns about the language in the text and committee note.

1. Reference to Minors by Pseudonyms

As explained in the Department of Justice's suggestion (24-CR-A), Rule 49.1(a)(3), requiring that a filing may include only the initials of a minor, does not ensure the privacy and safety of child victims and child witnesses—especially in crimes involving the sexual exploitation of a child. The Department's prosecutors and victim-witness personnel have pointed out that child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and they assert that child-exploitation offenders sometimes track federal criminal filings and take other measures to uncover the identity of child victims and contact and harass the minors. The American Association for Justice and National Crime Victim Bar Association (24-CR-C) supported the Department's proposal, but they added the suggestion that the advisory committees "consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence." They state, "the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover."

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

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

Before the subcommittee presented its draft to the Advisory Committee, the reporter for the Advisory Committee on Appellate Rules asked several questions about the meaning of the draft provision. Does the provision protect anyone who was a minor at the time of the underlying incident involved in the litigation? Does a person who is a minor at any time during the pendency of a case retain this privacy protection for the duration of the case? Or does the protection apply only while the person remains a minor, so that once a person turns 18, absent a motion and order, the rule would permit any subsequent filings to include the person's name?

At its fall meeting, the Advisory Committee had an initial discussion of these issues to provide some guidance for the subcommittee. Members noted that the issue has seldom arisen because of the widespread practice of using protective orders. The Department's representative agreed that this is currently how things work in practice, and she said that the Department's position is that the protections apply to victims and witnesses based on their age when the crime occurred. The representative further noted that 18 U.S.C. § 3509(a)(2)(B) defines "child" to include witnesses to a crime, and § 3509(d) provides the privacy protections for minor witnesses. She said that the Department therefore thought that, at least as applied to victims and witnesses, the protections should extend based on when the event happened that makes the person relevant to the case. The Department did not have a strong view on whether this should happen through protective orders, or local rules that are more specific.

Finally, members expressed no concern about the subcommittee's suggestion that the text of the rule should explicitly mention exhibits and attachments. This was intended to address the finding of the Federal Judicial Center that most of the unredacted material in public filings appears in exhibits and attachments.

2. Complete Redaction of Social-Security Numbers

Senator Ron Wyden (22-CR-B) expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules—permit filings to include the last four digits of social-security numbers.

Although all have agreed that neither the prosecution nor the defense need the last four digits of social-security numbers in public filings in criminal cases, the subcommittee thought it was important to understand whether there was any harm in including this information in public filings. Rules Law Clerk Kyle Brinker provided an excellent research memorandum explaining how this information could be misused by identity thieves and fraudsters.[1] Moreover, a variety of government agencies now consider full redaction to be a best practice.

The subcommittee concluded the case had been made for complete redaction of social-security numbers in Rule 49.1, and the Advisory Committee agreed with this recommendation.

[1] To avoid providing any sort of roadmap for misuse of this information, Mr. Brinker's memorandum has not been included in the public record.

3. Complete Redaction of Other Taxpayer-Identification Numbers

The Advisory Committee also expressed general support for the subcommittee's recommendation that *all* taxpayer-identification numbers be treated like social-security numbers in public filings, i.e., the filer must either omit or completely redact them. The Internal Revenue Service (IRS) recognizes four principal types of taxpayer-identification numbers: Social-Security Numbers (SSN), Individual Taxpayer-Identification Numbers (ITIN), Adoption Taxpayer-Identification Numbers (ATIN), and Employer-Identification Numbers (EIN). All these taxpayer-identification numbers implicate privacy interests. ATINs arise from adoption proceedings, and EINs also implicate privacy interests in at least some cases, such as EINs obtained by families who employ nannies or housekeepers who work in their homes.

Additional research by Mr. Brinker found that there is some risk of misuse of the last four digits of ITINs by fraudsters and identify thieves (though less than that for the last digits of SSNs), but that there was little information available on criminal misuse of ATINs and EINs. The Department of Justice's representative at the November meeting stated that DOJ was aware of no instance of fraud from the use of an ATIN or fraud on an EIN holder. There are many instances where a defendant will use an EIN to commit fraud on the government, but the DOJ had not seen identity theft of someone using an EIN.

Despite the lesser risk of criminal misuse of ATINs and EINs, no member expressed disagreement with the subcommittee's view that in the absence of any need for their inclusion in public filings, Rule 49.1 should prioritize privacy, avoid even the small possibility of criminal misuse of this information, and require full redaction of *all* taxpayer-identification numbers. However, Judge Harvey noted the importance of consistency and uniformity across the various privacy rules, and he stated that the Advisory Committee would need to return to these issues in the spring after hearing the views of other committees.

4. Next Steps

Although Criminal Rules has taken the lead on these suggestions, they implicate the other privacy rules as well. To the extent possible, the current Appellate[2], Bankruptcy, Civil, and Criminal Rules privacy rules are parallel and consistent. Accordingly, the discussion draft was shared with these other committees for discussion at their fall meetings, and the working group of reporters will attempt to develop parallel proposals for consideration at the spring meetings. The distinctive requirements of bankruptcy practice may preclude complete uniformity.

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

B. Rule 40, clarifying procedures after arrest in one district under a warrant issued in another district for violating a condition of release pending trial, sentencing or appeal, or for failing to appear as required by subpoena (24-CR-D & 23-CR-H)

The Magistrate Judge's Advisory Group (MJAG) and Judge Zachary Bolitho have both recommended clarification of Rule 40, which governs arrest for failing to appear in another district or for violating conditions of release set in another district. Judge Harvey provided a report on the work of the Rule 40 Subcommittee, which he chairs.

The subcommittee reached tentative decisions on most of the principal policy issues that concern arrests for violations of conditions of release pending trial, sentencing, or appeal. The subcommittee decided to focus exclusively on Rule 40 (rather than also considering changes in Rule 5, which includes provisions regulating procedures after an initial arrest in a district other than where the defendant was charged).

Members agreed unanimously that Rule 40 should be amended to clearly recognize the right to a provisional detention hearing in the arresting district. This decision agrees with the weight of existing authority, which holds that 18 U.S.C. § 3148(b) does not bar the magistrate judge in the arresting district from releasing the defendant on conditions and allowing the defendant to report in the jurisdiction that issued the warrant.

In his report to the Advisory Committee, Judge Harvey also briefly reviewed a variety of other tentative decisions by the subcommittee, including the following:

- Rule 40 should cite the statutory standard for the release/detention hearing in the arresting district without more detail about the burden of proof or showing required.

- The rule should inform a defendant of the right to consult with counsel if the defendant is already represented, as well as the right to appointment of counsel if the defendant is not presently represented.

- The rule should require the government to produce proof of the warrant and require the judge to find that the defendant is the same person named in the warrant.

- The defendant should be able to consent to appear by videoconferencing.

- The provision in Rule 5(c)(3)(E) requiring the transfer of papers and "any bail" should apply in the Rule 40 context, at least for arrests on violations of pretrial release.

- The rule should include a provision similar to Rule 5(d), which requires a warning at the initial appearance that the defendant has a "right not to make a statement, and that any statement made may be used against the defendant."

- Unlike Rule 5, Rule 40 should not provide for a preliminary hearing, require advice about consular notification, or information about Rule 20.

Advisory Committee members expressed no concerns about these preliminary decisions.

Judge Harvey said the subcommittee would continue its work and draft language to incorporate these decisions. He noted that the subcommittee had not yet considered what changes, if any, to recommend to the language in Rule 40(a) that addresses arrests for "failing to appear as required . . . by a subpoena." The subcommittee initially recommended that witness arrests remain in Rule 40, though more research will be needed to understand the appropriate procedures in such cases.

III. NEW SUGGESTION: RULE 11, ADVICE TO DEFENDANTS (25-CR-N)

Judge Patricia Barksdale suggested (25-CR-N) that the Advisory Committee consider amending Rule 11(b)(1)(M) of the Federal Rules of Criminal Procedure, which requires that before a guilty plea, the judge must determine that the defendant understands "in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a)." Judge Barksdale suggested deleting the language "possible departures under the Sentencing Guidelines," in light of the new amendments to the Sentencing Guidelines. Those amendments, effective November 1, 2025, removed separate consideration of departures when applying the Guidelines, reducing a three-step process to two steps.

Judge Mosman invited discussion of the proposal, and members generally agreed that the Guideline amendments warranted reconsideration of this language in Rule 11, as well as reconsideration of Rule 32(h), which presently prohibits departures on grounds not identified in the presentence report or party submissions, unless prior notice is provided to the parties.

Judge Mosman subsequently appointed a new subcommittee to consider these issues.

IV. ITEM REMOVED FROM THE ADVISORY COMMITTEE'S AGENDA: Rule 15, "Broadcasting" to Individuals and Good-Cause Exceptions (Rule 53) (25-CR-I)

Judge Edmond Chang requested consideration of amendments to Rule 53's blanket prohibition of broadcasting from the courtroom in criminal cases. He suggested two possible amendments:

> (1) a clarification of Rule 53 to make explicit that the "broadcasting" bar covers transmission to single individuals, not just to the general public; and
>
> (2) good-cause exceptions that (a) would permit broadcasting to "crime victim[s]," as defined in 18 U.S.C. § 3771(e)(2), and possibly permit remote participation by victims; and (b) would permit broadcasting to, and remote participation by, third-party custodians at bail hearings.

Just one year ago, in 2024, the Advisory Committee completed a thorough review of the rule. After considering these issues within a broader framework, it recommended no change to the

rule. In addition, with regard to the specific issue of broadcasting to victims, Congress acted by passing the Lockerbie Victims Access Act, Pub. L. No. 118-37, 138 Stat. 11 (2024).[3]

Although there is no strict rule precluding reconsideration only one year after the Advisory Committee has declined to pursue a similar proposal, the Advisory Committee's resources are limited. Accordingly, the chair announced that he was tabling Judge Chang's proposals at this time.

V. RECEIPT OF ADDITIONAL SUPPORT FOR ITEM ON STUDY AGENDA

At the April meeting, two proposals to amend Rule 15 to allow for pretrial depositions were placed on the Advisory Committee's study agenda. At the November meeting, the Advisory Committee was informed that there was strong support for these proposals within the defense community. The reporters described six more letters that backed the idea of adding depositions to Rule 15. They also noted that an additional eight suggestions supporting the pretrial depositions had come in just before the meeting, after they completed the agenda book. An Advisory Committee member stated that she had received 21 additional letters signed by 59 lawyers from across the country —some from very prominent large law firms, some from boutique law firms, and some from solo practitioners.

Judge Mosman reaffirmed that the issue was on the study agenda for the time being because the Advisory Committee did not currently have the bandwidth to undertake the project. He reiterated that he took this project very seriously and wanted to devote the right effort to it at the right time. Placement on the study agenda will facilitate that. It allows the Advisory Committee to keep hearing from more people, and to seek more information, so that if a subcommittee is established, it will have something to start with instead of starting with a blank slate.

VI. CROSS-COMMITTEE PROJECTS

A. Self-Represented Litigant Access to Electronic Filing

Professor Struve reported on developments in the working group as well as discussions of potential rules in the other advisory committee meetings. Members provided input on issues presented by Professor Struve.

B. Unified Bar Admissions

Professor Struve also provided an oral report on the work of the joint subcommittee.

[3] For a discussion of the Act, and the various safeguards the court imposed to provide for secure victim access, see *United States v. Al-Marimi*, 761 F. Supp. 3d 16 (D.D.C. 2024).

TAB 17

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 6, 2025

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (the "Committee") met by videoconference on November 6, 2025. The following members, liaisons, reporters, and consultants were in attendance:

Judge Michael Mosman, Chair (in-person in Washington, D.C.)
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Thomas M. Durkin
Judge Michael Harvey
Marianne Mariano, Esq.
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Sonja Ralston, Esq.[1]
Justice Carlos Samour
Professor Jenia Turner
Mary Jo White, Esq.
Brandy Lonchena, Esq., Clerk of Court Representative
Judge James C. Dever, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter (in-person in Washington, D.C.)
Professor Nancy J. King, Associate Reporter (in-person in Washington, D.C.)
Professor Catherine T. Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee (in-person in Washington, D.C.)
Sarah Sraders, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff (in-person in Washington, D.C.)
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff (in-person in Washington, D.C.)

[1] Ms. Ralston represented the Department of Justice.

Opening Business

Judge Mosman opened the meeting and welcomed the attendees. He noted that there were no representatives from the Federal Judicial Center present, as they were unable to attend due to the ongoing government shutdown.

Judge Mosman then briefly introduced the three new members of the Committee. The new academic member, Jenia Turner, is the Amy Abboud Ware Centennial Professor of Criminal Law at Dedman School of Law at Southern Methodist University. Judge Mosman said that Professor Turner's work has had a real-world impact, and her article on transparency in plea bargaining was recently cited by the United States Supreme Court.

Judge Mosman next introduced Mary Jo White, a partner at Debevoise & Plimpton LLP. Judge Mosman stated that Ms. White's focus was on high-stakes criminal defense and pre-enforcement work, among other things. Ms. White was the first female United States Attorney in the Southern District of New York, and possibly the only person to ever have been U.S. Attorney in both the Eastern District and Southern District of New York. She also previously served as chair of the Securities and Exchange Commission.

Next, Judge Mosman introduced the third new member, Judge Thomas Durkin, now a senior judge in Chicago, and a highly experienced trial judge. Judge Mosman said Judge Durkin spent almost 20 years as a partner at Mayer Brown before taking the bench, and had a full career before that as an Assistant U.S. Attorney, including being the First Assistant in the Chicago office.

Judge Mosman then introduced a new Rules Committee staff member, Sarah Sraders, who joined the Rules Office over the summer. Ms. Sraders previously worked as a litigation associate in two law firms in D.C. and was a law clerk to Judge Mark Goldsmith in the Eastern District of Michigan.

Judge Mosman expressed his gratitude to the Rules Committee Staff for their help during the government shutdown. He noted that they were not being paid and recounted an email exchange with Carolyn Dubay before Phase II of the shutdown began. Judge Mosman had expressed his sympathies for how rough the situation must be. Ms. Dubay had hoped that it would be over soon, but said that either way, the Rules Committee Staff had a job to do and it would therefore get done. Judge Mosman described this as the epitome of public service and said that the Committee was thankful for their help.

Judge Mosman then explained how the virtual meeting would proceed. The small group present in Washington, D.C. would turn off the camera and sound in the conference room during breaks. Members who were attending remotely should use the "raise hand" feature on Teams, or raise their hand, if they have something to say. Otherwise, everyone should remain muted. Judge Mosman stated that there was no preference as to whether members' cameras were on when they were not presenting.

Judge Mosman then turned to the draft minutes from the April 2025 Advisory Committee meeting, and called for a motion to approve the minutes. The motion passed unanimously.

Noting that the agenda book included draft minutes from the June 2025 meeting of the Standing Committee and the September 2025 report to the Judicial Conference, Judge Mosman turned to Ms. Dubay for a report on the status of proposed amendments to the Federal Rules. Ms. Dubay directed the Committee's attention to page 134 of the agenda book and noted that there are currently no criminal rules set to be implemented as final rules. The rules that were submitted for final approval to the Judicial Conference were approved. They were transmitted to the Supreme Court on October 16, 2025, and she would deliver them to Congress in April 2026 to become effective next December.

Professor Beale then provided an update on Rule 17, which was published for public comment in August. She gave a brief description of how the process works in general for the benefit of new members and members who have not yet seen a rule work all the way through the process. Rule 17 is now out for public comment, meaning that it has been posted online and has been mailed to various persons who would naturally be interested. The comment period runs until mid-February. The last time that Professor Beale checked, only one comment had been submitted. She cautioned that this does not mean that there will not be a large number of comments, as her experience is that most of the comments come in at the very end of the comment period. The comments can range from very specific comments about the wording of a proposal to more general agreement or disagreement with the purpose of the amendment. The comments would all be considered by the Rule 17 Subcommittee.

Professor Beale also noted the possibility that there would be requests for a hearing. There have not been hearings in recent years, but this is a big enough change that it is possible. The Rule 17 Subcommittee would work through all of the comments received and then present a report to the full Committee at the April 2026 meeting. Professor Beale expressed her hope that the subcommittee would be able to propose that the amendment be approved for presentation to the Standing Committee and ultimately to the Supreme Court and then to Congress. Committee members should therefore expect to see the results of the public comment period at the April meeting, along with a recommendation from the subcommittee.

Judge Mosman noted that prior to becoming Chair of the Committee, he had been serving as liaison to the Evidence Rules Committee, and pointed out that the Status of Proposed Amendments chart in the agenda book contained three fairly significant proposed amendments to the Evidence Rules: Rules 801, 609, and new Rule 707.

Judge Mosman then asked Ms. Sraders to walk through the chart of pending legislation that would directly or effectively amend the federal rules. Ms. Sraders directed the Committee's attention to page 141 of the agenda book, highlighting the Rape Shield Enhancement Act of 2025. The Act would require the Judicial Conference to identify certain amendments to Rule 16 that would narrow the scope of permissible discovery requests to limit inquiries into the records or history of an alleged victim of sexual assault. Ms. Sraders noted that there had been no action taken on the bill since it was introduced, but that the Rules Committee Staff would continue to monitor it.

Rule 49.1

Judge Mosman then asked Judge Harvey for the Rule 49.1 Subcommittee's report. Judge Harvey explained that the subcommittee had been hard at work since the last meeting. It had met several times, resolved the remaining policy issues, and worked with the style consultants on drafting language to amend Rule 49.1, which governs privacy protections in public court filings. The subcommittee had also worked very hard on that proposed draft language amending the rule. Judge Harvey stated that this was his first time drafting language, and he had mistakenly expected it would be fairly simple. It was not simple—the draft language in the agenda book went back and forth with the style consultants several times. Judge Harvey said that the subcommittee was very grateful for their help and for the help of the reporters. He noted the excellent memo found at page 145 of the agenda book. Judge Harvey also thanked Kyle Brinker, the former Law Clerk to the Standing Committee, for his research memos, which had been invaluable to the subcommittee's work.

Judge Harvey directed the Committee to page 153 of the agenda book, where the proposed draft language started. There was a clean and red-lined version, as well as a draft committee note. He asked for the Committee's feedback, noting that despite all the work that had been done, errors could still occur. Judge Harvey pointed out that Ms. Ralston had discovered a word that slipped into the draft language which did not belong there, in subparagraph (a)(2)(C). This portion of the rule governs financial account numbers, which had been outside the scope of the subcommittee enquiry. The draft amended version required no redaction of "the last four digits of an individual's financial account number." Judge Harvey explained that current Rule 49.1(a)(2)(C), refers to financial account numbers, not "an individual's financial account number." Judge Harvey thought that the words "an individual's" should not be included, and the reporters agreed. This language would be removed from the draft.

Judge Harvey then highlighted some of the decisions that the subcommittee had made, which were reflected in this draft. He explained that the subcommittee's work focused on consideration of two substantive changes to Rule 49.1: (1) replacing the use of initials with pseudonyms for minors in public criminal filings; and (2) requiring the complete redaction of social-security numbers (SSNs) and other taxpayer-identification numbers from public filings.

As the subcommittee had previously reported, it had unanimously decided from the outset to require the use of pseudonyms instead of minors' initials in public filings. Both the Department of Justice and the victim advocacy organizations that submitted the proposals triggering this review had emphasized that using initials with respect to minors does not adequately protect their privacy or safety. Use of the minor's initials can allow identification when combined with other information in the record.

Judge Harvey further explained that, as the subcommittee had discovered, the use of pseudonyms was already standard practice for federal prosecutors, and this had not caused a problem for defense counsel or the courts. In a sense, he said, this part of the proposal was simply catching up to what is already occurring. Judge Harvey noted that the proposed draft also made clear that filers may either substitute a pseudonym or simply omit the minor's name entirely from the filing.

Judge Harvey stated that the subcommittee has also recommended language in the committee note encouraging gender-neutral or otherwise non-identifying pseudonyms where feasible. This is the result of a recommendation of one of the victim advocacy groups and is meant to reduce the risk that gendered names or pronouns, when combined with other case facts, could make it easier to identify a minor. Judge Harvey acknowledged that the government's evidence may sometimes not be gender-neutral, making the use of gender-neutral pseudonyms not feasible, which is why this was drafted as a recommendation is in the note rather than a requirement in the text of the rule.

Judge Harvey observed that there were questions raised in the reporters' memo, and he asked for feedback from the full Committee. He first noted that someone (he believed someone from one of the other rules committees) had questioned whether the protection for minors in this rule would extend only to individuals who were minors at the time of the conduct at issue, or only to those who were minors during the pendency of the case. That is, should the protection apply only when the person is a minor, such that once the person turns 18, later filings would revert to using the individual's name unless the court orders otherwise? Judge Harvey noted that this question had been raised after the last subcommittee meeting, so the subcommittee had not discussed it, but was interested in hearing the full Committee's view.

Professor Beale added that these questions are being considered by all of the sister rules committees as well, because the current privacy rules are parallel to the extent possible. There was an ongoing effort to determine whether the Civil, Bankruptcy, and Criminal Rules were on the same page, and whether the Appellate Rules would continue to adopt the other rules by reference or require full redaction. She noted that there has been some discussion in the other committees this fall, and again emphasized that input from the full Committee to guide the Rule 49.1 Subcommittee would be helpful.

