
**ADVISORY COMMITTEE
ON
CIVIL RULES**

April 14, 2026

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Meeting of the Advisory Committee on Civil Rules
April 14, 2026

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TAB 1

ADVISORY COMMITTEE ON CIVIL RULES

Chair	Reporter
Honorable Sarah S. Vance United States District Court New Orleans, LA	Professor Richard L. Marcus University of California College of the Law, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA
Members	
Honorable Cathy Bissoon United States District Court Pittsburgh, PA	Honorable Jane Bland Supreme Court of Texas Austin, Texas
David J. Burman, Esq. Perkins Coie LLP Seattle, WA	Honorable Annie Christoff United States District Court Memphis, TN
Professor Zachary Clopton Northwestern University Pritzker School of Law Chicago, IL	Honorable David C. Godbey United States District Court Dallas, TX
W. Mark Lanier, Esq. The Lanier Law Firm Houston, TX	Jocelyn D. Larkin, Esq. Impact Fund Berkeley, CA
Honorable M. Hannah Lauck United States District Court Richmond, VA	Honorable R. David Proctor United States District Court Birmingham, AL
Honorable Marvin Quattlebaum, Jr. United States Court of Appeals Greenville, SC	Honorable Manish S. Shah United States District Court Chicago, IL
Brett A. Shumate, Esq. Assistant Attorney General (ex officio) United States Department of Justice Washington, DC	David C. Wright III, Esq. Robinson, Bradshaw & Hinson, P.A. Charlotte, NC

ADVISORY COMMITTEE ON CIVIL RULES

Liaisons

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

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

Consultant

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

Clerk of Court Representative

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

ADVISORY COMMITTEE ON CIVIL RULES

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

Rules Committee Staff Counsel: Sarah Sraders, 202-502-1820

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

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

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

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure (Standing Committee)

Chair

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

Reporter

Professor Edward Hartnett
Seton Hall University School of Law
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Secretary

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

Advisory Committee on Appellate Rules

Chair

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

Reporter

Professor Stephen Sachs
Harvard Law School
Cambridge, MA

Advisory Committee on Bankruptcy Rules

Chair

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

Reporter

Professor S. Elizabeth Gibson
University of North Carolina at Chapel Hill
Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
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RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Civil Rules

Chair

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New Orleans, LA

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San Francisco, CA

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Advisory Committee on Criminal Rules

Chair

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

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Professor Sara Sun Beale
Duke University School of Law
Durham, NC

Associate Reporter

Professor Nancy J. King
Vanderbilt University Law School
Nashville, TN

Advisory Committee on Evidence Rules

Chair

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

Reporter

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

RULES COMMITTEE LIAISON MEMBERS

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

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Bridget M. Healy, Esq.
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Management Analyst

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Counsel

Rakita Johnson
Administrative Analyst

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Senior Research Associate

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

Bankruptcy Rules Committee
Carly Giffin, Ph.D., J.D.
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Civil Rules Committee
Emery G. Lee, Ph.D., J.D.
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Criminal Rules Committee
Brittany Ripper, Ph.D., J.D.
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Elizabeth Wiggins, Ph.D., J.D.
Division Director

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

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

TAB 2

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 6, 2026

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in Washington, D.C., on January 6, 2026. The following members were present:

Judge James C. Dever III, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Colm F. Connolly
Judge Joan N. Ericksen

Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Andrew J. Pincus, Esq.
Judge Allison J. Rushing (attended remotely)
Elizabeth J. Shapiro, Esq.¹
Bart H. Williams, Esq.

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

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
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules:

Judge Sarah S. Vance, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant
(attended remotely)

Advisory Committee on Criminal Rules:

Judge Michael W. Mosman, 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: Bridget M. Healy, Esq., and Sarah A. Sraders, 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; Judge Robin L. Rosenberg, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC). Chief Judge Michael A. Chagares, on behalf of the Executive Committee of the Judicial Conference, attended remotely.

1. OPENING BUSINESS

A. Welcome and Opening Remarks

Judge James C. Dever III, Chair of the Standing Committee, called the meeting to order and welcomed the members, participants, and observers, including those attending remotely. Judge Dever noted that Judge D. Brooks Smith was unable to attend the meeting.

Judge Dever then welcomed the new members of the Committee: Judge Allison Rushing, who has served on the Fourth Circuit since 2019; Judge Colm Connolly, who has served as a district judge in the District of Delaware since 2018; and Bart Williams, a partner with the law firm Proskauer Rose in its Los Angeles office. He also welcomed two new Advisory Committee chairs: Judge Sarah Vance, the new chair of the Civil Rules Committee, from the Eastern District of Louisiana; and Judge Michael Mosman, the new chair of the Criminal Rules Committee, from the District of Oregon.

Judge Dever also informed the Committee that Sarah Sraders, who had been the Rules Law Clerk, had moved into a counsel position in the Rules Office and would be staffing the Civil Rules Committee. He also recognized Bridget Healy, counsel to the Bankruptcy Rules Committee and Appellate Rules Committee, for her twenty years of service in the judiciary. He concluded the welcoming remarks by noting that a recognition ceremony for Professor Catherine Struve, Joe Spaniol, and Professor Edward Hartnett would take place at the end of the meeting.

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 June 10, 2025 meeting.

C. Comments on 2025 Strategic Plan for the Judiciary

Judge Dever informed the members of the request of Chief Judge Michael Chagares, on behalf of the Executive Committee of the Judicial Conference and in his capacity as Planning Coordinator, to identify up to three of the Judiciary's five priorities listed in the 2025 Strategic Plan for the Judiciary to be prioritized over the next two years. The 2025 Strategic Plan for the Judiciary is included in the agenda book beginning at page 56.

Judge Dever suggested that the Standing Committee identify the following goals: (1) providing fair and impartial justice; (2) efficiently and effectively managing public resources; and (3) realizing technology's full value and managing its risks. Judge Dever then invited comments from Chief Judge Michael Chagares, who appeared remotely. Judge Chagares noted that Priority 1.3, ensuring that court rules,

processes, and procedure meet the needs of lawyers and litigants in the judicial process, goes to the core of the Committee's jurisdiction.

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved identifying the three goals set forth in the 2025 Strategic Plan as described by Judge Dever.

D. Status of Rule Amendments

Carolyn A. Dubay, Chief Counsel and Secretary to the Standing Committee, gave a brief report on the status of proposed rule amendments, referencing the chart of proposed amendments to the federal rules included in the agenda book beginning on page 90. Ms. Dubay drew the Committee's attention to the upcoming hearings on proposed rule amendments that the Standing Committee approved for publication and public comment at its June 2025 meeting. She further noted that final rule amendments approved by the Standing Committee at the June 2025 meeting were approved by the Judicial Conference and delivered to the Supreme Court in October 2025 for its review.

E. Legislative Update

Sarah Sraders, Counsel to the Civil Rules Committee, provided an update on pending legislation that directly or effectively amends the federal rules, referencing the chart of legislative proposals in the agenda book beginning on page 97. Ms. Sraders drew the Committee's attention to several bills involving third-party litigation funding, noting that the Protecting Our Courts from Foreign Manipulation Act had recently been reported favorably by the House Judiciary Committee. She also highlighted the Litigation Transparency Act, noting that no action has been taken on this bill since it was introduced.

F. Federal Judicial Center Update

Judge Robin R. Rosenberg, Director of the Federal Judicial Center, provided the Committee with an update on the FJC's activities relating to the work of the Rules Committees. The FJC Report is included in the agenda book beginning on page 120.

Judge Rosenberg began her report by highlighting a project for the Appellate Rules Committee to examine motions to intervene on appeal, both at the beginning and end of the case's time in the court of appeals. Judge Rosenberg also noted that the FJC has ongoing research regarding temporary administrative stays and attorney admissions, and is developing a collection of resources on complex criminal litigation at the suggestion of the Criminal Rules Committee.

Judge Rosenberg next provided an overview of other FJC projects. This includes projects involving case weights, a review of local rules relating to redaction of private information in public court filings, supplemental research on the prevalence of unredacted social security numbers in public court filings, and appeals of *sua sponte* remand orders after Class Action Fairness Act (CAFA) removals.

Other projects Judge Rosenberg described included a pilot program on comparative sentencing information for pre-sentence investigative reports, the privacy study regarding unredacted private personal information, a bankruptcy court case weights study, and the second edition of the FJC's publication on

consumer bankruptcy law. Judge Rosenberg noted a large number of inquiries for resources on artificial intelligence (AI), and that the FJC is working on a website of AI resources for judges, and an AI chapter in the new manual for scientific evidence. The FJC is also preparing a new edition of the Manual for Complex Litigation, which has not been updated since 2004. With respect to criminal cases, the FJC is preparing the seventh edition of its manual on recurring issues in criminal trials, and a new bench book for district court judges and magistrate judges.

Judge Rosenberg also noted the work of the FJC's History Division, which had developed an online series on managing cases with significant historical evidence, and had developed a program in partnership with the American Bar Association to provide professional development for teachers focusing on three famous historical trials. With respect to education efforts, Judge Rosenberg briefly noted the FJC's ongoing judicial education programs.

Judge Rosenberg concluded her remarks by thanking Judge Chagares for his work on the Judiciary's 2025 Strategic Plan and emphasized the importance of adhering to the core values and priorities outlined in the plan.

Judge Dever thanked Judge Rosenberg for her remarks and for the invaluable support the FJC provides to the Rules Committees.

2. JOINT COMMITTEE BUSINESS

Judge Dever then turned to Joint Committee Business.

A. Electronic Filing by Self-Represented Litigants

Professor Catherine Struve, Standing Committee Reporter, provided an update on the project on self-represented litigants. Professor Struve's memorandum appears on page 127 of the agenda book.

Professor Struve explained the two goals of the project: (1) eliminate the requirement for paper service of documents (after the initial filing) on litigants who already receive notice of case activity through the electronic filing system; and (2) adopt a rule that would presumptively permit self-represented litigants to file electronically, unless a court order or local rule bars them from doing so. On this last issue, the proposed rule would provide that if a court adopts a local rule that generally bars self-represented litigants from using the court's electronic filing system, it must include reasonable exceptions or allow the use of some other electronic method for filing.

Professor Struve informed the members that after considerable discussions among the four relevant Advisory Committees, which benefited greatly from the work of the Reporters, Advisory Committee members, FJC, and the clerk liaisons, the Advisory Committees are prepared to develop rule amendments for potential presentation to the Standing Committee in June 2026 for approval to publish for public comment. Professor Struve noted that among the relevant Advisory Committees, the Bankruptcy Rules Committee raised the most concern regarding the project because of the specifics of bankruptcy practice and would like the benefit of public comment before deciding whether to ultimately seek approval of such a rule.

The members then discussed the project for electronic filing for self-represented litigants.

A judge member expressed his enthusiasm for the project and offered three points. First, he was not clear as to the default consequence if a filing is non-conforming. Second, he was not clear as to what happens if a recipient does not receive a document and whether it is considered not filed. Third, he expressed his view, in opposition to the Department of Justice's position, that this project should not be limited to parties and should address electronic filing by unrepresented non-parties, particularly victims and subpoena recipients.

Professor Struve answered the first question, noting that the question as to the default consequence for a non-conforming filing has been considered. There was some sentiment in the Advisory Committee meetings in the fall that this was an issue outside the scope of the current project, and that the Advisory Committees did not want to take on that issue at this time. However, some participants expressed interest in trying to work it into the current project, so the issue is still pending for discussion. As to the question (whether to retain existing rule provisions providing that electronic service is not effective if the filer learns that it did not reach the person to be served), Professor Struve responded that the project probably should maintain the approach taken by the current rules. Finally, as to the third question, Professor Struve noted that the question of non-parties has a different valence among the different sets of rules, and project participants would give the question close attention.

Judge Dever thanked the judge member for his comments and encouraged the members of the Committee to provide feedback on any of the items presented.

B. Report of Joint Subcommittee on Attorney Admission

Professor Struve next provided an oral report on the work of the Joint Subcommittee on Attorney Admission. The subcommittee was formed in late 2023 in response to a proposal by Associate Dean Alan Morrison and others with respect to the attorney admissions practices of the federal trial courts. At present, the subcommittee is in the information gathering process.

Dean Morrison's proposal pointed out that a number of federal district courts require, as a condition of admission to the district court bar, that the attorney be admitted to the bar of the encompassing state. Among such states, four require, as a condition of admission to the state bar, that the attorney seeking admission take the bar exam. The proposal suggested that a rule could be adopted providing that admission to any federal district court entitles a lawyer to practice before any other district court, or as an alternative, barring a district court from requiring as a condition of admission to the 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 had also been thinking about the Appellate Rule 46 model, which is considerably more open than the approach taken by the more restrictive district courts – but that the subcommittee has noted the differences between appellate and trial-level practice.

With no questions or comments from the members, Judge Dever thanked Professor Struve for her report. Judge Dever further noted that Judge Paul Oetken had been the chair of the subcommittee but his term on the Bankruptcy Rules Committee had ended. Judge Leigh May, who replaced Judge Oetken on the

Bankruptcy Rules Committee, will join the subcommittee. The subcommittee also lost another member (from the Criminal Rules Committee), so a replacement will be added.

C. Privacy Rules and Redaction

Ms. Dubay provided an oral report on the privacy rules project, which focuses on two issues: (1) full redaction of social security numbers or other taxpayer identifying numbers in public court filings; and (2) use of pseudonyms instead of initials when referencing minors in public court filings. Ms. Dubay informed the members that each of the relevant Advisory Committees had considered a rule amendment to address the unique context of their proceedings, and planned to consider proposed language at their spring meetings, with the ultimate goal to present those proposed amendments to the Standing Committee in June 2026 for approval to publish for public comment.

With no questions or comments from the members, Judge Dever proceeded to the Advisory Committee reports.

3. ADVISORY COMMITTEE REPORTS

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

Judge Eid presented the report of the Advisory Committee on Appellate Rules, which last met on October 15, 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 130.

1. Status of Public Comments on Draft Amendments to Rule 15

Judge Eid reported on the status of the proposed amendments to Rule 15 regarding review of administrative agency decisions, which were published for public comment in August 2025. Judge Eid noted that two comments – both favorable – had been received and expressed hope that more comments would be received before the February 16, 2026, deadline.

Judge Eid explained that the proposed amendments were intended to address the “incurably premature doctrine,” which arises if a motion to reconsider an agency decision renders the decision unreviewable and requires dismissal of the only petition for review. This sequence of events is a trap for the unwary of the kind that the 1993 amendments to Rule 4 addressed in the context of district court decisions. Judge Eid noted that, for some reason, the 1993 amendments did not include a similar fix for petitions for review of agency decisions. The amendment to Rule 15, if it becomes final, will parallel the fix from Rule 4. The hope is that the amendment to Rule 15 will be presented to the Standing Committee for final review at its June 2026 meeting.

2. Status of Proposals Under Consideration

Judge Eid next discussed the Advisory Committee’s ongoing study of various issues, beginning with intervention on appeal.

Judge Eid explained that there is no current rule on intervention on appeal, and in the past, the Advisory Committee has been reluctant to draft a rule because members thought it would encourage intervention. In other words, if there is a rule, people will want to use it. Judge Eid stated that the Advisory Committee had moved past that concern and is working on a draft Rule 7.1, found on page 132 of the agenda book. Judge Eid then requested feedback on this draft, taking into account the draft's features as highlighted on page 134 of the agenda book.

Judge Eid described additional proposals under consideration. These include: (1) potential amendments to address reopening the time for appeal under Rule 4(a)(6) in light of the Supreme Court's decision in *Parrish v. United States*, with draft language appearing on page 138 of the agenda book; (2) ongoing study of administrative stays under Rule 8, with research assistance from the FJC; (3) ongoing study of a Uniform Rule of Bar Admissions to the Court of Appeals, with practitioners on the Advisory Committee noting difficulties posed by differing bar admission standards amongst the circuits; (4) the treatment of tribes under the appellate rules; (5) privacy amendments relating to redaction of social security numbers and reference to minors; and (6) expanding e-filing for self-represented litigants.

Judge Eid then invited Professor Hartnett to share anything he wished to add. Professor Hartnett noted two things. First, with regard to the possibility of a rule on intervention on appeal, he stated that it would be particularly valuable to receive feedback from the Standing Committee on two issues: (1) general feedback on whether the Advisory Committee is on the right track, and (2) whether the rule should specify the kinds of legal interests that count for intervention. On this issue, Professor Hartnett noted that greater specificity is helpful, but there is a risk that greater specificity risks considerable confusion and leaving out some important interests. Second, Professor Hartnett emphasized the interest in receiving feedback on the privacy amendments, found on page 142 of the agenda book. The general approach is to apply the rule applied in the district courts, but an extra layer of protection may also be appropriate in the courts of appeals because once on appeal, whatever good reasons there were for not redacting at the trial level (as to social security numbers, tax identification numbers, and the like) may not apply to a public filing in the court of appeals.

Judge Eid then noted that Professor Hartnett would be leaving his role as Reporter for the Advisory Committee to assume the role of Reporter for the Standing Committee. Judge Eid remarked on how amazing Professor Hartnett had been as the Appellate Reporter, with an incredible ability to take moving parts and get them to line up and make sense.

a. Proposed Rule 7.1 and Intervention on Appeal

Following Judge Eid's report, the members discussed intervention on appeal. A judge member expressed support for the efforts of the Advisory Committee and raised several questions relating to intervention on appeal. Specifically, the judge member asked if the Advisory Committee had drawn from Civil Rule 24 case law to draft the proposed rule, and suggested addressing the may/must distinction (with Rule 24 using the term "must permit" intervention if the criteria are met and the proposed Appellate Rule 7.1 using the term "may permit" intervention). This raises the issue of whether intervention would be as of right, or whether the appellate court would still have discretion (permissive intervention). The judge member also asked (1) would government motions be treated differently, and (2) what is the scope of the unfair

prejudice prong (subsection F in proposed Rule 7.1(b)(1)). On this latter issue, under Civil Rule 24, that determination goes to timeliness, but in proposed Rule 7.1, it is included as a factor. The judge member also pointed to line 19, page 133 of the agenda book with the proposed language in Rule 7.1(b)(1)(D), which as drafted states as a consideration that existing parties “will not” adequately protect the intervenor’s interest, and suggested that this could be rephrased to loosen the language, such as “are not likely to protect” or “may not protect.” Finally, the judge member raised the issue of the word “exceptional” in the language in Rule 7.1(a), found at line 4 on page 132 of the agenda book. On this point, the judge member asked if the Advisory Committee contemplated other words, such as “rare,” which would still suggest that granting a motion would not be frequent, but would give more flexibility than the word exceptional.

Professor Hartnett addressed these questions. As to the word “exceptional,” Professor Hartnett explained that the Advisory Committee is considering whether to stay with that “exceptional” language or to soften that a bit. As to Civil Rule 24, Professor Hartnett confirmed that it was considered, but in terms of the overall framing of the proposed rule, the draft language was driven by the case law in the courts of appeals that emphasizes how rare and exceptional intervention should be (although there is some dispute about whether every circuit articulates that point). On the unfair prejudice language, Professor Hartnett noted that phrasing undue prejudice broadly allows the rule to encompass other types of prejudice beyond that caused by untimeliness. Though the Advisory Committee had not found examples of such other types of prejudice, it did not want to close the door to those possibilities.

Another judge member raised a question about the draft language in Rule 7.1(b)(2), found on page 133 of the agenda book, relating to government intervention. Specifically, the judge member pointed to the language in proposed Rule 7.1(b)(2)(A), which permits a government to move to intervene to defend any “action it or one of its agencies or officers has taken,” and Yes. noted that this may be broader than existing Civil Rule 24. Civil Rule 24 is framed in terms of government intervention where a claim or defense is based on a statute or executive order. Professor Hartnett explained that at the very least, the proposed language covers the United States’s statutory right to intervene to defend the constitutionality of a federal statute. The proposed rule was drafted with the idea that there is no particular reason to not let the government defend its actions if the claim or defense raises a statutory rather than constitutional challenge to government action, but the Advisory Committee would look at that issue more closely.

A lawyer member noted that there was a lot of concern from the judges on the Advisory Committee that this rule could open the floodgates to intervention motions unless it was made clear that permission to intervene was the exception to the rule. This discussion is the source of the “exceptional” language. The unfair-prejudice prong is designed to provide a broad way to address the problem of non-parties coming in and raising arguments that were not raised below because they had failed to protect their interest in the district court.

Another judge member asked what problem the proposed rule was trying to solve and whether appellate courts could simply decide this according to case law and common sense. Professor Hartnett explained that one reason for drafting the rule is that these motions are being made frequently, as indicated in the FJC report. The Supreme Court has also noted the absence of a rule on intervention on appeal. Also, a rule would help lawyers to advise clients not to pursue intervention because they could point to the

standard set forth in the rule. Professor Hartnett also noted that while there is momentum towards a rule, the DOJ was not represented at the fall 2025 meeting because of the government shutdown and its position is not clear. At this point, Ms. Shapiro, on behalf of DOJ, confirmed that their representative could not attend the fall meeting because of the lapse in appropriations, but also noted that DOJ is extremely skeptical that a rule is necessary, and is particularly concerned about opening the floodgates to intervention whenever people are unhappy with an agency action that is on appeal.

The lawyer member added that part of the impetus for the rule was situations in which a federal or state government litigant changed its position and decided not to defend a rule on appeal. This issue arose in a Supreme Court case involving a state rule.

A judge member, noting his disagreement with the DOJ, added that the biggest need for intervention, and for administrative stays on the emergency interim docket, was in agency cases. He further pointed out language on page 134 of the agenda book noting that based on the FJC report, the Advisory Committee did not think that the intervention rule should pertain to agency review cases. The judge member noted his strong disagreement with that conclusion, and disagreement with excluding agency actions from the administrative-stay project as well, discussed in the Advisory Committee minutes on page 158 of the agenda book.

A lawyer member clarified that the Advisory Committee was drawing a distinction between agency cases coming from the district courts and agency cases on direct review in the courts of appeals. He noted that there is a robust settled practice for dealing with intervention in connection with a petition in the court of appeals for review or enforcement of an agency order, and that the Advisory Committee wished to avoid unsettling that practice.

b. Rule 25(a)(5)(C) and Privacy Considerations

The members then discussed the proposed amendments on privacy. A judge member asked whether amendments to Rule 25(a)(5)(C) would address redactions relating to minors, or whether that issue would have its own separate rule. Professor Hartnett explained that the proposed amendment would carry forward current Rule 25(a)(5)'s approach, which is generally to incorporate by reference whatever privacy provision applied below. Accordingly, provisions in the Criminal, Civil, and Bankruptcy Rules concerning pseudonyms for minors will carry forward on appeal. The Advisory Committee does not think there is a need for a special appellate rule on minors or a differing rule on appeal. The judge member responded that the privacy of minors is often overlooked, and it is worth considering the additional layer of privacy with respect to identification of minors on appeal. She further noted that appellate decisions are read by more people, and these opinions are more accessible, and she is in favor of making sure that we protect the minors as much as possible.

Professor Sara Sun Beale, Reporter for the Criminal Rules Committee, noted that Criminal Rules has taken the lead on these privacy provisions, and commented that it appears that all of the Advisory Committees agree on the move from initials for minors to pseudonyms. The disagreement has to do with social security numbers. Given the expectation that the Bankruptcy Rules will not be amended to require full redaction of Social Security numbers, the draft Appellate Rule 25 amendment is designed to require such redaction on appeal. The judge member responded that in criminal cases in the district courts, there

can be submissions from victims that are filed, and the name of the minor might not be caught given the speed and emotion that goes into filings in the district court. For this reason, she supports addressing the issue of minors so that oversights in the district court do not get repeated in the appellate record.

c. Rule 4 and Reopening Time for Appeal

The members then discussed the issue of reopening time for appeal. A lawyer member noted that his firm represented Mr. Parrish in *Parrish v. United States*, but that he did not think this precluded him from commenting on the proposed amendment. He proposed omitting the second sentence in proposed Rule 4(a)(6)(B) relating to whether a document should be construed as a notice of appeal. Rule 3 tells litigants how to file a notice of appeal, and courts already take a more liberal attitude with filings by *pro se* litigants. Interpretation of the notice of appeal is an issue for the courts rather than the litigants.

With no further discussion or questions from the members, Judge Dever proceeded to the next Advisory Committee report.

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

Judge Connelly presented one action item and several information items from the Advisory Committee on Bankruptcy Rules, which last met on September 25, 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 on page 164.

1. Retroactive Technical Amendment to Official Form 410C13-NR

Judge Connelly first presented the Advisory Committee's request that the Committee approve technical amendments to Official Form 410C13-NR, retroactive to December 1, 2025. Judge Connelly explained that this form was part of a package of six new forms that were approved in connection with changes to Bankruptcy Rule 3002.1 and went into effect on December 1, 2025. Rule 3002.1 has a very active history and has been amended numerous times, including the recent amendment that included the addition of six new official forms.

To provide background on the need to correct Official Form 410C13-NR, Judge Connelly explained that Bankruptcy Rule 3002.1 applies only in Chapter 13, which is why the form has "C13" in its title. Judge Connelly then explained that one of the rights of a Chapter 13 debtor is to file a bankruptcy case, reinstate a mortgage that is in default, and use a three- to five-year time period to cure mortgage arrears. That cure occurs by making payments to a Chapter 13 trustee, who disburses those payments to a mortgage holder or mortgage servicer. During this three- to five-year period, however, there may be changes to the servicer, changes to the payments, or inconsistencies regarding timing. As a result, at the end of this three- to five-year period, the mortgage holder or servicer's records may show that the arrears were not cured, but the debtor's and trustee's records show that they were. The amendments to Rule 3002.1 provide more transparency and notice in order to avoid these problems at the end of the case.

As part of the Rule 3002.1 amendments, the Bankruptcy Rules Committee changed an official form regarding the notice that the trustee submits to the mortgage holder or servicer and the form response by

the holder or servicer. The reason these are done as official forms is because of the volume and because management of these mortgage claims is usually handled at the mortgage-holder level, not the attorney level. Having a form that is uniform, that can be automated, and that can be managed by non-attorney staff is critical to compliance. And the mortgage holder or servicer will need to input it into a software program.

Official Form 410C13-NR was approved to go into effect December 1, 2025—along with all of the other forms, and along with the changes to Rule 3002.1. After this approval, one of the mortgage services caught a scrivener’s error. Official Form 410C13-NR, which the mortgage holder or servicer would file in response to the trustee’s notice of the disbursements that the trustee made on the mortgage claim, referred erroneously to the information as of the date of this “notice” in two places. The form was clearly meant to indicate that the respondent was sending its information as of the date of its “response” and not the date of the “notice.”

The servicer brought this to the attention of a member of the Bankruptcy Rules Committee, and the Advisory Committee was able to address this at its September 2025 meeting and approved changes to official Form 410C13-NR to change the word “notice” to “response” in two places. The approved, revised form appears in the agenda book at page 170. The Advisory Committee approved the changes with the expectation that it would come before the Standing Committee today to seek approval retroactive to December 1. The Advisory Committee determined that it was important for the changes to go into effect December 1, consistent with how the form should be used and applied, so that servicers and courts would have the correct form.

The Advisory Committee referred to authority that the Judicial Conference had issued in March of 2016, which specifically delegates authority to the Bankruptcy Rules 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.

Judge Connelly, on behalf of the Bankruptcy Rules Committee, requested approval of the changes to Official Form 410C13-NR, retroactive to December 1, 2025. With no questions or comments from the members, and upon motion and a second, with no opposition, the Standing Committee approved the requested technical amendments.

2. Status of Proposals Under Consideration

Judge Connelly next presented information on the status of proposals under consideration by the Advisory Committee on Bankruptcy Rules.

a. Rule 9037 and Rule 8011 and Privacy Protections

Judge Connelly first addressed the privacy amendments focused on complete redaction of social security numbers. She explained that for many reasons, the Bankruptcy Rules Committee has determined that full redaction of social security numbers is not practicable at this time in bankruptcy cases, and that the Bankruptcy Rules should continue to permit filings to contain the last four digits in a social security number. For example, when a bankruptcy case gets filed, notice to those who are affected by the

bankruptcy is absolutely essential, including notice to creditors who must be able to identify the debtor accurately. For this reason, use of the last four digits of the social security number of the debtor in court filings is still necessary for the stakeholders to be able to identify the party who is in bankruptcy. The same issue of appropriate notice applies in bankruptcy cases involving an employer identification number (EIN), or an individual taxpayer identification number (ITIN). For those reasons, the Advisory Committee at this time will not pursue an amendment to Rule 9037 with respect to complete redaction of the social security numbers or other taxpayer identifying information.

The Bankruptcy Rules Committee supports changing the denotation of minors from initials to pseudonyms. As for what rule would apply when a bankruptcy case is appealed, the Bankruptcy Rules Committee believes that the appellate rule should be consistent for both bankruptcy appeals and non-bankruptcy appeals and that the need for the last four digits of the social security number does not continue at the appellate level. Judge Connelly anticipates that proposed amendments to Bankruptcy Rule 9037 (to address pseudonyms for minors) and Bankruptcy Rule 8011 (the appellate rule) will be presented to the Standing Committee at its June 2026 meeting.

b. Rule 2003 and Meetings of Creditors

Judge Connelly next raised potential amendments to Bankruptcy Rule 2003, related to meetings of creditors. Upon the filing of the case, a meeting of creditors is convened in which a trustee conducts an examination of the debtor and creditors are given the opportunity to attend. Rule 2003 contains language regarding the timing and place of holding the meeting and specifies it has to be in the district where the bankruptcy case is pending. Two suggestions have been received regarding changing that rule to reflect the current practice of holding these meetings remotely and that in such cases, it may not matter where the trustee is located. The proposals also raised the concern that the current number of days referenced in the statute has created some administrative problems for certain trustees. Judge Connelly further noted that a bankruptcy judge does not conduct these meetings or have authority over them – the DOJ Office for U.S. Trustees is primarily involved with appointing trustees and managing these meetings of creditors (or, in some states, there is a bankruptcy administrator involved). Because changing Rule 2003 would have an impact on how the Office for U.S. Trustees and the bankruptcy administrators manage these meetings, before going forward with a proposed amendment to Rule 2003, the Advisory Committee is awaiting the outcome of discussions between the Office for U.S. Trustees and representatives from trustee organizations to try to achieve a consensus.

c. Rule 9031 and Use of Special Masters

Judge Connelly then turned to potential amendments to Bankruptcy Rule 9031, which currently provides that Civil Rule 53 relating to the appointment of special masters does not apply in cases under the Bankruptcy Code. After the Advisory Committee received suggestions to authorize Bankruptcy Judges to appoint special masters, the FJC conducted research to help the Advisory Committee determine if there is a perceived need for the use of special masters in bankruptcy cases, and the FJC research indicated that there is. With that feedback, the Advisory Committee is in the process of drafting a proposed rule change to incorporate the applicable provisions of Rule 53 in bankruptcy cases. Judge Connelly commended Professor Elizabeth Gibson, Reporter for the Bankruptcy Rules Committee, for her extraordinary work on

this issue. The goal is to bring the proposed amendment to the Standing Committee in June 2026 for approval to publish for public comment. The next issue under consideration by the Advisory Committee is potential amendments to Bankruptcy Rule 8017, which parallels Appellate Rule 29 on amicus briefs. With the proposed amendments to Appellate Rule 29 in the process of final approval, there is a need for a conforming amendment to Rule 8017, as well as Rule 8015 regarding the certificate of compliance. The Advisory Committee plans to present the Standing Committee at its June 2026 meeting with a package of proposed amendments to Rule 8017 and Rule 8015 for approval to publish for public comment.

Judge Connelly concluded her report by noting that the Advisory Committee has decided not to proceed with potential amendments to Rule 9006's time-computation provision. This decision parallels the decision of the Appellate Rules Committee to remove a similar proposal from its agenda.

The members then discussed the use of special masters in bankruptcy proceedings.

A judge member asked why the Advisory Committee has decided to support the use of special masters when it had previously chosen not to make that change, especially in light of past allegations of cronyism in the appointment of special masters. Judge Connelly responded that the renewed consideration of the issue was driven by two suggestions made to the Advisory Committee simultaneously proposing this change. The Advisory Committee looked at the issue very deliberately and slowly, including gathering research, and asking for the FJC's assistance to hear from bankruptcy judges on the issue. Given that study, the Advisory Committee felt that the proposed amendment could benefit from public comments. Professor Gibson added that the American Bar Association submitted one of the suggestions, which is very unusual and that she believed the impetus comes from mass tort bankruptcy cases with lawyers experienced in multi-district litigation, in which special masters are available. Professor Gibson also noted that the FJC survey reported respondents' mixed feelings, but also that a significant number of judges said they would have used a special master if available.

The judge member suggested that it would be good to hear from creditors who would have to pay the expense of the special masters. He further suggested that the draft language should address the use of special masters as limited to rare and unusually complex cases. Professor Gibson added that publication for public comment would also allow creditors or other people concerned about the costs to provide feedback.

The academic member added some historical and contemporary context on the use of special masters in bankruptcy cases. The driving force behind the latest round of proposals is the complexity and sprawl of some mass tort cases and other types of broad disputes that end up in bankruptcy court, where the participants in the case could benefit from the flexibility to appoint a special master. Historically, the fear of cronyism in the bankruptcy context goes back to the change from the title bankruptcy referee to bankruptcy judge. The Bankruptcy Rules as promulgated in the early 1970s used the term "judges" for referees. This change raised concerns about whether cronyism could be an issue in the tight-knit bankruptcy community. The academic member concluded, however, by stating that this past concern should not inhibit the use of effective procedural tools that could be used in bankruptcy, especially in enormously complex types of matters.

C. Advisory Committee on Civil Rules – Judge Sarah S. Vance, Chair

Judge Vance began her report by welcoming Sarah Sraders as Counsel to the Civil Rules Committee and then proceeded to present the report of the Advisory Committee on Civil Rules, which last met on October 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 on page 194. Judge Vance also reminded the Committee that a number of proposed amendments had been published for publication (Rule 7.1, Rule 26, Rule 41, Rule 45 and Rule 81) and that a public hearing on those proposed amendments would take place on January 27, 2026.