Professor Beale went on to say that the subcommittee has staked out a position beyond Senator Wyden's proposal (which only concerned social security numbers) to expand to taxpayer identification numbers, including employer identification numbers. She noted that Professor Marcus, in the Civil Rules Committee, had questioned why the subcommittee had gone beyond what Senator Wyden had proposed. Professor Beale stated that the Rule 49.1 Subcommittee thought that once it started looking at SSNs, it should also consider the closely related issue of taxpayer identification numbers. Once it started thinking about that issue, it considered whether its scope should be limited to just the individual taxpayer identification numbers or whether it should consider employer identification numbers as well. She stated that the subcommittee was looking for input from the Committee on those policy decisions as well as any comments about the specific language.

Professor Beale also echoed Judge Harvey's comment about the issue raised by Professor Hartnett regarding what should happen when an individual ages and is no longer a minor. She commented that it was surprising to her that this issue had not arisen since the privacy rules were originally enacted.

A member responded that the reason this had not previously come up was because there was often a protective order in such cases. It was not uncommon that some of the victims in sex offense cases—particularly victims of child pornography—are adults. She stated that these

individuals are protected with a pseudonym. Although she could not recall seeing such individuals called for a hearing, she was confident that in such cases, their identities would remain protected.

The member said that there may be a different type of offense where a family member is a minor. She said that even when such a person becomes an adult, their identify is usually considered protected information by an order of the court. The defense member said that for her, the issue concerns minors who are not victims, such as defendants who were minors during some portion of the offense. They may be a minor at one point and then an adult at a different point of a conspiracy. Those are not often identities that are protected. The member asked what happens in civil or bankruptcy cases when the minor is not a victim—for example, if a minor saw something happen, and then, by the time the case goes to trial, they are an adult. She observed that witnesses are generally not anonymized, and the public has a right to know who they are as part of the process.

The member suggested that the reason there is no case law on the issue was because there are very active protective orders protecting identities of people who were victimized as minors even once they are adults. This happened organically on a case-by-case basis. The member thought that this approach made more sense than trying to amend the rule, which would broadly affect other types of litigation.

Ms. Ralston agreed that this is currently how things work in practice. The DOJ's position is that for victims and witnesses, the protections apply based on the event in question (when the crime occurred). She further noted that 18 U.S.C. § 3509(a) defines "child" to include witnesses to a crime, and then subsection (d) provides the privacy protections for those people. She said that the DOJ therefore thought that, at least as applied to victims and witnesses, the protections should extend based on when the event happened that makes the person relevant to the case. The DOJ did not have a strong view on whether this happens through protective orders or local rules that are more specific. Ms. Ralston commented that it might be useful to clarify in the committee note that the Committee believes the rule applies to victims and witnesses. She also noted that the practice for juvenile defendants had been to refer to them by their initials, at least in indictments, but deferred to the defense member's experience in this regard as there are very few juvenile defendants in federal court.

Judge Harvey asked whether anyone else had thoughts on this issue. No one responded, and Judge Harvey then highlighted a few other aspects of the subcommittee's recommendation. He noted two other issues. First, the subcommittee thought it was clear that SSNs should be completed redacted or omitted from public filings. As reflected in the memo from Kyle Brinker, there is a vulnerability resulting from including these numbers. This is also consistent with best practices across federal agencies, so the Rule 49.1 Subcommittee felt confident that this was the appropriate position for the Criminal Rules.

The more difficult issue, Judge Harvey stated, is the treatment of taxpayer identification numbers. He explained that there are essentially three different numbers at issue: individual taxpayer identification numbers (ITINs), adoption taxpayer identification numbers (ATINs), and employer identification numbers (EINs). The subcommittee's recommendation is that all of these numbers should be treated like SSNs, and either fully redacted or omitted from public filings.

Judge Harvey noted a difference between what the subcommittee was proposing and what the present rule permits or requires with respect to EINs. In 2004, when this issue was first considered, the e-Government Committee decided to treat individual or personal taxpayer identification numbers different than EINs. At that time, they believed that EINs were only being used for tax purposes. Judge Harvey did not know whether that decision was right or wrong at the time, but stated that Kyle Brinker's research shows that EINs are now used far beyond simply filing taxes. Not unlike SSNs, they are part of applications made by businesses for credit, for loans, or for opening bank accounts. There are also issues with fraud with respect to EINs. The Rule 49.1 Subcommittee therefore believed that if the Committee can come forward with a rule that does not assist fraud, that would be a good thing.

Judge Harvey further stated that EINs can implicate personal privacy. They are used not only by businesses. Individuals who have nannies in their homes must obtain an EIN, and that EIN is nothing more than the business of having a nanny in the home. Judge Harvey found it compelling that the Tax Court requires full redaction of all of these taxpayer identification numbers, and the IRS treats them as confidential.

Judge Harvey emphasized that the subcommittee saw no need for any of these numbers to be disclosed in public criminal filings. Members could not recall any time when that would be necessary. To the extent the number was somehow relevant to a criminal proceeding, a party could file it under seal and file a redacted version publicly. He emphasized that the subcommittee was unwilling to accept even a modest risk of potential abuse of these numbers as a result of their disclosure in public criminal filings.

Judge Harvey did note, however, that this is a change. He also acknowledged that even though the research provided to the subcommittee demonstrated very real vulnerabilities with respect to SSNs, it became harder to see the vulnerabilities as one moved through the various tax identification numbers. ITINs are closest to SSNs in terms of the vulnerabilities, but at the other end of the spectrum are the ATINs, which are temporary. ATINs are required as part of the adoption process, but once the process is completed, that individual receives an SSN. Thus, ATINs are fleeting, and Judge Harvey could not recall any case law that even dealt with these on the criminal side. As for EINs, Judge Harvey noted that there are some requirements for public disclosure of EINS. Some companies must disclose their EINs in various public filings. He acknowledged that one could make the argument that, if the EINs must be publicly disclosed there, why should they not also be disclosed in criminal filings? Judge Harvey asked for the Committee's feedback on this issue.

Judge Mosman said that he suspected there was widespread agreement on some of the subcommittee's more basic assumptions. He asked the Committee whether anyone disagreed with the proposition that the Committee move forward with the suggestion to delete the last four digits of SSNs. No one did.

Judge Mosman then asked whether anyone disagreed with the removal of other forms of taxpayer identification numbers.

Ms. Ralston responded that it might be useful to break these into three pieces. In her view, the ITINs—which were clearly covered by the current rule and were similar to SSNs—

were differently situated from the other two types of numbers. And she thought that had been the subcommittee's view as well.

Judge Harvey agreed that the subcommittee had viewed ITINs as the "easiest" issue to deal with. They are treated the same as SSNs under the current rule, and are used like SSNs. He asked whether anyone objected to the subcommittee's proposal that ITINs should be fully redacted from public criminal filings. No one objected.

Judge Harvey next turned to ATINs, noting that these are the least prevalent, but do relate to an individual. He said they arguably fall under the current rule, which refers to individual taxpayer identification numbers. They do relate to an individual. And although the risk of misuse was not as great as that for ITINs and EINs, it was not zero. He asked whether anyone objected to treating ATINs the same as ITINs and social security numbers; that is, requiring their complete redaction from public criminal filings.

Ms. Ralston responded that there had been many discussions on this issue within the last month at the DOJ. The DOJ learned that no one had seen any fraud involving ATINs because they expire so quickly, and they are only used for tax purposes (to claim the child tax credit and to claim the child as a dependent on tax forms). Nor had the DOJ uncovered any instance of fraud on an EIN holder. There are many instances where a defendant will use an EIN to commit fraud on the government, but the DOJ had not seen identity theft of someone using an EIN.

Judge Harvey asked if the DOJ was taking a position on ATINs. Ms. Ralston responded that in the DOJ's view, consistency with the Civil Rules on this issue was important. If the Civil Rules Committee decided not to require redaction of ATINs, DOJ saw no need for the Criminal Rules to differ, because DOJ had not seen a real identity-theft-type risk related to ATINs. In contrast, for the ITINs, DOJ thought that they should be fully redacted in the Criminal Rules regardless of what the Civil Rules did. DOJ felt the same about the issue regarding the use of pseudonyms for minors.

Ms. Ralston also explained that because of the way certain documents are structured, certain numbers may end up being fully redacted regardless of whether the rule requires it. As an example, if someone is completing a tax form to claim a child as a dependent, the field may say "Social Security Number," and the person writes the ATIN in that field. People would later redact that number because the completed field was labeled "Social Security Number" and the person may not know that this is actually an ATIN that would (hypothetically) not require redaction. The DOJ representative said that the complexity of specifying this in the rule might outweigh the benefit.

Judge Harvey stated that this was a good point, and he emphasized that this was not the last time that the Committee would see this proposal. The other rules committees have also been considering amendments to their own rules, and there may be disagreements between the committees. This might be an area where the desire for uniformity might change some subcommittee members' views about how ATINs or EINs should be treated. Judge Harvey stated that there would be another opportunity to discuss these issues at the spring meeting, with the benefit of input from the other rules committees.

Professor Beale said that the Committee has some input now, as the other committees had some discussion of this issue at their recent fall meetings. Further, the Committee knew that the Bankruptcy Rules Committee has all along taken the position that it will still require the last four digits of SSNs. She said that the question of uniformity is certainly going to be raised.

Judge Dever explained that this issue did come up at the Civil Rules Committee's recent meeting. He asked Ms. Ralston to coordinate with Ms. Shapiro, who had raised concerns about EINs at the Civil Rules Committee meeting. Judge Dever had told Ms. Shapiro and the Civil Rules Committee that this Committee would be discussing this proposal at this meeting.

Judge Dever further stated that the subcommittee's proposal was not saying that the courts cannot have this information. Instead, it is simply not included in a public filing. The Rule 49.1 Subcommittee did not see why this information needed to be made public, and its proposal was consistent with how the Tax Court and IRS treat EINs. Judge Dever questioned what policy reason there would be for the rule to not treat all taxpayer identification numbers, including EINs, the same. Judge Dever asked DOJ to think about what the policy reason is to have EINs publicly disclosed in court filings given the ability of people engaging in sophisticated fraud schemes to use that information to commit fraud.

Professor Struve echoed Judge Dever's comments, and she added that bankruptcy is a "different world" on EINs, because EINs are necessary for purposes of the automatic stay. In fact, there is a bankruptcy form that requires entire EINs. She said that in the Appellate Rules Committee, the current rule picks up whatever rule applied below, but that committee is considering the possibility of adopting a provision that would expand protection beyond what applied below to cover the full redaction requirement for SSNs and taxpayer identification numbers. Professor Struve said that this should not change what the Criminal Rules Committee is doing. The only operative question is whether there is any reticence about the differences with the Bankruptcy Rules Committee, the reasons for which are well-supported.

Ms. Ralston commented that it was in response to what happened at the Bankruptcy Rules Committee meeting that the Department of Justice was able to discuss the issue more in-depth internally. She had spoken with Ms. Shapiro at length and with DOJ leadership to come to the view that consistency among committees, to the extent possible, is DOJ's higher priority.

Ms. Ralston further stated that the argument against redacting is that there is a presumption of public information. There needs to be a reason to remove these numbers from the record, rather than the presumption being that these numbers are private and there should be a reason to have them publicly filed.

Professor Beale said that this was a very interesting question, whether there is a presumption that private, individual information should be known once there is a criminal or civil filing, particularly if, in the criminal context, neither the prosecution nor defense nor clerks of court could see any reason why this information was useful in a public filing. She said that the question what is the proper starting point presumption, was a great one. She noted that there are no demonstrated incidents of, for example, fraud or identity theft of ATINs. On the other hand, they are the records of individuals, and if there is no need for their inclusion in public filings, it tees up exactly that kind of question. As for employer identification, Professor Beale noted that

the subcommittee heard that issue come up—why, if someone is hiring a nanny or a housecleaner, do they need to have a number that is in public filings? Whose business is that?

Judge Harvey asked whether the reporters needed anything further from the Committee on this issue. Professor Beale answered that they will be able to move forward and will be finding out more information from the other committees. They hope to bring this to the April meeting for final action of a proposal that would then go forward through the amendment process.

Professor Beale flagged one last issue—whether the proposed rule should explicitly mention exhibits and attachments. This language was bracketed in the draft because the reporters thought that it might raise eyebrows, but she gathered that, in the other committees, it did not. Ms. Dubay confirmed that it did not raise eyebrows in the other committees. Professor Beale said that, unless anyone said otherwise, the proposal in April will include this language. She stated that this would address what the FJC found was the most common place that things which are already supposed to be redacted show up. She thought it seemed like a good idea to remind people, in the text of the rule, that the rule covers attachments and exhibits.

Judge Harvey thanked everyone for their consideration and said that this issue would be back before the Committee in the spring.

Rule 40

Judge Mosman then asked Judge Harvey to present the next issue. Judge Harvey told the Committee that the Rule 40 Subcommittee had met several times over the last several months and made substantial progress in clarifying how an amended Rule 40 should address procedures before the magistrate judge in the arresting district when a defendant is arrested on an out-of-district warrant alleging a violation of release conditions pending trial, sentencing, or appeal. The subcommittee has reached a tentative agreement on most of these principal policy issues, and Judge Harvey thanked the reporters and Kyle Brinker for their help.

Judge Harvey stated that the subcommittee did not yet have language to present to the Committee. Instead, the subcommittee wanted to update everyone on the decisions made to date and find out whether there is any feedback from the Committee on these issues.

The first issue, and one that the subcommittee thought was the most important, was whether the defendant should have a provisional detention hearing before the magistrate judge in the arresting district. Judge Harvey explained that at this hearing the defendant can seek release on conditions, for example, that he voluntarily report to the district that issued the warrant. Or, alternatively, the government can obtain the defendant's detention pending the defendant's transfer to the issuing district for further proceedings on the warrant. The Rule 40 Subcommittee unanimously felt that there should be such a hearing. This is what the case law has held, and it is the current practice in the vast majority of district across the country. Judge Harvey noted that there may be a handful of magistrate judges who proceed otherwise, and the subcommittee thought that it would be helpful to clearly state in Rule 40 that there is a right to such a hearing in the arresting district.

Judge Harvey said that the subcommittee had also agreed that the amended rule should cite to the relevant provision of the Bail Reform Act where the detention or release standard can be derived: Section 3142 for cases involving violation of pre-trial release; section 3143(a) for violations of post-conviction, pre-sentence release; and section 3143(b) for release pending appeal.

The second threshold issue was whether the Committee should clarify Rule 5 to the extent that some of the ambiguities in Rule 40 arise from issues with Rule 5. Judge Harvey stated that he was interested in exploring that further, but the subcommittee had decided that for now, it should stay focused on the assignment at hand, clarifying Rule 40.

The subcommittee has come up with a list of procedures, not unlike those in Rule 5 or Rule 32.1, to assist the magistrate judge in the arresting jurisdiction. Judge Harvey explained that those additional procedures would include reminding defendants that they have a right to consult with their existing counsel when Rule 40 issues arise. The defendants have already appeared in the charging jurisdiction and already have an attorney. It is important that they are allowed an opportunity to consult with their existing counsel or, if they are unrepresented, that they have a right to appointed counsel. The subcommittee had also discussed acknowledging the common practice of allowing local public defenders in the arresting district to serve as stand-in or courtesy counsel after consulting with counsel in the charging or issuing district.

Judge Harvey said that the subcommittee also thought it important that the amended rule include a reminder of the defendant's right to remain silent, recognizing that defendants in Rule 40 situations are often appearing in an unfamiliar district and without ready access to their regular counsel. The subcommittee thought that it could not hurt to tell defendants again that they have a right to remain silent.

The subcommittee had also concluded that there is no right to a preliminary hearing in this situation. Case law is consistent on this point. No case has recognized a right to a preliminary hearing with respect to violations of pre-trial, pre-sentence, or post-conviction release. The subcommittee had therefore agreed not to include any notification of a right to a preliminary hearing at the proceeding before the magistrate judge in the arresting district.

The subcommittee did think that it was important that the defendant be allowed an identity hearing. Judge Harvey explained that it is always important to make sure that the correct individual has been detained when they are brought in on a warrant. The defendant is allowed a hearing unless they waive it.

The subcommittee also thought that the government should be required to produce the warrant in the case, consistent with what Rule 5 requires. The subcommittee also favored carrying over the language from Rule 5 that requires the clerk's office in the arresting district to transfer all the papers and any bail to the issuing district. However, the subcommittee had deferred its decision on whether the government should also be required to produce the paperwork underlying the warrant; that is, the actual application filed by pre-trial services that caused the warrant to be issued. The subcommittee wanted to look more closely at what the practice is and ensure that the paperwork is available to pre-trial in the arresting district.

With respect to video conferences, Judge Harvey explained that the subcommittee was not anticipating any change to what is already available in Rule 40. The rule permits video appearances in a Rule 40 proceeding. The defendant may be in jail or some other holding facility and appear before the magistrate judge by video, if the defendant consents. The subcommittee disagreed with the Magistrate Judges Advisory Group's suggestion that Rule 40 should permit video between the defendant and the district that issued the warrant, to hold an initial proceeding on the warrant, the initial detention hearing, or a revocation hearing remotely. Judge Harvey said that this would be a large change in present practice, and there would be many logistical difficulties trying to allow for the charging district to have remote proceedings in the arresting districts for these Rule 40 warrants.

Judge Harvey said that the subcommittee saw no need to restate advice about the circumstances under which the defendant may secure pre-trial release. This is in Rule 5, and the defendant would have already been told that at their initial appearance on the underlying charge in the charging district. The subcommittee saw no reason to repeat this in Rule 40. In any event, the magistrate judge does not need to describe to the defendant the circumstances for pre-trial release, because the hearing in which the defendant will be seeking release happens almost immediately. Similarly, the subcommittee saw no need to repeat advice about consular notification or the possibility of a Rule 20 transfer. This does not fit in with what is happening in the Rule 40 context.

The subcommittee also decided not to address in Rule 40 whether the magistrate judge in the issuing district may modify a detention or release order entered by a magistrate judge in the arresting district. Judge Harvey noted that this was an issue of some confusion in the case law, and that he had encountered this in his own district as well. A defendant who appears in front of Judge Harvey has been detained by a magistrate judge in another district, or has been released on conditions. In both situations, Judge Harvey said that one side or the other is appealing to him to change those conditions or seek the release order or detention order issued by the magistrate judge in the arresting district. There is some confusion as to what a magistrate judge in one district can do to change the order of a magistrate judge in another district. But this issue extends beyond the Rule 40 context. Indeed, it comes up far more often under Rule 5 or Rule 32.1, which deals with warrants arising from a violation of a supervised release. For this reason, the subcommittee concluded it was beyond the scope of what was being considered under Rule 40.

Judge Harvey concluded by saying that this is where things currently stand with respect to Rule 40. The subcommittee still wants to examine whether Rule 40 should also include procedures for what happens when there is a warrant for a pre-trial release violation and the initial proceeding is held in the charging district, because there is no description anywhere in the rules as to what the magistrate judge is supposed to do in that scenario. Rules 5 and 32.1 have provisions for both out-of-district hearings and in-district hearings on warrants, but the subcommittee has not yet decided whether Rule 40 should mirror those provisions. Judge Harvey highlighted one other section of Rule 40 that the subcommittee had not yet addressed: paragraph 40(a)(2), which covers arrests for failure to appear and arrests for failure to appear on a subpoena. This provision has been in the rule for many years, and the subcommittee needs further clarification about how these proceedings may differ. Judge Harvey requested the Committee's feedback with respect to the decisions made so far.

Professor King chimed in to explain the broader picture for members who were new to this project. Rule 5 spells out in some detail what to do at a first appearance on a warrant. Rule 32.1 spells out in some detail what happens when a person is arrested for violating supervised release. But Rule 40 is a very cryptic and unhelpful description of what is supposed to happen when a person is arrested for other types of violations—including pre-trial release—in a different district. It refers to the entire Bail Reform Act, which includes provisions about violation of release pending sentencing and pending appeal, and also includes a provision on material witnesses. Rule 40 also covers failure to appear as required by a subpoena. Professor King explained that the subcommittee thought it would pick the easiest and most frequent issues first—violations of pre-trial release and possibly release pending sentencing and appeal—and put off what to do about warrants for witnesses. At some point, though, the subcommittee will be coming back to the Committee for feedback on that issue. Professor King concluded by saying that it would be very helpful to hear from Committee members, particularly if they disagree with any of the subcommittee's tentative decisions.

A member said that the memo and presentation were very helpful. She noted that the memo says that the subcommittee thought videoconferencing with the judge in the charging district would not work because it does not reflect current practice and because there are serious logistical hurdles. She asked what these logistical hurdles are. In her view, there would be some advantages of having the teleconferencing with the charging district rather than with the arresting district. The member acknowledged that there would have to be counsel in both places for this to work, but she was curious as to what logistical hurdles the subcommittee saw.

Judge Harvey responded that these are essentially warrant returns—there are all different kinds of warrants, and these, warrants for violation of conditions of release, are just one subset of those. Traditionally and across the nation, it is magistrate judges who hear those warrant returns. Judge Harvey explained that there are logistical reasons for this. People are arrested every day and there are prompt presentment concerns with respect to any warrant; someone cannot be housed in jail for days on end. Magistrate judges are set up across the country. There is always a magistrate judge on duty, and one of the primary things that they do is to have initial proceedings on the warrant. This means that district judges do not handle warrants. The whole system is set up to have a duty magistrate judge, a duty AUSA, and a duty public defender; these people deal with all of the new arrests and all of the bench warrant returns on a given day.