1. Request for Approval of Publication for Public Comment – Rule 55

Judge Vance explained that the proposed amendments to Rule 55 are based on information learned in a comprehensive FJC study on default procedures in the district courts. The goal of the amendments is to conform the rule to actual practices in many districts. A draft of the proposed amendments to Rule 55 appears on page 218 of the agenda book.

The proposed amendment to Rule 55(a) governing entry of default by the clerk would change the term “must enter the party’s default” to “may enter the party’s default,” and also expressly adds that the clerk “may refer the matter to the court for directions.” This amendment addresses both the difficulties that clerks sometimes encounter in determining whether the requirements for a default have been met and the findings of the FJC study that such consultation with the court on default matters occurs in a number of districts.

The Advisory Committee also proposes amending Rule 55(b)(1) governing the clerk’s entry of a default judgment. The amendments parallel the changes to Rule 55(a). They would change the term “must” to “may” enter judgment (on claims for a sum certain or a sum that can be made certain by computation), and would expressly provide the clerk the option to refer the matter to the court for directions.

The proposed amendments recognize that since Rule 55 was adopted in 1938, litigation has become more complicated and, consequently, determining whether a claim is for a sum certain or capable of being made certain can be a challenging determination for clerks to make, especially when calculating interest and attorney’s fees. The FJC study further revealed that the reality is that the entry of default judgments by clerks is rare and they frequently exercise discretion to refer these applications to the district court. The FJC study also found considerable variation in other default procedures among the districts, some requiring notice of default, some requiring specific showings to be included in applications for defaults or default judgments, and at least one imposing a meet-and-confer requirement. The Advisory Committee was not persuaded that a nationwide rule amendment that would alter all of these local practices was warranted. Judge Vance also expressed the view of the Advisory Committee that default judgments do not play nearly as important a role in federal courts as they do in state courts, with default judgments in federal courts making up only two percent of all civil case terminations.

Judge Vance additionally noted two small revisions to the existing language in Rule 55. First, the proposed amendment to Rule 55(b)(2) changes the reference to “the party” to “a party” in the first line of

the rule. This change is for greater clarity and is not intended as a substantive change. Second, the draft adopts the Standing Committee Style Consultants' recommendation to add the word "either" after the word "may" in both places where "must" was changed to "may" in Rules 55(a) and (b)(1). (The addition of "either" is shown at page 321 of the agenda book.)

The members then discussed the proposed amendments to Rule 55.

A judge member raised concerns about the proposed language giving the clerk the ability to refer a matter to the court for directions. First, the change could be a way for a party to bypass the obligation to specifically request action from the court under current Rule 55(b)(2). Second, the language to seek "directions" from the court is vague. The judge member asked whether the Advisory Committee was open to removing the clerk's ability to enter default judgments, as mentioned in the Advisory Committee minutes.

Judge Vance explained that the Advisory Committee considered the option to refer all default-judgment requests to the court but determined that it would unsettle practices in some districts and that providing discretion to refer the matter was preferable. She noted that in a number of districts (about 32), all default judgments go to the district court under current practices, and in other districts (about 18), the clerk always get consultation or direction from the court. In light of this research, the Advisory Committee decided after discussion to add the option of referral to the court for direction. Professor Marcus added that there was a strong majority, maybe unanimity, among members of the Advisory Committee that abrogating Rule 55(b)(1) would forbid the current practice in certain districts. Additionally, "refer to the court for directions" is language that captures the various methods for getting default matters before the judge. During public comment, the Advisory Committee may also receive comments suggesting abrogation of Rule 55(b)(1) or raising questions about "refer to the court for directions." In many districts, under their local rules, clerks already refer matters to the court for directions (especially in complicated matters).

The judge member commented that none of the local rules cited state that the clerk may refer the matter to the court for directions. For example, the Northern District of New York and the District of Vermont have specific requirements that seem helpful. In Vermont, the clerk can "confer" with the district judge as opposed to an actual referral. Judge Vance added that sometimes a clerk may confer with chambers staff, such as a law clerk, which indicates there is a lot of variation in judges' preferences on how to handle default judgments.

As a historical reference, Professor Marcus added that there was an initial proposal before the Advisory Committee that would not have included those words "refer to the court" and would have only changed "must" to "may." An attorney member had reacted that merely changing "must" to "may" would have left the clerk's duty unclear. By saying that the clerk must "either" enter the judgment or refer the matter to the court, the draft rule provides both guidance and flexibility.

The judge member next asked the difference between the situation under the proposed revision to allow the clerk to refer the matter to the court for directions, and the process under Rule 55(b)(2) when the request for a default judgment comes directly to the court. Professor Marcus explained that presumably there is no difference, particularly since there are local rules in some places to say what happens when you ask the court to enter default judgment. There are also likely not many cases in which there really is

a sum certain or a sum that can be made certain by computation; all other cases would be addressed under Rule 55(b)(2).

The judge member predicted that public comment might raise the topic of the statutory protections concerning default judgments against military service members. Professor Marcus indicated that while the Advisory Committee discussed that issue at some length, the consensus was the downsides of adding the statutory reference would exceed the benefits. Judge Vance added that some districts have provisions for dealing with service members, that the Bar was aware of the service-member issue, and that adding a reference to that statute could cause a problem if references to other relevant statutes that were not put in the rule. More generally, the practice in rule-making is that it is not a good idea to refer to statutes in a rule because including a statutory reference in one rule might erroneously suggest that the statute does not apply under other rules that fail to refer to it.

A lawyer member wondered if using the term “consult” is better than “refer” because “refer” sounds like the judge is going to make the ultimate decision. What the amendment contemplates is that the clerk consults with the judge to get advice on what should be done, as opposed to referring it to the judge for the judge to act on the request.

Professor Marcus responded that the question actually shows the flexibility of the language in the proposal. Judges who are referred these matters can determine what they want to do with them. One judge might direct the clerk to enter the default, and another judge might direct the clerk to set it for hearing.

Another judge member raised concerns about using the word “consult” because it would suggest that the clerk can disregard whatever the district court judge says, and that “refer” was preferable. Professor Marcus agreed.

With no further questions or comments from the members, and upon motion and a second, with no opposition, the Standing Committee approved for publication and public comment on the proposed amendments to Rule 55, as shown in the agenda book at pages 218-221, with the addition of the edits from Professor Garner as reflected in Judge Vance’s email (agenda book page 321).

2. Status of Proposals Under Consideration

a. Rule 43 and Remote Trial Testimony

Judge Vance first directed members to the issue of remote testimony, which is discussed at pages 202 to 203 of the agenda book. Judge Vance stated that the Rule 43/45 Subcommittee, chaired by Judge Hannah Lauck, is seriously considering amendment of Rule 43(a) on remote trial testimony to relax the requirement that remote testimony be permitted only in compelling circumstances. The subcommittee is also considering whether a similar amendment to Rule 43(c) is in order since it authorizes the use of affidavits, oral testimony, or depositions on motions but does not state whether oral testimony may be provided remotely.

Judge Vance explained that Rule 43(a) was amended in 1996 to permit remote trial testimony but only for “good cause in compelling circumstances and with appropriate safeguards.” The amendment being

considered would delete “compelling circumstances” but would leave “good cause and with appropriate safeguards” in the rule. At the time of the 1996 amendments, the Advisory Committee noted that the justification for allowing remote trial testimony only in compelling circumstances was that the use of video depositions was superior to remote testimony for presenting absent witnesses. Since 1996, technology such as Zoom and Teams has changed the remote testimony landscape, and courts’ experience during the pandemic has demonstrated that remote proceedings can be conducted efficiently and effectively. Judge Vance further noted that in response to these developments, the Bankruptcy Rules have been amended to relax the constraints on remote testimony in contested matters, although not in adversary proceedings.

To consider the proposed amendment to Rule 43(a), the Rule 43/45 Subcommittee heard the views of lawyer groups, as well as the experience of a number of judges with remote proceedings during the pandemic, and they all are of the view that the current rule is too restrictive and that remote proceedings should be liberalized for trial testimony. The Advisory Committee also considered a discussion draft presented at its October 2025 meeting, found on page 201 of the agenda book, and expressed no opposition to eliminating the “compelling circumstances” requirement for remote trial testimony. Some members did express a view, however, that the draft committee note may be too cautious about the use of remote testimony and that more latitude should be given to the court to allow it. Some members also suggested that perhaps similar provisions authorizing remote testimony for motion hearings should be added to Rule 43(c). Since the October 2025 meeting, the subcommittee has met again, and its emerging view is that while in-person trial testimony should remain the norm, the “compelling circumstances” requirement for remote trial testimony is too restrictive and that a relaxed standard should likewise apply to permit remote testimony at motion hearings.

Professor Marcus added that this is an ongoing effort, but a proposed amendment may be presented at the June 2026 Committee meeting as a proposal for publication for public comment. If it is published, Professor Marcus expects a great deal of public comment.

The members then discussed the potential amendment of Rule 43(a) and Rule 43(c) to remove the “compelling circumstances” language.

A judge member referenced line 51 on page 201 and line 100 on page 202 of the agenda book and suggested adding a comma after “good cause,” because the “good cause” is separate from the “safeguards.” Professor Garner noted that commas are discretionary, with the open style and the closed style of punctuation. The rules committees’ style would be not to put a comma there.

The judge member also noted an inconsistency between reference in Rule 43(c) to “witness” testimony and subsection (a)’s reference to “oral” testimony. Professor Marcus thanked the judge member for pointing out that disjunction for the Advisory Committee’s consideration.

Another judge member raised the concern that the reference to COVID-19 in the committee note, when entire trials were held remotely, could be read in conjunction with the proposed Rule 43 changes to allow an entire trial to happen remotely. The judge member also noted that there could also be constitutional or evidentiary objections to remote testimony, but that her primary concern is the potential use of this rule to increase the instances of entire trials being held remotely. Judge Vance responded that the proposed

amendments were not intended to do that, and would not, for example, apply to trial proceedings such as voir dire. Judge Vance would suspect, however, that if there is good cause to allow more than one witness to testify remotely in a very long trial, this would be available for the judge's consideration. The amendment just removes "compelling circumstances," which seems to suggest that it needs to be a rare occurrence when in practice remote testimony does occur in a lot of complex litigation.

A lawyer member then commented on his experiences with both witnesses testifying remotely and whole trials being done remotely, and that he was not a fan of either. He noted that remote testimony really does impact the ability of a trier of fact to assess witness credibility, and so anything that facilitates remote participation of a witness is not a good thing and should be carefully assessed by a court before the court permits it. Additionally, remote testimony can have a profound impact on cases, and removing the "compelling circumstances" language would increase the prevalence of remote testimony. For example, with such a change, anytime it is inconvenient for the witness, the lawyer can ask for remote testimony and state there is good cause and we can have appropriate safeguards.

Another judge member agreed with the lawyer member and expressed concern that deleting the words "compelling circumstances" will create mischief because good cause is a relatively low standard. He also anticipated being besieged by requests to have witnesses testify remotely. Further, removing "compelling circumstances" is entirely inconsistent with the views of the Advisory Committee (as indicated in the minutes on page 228 of the agenda book) that live in-person testimony should remain the norm. For this reason, there needs to be something more to give guidance to judges as to when a request should be allowed. Finally, the judge member noted that in his experience, the existing language did not unduly limit the use of technology to present trial testimony. Judge Vance thanked the judge member for his comments, but added that others believe that remote testimony is effective. The judge member clarified that it is not that credibility cannot be assessed with remote testimony, but that in-person testimony should be the general rule. In response to a suggestion by the judge member that the problem is with the committee note rather than the text of the Rule, Professor Marcus observed that the rules process does not allow for amendments to committee notes without amendments to the rule itself.

Another practitioner member commented that while she shares the concerns about potential expanded use of remote testimony, she endorses and encourages the proposed amendment to go forward for public comment to get the perspectives of practitioners and judges. This may yield improvements or refinements to the rule text and committee notes. But her bottom line is that we are in a world where remote testimony is being used increasingly, sometimes of necessity, other times for convenience, and adopting a rule on the topic would be timely and consistent with the goals of Rule 1.

A practitioner member raised one additional, practical concern that occurs when a remote witness may have materials to review that are off screen. One safeguard that was applied by a court was to suggest that the lawyer ask questions, such as "is there anything in front of you on the desk? Is your phone on or off?" In that case, however, the practitioner had genuine questions about whether the expert witness who appeared remotely was continuing to communicate with the lawyers on the other side via text or some other device during the testimony. While the quality of the video may be good for credibility assessment, the practitioner also found that there are all sorts of other credibility-related concerns that arise with remote appearances.

Another judge member added that his sense is that jurors may not like remote testimony. For example, jurors may ask why they are required to be present but the witness is not. He asked whether the rule should distinguish between instances when a party opts to accept that potential risk and instances when it is the witness who is asking to appear remotely. Judge Vance noted that one argument in favor of permitting remote testimony is that sometimes the alternative would be to put in the witness's deposition testimony, and jurors do not like hearing deposition testimony or watching video depositions. Professor Hartnett suggested that the Advisory Committee might consider building into the text of the rule guidance on the choice between remote live testimony or use of depositions.

A judge member then added, in response to the concerns raised by a practitioner about appropriate safeguards during remote testimony, that there could be a requirement to allow the opposing party to have someone present with the remote witness. For example, when you have a video deposition, the other side is represented, and this is something that could be suggested in a committee note. Another judge member added that a brief search for case law distinguishing "good cause" from "compelling circumstances" did not yield much. But he would still like to hear the empirical basis that this is a problem (e.g., that judges are not allowing remote testimony under the current rule) and if there is a way to distinguish between compelling versus good cause and how that change would play out.

Professor Coquillette added for the benefit of the members that as a matter of rule-drafting philosophy, any language relating to compelling circumstances should be in the rule, not in the note. Further, case law should not go in the committee notes. Many people do not read the notes carefully. If an issue is important, it ought to be in the text of the rule.

b. Third-Party Litigation Funding

Judge Vance next provided a report on the Advisory Committee's consideration of amendments related to third-party litigation funding (TPLF), discussed on pages 203 and 204 of the agenda book. Judge Vance noted that the TPLF subcommittee, chaired by Judge David Proctor, was formed in 2024, but this issue has been on the Advisory Committee agenda for some time. It is an area of increasing interest to lawmakers, academics, lawyers, and litigants. The subcommittee has spent the last year educating itself on these issues. Judge Vance reminded the Committee members that Ms. Srader's legislative report had noted a number of TPLF-related bills under consideration in both houses of Congress. The Advisory Committee continues to hear from proponents and opponents of a disclosure rule. Most recently, members of the subcommittee, as well as Judge Dever, attended a conference held by George Washington University Law Center on this issue, which was attended by industry participants and parties who favored and opposed a disclosure rule.

Judge Vance explained that in general, the subcommittee's questions include: How would a rule define the financing arrangements that trigger disclosure? What would be disclosed and to whom? What would the court do with the information disclosed? Should judges be concerned about the ethical implications if funders control settlement decisions? Does third-party funding prompt the filing of unvetted claims? And will disclosure lead to time-consuming discovery? Judge Vance then invited any views of the Standing Committee on these issues.

A judge member with experience in TPLF issues offered to make himself available to the Advisory Committee if they had questions about the standing orders he has issued. Judge Vance expressed her appreciation for the offer.

c. Cross-Border Discovery

Judge Vance then proceeded to the work of the cross-border discovery subcommittee, chaired by Judge Manish Shah. The subcommittee was formed in 2023 to study the complex issues that sometimes arise in obtaining discovery outside the U.S. for use in federal courts. As discussed in the agenda book, the subcommittee engaged in substantial outreach to get an understanding of these issues and whether rules amendments would be helpful. This outreach revealed a lack of enthusiasm for rulemaking in this area. To a significant extent, lawyers felt that they could work out problems, as they come up, under the existing rules. Judge Vance reported that ultimately, the cross-border discovery committee recommended that this topic be dropped from the Advisory Committee's agenda and the Advisory Committee voted to approve that recommendation. Judge Dever added for the benefit of new members in particular that it is not uncommon for a subcommittee to study a proposal for rulemaking and then to decide not to go forward with a change.

d. Rule 26(a) and Filing Under Seal

Judge Vance then provided a report on the Advisory Committee's consideration of the issue of filing under seal, discussed at pages 205 to 208 of the agenda book. As background, Judge Vance explained that for several years, the discovery subcommittee, chaired by Judge David Godbey, had been considering a proposal to recognize in the rules that granting a motion for a protective order does not of itself justify the filing of the discovery material in the record under seal. The proposal also included proposed amendments to impose national procedural standards for handling sealing motions.

At the October 2025 Advisory Committee meeting, the discovery committee discussed the alternatives it had been considering for addressing sealing issues, and these were (1) whether to amend Rule 26(c) and Rule 5(d) to provide when filing under seal could be ordered or (2) whether it would be sufficient to amend only Rule 26(c) to call attention to the divergent standards for protective orders and sealing court records or (3) whether no amendment was necessary given the general recognition that the standard for issuing a protective order is less stringent than the common law and First Amendment limits on sealing court records. The subcommittee reached the unanimous conclusion that the rules need not be amended and recommended that this item be removed from the Committee's agenda because national procedural directives would ignore real differences in dockets across districts and would raise undue difficulties in some districts. The subcommittee concluded that it was unnecessary to recite in the rules what was already recognized in the law – that the standard for sealing documents is more stringent than the good cause standard for the issuance of a protective order. Further, various circuits have their own statements of the common law and First Amendment standards for sealing court records, and the subcommittee sought to avoid unsettling this established case law by stating grounds for sealing in the rules. The Advisory Committee voted to accept the subcommittee's recommendation that this item be dropped from the agenda.

A judge member asked if the issue was being dropped entirely or whether it would remain on a study agenda. If not fully forever dropped, the judge member referenced the work of Professor Volokh pointing to a smaller issue that could still be valuable regarding requiring a waiting period. In other words, people file a motion to seal and then there is a waiting period such as courts these days have for transfers out of the district. A waiting period would give the media or the government a chance to object to the requested sealing on the ground of public rights of access. Professor Marcus responded that the original proposal from Professor Volokh had a waiting period (it provided that no motion to seal may be acted upon until seven days after it is posted publicly). Professor Marcus recalled that a number of the lawyers said that a waiting period would be unworkable because, in the meantime, they could be facing a filing deadline while not knowing what they could include in their filing. Professor Marcus noted that the difficulties with filing under seal are numerous; the Advisory Committee has not shut and locked the door on considering sealing-related issues in the future, but it decided that the specific proposal it had received did not seem worth pursuing further. The judge member responded that the appellate courts see many sealed documents that take a great amount of energy to unseal because the sealing was done by joint agreement and district court approval, with a large amount of information that should not have been sealed. Judge Vance noted that local provisions address sealing matters, and the judge member agreed that courts have internal operating procedures on the topic.

e. Rule 23 Proposals

Judge Vance then turned to the status of proposals to amend Rule 23, discussed at pages 208 to 211 of the agenda book. She noted that the Rule 23 issues are not yet under study by a specific subcommittee.

The first Rule 23 issue concerns incentive or service awards to class representatives for work they have done on behalf of the class. In 2020, a divided panel of the Eleventh Circuit held that such awards were prohibited by two 19th Century Supreme Court cases. Before that, the circuits were unanimous in permitting these awards, and since the Eleventh Circuit decision, no court of appeals has followed suit. Four circuits have issued published opinions that continue allowing service awards in appropriate cases. The Advisory Committee is considering whether rulemaking is worthwhile to address an outlier decision, whether the Advisory Committee has authority under the Enabling Act to resolve this issue, and whether this is a policy-driven question that it would not ordinarily address.

The second Rule 23 issue concerns the Rule 23(b)(3) superiority requirement. This topic was brought to the Advisory Committee by the Lawyers for Civil Justice. The superiority prong of Rule 23(b) provides that a court should evaluate whether a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The proponent submits that this reference to adjudication has been interpreted as excluding consideration of private remedial initiatives, such as recall campaigns and product refunds, and it submits that the rule should permit consideration of these alternatives in the superiority analysis. The Advisory Committee is considering that, on one hand, ensuring that a judge has discretion to consider these additional alternatives could provide faster or more effective relief to class members, but it may be, on the other hand, extremely difficult for the court to evaluate these alternatives at the early point in the litigation when class certification has to be decided, and some courts have taken

non-litigation alternatives into account under the adequacy prong of Rule 23, which could call into question whether a rule in this area is necessary.

The third Rule 23 issue concerns whether court approval should be required for the settlement or voluntary dismissal of claims by class representatives before class certification. Before 2003, most courts required judicial review for the pre-certification settlement or dismissal of a case filed as a class action, but as amended in 2003, Rule 23 includes no such requirement. The Advisory Committee is considering whether judicial scrutiny is needed in this area. The current approach has been criticized as possibly inviting a form of strike suits where cases are settled for no real relief to the class but accompanied by a payoff to counsel or the class representative. Something like this was involved in a case that Judge Easterbrook decided in 2024, and he pointed out the inability for the court to consider under the class action rules whether the payments to the class representatives were appropriate. This was a federal securities case governed by the Private Securities Litigation Reform Act and there was an ability to use Rule 11 to get at this issue in that case, but he did point out that Rule 23 did not provide for court scrutiny of settlements of cases not yet certified as class actions and he suggested that perhaps the rulemakers should take a look at this. Also cited is potential prejudice to putative class members who are relying on the suit but receive no notice of its settlement or dismissal. The Advisory Committee noted these concerns but also noted potential obstacles to restoring judicial review. For example, the customary evaluation of a class settlement under Rule 23(e) may not be well suited to evaluate individual settlements by class representatives, and another consideration is that Rule 23(e) requires notice to class members of settlements in certified classes. If notice is required for settlements before certification, who would pay for it, and would the benefits of notice be outweighed by the cost? And there's also a question of whether, if reliance is an issue, the court can already use Rule 23(d) to order some form of notice.

The Advisory Committee has concluded preliminarily that all three of these Rule 23 topics warrant continued study, but the Committee is very much aware that any new Rule 23 project would be a significant and resource-intensive undertaking. Judge Vance then invited Professor Bradt to add any additional observations.

Professor Bradt added that it is unclear whether any or all of these three issues could be handled discretely or whether they would open the door to a much broader reconsideration of much of Rule 23, which would be a consequential decision for the Advisory Committee.

Committee members were then invited to offer feedback on the Rule 23 issues.

A lawyer member suggested that there are other Rule 23 issues that may be a higher priority, such that addressing these narrow Rule 23 concerns without looking more broadly into Rule 23 would be difficult. Another lawyer member added that the Rule 23 issues presented did not seem to warrant a rule amendment.

f. Random Case Assignment

Judge Vance then proceeded to the last information item to update the Committee on the issue of random case assignment, which the Advisory Committee has been considering since 2023. In March 2024, the Judicial Conference issued its guidance that districts should apply district-wide assignment to civil cases

seeking injunctions barring or mandating nationwide enforcement of federal law or statewide enforcement of state law, and last summer the Supreme Court decided *Trump v. CASA*, 606 U.S. 831 (2025), which also affects this issue. The Advisory Committee is continuing to monitor the developments in this area.

D. Advisory Committee on Criminal Rules – Judge Michael W. Mosman

Judge Mosman presented the report of the Advisory Committee on Criminal Rules, which last met (virtually, due to the government shutdown) on November 6, 2025. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 242. Judge Mosman opened his remarks by noting that as a new Chair, he is grateful to attend the Committee meeting with Professors Beale and King, who are a tremendous help.

3. Status of Proposals Under Consideration

a. Rule 49.1 and Privacy Concerns

Judge Mosman began his report with the proposal to amend Rule 49.1 to require reference to minors by pseudonyms rather than initials as provided in the current rule. There still will be a sealed filing that will contain all the information that a litigant might need. Judge Mosman noted several issues that have been raised. One is, can someone who is a minor when the case starts age out of the rule's protection as the case goes on? The discussion and experience among members of the Advisory Committee was that both by case-by-case protective orders and by general practice in criminal cases, individuals do not tend to age out of the current rule's protection. This change would not alter that practice. Another question that came up was whether this change would cover not just victims in criminal cases, but witnesses. Judge Mosman stated that this subject is not currently a part of the effort that is being undertaken on Rule 49.1. There are statutes that do cover witnesses in criminal cases who are minors and grant them some protections, but these protections are not uniform across all criminal cases. Finally, the proposal currently on the table makes a point of referencing exhibits and attachments because experience shows that most the violations of this protection arise in that context and not indictments or other filings.

Professor Beale added in reference to an earlier question (during the Appellate Rules Committee's report on the privacy project) from a judge member about the inadvertent inclusion of a minor's name, that the FJC study on redaction of social security numbers highlighted that most often unredacted information appears in attachments or exhibits. The Criminal Rules Committee is coordinating with and will share drafts with all the other Advisory Committees addressing privacy.

Judge Mosman then turned to the proposal to amend Rule 49.1 to require complete redaction of social security numbers and other taxpayer identifying information. The Advisory Committee's consideration of this started with a recommendation from Senator Ron Wyden to consider changing the current rule (which permits inclusion of the last four digits of social security numbers in public filings) to require complete redaction of social security numbers. The Rule 49.1 Subcommittee started with that proposal, and there is widespread support for the idea (except in the bankruptcy context).

Judge Mosman also reported that the Advisory Committee undertook to determine if other taxpayer identifying numbers (ITINs, ATINs, and EINs - Individual Taxpayer Identification Numbers, Adoption

Taxpayer Identification Numbers, and Employer Identification Numbers) have the same risk of fraudulent use as social security numbers. This research indicated that fraud involving ITINs shows up fairly frequently, while the other two are less common – at least in criminal cases. Even so, the idea was that the Advisory Committee would, once on the path of increasing the protection for social security numbers, take a look at these numbers also. Judge Mosman noted that the Advisory Committee is still discussing what to do with these identifying numbers in a descending order of frequency, the least frequent being the ATIN, which is a number given to someone to effectuate adoption that disappears immediately when they are adopted and obtain a social security number. Judge Mosman also recognized that the DOJ had raised the concern that redaction runs counter to the general idea of a presumption of public availability of information. Judge Mosman expressed uncertainty as to whether that presumption attaches to private information the way it does to other information in indictments, for example, but the current recommendation of the Rule 49.1 Subcommittee is to treat all three of these other categories the same way we treat social security numbers and to not include them in public filings, with the caveat that they can be included as necessary in the court filing but not in the public filings.

Judge Mosman also stated that one other concern raised by the DOJ and others is the desire for some uniformity among the various Advisory Committees that are looking at this issue. That may not be possible with the Bankruptcy Rules Committee, but the Advisory Committees should at least look at whether different rules for different settings are appropriate.

Professor Beale added that the Style Consultants have been enormously helpful in working on the draft as well and that the Advisory Committee and Rule 49.1 Subcommittee is very well aware of the importance of uniformity that has traditionally been part of all of these rules, although the Bankruptcy Rules Advisory Committee has already decided that it is necessary to keep the last four digits of social security numbers in bankruptcy filings.

Professor Beale also addressed adding EINs, noting that the Advisory Committee began with the idea that even for EINS at least some of those are held by individuals (such as people who have household service providers) who would object to that number being in a public filing. While EINs are used by large corporations and may be public for other reasons, the Advisory Committee started from the idea that if there is no need for an EIN then it should be redacted, and on the criminal side it seems (subject to further consultation with the DOJ) that EINs are not needed, and there is some recognition that EINs are private. At the spring 2026 meeting, the Advisory Committee will take up the underlying policy question about whether to address not just ITINs, but also the ATINs and EINs.

Judge Mosman added that he wanted to extend his thanks to former Rules Law Clerk, Kyle Brinker, who researched the extent to which people engaging in fraud use SSNs versus ITINs or other identifying taxpayer information. That research indicated either little or no known cases involving ATINs.

Professor Gibson asked for clarification whether the Criminal Rules Committee would apply the EIN protection to corporations and individuals. Professor Beale responded that the rule would apply to both, as done in the U.S. Tax Court. Professor Gibson followed up with a question about privacy concerns given that EINs are fully available on bankruptcy petitions. Professor Beale acknowledged that

bankruptcy is likely to be different, but that for Criminal Rules, if the current rule refers to taxpayer identifying information, that includes social security numbers, ITINs, ATINs, and EINs.

b. Rule 40 and Out of District Arrest for Violation of Conditions of Release

Judge Mosman then reported on the work of the Rule 40 Subcommittee. He explained that three rules set out what the judge must tell the defendant in certain proceedings. Rule 5 applies to an initial appearance in the charging district, Rule 32.1 is a comprehensive rule that applies when someone is arrested in another district for violating their supervised release, and Rule 40 (which is less comprehensive) applies when someone is arrested outside of the charging district for violating the conditions of their release (or for failure to appear in the charging district). Rule 40 does not provide the same level of detail or guidance as Rule 32.1, and the focus of the Rule 40 Subcommittee is to consider amendments to create a more comprehensive checklist for the judge when a defendant appears in court under the circumstances covered in Rule 40.

The Advisory Committee considered and generally agreed with the Subcommittee on a number of policy decisions about what should and should not be included in Rule 40, including: (1) the person should be advised that they have the right to a detention hearing even though they are not in the district where they were charged, (2) the person should be able to contest identity in the non-charging district; (3) the person should be advised that there will not be another or new preliminary hearing in the non-charging district; and (4) the person should be advised again of the right to consult with an attorney (if their attorney is in another state, they should be able to consult with some attorney at that hearing). The subcommittee further believes that Rule 40 does not need to require the judge to repeat consular warnings or some of the other things that go into Rule 5 or Rule 32.1.

c. Rule 11 and Plea Agreements

Judge Mosman next reported on a suggestion from Judge Patricia Barksdale to consider amending Rule 11(b)(1)(M), which provides that when accepting a plea, the judge must ensure the defendant understands that in determining a sentence, the judge will calculate the applicable guideline range and consider possible departures and then other sentencing factors. The Sentencing Guidelines were amended effective November 1, 2025 to fold departures into the general catch-all that the judge will consider “other sentencing factors.” Judge Barksdale suggested amending Rule 11 to conform to that change and delete the reference to departures as subsumed into the advice that the judge will consider “other sentencing factors.” Judge Mosman noted that the DOJ raised an interesting issue regarding whether the amendments to the Sentencing Guidelines also implicate Rule 32(h), which provides that before departing from the Sentencing Guidelines on a ground not previously noticed or briefed, a judge must give notice to the parties. Judge Mosman reported that a subcommittee will look into what to do with Rule 32(h).

A judge member suggested that if the subcommittee plans to look into Rules 11 and 32, it might want to add a requirement that when judges describe the “terms” of an appeal waiver, they must also explain the consequences. Such consequences include situations in which post-plea, the conduct subject to the plea is ruled not to be a crime, but the defendant has already waived the right to appeal. Judge Mosman noted

the suggestion and stated that the Advisory Committee would take a look at that issue (although it might await the outcome of a case on appeal waivers currently pending in the Supreme Court).

d. Status of Proposals Relating to Rule 53 and Rule 15

Judge Mosman concluded with a report on two items on the study agenda. One item is a suggestion from Judge Edmond Chang, Chair of the Criminal Law Committee, relating to Rule 53. Judge Mosman reminded the Committee that the Advisory Committee had studied Rule 53 about a year ago and decided not to make any changes. The previous Rule 53 proposal was driven by news organizations who wanted to have the rule changed quickly so that they could broadcast the Trump trial or trials, particularly in New York. Judge Chang's suggestion is much narrower and has to do with the idea that Rule 53's broadcasting ban not only affects big news organizations but also bars narrowly broadcasting the trial to a victim or a group of victims who might be remote from the courthouse where the sentencing or the trial is occurring. Judge Mosman noted that some of those victim groups, such as the Lockerbie victims, are covered by specific acts of Congress. Judge Mosman advised the Committee that given the workload of the Advisory Committee and its recent look at Rule 53 (and the decision not to change it), the Advisory Committee has decided to focus more narrowly on Judge Chang's specific suggestion.

Finally, Judge Mosman reported that a number of proposals and letters have been received to amend Rule 15 to allow for pretrial depositions. The submissions show differing views on this issue, which was placed on the Advisory Committee's study agenda. Judge Mosman added that the states are doing different things with this issue, with about 20 states that have some sort of criminal depositions, with some of them very informal. A subcommittee will eventually be stood up to study this issue, which will be a massive undertaking.

With no further questions or comments, Judge Mosman concluded his report.

E. Advisory Committee on Evidence Rules – Judge Jesse M. Furman

Judge Furman presented the report of the Advisory Committee on Evidence Rules, which met (virtually, due to the government shutdown) on November 5, 2025. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 282.

1. Status of Proposed Amendments Published for Public Comment

a. Proposed New Rule 707

Judge Furman began his report with proposed new Rule 707, which was published for public comment in August 2025. The Advisory Committee has spent several years studying issues relating to artificial intelligence and considering whether they warrant amendments to the Rules of Evidence. The Advisory Committee has focused on two concerns. The first is the issue of reliability, namely machine output that essentially functions like expert testimony, albeit without a human expert to cross-examine or test the reliability of the opinion, and the second is authenticity, namely whether audio/visual evidence is authentic or a deepfake.

Beginning with the first concern, which has advanced further on the rulemaking front, the Advisory Committee published for public comment a new Rule 707, which applies when machine output would be expert testimony if it were produced by a human. The new rule subjects that output to the requirements of Rule 702(a) through (d), but it explicitly excludes the output of “simple scientific instruments.” The public comment period closes on February 16. As of today, there have been nine public comments, and public hearings will be held on January 15 and 29, 2026.

At the Advisory Committee’s November meeting, the Advisory Committee discussed various potential changes to the committee note in light of some commentary on the issues, as well as input from members. These changes are noted on page 295 of the agenda book. The first change is to add a provision to emphasize the differences between human experts, who are subject to cross-examination, and machine-generated opinions. The change would encourage trial courts to consider limiting instructions, cautioning juries against over- or under-reliance on machine output given the absence of cross-examination. The second change responds to a concern that was expressed by the Standing Committee previously to strengthen the note to make clear that Rule 707 is not intended to circumvent Rule 702; the added language would emphasize that the requirements of the rule might actually be difficult to meet without an expert. The third change is to address the “black box” issue where no one can explain how the machine works and what it does. The sentiment is that in those circumstances, reliability is probably not something that can be shown unless it can be validated through error rates and the like. Finally, there are changes to clarify the relationship with Rule 901(b)(9), which provides a ground for authenticating machine-generated evidence, namely that if the requirements of Rule 707 are satisfied, it would likely subsume the requirements of 901(b)(9).