Judge Harvey explained that the proposal was that it would be better for the charging district to address and deal with its own warrants, over Zoom. This is not the practice, and Judge Harvey thought it would be difficult to change the system in a way such that the district judge signing the warrant would have to handle these initial proceedings.

A member agreed and offered several additional thoughts. First, it would cause delay to attempt to set up videoconferencing from the charging district. Second, there is no ability to broadcast proceedings. People need to be in a courtroom. The current rules allow for a defendant who consents to participate by video, but the proceeding itself is being held in a courthouse, in a courtroom that is open to the public. Now that the CARES Act has sunsetted, there is no ability under the Criminal Rules to have remote proceedings. Moreover, this particular rule applies to individuals on pre-trial release in several different scenarios. If the person has absconded and is picked up randomly someplace else in the country, they are going to be brought before a judge in

that district where the proceeding will happen. The other type of example is that the person has been residing in this other district—where they work, participate in whatever treatment programs they are in, and are supervised by a probation office. From the member's perspective, it made sense that this appearance is held in that arresting district even though there are some logistical difficulties (for example, the individual's attorney is not going to be present but will instead talk to the lawyer who will be at the hearing). There is an urgency to this first proceeding in the arresting district. The member said that it is valuable to have the hearing to address the conditions of release and whatever incident occurred right there, without the defendant needing to be detained and transported back to the charging district in the first instance. Of course, there will eventually be a proceeding in the charging district, and for that proceeding, it is possible that the defendant could participate by video while everyone else is in the courtroom.

A member asked Judge Harvey if he had experienced situations where counsel in another district appears remotely on behalf of a defendant who has been arrested in his district as the arresting district. In other words, the charging district's counsel appears by video to contest either the arrest or the violation. The member recognized that practicality may require that a local public defender or local counsel step in, but he said that by the time someone is on pretrial release, their counsel has a better sense for who the defendant is and would be better suited to advocate for them than would stand-in counsel.

Judge Harvey responded that he has had multiple cases where stand-in counsel had indicated that they had spoken to counsel, and counsel was comfortable with them moving forward and making certain representations. He could not recall a time when he had permitted counsel to appear remotely or even received a request to delay a hearing so that counsel could appear. The more typical situation is that the federal public defender calls counsel, gets their input, and then makes the arguments and representations with the understanding and agreement of the defendant. Judge Harvey asked whether the other member's experience was different.

A defense member answered that she had, on occasion, had an attorney on the phone in the courtroom, but the federal public defender was always present and handling the representation. Sometimes the attorney will have information that the judge wants to hear directly from them. But usually, the federal public defender has talked to counsel and is able to convey what was told to them by the attorney. The member recalled one instance where the client asked for a delay so that their lawyer could come to the district. The court accommodated that, and there was no question that a defendant can request that. But the person was held in custody.

Judge Harvey said that typically, the defendant wants to have a quick hearing. There is a federal public defender present who knows the magistrate judge, knows the district, and has spoken to the defendant's counsel. So most times defendants want to move forward rather than delay.

A member asked whether there was any discussion of supervised release violations being added to the list. He has had a number of instances where people on supervised release disappear and get arrested—typically in Indiana, because it is very close to Chicago. He assumes that those people went before a magistrate judge in that district. But it is not infrequent that he has people on supervised release lose touch with their probation officer and end up arrested somewhere else.

Judge Harvey responded that Rule 32.1 handles supervised release. Rule 40 addresses only violations of pre-trial release or release pending sentencing or appeal. It used to be that everything was under Rule 40, but at some point, the portion of the rule dealing with supervised release was moved to Rule 32.1. Judge Harvey said that whoever drafted Rule 32.1 did a great job of putting together the list of what the magistrate judge should do when that occurs—when there is a warrant in front of them involving a supervised release violation. Rule 40 does not have that list, so the Rule 40 Subcommittee had been trying to create it. Judge Harvey acknowledged that far more cases arise with respect to supervised release violations than Rule 40 scenarios.

Judge Mosman suggested that the Committee go through the list of things that the subcommittee wants to put into Rule 40 and see whether the Committee agrees or disagrees with each item.

Professor Beale said that these are enumerated on pages 164 to 168 of the agenda book. She said that this was not the last opportunity for someone to speak up about these issues, but asked that Committee members please speak now if they have any thoughts.

A member said that one of the questions in the memo was, why the rule excludes the "adjacent district," which is in Rules 5 and 32.1. She asked whether the subcommittee was planning to include that.

Judge Harvey answered that yes, it was. This was not on the list, but he thought the subcommittee had previously decided that this was something that would be included.

Judge Harvey asked for any other thoughts or concerns, and there were none. Judge Mosman thanked Judge Harvey and the Rule 40 Subcommittee for their work.

Electronic Filing and Service by Self-Represented Litigants

Judge Mosman asked Judge Burgess to address the next issue. He expressed his gratitude for Judge Burgess's sacrifice in attending the meeting from Alaska, noting that he had spoken with Judge Burgess by phone this morning and afterward realized that it was 3:30 a.m. in Anchorage.

Judge Burgess began by thanking the Pro Se Filing Subcommittee and Professor Struve for their work on this project. He said that over the course of the summer, Professor Struve had submitted questions to the subcommittee. The subcommittee met in September and discussed the questions at length. Judge Burgess said that he would like to highlight these questions and the input from the subcommittee, and invite any further suggestions, comments, or questions that Committee members may have.

Judge Burgess said that Professor Struve's memo, on page 170 of the agenda book, broke down the topic into three sections. The first section is the most recent developments. The second section contains the eight questions he referenced. The third section is the rejection of a filing for non-compliance with rules governing electronic filing. He invited Professor Struve to provide a brief highlight of new developments since the last meeting.

Professor Struve thanked Judge Burgess, the subcommittee, Judge Harvey, Ms. Lonchena, and the reporters for all of their work on this project. She explained that there are two basic pieces of the project, one of which concerns service. This was inspired by the practice in the Southern District of New York, which eliminates the requirement of separate paper service of documents, after the initial start of the case, on a litigant that is receiving the notice of case activities through the court's electronic filing system. The second piece is to increase access by presumptively permitting self-represented litigants to file electronically, unless there is an affirmative court provision barring them from doing so, and to provide that a local rule or other local provision that bars them from doing so must include reasonable exceptions, or allow for the use of another electronic method for filing documents and receiving electronic notices in the case. These are reflected in the proposed amendments to Criminal Rule 49(a) and (b), which start on page 219 of the agenda book.

Professor Struve said that this Committee is the latest committee to consider the progress of the project at the fall committee meetings. As of last spring, it was unclear whether the Bankruptcy Rules Committee would participate in this project at all, because they had identified particular concerns, specific to the bankruptcy context, which led them to be skeptical about these changes for the Bankruptcy Rules in particular. Their subcommittee discussed further over the summer, and at the fall meeting, based on the subcommittee's recommendation, the Bankruptcy Rules Committee decided to participate in the project. However, Professor Struve cautioned that this participation was specifically for purposes of publication. The package of proposals for the Standing Committee will include changes for the Bankruptcy Rules as well as for the Criminal, Civil, and Appellate Rules. But the Bankruptcy Rules Committee is keeping open the option to reconsider its participation in light of public comment. Professor Struve also noted that the general idea of limiting this project to only the Criminal, Civil, and Appellate Rules was presented to the Standing Committee last January, and the committee was not fazed by the idea that there could be inconsistency with the Bankruptcy Rules.

The Appellate and Civil Rules Committees also discussed the project at their fall meetings. Professor Struve reported that the Appellate Rules Committee focused on the question raised in part three of her memo, whether to expand the project to encompass a review of the clerk-refusal and local-form rules. The Appellate Rules Committee felt that this was an important topic, but was decidedly against expanding the project to include it. On the other hand, the Civil Rules Committee as a whole did not voice a view on this, but the clerk liaison voiced some interest in seeing whether further work might be done on the topic.

Judge Burgess then turned to the eight questions posed by Professor Struve. The first, on page 174 of the agenda book, was whether to delete item (ii) from proposed Criminal Rule 49(b)(2)(B). This item discusses local provisions for prohibiting access. One comment was that a simpler approach would be to add some additional language to item (iii) and eliminate item (ii). Judge Burgess reported that the subcommittee's conclusion was not to eliminate (ii) to make sure that there are reasonable alternatives for self-represented litigants if a court bars their use of electronic filing, either by local rule or by order of a particular judge in a case. In other words, the court can bar the use of electronic filing, but it must make sure that there are some reasonable alternatives available to self-represented litigants.

Professor Struve agreed, saying that this connects with the second topic that will be addressed. She said that she is very sympathetic to the goal of simplifying the rule. However, she suggested that there is the value that Judge Burgess mentioned to retaining the text of the rule provision in item (ii), so the subcommittee tried to explain in an expanded committee note how items (ii) and (iii) interrelate.

Professor Beale noted that there is obvious overlap between (ii) and (iii), and framed the question as whether to take out of (ii) whatever is distinctive and put it in (iii), or move whatever is in (iii) into (ii). She said she believed Professor Struve's position is that if a court has a local provision prohibiting access, then there are two choices, the reasonable exceptions or another electronic option. Putting this in item (ii) highlights the alternative electronic option and tells the courts, "You have to do something, and here are your two options for doing it." Otherwise, you have reasonable exceptions and conditions and restrictions on access, which all feel very similar.

Professor Struve said that this was exactly right. One of the important things that the subcommittee was trying to do was to work within the existing landscape. Courts increasing access have adopted two distinctive approaches. The first allows self-represented litigants into CM/ECF. The other is to provide a different accommodation, such as a portal to upload documents or accepting filings by email. This second option varies by court and what each court's technology team can support. It was very important to a number of participants in the process that the subcommittee listen to what is working on the ground, and allow clerks' offices as many options as possible to adjust to what the rule is nudging them towards. In Professor Struve's view, this was the added value of spelling that out in (ii). She agreed that items (ii) and (iii) are complementary, because the goal is to rule out complete bars on electronic filing. Either the court must give reasonable access to CM/ECF or it needs to build something else, as many courts are doing.

Judge Burgess highlighted that one of the alternative options was to eliminate (ii) and add language to (iii) that says, "but must not bar access by all self-represented litigants without reasonable exception." This was considered by the subcommittee, but in the end, the consensus was to leave (ii) as-is.

Judge Burgess then turned to the second question posed by Professor Struve's memo, which was whether to use reasonable exceptions or reasonable conditions and restrictions regarding self-represented e-filing access. The view of the subcommittee was to presumptively permit self-represented litigants to file electronically, unless prohibited by local order or local rules, and to provide that local rules or general court orders that bar self-represented litigants from using the court's electronic filing system must include reasonable exceptions or must permit the use of other electronic filing or receiving notice of case activity. He welcomed any questions, comments, or thoughts from Committee members.

Judge Mosman said that his understanding was that the goal was to tell courts that they cannot have a local rule that prohibits access. But the way this is expressed in the rule is that it says, "If you do have a local rule that prohibits access, you have to have reasonable exceptions." Judge Mosman said that this seemed to him as though the Committee is trying to walk through the "back door" instead of the "front door." He asked why the language did not say that courts cannot prohibit reasonable access.

Professor Struve said that if the Committee broadened the language to say that courts cannot bar access by self-represented litigants, then problems may arise with, for example, incarcerated individuals who may not have internet access. The working group and the clerk participants in particular were very concerned about a provision that says courts cannot bar self-represented litigants access (other than as to an individual litigant, which is a different provision). The key point, Professor Struve said, is to flip the presumption and say that courts definitely need to avoid a local provision that generally bars self-represented litigants from access. However, the court can impose conditions, such as saying that litigants cannot be incarcerated, or litigants must take a course before using the electronic filing system.

Professor Struve conceded that the goal of the project is somewhat modest, but said that there are some districts across the country that flatly ban all self-represented litigants from electronic access, without any exceptions. One of the primary goals of this provision is to take that option off the table, but to be maximally flexible as to what those courts must then do to comply with the new rule. The idea is to accommodate whichever method courts feel will work best for them.

Judge Mosman said that it seemed as though the Committee was saying that the court needs to have reasonable exceptions, but after reading item (iii) and the committee note, the reader learns that "reasonable exceptions" means "reasonable access." Why does the rule not just say then that the court must provide reasonable access?

Professor Struve said that this was a superb line of questioning. Her view was that the Committee wants to preserve some degree of articulation of the different ways that this reasonable access can happen. By breaking it out into (ii) and (iii), the rule sets out the baseline principle that the court must either include reasonable exceptions to the bar or allow alternative methods. Then, in item (iii), the rule says that you can impose reasonable conditions and restrictions, and those are the mirror image of reasonable access. She added that another reason to break the rule out in this way was because it gives clerk representatives something to point to when a self-represented litigant says, "Why did you put this limit on my access?" The clerks can say, "Well, because it's a reasonable condition or restriction on the access." Nonetheless, Professor Struve said that the working group was open to ways of redrafting that would preserve all of those concepts.

A member said that as the subcommittee was discussing the issue in September, there had recently been some nationwide ECF concerns. He thought there was probably concern amongst the judiciary and clerks that unfettered, unrestricted access to the electronic court filing system would open it up to potential abuse. Having the limitation in place as the standard, then finding exceptions to it, would still allow reasonable access with some barrier to entry. Courts can find a way to provide self-represented litigants with access beyond that. The member said that the second issue discussed by the subcommittee was that self-represented litigants would not have the benefit of an attorney to advise them against filing documents of a certain nature. Allowing the court to set what reasonable access would be would prevent potential unintended abuse of the ECF system—for example, if someone wants to file a proffer that someone gave, and they are not familiar with the rules of redaction or the sensitivity of the documents that they would be filing. That might put other defendants and other parties at risk.

The member said that he had not thought of the issue in the way that Judge Mosman had framed it, but he thought that what Judge Mosman said made sense. He wanted to offer up some of the subcommittee's thoughts to provide context behind the discussions that were not necessarily reflected in the agenda book materials.

Judge Burgess then offered two follow-up thoughts. First, the subcommittee did discuss the idea that some courts may never provide any reasonable access because they do not want self-represented litigants filing. That was a concern. Second, the approach seemed to Judge Burgess to be an incremental approach. The Committee could start with this, and see if down the road, Judge Mosman's suggestion could be adopted.

The clerk representative explained that from the clerk's perspective, part of the approach to keeping both (ii) and (iii) was a practical approach for self-represented litigants to (ii)—prohibiting access and providing an alternative method. Some courts may not want litigants filing directly into ECF, but may create a portal, where documents can be filed into the portal first then filed in ECF by the clerk's office. She also said that much of the drafting was done to make it easier for self-represented litigants to understand. An incremental approach between (ii) and (iii), as well as some of the wording in the committee note and the extra wording used elsewhere in the rule, were all designed to be easier for self-represented litigants to understand. It also gave the clerk's office something to point to if self-represented litigants had questions about the court's approach.

Professor King said that she had been an advocate of eliminating item (ii) and adding more words in item (iii). But if the consensus was that, for the reasons mentioned, the Committee should spell everything out, she thought that it might make more sense to make the language in item (ii) part of item (iii). This would tell courts that they can set reasonable conditions and restrictions, then provide an example of what is not reasonable and what courts must do if they have this kind of a restriction. Professor King's view was that the rule may be easier to understand if, instead of first saying, "If courts prohibit access, here is what they must do," and then saying that a court may set reasonable conditions, the rule says this in the reverse order. That is, state the general rule first, then the specific application, which is what the Style book recommends. Because (ii) is a specific application of the general rule in (iii), the Committee should swap the order of these two, or put one inside the other.

A member asked whether the language in item (iii) stating that a court may set reasonable conditions meant not only by local rule, but also on a case-by-case basis. Judge Burgess answered that this was referring to an order of a judge. The member thanked him, saying she just wanted to clarify this because (ii) is just referring to local rules.

Professor Struve agreed with that and thanked Professor King for her drafting suggestion. Professor Struve expressed a concern, however, that item (ii) is not an example or an implementation of (iii). She did not think that allowing self-represented litigants to file in another electronic portal or file by email is a reasonable condition or restriction on access to the e-filing system itself. Rather, it is an alternative system if courts want to bar self-represented litigants from the CM/ECF system entirely. Professor Struve agreed that these provisions were implementing similar concepts, but did not think that item (ii) was a subset of a condition on access to the CM/ECF filing system unless one were to say that it is reasonable to bar self-

represented litigants entirely because the court is giving them a different option. This argument did not seem intuitive to her.

Judge Mosman stated that the concerns he had about "back door" exceptions would be eliminated by switching the order of (ii) and (iii), because the rule would talk about the "front door" first, then the "back door."

Judge Mosman announced that the Committee would be taking a lunch break and would reconvene in thirty minutes.

After the lunch break, Judge Burgess announced that he had learned that Professor Struve was recently the recipient of the Harvey Levin Award for Teaching Excellence at the University of Pennsylvania. This award is given by the graduating class of the law school. Judge Mosman congratulated Professor Struve. She thanked him for his comments and said the award illustrated how very kind her students were.

Judge Mosman asked whether anyone had additional comments. Ms. Ralston said that she understood that item (i) states what the party should do. Because items (ii) and (iii) state what the court should do, she asked whether the working group had considered putting the provisions about the court first. This would not be switching the order of (ii) and (iii), but rather putting any provisions addressing what the court must do first, then stating that the party must, or may, or can use the system that has been established in item (i).

Professor Struve responded that Ms. Ralston was correct that item (i) talks about what the party can do, and (ii) and (iii) talk about what the court can do. Items (ii) and (iii) apply only if the court decides to do something. She explained that the initial provision is the default rule that would operate if a court did not say anything about electronic filing. Although (i) is phrased in terms of what the party may do, this will force the court to do something. It follows logically from that that if the court decides to do the thing referenced in item (i)—that is, adopt a "court order or local rule [that] prohibits the party from doing so"—then items (ii) and (iii) come into play.

Professor Struve further stated that the working group was hoping to bring these proposals back to the Committee in the spring for potential publication approval. She expressed an eagerness to work further on items (ii) and (iii) given the guidance received by the Committee today. She understood that the Committee wished to meld (ii) and (iii) together. It would say that the court must provide reasonable access to the court's electronic filing system. Then, as a specific application of that, completely barring access would not be reasonable access unless it provided an alternative means of electronic access, like a portal or filing by email. Professor Struve cautioned that this would mean that the text of the rule itself would tell fifteen or so district courts that completely bar access and do not provide alternative means of electronic submission that they are being unreasonable. The current text of the proposed draft does not say whether that would be reasonable or unreasonable. It simply says that the court needs to provide reasonable access or permit the use of another method.

Judge Burgess asked whether anyone else had comments, questions, or suggestions on this topic. No one did. Judge Burgess then turned to the next question proposed by Professor

Struve's memo, which was whether to retain the caveat regarding learning of non-receipt. In other words, if a filer learns that the recipient has not received a document or a filing, then it is deemed not filed. The subcommittee felt that this language should be retained. There were no comments, questions, or suggestions in response to this question.

Judge Burgess then turned to the next question proposed by Professor Struve's memo, which was whether to use the provision addressing service of papers that are not filed. He noted that this could be useful guidance to self-represented litigants, but said that the subcommittee had suggested seeking input from district clerks. No one from the Committee voiced any comments, questions, or suggestions, so Judge Burgess stated that the subcommittee would seek input from clerks on this issue.

Next, Judge Burgess turned to question five, which was whether to use "notice of case activity" rather than "notice of filing." The subcommittee's recommendation was to use "notice of case activity," and no Committee member voiced concerns or questions about that approach.

Judge Burgess turned to the next question—whether to use the term "unrepresented" or "self-represented" litigant. The subcommittee had preferred the term "self-represented," but was aware of complications this term could cause due to the use of "unrepresented" in existing rules. He asked whether Judge Dever had any concerns about an inconsistency with these terms. Judge Dever said that he did not. No Committee member voiced concerns or questions about using "self-represented."

The next question was whether to use the term "person" or "party" in the new rule. Judge Burgess said that the subcommittee had decided to use "party" to avoid any suggestion that a person who is not a participant in the case can file simply because they are a "person."

A member asked whether the rule could refer to a "party or nonparty," as Rule 49.1 does. She explained that she was thinking of potentially self-represented nonparties who might file a motion to quash a subpoena.

Professor Struve responded that the consensus from the clerks was that it was very important to say "party. Otherwise, the rule could allow someone entirely uninvolved in a case to say that the rule allows them to use the CM/ECF system. This becomes an issue now because the proposed rule flips the default presumption to say that this person can have electronic access unless the court bars it. Professor Struve opined that Rule 49.1(a) was different because there, the goal is to protect the information of people whether they are a party or not.

Professor Struve noted that a victim with rights under the Crime Victims' Rights Act (CVRA) may wish to participate in the proceeding. The proposed amendment would leave that person in the same position that they are in now. If the local district court wants to give them electronic access, it can, but the rule would not force the court to do so. Professor Struve asked the Committee members how often someone who is asserting rights under the CVRA does so themselves, as opposed to having the U.S. Attorney speaking for them.

Ms. Ralston said that this is an area where the DOJ feels strongly that using "party" would be particularly useful, for several reasons. First, the DOJ wants to continue to make clear that there is no rule of intervention in criminal cases. Second, the DOJ cares very deeply about

the Rule 49.1 privacy protections and other protected information, such as cooperators' identities. The DOJ feels very comfortable that attorneys are following all of the necessary rules and are not filing anything on the public docket that should not be made public. However, self-represented litigants may inadvertently file something that should not be public. Clerks are not necessarily reviewing all documents for compliances with the applicable rules, but when filings are served on the government, that allows the DOJ the opportunity to make whatever motion is appropriate to deal with that. Finally, the DOJ's experience has been that statements or information pertaining to victims is almost always filed by the attorney for the government and is properly redacted or sealed. When a victim is acting on their own—perhaps because there is a dispute about whether they are a victim—those people are represented. Ms. Ralston said that the practitioners surveyed had never seen a situation where a self-represented victim or would-be victim was filing, so she did not think that this was an issue. As for people hoping to quash a subpoena, or forfeiture claimants, the status quo deals appropriately with this small number of filers.

Ms. Ralston also pointed out that the title of proposed subparagraph (b)(2)(A) refers to a "person" represented by counsel in the title, but the text refers to a "party." She suggested that this could be clearer. She said that this also presents another question about whether the rules should be different for someone who is represented by counsel, if the concerns about misuse of the system do not apply to attorneys. If a media organization seeking a release of documents, or someone seeking to quash a subpoena, is represented by counsel, perhaps they should be able to file their motion electronically, because the lawyer is subject to all of the rules that lawyers are subject to. The DOJ does not have a position on what the outcome of that discussion should be, but thinks that it is different when people are represented by attorneys.

Judge Mosman added that in his experience, more than ninety percent of motions to quash subpoenas are filed by corporations.

A member agreed, saying that motions to quash were filed almost exclusively by corporations represented by large law firms.

Professor Struve thanked Ms. Ralston for pointing out the disjuncture between represented "person" and "party," and said that she would make sure that those accord. She pointed out that the current language in that provision, in what would become subparagraph (b)(2)(A), is taken from the existing rule. The existing rule says that a party represented by an attorney must file electronically. Therefore, the subcommittee will carry forward the existing rule unless the Committee says that it would like to do something different with respect to represented parties.

Professor King said that she had been reading criminal cases involving applications for writs, which are often filed by third parties, people who are not parties. She is also aware that nonparties like media representatives and subpoena recipients file in criminal cases. She has seen individuals filing motions to quash, and she assumed that these people are represented. She acknowledged that everyone has said that it is rare that nonparties want to file things, and if they do, they are almost always represented by counsel. If they are not represented, the status quo addresses how they file. Professor King asked, however, whether anything in the amended rule

speaks to what a self-represented nonparty has to do. How should a self-represented nonparty know what to do?

Professor Struve answered that they will not know what to do based on the rule. The Committee could add language that says that a self-represented nonparty must file non-electronically, unless allowed to file electronically by court order or local rule. If the national rule does not say this, these people would need to look at their court's local provisions or call the clerk's office.

Professor King said that her concern is that by staying silent on this issue, the rule would be interpreted to bar self-represented nonparties from electronic filing entirely. Perhaps that is what the Committee would like the rule to say.

Professor Struve said that the rule would simply not address the issue, and the Committee could put in the committee note that the rule does not speak to this topic. But if the Committee feels that by saying nothing, this would remove the court's ability to designate at a local level how it would like to receive filings by self-represented nonparties, the Committee could put this into the text of the rule.

Judge Burgess asked whether Judge Mosman would like the subcommittee to take a look at this issue, in addition to the work it would be doing with items (ii) and (iii). Judge Mosman said that he would.

Judge Burgess then turned to the next question posed by Professor Struve's memo, which was whether to use explicit wording as it pertains to self-represented litigants. The subcommittee felt that there was value in doing so, as this makes it easier for self-represented litigants to understand the rule. No one expressed any comments, questions, or concerns with this approach.

Judge Burgess then turned to the last question in the memo, which was whether to exclude the prison mailbox rules from the scope of the project. The subcommittee had decided to do so. No one expressed any questions, comments, or concerns about this approach.

Judge Burgess said that the final issue he wanted to discuss was raised in section three of Professor Struve's memo. He asked her to give a brief summary of the issue for the Committee.

Professor Struve explained that Professor Hartnett had raised this issue over the summer. His question was, given that the project currently encompasses a change to the architecture of how self-represented litigants will be allowed to file, does that implicate, to some extent, the question of what happens when they do it incorrectly? There are two existing rules that speak to (or could be read to speak to) that question. Rule 49(b)(5) is an example of what Professor Struve calls the "clerk refusal" rules. It says that the clerk must not refuse to file a paper just because it is not in the form prescribed by these rules or a local rule or practice. There are cognates of this in the other Federal Rules. The other (potentially) implicated rule is Rule 57(a)(2), which says that a local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement. This was adopted in 1995 along with other cognate provisions in the other sets of rules.

Professor Struve said that there are three different kinds of scenarios where these rules may come into play. First, someone may try to file using a method that the court does not permit, under circumstances where the result is that the filing never enters the physical building of the court or the court's electronic system. There is a circuit split between the Second, Sixth, Seventh, and Ninth Circuits, which have applied these rules to protect a filer who uses the non-permitted method, and the D.C. Circuit, which has held to the contrary. Second, someone may file using a permitted method, but submits the filing in a non-permitted format. There is some limited case law on this scenario. Third, someone may be allowed to use CM/ECF but does not do it successfully. They may manage to file something, but it contains technical errors. In the Second, Sixth, and Seventh Circuits, this is accepted despite the technical errors. However, there are cases where someone files a notice of appeal, proceeds to the payment screen, but does not progress to the final screen for CM/ECF submission. Three circuits have said that this person did not validly submit the notice of appeal.

Professor Struve said that the basic point was that these rules have been invoked by people who run into problems in their interactions with electronic filing systems, and the circuits disagree as to what the rules say about that. In an ideal world, where the committees had unlimited time and scope for this particular project, it could be very interesting and beneficial to expand the project to encompass the question of whether these rules are the right fit for the circumstances of misadventures in electronic filing (and if not, where there is a better way to do it).

Professor Struve recounted that a participant in one of the prior committee's discussions suggested creating a rule that is modeled on the U.S. Supreme Court's rule, which says that if there is a problem with a filing, the clerk's office will inform the filer and provide a grace period to fix the problem. If the filer fixes it, it is deemed filed as of the date of the original attempt. This proposal was discussed at the Appellate Rules Committee meeting, and there was resistance to trying to create a provision like this for use in the lower courts. The committee's view was that this practice may work for the U.S. Supreme Court, but the complications that could ensure in the lower courts would be considerable. Additionally, this facet of the project, while meritorious and worthy, would expand beyond the scope of what the project was trying to do with self-represented litigants. Professor Struve conceded that this was correct, because once one changes the architecture of how the rules deal with the failures of filing, it affects not only self-represented litigants but also everyone else. Her foray into the case law amply illustrated that lawyers and their assistants have challenges with compliance with all of these systems as well.

Professor Struve reported that the Appellate Rules Committee firmly decided not to expand its version of the self-represented litigant project to encompass this topic. As for the Civil Rules Committee, it did not reach a view on this, but its very wise and experienced clerk representative said that this was an intriguing idea and he would like to work on drafting something. The Bankruptcy Rules Committee was not presented with this question because it was at the antecedent step of deciding whether it wanted to participate in this project at all.

Judge Mosman said that he did not think the project should be expanded to include the clerk refusal issue. The project was already a significant advance, and he did not want this additional issue to slow down that effort.

Judge Burgess confirmed that the subcommittee would look into two issues: the interplay between items (ii) and (iii), and the party/nonparty issue. The subcommittee will report back at the April meeting.

Attorney Admissions

Judge Mosman asked Professor Struve to present the next issue on the agenda.

Professor Struve noted, for new members, that there are materials in the agenda book for the Standing Committee's January 2025 meeting that encapsulate where this project has been so far. This is a project for which Professor Struve and Professor Andrew Bradt are co-reporters. There is an inter-committee subcommittee, on which Judge Birotte is a member and Ms. Recker previously served as a member.

Professor Struve explained that this project originated in the observation by Dean Alan Morrison and others that the district courts take varying approaches to attorney admission, with the more restrictive districts requiring that an applicant for admission to the district court bar be admitted to practice in the courts of the state in which the relevant district courts sits. There are four such states that have no reciprocity with other states, such that a lawyer wishing to be admitted to practice in a district court in those states has to take the state bar exam in order to gain admission to the district court. This prompted their initial submission in 2023, which prompted the formation by Judge Bates of the subcommittee. Dean Morrison had three different proposals, but consideration in the project has narrowed them to two. The first is a national rule that would provide that admission to any federal district court entitles a lawyer to practice before any other federal district court. The other is a national rule that would bar district courts from requiring, as a condition of admission to that district court's bar, that the applicant reside in or be a member of the bar of the state in which the district court is located.

Professor Struve reported that the subcommittee has been in information-gathering mode. It has looked at the practice in the courts of appeals, where Appellate Rule 46 takes a relatively permissive approach to the question. The subcommittee has also been exploring the link between these topics and requirements that lawyers practicing before a district court associate with local counsel. It has also thought about ways in which this might link to questions of unauthorized practice of law. The subcommittee is now gathering information concerning the practices of districts that take varying approaches to this topic.

Judge Mosman asked whether there was any input on this subject, and there was none. He noted that he thinks he may be the only district judge in the country who has been reversed by the court of appeals for denying someone admission to the district court bar.

Rule 15

Judge Mosman noted that there are now three categories of new suggestions, and asked Professor Beale to explain the first category.

Professor Beale explained that, as continuing members may remember, two suggestions to amend Rule 15 to provide for a limited number of depositions under some circumstances were placed on the study agenda at the last meeting. The memo on page 271 of the agenda book

describes six more letters supporting the idea of adding depositions to Rule 15. The Rules Committee Staff also informed her that an additional eight suggestions supporting the same idea came in over the last seven days. Professor Beale said that she would only be describing those which arrived in time for inclusion in the agenda book. She would not describe the first two, which kicked off this process, and would not try to speed-read the most recent letters. She said that she was aware of them, however, and they will be digested moving forward.

Professor Beale highlighted some elements of particular new proposals that might be of special interest. In general, the proposals supported the initial Kelly Acosta proposal. They discussed the need for depositions in order to even the playing field, to provide very important and useful information to improve the fairness of the criminal justice process. Several of them drew on a state practice permitting depositions.

Suggestion 25-CR-H, from John Cline, like the others, has a general description of the need for depositions and many of the same themes as in the first two suggestions. In Professor Beale's view, what was particularly new and noteworthy about Mr. Cline's suggestion was his emphasis on New Mexico's current procedural rules. New Mexico provides for something called a "statement," which is an unsworn interview often taken very informally. There is typically no court reporter and no procedural fanfare. Someone turns on their phone; it is very inexpensive and efficient. New Mexico also has formal depositions by either agreement of the parties or by order of the court upon a showing that it is necessary to prevent injustices. The New Mexico Rules provide for protective orders as needed. Mr. Cline described his very positive experiences with the New Mexico rules.

Suggestion 25-CR-J is from John F. Murphy, the Executive Director of the Federal Defender Program in the Northern District of Illinois. Professor Beale said that Mr. Murphy set the stage by talking about the recurring problems that arise under the current rules, where the defense simply does not have the necessary information. He said that it was like flying blindly, and he also described the many reasons why voluntary interviews with witnesses are unsuccessful from the defense point of view. He argued that limited pre-trial depositions with court supervision would address those problems, allowing defense counsel to be able to make informed decisions. He highlighted several features of the Kelly Acosta proposal that he considered to be critically important. First, except for exceptional cases, it is limited to five depositions. Mr. Murphy thought that that number would minimize costs and necessarily require the defense to focus on the most important witnesses necessary to be able to advise their clients and make decisions about whether to plead guilty. He also stressed the proposal's safeguards to protect witnesses and promote judicial efficiency, including the requirement of the defense motion and a judicial finding that the depositions would be in the interest of justice. He drew attention to the success of depositions in other states, and he noted that Florida's depositions were found by a blue-ribbon study committee to be a necessary and valuable part of the criminal justice system to ensure fairness and equal administration of justice.

Suggestion 25-CR-K is from David Oscar Marks. Professor Beale said that he wrote in strong support of amending the rule as a matter of basic fairness. He talked about a tilt in favor of the government and the need to make life-altering decisions. He focused on the Florida depositions that Mr. Murphy said were affirmed by a blue ribbon committee, and noted that the depositions in Florida make the process more fair and efficient. They shorten trials and lead to

appropriate resolutions without trials, because parties are not blind-sided. Mr. Marks also asserted that Florida has ample tools to address concerns about witness safety or intimidation.

Next, Professor Beale described Suggestion 25-CR-L, submitted by Jonathan Blunt. This suggestion described his experiences in Indiana, one of the several states that now allow pretrial depositions in criminal cases. Noting he had been an AUSA and now a defense lawyer, he described the positive effects of pretrial depositions, the search for truth, and practical advantages for the prosecution. Professor Beale highlighted one distinctive aspect of Mr. Blunt's letter, which is that the defendant obtains valuable face-to-face confrontation and gives the defendant a sense that they had a fair opportunity to evaluate all of the evidence. This reminded Professor Beale of the research by Tom Tyler and others that people accept the results in the criminal justice process much better if they feel they have been treated fairly. Mr. Blunt asked the Committee to think about that element. He also said that he and his colleagues were unaware of any abuse or misuse of the Indiana process.

Suggestion 25-CR-M came from a group of lawyers at Hecker Fink. Trish Anderson was the first signatory, but 16 other partners at this law firm also signed the letter. It struck Professor Beale as unusual that they all put their own names on the letter. She stated that the letter was distinctive in describing a particular representation in a parallel civil and criminal securities fraud case in the Southern District of New York. Because the defendant had not yet been extradited, the civil case went forward first. The criminal prosecutors had not yet been able to obtain the defendant's presence, so full civil discovery was completed. The letter describes how different that discovery was from what would have been available under Rule 16, even though what the defendant was facing in the criminal case was a more serious potential sanction, incarceration. The letter described the importance of the information that they received and how beneficial that was to the correct and proper advice they were able to give in resolution of the criminal case. Hecker Fink then added its view that this is not just important in civil fraud cases, which may be very complex and include a great deal of information. Depositions would be at least equally as important in drug, gun, and immigration prosecutions. Moreover, in those cases, witnesses are often law enforcement agents and officers for whom concerns that might arise about witness intimidation or threats to witnesses are actually not likely to be significant.

Professor Beale turned to the last letter, 25-CR-O, from Lawrence S. Mosberg. He also wrote in support of the Kelly Acosta proposal. He was speaking from his position not only as co-chair of the White Collar Investigations section of his law firm, but also as a director of a fellowship in public interest and constitutional law. Like the other letters do, he wrote about the need to level the playing field and described the importance, for example, of being able to shed light on possible *Brady* violations. He urged that post-COVID, practitioners have the experience and technology to take and defend depositions, many of which could, should, and would take place remotely. He said that depositions would be especially helpful at this time, when an increasing number of cases involve witnesses from around the world who may be unable to travel to the United States.

A defense member stated that she had not had a chance to survey her colleagues on this topic at the spring meeting, but had done so since that time. She stated that she had also been in touch with Mr. Kelly and Mr. Acosta, whom she believed had joined the meeting. In addition to the letters referenced by Professor Beale, the member stated that she had 21 letters signed by 59

lawyers—some from very prominent large law firms, some from boutique law firms, and some from solo practitioners, from all across the country. Three federal defenders submitted letters in support, in addition to the letter from Mr. Murphy in the agenda book. The defense member represented that the federal defender community as a whole would support moving forward with the proposal to amend Rule 15. If now is not the time, she hoped that in the spring, the Committee would consider forming a subcommittee. She thought that there are many issues worth vetting in this proposal.

Anecdotally, the member shared that she has talked to a handful of relatively new defenders who previously worked in states that allow depositions. In New York, they do not, so when she hires someone new, the biggest surprise to them is sentencing. Her colleagues who had depositions in state court express surprise at the limitation here in federal court. The member also echoed the important ideals of such an amendment, which include leveling the playing field and ensuring that *Brady* is secure. She said that her colleagues have stressed to her that this resolves cases, because the parties are in a room, talking about the case, talking to a particular witness, and suddenly things start to move. The defense member emphasized that the defender community strongly supports moving forward with Rule 15 amendments.

Judge Harvey asked for an explanation of what it means when a suggestion is put off for study.

Judge Mosman said that he would answer that question and also let the Committee know what he, as chair, intended to do. He had had a chance to read the new submissions, and they are also in the same vein of what Professor Beale had already described. He stated that several of them hit an issue that is not hit quite as hard in the earlier submissions, which is that this is a resolution to *Brady* problems. Taken altogether, Judge Mosman thought that these submissions raised a very serious and important issue. He said that he had spoken with two of the newest Committee members, and they had both expressed an interest in that project.

A new member asked what the process was, because—to state the obvious—this would be a sea change. It is intended to be a sea change. She expressed no doubt of the thoroughness of this Committee and the work it does, but noted that the Committee would want very robust comment from the prosecutorial community as well, particularly in states that have such a rule already, and from DOJ. She asked how the process would work, because this is a heavy-duty issue, to say the least.

Judge Mosman agreed that this is an important issue. He said that this is also what he would call a "gigantic" issue, because it would require a hard look at the experience in the various states, and they are not uniform. They have very significant differences in their approaches. It raises, in Judge Mosman's mind, questions about what impact it will have on speedy trial protections. Judge Mosman thought it would be important to get at the nature of the problem the Committee is trying to solve here. Are these proposals trying to solve a *Brady* problem? Is the Committee doing this because, as the defense member suggested, it helps resolve cases better? There are many reasons. Of those reasons, which ones do depositions solve and which ones do they not solve?

Judge Mosman said that this is a very big project, and in his view as chair, the Committee is in the middle of some other very big projects. The Committee has Rule 17, that is nowhere near the finish line yet, although it is on the right path. He noted that Professor Beale had previously used the metaphor of an anaconda swallowing an antelope to describe where the Committee is right now. He said he wanted to wait to let that process work itself out. Judge Mosman did not think that the Committee had the bandwidth, right now, to undertake this project. He stated, candidly, that he thought this project would happen. Judge Mosman reiterated that he took this project very seriously and that he wanted to devote the right effort to it at the right time. He therefore placed it on the study agenda, which allows the Committee to do several things. First, it allows the Committee to keep hearing from more people, so, for example, the defense member's most recent submissions would be added. The Committee would read them. It would also do other things to gain more information, so that if and when the day came that the Committee established a subcommittee, they would have something to start with instead of starting with a blank slate.

Rule 53

For the next agenda item, Professor Beale directed the Committee to page 306 of the agenda book. She explained that Judge Edmond Chang has asked the Committee to consider two different possible amendments to Rule 53, which is a blanket prohibition on broadcasting from the courtroom. The first would make explicit that the "broadcasting" bar, as that term is used in Rule 53, would cover transmission to single individuals, not just to the general public. His second suggestion is to consider good-cause exceptions that would do one or possibly two things: (1) create a good-cause exception that would permit broadcasting to "victims," as defined in the CVRA, and possibly remote participation by victims; and (2) create a good-cause exception permitting broadcasting to, and remote participation by, third-party custodians at bail hearings.

Professor Beale explained, as background, that in 2024, the Rule 53 Subcommittee did a thorough review of the rule and considered multiple suggestions for changes to the rule to allow some broader availability of broadcasting. In the fall of 2024, the Committee accepted the subcommittee's recommendation that there be no change to Rule 53. Subsequently, in addition to the Chang proposal, Congress recently passed the Lockerbie Victims Access Act, providing for remote access under very limited circumstances for the victims. The agenda book provides the decision in *Al-Marimi*, in the District Court for the District of Columbia, where the court looked at what it would need to do to provide this access to victims, and came up with a long list of requirements and procedures.

Professor Beale said that the question is whether to make any change in what has been done with Rule 53.

Judge Mosman said that there is not a hard-and-fast written rule that if the Committee takes a hard look at a rule, it will not take another hard look one year later. However, he noted that it is "pretty close" to an unwritten rule that the Committee does not do that. Judge Mosman noted that Judge Chang's suggestion is much narrower in scope that what the Committee looked at previously, and said that he would not be opposed to undertaking a much narrower look at Rule 53 at some future point. But he was unwilling to devote resources right now, in the middle of a busy

time for the Committee, to a rule that the Committee just looked at a very short time ago. Judge Mosman tabled this suggestion as well.

Rule 11

The Committee next turned to Professor King to discuss the Rule 11 suggestion. This proposal came from Judge Patricia Barksdale, who suggested deleting language from Rule 11(b)(1)(M). As the Committee knows, Rule 11(b)(1) includes all of the advice that a judge must give a defendant who is pleading guilty or *nolo contendere*. The language at issue here is the advice that, "in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." The proposal is to take out the language "possible departures under the Sentencing Guidelines," because the Sentencing Commission has eliminated the departures in the Guidelines in the wake of *Booker*.

The question for the Committee was what to do with this proposal. Professor King noted that this issue is possibly simple enough that no subcommittee would be needed. If there is a consensus that the right thing to do is to eliminate those five words from Rule 11(b)(1)(M), then she and Professor Beale could draft an amended rule and prepare a memo for the spring meeting. At that point, the Committee would vote on the proposal. Professor King asked whether the Committee members thought this issue was that simple, or if there was something more to look at.