Judge Furman explained that the Advisory Committee also considered and rejected the following proposed changes to the proposed rule and the note: (1) to change machine-generated to computer-generated; (2) to limit the scope to machine learning, as that term is not clearly defined and is somewhat dynamic; (3) to cover expert testimony, because that is subject to the requirements of Rule 702; and (4) to change the sentence referring to “simple scientific instruments” to make it refer to machines that are generally understood by the public, because that change was too amorphous.

A judge member expressed concern about language from the proposed committee note, “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,” and then, at the end of that paragraph, the sentence that “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 judge member questioned how evidence could be put before a jury with no explanation of how output was produced. Professor Capra responded that the Advisory Committee considered the existence of validation studies that can show there is a very low rate of error for a particular machine even if no one can figure out how the machine actually reached the result it did. The alternative approach would be to not allow introduction of the output if it cannot be explained. Even with respect to experience-based experts, however, there are times when that expert can explain something but not the way actual way they came to the conclusion. The judge member asked Professor Capra to provide an example of output that could be introduced without an explanation of how it was produced, which could

be troubling if somebody's liberty were at issue in a trial. Professor Capra believed that instances will arise only rarely in which a black box/machine comes up with something that can be found to be reliable, but it has happened. For example, facial recognition technology may produce a conclusion as to identity, with no explanation of how it came to that conclusion, but there is corroborative evidence which indicates that the identification is correct. Though this is rare, Professor Capra suggested that it would be a big step to adopt a rule that such evidence can never be admitted. The Advisory Committee has not come to a formal decision on this issue. Professor Capra made a comparison to dog sniffs - you do not know how a dog came to the conclusion, but you can determine that the dog was trained properly and that the dog has been accurate in 800 particular situations and then the dog-sniff evidence is admissible. The judge member thanked Professor Capra for the helpful explanation and examples.

Judge Furman then brought to the attention of the Standing Committee, Civil Rules Committee, and Criminal Rules Committee that if Rule 707 is added to the Rules of Evidence, it would raise fairly important disclosure issues, for example regarding the algorithms underlying a machine. While this is not an issue for the Federal Rules of Evidence, it is an issue for the Civil and Criminal Rules Committees to consider in connection with their disclosure-related rules if Rule 707 is adopted.

Before moving to the next topic, another judge member noted that he had sent an edit regarding the notice and disclosure language raised in the proposed rule, pointing to lines 83 to 85 on page 297 of the agenda book. Professor Capra responded that he would look at it. Judge Furman concluded the discussion of proposed Rule 707 by restating his concern that at a minimum, if this rule is adopted, courts need to be alerted that they should be mindful of notice issues as they manage cases.

b. Proposed Amendments to Rule 609

Judge Furman then provided an update on public comments on Rule 609. Judge Furman reminded the Committee that the Advisory Committee had considered various proposals over the last few years regarding Rule 609 and settled on a relatively minor amendment to Rule 609(a)(1)(B), which makes the rule somewhat more exclusionary by adding the word "substantially" before "outweigh" in the balancing test on admissibility of prior convictions.

Judge Furman explained that the amendment was driven by the concern that district courts were misapplying the balancing test or applying it without regard for the similarity of the prior conviction to the charged conviction. The harm from this approach is compounded by the fact that under Supreme Court precedent, a ruling under Rule 609 is not appealable unless the defendant actually takes the stand, and this also leads to little court of appeals case law on the issue. While addressing this issue, the Advisory Committee also decided to draft an amendment to Rule 609(b) to address a circuit split as to when the 10-year period for older convictions ends. The Advisory Committee concluded that the date of trial is the appropriate date because it is the least subject to manipulation by the parties and unambiguous. As of the Committee meeting, three comments were received which are generally favorable.

2. *Status of Pending Proposals*

a. Rule 901(c) and Deepfake Evidence

Judge Furman next provided an update on the Advisory Committee's consideration of deepfake evidence. Judge Furman explained that the Advisory Committee had initially been of the view that there may not be a need for an amendment here because there was no evidence of deepfake problems in federal trials and because it is not clear that courts cannot address this issue under the existing rules, as they have dealt with forgeries, for example. Having said that, Judge Furman noted that the Advisory Committee also must be mindful of the fact that there may be an issue because the standard for authentication is so low. The Advisory Committee has tried to make progress on a rule that could be considered in the event that it decides that a rule change is warranted. To that end, the Advisory Committee has discussed a new proposed Rule 901(c), a working draft of which is at pages 286 to 288 of the agenda book. In brief, it would impose a burden on the opponent of the evidence to make a prima facie showing that there is reason (e.g., something suspicious about the item) for a reasonable person to conclude that it was fabricated. At that point, the burden would shift to the proponent of the evidence to show by a preponderance (that is, under the Rule 104(a) standard) that the item is authentic and not a fabrication.

Judge Furman added that at the Advisory Committee's last meeting, discussion of deepfakes continued, and there was some shift in sentiment in favor of publishing a proposed rule for public comment. He also noted that Professor Capra had gathered some anecdotal evidence that judges might be seeing these issues even if it is not showing up in case law or media reports. This information led the Advisory Committee to conclude that it might be helpful to enlist the FJC and conduct a survey of trial courts nationwide to see if they are encountering deepfake issues and whether they think a rule amendment is necessary.

Ms. Shapiro, on behalf of DOJ, noted that DOJ was the sole vote against publishing Rule 707 and also does not see the need for the deepfake rule. DOJ also intends to put in a public comment to lay out its arguments in full. Ms. Shapiro also noted that there is an Executive Order that prompted DOJ to perform an internal study on AI issues, and that she hopes to be able to report to the Advisory Committee on that as well.

A lawyer member asked why the proposal as drafted is limited to fabrications created by generative AI as opposed to other technological means. He noted that the Take It Down Act has a much broader scope than just generative AI. Professor Capra answered that if the manipulation is done by generative AI, it is almost impossible to discern. If there is manipulation done by other technical means, there are means of determining whether it is been fabricated. The Advisory Committee considered whether the rule should apply to electronic manipulation more generally, but Professor Capra was told by many that the rule should just be focusing on generative AI. Professor Capra thanked the lawyer member and appreciated the question, which is something that could come up if a proposed rule on deepfakes is issued for public comment.

b. Rule 902(1) and Federally Recognized Indian Tribes

Judge Furman next addressed the Advisory Committee's consideration of a suggestion to add federally recognized Indian tribes to Rule 902(1), which provides that certain domestic public records that are sealed

and signed are self-authenticating. Rule 902(1) does not currently include Indian tribes but does include a variety of other governmental entities. In criminal cases most notably, the government has to use another route to prove a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country, an issue that has become more prominent in the wake of the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020).

Judge Furman explained that the DOJ strongly supports changing the rule, but the Federal Defender on the Advisory Committee adamantly opposes it. In brief, DOJ favors amendment on the grounds that it would recognize the dignity and sovereignty of tribes and avoid unnecessary authentication hurdles, and further, that there is no meaningful distinction between tribes and the other entities that are currently in the rule. By contrast, the Federal Defender has expressed concerns about variability in tribal record-keeping and about losing the ability to challenge authenticity through an identified witness. Mindful of the dignitary issues involved, the Advisory Committee solicited input from tribal governments and Native legal organizations, and thus far has received comments from a number of tribes, all of which are very supportive of amending the rule. At its spring meeting, the Advisory Committee will consider whether to move forward with an amendment.

Professor Capra added that there can be a conflict in criminal cases between the tribe and an individual tribe member defendant. The defendant's interest is to challenge the certificate, and if the matter were treated under Rule 902(1) there would be no way to challenge the certificate, whereas under Rule 902(11) there is an opportunity to challenge the certificate. The Advisory Committee will consider this issue at the next meeting.

c. Rule 803(3) and Hearsay Exception for Declarant's State of Mind

Judge Furman reported on the Advisory Committee's consideration of amendments to Rule 803(3), which allows admission of a declarant's statement of then existing state of mind, i.e., intent, motive, emotion, or the like, to prove that mental condition. First, the Advisory Committee is considering whether the rule should require spontaneity or another reliability safeguard. There is no such requirement in the rule as written, but some courts have held that spontaneity or some other indicator of trustworthiness is required. There is a longstanding circuit split on the issue, which does seem to come up fairly frequently. Second, the Advisory Committee is considering amendments regarding whether a declarant's statement can be used to prove a non-declarant's intent or conduct. Judge Furman gave the example that if he said "I plan to go to lunch with Dan," this statement cannot be used as evidence that Dan intends to go to lunch or went to lunch. Most courts bar such use, but two circuits, the Ninth and the Second, have allowed it under some circumstances. Judge Furman noted that the issue does not come up as often as the spontaneity issue, and there are questions about whether the practical distinction between the different approaches is especially large. The Advisory Committee continues to study whether the spontaneity issue causes a problem in practice that warrants a rule amendment; if so, then it may also take up the second issue.

d. Rule 703 and the Impact of *Smith v. Arizona*

Judge Furman addressed potential amendments to Rule 703 in light of the Supreme Court's decision in *Smith v. Arizona*, 602 U.S. 779 (2024), in which a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst and that other analyst's findings were disclosed directly to

the jury. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right of confrontation even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. The Advisory Committee is generally of the view that to the extent that the Court was concerned about disclosure alone, there would be little to no impact on Rule 703, which limits disclosure of inadmissible hearsay as the basis of the expert's opinion. If the Court's decision is construed to also apply to reliance, not just disclosure, this interpretation could have a substantial effect on federal practice and raise serious questions about unconstitutional application of Rule 703 in some cases. Judge Furman noted that the Advisory Committee's consultant, Professor Liesa Richter, did a very thorough and helpful memo in which she surveyed decisions that addressed *Smith*, and there seems to be an emerging pattern where at least more than a majority have adopted the view that *Smith* prohibits reliance and not just disclosure. In light of this trend, the Advisory Committee's emerging view is that Rule 703 probably does warrant some sort of amendment to address the issues raised by *Smith*.

Judge Furman also commented that there are some difficulties with drafting an amendment, with possible language found in the Advisory Committee's report at page 291 of the agenda book. First, drafting an amendment to specifically address the concerns raised by *Smith* would be potentially complicated because it is limited to the criminal context and it is an evolving area of the law. At present, the Advisory Committee has gravitated toward a more modest amendment to the rule that would provide a "red flag" indicating that the rule might raise constitutional issues in criminal cases to alert practitioners and courts. Rule 412, which contains constitutional red flag language, provides a precedent for such an approach. On the flip side, Judge Furman stated that the Advisory Committee considered a similar issue after the Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), which held that Rule 606(b), which bars testimony from jurors about juror deliberations, is unconstitutional in certain circumstances. The Advisory Committee decided not to amend the rule, but might revisit that decision in the event that the Advisory Committee considers adding red-flag language to Rule 703, on the theory that the two are similar.

Professor Coquillette advised the Committee that the problem with a red flag is that sometimes it is appropriate and sometimes it is not. The problem arises when a rule red flags some things, but not others. If a constitutional concern is raised in one rule, does that mean that other rules without the red flag are safe constitutionally. Professor Capra added that the rationale for rejecting a red flag in Rule 606(b) was that it would encourage lawyers to make more legal arguments.

Ms. Shapiro, on behalf of DOJ, added that the Solicitor General's Office anticipates that this issue will come back to the Supreme Court soon, which could impact the rulemaking process. Judge Furman agreed that this is an area the Court is very likely to revisit, which counsels proceeding with any amendment in more general terms rather than specifically addressing the issue in *Smith*.

e. Rule 104 and Preliminary Questions on Evidence

Judge Furman moved on to possible amendment of Rule 104, which governs the judge's role in deciding preliminary questions about evidence. Many evidence scholars, including Professor Dan Capra, consider Rule 104 to be one of the worst rules in the Federal Rules of Evidence. First, Rule 104(a), which the Supreme Court has held to establish a preponderance standard, does not include the relevant standard.

Second, Rule 104(b) codifies the concept of conditional relevance, but there is a question as to whether that concept has any real meaning. Judge Furman directed the Committee to Professor Capra's suggestions to improve each section of the rule, which appear at page 292 of the agenda book. The Advisory Committee does have concerns, however, whether there is a big enough problem to justify amending the rule. Professor Capra added that his research has uncovered problems because the rule is so opaque and the concept of conditional relevance does not have a meaning.

A judge member asked if the Advisory Committee would consider adding the preponderance language to subsection (a) even in the absence of a change to (b). Professor Capra responded that subsection (a) could be a freestanding change. Judge Furman agreed that amendments to (a) and (b) do not have to go in tandem.

f. Rule 803(6) and Rule 901

Judge Furman also informed the Committee that the Advisory Committee had considered and rejected two suggestions from a practitioner relating to Rule 803(6), although the suggestions were well received and quite helpful. The first was to clarify Rule 803(6) regarding business records to explicitly permit incorporated business records, that is, records created by one entity but kept and relied upon by another. The second suggestion was to amend Rule 901 to treat production and discovery as a form of authentication, at least in civil cases. The Advisory Committee decided not to proceed on either suggestion because a survey of case law suggested that courts were generally interpreting each rule consistently with the relevant suggestion, and thus the amendments were not necessary.

g. 50th Anniversary of the Federal Rules of Evidence

Following the end of the substantive report, Judge Furman took a moment to inform the Committee of efforts to recognize the 50th Anniversary of the Rules of Evidence in 2025. But for the government shutdown in November 2025, the Advisory Committee had planned to celebrate that milestone. Judge Furman described a small celebration of the anniversary in New York for those present for the virtual meeting and noted that Ms. Dubay has a photograph that can be shared with the Committee. Judge Furman also thanked Ms. Dubay for providing Advisory Committee members with small tokens of appreciation for their service on the Advisory Committee.

4. OTHER COMMITTEE BUSINESS

With the conclusion of the Advisory Committee reports, Judge Dever turned attention to the recognition of three people who have made a remarkable contribution to the rules process over a large number of years – Professor Cathie Struve, Mr. Joseph Spaniol, and Professor Ed Hartnett.

A. Recognition of Professor Struve

Judge Dever began the recognition portion of the meeting with thanks to Professor Cathie Struve, who is the David Kaufman and Leopold Glass Professor of Law at the University of Pennsylvania Carey School of Law. She served as the Appellate Reporter from 2006 to 2015, became the Associate Reporter for Standing from 2017 to 2019, has been the Standing Committee Reporter since then, and will transition to a role as a consultant in February 2026. In her role as the Appellate Reporter, she served with Judges Carl

Stewart, Jeffrey Sutton, and Steven Colloton. As the Standing Committee Reporter, she served with Judges David Campbell and John Bates. Judge Dever noted that while he has been Chair for only three months, in previous work as Chair of Criminal Rules and on that Committee over the past 11 years, it has been a privilege to work with her.

Judge Dever shared messages of appreciation to Professor Struve from Judges Campbell and Bates. Among other superlatives, Judge Campbell offered that he had “never met anyone who combines breadth of knowledge, wise judgment, attention to detail, and incisive analysis as well as Cathie Struve” and that she is “a consistently delightful colleague whose invaluable contributions will be greatly missed.” Judge Bates offered additionally that Professor Struve’s “contributions are always thoughtful and incisive yet unerringly fair and polite.” Judge Dever concurred in these assessments, noting that Professor Struve has been a great resource, teacher, and friend to all involved in the rules effort. Judge Dever thanked Professor Struve again for her incredible contribution and invited Ms. Dubay to make remarks on behalf of the Rules Committee Staff.

Ms. Dubay shared her appreciation of Professor Struve’s assistance and offered tokens of appreciation from the Rules Committee Staff. Ms. Dubay recognized the special camaraderie among the Reporters, and also the camaraderie Professor Struve developed with the Rules Committee Staff. Ms. Dubay commented that the job of the Rules Committee Staff is to ensure the rules process works well and to support not just the members, but the Reporters as an important part of the Rules Enabling Act process. Ms. Dubay thanked Professor Struve, not only on behalf of the staff, but personally for helping her learn the history, often oral, of the work of the Rules Committees.

Professor Hartnett spoke on behalf of the Reporters and Consultants, noting that he and Professor Struve had been colleagues in various contexts for over 25 years. Professor Hartnett presented Professor Struve with a gift from the Reporters and Consultants, along with the Rules Committee Staff - a membership to the Philadelphia Museum of Art. Professor Coquillette, former Reporter for the Standing Committee and involved in the rules process for 42 years, also shared generous remarks about Professor Struve.

Professor Struve offered her thanks for the remarks and gifts. She recalled that 25 years ago, she first attended (as a member of the public) a meeting of the Standing Committee, then chaired by Judge Anthony Scirica. Professors Dan Coquillette, Dan Capra, Ed Cooper, and Rick Marcus were already Reporters. She was struck not just by the rigor and dedication of those discussions, but the deep good fellowship among the participants. Professor Struve noted that the community of Reporters is an extraordinary group, and thanked in particular Professor Coquillette, who guided her in her role as Standing Committee Reporter. Professor Struve extended her appreciation to the judges with whom she worked, including not only those Judge Dever mentioned but also Judges David Levi, Lee Rosenthal, and Mark Kravitz. Professor Struve also thanked the unparalleled researchers who supported the committees, including Tim Reagan and his colleagues in the Federal Judicial Center. She also extended her gratitude to the Rules Committee Staff and expressed her appreciation for their work to support the rules process. Finally, Professor Struve gave thanks to the Style Consultants for their tutelage and friendly discussions about style.

B. Recognition of Joe Spaniol

Judge Dever then recognized Joe Spaniol, Style Consultant to the Standing Committee. Mr. Spaniol, who just turned 100 years old, served in World War II in combat. After law school, he joined the Administrative Office of the U.S. Courts in 1951, rising to Deputy Director and then Acting Director. He served as Clerk of the Supreme Court from 1985 to 1991. Mr. Spaniol served as Style Consultant for the Standing Committee from 1991 to 2025, and is both an extraordinary person and an extraordinary contributor to the rules process.

Style Consultant Joe Kimble submitted a pre-recorded tribute to Mr. Spaniol that was played for the Committee. Professor Kimble noted that Mr. Spaniol is the only one of the three Style Consultants who has served continuously since the beginning of the Style work in 1991, participating in all five rule set restylings. Professor Kimble described him as an “ace drafter” with “an especially sharp eye for logic and consistency.” He was an Editor and then Editor-in-Chief of both the *Federal Bar News* and the *Federal Bar Journal*. Mr. Spaniol served in the 86th Black Hawk Division in World War II. Mr. Spaniol has eight children, 15 grandchildren, and seven great-grandchildren. Above all, Professor Kimble noted that Mr. Spaniol is a kind and gracious man, and his children offered these kind words: “We are all proud of our father, amazed by his many accomplishments, and grateful for his help in our success. He is the epitome of unconditional love, and he is pretty darn smart too. That’s our tribute to you, Dad, from all of us. We love you.”

Bryan Garner, Style Consultant, echoed the remarks of Professor Kimble, and recalled that when Judge Keeton sought to create the Style Committee in the early ‘90s, nobody dreamed that it would overhaul all five rule sets. The success of the Style project was largely attributable to Mr. Spaniol and his steadfastness. Professor Garner described Mr. Spaniol as a very creative, audacious editor, often having to be reined in a bit. Professor Garner concluded by remarking how glad he was to see Mr. Spaniol getting this recognition.

Professor Capra commented that Mr. Spaniol was gracious and kind to Reporters. At one of Professor Capra’s first meetings, the Evidence Rules Committee sought permission to publish for public comment a proposed amendment to Evidence Rule 103. In the Advisory Committee Chair’s absence, Dan presented the proposal, which met with harsh criticism from two members of the Standing Committee. Shortly thereafter, Professor Capra received a note from Mr. Spaniol urging him not to worry about it because the Committee members did that to everybody. Professor Capra thanked Mr. Spaniol for his kindness.

C. Recognition of Professor Hartnett

Judge Dever then recognized Professor Hartnett for his service as Appellate Rules Committee Reporter and congratulated him on his next role as Standing Committee Reporter. Judge Dever thanked Professor Hartnett for his remarkable contributions as the Reporter to Appellate Rules since 2018. He described Professor Hartnett as someone who is “kind and thoughtful and detail-oriented and has an encyclopedic knowledge of the rules and the rules process.”

Judge Eid, Chair of the Appellate Rules Committee, then extended her thanks to Professor Hartnett. She echoed her earlier remarks about Professor Hartnett’s brilliance and amazing work for the Advisory

Committee, but also recognized Professor Hartnett’s professional accomplishments. He is the Richard J. Hughes Professor for Constitutional and Public Law and Service at Seton Hall. Judge Eid thanked him warmly for his service, wished him well, and expressed confidence that he would be a great Standing Committee Reporter.

D. Closing Remarks and Adjournment

Judge Dever informed the members that the next meeting will be June 3-4 in Chicago at Northwestern School of Law.

Judge Dever concluded by thanking everyone for taking the time to do this very important work in support of the rule of law. The meeting was then adjourned.

Draft

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

- Federal Rules of Appellate Procedure p. 2
- Federal Rules of Bankruptcy Procedure p. 3
- Federal Rules of Civil Procedure p. 4
- Federal Rules of Criminal Procedure.....p. 5
- Federal Rules of Evidence pp. 6-7
- Judiciary Strategic Planning p. 7

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 January 6, 2026. Member Judge D. Brooks Smith was unable to participate.

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 Sarah S. Vance (S.D. La.), chair; Professor Richard L. Marcus, Reporter; Professor Andrew Bradt, Associate Reporter; and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge Michael W. Mosman (D. Or.), 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, Standing Committee Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Carolyn A. Dubay, Secretary to the Standing Committee; Bridget M. Healy and Sarah Sraders, Rules Committee Staff Counsel; Judge Robin L. Rosenberg, Director, and Dr. Tim Reagan, Senior Research Associate, Federal

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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 the status of pending rule amendments in different stages of the Rules Enabling Act process, the Standing Committee received and responded to reports from the 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 asked to submit up to three goals from the *Strategic Plan for the Federal Judiciary* that should be prioritized over the next two years 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

Information Items

The Advisory Committee reported on the status of matters under consideration following its October 15, 2025 meeting. The Advisory Committee is considering several issues, including possible amendments to Rule 4 (Appeal as of Right—When Taken) concerning reopening of the time to appeal, and Rule 8 (Stay or Injunction Pending Appeal) to address the purpose and length of administrative stays. It is also considering suggestions for a new rule governing intervention on appeal, amendments to Rule 46(a) concerning admission to the bar of the court of appeals, and the treatment of tribes in the Appellate Rules. The Advisory Committee removed from its agenda a suggestion that Rule 3 be amended to provide that the district clerk, rather than the appellant, identify the court to which the appeal is taken.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Notice of Retroactive Technical Amendment

In March 2016, the Judicial Conference delegated authority to the Bankruptcy Rules Advisory Committee to make “non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to later approval by the Rules Committee and notice to the Judicial Conference.” JCUS-MAR 2016, p. 24.

Official Form 410C13-NR (Response to Trustee’s Notice of Disbursements Made)

The Advisory Committee on Bankruptcy Rules submitted for retroactive approval a technical amendment to Official Form 410C13-NR (Response to Trustee’s Notice of Disbursements Made). Technical corrections are required to fix two erroneous references in Form 410C13-NR, which went into effect on December 1, 2025. Specifically, two items in Part 2 of the form referred to “the date of this notice” when it should have stated “the date of this response.” The technical corrections conform Part 2 to the introductory language of that section. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Information Items

The Advisory Committee also reported on the status of matters under consideration following its September 25, 2025 meeting. In addition to the recommendation discussed above, the Advisory Committee considered proposed amendments to the privacy rules, suggestions to amend Rule 2003 (Meeting of Creditors or Equity Security Holders) regarding the location and timing of meetings of creditors, suggestions to allow the use of masters in bankruptcy cases and proceedings, and proposed amendments to Rule 8017 to conform with proposed amendments to Appellate Rule 29. It removed from its agenda a suggestion to amend Rule 2006 regarding time counting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 55 (Default; Default Judgment) with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee’s recommendation, including minor style changes.

The proposed amendment to Rule 55 removes the commands in Rules 55(a) and (b)(1) that the clerk “must” enter a default or default judgment, respectively, whenever the rules empower the clerk to do so. Instead, the proposed amendment provides that the clerk “may either” enter default or default judgment, respectively, “or refer the matter to the court for directions.” The proposed amendment also changes the reference to “the party” in Rule 55(b)(2) to “a party” for greater clarity.

Information Items

The Advisory Committee also reported on the status of matters under consideration following its October 24, 2025 meeting. In addition to the recommendation discussed above, the Advisory Committee continued to discuss proposals to amend Rule 43 (Taking Testimony) to relax the standards governing permission for remote testimony and heard an update concerning third-party litigation funding. The Advisory Committee also continues to study suggestions relating to Rule 23 (Class Actions) and random case assignment.

The Advisory Committee decided to remove from its agenda proposals concerning cross-border discovery, filing under seal, discovery cybersecurity risks, reimbursement of nonparties served with subpoenas for costs of compliance, permissive filing of discovery requests and responses, and time counting for responses to motions.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee reported on the status of matters under consideration following its November 6, 2025 meeting. The Advisory Committee continues to consider amendments to Rule 49.1 (Privacy Protection for Filings Made with the Court) to protect minors' privacy by requiring the use of pseudonyms and to require complete redaction of SSNs and other taxpayer identifying information. The Advisory Committee plans to consider the proposed amendments at its spring 2026 meeting with a view to proposing them at the Standing Committee's June 2026 meeting for publication and public comment. (Consideration of the privacy rules has been a coordinated project, and the Appellate, Bankruptcy, and Civil Rules Advisory Committees are also considering amendments to their privacy rules that may also be submitted to the Standing Committee in June 2026.) The Advisory Committee also reported on the activities of its subcommittee on Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District). The Advisory Committee also formed a new subcommittee to consider a suggestion on Rule 11 (Pleas) to remove "possible departures under the Sentencing Guidelines" from the factors a court must advise the defendant it must consider in determining a sentence, in light of the new amendments to the Sentencing Guidelines that took effect in November 2025. The suggestion also implicates Rule 32(h) concerning notice of possible departures from sentencing guidelines.

The Advisory Committee decided to remove from its agenda a recent proposal to amend Rule 53 (Courtroom Photographing and Broadcasting Prohibited) to allow broadcasting of criminal proceedings since it had already recently considered and declined to pursue a related proposal in 2024. The Advisory Committee continues to study potential amendments to Rule 15 (Depositions).

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee reported on the status of matters under consideration following its November 5, 2025 meeting. The Advisory Committee reported on potential edits to the proposal for new Rule 707 regarding the admissibility of evidence generated by artificial intelligence, which has been published for public comment. Potential edits to the published preliminary draft include amending the proposed committee note to emphasize the distinction between expert opinions offered by humans (Rule 702) and opinions generated by machines (Rule 707). The Advisory Committee also discussed strengthening language in the committee note to (1) 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; (2) provide guidance on what to do if it is not possible to explain how a machine reached its opinion or conclusion; and (3) explain the relationship between Rule 707 and Rule 901(b)(9), which provides a ground for authenticating machine-generated evidence.

The Advisory Committee also continued to discuss a proposal to add a new Rule 901(c) to establish a procedure to challenge the authenticity of evidence suspected to be a deepfake. Other items under the Advisory Committee's consideration include possible amendments to the following rules: Rule 902 (Evidence that is Self-Authenticating) to add a reference to federally recognized Indian tribes and nations; 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; Rule 703 (Bases of an Expert's Opinion Testimony) in light of *Smith v. Arizona*; and Rule 104(a) and (b) (Preliminary Questions) to include applicable standards of proof.

The Advisory Committee also reported on its celebration of the 50th Anniversary of the enactment of the Federal Rules of Evidence in 2025 and noted that materials will be made available publicly to commemorate the anniversary.

JUDICIARY STRATEGIC PLANNING

At the request of the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares (3d Circuit), the Committee reviewed the *Strategic Plan for the Federal Judiciary* for 2025-2030 and provided recommendations for aspects of the plan that should be prioritized over the next two years.

Respectfully submitted,



James C. Dever III, Chair

Paul J. Barbadoro
Todd Blanche
Elizabeth J. Cabraser
Louis A. Chaiten
Colm F. Connolly
Joan N. Ericksen
Stephen A. Higginson

Edward M. Mansfield
Troy A. McKenzie
Andrew J. Pincus
Allison J. Rushing
D. Brooks Smith
Bart H. Williams

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PROPOSED AMENDMENTS TO THE FEDERAL RULES

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	

Revised March 16, 2026

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2025) (except see [2025 U.S. Supreme Court Package](#) to view the March 10, 2026 request to withdraw proposed amendments to Appellate Rules 29 and 32 and the Appendix of Length Limits).

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.	

Revised March 16, 2026

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2025) (except see [2025 U.S. Supreme Court Package](#) to view the March 10, 2026 request to withdraw proposed amendments to Appellate Rules 29 and 32 and the Appendix of Length Limits).

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.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

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

REA History:

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

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

Revised March 16, 2026

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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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.	

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
Prohibiting Political Prosecutions Act of 2026	<u>H.R. 7575</u> <i>Sponsor:</i> Goldman (D-NY) <i>Cosponsors:</i> Norton (D-DC) Gomez (D-CA) Larson (D-CT)	CR 6, 16, 48	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr7575/BILLS-119hr7575ih.pdf</u> Summary: Would amend Criminal Rules 6 (to require the government to inform the grand jury of exculpatory evidence and things that may impact a witness's credibility), 16 (to require the government to inform the defendant of the grand jury vote) and 48 (to allow dismissal based on politically-motivated prosecution).	2/13/2026: Introduced in House and referred to Committee on the Judiciary
Litigation Funding Transparency Act of 2026	<u>S. 3826</u> <i>Sponsor:</i> Grassley (R-IA) <i>Cosponsors:</i> Tillis (R-NC) Kennedy (R-LA) Cornyn (R-TX)	CV 26	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/s3826/BILLS-119s3826is.pdf</u> Summary: Would require disclosure of third-party funding in MDL, class action, and other large litigations (100+ consolidated or coordinated cases). Disclosure of the identity of the funder and the agreement must be made to the court and the parties. Would also prohibit funders from exerting control over the litigation or viewing materials produced in discovery, unless ordered otherwise by the court.	2/11/2026: Read twice and referred to the Committee on the Judiciary
Protecting TPLF From Abuse Act	<u>H.R. 7015</u> <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> Fitzgerald (R-WI) Baumgartner (R-WA)	CV 26	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr7015/BILLS-119hr7015ih.pdf</u> 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.	1/12/2026: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Sunshine for Regulatory Decrees and Settlements Act of 2025	H.R. 6622 <i>Sponsor:</i> Cline (R-VA) <i>Cosponsor:</i> Tiffany (R-WI)	CV 24, 41	Most Recent Bill Text: https://www.congress.gov/119/bills/hr6622/BILLS-119hr6622ih.pdf Summary: Would impose additional requirements for consent decrees or dismissals pursuant to settlement agreements in agency actions. Would also create additional considerations for the court for motions to intervene in agency actions.	1/8/2026: Ordered to be Reported (Amended) 1/8/2026: Committee Consideration and Mark-up Session Held 12/11/2025: Introduced in House; referred to Judiciary Committee
Back the Blue Act of 2025	S. 3366 <i>Sponsor:</i> Cornyn (R-TX) <i>Cosponsors:</i> 38 Republican Cosponsors	§ 2254 Rule 11	Most Recent Bill Text: https://www.congress.gov/119/bills/s3366/BILLS-119s3366is.pdf Summary: Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	12/4/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	H.R. 2675 <i>Sponsor:</i> Cline (R-VA) <i>Cosponsors:</i> 19 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 litigation 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 <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> 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

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Courts from Foreign Manipulation Act of 2025	<u>S. 3180</u> <i>Sponsor:</i> 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 litigation funding by foreign states and sovereign wealth funds.	11/18/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Democracy Act	<u>S. 2838</u> <i>Sponsor:</i> Schiff (D-CA) <i>Cosponsors:</i> <u>9 Democratic and Independent Cosponsors</u>	CV – New Rule(s)	Most Recent Bill Text: https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf Summary: Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	9/17/2025: S. 2838 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs
Lawsuit Abuse Reduction Act of 2025	<u>H.R. 5258</u> <i>Sponsor:</i> Collins (R-GA) <i>Cosponsors:</i> Gill (R-TX) Tiffany (R-WI) Hageman (R-WY)	CV 11	Most Recent Bill Text: https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf Summary: Would amend Civil Rule 11 to require the court to issue sanctions for Rule 11 violations, which shall consist of an order to pay the amount of the reasonable expenses incurred as a direct result of the violation.	9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2025	<u>H.R. 4678</u> <i>Sponsor:</i> Johnson (D-GA) <i>Cosponsors:</i> <u>20 Democratic cosponsors</u>	EV 416	Most Recent Bill Text: https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf Summary: Would create a new Evidence Rule (416, Limitation on Admissibility of Defendant's Creative or Artistic Expression) that would make a defendant's creative or artistic expression inadmissible unless the government proves by clear and convincing evidence that one of several exceptions applies.	7/23/2025: H.R. 4678 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Rape Shield Enhancement Act of 2025	<u>H.R. 3596</u> <i>Sponsor:</i> Mace (R-SC)	EV 412; CV 26; CR 16	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf</u> Summary: Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2025	<u>S. 1814</u> <i>Sponsor:</i> Whitehouse (D-RI) <i>Cosponsors:</i> <u>27 Democratic and Independent cosponsors</u>	AP 29	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf</u> 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	<u>S. 1133</u> <i>Sponsor:</i> Grassley (R-IA) <i>Cosponsors:</i> Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf</u> 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	<u>H.R. 1379</u> <i>Sponsor:</i> Fry (R-SC) <i>Cosponsors:</i> <u>17 bipartisan cosponsors</u>	CR 29	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf</u> 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

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Alexandra's Law Act of 2025	H.R. 780 <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> Kiley (R-CA) Oberholte (R-CA)	EV 410	Most Recent Bill Text: https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf Summary: Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	H.R. 100 <i>Sponsor:</i> Biggs (R-AZ)	CV 23	Most Recent Bill Text: https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf Summary: Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 3

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

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

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

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

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

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

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

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

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

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

138 *Amendments Related to Cross-Border Discovery*

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

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

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

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

160 *Discovery Subcommittee—Filing Under Seal*

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

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

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

177 **Information Items**

178 *Rule 43/45 Subcommittee—Remote Testimony*

179 Judge Lauck reported on the progress of the Rule 43/45 Subcommittee, of which she is
180 the chair. The subcommittee has been hard at work. Its first project, the amendment to Rule 45
181 regarding subpoenas for remote testimony, is out for publication with hearings scheduled early in
182 2026. The subcommittee is currently considering possible amendments to Rule 43's provisions
183 for remote testimony. Currently, Rule 43(a) provides the standard for when remote testimony
184 may be used at trial, while Rule 43(c) addresses evidence on a motion but does not explicitly
185 address remote testimony. The subcommittee is focused on what the standard should be for the
186 use of remote testimony, and whether that standard should be the same for trials and hearings.
187 Judge Lauck noted that the Bankruptcy Rules Committee had already approved amendments to
188 permit remote testimony for contested matters (but not adversary proceedings) and has been
189 extremely helpful to the subcommittee.