Judge Mosman said that, from a sentencing judge's perspective, the Committee was talking about what a judge is obligated to tell a defendant under Rule 11 in order to get a plea. Judges are obligated to tell defendants about possible departures under the Guidelines as part of what was a three-step analysis. There are still departures, but there is no longer three-step analysis. Now it is just two steps. So the proposal would be that judges no longer tell defendants at Rule 11 colloquy about possible departures under the Sentencing Guidelines since that is no longer a formalized step in sentencing someone. It would eliminate that language from Rule 11.

Ms. Ralston thought this was a good suggestion, as DOJ had pointed out to the Sentencing Commission in its letter over the summer, saying that it might consider suggesting this change to the Criminal Rules Committee. The Sentencing Commission declined. But the representative stated that DOJ thought that it might be useful to have a subcommittee meet, even if just once, to discuss this issue. She thought that this would be a little more complicated than just deleting a couple of words, because the substantial assistance provision remains in the Guidelines and is not part of the Guidelines range. She did not know whether that needed to be dealt with. Although it is not part of the statute nor part of the Guidelines range, it is still relevant. She also said that Rule 32(h) should also be considered, because it contains a similar reference to notice about departures that the Supreme Court struck down fifteen years ago. In her view, if the Committee is going to change Rule 11, it should also consider amending Rule 32(h). It may be useful to have some people on the Committee talk about this issue a little more in depth once or twice.

A member said that she had been thinking along the same lines, but not that a subcommittee is necessarily needed (although she expressed her willingness to participate in

one). She stated that the first line, which referred to properly calculating the Guidelines range, should encompass everything that is in the Guidelines now. She suggested that that make its way into the committee note, that it is in the three-step process, but the fact is there is still the 5(k)(1) departure, which is part of that Guideline calculation. She thought it would be pretty easy to address this. She had not looked at the other provision, but agreed that it had been struck by the Supreme Court. If the language was there, though, she stated that this is definitely not the law.

Judge Mosman said that he takes these suggestions seriously. He would do one of two things: either he would create a subcommittee, or he would ask the DOJ representative and the defense member to talk with Professor King about the issue.

Closing Comments

Judge Mosman noted that there is no report from the FJC, as they were unable to attend the meeting. Professor Beale nonetheless noted that there is a written report in the agenda book.

Judge Dever expressed his gratitude for Professor Struve, saying that she is not only an award-winning teacher, but has also done extraordinary work in the Rules process since 2006. She first worked as a reporter to the Appellate Rules Committee for almost a decade, then was an associate reporter to the Standing Committee, and has been the reporter to the Standing Committee since 2019. Because of a whole host of commitments, Professor Struve will cease being the reporter in mid-February of 2006, although she will still be a consultant to the Standing Committee. Judge Dever said that everyone present has been the beneficiaries of her extraordinary scholarship, disposition, and effort on behalf of the Rules process, in addition to her many other obligations that she had. Judge Dever said that Professor Edward Hartnett, who is currently the reporter for the Appellate Rules Committee, will become the reporter to the Standing Committee, and Professor Steven Sachs at Harvard Law School will become the reporter for the Appellate Rules Committee in mid-February.

Judge Dever wished to publicly thank Professor Struve for her extraordinary work on behalf of the Rules process, which thankfully will continue in just a slightly different capacity. Judge Mosman echoed these comments.

Professor Struve thanked Judge Dever and Judge Mosman for their comments. She also thanked the Committee, saying that it has been a pleasure and a privilege to learned from everyone (particularly Professor Beale and Professor King, as her long-time reporter colleagues).

Judge Mosman informed the Committee that the next meting will take place on April 29, 2026, in Washington, D.C. He thanked everyone for their very helpful participation and adjourned the meeting.

TAB 18

MEMORANDUM

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

FROM: Hon. Jesse M. Furman, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: December 1, 2025

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") conducted a meeting on Microsoft Teams on November 5, 2025. The Committee reviewed several possible amendments, including amendments currently out for public comment on machine-generated evidence (Rule 707) and impeachment with convictions (Rule 609).

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Rule 707 on Machine Learning

For the past three years, the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by Artificial Intelligence will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: 1) machine-generated evidence that would be subject to Rule 702 if propounded by a human expert; and 2) audiovisual evidence that is not authentic because it is a difficult-to-detect deepfake.

At its Spring meeting, the Standing Committee approved for release for public comment a proposal to add a new Rule 707 to the Federal Rules of Evidence to address the former concern. The rule is intended to regulate machine-generated evidence when it is offered without any expert testimony, when the output, if coming from a human, would be considered expert testimony:

Rule 707. Machine-Generated Evidence

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702. This rule does not apply to the output of simple scientific instruments.

The Committee Note explains that "if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability) Rule 702 is not obviously applicable" because no expert witness is testifying. In such situations, the Committee believes it is critical that the machine output must satisfy the standards that would be applicable if a human expert were to testify.

At its November 5 meeting, the Committee discussed a number of proposals — from commentators and from members of the Committee — for amending either the text or the Committee Note to Rule 707. The Committee made a number of tentative decisions:

- A provision should be added to the Committee Note to emphasize a distinction between human experts and machines at trial and to endorse an instruction analogous to that which a court may give in connection with expert testimony. The tentatively approved language is as follows:

  Under this rule, machine-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may

> well be a difference at trial when machine-generated evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable — or unreliable — simply because it was produced by a machine.

- The Committee Note should be fortified to emphasize that Rule 707 does not provide a way for the proponent to evade the requirements of Rule 702 by presenting machine-based evidence instead of an expert. The tentatively approved language, added to existing language in the Committee Note, is as follows:

> This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert. <u>It is anticipated that these reliability standards will be difficult to meet — and sometimes impossible to meet — without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony.</u>

- The Committee Note should provide some guidance on what is to be done if it is not possible to explain how the machine reached its conclusion. The tentatively approved language is as follows:

> A machine learning process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based testimony, the proponent is required to show how the methodology leads to a reliable conclusion. *See* Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of machine learning output may overcome the problem of inexplicability by showing how the machine got

> trained and establishing, for example through validation studies, that the process leads to a low rate of error.

- The Committee Note should explain the relationship between Rule 707 and Rule 901(b)(9), which provides a ground for authenticating machine-generated evidence. The Note should emphasize that the problem raised by machine-learning is one of reliability, not authenticity. The tentatively approved language is as follows:

> All questions regarding the reliability of machine-generated evidence are now regulated under Rules 702 and 707. Rule 901(b)(9)'s requirement that the process or system "produces an accurate result" is subsumed by the reliability requirements that must be established by a preponderance of the evidence under Rule 702 or 707. Given the fact that the threshold requirement for authenticity is significantly lower than that for reliability, it follows that if machine-generated evidence is qualified under Rule 707 or 702, then it automatically satisfies the lesser requirements of Rule 901(b)(9). In contrast, satisfying Rule 901(b)(9) does not suffice for admissibility.

In addition, the Committee tentatively rejected the following proposed changes:

- Changing "machine-generated" to "computer-generated" throughout the rule. This change was tentatively determined to be no improvement for interpreting the scope of the rule. Some machines are not computerized, but there is no information in such machines that raises a Rule 702-type concern.

- A change in the text and note that would focus on "machine learning" as opposed to "machine-generated" evidence. The Committee was concerned that the term "machine learning" is dynamic. Additionally, the output of sophisticated computer systems should be regulated by Rule 707 even if it is not the product of machine learning.

- A proposal to include expert testimony on the basis of machine learning within the coverage of Rule 707. This proposal was rejected because (as reflected in the draft Committee Note) expert testimony on the basis of machine learning is already covered by Rule 702, and it would only be confusing to shift that coverage to Rule 707.

- A proposal to change the last sentence of the rule, currently providing that the rule does not cover the output of "simple scientific instruments" to the following: "This rule does not apply when the type of machine that generated the evidence is accessible to, and the extent of its reliability is known to, the general public." This language was rejected because the Committee did not think it appropriate to cede the coverage of the rule to the general public, and also because a standard dependent on public opinion is too amorphous to be useful.
- A proposal to eliminate Rule 901(b)(9), which provides that machine-generated evidence can be admitted over an authenticity objection if the proponent provides evidence sufficient to support a finding that the process or system "produces an accurate result." The

Committee concluded, as noted above, that Rule 707 renders Rule 901(b)(9) irrelevant in the cases to which Rule 707 applies. And the Committee also concluded that Rule 901(b)(9) is an odd fit for an authenticity rule, because it is really trying to guarantee reliability as opposed to authenticity. But that said, the Committee concluded that eliminating Rule 901(b)(9) was not advisable at this time, as the impact of elimination on machine-generated evidence not covered by Rule 707 would need further consideration.

The Committee will review and process the public comment on Rule 707 and will provide a final report at the June 2026 Standing Committee meeting.

B. Admissibility of Deepfakes

When a video or audio is a deepfake and is offered for trial, it presents a challenge to the authenticity requirements under Rules 901 and 902 of the Evidence Rules. The existing standard of authenticity is a mild one. The proponent must establish that a reasonable person could believe that the item is what the proponent says it is. The Committee is of the view that this "sufficient to support a finding" standard may not be stringent enough to regulate deepfakes because they can be extremely hard to detect, and they can be generated easily and inexpensively by any member of the public. That said, the Committee is also of the view that a deepfake enquiry should not be made necessary simply by the opponent's bare assertion that the proffered item is a deepfake.

Over the course of three years, the Committee has worked on a proposal that would provide a stricter standard of authenticity to purported deepfakes, whenever the proponent can actually provide information that the item may in fact be fake. The Committee has tentatively approved a proposal that would add a new Rule 901(c) to the Rule of Evidence. The proposed text and Committee Note provide as follows:

Rule 901(c) Potentially Fabricated Evidence Created By Artificial Intelligence.

(1) ***Showing Required Before an Inquiry into Fabrication.*** A party challenging the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence must present evidence sufficient to support a finding of such fabrication to warrant an inquiry by the court.

(2) ***Showing Required by the Proponent.*** If the opponent meets the requirement of (1), the item of evidence will be admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

(3) ***Applicability.*** This rule applies to items offered under either Rule 901 or 902.

Committee Note

This new subdivision is intended to set forth guidance and standards when a party-opponent alleges that a proffered item of evidence is a "deepfake" --- i.e., that it has been prepared

by the use of generative artificial intelligence so that it is not an authentic item — not what the proponent says it is.

The term "artificial intelligence" can have several meanings. It is not a static term. In this rule, "artificial intelligence" means software used to perform tasks or produce output previously thought to require human intelligence. "Generative artificial intelligence" is used in this rule to cover technology that can produce various types of content, including text, imagery, audio and synthetic data. Generative artificial intelligence creates new content in response to a wide variety of user inputs.

The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent must set forth enough information for a reasonable person to find that the item has been fabricated in whole or part by the use of generative artificial intelligence. Thus, a broad claim of "deepfake" is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated by generative artificial intelligence. Second, if the opponent has shown enough to merit the inquiry, the proponent must then show to the court that the item is more likely than not authentic. While that Rule 104(a) standard is higher than what is ordinarily required for a showing of authenticity, it is justified because any member of the public now has the capacity to make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect by jurors. It is therefore reasonable for the court to require a showing, by a preponderance of the evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

If the opponent satisfies its burden of going forward, the proponent will not establish authenticity simply by satisfying one of the illustrations of authenticity set forth in Rule 901(b). Rule 901(b) sets forth illustrations that "establish" the authenticity requirement — but that is in the context of the lower standard of proof set forth in Rule 901(a). So for example, testimony of a witness with knowledge (Rule 901(b)(1)) will establish evidence sufficient to support a finding that the item is authentic under Rule 901(a). But that knowledge will not necessarily prove more likely than not that the item is authentic, especially given the opponent's submission showing some likelihood of a deepfake. Requiring a stronger showing of authenticity is justified for the very reason that a person with "knowledge" may well think that the item is genuine when in fact it is a deepfake.

This amendment covers specific proffered items as to which the opponent has presented a sufficient foundation of fabrication. It does not directly address another possible consequence — that because of the background risk of deepfakes, juries might be led to think that no evidence can be trusted. This phenomenon has been called the "liar's dividend." But rules are in place to combat claims that "you can't believe anything you see." To the extent evidence of such a broad point is proffered, it is subject to exclusion under Rule 403 for being distracting and confusing in the absence of the necessary foundation. *See United States v. Peterson,* 945 F.3d 144, 157 (4th Cir. 2019) (finding that a demonstration of how easy it is to fake a text was properly excluded under Rule 403; the proposed demonstration "was an attempt to prejudice the jury — an attempt to confuse it by throwing the veracity of text message screenshots writ large into doubt, without any effort to identify a connection to Peterson's case."). And to the extent the point is expressed by lawyers in argument, it is subject to the court's inherent authority to regulate lawyer argument that

is made without foundation in the evidence. *See Lee v. City of Troy*, 339 F.R.D. 346, 367-68 (N.D.N.Y. 2021) (reversing the judgment for the defendant after defense counsel argued, without any basis, that the plaintiff's videos were "manufactured" and stating that "attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial.").

The requirements of the rule apply to authentication under either Rule 901 or 902. The risk of deepfakes extends to many of the items designated in Rule 902 as self-authenticating — most obviously newspapers and publications.

Courts are encouraged to exercise their discretion over case management to establish notice requirements in order to limit the possibility that a battle of experts on admissibility of evidence under the rule will occur during a trial. The rule does not set forth notice requirements because the deepfake issue is likely to arise in different contexts, and the appropriate notice may well depend on whether it is a civil or criminal case and on whether the item of evidence is offered for impeachment.

The above proposal is being held in abeyance because the Committee is not yet convinced that deepfakes are being frequently offered into evidence in federal court; nor is it yet convinced that, if so offered, a court could not handle the deepfake challenge under the existing authenticity rules. At the meeting, the Committee was made aware of some anecdotal evidence that deepfake arguments were being made in some courts, but not reported in published opinions. The Committee resolved to ask the FJC to prepare a survey of courts to assess the extent to which deepfake arguments are being made and whether the Evidence Rules should be amended to address them. If deepfake arguments are being made, and if the Committee determines that courts can be assisted by applying the more stringent requirements of Rule 901(c), then the Committee will decide whether to recommend that the rule be sent out for public comment.

Finally, the Committee rejected an alternative proposal, submitted by two professors, for treating deepfakes. That proposal would provide that a court "may" rather than "must" find sufficient evidence of authenticity upon satisfaction of one of the illustrations in Rule 901(b). Purportedly, this would give the court discretion to exclude an item on deepfake grounds even though a witness with personal knowledge testified that the item is authentic. The Committee found that granting such discretion to the trial judge, without any structure or standard for determination, could lead to inconsistent results as well as confusion. It also concluded that the structure provided by proposed Rule 901(c) was preferable.

C. Rule 609

At its last meeting, the Standing Committee unanimously approved for public comment a modest proposed amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant-witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to

substantially outweigh its prejudicial effect. The amendment addresses the fact that many courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. The proposal leaves intact Rule 609(a)(2), which governs admissibility of convictions involving dishonesty or false statement.

In addition, the amendment includes a slight change to Rule 609(b), which covers older convictions. The rule is triggered when a conviction is over ten years old, but the current rule does not specify the end date of the ten-year period. The absence of any guidance in the rule has led courts to apply varying dates. The proposed amendment would end the ten-year period on the date that the trial begins. The Committee believes that the date of trial is the date that is most easily administered, the least amenable to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial.

To date, the Committee has received only two public comments on the proposed changes to Rule 609(b). The Committee will monitor and process the comments it receives and hopes to propose an amendment for final approval at the next Standing Committee meeting.

D. Rule 902(1) and Indian Tribes

The Committee is considering the important question of whether federally recognized Indian tribes should be added to Rule 902(1), which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1) does not list Indian Tribes, the government must use another route to authenticate proof of a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been a few cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception, which allows authentication through a certificate under Rule 902(11).

At the Fall 2025 meeting, the Committee invited and considered submissions by several Indian Tribes, other interested parties, as well as the Department of Justice, all supporting the inclusion of Indian Tribes under Rule 902(1). And it considered submissions by the Federal Defender opposing the change. The basic argument for amending Rule 902(1) is that it would recognize the dignity and sovereignty of Indian Tribes and Nations and would avoid the burden and expense of complying with other authenticity requirements. The Federal Defender's position is that allowing authenticity through a Tribal certificate will deprive Indian defendants of the opportunity to challenge authenticity as it is currently provided by Rule 902(11). The Defenders also argue that recordkeeping among Indian Tribes may not be uniform.

The Committee has sent requests for comment on the proposed change to Rule 902(1) to all federally recognized Indian Tribes and Nations. The Committee will review the returns and discuss at its next meeting whether to propose an amendment to Rule 902(1).

E. Rule 803(3)

At its November 5 meeting, the Committee considered possible changes to Rule 803(3), which provides that statements made by a declarant describing how the declarant is currently feeling — emotionally or physically — can be offered over a hearsay objection to prove that the declarant was actually feeling that way at the time of the statement. Two problems have arisen.

The more important problem arises most often when a criminal defendant makes a statement expressing innocence at a time when the statement appears suspect — but nonetheless on its face it is an expression of the defendant's state of mind. Many courts have held that to be admissible, a statement of a then-existing state of mind must be "spontaneous" or "trustworthy under the circumstances." These requirements are, however, not in the text of the rule itself and so have been rejected by other courts.

An amendment would rectify a split in the circuits, which is an important reason for amending a rule. In discussion, the Committee appeared to approve in principle an amendment that would emphasize that the rule means what it says: It does not impose an additional admissibility requirement of spontaneousness or trustworthiness. The rationale for rejecting these additional requirements is that the jury can give proper weight to a state of mind statement that is made under suspicious circumstances, and there is no justification for judicial oversight.

But Committee members were not convinced that an amendment was necessary. They sought more information on whether the spontaneity/trustworthiness requirement actually created a problem for defendants in criminal cases. If the defendant could find other ways to admit the statement, or if it made no forensic sense for the defendant to offer such a statement, then an amendment to Rule 803(3) would not be necessary. The Committee requested further information on the consequences of a possible change and will consider that information at the next meeting.

The second problem under Rule 803(3) is the possibility that a proponent will seek to use a statement of a declarant's state of mind to prove the conduct of another person: for example, using Joe's statement "I am going to do a drug deal with Jim" to prove that *Jim* did the drug deal with Joe. Most courts have correctly held that the state of mind exception does not extend to proving the conduct of a non-declarant because the rule is based on the presumption that the declarant has unique awareness of her *own* state of mind. Nothing in the state of mind exception justifies an assumption that the declarant has any special knowledge of the state of mind and conduct of another person.

The rule does not specifically provide that it is inapplicable to proof of the state of mind and conduct of a non-declarant. The Committee determined that an amendment prohibiting such use might be useful, but there was not a sufficient reason to propose such an amendment as an independent exception to Rule 803(3), as the courts are not really divided on the subject. The Committee concluded, however, that if it resolves to treat the problem of "spontaneity," it would then consider an amendment prohibiting the use of the state of mind exception to prove the state of mind and conduct of a non-declarant.

F. The Right to Confrontation and the Supreme Court's Decision in *Smith v. Arizona*

In 2024, the Supreme Court decided *Smith v. Arizona,* in which a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst — and the other analyst's findings were disclosed to the jury. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. At its Fall 2025 meeting, the Committee considered whether the Court's confrontation analysis counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay, but strictly limits the disclosure of that hearsay to the jury. The Committee determined that, to the extent that the Court was concerned about *disclosure* of the report as the basis of the expert's testimony, there would be little to no impact on Federal practice because Rule 703 already limits disclosure of inadmissible hearsay as the basis of the expert's opinion. But if the Court's decision is construed to apply also to the expert's *reliance* on the lab report, it could have a substantial effect on Federal practice because Rule 703 specifically allows the expert to rely on inadmissible hearsay if it is the kind of information on which other experts in the field would reasonably rely.

The Academic Consultant to the Committee conducted a survey of lower court cases and presented her research, indicating that courts are split on whether *Smith* bars reliance on the testimonial report. The majority rule appears to be that *Smith* does in fact prohibit reliance by the expert on the testimonial hearsay. The Committee resolved to consider an amendment to Rule 703 that would provide a "red flag" indicating the possibility that Rule 703 might raise a constitutional concern in a criminal case. Such an amendment might look like this:

Rule 703. Bases of an Expert's Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. <u>An expert may not rely upon or disclose inadmissible facts or data if doing so would violate the constitutional rights of a defendant in a criminal case.</u>

The value of such a red flag is to alert lawyers to a possible constitutional concern of which they may not otherwise be aware. The Committee observed that Rule 412 includes similar "red flag" language — which is to say, there is precedent for adding such language to a rule that is uniquely susceptible to unconstitutional application.

The Committee also agreed to consider a similar red flag for Rule 606(b), which bars testimony from jurors about jury deliberations when a party is seeking to attack the verdict. The Supreme Court in *Pena-Rodriguez v. Colorado,* 580 U.S. 206 (2017), held that the defendant's Sixth Amendment right to fair trial was violated when Rule 606(b) was applied to exclude racially

biased statements of jurors. Thus, the same kind of cautionary language may be an appropriate addition to Rule 606(b).

G. Rule 104

Rule 104(a) and (b) set forth the applicable standards of proof to be employed by the court in determining preliminary questions on which admissibility of evidence is based. Rule 104(a) covers most questions of admissibility, while Rule 104(b) provides that if the relevance of one piece of evidence is conditioned on a fact, the burden of proof on that conditional fact is evidence sufficient to support a finding.