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

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

199 Although the subcommittee continues to gather information, including local and state
200 court rules, it has begun to consider closely whether current requirement of “compelling
201 circumstances” for remote testimony at trial is too high a bar. The current rule, last amended in
202 1996 when telephones were the technological standard for remote testimony, does not reflect the
203 regular use of modern video-conferencing technology. Nevertheless, two areas of agreement in
204 the subcommittee are that live, in-person testimony should remain the norm, and that the
205 decision whether to allow remote testimony should be in the discretion of the district judge. The
206 key questions are how the rule should guide that discretion and what safeguards should be
207 required to ensure the reliability of the testimony. Overlaying all of this is the question of
208 whether these provisions should be the same at all proceedings where testimony is taken.

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

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

233 Professor Marcus then raised a separate issue regarding “apex witnesses.” One complaint
234 by defendants is that some witnesses, such as company executives, might find their time
235 monopolized by recurring requirements to appear in person to testify. The subcommittee is trying
236 to balance such concerns with the reasons in-person testimony from such witnesses might be
237 desirable. Judge Lauck noted that often deposition transcripts are read as a substitute, so wide
238 acceptance of remote testimony would be an improvement for jurors. The subcommittee will
239 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),

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

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

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

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

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

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

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

304 Class Representative Incentive/Service Awards

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

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

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

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

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

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

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

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

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

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

357 Rule 23(b)(3) Superiority

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

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

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

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

387 Settlement before class certification

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

392 First, individual settlements of proposed class actions could invite a form of strike suit. In
393 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 *Alcares* 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

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

635 Judge Vance then adjourned the meeting.

Draft

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 4

Rule 7.1—Disclosure Statement

During the public comment period, we received relatively little feedback on the proposed amendments to Rule 7.1. A summary of the testimony of the four witnesses who commented on the proposal and the eight written comments we received is attached. The subcommittee reviewed and discussed the public comments via email and unanimously recommends final approval of the rule as published, with no changes.

Although one witness expressed concerns that the definitions of “business organizations” and “indirectly owns” might be confusing, all other comments were supportive and expressed confidence that these amendments will make it easier for judges to determine whether they have any financial interest in the outcome of the litigation that requires them to recuse. The subcommittee has wrestled quite a bit with the terminology in the rule and concluded that, while not defined with exactitude, this language captures the purpose of the rule and will be applied pragmatically. Moreover, since 1998, the committee note for Appellate Rule 26.1 has stated that the “rule requires disclosure of all of a party’s parent corporations meaning grandparent and great grandparent corporations,” and it has not caused insurmountable confusion. Consequently, the subcommittee opted against any changes. Additionally, some commenters suggested that the rule also require disclosure of any third-party litigation financing, but these comments go well beyond what is proposed in the rule and would likely be a substantial change requiring republication. Moreover, the Advisory Committee currently has a subcommittee devoted to studying this issue.

Attachment(s):

- Redline and Clean Versions of Rule 7.1 Amendments
- Summary of Testimony and Public Comments

Published Rule 7.1 Amendment
(Redline)

PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE¹

- 1 **Rule 7.1. Disclosure Statement**
- 2 **(a) Who Must File; Contents.**
- 3 (1) *Nongovernmental* ~~*Corporations*~~ *Business*
- 4 *Organizations*. A nongovernmental
- 5 ~~corporate~~ business organization that
- 6 is a party or a ~~nongovernmental~~
- 7 ~~corporation~~ that seeks to intervene
- 8 must file a statement that:
- 9 **(A)** identifies any parent ~~corporation~~
- 10 business organization and any
- 11 publicly held ~~corporation~~ business
- 12 organization ~~owning~~ that directly or

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

Attachment to Rule 7.1—Disclosure Statement

2 FEDERAL RULES OF CIVIL PROCEDURE

13 indirectly owns 10% or more of ~~its~~
14 ~~stock~~ it; or
15 (B) states that there is no such ~~corporation~~
16 business organization.

Published Rule 7.1 Amendment and
Committee Note

PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE

1 **Rule 7.1. Disclosure Statement**

2 **(a) Who Must File; Contents.**

3 **(1) *Nongovernmental Business Organizations.***

4 A nongovernmental business
5 organization that is a party or that
6 seeks to intervene must file a
7 statement that:

8 **(A)** identifies any parent business
9 organization and any publicly held
10 business organization that directly or
11 indirectly owns 10% or more of it; or

12 **(B)** states that there is no such business
13 organization.

14 * * * * *

15

Committee Note

16 Rule 7.1(a)(1) is amended in two ways intended to
17 better assist judges in complying with their statutory and
18 ethical duty to recuse in cases in which they or relevant
19 family members have “a financial interest in the subject
20 matter in controversy or in a party to the proceeding, or any
21 other interest that could be substantially affected by the
22 outcome of the proceeding.” 28 U.S.C. § 455(b)(4); Code of
23 Conduct for United States Judges Canon 3C(1)(c).

24 First, the amended rule substitutes “business
25 organization” in place of references to “corporation” to
26 cover entities not organized as “corporations,” defined
27 narrowly. “Business organizations” is a more capacious term
28 intended to flexibly adapt to the ever-changing variety of
29 commercial entities, and the term is generally accepted and
30 well understood. *See, e.g.*, Uniform Business Organizations
31 Code (2015).

32 Second, the rule is amended to require disclosure of
33 business organizations that “directly or indirectly own 10%
34 or more of” a party, whether or not that ownership interest is
35 formally denominated as stock. Such a direct or indirect
36 owner is presumed to hold a sufficient interest in a party to
37 raise a rebuttable presumption that a judge’s financial
38 interest in the owner extends to the party, warranting recusal.
39 *See* U.S. Judicial Conference, Guide to Judiciary Policy
40 § 220, Committee on Codes of Conduct, Advisory Opinion
41 No. 57: Disqualification Based on a Parent-Subsidiary
42 Relationship (Feb. 2024). Under the amended rule, a party
43 must disclose not only a parent business organization but
44 also any publicly held business organization that is a
45 grandparent, great-grandparent, or other corporate relative
46 that owns 10% or more of a party, whether directly or
47 through another business organization. The requirement to

48 disclose “indirect” owners of 10% or more of a party is a
49 pragmatic effort to better inform judges of circumstances
50 when their financial interests may be affected by a litigation
51 or when further inquiry into the ownership interests in a
52 party is appropriate.

53 As before, this rule does not capture every scenario
54 that might require a judge to recuse. As reflected in the
55 Committee on Codes of Conduct Advisory Opinion No. 57,
56 a judge may need to seek additional information about a
57 party’s business affiliations when deciding whether to
58 recuse. And, as before, districts may promulgate local rules
59 requiring additional disclosures.

Attachment to Rule 7.1—Disclosure Statement

Summary of Comments and Testimony on Proposed Amendments to Rule 7.1, 2025-2026

[The following uses only the last four digits as identifiers. Each is preceded officially by CV-2025-____.]

January 27 online hearing

Thomas Allman: Thinks there are “good reasons for the changes.” The changes “pass up” an opportunity to address third-party litigation-finance disclosures, but an approach similar to disclosures of insurance contracts would be “the best place to put references to disclosures of third-party funding.”

Jonathan Redgrave: The amendments address important issues and expanding the disclosure requirements beyond corporations “makes a lot of sense.” Expressed concerns about definition of “indirect ownership.” Also expressed support for requiring disclosure of third-party litigation funding. In response to a question from Judge Vance, indicated that the change to the term “business organization” is unlikely to create confusion.

Melissa Kotulski: appreciates shift from corporation to business organization because it is more consistent with international-law norms.

Robert Levy: raised concern over lack of definition of “business organization” because while there is a “general understanding . . . questions could arise on joint ventures or informal associations.” Concerned that without a definition, “indirect ownership” could be an area of confusion. Suggests an addition to the committee note “to make it clear that judges should do whatever they can to avoid situations where they would be required to recuse.” Would also prefer that the required disclosure include “any entities with a significant interest in the outcome of the litigation through litigation funding.”

Written Comments

Federal Magistrate Judges Association (0101): “The FMJA fully supports these changes to Rule 7.1 because they will assist judges in making recusal decisions and help to flag potential conflicts of interest at the outset of a case.”

Anonymous (0136): An “interested member of the public” notes that the proposed amendments “likely aim to enhance transparency regarding corporate affiliations, a matter of ongoing importance for managing conflicts of interest.”

Aaron Greenspan (0174): “I also support changes to Rule 7.1 that would make it clearer exactly who has a conflict with a judge, starting with litigation finance companies[.]”

International Attestations (0184): “First, the progression of Rule 7.1 indicates compliance with international laws, mores and standards concerning corporates qua ‘business organizations.’”

Attachment to Rule 7.1—Disclosure Statement

American Civil Accountability Alliance (0263): “[S]upports the core purpose of Rule 7.1 . . . [and] agree that it makes sense to narrowly expand the scope of Rule 7.1, as the drafted amendment does, to include limited liability partnerships and other ‘business organizations’ that are not organized as ‘corporations.’” This group, however, opposes “any attempts to expand the scope of Rule 7.1 . . . into a sweeping disclosure mandate for litigants who rely on third-party financing[.]” Conflicts of interest regarding third-party litigation finance are “extraordinarily, almost inconceivably rare.”

Citizens for Responsibility and Ethics in Washington (0274): “We write to express our support for the proposed amendments to Rule 7.1 . . . which would facilitate timely and informed judicial recusal decisions under 28 U.S.C. § 455 and the Code of Conduct for United States Judges.” The amendment “provides district judges with timely information that may affect their disqualification decisions and aligns district court disclosure rules with the longstanding practice of the courts of appeals.”

Kate Baxter-Kauf (0282): The amendment is a “common sense change[.]”

Gibson Consumer Law Group LLC (0291): “The proposed change . . . is a practical evolution of the rule and makes sense with respect to evaluating bias and recusal.”

TAB 5

Rule 41(a)—Dismissal Without Prejudice

During the public comment period, three witnesses testified, and the Advisory Committee received 28 public comments on the proposed amendments to Rule 41. All of the testimony and comments were in support of the amendments. A summary of the testimony and comments is attached. Three commenters suggested tweaks to the language of the rule, described below. After review and discussion via email of the public comments, the subcommittee unanimously recommends final approval of the amendments as published.

Themes emerging from the public comments include praise for the amendments' resolution of the circuit split over the meaning of the word "action" and confidence that the amendments allowing dismissal of a claim or claims and requiring only signatures of parties remaining in the action on a stipulation of dismissal will increase efficiency and reduce confusion. No comments opposed the changes.

There were, however, three suggested tweaks to the rule that the subcommittee has considered.

One witness suggested "out of an abundance of caution" that the rule include language making it clear that a claimant may voluntarily dismiss a "party" to a case, as well as a claim or claims. But, as Professor Marcus noted at the hearing, there is no way for a party to "dismiss" another party aside from dismissing the claims against it. Upon reflection, the subcommittee concluded that adding any such language would only add confusion.

The American Association for Justice proposed that the amendment to Rule 41(a)(1)(A)(ii) regarding the required signatures on a stipulation of dismissal be changed from "**all** parties who have appeared and remain in the action" to "**the** parties who have appeared and remain in the action." The stated reason for this change is: "The word 'all' seems inconsistent with the added text referring to parties that 'remain in the action.' This is also conceptionally consistent with the purpose of the amendment: that it be signed only by parties who have appeared and remain in the action." After consideration, the subcommittee does not think the published language is confusing and has concluded that this change is unnecessary, since the word "all" is expressly limited to parties who remain in the action.

Finally, the National Health Law Program sought a clarification that the proposed amendments to Rule 41(a) do not affect the requirements in Rule 23(e) that voluntary dismissal of claims of a certified class requires notice to the class and court approval. After discussion, the subcommittee is of the view that such clarification is unnecessary. Rules 23 and 41 have long peacefully coexisted without confusion, and nothing in the proposed amendments casts doubt on the additional requirements for dismissing class claims after certification.

The subcommittee therefore recommends final approval of the proposed amendments to Rule 41 as published.

Attachment(s):

- Redline and Clean Versions of Rule 41 Amendments
- Summary of Testimony and Public Comments

Published Rule 41 Amendment
(Redline)

PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE¹

- 1 **Rule 41.** **Dismissal of Actions or Claims**
- 2 **(a)** **Voluntary Dismissal.**
- 3 **(1)** ***By ~~the~~ a Plaintiff.***
- 4 **(A)** *Without a Court Order.* Subject to
- 5 Rules 23(e), 23.1(c), 23.2, and 66 and
- 6 any applicable federal statute, ~~the~~ a
- 7 plaintiff may dismiss ~~an~~ its action or
- 8 one or more of its claims without a
- 9 court order by filing:
- 10 (i) a notice of dismissal before
- 11 the opposing party serves
- 12 either an answer or a motion
- 13 for summary judgment; or

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

14 (ii) a stipulation of dismissal
15 signed by all parties who have
16 appeared and remain in the
17 action.

18 * * * * *

19 (2) ***By Court Order; Effect.*** Except as provided
20 in Rule 41(a)(1), an action or one or more
21 claims may be dismissed at ~~the~~ a plaintiff's
22 request only by court order, on terms that the
23 court considers proper. If a defendant has
24 pleaded a counterclaim before being served
25 with the plaintiff's motion to dismiss, the
26 action, claim, or claims may be dismissed
27 over the defendant's objection only if the
28 counterclaim can remain pending for
29 independent adjudication. Unless the order
30 states otherwise, a dismissal under this
31 paragraph (2) is without prejudice.

Published Rule 41 Amendment and
Committee Note

PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE

- 1 **Rule 41. Dismissal of Actions or Claims**
- 2 **(a) Voluntary Dismissal.**
- 3 **(1) *By a Plaintiff.***
- 4 **(A) *Without a Court Order.*** Subject to
- 5 Rules 23(e), 23.1(c), 23.2, and 66 and
- 6 any applicable federal statute, a
- 7 plaintiff may dismiss its action or one
- 8 or more of its claims without a court
- 9 order by filing:
- 10 (i) a notice of dismissal before
- 11 the opposing party serves
- 12 either an answer or a motion
- 13 for summary judgment; or

14 (ii) a stipulation of dismissal
15 signed by all parties who have
16 appeared and remain in the
17 action.

18 * * * * *

19 (2) ***By Court Order; Effect.*** Except as provided
20 in Rule 41(a)(1), an action or one or more
21 claims may be dismissed at a plaintiff's
22 request only by court order, on terms that the
23 court considers proper. If a defendant has
24 pleaded a counterclaim before being served
25 with the plaintiff's motion to dismiss, the
26 action, claim, or claims may be dismissed
27 over the defendant's objection only if the
28 counterclaim can remain pending for
29 independent adjudication. Unless the order
30 states otherwise, a dismissal under this
31 paragraph (2) is without prejudice.

* * * * *

Committee Note

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 prior to an answer or motion for summary judgment by a party opposing that claim, or by stipulation or court order. Some courts interpreted the previous 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 this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. This amendment to Rule 41(a), permitting voluntary dismissal of a claim or claims, does not affect the operation of Rule 41(d), whose applicability is limited to situations when the plaintiff has previously dismissed an entire action.

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who have dismissed all claims, or had all claims against them dismissed. Such a requirement can be overly burdensome and an unnecessary obstacle to

Attachment to Rule 41(a)—Dismissal Without Prejudice

4

FEDERAL RULES OF CIVIL PROCEDURE

65 narrowing the scope of a case; signatures of the parties
66 currently litigating claims at the time of the stipulation
67 provide both sufficient notice to those actively involved in
68 the case and better facilitate formulating and simplifying the
69 issues and eliminating claims that the parties agree to
70 resolve.

Summary of Comments and Testimony on Proposed Amendments to Rule 41, 2025-2026

[The following uses only the last four digits as identifiers. Each is preceded officially by CV-2025-____.]

January 27, 2026 Online Hearing

Scott Hendler: supports clarification of voluntary dismissal procedures because it “improves efficiency for courts and litigants.” It is important to be able to dismiss claims in multiparty, multiclaim cases as evidence develops during discovery without having to seek leave to amend and then file an amended complaint. Only recommendation is to include explicit language that a party can be dismissed without dismissing the action “out of abundance of caution.”

Tobi Millrood (on behalf of Amer. Ass’n for Justice): supports amendment. In written materials submitted in advance of the hearing, suggests replacing the word “all” with “the” in amended Rule 41(a)(1)(A)(ii). “The word ‘all’ seems inconsistent with the added text referring to parties that ‘remain in the action.’ This is also conceptionally consistent with the purpose of the amendment: that it be signed only by parties who have appeared and remain in the action.”

Melissa Kotulski: says this reminds her of the line-item veto and is supportive of the change.

Written Comments

Maria Diamond (0042): Supports amendments because they will “resolve prior uncertainty in some courts that limited voluntary dismissal to entire actions or all claims against a party. Furthermore, this change will align the rule with modern multi-claim, multi-party practice and promote efficiency by reducing the need for amended complaints and motion practice under Rule 15. . . . Together, the changes to the rule will reduce unnecessary procedural hurdles, and support the laudable goals of narrowing issues and streamlining litigation. They strike the right balance tween [sic] reducing burdens while protecting fairness to all parties.”

Federal Magistrate Judges Association (0101): “Magistrate Judges often handle cases on consent, including multi-party cases where this issue has arisen. The proposed changes provide clarity and allow for proper streamlining of cases. The FMJA agrees with the Advisory Committee that the amended Rule is more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings and therefore endorses the change.”

Anonymous (0136): “[A]mendments to Rule 41 concerning the dismissal of actions likely seek to clarify timing or effect under certain circumstances, which is always beneficial for practitioners aiming to avoid inadvertent dismissals or confusion over the status of a case.”

Nat’l Health Law Program (0177): “strongly supports” proposed amendments. Notes that some circuits’ requirement that a complaint must be amended to dismiss a claim is “onerous and resource intensive for the parties and the court.” Also notes question as to whether voluntary dismissal of a claim in a class action triggers the Rule 23(e)(1) requirement of notice to the class members.

Attachment to Rule 41(a)—Dismissal Without Prejudice

Casey Johnson (0183): “The proposed changes to FRCP 41(a) resolves uncertainty in some courts and allows for a plaintiff to dismiss one or more claims against a party. This change brings the rule in the line with the reality of multi-party, multi-claim litigation, which frequently requires a plaintiff to plead all possible claims due to limited access to the evidence. During the course of litigation, plaintiffs frequently streamline the Complaint based on the state of the evidence, eliminating claims that may no longer be viable. The proposed change will reduce the need for amended Complaints under Rule 15 - saving time and resources for all parties and the courts. And the further change regarding the stipulation in Rule 41(a)(1)(A)(ii) also appropriately removes barriers that exist by seeking consent from wholly uninterested former parties. In fact, the committee may want to consider requiring only ‘affected’ parties sign such a stipulation.”

Melissa Kotulski (0184): supports amendments on grounds that they are consistent with the “clear pathway to getting to the merits most of the time when cases are brought to the ICJ.”

Teris Swanson (0249): “[T]he clarification to Rule 41(a) resolves an unnecessary circuit split by confirming that plaintiffs may voluntarily dismiss an entire action or individual claims, which reflects common litigation practice and avoids needless procedural traps.”

Nicole Snapp-Holloway (0235): supports amendments as “long overdue The amendment aligns the rule with modern litigation practices and would allow parties to streamline their claims without procedural gymnastics.” Also supports signatures amendment: “There is no practical purpose for forcing litigants to delay resolution of pending claims by seeking signatures from parties no longer in the case. This change promotes efficiency without prejudicing defendants.”

Kevin Green (0238): Practices in Seventh Circuit, which requires dismissal of entire actions and reports that, due to this practice, “court dockets are heavily backlogged, and waiting for what amounts to a ministerial act can cause unnecessary delay. . . . What should be a straightforward exercise in party autonomy instead becomes a multi-step procedural detour that burdens both the litigants and the court. The proposed amendment avoids this inefficiency, brings uniformity to the circuits, and aligns the rule with the practical realities of modern litigation. I support its adoption.”

Bhavani Raveendran (0252): Civil-rights lawyer explains that “litigants should have a clear and efficient procedural mechanism to dismiss weaker or unnecessary claims without risking procedural complications or incurring unnecessary motion practice. Such flexibility would also be positive for defendants in civil rights cases.”

Charles Cooper (0253): “The proposed change to Rule 41(a) would clear up some confusion among the circuits, some of which currently require dismissal of all claims and will not permit dismissal of individual claims against some but not all defendants.”

Comm. To Support the Antitrust Laws (COSAL) (0255): “The proposed amendments make clear that the rule can be used to voluntarily dismiss a claim or claims within an action. The amendments will make clear that the rule is explicitly not limited to the dismissal of entire actions and that a stipulation of dismissal does not require the agreement of former parties to the action. These amendments will codify an efficient dismissal process that is critical for complex

Attachment to Rule 41(a)—Dismissal Without Prejudice

antitrust litigation, which often involves numerous claims and numerous parties on both sides of the case. . . . The parties’ ability to narrow the scope of proceedings before trial means that any remaining pretrial proceedings, as well as the trial itself, can proceed faster and more efficiently with respect to the claims, defenses, and other issues that need to be decided.” Suggests that the rule “state that ‘a plaintiff may dismiss its action or one or more of its claims **against one or more parties** without a court order.’” Expresses concern that “without the specific inclusion of language covering the dismissal of a party, there remains a risk that courts will reach different outcomes on this question.”

Amer. Ass’n for Justice (0258): Supports amendment but suggests replacing the word “all” with “the” in amended Rule 41(a)(1)(A)(ii). “The word ‘all’ seems inconsistent with the added text referring to parties that ‘remain in the action.’ This is also conceptionally consistent with the purpose of the amendment: that it be signed only by parties who have appeared and remain in the action.”

Anonymous (0260): “I agree with the change to Rule 41(a) permitting a Plaintiff to voluntarily dismiss one or more claims within an action. It would help streamline litigation, on claims that both parties agree would be extinguished, without forcing Plaintiffs to restart the whole case.”

Deborah C. Waters (0265): “The proposed amendment recognizes the realities of litigation and allows for partial dismissal rather than requiring dismissal of an entire action. The proposed language encourages settlement negotiations between and among the parties and promotes judicial efficiency by decreasing the need for motion practice under Rule 15. This is a sensible amendment. . . . Further, the proposed amendment to Rule 41(a)(1)(A)(ii) streamlines the process for dismissal by requiring only defendants who have not been dismissed previously to sign the dismissal order. It is often difficult to get long-dismissed parties to sign orders that, frankly, have nothing to do with them, especially after their attorney’s representation has ended. This is a good amendment.”

Daniel Laurence (0267): Supports “laudable changes.” “Some circuits currently require dismissal of all claims. The rule would resolve a circuit split, creating greater procedural certainty in litigation, which is laudable in its own right, but also lowers costs and delayed and, in some cases, denied justice for litigants and the courts by avoiding refiling lawsuits in those circuits that require complete dismissal of all claims.”

Daniel Linebaugh (0278): “[P]lease note my support for the proposed amendments to FRCP 41(a), 45 (b) and 45(c) and do everything within your power to ensure their passage”

Sean Dominick (0279): “Rule 41(a) would resolve the current split and allow for dismissal of one or more claims in an action. Allowing for certain counts or claims to be dismissed again will streamline the process, avoid the need for unnecessary pleading battles and make it easier to have clarity of pleadings.”

Jacob Podell (0280): supportive on ground that the amendment “would add more flexibility,” “reduce procedural hurdles,” and “otherwise streamline litigation.”

Attachment to Rule 41(a)—Dismissal Without Prejudice

George Tolley (0281): medical-negligence lawyer supports amendments on ground that “partial voluntary dismissals have become valuable tools that help resolve cases that can be resolved without the need for a full jury trial on the merits.” In his district (D. Md.), an amended complaint is required to dismiss a claim; in his view “requiring motions practice under Rule 15 is needlessly expensive, burdensome, and time-consuming. Allowing a partial voluntary dismissal pursuant to Rule 41 would have time, money, and judicial resources.”

DiCello Levitt LLP (0284): “DiCello Levitt endorses the Advisory Committee’s proposed amendment to Rule 41, which provides a way to better facilitate voluntary dismissal of one or more claims in a litigation, as opposed to the entire matter, by the parties remaining in an action. The proposed amendment is in keeping with Federal Rule of Civil Procedure 1 and would be especially useful in complex litigation to allow parties to refine the claims proceeding to an eventual trial or resolution.”

Benjamin L. Mook (0285): Supports amendment to Rule 41(a) because it “eliminates confusion among the circuits” and “makes sense for litigants and judges.”

Kevin Weis (0288): “As an attorney in practice for over 26 years I write to support the proposed amendments to FRCP 41(a).”

Gibson Consumer Law Group (0291): Supportive on grounds that amendment “makes sense particularly in complex litigation involving multiple parties where initially many claims are asserted before a consolidated complaint is filed. The proposed change that would only require the signatures of the parties remaining in the action also promotes the efficient progression of an action. Many times, parties are initially eager to pursue litigation only to discover they cannot dedicate the time necessary to pursue their claims, and in some cases, become nonresponsive. Permitting the parties who remain in the litigation to stipulate to a dismissal of such claims would streamline litigation.”

Donald Slavik (0294): Supportive because amendments “will streamline the prosecution of cases, allowing one to dismiss what may turn out to be an unprovable claim while pursuing a more focused and provable claim.”

Joseph Camerlengo (0295): Calls adoption of the amendments “imperative” because: “With short statutes of limitations and well healed [sic] experienced defendants and defense counsel that refuse to cooperate or share information prior to filing a lawsuit, catastrophically injured plaintiffs must sue all the potential defendants and allege all the potential causes of action against them. That allows appropriate discovery into which defendants are the most culpable and what are the best claims to pursue against those defendants. Allowing plaintiffs to narrow the parties and claims to be litigated for trial promotes the resolution of all or portions of claims; preserves precious court time on dispositive motions, Daubert motions, and motions in limine; and reduces the time, witnesses, and evidence at trial.”

Carla Aikens (0297): “Modern federal cases frequently involve multiple claims and multiple parties, and it should be straightforward for a plaintiff to narrow a case as discovery develops, claims are resolved, or litigation strategy changes. Clarifying that Rule 41(a) may be used to dismiss fewer than all claims will reduce unnecessary procedural workarounds and

Attachment to Rule 41(a)—Dismissal Without Prejudice

promote efficient case management. . . . In multi-party cases, requiring signatures from parties who have already been dismissed or are no longer participating can create needless delay, expense, and avoidable disputes. This change facilitates settlement and narrowing of issues while keeping the focus on the parties who are actively litigating the remaining claims.”

Jennifer Lawrence (0298): “I am also in favor of Rule 41(a)[which] would promote efficiency and economy within the judicial system.”

TAB 6

Rule 45(c)—Subpoena for Remote Trial Testimony

The preliminary draft of Rule 45(c) was published for public comment in August 2025, with comment closing in February 2026. On March 11, the Rule 43/45 Subcommittee met to discuss the public comments. Except for a modification of one paragraph of the committee note, the Subcommittee saw no need to make other changes. Notes of that meeting are included in this agenda book. (Notes of the discussion of ongoing consideration of a possible amendment to Rule 43(a) are included in the agenda book section for Subcommittee Reports.) A summary of the testimony and comments on the Rule 45(c) amendment follows in this agenda book.

The principal goal of this Rule 45(c) amendment proposal was to change the outcome in the Ninth Circuit’s 2-1 *In re Kirkland* panel decision, which held that current Rule 45 would not permit a subpoena to require a witness to provide remote trial testimony even though the court had found that the requirements of Rule 43(a) were satisfied in the case. *See In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). The panel majority held that the rule did not, as written, authorize a subpoena for such remote trial testimony. The panel majority recognized that a rule change would solve the problem and undo the panel’s interpretation.

Though at least some witnesses opposed that change on the merits (including the lawyer who persuaded the Ninth Circuit panel to adopt its interpretation of the current rule), many more favored the change. The Subcommittee saw no reason to retract the rule change, and notes that there is considerable urgency about responding to the Ninth Circuit decision.

As the notes of the March 11 Subcommittee meeting below show, the discussion indicated that only one change was needed in the published preliminary draft—refinement of the next-to-last paragraph of the note. There may be a risk that the wording of the published draft suggests that the Rule 43(a) standard for remote testimony at trial applies to motion hearings or other proceedings. So the Subcommittee recommends that note be clarified as follows:

The amendment does not alter the standards for deciding whether to permit in-court remote trial testimony. Instead, it applies to any subpoena for witness testimony. ~~Ordinarily, court approval is required for remote testimony in court. Rule 43(a), for example,~~ authorizes remote trial testimony ~~in trials and hearings~~ but depends on court permission for such testimony. Rule 26(a)(3)(A)(i) requires that the parties disclose the identities of witnesses whose testimony will be presented, without distinguishing between in-person and remote testimony. ~~Even remote deposition testimony is authorized only by stipulation or court order. See Rule 30(b)(4).~~

Without this clarification, the published draft note might be read to limit the court’s latitude to hold remote proceedings that are not trials. The basic point of the paragraph is that remote trial testimony—the only thing regulated by Rule 43(a)—requires court approval. Other remote activities—court proceedings or depositions—are not affected by this amendment and referring to them might create confusion. This clarification avoids that potential confusion.

Proposed Clarification of Rule

During the January 27 hearing, one recommendation was that the rule change be revised along the following lines:

(2) For Remote Testimony. Under Rule 45(c)(1), the place of attendance is the location where the person is commanded to provide the remote testimony ~~appear in person~~.

The concern was that the use of the terms “place” and “location” might be confusing and support arguments inconsistent with the purpose of the rule amendment.

The Subcommittee did not find this change useful, and also noted that the term “commanded to appear” shows up elsewhere in Rule 45. Thus, the published amendment to Rule 45(b)(1) says that the tender of the witness fee does not have to be part of service of the subpoena, and that the fee can instead be tendered at the time and place the witness is “commanded to appear.” And Rule 45(a)(1)(A)(iii) already says that a subpoena can “command each person to whom it is directed to * * * attend and testify.”

The risk of misunderstanding, or not fitting with the simultaneous amendment of Rule 45(b)(1) (which is recommended for final adoption), support retaining the published rule amendment.

Deferring until 43(a) issue resolved

Several witnesses urged that—even though they had no particular opposition to changing the Ninth Circuit’s interpretation of current Rule 45(c)—no action should be taken on Rule 5(c) until the Rule 43(a) process has run its course. As introduced in the Subcommittee’s report below in the Subcommittee Reports section of this agenda book, the recommendation is that the Rule 43(a) question not be rushed into the upcoming amendment cycle. Instead, after the subcommittee receives the views of the full Advisory Committee during the April meeting, Rule 43(a) will remain on the agenda for possible presentation to the Advisory Committee at the fall 2026 meeting and then to the Standing Committee at its January 2027 meeting or its June 2027 meeting, probably with a recommendation to publish for public comment.

The argument to defer decision is curious. One aspect is the assertion that (perhaps depending on how the Rule 43(a) question plays out) undoing the Ninth Circuit’s interpretation of Rule 45(c) would enable oppression of prospective witnesses. There was no evidence presented that such oppressive efforts have happened in the past, and Rule 43(c) has authorized remote trial testimony since 1996. Perhaps more pertinently, subject to the limits presently in Rule 45(c), those inclined to such abusive over-serving of subpoenas could presently do so without running afoul of *In re Kirkland* by serving oppressive subpoenas on numerous nearby witnesses commanding them to show up in court.

To the contrary, testimony and written comments on the Rule 45(b)(1) amendment to facilitate service of subpoenas (also an action item at this Advisory Committee meeting) emphasize that sometimes serving a subpoena is a very tricky and expensive proposition even with nearby witnesses.

But (as cited in the draft committee note) parties have already tried to use *In re Kirkland* to resist subpoenas calling for pretrial discovery close to their homes. The 2013 amendment to Rule 45 made it clear that a discovery subpoena (for a deposition or document production) could issue from the court presiding over the action and be served anywhere in the country. It is important to amend the rule now to guard against further such arguments.

Requiring that the party first obtain a court order and then serve

Another argument during the public comment process was that Rule 45(c) should require that a court order always issue before a subpoena may be served for remote trial testimony. Unless the court approves remote testimony, serving a subpoena does not afford a party an advantage. And it is worth noting that nothing in current Rule 45 says court approval is necessary for issuance or service of a subpoena. For example, there is and would remain no rule requirement that an order be obtained to serve a trial subpoena on a witness within the geographic limits set out in Rule 45(c), which may include the entire state in which the court sits.

Furthermore, such a requirement would seem to contradict what the committee note to the 1996 Rule 43(a) amendment now says. True, the Advisory Committee may later propose to change that rule, but the present committee note says that “compelling circumstances” would most likely be presented by some sort of last-minute emergency that precludes the witness’s presence in court. It would be odd to say that a party confronted with such a last-minute emergency could not at least initiate service of the subpoena while seeking court approval. At least one witness reported that she has on occasion inserted into such subpoenas a recognition that attendance was dependent on court approval for remote testimony.