There are at least two problems with these provisions. As to Rule 104(a), the standard of proof has been declared by the Supreme Court to be a preponderance of the evidence. But that standard is nowhere to be found in the text of the rule. After discussion at the Fall meeting, the Committee has agreed to consider an amendment to Rule 104(a) that would read as follows:

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege. Unless otherwise provided in these rules, the proponent must establish the existence of a preliminary fact by a preponderance of the evidence.

As to Rule 104(b), the problem is that the concept of conditional relevance has no real meaning. There is no reason for special treatment of facts that are conditional to relevance because in almost *all* cases, the relevance of a particular fact is dependent on a showing of other facts and so relevance is always "conditional." Moreover, if the existence of one fact is conditionally relevant upon another, the result is that each fact is "conditionally relevant" to the other. And it is anomalous that there is a standard of proof for conditional relevance but not for questions of logical relevance (such as, is it relevant to a charge of armed bank robbery that the defendant possessed a gun ten years ago).

At the Fall meeting, the Reporter prepared a proposed change to Rule 104(b) that would eliminate the concept of conditional relevance and would treat all questions of relevance under the same standard of proof:

(b) Relevance ~~That Depends on a Fact~~. ~~When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist~~. Evidence is relevant only if the proponent introduces proof sufficient to support a finding that a fact of consequence is more or less probable than it would be without the evidence. The court may admit the proposed evidence on the condition that the proof be introduced later.

Committee discussion indicated that this proposal was an improvement and more straightforward than the current relevance distinctions that serve no purpose. But the Committee sought more information on whether courts and litigants were having problems with the current Rule 104(b). The Reporter will be conducting research on whether the current rule is problematic in practice, and the Committee will revisit the possibility of amendments to Rule 104(a) and (b) at its next meeting.

H. Rule 803(6) and Incorporated Records

The Committee invited some private practitioners to provide suggestions for changes to the Evidence Rules as applied in civil cases. One practitioner suggested that the Committee consider addressing whether the admissibility of an "incorporated business record" should be made explicit in Rule 803(6). The fact situation is fairly common. The records are proffered by one entity, but they were originally created by another. Examples include legal bills in the records of the client; toll receipts in the business records of the entity that paid the receipts; and situations where one company merges with another. In each of these cases, the foundation witness is from the company where the records currently are.

Rule 803(6) does not specifically treat the question of incorporated records. But the Committee has determined that the case law allows treatment of such records as business records of the receiving entity, so long as it is shown that the records have indeed been incorporated into the receiving entity's business records and that the receiving entity relies upon these records within the ordinary course of regularly conducted activity. Because this case law is uniform and straightforward, the Committee decided not to proceed at this time with an amendment addressing the admissibility of incorporated records.

I. Rule 901 and Production as Proof of Authenticity

The same practitioner also suggested that the Committee consider amending Rule 901 to provide that when a party produces a document in discovery, that production is a concession of authenticity that satisfies the standards of Rule 901. The Committee determined that it would be problematic to have a bright-line rule that production in discovery automatically constitutes a sufficient showing of authenticity. It would be a stretch to conclude that a party producing millions of documents in discovery is conceding the genuineness of each one. Moreover, it is possible that a document is produced not because it is genuine, but rather because it is fake. Or it is possible that the production was inadvertent and so unlikely to be a concession of authenticity. A more nuanced approach to production and its relationship to authenticity is required.

Courts have appropriately found that production in discovery is *some* evidence of authenticity. The question for the Committee was whether those holdings should be codified. One possibility considered by the Committee would be to add to Rule 901(b)(4), as follows:

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement [of authenticity]:

* * *

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances, including whether the item was produced in response to a valid discovery request [in civil cases].

The Committee considered this proposal and determined that it would not be necessary to proceed with it at this time. Courts already do consider production to be relevant, so codification about this narrow point does not appear warranted at this time. Moreover, an amendment would need to address the difficult question of whether production would be a concession of authenticity in criminal cases.

IV. Minutes of the Fall 2025 Meeting

The draft of the minutes of the Committee's Fall 2025 meeting is attached to this report. These minutes have not yet been approved by the Committee.

**Rule 707 as issued for public comment,
showing changes to the Committee Note tentatively agreed to
by the Evidence Rules Committee**

Rule 707. Machine-Generated Evidence

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments.

Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on such a method, that method—and the expert's reliance on it—will be scrutinized under Rule 702. But if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly [or through a lay witness], where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to the requirements of Rule 702(a)-(d).

The rule applies when machine-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of machine-generated information.

If the machine output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.

This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when

a party chooses to proffer machine-generated evidence instead of a live expert. It is anticipated that these reliability standards will be difficult to meet — and sometimes impossible to meet — without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.

A machine learning process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based testimony, the proponent is required to show how the methodology leads to a reliable conclusion. *See* Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of machine learning output may overcome the problem of inexplicability by showing how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. Moreover, the rule does not apply when the court can take judicial notice that the machine output is reliable. *See* Rule 201.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

All questions regarding the reliability of machine-generated evidence are now regulated under Rules 702 and 707. Rule 901(b)(9)'s requirement that the process or system "produces an accurate result" is subsumed by the reliability requirements that must be established by a preponderance of the evidence under Rule 702 or 707. Given the fact that the threshold requirement for authenticity is significantly lower than that for reliability, it follows that if machine-generated

evidence is qualified under Rule 707 or 702, then it automatically satisfies the lesser requirements of Rule 901(b)(9). In contrast, satisfying Rule 901(b)(9) does not suffice for admissibility.

Under this rule, machine-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when machine-generated evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable — or unreliable — simply because it was produced by a machine.

Because Rule 707 applies the requirements of admitting expert testimony under Rule 702 to machine-generated output, the notice principles that would be applicable to expert opinions and reports of examinations and tests should be applied to output offered under this rule.

TAB 19

Advisory Committee on Evidence Rules
Minutes of the Meeting of November 5, 2025

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 5, 2025 via Microsoft Teams due to the ongoing shutdown of the federal government. The Chair, Reporter, and staff conducted the meeting from New York, where several members of the Committee were also present.

The following members of the Committee were present:

Hon. Jesse Furman, Chair (in New York)
Hon. Valerie E. Caproni (in New York)
Hon. Mark S. Massa (via Teams)
Hon. Edmund A. Sargus, Jr. (via Teams)
John S. Siffert, Esq. (in New York)
James P. Cooney III, Esq. (via Teams)
Rene L. Valladares, Esq., Federal Public Defender (via Teams)
Elizabeth J. Shapiro, Esq., Department of Justice (in New York)
Hon. Richard J. Sullivan (via Teams)

The following individuals also participated in support of the Committee:

Reporter and Consultant
Professor Daniel J. Capra, Reporter to the Committee (in New York)
Professor Liesa L. Richter, Academic Consultant to the Committee (via Teams)

Rules Committee Staff
Carolyn Dubay, Esq., Chief Counsel, Rules Committee Staff (in New York)
Bridget M. Healy, Esq., Counsel, Rules Committee (via Teams)
Shelly Cox, Management Analyst, Rules Committee (via Teams)
Sarah Sraders, Esq., Rules Law Clerk (in New York)

Other Rules Committee Attendees (via Teams)
Hon. James C. Dever III, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Jami Johnson, Assistant Federal Public Defender
Andrea Roth, Professor of Law and Barry Tarlow Chancellor's Chair in Criminal Justice, UC Berkeley

The following members of the public also observed the meeting (via Teams):

Allison A. Bruff, Esq.
Alex Dahl, LCJ
Anna Roberts, Professor, Brooklyn Law School

Ben Tietjen, CJRI, UC Berkeley Law
Chloé M. Chetta, Esq.
Christian Fannin, Esq.
Crystal Denise Williams
Daniel Steen, Esq., LCJ
Dr. Sarah Brown-Schmidt
Hank Fellows, Esq.
Will Holstrom, Esq., AAJ
James Ulwick, Esq.
John Hawkinson
Jack Karp
Katherine E. Charonko, Esq.
Kaiya Lyons, AAJ
John G. McCarthy, Federal Bar Association
Suzanne Monyak, Bloomberg Law
Nate Raymond, Reuters
Samuel Tope-Ojo
Eileen Scallen, Professor, UCLA Law
Julia Simon-Kerr, Evangeline Starr Professor of Law, University of Connecticut Law
Susan Steinman, AAJ
Susan Ehrmann Provenzano, Professor of Law, Georgia State University Law
Jessica Tyler
William P. Keane, ACTL

I. Welcome and Opening Business

Judge Furman opened the meeting by welcoming the Committee and other participants and attendees via Microsoft Teams. He noted that the meeting was held via Teams (with a few Committee members, the Reporter, and Carolyn Dubay of the Rules Committee Staff together in New York) due to the ongoing shutdown of the federal government. He thanked Ms. Dubay and the Rules Committee Staff for working during the furlough and without pay for their perseverance in supporting the ongoing work of the Advisory Committee during a time of hardship.

Judge Furman offered a warm welcome to Judge Dever, the new Chair of the Standing Committee, and to Sarah Sraders, the new Rules Law Clerk. Judge Furman also welcomed members of the press and public and thanked them for their interest in the work of the Advisory Committee.

Judge Furman explained that 2025 marks the 50th anniversary of the Federal Rules of Evidence. He noted that this is a significant milestone and that there are plans to add content regarding the history of the Rules to the uscourts.gov website upon the reopening of the federal government to celebrate the important anniversary. He further noted that the Rules Committee Staff had graciously arranged for small tokens of appreciation to be sent to members of the Evidence Advisory Committee, past and present, as well as to other important contributors to the rulemaking process to show appreciation for their important work.

Next, Judge Furman asked if there was a motion to approve the minutes of the Committee's Spring 2025 meeting. A motion was made and seconded and the minutes were unanimously approved.

Judge Furman offered a brief report on the June 2025 meeting of the Standing Committee. First, he explained that the Standing Committee had given final approval to advance the proposed amendment to FRE 801(d)(1)(A) that governs the substantive admissibility of a testifying witness's prior inconsistent statements. He noted that the Standing Committee had also approved the publication of proposed FRE 707, as well as the proposed amendment to FRE 609 for public comment. Judge Furman explained that the Standing Committee had offered some minor feedback on both proposals and that the Advisory Committee would wait until its Spring 2026 meeting when it reviews public comment on both proposed amendments to consider and incorporate Standing Committee input.

Carolyn Dubay next updated the Committee on Federal Rules of Evidence currently in the Rules Enabling Act pipeline, informing the Committee that the proposed amendment to FRE 801(d)(1)(A) had been sent to the Supreme Court on October 16, 2025 and that the proposed amendment would be transmitted to Congress if approved by the Supreme Court this spring. She informed the Committee that the Rule 609 and 707 proposals had both been published for notice and comment, that the comment period will close on February 16, 2026, and that the Rules Committee staff is sharing responses with the Chair and Reporter for consideration at the Spring 2026 meeting. She further noted that public hearings on both proposals were scheduled for January 2026 and that some commenters had already requested to testify. The Chair noted that the public hearings are scheduled for January 15 and January 29, 2026.

Sarah Sraders then offered an update on pending legislation that could impact the Federal Rules of Evidence, directing the Committee's attention to page 98 of the agenda materials. She briefly described the Rape Shield Enhancement Act of 2025 and the Restoring Artistic Protection Act of 2025, explaining that no action had been taken on either bill since they were introduced.

II. Proposed New Rule 707

The Chair opened the discussion of proposed new Rule 707 governing the admissibility of "machine-generated evidence." He reiterated that the proposed provision had been released for public comment and that the comment period would close on February 16, 2026. He informed the Committee that no comments had yet been received and expressed his hope that the Committee would receive some helpful commentary given the importance of the issues raised by the proposed rule. Because the comment period remains open, the Chair explained that the Committee would take no action on the proposal until the Spring 2026 meeting. Still, he noted that the Reporter had offered some updates in the agenda materials on the status of machine learning and machine-generated evidence and that the Reporter and Professor Andrea Roth, who was invited to attend the meeting, would offer some suggestions for the Committee's consideration.

The Reporter called the Committee's attention to Tab 2 of the agenda materials and proposed Rule 707 on page 137. The Reporter explained that it was not atypical to have few, if any, public comments at this point in the comment period, noting that there is typically an influx of comments in the weeks and days prior to the end of the comment period. He further noted that commentary

on proposed amendments from academic quarters is almost always negative, meaning that no academic feedback to date is likely good news.

The Reporter noted that several articles had been published regarding the issue of machine or computer-generated evidence since the Committee last met that offered some helpful insights. The Reporter first called the Committee's attention to an article by Professor Ed Imwinkelried, explaining that Professor Imwinkelried is the foremost authority on Evidence law, having drafted countless influential articles. The Reporter explained that Professor Imwinkelried's article opined that the problem of machine-generated evidence is not one of "authenticity" to be handled under Article 9 of the Federal Rules of Evidence, but rather one of "reliability" that calls for *Daubert*-esque treatment under Article 7. The Reporter explained that Professor Imwinkelried had not analyzed proposed Rule 707 in the article because his article was published before proposed Rule 707 was issued. Even so, the Reporter opined that Professor Imwinkelried's article should give the Committee confidence that it is on the right track in treating the issue of machine-generated evidence as one of reliability. The Reporter pointed the Committee to other articles described in the agenda item on this issue, noting concerns regarding the difficulty in assessing error rates in connection with machine learning and the importance of explainability of outputs. The Reporter stated that explainability is a key component of reliability, noting that experience-based experts must be able to explain how they arrive at their opinions in order to testify pursuant to Rule 702. He noted that a similar explainability should be required of machine-learning and other machine-generated evidence. The Reporter explained that he would share a suggested addition to the committee note for proposed Rule 707 note to address the issue of explainability. The Reporter also alerted the Committee to an article suggesting that Rule 707 should apply even when an expert witness testifies, and not only when there is no expert on the stand. The Reporter opined that it would not be workable to apply Rule 707 when an expert testifies to machine-generated output because Rule 702 already controls in that situation and mandates that the expert both rely upon and reliably apply reliable principles and methods in offering testimony. He noted that he had circulated four proposed modifications to the published proposal for the Committee's consideration, though no action would be taken on any changes until after the expiration of the public comment period.

The Reporter then invited Professor Andrea Roth to share her thoughts and suggestions on Rule 707 and thanked her for her support of the Committee's work. Professor Roth first opined that proposed Rule 707 is a good rule. She noted that she had originally proposed additional conditions regarding access and discovery, but now appreciates that these issues are properly regulated outside the Evidence Advisory Committee. Although the courts have yet to see a wave of AI software outputs in the courtroom, Professor Roth explained that courts are regularly encountering sophisticated software outputs being proffered without an expert witness. She noted that the wave of AI outputs is surely on the horizon and that proposed Rule 707 would be important in ensuring the reliability of all of this machine-generated evidence. Professor Roth also noted that it makes sense to apply Rule 707 only when there is no expert on the stand because Rule 702 will serve as the governor on reliability when machine-generated output is relied upon by a testifying expert. She also suggested that the proposed committee note to Rule 707 would have an important guiding effect that would ensure proper regulation with or without an expert witness.

Professor Roth also offered some suggestions for improving proposed Rule 707. First, she recommended deleting the final sentence of the proposed rule making it inapplicable to "simple

scientific instruments." Although she acknowledged the concern of over-regulation of basic and well-accepted instruments such as thermometers, she expressed concern that litigants could seek to characterize more sophisticated proprietary software as "simple math" that would remain outside Rule 707 protection. She proposed deleting the final sentence of the proposed provision altogether, suggesting that Rule 201 (governing judicial notice) could serve to exempt the instruments whose reliability is truly beyond reasonable dispute. If the Committee preferred to retain a final limiting sentence, Professor Roth suggested that it should exempt machine-generated output, the reliability of which is well known to the "general public." She explained that the concern over machine-generated output is that those with proprietary licenses are often the only ones with information about reliability and that the key to admissibility should be that someone other than the owner has a sense of the limits of the output. She expressed willingness to work with the Committee to draft language for an appropriate exemption. Professor Roth also suggested that proposed Rule 707 be modified to clarify that it applies to machine output offered directly without an expert witness "or through a lay witness who authenticates the output." She further suggested that it would be critical to add commentary to the committee note about the importance of appropriate and representative training data as a factor affecting admissibility. She noted the importance of independent access to research licenses for non-law-enforcement personnel. Although she noted the right of the owner of proprietary software to deny research licenses, she urged that the note emphasize the importance of access in assessing the reliability of machine output.

The Chair thanked Professor Roth for her input and continuing support for the Committee's work on Rule 707. He raised the fact that Rule 707, as published, is applicable only when there is no expert testimony and emphasized that the proposed rule was not intended to incentivize parties to avoid calling experts. He noted that the Committee would consider adding language to the committee note explaining that it will be difficult, if not impossible, to satisfy the admissibility standard for machine-generated output without an expert witness. The proposed committee note could be amended – as indicated in underline – as follows:

> "This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert. <u>It is anticipated that these reliability standards will be difficult to meet - and sometimes impossible to meet - without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony</u>."

No Committee member raised concerns about the above addition to the proposed committee note. The Chair also noted an observation made by a Committee member that it is impossible to cross-examine or confront machine-generated output offered without an expert witness at trial (in the way that parties can challenge a testifying expert). He noted a suggestion to add a paragraph to the committee note that would flag the concern about the lack of cross-examination for trial judges and that would encourage courts to consider offering a limiting instruction about the potential unreliability of machine-generated output. The suggested addition to the committee note is as follows:

> Under this rule, machine learning output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when machine-based evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable - or unreliable - simply because it was produced by a machine.

The Committee member who raised this issue noted that the concern is not one of the admissibility of machine-generated output, but rather about how a jury will weigh such output once they have it without a witness to confront. He noted that it may be challenging for a jury to decide how to weigh such evidence, particularly where it may offer probabilistic assessments rather than concrete determinations. The Committee member suggested that the additional paragraph in the committee note would encourage oversight by the trial judge once the evidence is admitted. The Chair noted that a limiting instruction regarding machine output would be analogous to the instruction given about expert witnesses to the effect that the jury is not to give an expert's testimony greater weight simply due to her status as an "expert." The Reporter explained that he would propose adding the paragraph to the Committee note for the Spring 2026 meeting unless Committee members had concerns about the language. He noted that the language would not tell a trial judge how to instruct the jury or handle such admitted output but would alert them to the issue. Committee members expressed no concerns and generally supported the addition of the paragraph.

The Reporter also suggested adding a factor proposed by Professor Roth to the list of considerations the trial judge to determine admissibility. This addition would add the following to the bullet point list in the committee note:

> Considering whether the process has been validated by independent researchers, and whether research licenses are available to independent researchers. The less available and familiar the tool and its reliability limits are to the public, the more critical it will be for the proponent to show independent validation studies and that licenses are available to independent researchers.

Ms. Shapiro, on behalf of the Department of Justice, objected to the proposed additional factor, contending that it would put a thumb on the scale against the admissibility of output produced by government proprietary software. She opined that this factor would suggest that anything that could not be shared should be inadmissible. Ms. Shapiro explained that the DOJ has greater overall concerns with the proposal to add a new Rule 707, with these concerns to be addressed by a comprehensive memorandum at the Spring 2026 meeting (once the government shutdown has ended and more detail can be gathered and presented). But she expressed immediate concern about adding a factor that would disadvantage government software on its face. Ms. Shapiro also noted that certain DNA software was referenced in the materials as involving "machine learning," but the government contends that such software does not rely upon machine learning at all. Professor

Roth agreed that two of the referenced DNA software programs do not use machine learning, but emphasized that those programs still generate complex software outputs that should be regulated. She noted that researchers pay a great deal of money for licenses to attain access to such proprietary software and that the proposed Committee note language will not place a thumb on the scale against admissibility unless the owners of the software continue to deny licenses to everyone except for law enforcement. The Chair proposed including the factor in brackets for full consideration by the Committee in the spring.

The Reporter next raised Professor Roth's proposed modification to the final sentence of the text of Rule 707, which would alter it, as follows:

> This rule does not apply ~~to the output of simple scientific instruments~~ when the machine that generated the evidence is accessible to, and the extent of its reliability well known to, the general public.

The Reporter noted that another possibility for limiting Rule 707 would be to substitute the term "computer-generated" for "machine-generated." Or he noted that the Committee could reconsider limiting the rule to "machine-learning" evidence. He noted that another possibility would be to delete the final sentence of the rule, leaving no defined limit in Rule 707. The Chair explained that the Committee had been concerned from the start about the possibility of wasteful *Daubert* hearings for thermometers and other basic scientific instruments. The Chair informed the Committee that the Standing Committee had suggested the change from "basic" scientific instruments to "simple" scientific instruments. He explained that the Committee would take no action to change the text of proposed Rule 707 until after the public comment period closes but that it is useful to discuss possibilities.

One Committee member argued that it would be counterproductive to wordsmith Rule 707 too much and favored leaving the straightforward and simple limitation in the final sentence of proposed 707 as it is for now. He noted that certain software or machine-generated output might be generally known and well-regarded by the general public but still be unreliable. The Committee member suggested starting with a simple rule that allows litigants and judges to work out its limits. The Reporter noted that the Committee cannot rewrite rules regularly and emphasized the importance of getting the text right the first time. Another Committee member agreed that proposed Rule 707 is a simple rule and that the Committee should not overcomplicate it with excessive wordsmithing. Ms. Shapiro reported that the DOJ would want to retain a textual limit in the final sentence of the rule (to avoid wasteful litigation over well-accepted machine output) but opined that the suggested language regarding reliability "well-known to the general public" would be too broad and could be too easily manipulated.

Professor Roth asked whether there is any distinction between instrument output that would be accepted under Rule 201 and the output intended to be exempt from Rule 707. She suggested that many basic instruments would be covered by Rule 201 and noted that the evidence rules are not meant to protect the fact finder from all unreliable information, but rather to ensure that the jury has the ability to evaluate the reliability of evidence. In response, Ms. Shapiro asked whether federal courts could take judicial notice of the output of DNA software that has been admitted in hundreds of prior cases under Rule 201. Professor Roth suggested that they could not. Ms. Shapiro responded that there is then a difference between the output that could be admitted through Rule

201 and the output that should be exempt from Rule 707 coverage. Another Committee member suggested retaining the final sentence of Rule 707 regarding "simple scientific instruments" as a placeholder until the Spring 2026 meeting when public comment will be available. The Chair agreed that was a sensible approach given the expectation that the Committee will receive rich public commentary on the proposed rule that could aid in crafting an appropriate limit. He expressed concern that a limitation tied to the knowledge of the general public could shift the focus of the rule away from reliability.

Another Committee member inquired about distinguishing between "machine-learning" output and "machine-generated" output and asked whether there are concrete examples of output that would fit one category but not the other. The Reporter suggested that facial recognition software represents a clear example of "machine-learning" and that more basic machines do not rely upon "machine-learning." Another Committee member noted that it is really difficult to distinguish the two categories with any precision. A Committee member suggested that Rule 707 could attempt to limit coverage by regulating "computer-generated" rather than "machine-generated" output. The Reporter suggested that, although "computer-generated" might represent a slight shift in the tone of the provision, the rule would still broadly cover most machine output and would need to be limited by a final sentence. The Reporter suggested dropping consideration of limiting the rule to "machine-learning" and to stick with "machine-generated" for the time being. Ms. Shapiro suggested that Rule 707 was originally drafted in an effort to regulate machines that are operating like witnesses do. She argued that the Rule was conceived as a way to regulate "machine-learning" but had been broadened to cover all machine output of any kind. The Reporter reiterated the difficulty in distinguishing between "machine-learning" output and "machine-generated" output more broadly and explained that the version of Rule 707 out for public comment erred on the side of being over-, rather than under-inclusive due to that difficulty. Professor Roth advocated retention of the broader "machine-generated" focus of Rule 707 because complex software capable of generating conclusions should be regulated whether or not it depends on what we would characterize as "machine-learning." No Committee member objected to taking the "machine-learning" and "computer-generated" versions of the rule off the table.

The Reporter next reiterated the importance of adding language to the Committee note to reinforce that Rule 707 is not designed to discourage expert testimony and that the Rule 707 standard may be difficult if not impossible to satisfy without a testifying expert to validate machine-generated output. The Chair agreed that the added commentary would be helpful and noted that the Committee could continue to wordsmith it during the comment period. Ms. Shapiro inquired whether a trial judge could use Rule 611(a) to refuse to admit machine-generated output unaccompanied by an expert witness, essentially querying whether a judge could require that expert testimony accompany machine-generated output. The Reporter suggested that courts had admitted machine-generated output without requiring accompanying expert testimony and it isn't clear courts would or could use Rule 611(a) to demand expert testimony. The Reporter next noted that Rule 707 intentionally makes it difficult to admit machine-generated output on its own, suggesting that there may be few ways of validating output without an expert. Professor Roth argued that Rule 707 is a very simple, and modest gap-filling provision. She explained that machine-generated output should already be subject to the requirements of Rule 702 and that Rule 707 would allow a lay witness to authenticate such output if those same requirements are satisfied. The Federal Public Defender member suggested that cross-examination remains important when machine-generated output is admitted, and that Rule 707 would properly encourage parties to use

expert witnesses who may be cross-examined when presenting such output. Another Committee member emphasized the difficulty for jurors in weighing machine output that may reflect a probabilistic assessment that has been admitted on a preponderance of the evidence standard. This Committee member suggested that Rule 707 would create important guardrails that would ensure the reliability of any output sent to a jury to weigh.

The Chair reminded the Committee that a decision to publish a proposed rule for public comment is typically seen as a sign of support for its eventual enactment. He also reminded the Committee that in the case of Rule 707, it was published because the Committee wanted to stay ahead of issues related to machine-generated evidence and that its publication does not mean that it will be enacted at all or in its current form. The Chair emphasized the Committee's desire to receive public comment to aid in consideration of the provision.

In concluding the discussion, the Reporter noted that it is unworkable to make Rule 707 applicable when an expert witness is on the stand due to the overlap with Rule 702. He also noted the impracticability of including regulation of machine-generated output within Rule 702 because it is a rule of general application and also was recently amended. The Chair agreed, noting that the committee note regarding expert witness testimony was quite clear. The Reporter next emphasized the importance of including language in the committee note regarding the explainability of machine-generated output. He noted that machine-learning output would reach a point where it is not explainable, making a cautionary note about the importance of explainability critical. He explained that machine output that cannot be explained should not be admitted unless the proponent can find another method of validating it. Committee members offered no objections to adding language to the committee note on the importance of explainability.

Finally, the Reporter noted Professor Imwinkelried's proposal to abrogate Rule 901(b)(9) regarding authentication of a process or system by showing that it produces an "accurate result." The Reporter explained that requiring a showing of "accuracy" is different from requiring authenticity. He noted that Rule 901(b)(9) would be inapplicable to machine-generated output if Rule 707 is adopted because that output would have to be shown to be reliable under a Rule 104(a) preponderance standard (as opposed to merely authentic under the Rule 104(b) standard currently applicable to Rule 901). The Reporter reminded the Committee that some more basic instruments would not be covered by Rule 707 and that Rule 901(b) would remain useful in authenticating their output. He suggested tabling any proposal to abrogate Rule 901(b) and Committee members agreed.

III. Deepfake Evidence and Draft Rule 901(c)

The Chair next introduced the topic of draft Rule 901(c), a burden-shifting provision designed by the Committee to help trial judges evaluate claims of deepfake evidence. He explained that the issue for the Committee is whether any rule change to deal with the prospect of deepfake evidence is warranted where there has not been a wave of deepfake evidence entering the court system and where existing rules may be sufficient to address such issues when they do arise. He noted that there has been a lot of commentary about the dangers of deepfake evidence, but little evidence that this issue has become a significant problem in the courts. The Chair noted that the Reporter had collected anecdotal evidence from some trial judges that such issues are being presented in court but the resolution of the issue does not appear in reported opinions.

The Chair explained that the question is whether the Committee is on the right track in regulating the deepfake problem through a provision such as draft Rule 901(c), found on page 167 of the agenda materials. The Chair also noted that the Reporter suggested a new paragraph for the committee note cautioning that the proponent of the alleged deepfake evidence could not rely upon Rule 901(b) for authentication if the opponent of such evidence satisfied its burden under draft Rule 901(c) (e.g., by presenting evidence sufficient to support a finding of fabrication to warrant the court's inquiry. This is because Rule 901(c) requires the judge to make a finding of authenticity by a preponderance of the evidence under Rule 104(a) after the opponent has satisfied its deepfake burden and the lower Rule 104(b) standard generally applicable under Rule 901(b) will no longer apply.

The Reporter then described recent commentary on the deepfake problem, noting that the administration's guidance on AI mentions draft Rule 901(c) putting the Advisory Committee's work on this issue at the forefront of the AI conversation. Ms. Shapiro noted that the DOJ was going to develop its own guidance on the problem of deepfake evidence, but that such work had yet to begin. The Reporter emphasized that the deepfake problem was likely to worsen given a recent article suggesting that its authors had developed technology capable of eliminating watermarks designed to embed authentication data into media. He also noted conversations with trial judges about this issue in which they reported fielding deepfake arguments frequently notwithstanding that those issues are not appearing in reported opinions. Ms. Shapiro suggested that this feedback shows that the existing Rules of Evidence are sufficient for dealing with deepfake arguments.

The Reporter opined that draft Rule 901(c) offers trial judges a helpful roadmap for resolving deepfake claims effectively. Further, Rule 901(c) would require a finding of authenticity by a preponderance of the evidence under Rule 104(a) once the appropriate showing has been made, rather than the lower Rule 104(b) standard under the existing rules. Ms. Shapiro raised a concern about deepfake claims being made for the first time in the heat of trial, making it difficult to respond effectively and inquired about the possibility of adding a notice requirement to any deepfake rule, as the Committee had previously discussed. The Reporter pointed out language on page 169 of the agenda materials for a proposed committee note which would encourage trial judges to establish notice requirements for deepfake disputes. He argued that there would need to be flexibility in a notice standard that would allow for case-by-case treatment and that the question for the Committee would be whether it is better to have that flexible standard in rule text or within the committee note. The Chair agreed that notice is an important issue to address and that deepfake challenges made halfway through trial could prove problematic. One Committee member queried whether the DOJ wanted to treat a deepfake challenge like an alibi defense for purposes of advance notice, rather than as a typical evidence issue. Ms. Shapiro suggested that a notice requirement could be characterized as an important case management tool that would prevent a wasteful minitrial on deepfake issue in the middle of a trial. The Committee member suggested that most trial judges want to resolve such issues in limine and that a committee note suggesting as much would likely be optimal.

The Reporter noted that his conversations with trial judges about increasing deepfake arguments offer purely anecdotal information that may not be representative. He queried whether it would make sense to ask the FJC (once the federal government reopens and they are able to come back to work) whether they can conduct a judicial survey to assess the true incidence of

deepfake arguments in a more scientific fashion. One Committee member suggested that there have long been arguments of fakery, as well as litigants presenting fake email chains and the like and that the existing evidence rules are sufficient to deal with such arguments pretty quickly during in limine proceedings. The Chair agreed that courts have been dealing successfully with forgeries for ages under existing standards. Still, he suggested that an FJC survey would be helpful in providing the Committee with additional information on the scope of the deepfake problem. Because the rulemaking process is so slow and deliberate, the Chair noted that it may make sense for the Committee to publish a deepfake proposal in the spring to gather commentary and move the proposal forward. Alternatively, he explained that the Committee could elect to keep the deepfake draft rule under development to be published when a need arises. Some Committee members expressed the view that the Committee should move forward with publication of a proposal in the spring to gather commentary and to remain at the forefront of the issue. Other Committee members expressed a desire to have an FJC survey for the spring to help the Committee determine the need to publish a proposal, acknowledging some skepticism about the degree of the danger currently presented by deepfake evidence.

The Chair stated that he would work on requesting an FJC survey regarding deepfake evidence for the spring meeting if possible. He also explained that proposed Rule 901(c) would be on the agenda as an action item for the Spring 2026 meeting, meaning that the Committee will decide whether to publish the proposed provision. The Reporter closed the discussion by suggesting that the Committee reject a proposal that appeared on pages 173-174 of the agenda materials to amend the illustrations of proper authentication in Rule 901(b) to say that the illustrations "may satisfy" the authenticity standard to avoid automatic authentication of potential deepfakes. Everyone agreed that such a change would make Rule 901(b) essentially standardless and that proposed Rule 901(c) would be a much more structured and effective manner of dealing with deepfake issues. Any change to Rule 901(b) was thus rejected and the Committee closed the discussion of deepfake proposals.

IV. Proposed Amendment to Rule 609

The Chair next directed the Committee's attention to Tab 4 of the agenda materials and to the proposal to amend Federal Rule of Evidence 609. He explained that the discussion of Rule 609 would be brief because the proposed amendment remains out for public comment through February 16, 2026. He noted one comment that suggested changing the ending date for measuring the age of a witness's convictions for purposes of Rule 609(b) to the date of the indictment rather than the date of trial. The Reporter explained that the Committee had considered several ending dates to add to Rule 609(b) in its original deliberations, including the date of indictment. He reminded the Committee that it had decided that the date of trial is the optimal date, particularly because it is more closely connected to the rationale of Rule 609(b) of allowing the jury to use convictions to assess the witness's credibility at the time of his testimony. The Reporter thus explained that the Committee had considered and rejected the date of indictment. The Reporter also noted a comment of support for the addition of the word "substantially" in the Rule 609(A)(1)(B) balancing test from the Federal Public Defender for the District of Kansas. The Chair closed the discussion of Rule 609 by promising that the Committee would consider any additional comments or feedback at the Spring 2026 meeting after the close of the public comment period.

V. Department of Justice Proposal to Add Tribal Nations to Rule 902(1)

The Chair next directed the Committee's attention to Tab V of the agenda materials and a proposal to amend Federal Rule of Evidence 902(1), which allows self-authentication of the signed and sealed records of enumerated government entities. He reminded the Committee that it originally received a recommendation to consider an amendment that would add "federally recognized tribes" to the list of enumerated government entities whose records are self-authenticating from Judge Frizzell of the Northern District of Oklahoma on the eve of the Fall 2024 meeting in New York. The Chair noted that a similar proposal had been on the Committee's agenda over a decade ago and that no action had been taken on the matter at that time.

The Chair explained that the Committee had deferred consideration of the proposal in Fall 2024 pending input from the Department of Justice. He reminded the Committee that the DOJ had submitted a memorandum in support of an amendment to Rule 902(1) at the Spring 2025 meeting noting the reversal of a few convictions due to insufficient proof of a defendant's tribal affiliation. The Chair explained that there could be some reason to consider the need for an amendment due to increased federal prosecutions post *McGirt*. The Chair also reminded the Committee that it had discussed the proposal at the Spring 2025 meeting and had decided to seek input from tribal governments and organizations before proceeding with an amendment proposal. He explained that the Committee had received four submissions to date from tribal representatives, all strongly in support of an amendment and that the Committee had invited additional input from tribal leaders and hoped to receive more responses for the Spring 2026 meeting. The Chair reminded the Committee that five district judges with significant experience in federal prosecutions involving tribal victims or defendants submitted a letter in support of an amendment to Rule 902(1). He then called the Committee's attention to the proposed amendment supported by the DOJ on page 189 of the agenda materials. He noted that the Federal Public Defender had submitted a new letter in opposition to any amendment to Rule 902(1). If the Committee is inclined to propose an amendment to Rule 902(1), the Chair explained that the Federal Public Defender seeks to limit the amendment to permit self-authentication only of the records of tribal governments that honor public records requests from non-members. The Chair explained that the Committee would discuss the proposal today in anticipation of making a decision about the proposed amendment at the Spring 2026 meeting. The Chair then invited Ms. Shapiro from the DOJ and Ms. Jami Johnson, an experienced Assistant Federal Public Defender to make presentations regarding the proposal.

Ms. Shapiro explained that the DOJ strongly supports an amendment to Rule 902(1) to add federally recognized tribes and nations to the list of entities whose records are self-authenticating. She explained that she would like to be in a position to present additional information in support of the amendment but that all employees of the federal Office of Tribal Justice are currently furloughed and unable to provide support and expertise. She explained that she expects to present additional information in support of the amendment at the Spring 2026 meeting when the federal government is open.

The Federal Public Defender member then invited Jamie Johnson, an assistant federal public defender, to highlight the concerns of the federal defender community regarding the proposed amendment, explaining that she had participated in a number of the cases in which the convictions had been reversed due to the government's failure to prove the defendant's tribal affiliation. Ms. Johnson explained that an amendment to Rule 902(1) is unnecessary because the government may

already authenticate tribal records without a witness using a Rule 902(11) business records certification. She explained that she regularly represents tribal defendants and has significant difficulty accessing records because many tribes have no public records access equivalent to the Freedom of Information Act (FOIA). Ms. Johnson explained that when a Rule 902(11) business records certification is used to authenticate tribal records, defense counsel is able to identify a current tribal records custodian who is able to attest to the authenticity of the tribal records at issue. As an example, Ms. Johnson displayed her own tribal enrollment card which would become self-authenticating under an amended Rule 902(1) without the need for such a certification. She explained that the two tribal representatives whose names are auto-penned on her enrollment card would have no recollection or personal knowledge of her enrollment or of the authenticity of the card if they were to be called as witnesses, and both may be deceased (as may often be the case) and could not be called in any event. Under existing law, the government would need a Rule 902(11) certification listing a current custodian with personal knowledge of tribal record-keeping practices who can attest to the authenticity of the same enrollment card. When the defense has concerns with any tribal records, it has the name of a live custodian who can be subpoenaed to testify at trial regarding the record. If the tribal enrollment card becomes self-authenticating under Rule 902(1) without any certification, the defense will lose that important check on authenticity.

The Chair noted that it had been suggested that all entities whose records are currently self-authenticating under Rule 902(1) have the open records laws that would allow defense access to those records that some tribal governments may lack. He asked whether it is true that all entities currently listed in Rule 902(1) are subject to open records requests. Ms. Johnson stated that it is true that all entities currently listed in Rule 902(1) are subject to open records laws. She explained that all states are subject to open records laws, as are all current zones and territories. Ms. Johnson noted that all municipalities (even one with one resident described in the DOJ materials) are subject to the public records requirements of the states within which they operate. The Reporter queried whether the proposed amendment to Rule 902(1) creates tension between tribal sovereignty and dignity on the one hand and the rights of criminal defendants to access information important to their defense on the other. Ms. Johnson agreed with that characterization but opined that there is no tribal dignity in having forged or faked records falsely attributed to a tribe admitted into evidence in federal court. She explained that the policy animating Rule 902(1) is the practical impossibility of forgeries of the records of the listed entities and that the same policy does not apply to the records of all federally recognized tribes and nations. Ms. Johnson suggested that the tribal dignity and sovereignty interests that exist are offset by the rights of criminal defendants to challenge evidence against them. Ms. Shapiro suggested that the concern about a lack of uniform tribal FOIA protections is a red herring because FOIA did not exist at the time that Rule 902(1) was originally enacted.

The Chair suggested that the Committee would benefit from a Reporter's memorandum on the issue of amending Rule 902(1) to add federally recognized Indian tribes and nations, weighing the pros and cons of an amendment. He explained that such a memo could explore whether any amendment should be limited to tribes that offer open records access to non-members. In addition, he noted that such a memo could address whether the date of a tribe's federal recognition should impact self-authentication under an amended Rule 902(1). He opined that the issue of the timing of federal recognition would be best addressed in a committee note to an amendment and that his instinct would be to allow self-authentication of the records of any tribes that are federally recognized on the date that the record is admitted into evidence. The Chair noted that the

Committee hopefully will have additional tribal input on the proposal and that the Rule 902(1) amendment would be an action item for the Spring 2026 meeting.

One Committee member noted that tribal records are outcome-determinative in federal criminal prosecutions and that it is hard to think of other records that are currently self-authenticating under Rule 902(1) that are outcome-determinative in the same way. Another Committee member noted that Dr. Timothy Lau of the FJC had done some helpful preliminary research on the prevalence of contested tribal affiliations in federal prosecutions and asked whether he could collect additional data that would aid the Committee. The Chair noted that Dr. Lau had been furloughed and that he would be asked whether there was more data to be gathered as soon as he was able to return to work. The Reporter suggested that it would be helpful to research reported cases regarding the use of Rule 902(11) certifications to authenticate records to determine whether such certifications afford criminal defendants more avenues for contesting evidence.

The Chair closed the discussion of Rule 902(1) by reiterating that the Rule 902(1) proposal will be an action item for the Spring 2026 meeting, promising a Reporter's memorandum on the issue, and inviting additional input from both the DOJ and the Federal Public Defender member, and Ms. Johnson.

VI. Potential Amendments to Federal Rule of Evidence 803(3): The State-of-mind Hearsay Exception

The Chair next directed the Committee's attention to Tab 6 on page 247 of the agenda materials and to a Reporter's memorandum regarding two potential amendments to Rule 803(3), the hearsay exception for statements of a declarant's own existing state of mind. The Chair explained that there are two circuit splits regarding the state-of-mind exception being presented to the Committee to determine whether the Committee wants to add Rule 803(3) to the Committee's Spring 2026 agenda. He emphasized that Rule 803(3) is not currently an action item for the Committee.

The Chair explained that the first issue with Rule 803(3) is that some courts read a "spontaneity" requirement into the provision where none exists in order to ensure the reliability of admitted statements and to exclude self-serving statements. He explained that other courts apply the exception as written and do not exercise discretion to exclude otherwise qualifying statements due to a lack of trustworthiness. The Chair noted that this was a longstanding circuit split and that the issue comes up with some frequency in the cases. He explained that the Committee could consider whether the problem was in need of a rulemaking solution and why the Supreme Court had yet to address the split.

The Chair explained that the second split involving Rule 803(3) was the *Hillmon* issue of a state-of-mind statement by one declarant being used to prove the future conduct of a third party. He noted the Reporter's research showing that most courts reject this use of a state-of-mind statement, while the Ninth Circuit allows it with an accompanying limiting instruction and the Second Circuit permits it if there is adequate corroborating evidence of the third-party conduct. The Chair informed the Committee that the *Hillmon* issue does not arise as frequently as does the "spontaneity" issue and would likely not warrant rulemaking on its own. He explained that it could be a useful companion amendment if the Committee were to propose a change to deal with the Circuit split on the admissibility of "spontaneous" statements only.