Requiring that details on the manner of transmission, etc., be included in the order

Another argument was that the order not only must be obtained before service of the subpoena but also include details like the exact location at which the witness would provide the testimony, the location of the reporter, whether counsel could be in the room with the witness, etc.

Certainly these topics may bear on whether a court authorizes remote trial testimony. The committee note makes it clear that the party seeking to present remote trial testimony must satisfy the court on such points. Recall that “appropriate safeguards” are required. But insisting by rule that specifics must be included in every order authorizing remote trial testimony seems unnecessary before service can occur. Often, counsel serving such a subpoena will need to resolve many of those issues before service. The subpoena should, for example, command the witness to testify at a specific location identified in the subpoena. But there is little reason to command that such specifics must always be included in the order.

In the same vein, at least one witness urged that “necessary technology” must be defined more precisely than that term does. Trying to do that could be viewed as something of a fool’s errand. When remote trial testimony was first authorized in the 1996 amendment to Rule 43(a), there was no reference to technology. And consider what could have been foreseen thirty years ago. Email was only then coming into widespread use. At a mini-conference on discovery in January 1997, leading lawyers were bemoaning the difficulty of complying with Rule 34

requests for email; some urged that the rules should say emails are not “documents” and not discoverable. Social media did not exist then. And Zoom and Teams and other services of that sort were unknown. Trying to foresee what new methods for remote trial testimony emerge in the coming years seems unwise.

Additional changes to the note needed to avoid misinterpretation by courts?

Some commentators also wanted changes to the note to avoid resurrection of the *In re Kirkland* interpretation of Rule 45. But the note cites that decision and then says that the amendment “clarifies that the court’s subpoena power for in-court testimony or to provide discovery extends nationwide.” It is difficult to understand how the amendment could be interpreted to preserve the Ninth Circuit panel’s interpretation.

One witness urged the following change to the note to avoid perceived ambiguity:

For purposes of Rule 43 and Rule 77(b), such remote testimony should be construed as occurring ~~occurs~~ in the court where the trial or hearing is conducted.

Another witness sought a different change to the same sentence in the note:

For purposes of Rule 43 and Rule 77(b), such remote testimony is presented ~~occurs~~ in the court where the trial or hearing is conducted.

The stated worry was that without this change courts would continue to adhere to the *In re Kirkland* reading of the rule.

But that worry should go away if one also considers the prior sentence of the committee note, which explains that the rule confirms the court’s power to order the witness to attend within the geographical scope of Rule 45(c):

It [the amendment] specifies that, for purposes of Rule 45(c)(1), the witness “attends” at the place where the person must appear to provide the remote testimony. For purposes of Rule 43 and Rule 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

Having considered these points, the Subcommittee concluded that additional changes to the note were not needed.

Attachment(s):

- Redline and Clean Versions of Rule 45(c) Amendments
- Notes of March 11, 2026 Subcommittee Meeting
- Summary of Testimony and Public Comments

Amendment of Rule 45(c) with Changes to Committee Note indicated

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE¹

1 **Rule 45. Subpoena**

* * * * *

3 **(c) Place of Compliance.**

4 **(1) *For a Trial, Hearing, or Deposition.*** A
5 subpoena may command a person to attend a
6 trial, hearing, or deposition only as follows:

7 **(A)** within 100 miles of where the person
8 resides, is employed, or regularly
9 transacts business in person; or

10 **(B)** within the state where the person
11 resides, is employed, or regularly

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

12 transacts business in person, if the
13 person:

14 (i) is a party or a party's officer;
15 or

16 (ii) is commanded to attend a trial
17 or hearing and would not
18 incur substantial expense.

19 (2) For Remote Testimony. Under
20 Rule 45(c)(1), the place of attendance for
21 remote testimony is the location where the
22 person is commanded to appear in person.

23 (32) *For Other Discovery.* A subpoena may
24 command:

25 (A) production of documents,
26 electronically stored information, or
27 tangible things at a place within 100
28 miles of where the person resides, is

29 employed, or regularly transacts
 30 business in person; and
 31 **(B)** inspection of premises at the premises
 32 to be inspected.

33 * * * * *

34 **Committee Note²**

35 In 2013, Rule 45(a)(2) was amended to provide that
 36 a subpoena must issue from the court where the action is
 37 pending, and Rule 45(b)(2) now provides that such a
 38 subpoena can be served at any place within the United
 39 States.

40 Since the 2013 amendments, however, some courts
 41 have concluded that they are without authority to command
 42 witnesses to provide remote trial testimony because the
 43 witnesses are not within the “subpoena power” of the
 44 presiding court. *See, e.g., In re Kirkland*, 75 F.4th 1030 (9th
 45 Cir. 2023) (holding that a subpoena can compel remote trial
 46 testimony from a witness only if the witness resides or
 47 transacts business in person within 100 miles of the court or
 48 within the state in which the court sits). Questions have also
 49 been raised about whether a subpoena can compel a nonparty
 50 to provide discovery if the nonparty witness is located
 51 outside the geographical scope of the subpoena power to
 52 command the witness to appear in court. *See, e.g., York*

² The Committee Note shows changes *since publication* underlined in red and lined through. For avoidance of doubt, no changes to the text of Rule 45(c) itself have been proposed since publication.

53 *Holding, Inc. v. Waid*, 345 F.R.D. 626 (D. Nev. 2024)
54 (rejecting the argument that a Nevada district court subpoena
55 could not command production of documents within 100
56 miles of the nonparty’s place of business in New
57 Hampshire).

58 This amendment clarifies that the court’s subpoena
59 power for in-court testimony or to provide discovery extends
60 nationwide so long as a subpoena does not command the
61 witness to travel farther than the distance authorized under
62 Rule 45(c)(1), which provides protections against undue
63 burdens on persons subject to subpoenas. It specifies that,
64 for purposes of Rule 45(c)(1), the witness “attends” at the
65 place where the person must appear to provide the remote
66 testimony. For purposes of Rule 43 and Rule 77(b), such
67 remote testimony occurs in the court where the trial or
68 hearing is conducted.

69 The amendment does not alter the standards for
70 deciding whether to permit in-court remote trial testimony.
71 Instead, it applies to any subpoena for witness testimony.
72 ~~Ordinarily, court approval is required for remote testimony~~
73 ~~in court. Rule 43(a), for example, authorizes remote trial~~
74 ~~testimony in trials and hearings but depends on court~~
75 ~~permission for such testimony. Rule 26(a)(3)(A)(i) requires~~
76 ~~that the parties disclose the identities of witnesses whose~~
77 ~~testimony will be presented, without distinguishing between~~
78 ~~in-person and remote testimony. Even remote deposition~~
79 ~~testimony is authorized only by stipulation or court order.~~
80 ~~See Rule 30(b)(4).~~

81 When a subpoena commands a witness to provide
82 remote testimony, it is the responsibility of the serving party
83 to ensure that the necessary technology is available at the
84 remote location for such testimony.

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16 (ii) is commanded to attend a trial
17 or hearing and would not
18 incur substantial expense.

19 (2) ***For Remote Testimony.*** Under Rule 45(c)(1),
20 the place of attendance for remote testimony
21 is the location where the person is
22 commanded to appear in person.

23 (3) ***For Other Discovery.*** A subpoena may
24 command:

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27 tangible things at a place within 100
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29 employed, or regularly transacts
30 business in person; and

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32 to be inspected.

33 * * * * *

34

Committee Note

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44 presiding court. *See, e.g., In re Kirkland*, 75 F.4th 1030 (9th
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63 burdens on persons subject to subpoenas. It specifies that,
64 for purposes of Rule 45(c)(1), the witness “attends” at the
65 place where the person must appear to provide the remote
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67 remote testimony occurs in the court where the trial or
68 hearing is conducted.

69 The amendment does not alter the standards for
70 deciding whether to permit in-court remote trial testimony.
71 Instead, it applies to any subpoena for witness testimony.
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73 court permission for such testimony. Rule 26(a)(3)(A)(i)
74 requires that the parties disclose the identities of witnesses
75 whose testimony will be presented, without distinguishing
76 between in-person and remote testimony.

77 When a subpoena commands a witness to provide
78 remote testimony, it is the responsibility of the serving
79 party to ensure that the necessary technology is available at
80 the remote location for such testimony.

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

Notes of Teams Meeting
Rule 43/45 Subcommittee
March 11, 2026

The Rule 43/45 Subcommittee met by Teams on March 11, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, and Jocelyn Larkin. Also participating were Reporters Richard Marcus and Andrew Bradt, and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center. Sarah Sraders represented the Rules Office.

The meeting addressed two topics: (1) whether any changes should be made in the published preliminary draft of Rule 45(c) and 26(a)(3) amendments; and (2) ongoing issues regarding the work on Rule 43(a).

(1) Published Preliminary Drafts

Rule 45(c)

In August 2025 preliminary drafts of proposed amendments to Rule 45(c) and to Rule 26(a)(3) regarding subpoenas for remote trial testimony were published for public comment. As introduced in the memo included as an Appendix to these Notes, there was a proposal to change the wording of new Rule 45(c)(2) from “commanded to appear” to “commanded to provide the remote testimony.” The stated goal of this proposed change was to avoid misinterpretation of the rule amendment to preserve the Ninth Circuit’s take on the current rule.

It was noted that “commanded to appear” shows up elsewhere in Rule 45. Thus, the published amendment to Rule 45(b)(1) says that the tender of the witness fee does not have to be part of service of the subpoena, and that the fee can instead be tendered at the time and place the witness is “commanded to appear.” And Rule 45(a)(1)(A)(iii) already says that a subpoena can “command each person to whom it is directed to * * * attend and testify.”

The risk of misunderstanding or not fitting with the simultaneous amendment of Rule 45(b)(1) (which is recommended for final adoption) cut against changing the published amendment draft of the rule.

But a concern was raised about whether the next-to-last paragraph of the committee note might support arguments that remote testimony at motion hearings and other non-trial events might have to satisfy the requirements of Rule 43(a), which is only about remote trial testimony. It was agreed that this paragraph should be revised as follows:

The amendment does not alter the standards for deciding whether to permit in-court remote trial testimony. Instead, it applies to any subpoena for witness testimony. ~~Ordinarily, court approval is required for remote testimony in court.~~ Rule 43(a), ~~for example,~~ authorizes remote trial testimony ~~in trials and hearings~~ but depends on court permission for such testimony. Rule 26(a)(3)(A)(i) requires that the parties disclose the identities of witnesses whose testimony will be presented, without

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distinguishing between in-person and remote testimony. ~~Even remote deposition testimony is authorized only by stipulation or court order. See Rule 30(b)(4).~~

This clarification avoids arguments blending Rule 43(a) (relating to trial testimony) and Rule 43(c) (relating to motion proceedings and other pretrial proceedings). Otherwise, some might contend that the “compelling circumstances” provision of Rule 43(a) might also apply to non-trial events. With that clarification of the note, the Subcommittee approved recommending that the rule be adopted as published.

Other issues raised in the public comments were considered, but not found to be reasons to change the published draft amendment and note. These included (1) deferring any change to Rule 45(c) until after work on Rule 43(a) was complete; (2) requiring that the party seeking to present remote trial testimony always obtain a court order before serving a subpoena; (3) requiring that the court order contain details of the manner of providing remote testimony, and (4) editing the note to prevent misinterpretation by courts.

Rule 26(a)(3) amendment

The Rule 26(a)(3) amendment attracted few comments. No reason was found to change the published proposal, which would be recommended for final adoption. Some of the comments, indeed, seemed to take the amendment to apply to initial disclosure rather than pretrial disclosure.

The meeting notes related to Rule 43(a) are included in the Subcommittee Reports section of this agenda book.

Summary of comments on Rule 45(c)

January 27 online hearing

Tobi Millrood (including written testimony) (past President of American Association for Justice (AAJ)): The proposed amendment is valuable to restore effective nationwide subpoena authority. Particularly in modern multiparty litigation, including multidistrict litigation (MDL) proceedings, there are regular witnesses spread across the country. Particularly post-pandemic, the rules should foster convenience and efficiency. Physical attendance in court may impose severe burdens on witnesses who live far from federal courthouses. And even well-planned in-person testimony may be thwarted by travel disruptions, medical issues, or other problems. The real choice is not between in-person testimony and remote testimony, but between live remote testimony and relying instead on a deposition that often was taken long before trial. To avoid possible ambiguity, AAJ recommends that amended Rule 45(c)(2) be revised as follows from the published draft:

Under Rule 45(c)(1), the place of attendance for remote testimony is the location from where the person is commanded to provide the remote testimony ~~appear in person~~.

The point should be that the remote testimony occurs in the courtroom even though the witness is located elsewhere. The goal is to ensure that courts will not continue to adhere to the *In re Kirkland* reading of the rule. In addition, AAJ recommends that the committee note (at lines 66-68) be revised as follows:

For purposes of Rule 43 and Rule 77(b), such remote testimony should be considered as occurring in the court where the trial or hearing is conducted.

Without this change, there is a risk that the note could be mistakenly read to suggest that remote testimony “occurs” at the witness’s location. In addition, though some who have addressed this amendment proposal urge that the rule say subpoenas should not issue until the court first authorizes remote testimony under Rule 43(a), that has not proved to be a real-life problem.

Thomas Allman (including written testimony and comment 0040) (Chair Emeritus, Sedona Conference Working Group 1): I agree with the proposed amendment to Rule 45(c). But it would be desirable to provide that the subpoena not issue until the court makes an order authorizing remote testimony. It might be that the order should specify where the witness is to report to provide that testimony, but that might be too difficult to determine at the time the court order is obtained. If the grounds for authorizing remote testimony under Rule 43(a) are relaxed, however, that could make this change more important. It would be best to defer deciding whether to amend Rule 45(c) until it is clear what will happen with Rule 43(a).

Jonathan Redgrave: In terms of remote testimony versus deposition testimony at trial, neither is inherently better than the other. For example, potential privilege issues may be more challenging to address with remote testimony. One could say that counsel may “confront” the witness on screen, but that may be inferior to face-to-face confrontation during a deposition.

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

Alex Dahl: Changing Rule 45(c) should be deferred until it is decided what to do with Rule 43(a), if that is to be changed. Otherwise, there is a risk of opening the barn door and letting out the horses without appreciating the true consequences of the rule change. The rule should ensure that the judge is involved in deciding whether to allow service. The proposed Rule 26(a) amendment is “very early” in the case and does not adequately address this problem.

Lauren Barnes (including comment 0292) (CEO of Public Justice): This is a modest change that brings the rule into conformity with practice. Due to the Ninth Circuit decision in *In re Kirkland*, there has been a lot of confusion. This correction to Rule 45(c) need not be held back while the Committee studies Rule 43(a). On the Rule 43(a) point, inability to attend in court is an access to justice issue. There is no question that in-person testimony is the gold standard. But when that is not possible the question becomes “what is second best?” Even videotaped depositions present many problems. Sometimes they were taken years before trial. Things may have changed. And jurors’ eyes quickly glaze over. On top of that, there can be days and days of negotiation about what the jury will see, often requiring the court to referee. The presentation is often very hard to follow; the parties end up with a “gummed-up video.”

Rachel Downey: I support the amendment. It clarifies that the 2013 amendments empowered courts to compel witnesses to provide remote trial testimony if Rule 43(a) has been satisfied. The 100-mile limit in Rule 45 originated in the 18th century when the only way to travel (besides walking) was by horse and horse and buggy. That provides a context for the notion that in the 21st century that 18th century 100-mile limit should still apply. The ruling in *In re Kirkland* has created uncertainties for courts and litigants. The Ninth Circuit panel invited the Committee to change the rule to address its interpretation. This amendment is a desirable antidote. There is no reason to tie this amendment to the possible change to Rule 43(a). This change should correct the line of cases, including the Ninth Circuit’s *In re Kirkland* decision, that has interpreted the 100-mile limit as applying to the distance to the courthouse, not to where the witness is commanded to appear. As a plaintiff’s lawyer, I prefer to obtain court approval for remote testimony before serving the subpoena on the witness unless that is impractical. If it is right before trial, however, that may not be practical. On occasion, we have served subpoenas that say they are “contingent on court order.” I do raise one concern—the final sentence of the third paragraph of the committee note says that “such remote testimony occurs in the court where the trial or hearing is conducted.” The point is clear when this sentence is read in tandem with the following sentence about Rules 43 and 77(b), but a less careful reader could read it to support *In re Kirkland*’s definition of “place of compliance.” I suggest a minor revision, such as replacing “occurs” with “is presented” or “is offered” to avoid any potential confusion, as follows:

For purposes of Rule 43 and Rule 77(b), such remote testimony is presented ~~occurs~~ in the court where the trial or hearing is conducted.

Steven Fleischman: My firm represented the petitioners in *In re Kirkland*. We oppose this amendment. It is a solution in search of a problem. There is no need for this amendment; the rule works well as it is. But the idea of subpoena power is important, and a rule amendment “does not justify upending a century of practice.” Though Rule 45 now says that nationwide service of a subpoena is authorized, that does not address the scope of the subpoena power. Moreover, this amendment does not take account of the burden of forcing the witness to testify first, if a

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

deposition is first taken and then the witness must appear at trial to testify again. In MDL proceedings, in which witnesses are usually deposed only once, that could mean that the same witness must testify again and again at trial. Moreover, this amendment risks making other rule provisions superfluous. Under the amendment, there is a risk that courts would hold that witnesses who could be subpoenaed to testify remotely are not “unavailable” even though located far away in other states. Though the note addresses this problem, that may not be sufficient. Moreover, video testimony actually works well most of the time. True, the Rule 43(a) issue is not presently before the Committee, but we think it should be rejected. Otherwise, expert witnesses will regularly insist on testifying by Zoom.

Robert Levy: Consistent with Rule 43(a)’s existing framework, determinations regarding remote testimony should be made before a subpoena issues; litigants should not unilaterally decide that remote participation is appropriate and then seek to compel compliance. And this change to Rule 45(c) should be considered holistically. Any change in the operation of Rule 45(c) necessarily also alters the practical operation of Rule 43(a). Making this change risks disturbing the operation of Rule 32(a)(4) on use of deposition testimony of an “unavailable” witness and the hearsay exception in Federal Rule of Evidence 804(a)(5). It could also affect the operation of 28 U.S.C. § 1783 regarding subpoenas for U.S. nationals abroad. There are also Rules Enabling Act limitations that deserve attention. A subpoena places a burden on the person subject to the subpoena. Changes to Rule 45(c) that materially expand compulsory participation risk exceeding the Enabling Act authority. The Committee should not overturn *In re Kirkland* because the current rule governs whether the court may compel testimony. “Allowing nationwide compulsory service for trial testimony—especially remote testimony—would represent a substantial expansion of party power, impairing long-recognized protections for non-party witnesses.” There would be a potential for abuse. “A party could serve trial subpoenas on dozens of witnesses, forcing them to remain available throughout lengthy trials regardless of location or likelihood of being called.” The amendment does not adequately protect the rights of witnesses. It should address where the court reporter must be located, whether the parties are entitled to be physically present with the witness, and what court has authority over disputes arising during remote testimony. The rule also does not clarify where motions to compel, quash, or enforce subpoenas must be filed. Forum shopping is likely, particularly in densely populated regions with multiple potential courts.

Mary Novachek: My testimony will address “the proposed amendment to Fed. R. Civ. P. 45(d)(1)(B) concerning [awards of] costs and expenses to non-parties.” My practice has been in defense of manufacturers in complex litigation involving significant document production. In this practice, it is common for plaintiffs to rely on Rule 45 subpoenas to obtain documents from third party vendors, distributors, dealers, and sales representatives. Often these subpoenas duplicate discovery already had from named parties. Particularly with regard to eDiscovery, these subpoenas impose real practical challenges on those nonparties. There should be clear language in Rule 45 requiring that the party serving the subpoena compensate nonparties for this cost.

Tiega-Noel Varlack: I favor the rule change to correct the consequences of *In re Kirkland*. In a large state like California the *Kirkland* rule is burdensome and inefficient. Rule 45(c) is focused on the burden on the witness, not the location of the courtroom. I propose that the amendment be clarified to say that the pertinent location is where the person is commanded

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

to “provide the remote testimony.” This clarification would make it clear that the Rule 43(a) and 77(b) provisions deal with a separate issue—whether the testimony is offered in open court though by remote means.

Written Comments

Victoria Ammann (0082): Clarifying subpoena power for remote testimony is helpful, but expanded authority should be balanced against the burden imposed on distant nonparty witnesses. Judicial confirmation of necessity, encouragement of remote testimony, or reasonable travel accommodations provide appropriate safeguards.

Federal Magistrate Judges’ Association (FMJA) (0101): The FMJA endorses the proposed amendment to ensure the authority to issue a subpoena to compel remote court testimony when appropriate under Rule 43(a). It agrees that the location where the person is commanded to appear, rather than the issuing district, should be considered the “place of attendance.”

Anonymous (0136): “Regarding Civil Rules 45, changes concerning the place of compliance for subpoenas seem like a sensible adjustment to reflect modern litigation practices.”

National Health Law Program (0177): We support the changes to Rules 26(a) and 45(c) to clarify the possibility of remote testimony. Remote deposition and trial testimony have become commonplace. Remote testimony avoids financial waste. “The proposed amendments facilitate careful stewardship of court and litigant resources and should be adopted.”

Casey Johnson (0183): The amendments to 45(c) and 26(a) will correct the Ninth Circuit’s holding in *In re Kirkland*. The change expands access to justice by ensuring that plaintiffs and nonparties are not excluded from proceedings solely because of their geographic location.

Andrew Lucchetti (0185): *In re Kirkland* created an unworkable limitation at odds with the 2013 revision of Rule 45 and the growing prevalence of remote testimony in modern litigation. The proposed amendment restores the authority that the 2013 Advisory Committee Note made clear was intended and ensures that courts retain the tools necessary to manage their proceedings effectively.

Dorothy Haraminac (0205): The amendment creates uncertainty regarding costs and technical requirements for remote testimony. By requiring that the requesting party provide “necessary technology” at a remote location, without defining what that is, the amendment may inadvertently obligate the serving party to secure and fund a suitable location without specifying what determines suitability.

New York County Lawyers Association, Federal Courts Committee (0206): The current interpretation of Rule 45(c) by some courts has produced results that are inconsistent with modern litigation practice. In particular, the Ninth Circuit interpretation creates an unnecessary obstacle to effective practice. The amendment clarifies that territorial concepts about physical presence should not control subpoenas for remote testimony. The existing protections in Rule 45(d) provide protection for the witness and avoid an undue burden on the witness.

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

Lindsay Lien Amin (0208): I strongly support the Rule 45(c) amendment. Some courts continue to construe the rule as limiting service of a subpoena to 100 miles from the courthouse or within the state. That is inconsistent with the realities of modern litigation. On a practical level, this clarification promises efficiency and reduces travel burdens.

Paul Sterbcow (0216): This amendment is long overdue. It reflects the great need for flexibility as courts and parties navigate the challenges of getting to the courthouse. We routinely handle cases where fact witnesses, treating medical professionals and expert witnesses are located outside this state. Under the current rules, we have to spend a great deal of time and money to pay doctors and experts to travel to testify, or spend time and money to travel to those experts to obtain video trial perpetuation depositions. Those depositions are a poor substitute for live remote testimony.

Nicole Snapp-Holloway (0235): This amendment addresses a modernization issue that has only recently come into being. Despite the purposes of the 2013 amendments, the *In re Kirkland* decision imposed limits on the court's authority to compel remote testimony based on geography. Remote testimony is no longer a novelty; it is a constant and common method of preserving testimony. It reduces cost, limits unnecessary travel, and often makes participation possible for witnesses who would not, or could not, otherwise appear. Litigation is rarely "local," and key witnesses frequently reside far from the forum. Requiring in-person attendance when remote testimony would suffice increases expense and can effectively exclude relevant evidence. The proposed amendment sensibly clarifies that wherever the witness appears is the place of attendance. It preserves the rule's distance protections while restoring the intended scope of subpoena authority. "Most importantly, it does not lower the standard for allowing remote testimony. It is intended to ensure that when remote testimony is authorized, courts have the authority to compel it within the existing framework."

Kevin Green (0238): The proposed change accords with Rule 45's broader purpose of providing nationwide subpoena power and brings the rule into the modern era. While the court retains discretion to permit live remote testimony where appropriate, the amendment gives litigators more flexibility to make determinations about witness presentation based on relevant strategic and practical factors, rather than being constrained solely by the witness's proximity to the courthouse.

Ashlie Sletvold (0240): The proposed amendment will have the effect of restoring nationwide subpoena authority. It serves justice and supports the pursuit of truth by facilitating remote appearance for live testimony.

Brandon Baxter (0242): The change to Rule 45(c) makes sense in a world where remote meetings have become standard practice.

Charles Cooper (0253): "The change to Rule 45 helpfully aligns Rule 45 with Rule 4 in terms of methods of service and also clears up an issue the Ninth Circuit created about nationwide subpoena authority."

American Association for Justice (0258): The proposed amendments address a pressing problem—correcting the Ninth Circuit's misinterpretation in *In re Kirkland*. The proposed

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

amendment appropriately restores the nationwide subpoena authority introduced in 2013. Experience since 2020 has shown that remote testimony is efficient, cost-effective, and subject to reasonable safeguards. Remote testimony is materially superior to prerecorded depositions. Allowing remote participation also increases geographic access to the courthouse. Witnesses nowadays are routinely spread across the country. We propose modest changes to the rule and the committee note to ensure correct interpretation. In the rule, we propose that there is an inconsistency due to the use of the words “place” and “location.” We recommend the following addition to 45(c)(1):

~~For Remote Testimony.~~ Under Rule 45(c)(1), the place of attendance for remote testimony is the location from where the person is commanded to provide the remote testimony ~~appear in person~~.

This revision makes explicit that the “place of attendance” under Rule 45(c)(1) is the witness’s physical location. The distinction between “place of testimony” and “place of attendance” became a source of confusion in *In re Kirkland* when the Ninth Circuit implicitly treated “attendance” as synonymous with being physically present in the same courtroom as the judge. This clarification will guard against further misinterpretation of the rule. In addition, we think the committee note should be revised as follows:

For purposes of Rule 43 and Rule 77(b), such remote testimony should be considered as occurring ~~occurs~~ in the court where the trial or hearing is conducted.

As drafted, the note could be interpreted to mean that the remote testimony “occurs” at the witness’s location, potentially affecting venue, jurisdictional questions, courtroom management, and even the public’s right of access.

Lawyers for Civil Justice (0259): Rule 45 should require prior court approval before service of a subpoena commanding remote trial testimony. The proposed amendment is unnecessary and risks unintended consequences. Because Rule 45 is intertwined with Rule 43, amending Rule 45 should be deferred if changes to Rule 43 are to be proposed. That way, the Advisory Committee can produce one comprehensive package rather than handling related issues piecemeal. But if the Committee elects to proceed, it is essential that the rule also be amended to require prior judicial approval before a subpoena may issue. Absent such a safeguard, the rule will invite abusive over-designation of remote witnesses and entangle courts in disputes concerning both party and nonparty witnesses. Because Rule 43 sets the standards for remote testimony, it is inextricably linked to Rule 45’s function governing the issuance of subpoenas for remote testimony. The proposal to amend Rule 26(a) to require disclosure of the intention to offer remote trial testimony is no substitute for advance judicial approval. This disclosure obligation imposes no check on a party’s unilateral decision to designate a witness for remote trial testimony. Because it would likely provoke disputes the court would have to resolve, it would exacerbate the issue of parties’ over-designating.

Stephen Skinner (0261): Although the Ninth Circuit’s textual analysis under the current rule may be defensible, its practical consequences are untenable. The holding requires us to content ourselves with stale deposition testimony rather than live remote testimony at trial. This undermines the truth-seeking function of trials. This amendment is particularly important for

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

personal injury plaintiffs and in consumer litigation. Crucial witnesses, including corporate officers, treating physicians, and expert witnesses, frequently reside outside the 100-mile radius of the courthouse. This dynamic disproportionately benefits defendants, particularly corporate defendants.

Deborah Walters (0265): The additional language proposed for Rule 26(a) underscores the fact that distant witnesses are subject to pretrial disclosure mandates. The proposed amendment to Rule 45(c) corrects the Ninth Circuit's holding in *In re Kirkland*. Making the rule clear is valuable.

Daniel Laurence (0267): In Texas, where I practice, there has been great success with remote jury trials and appearances by witnesses instead of making witnesses travel great distances to provide short but important fact-based testimony.

Sean Domnick (0279): In this age of Zoom and with the expense and inconvenience of traveling for many witnesses, restoring nationwide subpoena authority is an important step. It will reduce the costs of litigation, allow witnesses to be inconvenienced as little as possible, and allow juries and judges to evaluate witnesses in a live manner.

Jacob Powell (0280): This amendment would correct the Ninth Circuit's decision and restore nationwide subpoena authority.

Kate Baxter-Kauf (0282): This change is needed. Remote testimony is now the norm for many subpoenas, and comports with Rule 45's requirement that parties seeking information or testimony seek to limit the burden on those nonparties.

Amy Keller (0284): Changing the result the Ninth Circuit reached in *In re Kirkland* is important. The protections of Rule 45(c) are designed for the benefit of the witness, and so long as the place of compliance is within what Rule 45(c) provides that should suffice. The amendment corrects the Ninth Circuit's error. Concerns that the amendment to this rule over-promotes remote testimony are unfounded. As the committee note states, the amendment does not change the standards under rule 43(a) for authorizing remote trial testimony.

Benjamin Mook (0285): The change clarifies nationwide subpoena authority and will promote the use of remote live testimony rather than forcing litigants to use deposition testimony. Jurors can tolerate deposition testimony, but they do not like it.

Jean Martin & Francesca Burne (0290): We strongly support this amendment. It clarifies nationwide service of subpoenas despite the Ninth Circuit decision in *In re Kirkland*. That decision created uncertainty and imposed unnecessary geographic constraints on a court's ability to compel compliance with in a manner consistent with modern litigation practice. In an era in which remote proceedings are commonplace, to impose unnecessary geographic limitations on the court's ability to require compliance is not sensible.

Mary Beth Gibson (0291): This is a much needed change, particularly in light of how parties practiced during the COVID-19 pandemic. Remote testimony became commonplace. There are guidelines and best practices to ensure reliability. Allowing more remote testimony reduces the burdens on nonparty witnesses.

Attachment to Rule 45(c)—Subpoena for Remote Trial Testimony

Joseph Camerlengo (0295): These are overdue amendments. Nationwide subpoena authority is critical to complex civil litigation like that arising from a tractor trailer or commercial vehicle crash. Being able to issue nationwide subpoenas reduces the unnecessary time and cost burdens on plaintiffs. In addition, allowing for remote live testimony rather than stale prerecorded deposition testimony from witnesses that cannot make it to court is critical.

Carla Aikens (0297): I support this amendment. Remote testimony is now a practical and often least burdensome mechanism for securing evidence from nonparty witnesses. When courts conclude they lack authority to compel remote testimony based on geographic limitations designed for in-person attendance, parties are forced into avoidable expense and delay. The proposed amendment is balanced. It supports efficient adjudication without expanding when remote testimony is authorized in the first place.

Jennifer Lawrence (0298): I favor this change because it is important for witnesses to be able to appear remotely in certain situations and remote live testimony is preferable in many instances to reading a deposition.

Additional comments

Federal Magistrate Judges Association (0101): While the FMJA endorses the proposed change to Rule 45(c), it also suggests that the Advisory Committee consider changes to Rule 45(d)(1) and (d)(3), concerning the place of enforcement of subpoenas. Presently the rule requires that such matters be handled by the court in the district where compliance is required. Rule 45(f) now authorizes that court, when appropriate, to transfer the motion to the issuing court for resolution. To protect local nonparty witnesses subpoenaed for trial, it might be prudent to add language encouraging issuing courts to accommodate distant nonparty witnesses, such as by allowing the witness to participate by remote means in challenging the subpoena.

TAB 7

Rule 26(a)(3)(A)—Disclosure of Remote Trial Testimony

The August 2025 package of proposed amendments also included a small change to Rule 26(a)(3)(A) on pretrial disclosure regarding witnesses a party will or may call at trial, directing that the parties indicate whether they intend to have any trial witness testify by remote means. This proposal for amendment was prompted by the Rule 45(c) action item introduced above, but adopting it is not dependent on the adoption of the Rule 45(c) amendment. Since there is no question about the power of the court to subpoena witnesses from within its “subpoena power,” and nearby witnesses may for various reasons be unable to appear in court but be able to testify by remote means, early identification of that possibility seems a positive addition even if the Rule 45(c) amendment does not go forward (though the Subcommittee proposes that it be adopted as published).

This proposed amendment attracted little comment. Some witnesses appeared not to notice that this amendment is about pretrial disclosures rather than initial disclosures. They worried that the disclosure requirement would apply too early in the case. But Rule 26(a)(3) requires disclosures 30 days before trial of every witness the disclosing party “expects to present and those it may call if the need arises.” That witness list should be pretty reliable as trial is approaching. Indeed, one would expect that a court would not permit a party to call an undisclosed witness. Rule 26(a)(3)(A) says one must disclose all evidence that may be used “other than solely for impeachment.” As the published note says:

Under Rule 43, the court may permit remote testimony at trial. Because the rule presently requires disclosure of witnesses a party “expects to present,” it should be understood to include witnesses who will testify remotely. This amendment clarifies that the disclosure requirement applies whether or not the witness is testifying in person or remotely and alerts the parties and the court that a party expects to present one or more witnesses remotely.

Having considered these issues, the Subcommittee decided during its March 11 meeting to recommend final adoption of this amendment.