The Reporter explained that he thought it would be somewhat unlikely for the Supreme Court to resolve the longstanding split of authority in both these areas, noting that the Supreme Court had once denied certiorari in a case involving the spontaneity issue. The Reporter informed the Committee that the spontaneity issue most often comes up when criminal defendants attempt to admit their own self-serving statements about an innocent state of mind. For example, a defendant arrested in possession of a large quantity of illegal drugs might exclaim "I feel so innocent right now" or "I thought these were all legal" to show a lack of mens rea. The Chair emphasized that defense counsel will need a hearsay exception to elicit the fact that the defendant made such a statement from a testifying law enforcement agent because the defendant may not admit his own statements against the government under Rule 801(d)(2)(A). The Reporter agreed and noted that many federal courts read a "spontaneous" limitation into the hearsay exception that is not there in order to exclude these self-serving statements. He explained that the original Advisory Committee found no need for such a limitation because a jury can easily weigh a suspiciously timed state-of-mind statement and appreciate its lack of trustworthiness. He analogized the situation to one where a court admits a plaintiff's a self-serving statement made to a medical expert for purposes of a litigation diagnosis under Rule 803(4). There too, jurors can appreciate the declarant's incentives to falsify.

The Reporter noted that the first question is whether the spontaneity issue merits an amendment to Rule 803(3), suggesting that rulemaking would be necessary to resolve this longstanding split of authority. He explained that there are two potential directions that could be taken to resolve the spontaneity circuit split. First, the Committee could reinforce the absence of any "spontaneity" requirement under Rule 803(3), leaving the exception without any trustworthiness limit. He emphasized that an amendment would be required to achieve this in order to reverse the courts that currently graft a spontaneity requirement onto the provision (where the text does not include one). This could be done by adding "whether or not spontaneous" to Rule 803(3) to remove the limit that some courts have added. Alternatively, the Committee could propose an amendment to expressly *add* a spontaneity or trustworthiness requirement to the hearsay exception. He called the Committee's attention to potential draft amendments on pages 256-257 of the Agenda materials that would achieve both outcomes. The Reporter stated that should the Committee want to add a trustworthiness limit to Rule 803(3), there are two possible ways to do that. The first would be to add a "spontaneity" requirement to be satisfied by the proponent of a state-of-mind statement, as has been required by some courts. Conversely, the Reporter explained that the Committee could add a trustworthiness escape clause to Rule 803(3) like those currently available under Rules 803(6)-(8). This would place the burden on the opponent of a state-of-mind statement to show that circumstances surrounding the statement render it untrustworthy. Should the Committee want to add some limit to Rule 803(3), the Reporter opined that the trustworthiness escape clause would be the superior alternative because it could capture a broader array of reliability concerns than a "spontaneity" requirement would.

One Committee member asked whether a defendant's statements "Oh gee, I didn't know there were drugs in my backpack!" could be admitted under Rule 803(3) in the absence of a spontaneity or trustworthiness requirement. The Reporter answered in the affirmative, noting that the Second Circuit would admit the statement. Another Committee member responded that admitting the statement was not problematic because the jury could see that the defendant was lying.

The Chair noted two issues to be resolved by the Committee: 1) whether the circuit split on the spontaneity issue merits a rulemaking solution and 2) if so, which amendment alternative to pursue. One Committee member asked whether it is the Committee's role to resolve circuit splits and the Reporter responded that resolving splits is a key component of the Advisory Committee's function. Another Committee member inquired how much of a difference an amendment would make with respect to the statements of criminal defendants given that all or most statements that the defense would seek to admit would not be spontaneous. The Federal Public Defender member expressed support for an amendment proposal that would remove any spontaneity requirement from Rule 803(3) and that would resolve the *Hillmon* issue to prevent offering one person's state-of-mind statement to prove the conduct of another. Another Committee member suggested that there are avenues outside of Rule 803(3) for admitting truly spontaneous statements, such as the excited utterance exception in Rule 803(2). He suggested that the Committee may be trying to solve a problem that does not exist. The Reporter explained that the federal courts ordinarily do not admit the self-serving statements of criminal defendants under any exception. He noted a recent case in which a defendant's explanation for shooting a police officer who entered his home, "I thought he was an intruder," was excluded as not fitting within the excited utterance exception.

Judge Dever suggested that the Committee should explore whether there is a problem meriting an amendment with respect to the self-serving statements of criminal defendants, noting that many such statements are actually offered by the government as false exculpatory statements. Another Committee member agreed, suggesting that criminal defense lawyers were not advocating a change to Rule 803(3) to admit the self-serving statements of defendants. The Federal Public Defender member stated that he believed something should be done to address Rule 803(3) and that he would favor an amendment that eliminates any trustworthiness or spontaneity requirement. He further noted that he would be very concerned about any proposal to add a trustworthiness requirement to Rule 803(3). A Committee member suggested reaching out to the criminal defense community to see whether there is a real problem to be addressed by an amendment. The Chair promised to reach out to DOJ and to the criminal defense community. He also noted that the Reporter could do a deeper dive into the caselaw to explore the need for an amendment, and the Reporter agreed.

The Chair opined that nobody would view the *Hillmon* issue within Rule 803(3) as a problem justifying an amendment on its own but that it could be a companion proposal if the Committee were to propose an amendment to resolve the spontaneity circuit split. The Reporter agreed that the *Hillmon* issue is straightforward and that state-of-mind statements should not be admissible to prove third party conduct. He noted that most courts already exclude such statements. The Chair also encouraged Committee members to solicit any helpful input on the need for a Rule 803(3) amendment and explained that Rule 803(3) would be on the Committee's Agenda at the Spring 2026 meeting.

VII. *Smith v. Arizona* and Federal Rule of Evidence 703

The Chair directed the Committee's attention to Tab 7 of the agenda materials and to a memorandum regarding the Supreme Court's 2024 confrontation clause decision in *Smith v. Arizona* and its potential impact on Rule 703, which governs the permissible basis for expert opinion testimony. He reminded the Committee that this topic had been addressed at the Fall 2024 Advisory Committee meeting. In *Smith*, the Court held that the defendant's confrontation clause rights were violated when a prosecution expert who had not tested the drugs found on the defendant related an absent forensic expert's procedure and findings with respect to the substances contained in the absent expert's notes and report. Although the testifying expert offered his "independent opinion" that the substances were illegal drugs, the Court noted that he relayed the testimonial hearsay of the absent analyst as the "basis" for his opinion. Because the statements of the absent analyst had to be true to support the opinion of the testifying expert, the Court found that those statements had been admitted for their truth in violation of the defendant's Sixth Amendment right to confront the absent analyst.

The Chair explained that the question is whether *Smith* requires an amendment to Rule 703 because the rule permits expert witnesses to rely upon inadmissible information reasonably relied upon by other experts in the field in forming an opinion for trial and even permits disclosure of that inadmissible basis, albeit in very limited circumstances. He emphasized that if *Smith* prohibits only the *disclosure* of inadmissible basis information to the jury, an amendment to Rule 703 may be unnecessary because Rule 703 already prohibits such disclosure except when the probative value of the information to show the basis for the expert's opinion substantially outweighs the risk of it being relied upon for its truth. Alternatively, if the *Smith* opinion is interpreted to mean that prosecutorial experts may not *rely* upon any testimonial hearsay in forming a trial opinion, then Rule 703 needs to be amended because it expressly authorizes such reliance as currently drafted. He directed the Committee's attention to a memorandum from Professor Richter in the agenda materials reviewing the cases interpreting *Smith* since the Committee was last updated in Fall 2024. He explained that approximately 167 reported cases had interpreted or cited *Smith* in the intervening fifteen months, revealing an emerging tension (if not a full split of authority) regarding the ability of a prosecution expert to rely upon testimonial hearsay under Rule 703.

Professor Richter described some federal and state cases broadly interpreting *Smith* to prohibit any reliance on testimonial hearsay by a prosecution expert. She then noted conflicting federal and state cases that prohibit a prosecution expert from parroting the opinion of an absent expert or from disclosing testimonial hearsay, but that permit a prosecution expert with a truly independent opinion to rely to some extent on the testimonial statements of an absent analyst. These courts are receptive to expert testimony from supervisors and technical reviewers who oversee the work of other analysts and who review the reports and notes of those analysts, as well as raw data produced by testing run by those analysts, to develop an independent opinion for trial.

Professor Richter called the Committee's attention to potential amendments to Rule 703 to account for the Court's holding in *Smith* on pages 285-287 of the agenda materials. She explained that an amendment to Rule 703 could be considered premature where the Supreme Court is likely to have to resolve the split of authority sooner rather than later given the ubiquity and importance of prosecution expert testimony. Professor Richter opined that it would certainly be premature to amend Rule 703 to prohibit prosecutorial expert reliance on testimonial hearsay because the Court

could clarify that some reliance remains constitutional, in which case Rule 703 would be more restrictive than constitutionally necessary. One option is for the Committee to hold off on any amendment and to await further case development and a potential Supreme Court resolution of the issue. On the other hand, Professor Richter noted that it is problematic for a Federal Rule of Evidence to be capable of unconstitutional application and that judges and lawyers should be aware of the constitutional issues underlying Rule 703. She explained that *disclosure* of testimonial hearsay as the basis for a prosecutorial expert opinion is clearly unconstitutional after *Smith* but remains at least technically possible to be allowed under the Rule 703 balancing test. She suggested that a generic amendment noting that an expert "may not rely upon or disclose inadmissible facts or data when doing so would violate the constitutional rights of a defendant in a criminal case" could flag the issue for courts and counsel. Professor Richter explained that a generic amendment like this one would be sufficiently flexible to accommodate any eventual resolution of the disclosure/reliance dichotomy by the Supreme Court. If the Sixth Amendment allows reliance on some testimonial hearsay, Rule 703 would continue to do so. Professor Richter noted that Rule 412 utilizes a similar constitutional catchall to highlight that some evidence otherwise excluded by that provision may be constitutionally required when offered by a defendant in a criminal case.

Ms. Shapiro stated that she agreed that the Supreme Court was going to have to resolve the split of authority regarding the meaning of *Smith* sooner rather than later. She opined that this is a real problem that will have to be addressed. The Reporter noted that the Supreme Court decided the *Williams* case in 2012, leaving the question of whether basis information is offered for its truth unresolved, and only returned to the issue 12 years later in 2024. He suggested that this split of authority could stick around for a long time. Ms. Shapiro responded that the Court is likely to take up the issue if the government seeks certiorari. She noted her preference to wait to see how the Supreme Court resolves the issue but agreed that there would be some merit in a generic constitutional proviso, although she acknowledged that the same could be said for every Federal Rule of Evidence. Another Committee member agreed that there is an excellent chance that the Supreme Court returns to the issue soon. He noted that Rule 703 can be interpreted in a constitutional manner as things now stand and that the Committee should wait to amend the rule until the constitutional parameters are clearer.

The Chair opined that there was an argument for proceeding with a generic "red flag" amendment to highlight the issue for courts and litigants without impacting the eventual resolution of the constitutional issue. He further commented that there is already a disconnect between *Smith* and Rule 703 where the rule permits disclosure of inadmissible basis information upon satisfaction of a stringent balancing test. The Chair suggested that he was playing devil's advocate in noting that a generic amendment would align Rule 703 with the confrontation clause regardless of how the Supreme Court ultimately resolves the *Smith* split. A Committee member expressed support for a potential generic constitutional red flag amendment but opposed adding any specific limit to Rule 703 in advance of Supreme Court resolution of the *Smith* issue. Another Committee member agreed, noting that rulemaking is slow and that it could take 2+ years to advance a generic Rule 703 amendment and that it could take the Supreme Court longer than that to weigh in on the *Smith* issue again. He proposed going forward with a generic amendment to Rule 703 now. Another Committee member emphasized that a generic constitutional proviso would not resolve the conflict about the proper interpretation of *Smith* but would simply "flag" the problem for courts and counsel. The Chair noted the similar flag in Rule 412 that provides precedent for such an amendment. He asked whether any Committee members opposed moving forward with a proposal

for a generic constitutional amendment to Rule 703. Committee members were supportive of proceeding and the Reporter stated that an amendment to Rule 703 would be an action item for the Spring 2026 meeting.

The Reporter explained that Rule 606(b) that prohibits post-verdict juror testimony regarding deliberations contains a similar constitutional defect because the Supreme Court decided *Pena-Rodriguez v. Colorado* in 2017 in which it found post-verdict juror testimony that was barred under Rule 606(b) was constitutionally required to be admitted if it involved a report about overtly racist remarks made during deliberations. He explained that the Committee had considered but rejected a "red flag" amendment to Rule 606(b) to account for *Pena-Rodriguez* at that time out of concern that an amendment might expand the constitutional exception to Rule 606(b) beyond *Pena-Rodriguez* and that the Supreme Court might revisit the issue. He noted that Rule 606(b) on its face is capable of unconstitutional application as it now stands and recommended a similar generic amendment to Rule 606(b) as part of a package to be addressed alongside Rule 703. He proposed a single agenda memo on generic amendments to both Rules 606(b) and 703 to address constitutional infirmities. The Chair agreed that the Committee would consider both proposals at the Spring 2026 meeting.

VIII. Potential Amendments to Federal Rule of Evidence 104

The Chair next raised two potential changes to Rule 104 discussed in Tab 8 on page 290 of the agenda materials. First, he noted that trial judges are to make preliminary findings regarding the admissibility of evidence under Rule 104(a) by a preponderance of the evidence, according to the Supreme Court's decision in the *Bourjaily* case. Oddly, however, Rule 104(a) itself nowhere mentions the standard of proof that applies to such preliminary findings. The Chair explained that the Federal Rules of Evidence are supposed to be easy to use and apply and that one possible amendment would add the preponderance of the evidence standard of proof to Rule 104(a). Second, the Chair explained that Rule 104(b) deals with the concept of conditional relevance – when the relevance of a particular item of evidence is conditioned on the existence of another fact. He noted that significant scholarship demonstrates that there is no logical distinction to be drawn between basic relevance and conditional relevance and that the same standard of proof should apply to both. He emphasized that it is not clear that there is any practical problem to be addressed in Rule 104(b) and that an amendment making all relevance determinations subject to the Rule 104(b) prima facie standard may be unnecessary. The Chair also opined that it may be wise to leave well enough alone after 50 years of the successful operation of the Federal Rules of Evidence and that it may not be the time to make such changes.

The Reporter offered that 50 years old is a great time to learn new things. He urged that Rule 104(a) should contain the preponderance of the evidence standard that already applies to findings under that provision. He explained that the most significant problems dealt with by the 2023 amendment to Rule 702 were caused by a lack of an express preponderance standard in Rule 104(a). He called the Committee's attention to the proposal on page 296 of the Agenda materials to add a sentence to Rule 104(a) to express the preponderance standard. The Reporter recognized that an amendment to Rule 104(b) would be more complicated because it would make a change and would not simply add an existing standard to the text of the rule. He explained that Rule 104(b) currently applies when the relevance of evidence depends on the existence of another fact. He stated that it was not clear why a different, lower standard of proof applies to those relevance

questions. The Reporter offered examples of both conditional and basic relevance. He explained that the relevance of a particular statement uttered outside of court might depend upon whether a party actually heard the statement, making it an issue of conditional relevance. Conversely, the Reporter explained that evidence that a defendant owned the weapon used in a crime presents a question of basic relevance. It has some tendency to make the defendant's participation in the crime more likely than it would be without the evidence. He opined that both relevance questions should be governed by the same prima facie standard of admissibility that now applies under Rule 104(b) – evidence sufficient to support a finding of relevance. The Reporter noted a recent Second Circuit case described in the agenda materials in which the court treated both basic and conditional relevance questions under the prima facie standard. The Reporter suggested that streamlining Rule 104(b) to make its prima facie standard applicable to all relevance questions was worthy of consideration.

One Committee member opined that this is an issue that troubles Evidence professors more than judges and lawyers. The Chair queried whether courts are getting relevance questions wrong because of the distinct standards of admissibility and whether there truly is a problem that needs to be solved by an amendment. The Reporter opined that it is a "no-brainer" to add the preponderance standard to Rule 104(a) which would help courts addressing preliminary questions. Another Committee member opined that both amendments to Rule 104(a) and (b) would be salutary, noting he had stopped teaching Rule 104(b) in courses and trainings because it makes no sense. Another Committee member asked whether the Supreme Court's opinions in *Bourjaily* and *Huddleston* cause confusion because they do not reference one another and set different standards of admissibility in circumstances that could be viewed in the same way. The Reporter explained that the change to Rule 104(b) would adopt the *Huddleston* standard for all relevance questions and would not alter *Huddleston*. Another Committee member suggested that she had encountered no problems with relevance issues at trial, noting that she had seen courts admit evidence on the condition that it be connected later.

The Reporter stated that he had not heard real objections to making both proposals action items for the Spring 2026 meeting. The Chair opined that there would be little reason to amend Rule 104(b) in particular if courts are not getting it wrong and suggested that the Reporter do additional research to be presented at the Spring 2026 meeting. The Committee decided to await additional research before deciding whether to make amendments to Rule 104 an action item.

IX. Incorporated Business Records & Production as Authentication

The Chair explained that the Committee had hoped to host a practitioner panel about helpful modifications to the Federal Rules of Evidence, but the panel could not be convened for various reasons. In connection with those efforts, he reported that the Committee had received thoughtful suggestions for potential amendments from practitioner Chloe Chetta that appear on page 301 of the agenda materials. The Chair explained that the question for the Committee was whether to proceed with additional study of those suggestions.

First, Ms. Chetta noted the problem of admitting the business records of one entity that incorporate or adopt the business records of a separate entity. She noted that Rule 803(6) does not specifically address the issue of embedded business records and that courts take different approaches to the problem. Some courts admit such records upon a finding that they have been

incorporated by another entity whose records satisfy Rule 803(6), while others appear to evaluate the trustworthiness of the incorporated records. Ms. Chetta offered a proposal for amending Rule 803(6) to deal with the issue of incorporated records that appears on page 304 of the Agenda materials. The Reporter explained that there is a lot of caselaw on this and that courts appear to be handling the issue well without an express provision in the Rule. He noted that there is no true split of authority on this point that could be addressed by an amendment.

A Committee member queried how an incorporating entity can establish the requisite Rule 803(6) requirements for the records of a different entity. She noted that the incorporating entity is ultimately trusting someone else's records. The Reporter suggested that the caselaw is stable on this point and that there is no urgent need for an amendment. The Chair agreed that the Committee appreciated the thoughtful suggestion but would not pursue the issue of incorporated business records further.

The Chair explained that the second suggestion was to treat the production of records in discovery in a civil case as *per se* authentication of those records. He noted that courts already point to the production of records as authenticating in some circumstances and that a Texas Rule of Civil Procedure operates to make the act of production authenticating. The Reporter directed the Committee's attention to alternatives for incorporating this into Federal Rule of Evidence 901 on page 308 of the agenda materials. One option would be to add production as an indicator of authenticity in Rule 901(b)(4) and the other would be to add a new Rule 901(b)(11) to address the issue separately. The Reporter opined that any such amendment would probably have to be limited to civil cases and that such a limitation would be a matter for the Committee to consider of it decided to proceed with such a proposal. The Reporter further noted that the courts take a nuanced approach to the issue and that production is not necessarily sufficient alone to authenticate the records produced in all circumstances. One Committee member explained that Rule 502 had been enacted to permit parties to produce vast amounts of electronically stored information without reviewing every record produced to save time and money and opined that a provision making production per se authenticating could encourage more careful review that would undermine the goal of Rule 502. The Reporter informed the Committee that most courts treat production as one factor indicating authenticity and suggested that Rule 901(b)(4) dealing with distinctive characteristics would be the better place to put language regarding production. But he questioned whether any express reference to production as part of the authentication analysis is necessary given that courts are already analyzing it as a Rule 901(b)(4) characteristic that is relevant to authenticity. The Chair concluded the discussion by explaining that courts appear to be handling the issue of production as authentication well without an express provision and by expressing gratitude to Ms. Chetta for excellent suggestions. The Committee concluded not to proceed with further consideration of the issue of production of records as authenticating them.

X. Closing Matters

The Chair thanked the Committee and all participants for a productive session. He announced that the Spring 2026 meeting will be held in Washington, D.C.[1]

[1] The original date set for April 28, 2026 was modified to May 7, 2026 following the adjournment of the meeting.

Judge Dever thanked the Committee for an excellent session and stated that he wished to thank Professor Cathie Struve for her extraordinary contributions to rulemaking in her roles as Reporter to the Appellate Rules Committee, Associate Reporter to the Standing Committee, and Reporter to the Standing Committee. Judge Dever informed the Committee that Professor would be stepping down as Reporter to the Standing Committee in February 2026 and would transition to a consultant role at that time. He thanked Professor Struve for her scholarship and incredible work on behalf of the Standing Committee since this would be her last meeting with the Evidence Advisory Committee as the Reporter to the Standing Committee. Professor Struve thanked Judge Dever and the Committee, stating that it had been a privilege to learn and work with the Advisory Committee. She offered a special thanks to Dan Capra, who she said had taught her much of what she knows about serving as an effective Reporter. The Chair also thanked Professor Struve for her excellent contributions and noted that it was fitting to celebrate her work, as well as the 50th anniversary of the Federal Rules of Evidence in 2025. He offered his sincere thanks as well to Carolyn Dubay and the rest of the Rules Committee staff who organized and supported the Committee meeting notwithstanding the shutdown of the federal government that was requiring them to work without compensation. The meeting was then adjourned.

Respectfully submitted,

Liesa L. Richter