Attachment(s):

- Redline and Clean Versions of Rule 26(a)(3) Amendments
- Summary of Testimony and Public Comments

Published Rule 26(a)(3) Amendment
(Redline)

PROPOSED AMENDMENT TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹

1 **Rule 26. Duty to Disclose; General Provisions**
2 **Governing Discovery**

3 **(a) Required Disclosures.**

4 * * * * *

5 **(3) *Pretrial Disclosures.***

6 **(A) *In General.*** In addition to the
7 disclosures required by Rules
8 26(a)(1) and (2), a party must provide
9 to the other parties and promptly file
10 the following information about the
11 evidence that it may present at trial
12 other than solely for impeachment:

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

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Published Rule 26(a)(3) Amendment and
Committee Note

PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE

1 **Rule 26. Duty to Disclose; General Provisions**
2 **Governing Discovery**

3 **(a) Required Disclosures.**

4 * * * * *

5 **(3) *Pretrial Disclosures.***

6 **(A) *In General.*** In addition to the
7 disclosures required by Rules
8 26(a)(1) and (2), a party must provide
9 to the other parties and promptly file
10 the following information about the
11 evidence that it may present at trial
12 other than solely for impeachment:

13 **(i)** the name and (if not
14 previously provided) the
15 address and telephone number

2 FEDERAL RULES OF CIVIL PROCEDURE

16 of each witness—separately
17 identifying those the party
18 expects to present and those it
19 may call if the need arises, and
20 whether the testimony will be
21 in person or remote;
22 (ii) the designation of those
23 witnesses whose testimony
24 the party expects to present by
25 deposition and, if not taken
26 stenographically, a transcript
27 of the pertinent parts of the
28 deposition; and

29 * * * * *

30 **Committee Note**

31 Under Rule 43, the court may permit remote
32 testimony at trial. Because Rule 26 requires disclosure of
33 witnesses a party “expects to present,” it should be
34 understood to include witnesses who will testify remotely
35 upon court approval. This amendment clarifies that the
36 disclosure requirement applies whether or not the witness is

37 testifying in person or remotely and alerts the parties and the
38 court that a party proposes to present one or more witnesses
39 remotely.

Summary of Comments on Rule 26(a)(3)

January 27 online hearing

Thomas Allman (including written testimony and comment 0040) (Chair Emeritus, Sedona Conference Working Group 1): I agree with the amendment to require pretrial disclosure of possible remote testimony.

Robert Levy: This amendment risks becoming a purely formal exercise. Parties will predictably list every potential witness and state that each “may testify in person or remotely,” providing little meaningful information. If remote testimony is contemplated, the disclosure should at least require identification of the physical location from which the witness would testify, as this information bears directly on subpoena authority, witness burden, and judicial oversight.

Written Comments

Scott Grossman (0004): I oppose this amendment. Whether a witness will testify remotely is a Rule 16 issue, not a Rule 26(a) issue. In addition, this amendment would send the wrong message, suggesting that remote testimony may be routinely permitted. Though remote testimony can be reliably implemented, the default should nevertheless be a strong preference for in-person testimony.

National Health Law Program (0177): We support the changes to Rules 26(a) and 45(c) to clarify the possibility of remote testimony. Remote deposition and trial testimony have become commonplace. Remote testimony avoids financial waste. “The proposed amendments facilitate careful stewardship of court and litigant resources and should be adopted.”

Casey Johnson (0183): I support this change to clarify that remote witnesses are included within the pretrial disclosures.

Dorothy Haraminac (0205): I oppose this amendment. The decision whether the witness will testify remotely is typically made far closer to the date of testimony. Requiring an early declaration restricts flexibility and imposes commitments that may later conflict with practical and financial realities.

New York County Lawyers Association, Federal Courts Committee (0206): We support this change. It would require that parties state in their final pretrial disclosures whether any witness will be appearing remotely. This would require the parties also to identify the anticipated mode of remote testimony.

Lawyers for Civil Justice (0259): Rule 45 should require prior court approval before service of a subpoena commanding remote trial testimony. The proposal to amend Rule 26(a) to require disclosure of the intention to offer remote trial testimony is no substitute for advance judicial approval. This disclosure obligation imposes no check on a party’s unilateral decision to designate a witness for remote trial testimony. Because it would likely provoke disputes the court would have to resolve, it would exacerbate the encourage parties to over-designate.

Attachment to Rule 26(a)(3)(A)—Disclosure of Remote Trial Testimony

Anonymous (0260): I don't like this change because, at the time of initial disclosure, it may not be apparent whether a witness will be remote or in person.

Stephen Skinner (0261): This provision is a sensible companion to the proposed change in Rule 45(c). Early disclosure of the mode of testimony allows all parties to plan accordingly and reduces the potential for disputes at trial.

TAB 8

Rule 45(b)(1)—Manner of Service of Subpoena

A preliminary draft of an amendment to Rule 45(b)(1) was published for public comment in August 2025. The proposed amendments received many written comments and were addressed by several witnesses during the January 27, 2026 public hearing. A summary of those comments and that testimony is included in this agenda book.

After the close of the public comment period and review of the summary of comments and testimony, the Subcommittee met on March 10, 2026. Notes of that meeting, including as an Appendix the memorandum introducing the issues raised during the public comment period, are included in this agenda book.

The bottom line from the March 10, 2026 meeting was that the Subcommittee recommends adoption of the draft amendment as published. Details on the issues raised and the discussion of the Subcommittee are provided by the notes of the meeting and summary of the comments received, to which reference is made.

In short, several of the proposed changes in the draft went beyond what was published for comment. For example, several urged that Rule 45(d) be amended to direct that a nonparty served with a subpoena be reimbursed for the cost of complying. But no proposed amendment to Rule 45(d) was published for comment.

In addition, there was a proposal that Rule 45 be amended to deal with the “privilege log” problem for producing parties. The Subcommittee has recently completed a thorough review of the “privilege log” problem with party discovery, and its proposed amendments to Rule 16 and Rule 26(f) went into effect on December 1, 2025. No such changes were included in the August 2025 preliminary drafts.

In terms of what was included in the preliminary draft, there were quite a few suggestions that clarification of some terms was needed. Some of those terms were borrowed from Rule 4(e)—on service of summons and complaint—so a further clarification of them seemed unnecessary. Questions were raised about the use of the term “confirmation of receipt” in regard to service by U.S. Mail or commercial carrier, but attempting to provide more specific direction seemed unworkable, particularly when technology might affect application of that requirement in the future.

Other proposals during the public comment period included service on an agent authorized to receive service, service on a person at the abode of the witness who does not reside there (e.g., a nanny who is not a live-in nanny), and adding service at the witness’s place of employment. Regardless whether those changes might trigger a need for re-publication because they would be “substantial” post-public-comment changes, the Subcommittee did not favor them.

Another proposal was to change “confirmation of receipt” to confirmation of “delivery.” Particularly with the inclusion of service by U.S. Mail or commercial carrier, that did not seem advisable.

Another change included in the preliminary draft was relaxation of the current requirement that the witness fee be tendered at the time of service. Concerns were raised in public comments about witnesses who would confront financial burdens in appearing. But it was also observed that parties serving subpoenas ordinarily want the witness to show up and therefore would be motivated to assist if financial assistance were needed. Though some said there was a risk parties serving subpoenas might withhold reimbursement until after the testimony and refuse it if the testimony were not “satisfactory,” those risks seemed unpersuasive. The amended rule says the alternative to tender of the fees at the time of service is tender “at the time and place the person is commanded to appear.” That means before the testimony, not afterwards.

The preliminary draft also added a 14-day notice period unless the court authorizes a shorter one. Several commenters favored this addition. The Federal Magistrate Judges Association suggested that it might be increased to 21 days. The Subcommittee retained the 14-day provision. The Subcommittee did not see that change as necessary.

Attachment(s):

- Redline and Clean Versions of Rule 45(b)(1) Amendments
- Notes of March 10, 2026 Subcommittee Meeting
- Summary of Testimony and Public Comments

**Published Rule 45(b)(1) Amendment
(Redline)**

**PROPOSED AMENDMENT TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

1 **Rule 45. Subpoena**

2 * * * * *

3 **(b) Service.**

4 (1) ~~By Whom and How; Tendering~~ Means;

5 **Notice Period; Fees.**

6 (A) By Whom and How. Any person who

7 is at least 18 years old and not a party

8 may serve a subpoena. Serving a

9 subpoena requires:

10 (i) delivering a copy to the

11 named person personally;

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

12 (ii) leaving a copy at the person's
13 dwelling or usual place of
14 abode with someone of
15 suitable age and discretion
16 who resides there;

17 (iii) sending a copy to the person's
18 last known address by a
19 method of United States mail
20 or commercial-carrier
21 delivery, if the selected
22 method provides confirmation
23 of actual receipt; or

24 (iv) using another means that is
25 authorized by the court for
26 good cause and is reasonably
27 calculated to give notice.

28 (B) Time to Serve if Attendance Is
29 Required; Tendering Fees. and, if

30 the subpoena requires that the named
31 ~~person's attendance,~~ a trial, hearing,
32 or deposition, unless the court orders
33 otherwise, the subpoena must be
34 served at least 14 days before the date
35 on which the person is commanded to
36 attend. In addition, the party serving
37 the subpoena must tendering the fees
38 for 1 day's attendance and the
39 mileage allowed by law at the time of
40 service, or at the time and place the
41 person is commanded to appear. Fees
42 and mileage need not be tendered
43 when the subpoena issues on behalf
44 of the United States or any of its
45 officers or agencies.

Published Rule 45(b)(1) Amendment and Committee Note

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

1 **Rule 45. Subpoena**

* * * * *

3 **(b) Service.**

4 **(1) Means; Notice Period; Fees.**

5 **(A)** *By Whom and How.* Any person who
6 is at least 18 years old and not a party
7 may serve a subpoena. Serving a
8 subpoena requires:

9 (i) delivering a copy to the
10 named person personally;

(ii) leaving a copy at the person's dwelling or usual place of abode with someone of

FEDERAL RULES OF CIVIL PROCEDURE

16 (iii) sending a copy to the person's
17 last known address by a
18 method of United States mail
19 or commercial-carrier
20 delivery, if the selected
21 method provides confirmation
22 of actual receipt; or

(B) *Time to Serve if Attendance Is Required; Tendering Fees.* If the subpoena requires that the named person attend a trial, hearing, or deposition, unless the court orders

32 otherwise, the subpoena must be
33 served at least 14 days before the date
34 on which the person is commanded to
35 attend. In addition, the party serving
36 the subpoena must tender the fees for
37 1 day's attendance and the mileage
38 allowed by law at the time of service,
39 or at the time and place the person is
40 commanded to appear. Fees and
41 mileage need not be tendered when
42 the subpoena issues on behalf of the
43 United States or any of its officers or
44 agencies.

45 * * * * *

46 **Committee Note**

47 Rule 45(b)(1) is amended to clarify the means of
48 serving a subpoena. Courts have disagreed about whether the
49 rule requires hand delivery. Though service of a subpoena
50 usually does not present problems—particularly with regard
51 to deposition subpoenas—uncertainty about what the rule
52 requires has on occasion caused delays and imposed costs.

53 The amendment removes that ambiguity by
54 providing that methods authorized under Rule 4(e)(2)(A)
55 and (B) for service of a summons and complaint constitute
56 effective service of a subpoena. Though the issues involved
57 with service of a summons are not identical with service of
58 a subpoena, the basic goal is to give notice and the
59 authorized methods should assure notice. In place of the
60 current rule’s use of “delivering,” these methods of service
61 also are familiar methods that ought easily adapt to the
62 subpoena context.

63 The amendment also adds another option—service
64 by United States mail or commercial carrier to the person’s
65 last known address, if the selected method provides
66 confirmation of actual receipt. The rule does not prescribe
67 the exact means of confirmation, but courts should be alert
68 to ensuring that there is reliable confirmation of actual
69 receipt. *Cf.* Rule 45(b)(4) (proving service of subpoena).
70 Experience has shown that this method regularly works and
71 is reliable.

72 The amended rule also authorizes a court order
73 permitting an additional method of serving a subpoena so
74 long as that method is reasonably calculated to give notice.
75 A party seeking such an order must establish good cause,
76 which ordinarily would require at least first resort to the
77 authorized methods of service. The application should also
78 demonstrate that the proposed method is reasonably
79 calculated to give notice.

80 The amendment adds a requirement that the person
81 served be given at least 14 days’ notice if the subpoena
82 commands attendance at a trial, hearing, or deposition.
83 Rule 45(a)(4) requires the party serving the subpoena to give
84 notice to the other parties before serving it, but the rule does
85 not presently require any advance notice to the person

86 commanded to appear. Compliance may be difficult without
87 reasonable notice. Providing 14-day notice is a method of
88 avoiding possible burdens on the person served. In addition,
89 emergency motions for relief from a subpoena can burden
90 courts. For good cause, the court may shorten the notice
91 period on application by the serving party.

92 The amendment also simplifies the task of serving
93 the subpoena by removing the requirement that the witness
94 fee under 28 U.S.C. § 1821 be tendered at the time of service
95 as a prerequisite to effective service. Though tender at the
96 time of service should be done whenever practicable, the
97 amendment permits tender to occur instead at the time and
98 place the subpoena commands the person to appear. The
99 requirement to tender fees at the time of service has in some
100 cases further complicated the process of serving a subpoena,
101 and this alternative should simplify the task.

Attachment to Rule 45(b)(1)—Manner of Service of Subpoena

Notes of Teams Meeting Discovery Subcommittee March 10, 2026

The Discovery Subcommittee met by Teams on March 10, 2026. Participants included David Godbey (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Magistrate Judge Annie Christoff, David Burman, David Wright, and Thomas Bruton (clerk liaison). Also participating were Richard Marcus and Andrew Bradt as Reporters, Edward Cooper as Consultant, and Emery Lee represented the Federal Judicial Center. Sarah Sraders represented the Rules Office.

The meeting was introduced as designed to determine whether the public comments and hearing testimony indicated that any changes were needed in the published proposed amendments to Rule 45(b)(1). The issues were presented in Professor Marcus's memo for this meeting. A copy of that memo is attached as an Appendix to these notes. The memo began with the following bottom line:

Although there was a large volume of comments (particularly from process servers), unless one found those objections persuasive there seemed little reason to modify the published preliminary draft.

Professor Marcus provided a further introduction. It is important to appreciate that post-public-comment changes that are “substantial” can trigger a need for re-publication. Some of the concerns raised during the public comment period seem to call for such changes. A prime example is the invitation to amend Rule 45(d) to require the party serving the subpoena to reimburse the nonparty served with the subpoena for the costs of compliance, or perhaps only “excessive” costs of compliance. Another example was the proposal that Rule 45 be amended to deal with the “privilege logging” problem. The Subcommittee has recently completed an amendment cycle addressing the privilege logging concern. That effort produced amendments to Rules 16 and 26(f) that went into effect on December 1, 2025.

The other proposals for changes that emerged during the public comment period, as introduced in Professor Marcus's memo for this meeting, included:

- (1) Terminology concerns, including terms borrowed from Rule 4 such as “dwelling or usual place of abode” and a person “of suitable age and discretion” and “who resides there.”
- (2) Terminology concerns about “confirmation of receipt,” which the amendment requires for delivery by U.S. Mail or commercial carrier. Foreseeing what might be well-recognized methods of confirming receipt in the future is a challenge.
- (3) Service on an agent authorized by appointment to receive service of process.
- (4) Service on another person at a person's place of employment in addition to service at the witness's abode. (Note that service on the witness personally at the place of work would suffice under the rule, so this addition would only matter if the subpoena were delivered to somebody else.)

Attachment to Rule 45(b)(1)—Manner of Service of Subpoena

(5) Service at the witness's abode, but not on a person who resides there, such as a nanny, housekeeper, etc.

(6) Treating confirmation of delivery as sufficient rather than requiring confirmation of "receipt."

(7) Requiring follow-up service by mail when service is accomplished by leaving the subpoena at the dwelling with a person who resides there.

There was also opposition to removing the requirement that witness fees be tendered at the time of service. Some worried that the serving party might withhold payment of the witness fee until after the witness completed testimony—"I won't pay you unless you say the right things."

The amendment also introduces a 14-day notice period unless the court shortens the time. One suggestion was to increase that to 21 days.

A concluding thought was that one would expect that attorneys serving subpoenas would usually *want* to remove obstacles that might make it difficult for the witness to show up and testify. At least some of the objections to the amendments seemed not to appreciate that attitude. For example, most attorneys would probably want to retain the services of experienced process servers to ensure that if there were a dispute about whether service had been effected an adequate showing of service could be made.

One subcommittee member observed that the Subcommittee discussed all these points during its development of the amendment proposal. "We've worked them into the current proposal." Another subcommittee member agreed.

Another subcommittee member raised two points:

(1) There may be an ambiguity in proposed romanette (iii) regarding delivery by U.S. Mail or commercial carrier, which calls for confirmation of "actual receipt" but does not say by whom.

A response was that (iii) is an alternative to (i) and (ii), both of which call for delivery either to the witness or a person of suitable age and discretion who resides in the witness's abode. It would seem to follow that confirmation of receipt would depend on proof of receipt by such a person. To go back to one of the possible revisions proposed during the public comment period, serving the nanny by mail (under (iii)) would not suffice if serving the nanny personally does not (assuming this is not a live-in nanny).

Another subcommittee member offered experience from the Seventh Circuit, where service by mail is often used for subpoenas and other items. The Postal Service, UPS, and FedEx all permit delivery instructions to require signature by a specified person. This is often called "restricted" service. Attorneys seeking to accomplish service via route (iii) presumably will employ means that enable them to satisfy the court, if needed, that there was receipt by the right person.

(2) The Committee Note includes the following comment regarding (iii): "Cf. Rule 45(b)(4) (proving service of subpoena)." Rule 45(b)(4) says that proving service

Attachment to Rule 45(b)(1)—Manner of Service of Subpoena

requires “a statement showing the date and manner of service” that “must be certified by the server.” Can that work with service by mail or commercial carrier? How does one then get a “certification”?

A reaction to this concern was that the “cf.” invocation of Rule 45(b)(4) is just a comparison, not an additional requirement for effective service. This reaction was reinforced—the invocation of that other rule provision points up that the burden is on the party that served the subpoena to show that service was proper, more than a specific command that service be proved a certain way.

After the forgoing discussion, the subcommittee agreed to recommend that the Advisory Committee recommend final adoption of the rule change to the Standing Committee.

APPENDIX

Memo for March 10 meeting
Discovery Subcommittee

To: Discovery Subcommittee
From: Rick Marcus
CC: Hon. Sarah Vance
Date: March 3, 2026
Re: Teams meeting March 10

The Subcommittee has a Teams meeting on March 10 to consider the public comments received during the public comment period, which ended on Feb. 16, 2026. A summary of the comments should accompany this memorandum. In addition, a copy of the published proposed amendment and accompanying Committee Note are attached to this memo.

This memo is intended to address at least some of the issues raised during the public comment period and, perhaps, to expedite discussion of them on March 10.

By way of background, it is useful to have in mind what our regulations say about the post-public-comment task. § 440.20.50 of the regulations provides the following regarding such review:

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the rules committees.

Some of the proposals made during the public comment period appear to be “significant changes.” One is the proposal to amend Rule 45(d) to require the serving party to compensate a nonparty for the costs of compliance with the subpoena. Another is the proposal that Rule 45 be amended to deal with the privilege log problem.

Bottom line

It makes sense to begin with a bottom line summary of the memo. The testimony and public comment do not seem to warrant changing our proposed amendments. If all agree, the March 10 meeting could be brief.

Terminology Concerns

Several participants in the Jan. 27 hearing objected that there were no definitions of terms borrowed from Rule 4(e). It is useful to remember that Rule 4(e)(2)(B) says that one means of serving a summons and complaint is “leaving a copy of each at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there.” Since these terms already appear in the rules, it does not seem necessary to define them further.

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Our amendment does authorize sending a copy of the subpoena by U.S. mail or commercial carrier if there is “confirmation of receipt.” Some urged that this be defined more precisely. The Committee Note addresses this issue: “The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt.” Having in mind that this concern is likely to arise only when a witness fails to appear as directed by a subpoena and a party seeks relief in court, it may not be possible to state more precisely what a judge would treat as adequate confirmation.

The amendment also empowers the court to authorize an additional method that is “reasonably calculated to give notice.” That term is drawn directly from the pertinent Supreme Court due process precedent—*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). As with the “confirmation of actual receipt” phrase, it is difficult to devise a substitute that would be better.

Expanding or adding service methods

Several commenters urged that an additional provision be added in parallel with Rule 4(e)(2)(C) regarding service of a summons and complaint: “delivering a copy of each to an agent authorized by appointment or by law to receive service of process.” It seems unlikely that many individuals have appointed agents for service of process, but many states require that foreign corporations appoint such an agent to receive service of process within the state to obtain permission to do business in the state. Perhaps that method is regularly used in regard to 30(b)(6) depositions. There was not much attention to Rule 30(b)(6) subpoenas during the Subcommittee’s consideration of this amendment proposal. If this sort of provision were added, it might mean that re-publication is required.

There were also suggestions that the provision regarding leaving a copy at a person’s abode be expanded. One idea was to authorize doing so also at the person’s place of employment. Another was that the rule be revised so that the person “of suitable age and discretion” need not also reside there, as Rule 4(e) does require. Those are not service methods under Rule 4(e)(2), though there may be some provisions of state law that permit service a summons and complaint be accomplished in such a manner under Rule 4(e)(1) (“following state law for serving a summons and complaint”).

AAJ (0258) urged that confirmation of receipt not be required, but only confirmation of “delivery.” That would seem to treat a photo of the subpoena left at a doorstep (in the snow?) as sufficient even though there is no evidence it was picked up. This might be considered a significant change.

Managing Attorneys & Clerks Assoc. (0268) proposed that (ii) and (iii) be combined so that when service is effected by leaving the subpoena at the dwelling of the witness there is also a requirement to serve by mail. That is not required under Rule 4(e)(2)(B) for service of a summons and complaint.

Tender of witness fee

Several urged that the current tender requirement be retained as a safeguard against imposition on witnesses. One suggestion was that tender of fees need not occur until a specified

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period (7 days?) after service of the subpoena. The FMJA (0101) cautions that tender may be important for pro se and low-income witnesses who could be burdened by travel costs. It is not clear what method of tendering would suffice. The amendment surely permits immediate or “early” tender. One would think that parties serving subpoenas would ordinarily want to ease the path of compliance. One would not think that a party would anger a witness by refusing to tender the fee when the witness appears.

Some comments raised concerns about witnesses being denied reimbursement if the witness fee were not delivered at the same time the subpoena is served.

Notice period

The FMJA supported the addition of a 14-day notice period (absent judicial permission for a shorter period), and suggested also that it might be better to have a 21-day notice period. That change would not be “substantial,” but might be unnecessary.

Some comments raised concerns about witnesses being denied reimbursement after they showed up for the deposition, hearing, or trial if the party serving the subpoena did not like their testimony. Since the amendment says the fee must be tendered at the time of service “or at the time and place the person is commanded to appear,” it does not contemplate that the tender of the fee is to occur after the testimony is completed.

* * * * *

One conclusion on March 10 might be that we should propose final approval of the amendment as published.

Summary of comments on Rule 45(b)(1)

January 27 online hearing

Thomas Allman (including written testimony and comment 0040) (Chair Emeritus, Sedona Conference Working Group 1): I have no reason to disagree with the proposed changes regarding the manner of service or relaxing the requirement that the witness fee be tendered at the time of service.

Jonathan Redgrave: It would be desirable to have a definition of what constitutes receipt of a subpoena. That is particularly problematic in proposed Rule 45(b)(1)(A)(iii) regarding confirmation of receipt. Proposed (iv) deals with that by calling for advance court authorization.

Alex Dahl (including LCJ written comment 0006): The proposal makes only a weak case for amendment; the agenda book materials mention only two cases arguably presenting ineffective service. There is a high risk that loosening service requirements will cause uncertainty and incite new litigation over untested methods. The current methods for service are working well. But the amendment would expand the courts' authority to permit untested methods of service. For example, a court might allow such methods as email or social media service. This authority is cabined only by the ill-defined standard that the method selected be "reasonably calculated" to provide notice. Actual notice is important because contempt is a possible consequence of failure to obey a subpoena. These issues can arise in regard to Rule 30(b)(6) subpoenas also; a broader array of methods of serving will increase the risks of inadequate notice.

Navan Ward (including written testimony) (former president of American Association for Justice (AAJ)): AAJ members have no shortage of stories regarding difficulties with witnesses who evade service. Many of these people are extremely wealthy and "hide" behind gated walls, often protected by security. The additional option provided in the rule—court authority to direct service by other means—can be critical, particularly with "wealthy tech moguls who rely on their technology platforms to communicate." It seems that many process servers oppose this rule change. But the current rule does not require the use of professional process servers. Plaintiff firms want to save both time and money, particularly because they are operating on a contingency basis. This rule change offers much-needed flexibility to the court. But the rule could be improved by adding language drawn from Rule 4(e)(2)(C):

delivering a copy to an agent authorized by appointment or by law to receive service of process.

This addition would alleviate the potential problem of misinterpretation resulting from importing some of Rule 4, but not all of it. We also think that complete parallelism to Rule 4 is not needed on another point. For service of a summons, Rule 4 permits delivery to a person who resides in the same dwelling. But in the subpoena context this should be expanded to include others even though they do not reside there, such as property managers, nannies, and housekeepers. In addition, the focus on "actual receipt" in terms of substitute service is troubling. Does this mean the commercial carrier must obtain something no longer obtained by carriers in this day of

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electronic signatures? We propose the following (at lines 76-80 of the published preliminary draft):

A party seeking such an order must establish good cause, such as evasion of service, which ordinarily would require at least first resort to the authorized methods of service. The rule is intended to be flexible and accommodate electronic means of service and new technologies. The application should also demonstrate that the proposed method is reasonably calculated to give notice.

A further change that would be desirable would be to insert “or” between the romanettes in amended Rule 45(b)(1)(A) to forestall an argument that one must do all these things for service of a subpoena to be effective.

Robert Levy: The amendment does not require proof that the subpoena was actually received by the named individual. In practice, commercial carriers often accept signatures from someone other than the recipient or leave parcels without obtaining any signature at all. The amendment also uses multiple undefined terms—“dwelling,” “usual place of abode,” and “resides”—suggesting distinctions without clarifying them. It also permits service on a person of “suitable age and discretion” without guidance, raising obvious questions about adequacy and fairness. In addition, the amendment does not require the party serving the subpoena to obtain advance court authority for remote testimony. The rule should make clear that the question whether to quash the subpoena must be decided in the district where the witness is to appear. Otherwise the witness must obtain counsel in the district where the action is pending.

Mary Novachek: Rule 45 requires that the subpoena include the text of Rules 45(d) and (e). But many subpoena recipients cannot decipher that dense text. It would be desirable to provide more specific language. And the serving party should be required to make a motion before the subpoena is enforced and justify it to the judge. A meet-and-confer requirement would also be desirable in Rule 45. The requirement now in Rule 30(b)(6) has been helpful.

John Southerland: I oppose this rule change. The Committee’s record does not demonstrate a pervasive problem with ineffective service that warrants expansion to include untested methods of service. And deferring delivery of the witness fee will reduce compliance with the subpoena, and require the witness to “gamble on later reimbursement.” Instead, Rule 45(d)(2)(B) should be modernized to require the party serving the subpoena to reimburse the reasonable costs incurred by nonparties in responding to subpoenas. In addition to that, Rule 45 should authorize categorical logging of materials withheld on grounds of privilege rather than document-by-document privilege logs.

Tiega-Noel Varlack: I strongly support this rule change. I often have to serve witnesses at their workplaces. Requiring face-to-face delivery presents unnecessary barriers, particularly when security personnel prevent access to the workplace. But the amendment proposes to say that serving the subpoena requires “delivering a copy to the named person personally.” Particularly with 30(b)(6) depositions, or in the witness’s workplace, this differs from the current rule and could cause difficulties. To solve this problem, I think another prong should be added, authorizing service in the workplace.

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Written Comments

Effectiveness in giving notice

Anonymous (0003): Allowing service by mail or commercial carrier does not provide necessary proof of actual receipt.

Knox Attorney Service (0007): Personal service is the only reliable method. The current rule works well, and this amendment will create uncertainty. Virtually identical comments submitted by Anonymous (0009); Omni Present Investigation (0010); Anonymous (0012).

Solid Serve Legal LLC (0008): “These proposed amendments to subpoena service are horrible.” As a professional process server, I can tell you that you will not get people to show up and testify this way. “You’re going to kill our legal system.”

Hart 2 Hart Investigations and Legal Support Serv. (0011): “This cannot be ethical * * * Process servers are being taken advantage of as it is with rules like these. * * * Stop trying to replace humans with technology * * * This will make it so easy to violate our civil rights – we have lost so much already, stop taking away our rights and our income.”

Jay Eagle (0013): I cannot imagine e-service being considered reliable. Just because something is delivered does not mean that it is actually received.

Pennington Legal Investigations LLC (0014): “This rule will erode due process and should not be passed.”

Sheila Williamson (0015): As a working process server, I oppose this change. It would normalize subpoena service by permitting servers to leave a subpoena at a dwelling or sending the subpoena by mail or commercial carrier. This is about constitutional due process and the integrity of notice. Delivery confirmation does not mean the witness actually received notice. “I have seen countless situations where documents left at a residence or accepted by a third party later became the center of a service challenge.”

Carter Williamson (0016): Expanding judicial authority to allow alternative and largely untested service methods would not make subpoena service more efficient. But it would create uncertainty and lead to more disputes over whether service was valid, particularly under the vague “reasonably calculated” standard in the proposed amendment.

Zodiac Legal Process (0017): “This will destroy the integrity of the service of process, plain and simple!”

Serve’s Up Process Services LLC (0018): As a professional process server, I urge that permitting service by US mail or commercial carrier based on “confirmation of receipt” raises significant concerns. The term is undefined and invites dispute. Receipt confirmation does not establish who accepted the documents, and whether that person had authority to do so. “Professional process servers do more than deliver documents. We are trained, neutral officers who ensure lawful notice[.]”

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Michael Read, President, Mighty Process Server (0019): On behalf of a national professional organization representing service of process professionals operating in all fifty states, we urge that convenience should never outweigh certainty, fairness, and the protection of nonparties. Permitting service by mail or commercial carrier undermines certainty and invites disputes. And relying upon a “confirmation of receipt” is not adequate. The term is undefined, and disputes about whether the confirmation tendered sufficed under the rule will produce further litigation, not reduce it. Allowing courts to authorize “alternative methods” creates a dangerous slippery slope. “As someone who has testified and provided tens of thousands of affidavits regarding service, I know how subjective and speculative this standard becomes in practice.”

Alix Lubin (0020): As a professional process server, I oppose these amendments. “Personal service by trained professionals ensures that recipients receive lawful notice and understand the gravity of the court’s command, which is essential to protecting due process.” So any expansion of alternative methods of service should be narrow, exceptional, and subject to meaningful court oversight.

Anonymous (0021): As a professional process server, I can report that “[p]ersonal service by trained, accountable professionals plays a critical role in ensuring lawful notice[.]” When a professional server is involved, courts receive sworn declarations based on firsthand observation, not assumptions or indirect delivery methods. Reliance on “confirmation of receipt” will increase disputes rather than reduce them.

Richard Long (0022): I am a registered process server. “Personal service by trained professionals is critical when contempt and sanctions are at stake * * * Professional process servers provide accountability that mail and couriers cannot.” “This is about protecting due process AND our profession.”

Mark Hagood (0023): Making these changes will cause problems. Most people will use this as an excuse not to comply. Though the current system is not perfect, it is much better than this proposal. It has worked.

Anonymous (0024): “This is bad news for all parties.” People move without changing their mailing addresses. “Seems like another government scam.”

Paper Monkey Legal Services (0025): Based on extensive professional experience with service of subpoenas, I foresee that these changes would introduce ambiguity. Service of a subpoena has historically required a higher level of certainty than ordinary notice. But this amendment would rely on whether the substitute manner of service is “reasonably calculated” to provide actual notice, based on the *Mullane v. Central Hanover Bank* case. And allowing service based on an undefined “confirmation of receipt” introduces uncertainty at precisely the critical point. I have personally encountered situations in which subpoenas were accepted by office staff or mailroom personnel, only for the named person later to deny receipt. Granting judges discretion without standards about what constitutes “confirmation of receipt” compounds this concern. Though alternative means of service may in appropriate cases be permitted, it should not be normalized without defined limits and required findings. Orders authorizing such

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alternative methods of service should identify both the approved method and the factual basis for its use.

Integrity Discovery Solutions Group (0026): “A vague standard cannot replace the accountability and documentation that trained process servers provide. We are neutral third parties trained to verify identity, record attempts, document timing, and ensure compliance. * * * I stand not only for myself, but for thousands of dedicated professionals who take this responsibility seriously[. W]e are the Process Server Community.” Making these changes would place the courts, and the people they serve, at greater risk.

Anonymous (0027): These changes will reduce reliability, increase disputes, and undermine due process. In particular, the term “confirmed receipt” remains undefined. “Professional service by trained, neutral professionals provides accountability that no electronic or mail method can replicate.”

Central Texas Litigation Support Services (0028): “We having been in the process serving profession for over 30 years violently oppose the proposed changes to the requirement of personal service of subpoenas.”

Downey Investigations (0029): “These proposed rules jeopardize the honesty and integrity of due process and the purpose of having certified process servers.”

Charm City Process Services and Notary (0030): It will “put us, Process Server’s out of business or at least reduce a significant amount of our work.”

Patton Legal Services (0031): I own a professional process-serving Company. I write to highlight the unintended legal and practical consequences of making this change. Adopting these changes will lead to increased disputes about whether service occurred and also contribute to greater problems of evasion of service. The rule should preserve personal service as the default standard and require clear judicial oversight of alternative service methods.

Matthew Figurate (0032): I have been a process server for four years and oppose this change. Permitting service at the witness’s home is unreliable because people move frequently.

Locate Process Servers (0033): We oppose this change. It will dramatically affect the security level of subpoena citations and proof of service, leading to missed court dates, and disrupt family court matters such as child support.

United Legal Support Services, Inc. (0034): Based on decades of direct involvement in the service of process industry, I oppose these changes to the rule. Though a subpoena may seem routine, it can carry significant consequences. Expanding beyond personal service is very risky. In particular, relying on email does not reflect modern realities. Today many people maintain multiple residences, for example. Professional process servers navigate this complexity daily.

Sandra Kimbrough (0035): As a certified process server, I oppose these rule changes. This amendment would introduce vague and subjective standards. Convenience should never outweigh certainty, fairness, and the protection of nonparties. Permitting service by mail or

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commercial carrier undermines certainty. Using court-authorized alternative methods creates a dangerous standard. Delaying tender of witness fees undermines fairness. The current rule works and should not be changed.

Joseph Reeves (0036): I strongly oppose these changes, which will harm due process and the integrity of service outcomes. Service of a subpoena cannot be left to an “overworked underpaid uninterested mail carrier[.]” Only use of a trained, experienced process server will ensure due process.

Anonymous (0037): These rule changes will cause more litigation and destroy small minority owned businesses across the country.

Mark Kitrick (0039): As a plaintiff trial lawyer for nearly 45 years, I support the rule changes, which appropriately modernize subpoena service while preserving due process. The need for alternative methods of service does not often arise, but when people actively evade service alternatives are needed. The amendment provides a narrowly tailored mechanism to address exceptional situations where traditional service has proven ineffective despite diligence. But personal service will remain the norm in the vast majority of cases. “Modernizing Rule 45(b) is necessary to preserve it.”

Direct Legal Support, Inc. (0041): These amendments represent a significant departure from longstanding federal practice. Adopting them will substantially reduce the demand for traditional in-hand subpoena service and also cause a loss of revenue for thousands of professional process servers, often independent small businesses. Substitute methods for service are unreliable. And making these changes for federal courts may well spill over into state practice.

NAPPS Template: Very similar comments—perhaps based on a template from the National Association of Professional Process Servers (seemingly with more than 3,000 members) were received from the following:

Direct Legal Support, Inc. (0041)
Desy Garcia (0060)
Legal-Ease Enterprises, Inc. (0061)
Served 123 LLC (0062)
Just Legal Solutions (0065)
Susan Collins (0066) (Board Member, NAPPS)
Katherine Young (0068)
Ranger TCS LLC (0070)
New York State Professional Process Servers (0071)
BBPS LLC (0073)
Berto Legal Services, Inc. (0074)
PaperWorks Express (0075)
Capital Court Services (0076)

FastAct Civil Process, LLC (0077)
Venture Investigations & Process Services, Inc. (0080)
New York Process Servers, Inc. (0083)
Kalima Nelson-Christie (0086)
Anonymous (0089)
Anonymous (0091)
Richard Mateo, Jr. (0092)
Abigail Dirksmeier (0095)
Collin Katz (0098)
Legal Services Solutions LLC (0099)
Alliance Process Serving LLC (0100)
CenterLine, LLC (0104)
Its Done Courier LLC (0106)
All New York Process Servers, Inc. (0118)

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Erica Heatherington (0120)
Andrew Dean (0121)
Carolyn Haley (0126)
Glenn Brooks & Associates (0127)
Shereice Fitts (0132)
Douglas Fonville (0134)
Hole in One Process from Kemp, Texas (0140)
Likety Split, LLC (0147)
ALMA (0149)
Legal Advocate Services, Inc. (150)
Marta Diaz (0162)
Rosemary LaManna (0163)
Z Process Servers (0164)
Allcounty Legal Support, Inc. (0165)
Luis Alava (0166)
Peak Process Servers, Inc. (0172)
Legal Lawgic, Inc. (0176)
Alena Bohll (0178)
American Process Service (0180)
Michael Barberio (0186)
Richard Benito (0187)
Michelle Howard (0188)
Barrister Mastroms (0190)
David Hariuchi (0195)
Class Action Research & Litigation (0201)
Nassim Tauli (0209)
Randy Crone (0212)

Jack Key (0215)
Larry Johnston (0219)
Matthew Bolin (0220)
Andrew Spikes (0221)
Paul Fleckinger (0222)
Christopher O'Quinn (0223)
Nathan Lunsford (0224)
Alliance Civil Process, Inc. (0227)
Support LLC, I Serve Legal (0231)
Pennsylvania Ass'n of Licensed Investigators (0233)
Top Tier Investigative Solutions (0234)
Private Detective Company owner for PALI (0236)
CSI Corporate Security Investigations (0237)
John Adams & Associates (0241)
Ron Grossberg (0254)
Tammy White (0257)
Florida Ass'n of Professional Process Servers (0264)
Chis Yoeman (0266)
Wyman Kroft (0273)
Blackhawk Special Services, Inc. (0275)
TriCounty Private Process Service, Inc. (0276)
Anonymous (0277)
O'Rourke Investigative Assoc., Inc. (0283)

Support LLC, I Serve Legal (0043): Personal service is the only reliable method that confirms actual receipt. Mail and email create more uncertainty. The current rule works and is not the source of systemic problems.

Are You Being Served?, Inc. Legal Support Services (0044): At a time when people are worried about “sewer service,” it does not make sense to open service up to additional contests about whether it was done properly. When witnesses start missing depositions and hearings due to this rule change, the feds will realize what a mistake they have made.

California Civil Process (0045): Mail is unreliable. I received three letters last week that were postmarked October 2002.

Valpro Attorney Services (0046): We oppose this change. Personal service is the only effective method of service.

Kelly Cory (0047): Legal professionals and officers of the court oppose the expansion of alternative service methods for subpoenas. Mailed or electronic delivery is not a substitute for personal service.

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Danielle Myels (0048): Opening the door to alternative methods of service will produce a surplus of issues that would be avoided with reliable personal service.

Dynamic Legal Services (0049): Service upon individuals “should ALWAYS be face to face.”

Bella Rose Legal Services (0050): We support personal service only, but by a professional Process Server. It is secure.

Allegiance Legal Solutions, LLC (0051): I strongly oppose these changes for several reasons: (1) The current rule works well; (2) Mail/carrier service does not reliably ensure receipt; (3) This change undermines enforceability; (4) There will be an increased burden on nonparties and confusion for the courts.

Larry Kirlin (0052): “I’ve been serving process since 1991, and I’ve seen firsthand why personal service matters.” Increased “convenience” for the serving party comes at a cost of fairness for the person served.

Ashley Morgan (0053): “This takes away jobs for us process servers who are doing our best to support [and] feed our families.” Mail does not do an equally good job.

Brooke Frechette (0054): I strongly oppose the proposed amendments. Personal service provides reliability and accountability. This change would create uncertainty and undermine due process.

Delaware Attorney Services (0055): The existing framework under Rules 4, 5, and 45 is essential to the lawful exercise of personal jurisdiction and the constitutional requirement of due process notice. The amendments would diminish evidentiary reliability by permitting methods that increase uncertainty.

Subpoena Me Process Servers (0056): Making these changes will reduce reliability and increase disputes about service. The term “confirmed receipt” is not defined. “Professional process servers provide accountability, documentation and neutrality that mail and courier services cannot replicate[.]”

Anderson Attorney Services (0057): “Personal service is the only reliable method that confirms actual receipt.”

Jonathan Shisler (0058): I oppose the amendment insofar as it authorizes “alternative” methods of service. A subpoena is not a routine notice document, but a compulsory court order. It is fundamentally different from a summons or ordinary legal notice. The “reasonably calculated to give notice” standard is insufficient for subpoenas, which require more than notice. They require certainty of receipt.

Uthe Investigative and Professional Services, PLLC (0059): Permitting subpoenas to be mailed is not due process. What if the person has moved?

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Brown Investigative Services, LLC (0063): We oppose these changes. They risk weakening essential due process protections. Service of process is the mechanism that ensures defendants receive actual notice. Lowering the threshold to allow for other methods than a process server introduces serious reliability concerns.

Denise Rock (0064): “I oppose this change.”

Weno Process LLC (0067): This amendment is problematic. Even with tracking, USPS is unreliable. Anyone can sign a return receipt and there is no way to prove the documents will get to right place or person.

Anonymous (0069): In Oklahoma, state law requires that service of documents must have a process server license; commercial carriers do not have such a license.

Brad Sanders (0072): I strongly oppose this amendment. I own a professional process serving business based in Bakersfield, California. These amendments represent a radical and unnecessary departure from the proven reliability of personal service, a cornerstone of due process. To adopt them will have a devastating impact on small businesses, by triggering an immediate and irreversible collapse in demand for our services. “Conservative estimates show revenue losses of 50-80% for federal work alone.”

Rebecca Schuster (0078): I am a certified process server in Texas. These amendments represent a significant departure from longstanding practice and would materially reduce the demand for traditional in-hand subpoena service, causing significant revenue loss for thousands of professional process servers. Independent process servers cannot easily absorb such a structural shift.

Kate Fisher (0079): “No to amend Rule 45.”

Anthony Crowley (0081): This is a bad idea. People will say they never received service.

Victoria Ammann (0082): I base my comments on experience as a certified paralegal and owner of a process-serving business that regularly handles subpoenas. I support clarification of the service methods, including residential service and service by mail or commercial carrier with confirmation of receipt. These methods reflect modern practice.

Anonymous (0084): This will jeopardize the way our court works.

Department of Child Support (0085): “This will hurt the industry and more importantly it will be difficult to prove whether the party is served.”

Katelyn Miller (0087): Based on my experience as a certified professional process server and as a legal secretary, I worry that the amendments may unintentionally increase litigation over service issues. Court personnel are already overwhelmed, and adding disputes about service of subpoenas. I urge the committee to preserve personal service by authorized process servers as a clear and valid method of subpoena service.

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Denise Amini (0088): “The fundamental reason for serving process through a sheriff or a licensed and certified process server is to ensure that the individual being deposed is properly informed of the legal action. This method also establishes the court’s jurisdiction over that person or entity[.]”

Rondout Legal Services, Inc. (0090): “As a process server of almost forty years, I’m all for this change. Suitable age service makes sense in order to efficiently and in a timely manner serve a Subpoena that is needed to further a federal case. Trying to serve people in hand when they don’t want to testify can be a major challenge.”

Joel Golub (0093): “Mail service alone should not be an option when serving process!!”

Anonymous (0094): “Personal service is the only method that confirms actual receipt.”

Anonymous (0096): Personal service by trained professionals ensures that recipients receive lawful notice. Service by mail or commercial carrier invites disputes, particularly since “confirmation of receipt” is undefined.

Jack King (0097): Identical to 0096 above.

Federal Magistrate Judges Association (0101): The FMJA supports the proposed changes to Rule 45(b)(1) because it is often difficult and costly to serve someone personally, and because the alternative methods of service will minimize the costs of service and delays associated with failed service, while verifying that the subpoena was delivered. It also supports the change to give the courts the ability to authorize alternative methods of service. These changes will reduce motion practice concerning methods of service. The proposed changes clarify ambiguity in the current rule, and authorize methods of service under Rule 4 that courts have long found to be reasonable.

Tanner Kish (0102): “Rule 45 must keep personal service as the default.”

LaSalle Process Servers (0103): Personal service is the only reliable method that confirms actual receipt.

Professional Process Servers & Investigators, Inc. (0105): We oppose the amendment because it continues to move the courts away from personal service and toward more automated and administrative processes.

Chris Johnson (0108): This rule change should be adopted. Allowing a person to be served by leaving the document at the person’s home actually safeguards due process rather than diminishing it. “While process companies stand to gain financial benefit if the rule fails, the general public and the court system loses if this rule fails.”

Ray Wilson (0109): As a professional process server with 15 years’ experience, I am concerned about these amendments. Trying to clarify service methods is desirable, but the shift toward mail-based service is not. Confirmation of receipt ought not be entrusted to commercial carriers. And subpoenas often contain sensitive personal information, and the changes risk exposing this sort of information to third parties. There would also be unfortunate economic

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consequences. “For many independent servers, federal subpoena work provides the economic stability required to maintain operations.”

Gregory Kellerman (0116): I strongly oppose these proposed amendments. They would significantly increase litigation costs and procedural complexity for all parties despite the evidence of widespread abuse.

Cynthia Thomas (0117): “While some courts already permit these alternative methods [of service], the proposed rule eliminates the ambiguity that has historically preserved the central role of personal service and undermines an industry that has served the federal judiciary reliably for decades.”

[Additional statements of opposition (several from Anonymous) were submitted by numerous other individuals or entities with experience in serving process. In the Reporter’s judgment, these submissions largely repeated comments summarized above, and the additional submissions are not separately noted in this summary. They should be accessible via the appropriate government website.]

Randy Scott (0153): I support this change to expand permissible methods to serve subpoenas. “The courts exist to serve litigants and the public, not to protect or subsidize specific professions against technological or procedural evolution.” Modern technology offers far more convincing evidence of notice than traditional process service. Tools offered by technology reduce disputes about service.

Committee on Federal Courts, Litigation Section, California Lawyers Association (0154): Proposed Rule 45(b)(1)(A)(iii) should be amended or withdrawn. As currently written, it does not include sufficient safeguards to ensure nonparty notice. It does not clarify who can accept service when the subpoena is sent with actual confirmation of receipt to the last known address. A possible model exists in § 12963.1(b) of the California Government Code: “A subpoena shall be served by delivering a copy of the subpoena to the individual named on the subpoena or to any person who would be eligible to receive service of summons on behalf of the individual or organization named in the subpoena.” The revision is vague regarding what constitutes the “last known address.”

Lee Allen Miller (0161): These amendments will have an adverse impact on rural service providers, where service is already difficult. Small, independent service providers will face severe financial pressure, leading to systemic harm to service in rural markets. Federal subpoena work provides revenue stability for such businesses, and these changes create a risk of a “rural service desert.” Mail service is not a substitute. In rural areas, there are properties with no street addresses, people who work unusual hours or travel extensively for work, seasonal residents present only for part of the year, language barriers with immigrant agricultural workers, and cultural issues involving indigenous populations or insular communities. Adopting these changes will result in increased motion practice. Particularly in rural areas, these changes rely on the false economy of cost reduction. The reliance on “place of abode” raises particular problems in rural areas. Rural mail delivery is often irregular. Permitting the court to authorize additional methods of service “essentially eliminates any meaningful standard for subpoena service and will be particularly harmful in rural jurisdictions.” In addition, though the 14-day notice requirement

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provides some protection, it is not sufficient, particularly for rural residents who check mail infrequently. Before these amendments are adopted, a comprehensive economic assessment should be conducted, and if the results are promising pilot projects should be established.

Aaron Greenspan (0174): “As a plaintiff in a lawsuit where service of a subpoena via Certified Mail has turned into a major issue, I am completely in favor of the suggested changes to Rule 45(b)(1)(A).” Even though mail service of a subpoena was formerly approved in this jurisdiction, in my case the judge changed her mind and ruled it unacceptable. This rule change would make it clear that service by mail is sufficient.

[Additional adverse comments were received from others involved in the business of serving process. They are not summarized here because they do not seem to raise new points.]

Casey Johnson (0183): As an attorney with more than 20 years’ experience, I support the change to 45(b). By recognizing that the method used to serve a complaint is also sufficient for a subpoena, adding confirmed receipt mailing, and authorizing court approval of additional means, the proposed changes recognize the challenge sometimes presented to accomplish “personal service.” The difficulties can be particularly pressing with people living in gated communities.

Andrew Lucchetti (0185): These amendments address a longstanding source of practical difficulty. The wording of the current rule has generated disagreement among courts about whether personal hand delivery is required. The amendment wisely resolves the ambiguity of the current rule by drawing from the well-established methods in Rule 4. The additional method of U.S. mail or commercial carrier, conditioned on confirmation of actual receipt, reflects the practical reality that these methods regularly succeed and provide adequate assurance that the witness has received notice.

Dorothy Haramanic (0205): These amendments risk deeming service sufficient when no actual notice was given. To say that one may serve a person “of suitable age” provides no criteria for determining suitability. The expanded concepts of “dwelling” and “usual place of abode” could authorize service at locations bearing no meaningful relationship to the intended recipient. Relying on U.S. mail or commercial carriers does not assure actual notice. And permitting the judge to authorize service by “any other means” does not offer standards or procedural safeguards. These additional methods of service should not be adopted.

Lindsay Lien Amin (0208): This amendment provides much-needed clarity regarding what constitutes effective service. Under the current rule, courts have disagreed about whether personal in-hand delivery is required. By expressly providing additional methods the rule better reflects real-world challenges. These alternative methods of service are particularly important when individuals live in secured buildings, gated communities, or other residences where access is restricted.

Lori Andrus (0211): I support this change. I know it can be difficult and expensive sometimes to serve subpoenas. Two examples from my practice come to mind. In one, opposing counsel refused to accept service of a deposition notice for one of the defense expert witnesses. This witness—who had testified on the defense side in hundreds of cases—was known to evade service, and lived in a gated community. In the other, the witness was a former executive of the

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defendant company (but not in the control group) and lived in a mansion in Malibu with walls surrounding the compound. After efforts to serve a deposition subpoena were unsuccessful, I hired a process server to “stake out” the property, and the process server was able to catch the witness as he was departing his home. Both these problems could be avoided had the rule included the additional methods of service added by the amendment.

Paul Sterbcow (0216): I fully support these proposed amendments. As a plaintiff lawyer, I can affirm that these amendments will streamline and increase the efficiency of the subpoena service process. As a backstop, the rule recognizes that the court can authorize additional methods of service. Although this alternative can be employed only upon a showing of good cause, it will sometimes be important.

Irwin Warren (0218): I perceive a potential inconsistency in the amendment proposal for Rule 45(b)(1)(A) regarding who must receive the subpoena. Under (ii) service is sufficient if the subpoena is left at the witness’s abode, so long as it is given to a person of suitable age and discretion who resides there. But under (iii) service is permitted by mail or delivery, which need only provide confirmation of “actual receipt,” without specifying by whom. This could be a real world problem for those with experience with a teenage child, a non-live-in or occasional housekeeper, or an apartment building with one or more part-time mailroom attendants, etc. I suggest that the “person of suitable age and discretion” be included in both subsections.

Are You Being Served? (0225): As a registered process server in California we note that Assembly Bill 747 has been signed into legislation. It makes service regulations more comprehensive in order to notify subjects of their pending depositions, lawsuits and hearings. The proposed amendments are going to provide the deponent multiple reasons to allege that process was not properly served.

Teris Swanson (0229): Expanding the permissible methods of service under Rule 45(b) simply provides flexibility and does not eliminate the continued practicality of using professional process servers, which will remain the most convenient option in many cases. The amendment appropriately focuses on access and efficiency rather than protecting a particular service model.

Nicole Snapp-Holloway (0235): The proposed service revisions reflect practical reality. The current ambiguity around the word “delivering” a subpoena has generated unnecessary disputes. In some cases, secured buildings or gated communities make hand delivery very difficult and costly. Involving a commercial carrier, or other court-approved alternative means, provides the reliability that litigation deserves. Service by commercial carrier with confirmation of receipt is often more reliable and better documented than disputed in-person attempts.

Kevin Green (0238): Evasion of service is a real and costly problem, and the proposed amendments are a welcome improvement. The changes will not eliminate the need for personal service, which will likely remain the best way for efficient service. But allowing additional verifiable means of service and allowing the court to approve additional means when needed, addresses the issue in a practical, measured way.

Joel Niskar (0239): I have been practicing law for almost 30 years. These changes to Rule 45 are “LONG OVERDUE.” They protect the due process rights of witnesses by ensuring

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reasonable notice through reliable methods of service, and do so in a manner that will significantly reduce the costs of litigation. These changes should have been made years ago.

Ashlie Sletvold (0240): The proposed amendment to Rule 45(b) will provide common-sense alternatives to the existing subpoena-service requirements. This is particularly true for subpoena subjects trying to evade service, which generates extra costs and introduces delay.

Brandon Baxter (0242): This amendment is an appropriate measure that prevents people from evading the justice system. It will save money for all parties.

Leah Snyder (0243): I support this change as the founder of a boutique firm that represents individuals and businesses who have disputes with insurance companies. It is beneficial for all litigants that a convenient, inexpensive, and reliable method of providing notice be adopted. Additional methods of service are necessary because a few individuals purposely evade service. The proposed options for commercial notice or leaving a copy at the dwelling with a person of suitable age and discretion are already familiar to parties under Rule 4. While most parties will continue to use a process server for routine business, the additional options provided by the amendments ensure that people receive proper notice.

Charles Cooper (0253): “The proposed change to Rule 45 helpfully aligns Rule 45 with Rule 4 in terms of methods of service and also clears up an issue the Ninth Circuit created about nationwide subpoena authority.”

American Association for Justice (0258): AAJ supports this change. Its members have encountered difficulty effecting service of subpoenas. In particular, wealthy individuals residing in gated communities present service challenges. In an age when ultra-wealthy people often employ armed security, it is just a matter of time before a process server is injured or killed while attempting service. (The comment cites a newspaper article entitled “Man Attempting to Serve Taylor Swift Papers Arrested at Travis Kelce’s Home.”) The proposed additional methods of service are already familiar to courts and parties. Contrary to the assertions of some others that the method for service under the current rule is working well, our members often struggle to serve persons determined to avoid service. The authority for the court to authorize additional methods is an important backstop. The courts already employ additional methods of service on occasion. For purposes of clarification, AAJ favors revising the rule amendment to what the Advisory Committee proposed to the Standing Committee in June 2025 (*see* Appendix to the Report of the Advisory Committee on Civil Rules, in Agenda Book for the Committee on Rules of Practice & Procedure, June 10, 2025, at 332):

(A) *By Whom and How.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering it to the named person by:

(i) delivering a copy to the named person personally; * * * [Note: This appears not to track the Standing Committee agenda book exactly.]

Structuring the rule this way is clarifying, not redundant. It keeps the basic requirement of the rule the same. Although the phrase “named person personally” is awkward, it does not result in confusion over subpoena delivery. While the original Advisory Committee proposal from April

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2025 (“individual personally”), and add a provision for service on an organization (i.e., a 30(b)(6) subpoena), it is important to retain the word “person.” Perhaps it would be better to add a provision about an “authorized agent,” but that might require republication. We also suggest deleting the phrase “who resides there.” This would make service easier, by including property managers, nannies, and housekeepers. Here is how that change could be made:

(ii) leaving a copy at the person’s dwelling or usual place of abode with someone of suitable age and discretion ~~who resides there~~; * * *

In addition, we believe that (iii) should be amended to replace “actual receipt” with “delivery,” as follows:

(iii) sending a copy to the person’s last known address by a form of United States mail or commercial carrier delivery, if the selected method provides confirmation of ~~actual receipt~~ delivery; or * * *

In addition, the phrase “unless the court orders otherwise” should be moved to either the beginning or the end of the sentence for ease of readability. We also recommend changes to clarify the Committee Note.

Deborah Waters (0265): The proposed amendment appropriately expands the means and methods of service of subpoenas while recognizing the necessity of due process and adequate notice. Service by commercial carrier provides an affordable and appropriate option to repeated, unsuccessful attempts by process servers. As a solo practitioner, I am confident this will assist in serving those who seek to avoid service. “Frankly, I will continue to employ the same local process server I normally rely upon but would definitely appreciate an alternative for particularly difficult situations.”

Daniel Laurence (0267): This rule change will have the secondary effect of providing cost savings with resistant witnesses who make it necessary to incur the cost of hiring process servers to hunt down or “stake out” those witnesses. That is a particular problem with gated communities. “The process server industry members opposed to this change seek to protect a relatively small piece of an unnecessary financial monopoly on service of subpoenas. Process servers need not worry – attorneys and parties representing themselves *pro se* will still use those professional services in most cases.”

Managing Attorneys & Clerks Assoc., Inc. (signed, among others, by representatives of Cahill Gordon & Reindel LLP, Debevoise & Plimpton LLP, Vinson & Elkins LLP, Cleary Gottlieb Steen & Hamilton LLP, and Allen Overy Shearman Sterling US LLP) (0268): We have two suggestions. First, (ii) and (iii) should be combined, so that service on a person of suitable age at an abode is followed by mailed notice to the same address. Second, we think that (iii) should not be adopted in its present form. Although in theory a return receipt should confirm receipt, in practice that is seldom the case. We also urge that (iii) be expanded to authorize service on an authorized agent. Personal service on a corporate officer can prove challenging. We have attached proposed language that would achieve these results.

Daniel Linebaugh (0278): The amendment to Rule 45(b) provides necessary alternatives to ensure that persons evading service can be served more easily.

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Sean Domnick (0279): In this day and age, it is far too easy to avoid service of process. Giving flexibility that allows reasonable alternative means is an important step in fixing this problem.

Jacob Podell (0280): Increasing the ways to serve a subpoena increases the availability of testimony which in turn increases courts making a decision with a complete record. The comments against this rule change from process servers are economically driven. The alternative methods of service sufficiently assure notice.

George Tolley III (0281): Although our office usually can accomplish appearance of witnesses and production of witnesses through party agreement, sometimes the rule's limits requires us to hire process servers to serve subpoenas. In such situations, the proposed amendment would greatly benefit my clients. Based on over 25 years of federal court practice, I support this change. The changes on manner of service align the rule with Rule 4 and provide reasonable alternatives.

Kate Baxter-Kauf (0282): In this age of remote work, complex corporate structures, and fast-moving litigation, courts should endeavor to have clear rules that follow actual practice. There is no reason to foreclose the use of ordinary service methods simply because the target is a third party for whom a subpoena is required. Certified mail is often more reasonable than in-person service, especially for businesses that do not regularly staff an in-person office. In my experience, and especially for complex or multidistrict litigation, the current rule often requires *worse* methods of service, or protracted litigation in courts throughout the country who are not overseeing the litigation. These rule changes are a helpful way of streamlining third-party subpoenas and will reduce ancillary disputes.

Amy Keller (0284): The amendment clarifies that the subpoena must be served on the witness "personally," and adds new permissible ways of serving. The changes clarify ambiguities, harmonize Rule 45 with Rule 4, and add sensible flexibility. The new alternative service methods are necessary because traditional in-hand service is ill-equipped to reach a person evading service. Courts have recognized the need for such flexibility under the current rule. Concerns raised by process servers worried about harm to their business model are misplaced. The current rule does not require service by a professional process server, nor do the amendments limit their role. "Law firms will continue to rely on them and traditional service methods in most cases."

Benjamin Mook (0285): Based on over 25 years of federal court practice, I support this change. The changes on manner of service align the rule with Rule 4 and provide reasonable alternatives. It is beneficial to confirm how service is properly accomplished. The proposed amendment adopts methods of service from Rule 4(e) that are well-recognized and would be simple for experienced process servers to satisfy.

Katherine Charonko (0287): We support this change. As complex civil litigators and trial lawyers, we believe that by clarifying methods of service the amendment will improve litigation efficiencies. Under the present rule, courts have disagreed about what "delivering" requires. The amendment seeks to resolve this ambiguity. Opponents of this amendment raise due process

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objections. But neither due process nor the rules depends upon a particular industry. And the amendment itself makes it clear that actual notice is paramount.

Jean Martin & Francesca Burne (0290): We strongly support this amendment to Rule 45(b). Under the current rule, personal service is often the only method. Too often, individuals actively evade service or reside in locations that make personal service unnecessarily costly. Counsel are then forced to retain professional process servers to conduct repeated attempts or extended surveillance simply to effectuate service. Allowing service by commercial carrier that provides confirmation of delivery would preserve due process protections while reducing unnecessary cost. Reputable carriers maintain detailed tracking records and delivery confirmation that provide objective proof of receipt. In many circumstances, such delivery is at least as reliable as in-hand service. Making this change would align Rule 45 with modern business practices. It is equally important that the amendment recognizes that the court may authorize alternative methods of service on a proper showing.

Mary Beth Gibson (0291): The proposed change regarding service of a subpoena should be adopted. At present, the rule is ambiguous and creates issues for parties seeking to comply with the rule. Permitting service by the proposed alternative methods will streamline third-party discovery practice and avoid delays in fact discovery. I highly endorse the provision for commercial-service that provides confirmation of receipt.

Donald Slavik (0294): “Modern technology and methods of communication should be allowed to reduce the cost and improve the speed of service of subpoenas. We are not in the 1920’s. It’s the 2020’s and [we] need to modernize.”

Joseph Camerlengo (0295): This is the most important rule change being proposed. In our complex motor vehicle crash cases, we often deal with companies and witnesses that are evading service. Providing dependable but alternative means of service is a long-awaited and needed change. “As the Committee can see based on the number of process servers that have flooded the comments in opposition to this proposed amendment, this rule has created a significant amount of unnecessary costs to plaintiffs and a boon to the process server industry.”

David Webbert (0293): I have been prosecuting civil rights actions for 40 years. I have found that the cost and complexity of obtaining essential discovery from third parties is frustrated by the fact that Rule 45 does not unambiguously allow service of a subpoena by U.S. mail. The proposed amendments strike a fair balance between due process and the Rule 1 objective of speedy and inexpensive justice.

Carla Aikens (0296): I support the amendments specifying workable service methods beyond in-hand personal delivery. These changes properly focus the rule on reliable notice rather than rigid formalism. As a plaintiffs’ employment attorney, I routinely see how the rule’s existing service framework imposes unnecessary cost, delay, and inefficiency. In employment cases, former employees are often critical subpoena targets. When a former employee evades service efforts, the current rule requires multiple process-server attempts followed by motion practice and compliance disputes. In several of my cases, process servers were required to make five or more attempts to serve the same witness due to evasion. The rule should not reward avoidance behavior. The proposed amendments address these issues in a balanced and sensible

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manner. Service by mail or commercial carrier with confirmation of actual receipt provides dependable evidence while reducing unnecessary expense.

Jennifer Lawrence (0298): I am in favor of this change. It allows service more easily when the witness is evading service.

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Deleting requirement to tender witness fees

January 27 online hearing

Jonathan Redgrave: It is understandable that tendering the fees along with service can be a complication, but it may sometimes be undesirable to postpone tender of fees until the witness shows up. A possible reconciliation is the directive that fees be tendered within ten days of service.

Alex Dahl (including LCJ submission 0006): Allowing service to be complete without the simultaneous tender of witness fees is contrary to the rule's deeply rooted purpose of protecting nonparty witnesses. Permitting service without tender of fees would reduce compliance. The tender requirement is an important safeguard deeply rooted in the rule's history and protects against abuse. And the change overlooks the reality that many subpoenas call only for document production, without appearance at a deposition, and many trial subpoenas do not result in an actual appearance because most cases settle before trial. Moreover, this change creates the risk that a witness will travel to a deposition, answer questions for seven hours, and then leave without getting the fees because the party that served the subpoena was not satisfied with the responses. Thus, it invites gamesmanship by the subpoenaing party.

Navan Ward (including written testimony): As a lawyer serving a subpoena, I want the witness to show up. We surely do not want cost to be an impediment to that.

Brian Fitzpatrick: I am a “big fan of private enforcement,” and with AAJ 99% of the time. But there is no reason to enable lawyers with subpoenas to impose significant costs on nonparties. People who are hauled into court should not have to subsidize that. Indeed, what should be done is to make the witness fee closer to full compensation. Though it is usually true that the serving party wants the witness to show up, sometimes that party will use the failure to appear as grounds for a sanction against the witness. Indeed, something of the sort happened to me recently; I was served with a subpoena but not tendered the witness and travel costs.

John Southerland: The cost of compliance with a subpoena is a substantial burden on nonparties. The rule should require full compensation before the nonparty must make the effort to show up or produce the requested material. Privilege logging in particular is a major burden, and courts are not consistent on what is covered. The rule should confirm that categorical logs suffice, and that the costs of logging are compensable costs under the rule.

Tiega-Noel Varlack: As a solo practitioner, I prefer a rule that calls for tender of fees only after the witness appears. If I need to subpoena ten witnesses for a trial, it is a considerable expense to tender the fees to all of them in advance, particularly when cases often settle and the witnesses do not have to appear after all.

Written comments

Sheila Williamson (0015): “Relaxing the expectation of fee tender at service undermines the clarity and perceived legitimacy of compulsory process.” Tendering the fees “signals that the subpoena is official, lawful, and used in good faith. ‘Show up first, then we’ll pay you’ invites confusion, resistance, and disputes at the appearance stage.”

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Carter Williamson (0016): There is little support for changing the requirement to tender witness fees at the time of service. The examples cited by the Subcommittee involve unusual circumstances of easily avoidable issues. Requiring tender at the time of service encourages compliance.

Michael Read, President, Mighty Process Server (0019): Delaying tender of fees harms compliance and fairness. Tender of fees signals legitimacy, and shows respect for the recipient's time. Witnesses are more cooperative when fees are tendered, and failure to tender fees breeds distrust and resistance. Nonparties should not be forced to front costs or rely on later reimbursement which often does not materialize without a fight.

Paper Monkey Legal Services (0025): Removal of the requirement that the witness fee be tendered at the time of service further undermines enforceability. Contemporaneous tender has long served as a fairness safeguard. Eliminating this requirement shifts financial uncertainty onto individuals with no stake in the litigation.

Victoria Ammann (0082): I base my comments on experience as a certified paralegal and owner of a process-serving business that regularly handles subpoenas. I support clarification of the service methods, including residential service and service by mail or commercial carrier with confirmation of receipt. These methods reflect modern practice. But I do not support eliminating payment expectations tied to subpoenas. Nonparties should not have to absorb the cost of compliance. Even with tender of fees, travel can be burdensome for low-income or financially vulnerable individuals. The rule should provide that the person subject to the subpoena may request payment of reasonable compliance costs.

Federal Magistrate Judges Association (0101): The FMJA appreciates the desire for flexibility in the tendering of fees and costs, but believes that this proposed amendment does not take into account the needs of pro se and low-income individuals who may need the modest fee and costs in order to travel to the place of the deposition. We suggest that the Advisory Committee consider requiring tendering the fee and costs at least three business days before attendance is required unless the person subject to the subpoena consents to tendering of the fee and costs on the date of the appearance.

Ray Wilson (0109): Requiring the party serving the subpoena to provide mileage and attendance fees up front ensures that the witness has the means to comply with the court's command.

Andrew Lucchetti (0185): The relaxation of the requirement that the witness fee be tendered at the time of service addresses a practical problem that has led to service being invalidated on purely technical grounds.

Amy Keller (0284): Relaxing the requirement for tendering fees makes service of a subpoena unnecessarily complicated. Nonetheless, given that pro se and low-income individuals may need the modest fees in order to travel to the requested location, we suggest that the Committee consider including in the committee note the idea that the fee must be tendered in advance if the person requests it tender to ensure attendance. In the real world, a witness may

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request fees in advance for a compelled deposition to buy bus tickets or hire a taxi to the deposition site.

David Webbert (0293): Based on my 40 years prosecuting civil rights actions, I favor the change to the rule on tendering witness fees. This change will make the service process more efficient and fairer.

Carla Aikens (0296): This is a good rule change. Allowing these amounts to be tendered either at the time of service or at the time and place the person is commanded to appear reduces technical disputes.

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Notice period

Federal Magistrate Judges Association (0101): The FMJA supports the 14-day notice requirement because it provides a minimum baseline for what is reasonable notice and allows a party sufficient time to object in advance of a deadline for attendance. The Advisory Committee might consider changing the notice period to 21 days, but that longer period might not be practical in some instances.

Casey Johnson (0183): The addition of the 14-day notice period will promote litigation efficiency.

Andrew Lucchetti (0185): The 14-day advance service requirement is a sensible addition that protects witnesses from unreasonably short notice while preserving the court's ability to shorten that period for good cause.

Nicole Snapp-Holloway (0235): The addition of a 14-day notice period further enhances the protections this rule deserves and would protect nonparties and reduce emergency filings.

Kevin Green (0238): The clarity provided by defining the proper time for service helps avoid needless disputes. And the additional time allowed for tender of the witness fee serves a practical purpose by allowing counsel to meet and confer after service but before testimony. This is a small but meaningful improvement.

Deborah Waters (0265): The proposal requires a reasonable 14-day notice before the appearance required by the subpoena. This is a welcome addition to a rule to accommodate the convenience of the witness.

George Tolley III (0281): The proposed 14-day notice requirement is both reasonable and appropriate.

Amy Keller (0284): This is a practical change. At present, the rule contains no minimum notice period. The amendment fills an obvious gap in the current rule and recognizes that complying with a subpoena may pose logistical problems for the witness.

David Webbert (0293): The amendment makes service of subpoenas fairer by specifying a 14-day notice period.

Carla Aikens (0296): I support the clarification regarding the notice period. A clear baseline promotes predictability and reduces disputes.

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Overall

January 27 online hearing

Thomas Allman (including written testimony and comment 0040) (Chair Emeritus, Sedona Conference Working Group 1): Rule 45(d) should also be amended to emphasize in a targeted way that nonparties are entitled to full reimbursement for any “significant expenses” they incur in complying with a subpoena. Nonparties are in a unique position in that they have no stake in the litigation. Though the 1991 amendments to Rule 45 were intended to make it easier for a nonparty to recover costs of complying with discovery, some courts seem to have adopted a “means test” that regards expense as “insignificant” when the entity subject to the subpoena is large. *See* Sedona Conference Commentary on Rule 45 as to Non-Parties (2d ed.), 22 Sedona Conf. J. 1, 65 (2021). Considering the nonparty’s financial means is not required; the only question should be whether the cost of complying is “significant.” But this does not mean that the current rule’s reference to “significant” expense should be changed to “disproportionate.” And there is no need to reject the “multi-factor equitable approach” adopted by some courts. Rule 45(d)(2)(B) should be amended to reject the “financial means” test adopted by some courts.

Xiomara Damour: This amendment package fails to address a pressing need—handling privilege logging by a nonparty subject to a subpoena. Too often requesting parties demand a document-by-document log, which is not really needed. The rule should specify that categorical logging will suffice.

Brian Fitzpatrick: The original idea behind Rule 45 in the 1930s was that the nonparty could recover its actual costs. The march of technology since that time has severely eroded that, particularly with regard to document subpoenas. Big companies have entire departments that only deal with responding to document demands.

Matthew Moeller: The serving party should be required to cover all “excessive” costs of compliance. That compensation should include the cost of people’s time complying with the subpoena. Though Rule 45(d) appears to provide protections for the nonparty witness, in reality that requires motion practice, a requirement that may deter nonparties from seeking compensation. As an example, a client in Texas received a subpoena that required it to direct three employees to spend several days preparing responsive materials instead of doing their regular jobs. The reasonable cost for thus deploying those employees would be over \$200 per hour, and might amount to \$10,000 in total. Moeller’s clients are prepared to meet and confer with the serving party to address these issues equitably, but the protections in the rule now are insufficient. If I have to tell my clients that it will cost them \$10,000 in my fees to litigate these issues, they will decide to drop the issue. As an example, in one multidistrict litigation, the plaintiffs made a very broad demand for documents. Magistrate Judge Craig Shaffer began a hearing by looking at plaintiff counsel and saying “I nearly fell out of my chair” when I saw what you are demanding.

John Southerland: The cost of compliance with a subpoena is a substantial burden on nonparties. The rule should require full compensation before the nonparty must make the effort to show up or produce the requested material. Privilege logging in particular is a major burden,

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and courts are not consistent on what is covered. The rule should confirm that categorical logs suffice, and that the costs of logging are compensable costs under the rule.

Written Comments

Lawyers for Civil Justice (0006): The proposed amendments to Rule 45 fail to address three matters that do call for action, while making ill-founded proposals for change in ways that are harmful or not needed. First, the amendment does not require that the serving party compensate the nonparty for all costs of compliance, which have escalated in the information age, with digital material subject to subpoenas. Moreover, though the 1991 amendments to Rule 45 directed the courts to guard against “significant expense” imposed on the nonparty, this rule provision has been “effectively rewritten” by the courts, particularly when the nonparty is a large company. Rule 45(d)(2)(B)(ii) should be revised as follows:

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from any reasonable significant expenses resulting from compliance, absent good cause.

Second, Rule 45 should provide guidance for the protection of personal or confidential information, particularly in light of cybersecurity risks. Third, the rule should be amended to provide guidance concerning privilege logs by authorizing categorical logging and/or defining the expense of document-by-document logging as a “significant expense” the rule directs the court to protect against.

Victoria Ammann (0082): Rule 45(d) should be amended to reinforce the longstanding principle that a subpoena should not impose undue burden or expense on nonparties. For a business responding to document requests the costs can be large. Clarifying payment timing within the existing Rule 45(d) framework would reduce disputes. Electronic production of documents should be expressly encouraged. Subpoenas should not require personal appearance. A written response should suffice.

TAB 9

Rule 81(c)(3)—Jury Demand After Removal

The Rule 81(c) amendment attracted few comments, summarized below. They were favorable to the amendment. The recommendation is that the published preliminary draft be adopted as drafted.

Attachment(s):

- Redline and Clean Versions of Rule 81(c)(3) Amendments
- Summary of Testimony and Public Comments

**Published Rule 81 Amendment
(Redline)**

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE¹**

1 **Rule 81. Applicability of the Rules in General;**
2 **Removed Actions**

* * * * *

4 **(c) Removed Actions.**

5 **(1) Applicability.** These rules apply to a civil
6 action after it is removed from a state court.

* * * * *

8 (3) *Demand for a Jury Trial.*

9 (A) *Before Removal* ~~*As Affected by State*~~
10 ~~*Law*~~. A party who, before removal,
11 expressly demanded a jury trial in
12 accordance with state law need not
13 renew the demand after removal.

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

Attachment to Rule 81(c)(3)—Jury Demand After Removal

2

FEDERAL RULES OF CIVIL PROCEDURE

14 **(B)** After Removal. If no demand has been
15 made before removal, Rule 38(b)
16 governs a demand for a jury trial. If
17 all necessary pleadings have been
18 served at the time of removal, a party
19 entitled to a jury trial under Rule
20 38(b) must be given one if the party
21 serves a demand within 14 days after:
22 ~~If the state law did not require an~~
23 ~~express demand for a jury trial, a~~
24 ~~party need not make one after~~
25 ~~removal unless the court orders the~~
26 ~~parties to do so within a specified~~
27 ~~time. The court must so order at a~~
28 ~~party's request and may so order on~~
29 ~~its own. A party who fails to make a~~
30 ~~demand when so ordered waives a~~
31 ~~jury trial.~~

- 32 ~~(B) — *Under Rule 38.*~~ If all necessary
33 ~~pleadings have been served at the~~
34 ~~time of removal, a party entitled to a~~
35 ~~jury trial under Rule 38 must be given~~
36 ~~one if the party serves a demand~~
37 ~~within 14 days after:~~
- 38 (i) it files a notice of removal; or
39 (ii) it is served with a notice of
40 removal filed by another
41 party.

Published Rule 81 Amendment and
Committee Note

PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE

1 **Rule 81. Applicability of the Rules in General;**
2 **Removed Actions**

3 * * * * *

4 **(c) Removed Actions.**

5 **(1)** *Applicability.* These rules apply to a civil
6 action after it is removed from a state court.

7 * * * * *

8 **(3) Demand for a Jury Trial.**

9 **(A)** *Before Removal.* A party who, before
10 removal, expressly demanded a jury
11 trial in accordance with state law need
12 not renew the demand after removal.

13 **(B)** *After Removal.* If no demand has been
14 made before removal, Rule 38(b)
15 governs a demand for a jury trial. If

16 all necessary pleadings have been
17 served at the time of removal, a party
18 entitled to a jury trial under Rule
19 38(b) must be given one if the party
20 serves a demand within 14 days after:
21 (i) it files a notice of removal; or
22 (ii) it is served with a notice of
23 removal filed by another
24 party.

25 **Committee Note**

26 Rule 81(c) is amended to remove uncertainty about
27 when and whether a party to a removed action must demand
28 a jury trial. Prior to 2007, the rule said no demand was
29 necessary if the state court “does” not require a jury demand
30 to obtain a jury trial. State practice on jury demands varies,
31 and it appears that in at least some state courts no demand
32 need be made, although it is uncertain whether those states
33 actually guarantee a jury trial unless the parties affirmatively
34 waive jury trial. In other state courts, a jury demand is
35 required, but only later in the case than the deadline in
36 Rule 38 for demanding a jury trial. A number of states have
37 rules similar to Rule 38, but time limits for making a jury
38 demand differ from the time limit in Rule 38.

39 This amendment is designed to remove uncertainty
40 about whether and when a jury demand must be made after

41 removal. It explicitly preserves the right to jury trial of a
42 party that expressly demanded a jury trial before removal.
43 But otherwise it makes clear that Rule 38 applies to removed
44 cases. If all pleadings have been served at the time of
45 removal, the demand must be made by the removing party
46 within 14 days of the date on which it filed its notice of
47 removal, and by any other party within 14 days of the date
48 on which it was served with a notice of removal. If further
49 pleadings are required, Rule 38(b)(1) applies to the removed
50 case.

51 When no demand has been made either before
52 removal or in compliance with Rule 38(b), the court has
53 discretion under Rule 39(b), on motion, to order a jury trial
54 on any issue for which a jury trial might have been
55 demanded.

56 The amendment removes the prior exemption from
57 the jury demand requirement in cases removed from state
58 courts in which an express demand for a jury trial is not
59 required. Courts no longer have to order parties to cases
60 removed from such state courts to make a jury demand; the
61 rule so requires.

Attachment to Rule 81(c)(3)—Jury Demand After Removal

Comments on Rule 81(c) Preliminary Draft

Written comments

Anonymous (0136): “For Rule 81, which deals with the applicability of the rules in general and removed actions, any clarification is welcome, as removed cases often present unique jurisdictional and procedural questions upon transition from state to federal court.”

Missouri Association of Trial Attorneys (also signed by the presidents of the Trial Lawyers Associations of 47 other states) (0232): For two decades, the language of Rule 81(c) has created confusion among the trial bar about when a jury demand must be made in removed cases. In some cases, this confusion has resulted in the deprivation of the right to jury trial. The proposed amendments to Rule 81 protect the right to jury trial by (1) eliminating exemptions based on highly variable state practice rules, and (2) standardizing filing deadlines for jury demands after removal where no demand was filed prior to removal. The proposed changes add clarity while the current rule muddies the water. The amendments also clarify when a demand for a jury trial must be made if none was made before removal.

Deborah Walters (0265): The proposed amendment to Rule 81(c) resolves the ambiguity of the language of the existing rule. Given that various jurisdictions interpret the language of the rule differently, adoption of the proposed language will promote a clearer understanding and promote uniformity.

Mary Beth Gibson (0291): “The proposed changes to FRCP 81 regarding post-removal jury demands is a welcome clarification to jury demands in removed cases.”

TAB 10

MEMORANDUM

DATE: March 19, 2026

TO: Advisory Committee on Civil Rules

FROM: Catherine T. Struve

RE: Proposed draft amendments relating to self-represented litigants

Enclosed with this memo are proposed draft amendments to Civil Rules 5 and 6. These amendments would implement changes developed by the project on self-represented litigants' filing and service. If approved for publication at the Advisory Committee's spring 2026 meeting, these amendments would form part of a package of proposed amendments (to the Appellate, Bankruptcy, Civil, and Criminal Rules) presented for approval for publication in summer 2026. This memo highlights matters for the Advisory Committee to consider as it determines whether to propose the amendments for publication.

To ground the Advisory Committee's review of the proposed amendments, I enclose (1) a clean version of the proposed amendments to Civil Rules 5 and 6; (2) a redline showing how the clean version of the Civil Rule 5 draft differs from the one in the fall 2025 agenda book; and (3) a comparison chart of the proposed amended rule language (in clean form) across the Bankruptcy, Appellate, Civil, and Criminal rule sets.

Part I of this memo recounts that the provision on electronic filing access for self-represented litigants has been restructured to accord with guidance provided at the Criminal Rules Committee's fall 2025 meeting. Part II explains the tentative decision – reflected in the enclosed draft – to limit the new filing provision in the Criminal, Civil, and Appellate Rules to self-represented “parties.” Part III collects other developments since the fall. And Part IV notes remaining variances in wording across the rule sets in the overall package.

I. New structure of the e-filing provision

The new structure for the proposed e-filing provision grows out of discussions at the Criminal Rules Committee's fall meeting.

As a point of comparison, the sketch set out in the fall 2025 agenda books used a four-part structure for the provision on e-filing by self-represented litigants. Part (i) flipped the default principle (by providing that a self-represented litigant may “use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or by local

rule prohibits the party from doing so”). Part (ii) provided that any local provision (extending beyond a particular litigant) that prohibits self-represented litigants from using the e-filing system “must include reasonable exceptions or must permit the use of another electronic method for filing papers and for receiving electronic notice of activity in the case.” Part (iii) stated that “[a] court may set reasonable conditions and restrictions on unrepresented parties’ access to the court’s electronic-filing system.” Part (iv) stated that the court may deny a person access to the e-filing system “and may revoke a person’s previously granted access for not complying with the conditions authorized in (iii).”

That structure had a number of features that participants in prior discussions found valuable. But, on the other hand, some participants questioned the structure and wondered why parts (ii) and (iii) were separate, given that they are really two sides of the same coin. Here is the new structure¹ (shown for illustrative purposes in a clean version that would become part of Civil Rule 5(d)):

(2) Electronic Filing and Signing.

(A) [subpart (A) deals with represented persons]

(B) By an Unrepresented Party – When Allowed or Required.

(i) In General. An unrepresented party may use the court’s electronic-filing system to file papers and receive notice of activity in the party’s² case, unless a court order or local rule prohibits the party from doing so. An unrepresented person may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.

(ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented parties’ access to the court’s electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party’s case.

¹ The Committee Note to this provision has also been revised to track the new structure.

² We have added “party’s” before “case” to emphasize that the presumption in favor of access to the court’s e-filing system only extends to access in the party’s own case.

II. Limitation of e-filing provision to self-represented “parties”

As shown in Part I, the self-represented litigant e-filing provisions proposed for the Civil, Criminal, and Appellate Rules refer to access for unrepresented “*parties*.”³ This is a shift from the current Civil and Appellate Rules (which refer to an unrepresented “person”), though it carries forward current Criminal Rule 49’s reference to a self-represented “party.” The reason for the shift is that the amended provision flips the default presumption from one of non-access to one of access to the court’s electronic-filing system. Once the presumption is inverted to say that self-represented litigants may e-file *unless* barred by order or local rule, it seems advisable to change “person” to “party” so that lay people who are not parties to the case do not cite the rule as granting *them* access.

In developing consensus around this recommendation, participants have considered how this change would affect would-be intervenors. If the e-filing portion of the draft refers to a self-represented “party,” then under the proposed rule – as now – a self-represented person seeking to intervene would be able to e-file only if affirmatively authorized by the court through local rule or order or local practice. Of course, once a self-represented person is granted intervenor status in the district court, they would count as a party. Self-represented would-be intervenors are likely not numerous. Also, referring to “parties or those seeking intervention” would be cumbersome, and might invite members of the public to characterize themselves as would-be intervenors any time they really wanted to put in their two cents on a high-profile case.

As noted above, in the Criminal Rules context there is an additional reason to use “party” – that is, because that is the term used in current Criminal Rule 49. Criminal Rule 49(b)(3)(B) deals only with electronic filing by a “party not represented by an attorney.” Meanwhile, Criminal Rule 49(c) provides: “A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court’s electronic-filing system only if allowed by court order or local rule.”

III. Other developments since fall 2025

This section highlights changes made since Advisory Committee members last saw the draft of Rule 5 in fall 2025: the deletion of the provision addressing service of papers not filed

3 There is one nuance in the Civil and Appellate proposals: Proposed Civil Rule 5(d)(2)(B)(i) carries forward the present Rule’s provision that an unrepresented “person” may “be required to file electronically only by” court order or “a local rule that includes reasonable exceptions.” The choice of the broader term is appropriate in this provision, which is designed to protect unrepresented people from being required to use the court’s e-filing system if doing so would pose a hardship for them.

See *infra* Part IV for discussion of the Bankruptcy-specific proposal to use “individual” rather than “party.”

(Part III.A), revisions to the provision addressing when service by the notice of case activity is complete (Part III.B), a revision to the provision addressing service of sealed filings (Part III.C), and a bracketed addition to the Committee Note to proposed Rule 5(d)(2)(B) (Part III.D). Part III.E notes a few matters that have been resolved without a change to the proposed rule text.

A. Deletion of provision addressing service of papers not filed

The Rules currently don't specifically and explicitly address manners of service for papers that aren't filed. Because some project participants had expressed interest in separately treating that topic, the fall 2025 sketch included a proposed Rule 5(b)(4): "**Serving Papers That Are Not Filed.** Rule 5(b)(3) governs service of a paper that is not filed." There's a good argument, though, that such a provision is redundant: The rules governing method of service don't confine themselves to service of *filed* papers, except of course that the provision for service via the court's e-filing system will not be an option for non-filed papers.

This proposed provision did not attract support among other project participants. At the Criminal Rules Committee's fall 2025 meeting, it was suggested that we should ask the Clerk liaisons whether they saw a need for such a provision. None of the four Clerk liaisons voiced support for including such a provision. In addition, Brandy Lonchena consulted some other District Clerks about this question and reported that they, too, saw no reason to include such a provision. Accordingly, we have deleted the "service of papers not filed" provision from the draft.

B. Provision on when service by notice of case activity is complete

The fall 2025 sketch essentially said that service by means of the notice of case activity is complete as of the notice's date ("A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date."). This provision was designed to protect litigants whose deadlines run *from* the date of service, by ensuring that if there's a time lag in the courthouse (in scanning a paper filing and uploading it into CM/ECF) then that time lag will occur *before* the date of service. (Courts are pretty prompt in scanning and uploading; but still we have heard of one to two day delays between receipt and upload.)

But last month, we focused on the fact that the rules contain a number of provisions that require a litigant to *serve* an item *by* a certain date – and in a close case, the fall 2025 draft might lead a court to conclude that service was untimely, if a self-represented litigant were to get their filing into the court's hands on the last day of the period but the court didn't upload it until a later date.

Accordingly, we modified the proposed provisions that address when service by means of the notice of case activity is complete to read as follows: "For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the

date of service, service [by a notice of case activity]⁴ is complete as of the notice’s date.” Variants of this language are now in proposed Bankruptcy Rules 9036(d) and 8011(c)(3), Appellate Rule 25(c)(4), Civil Rule 5(b)(2), and Criminal Rule 49(a)(3). We have also deleted the words “as of the notice’s date” from the provisions in Bankruptcy Rules 9036(c)(1) and 8011(c)(1), Appellate Rule 25(c)(1), Civil Rule 5(b)(2), and Criminal Rule 49(a)(3) stating that the notice of case activity constitutes service on persons registered to receive such notices.

C. Revision to provision on service of sealed filings

As the Committee knows, the goal of the service component of the project is to relieve self-represented litigants who file in paper from having to serve in paper when the recipient is already receiving the electronic notice of case activity. As shown in the fall 2025 drafts, the service-related proposal provided that the notice of case activity constituted service on anyone registered to receive notices of case activity, but also stated that “a court may provide by local rule that if a paper is filed under seal, it must be served by other means.”

This winter, we focused on the fact that, in fall 2025, a number of federal courts “implemented new procedures to prevent sealed filings from being accessed or viewed electronically in CM/ECF.”⁵ The reporters and Clerk liaisons discussed whether the requirement of service of sealed documents by other means should be part of the national rule rather than being left up to local discretion. Participants concluded that a national rule requiring sealed filings to be served by other means was unnecessary because court practices for handling and serving sealed documents may continue to evolve. The group favored preserving flexibility by leaving the decision to local rules or orders rather than imposing a uniform national requirement.

Accordingly, we retained the provision for local control (shown in the Civil Rule 5 draft as proposed new Civil Rule 5(b)(2)(B)). To accord further flexibility to courts, we expanded that provision by adding “order or,” thus: “a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means.”

D. Note language on requiring court permission to use e-filing system

The draft Committee Note to proposed 5(d)(2)(B) includes a bracketed sentence

4 This bracketed language was not in the version approved by the Criminal Rules Committee’s subcommittee – which originated this phrasing – but the bracketed language may be desirable for clarity, to flag that the sentence addresses completeness only for purposes of service by the notice of case activity, and not also for purposes of service by other means.

5 https://www.gand.uscourts.gov/sites/gand/files/general-ordes/2025-09-24%20Standing_Order_25-02-Access_and_Management_of_Sealed_Documents-Revised.pdf.

See also

https://www.wiwd.uscourts.gov/sites/default/files/Sealed%20Documents_Electronic%20Access%20and%20Service.pdf.

concerning the permissibility of a local provision requiring unrepresented parties to obtain court permission to use the court’s e-filing system. This language was included in the draft based on a suggestion from a member of the Criminal Rules Committee.

The bracketed statement – as shown in the enclosed draft – is: “[For example, local provisions that require unrepresented parties who seek to use the court’s electronic-filing system to obtain permission from the judge to whom the case is assigned would count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice.]”

On one hand, including this language would recognize existing practices in more than half of the federal courts of appeals and district courts.⁶ On the other hand, because it would be challenging for an unrepresented party to demonstrate that a court unreasonably withholds permission in practice, one concern is that this Note language might seem to bless local provisions that effectively deny e-filing to unrepresented parties in general.

E. Items resolved without a change to the draft

Some issues that were presented during the fall 2025 discussions appear – based on a combination of expressed agreement by some participants and an absence of expressed qualms from other participants – to have been resolved without a change to the draft rules. Here is a quick report on the two most notable issues:

- Whether to include the prison-mailbox rule in the scope of the current project
 - We had previously discussed whether it might be worthwhile to expand the project to include an update to the inmate-filing provisions in Appellate Rules 4(c)(1) and 25(a)(2)(A)(iii), and perhaps also those in the Habeas and Section 2255 Rules 3(d). All feedback received on this point favored excluding an update of the prison-mailbox rules from the scope of the current project, so the project will not tackle that issue.
- Whether the project should try to overhaul the clerk-refusal and local-form rules
 - My fall 2025 memo asked whether project participants were interested in expanding the project to encompass revisions to the rules that govern the clerk’s

⁶ See Tim Reagan, *United States District Courts’ Local Rules and Procedures on Electronic Filing by Self-Represented Litigants* (FJC 2025) at 1 (reporting that 54 federal districts “permit self-represented litigants to request permission to use the electronic filing system”); Tim Reagan, Carly Giffin, and Roy Germano, *Federal Courts’ Electronic Filing by Pro Se Litigants* (FJC 2025) at 6-7 (reporting that seven courts of appeals “allow [pro se litigants to register as CM/ECF users] with individual permission”).

rejection of a filing for noncompliance with national or local rules on form⁷ and the enforcement of local requirements on form.⁸ The consensus view is that the project should not expand to encompass those issues.

IV. Remaining variances across the rule sets in the package

We are proposing for publication possible amendments to Appellate Rule 25, Bankruptcy Rules 5005, 8011, and 9036, and Criminal Rule 49, as well as Civil Rule 5.⁹ As you can see from the enclosed comparison chart, we have tried to maintain parallel language across the proposals. But some variations have emerged as the committees have considered the proposals. In inter-committee projects like this one, we always prefer to use parallel language whenever possible; but the Standing Committee can be willing to approve deviations from parallel language where a particular rule set's needs justify those deviations. Below is a summary of the variances that have emerged and the reasons for them.

- Self-represented litigant (“SRL”) provisions generally: “unrepresented” versus “self-represented”
 - The Bankruptcy, Civil, and Appellate Rules will use the term “unrepresented” to describe SRLs, whereas the Criminal Rule will use “self-represented.” Though the latter is preferred by many project participants, implementing that preference is not practicable in the Bankruptcy, Civil, and Appellate Rules because too many existing rules in those sets would have to be amended correspondingly.
 - This difference seems warranted by differences between the rules sets (that is, that the current Criminal Rules use the term “unrepresented” only in Rule 49), so my working assumption is that it will be fine with the Standing Committee for Criminal to take a different approach than the other Advisory Committees. Notably, the proposed amendments to Criminal Rule 17 use the term “self-represented,” and the public comment on the Rule 17 proposal does not seem to have taken issue with the use of that phrase as a matter of terminology.
- SRL e-filing: “individual” versus “party”
 - The current rules vary in the term that they use to denote an unrepresented filer.

⁷ See Appellate Rule 25(a)(4), Bankruptcy Rule 5005(a)(1), Civil Rule 5(d)(4), and Criminal Rule 49(b)(5).

⁸ See Appellate Rule 47(a)(2), Bankruptcy Rule 9029(b), Civil Rule 83(a)(2), and Criminal Rule 57(a)(2).

⁹ We are also proposing for publication conforming amendments to the three-day rules in Civil Rule 6 and Criminal Rule 45; the Civil Rule 6 amendment proposal has not changed since you last saw it in fall 2025.

Criminal Rule 49 says “party,” Appellate Rule 25 and Civil Rule 5 say “person,” and the Bankruptcy Rules say “individual.” (Terminology in the Bankruptcy Rules is affected by the definitions in the Bankruptcy Code.)

- The term of choice will vary in the proposed amended rules as well. To denote the type of SRL who is encompassed in the new default principle of access to the court’s e-filing system, the Bankruptcy Rules Committee’s Technology Subcommittee has decided that Bankruptcy Rules 5005 and 8011 should use “individual.” By contrast, the proposed Appellate, Civil, and Criminal Rules use “party.”
 - The Bankruptcy Rules subcommittee considered and rejected the term “unrepresented party,” because it is concerned that that term would erroneously suggest to readers that a nonhuman litigant could represent itself. To avoid that possibility, they have decided that the Bankruptcy Rules should continue to use “individual,” which is the term those rules use to refer to a human being.
 - The current plan¹⁰ is for the other rule sets to use “party,” in order to emphasize that only those unrepresented litigants who are parties to a lawsuit are encompassed in the amended rules’ presumption of access to the court’s e-filing system. We have heard from participants that, from the clerk’s perspective, it’s important that the rule draw that boundary.
 - This variance in terminology may be justified by features of bankruptcy practice – that is, the number of artificial entities (eg, small creditors) that may participate in a bankruptcy proceeding and might wish to appear without a lawyer. By contrast, the other three sets of rules already use words (to denote unrepresented litigants) that encompass artificial entities – they say either “person” (Civil and Appellate) or “party” (Criminal) – and we haven’t heard of those terms giving rise to any erroneous assumptions that artificial entities can appear without a lawyer; so the concern that arose for the Bankruptcy subcommittee appears not to be an issue for the other three sets of rules.
- SRL e-filing: “in the case” versus “in the party’s case”
 - Proposed Bankruptcy Rules 5005(a)(3)(B)(i) and 8011(a)(2)(C)(i) refer to “receiv[ing] notice of activity in the case,” while proposed Appellate Rule 25(a)(2)(C)(i), Civil Rule 5(d)(2)(B)(i), and Criminal Rule 49(b)(2)(B)(i) refer to “receiv[ing] notice of activity in the party’s case.” The latter three rules specify “in the party’s case” because we have heard from clerk participants how

¹⁰ Subject, of course, to determination by the advisory committees of the question presented in Part II.

important it is to make clear that the default principle of access to e-filing should extend only to the case in which the SRL is a party, and not to other cases. But the Bankruptcy Rules will say, simply, “in the case” – because in the bankruptcy context, there is a concern that saying “in the individual’s case” would suggest that the denoted individual must always be the debtor, and that’s not true, because the rule is designed to extend to self-represented human *creditors* as well.

- SRL e-filing: requirements to e-file
 - This variance is carried forward from the existing rules. Unlike the other SRL e-filing default rules, proposed Criminal Rule 49(b)(2)(B)(i) (like existing Criminal Rule 49(b)(3)(B)) contains no provision about the circumstances under which a SRL can be required to e-file, because the Criminal Rules Committee has made a judgment call that the Criminal Rule shouldn’t authorize a court to require a SRL to e-file.
- E-filing and signatures:
 - Currently, all five relevant rules contain (with immaterial variations) the following provision, added in 2018: “A filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.” See, e.g., Civil Rule 5(d)(3)(C).
 - In the process of preparing the SRL-related amendments, the Bankruptcy Rules team has decided to amend their signature provisions to use “individual” instead of “person.” Their reason is that “person” (as defined in Section 101 of the Bankruptcy Code) includes some artificial entities, and their surmise is that only human beings can currently register for electronic-filing accounts. As noted above, to denote human entities, the Bankruptcy Rules use the term “individual.”
 - The Bankruptcy Code’s definitions are not relevant to the non-bankruptcy rule sets, and “person” has been used in all the signature rules for nearly eight years without causing any perceptible problem, so no change to the non-bankruptcy rules’ signature provisions is proposed for the other three sets of rules.
- Possible FRAP provision concerning nonparties permitted to e-file in the court below:
 - The Appellate Rules draft includes a sketch of a proposed Rule 25(a)(2)(C)(iii), which would accord presumptive access to the court of appeals’ e-filing system for a self-represented nonparty (e.g., an academic submitting an amicus brief) who was permitted to file electronically in the district court.

- “Documents” versus “papers” (this one is not a substantive variation, but is an intentional one):
 - Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and (in the main) Appellate Rule 25 use the word “paper,” while Bankruptcy Rules 8011 and 9036 use the word “document.” On the theory that internal consistency within a rule may be more valuable than consistency across rules, the proposals use “paper” in the amendments to Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and Appellate Rule 25, but use “document” in the amendments to Bankruptcy Rules 8011 and 9036.

Encls.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

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

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of

case activity]¹ is complete as of the notice's date. But these qualifications apply:

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

to be served; and

(B) a court may provide by order or local rule that if a paper is filed under seal, it

must be served by other means.

(3) Service by Other Means in General. A paper is may also be served under this rule

by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one

is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's

dwelling or usual place of abode with someone of suitable age and

discretion who resides there;

(C) mailing it to the person's last known address—in which event service is

complete upon mailing;

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

(E) ~~sending it to a registered user by filing it with the court's electronic filing~~

~~system or~~ sending it by ~~other~~ electronic means that the person has

consented to in writing—in ~~either of~~ which events service is complete

upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that

¹ See Part III.B of accompanying memorandum.

43 it did not reach the person to be served; or

44 (F) delivering it by any other means that the person has consented to in writing—

45 in which event service is complete when the person making service

46 delivers it to the agency designated to make delivery.

47 ~~(3) Using Court Facilities.~~ [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)] **(4) Definition**

48 **of “Notice of Case Activity.”** The term “notice of case activity” includes a notice

49 of docket activity, a notice of electronic filing, and any other similar electronic

50 notice provided to case participants through the court’s electronic-filing system to

51 inform them of activity on the docket.

52 * * *

53 **(d) Filing.**

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

55 **(A) Papers ~~after~~ After the Complaint.** Any paper after the complaint that is

56 required to be served must be filed no later than a reasonable time after

57 service. But disclosures under Rule 26(a)(1) or (2) and the following

58 discovery requests and responses must not be filed until they are used in

59 the proceeding or the court orders filing: depositions, interrogatories,

60 requests for documents or tangible things or to permit entry onto land, and

61 requests for admission.

62 **(B) Certificate of Service.** No certificate of service is required when a paper is

63 served through the court’s electronic-filing system under Rule 5(b)(2)~~by—~~

64 ~~filing it with the court’s electronic-filing system.~~ When a paper that is

required to be served is served by other means:

(i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or

within a reasonable time after service; and

(ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed,

unless filing is required by court order or by local rule.

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

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

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

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

(3) Electronic Filing and Signing.

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

Exceptions. A person represented by an attorney must file electronically,

unless nonelectronic filing is allowed by the court for good cause or is

allowed or required by local rule.

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

(i) **In General.** ~~An unrepresented party person not represented by an~~

~~attorney: (i) may file electronically only if allowed by~~ use the

court's electronic-filing system to file papers and receive notice of

activity in the party's case, unless a court order or by local rule

prohibits the party from doing so.; and (ii) An unrepresented

person may be required to file electronically only by ~~court~~ court order in

a case; or by a local rule that includes reasonable exceptions.

87 (ii) **Conditions and Restrictions on Access.** A court may set and enforce
88 reasonable conditions and restrictions on unrepresented parties’
89 access to the court’s electronic-filing system (including by denying
90 or revoking access for a particular unrepresented party). But the
91 court may not prohibit all unrepresented parties from using the
92 system unless that prohibition includes reasonable exceptions or
93 the court permits the use of another electronic method for filing
94 papers and receiving electronic notice of activity in the party’s
95 case.

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

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

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

102 (A) to the clerk; or

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

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

107 **Committee Note**

108
109 Rule 5 is amended to address two topics concerning unrepresented parties. (Concurrent
110 amendments are made to Bankruptcy Rules 5005, 8011, and 9036, Criminal Rule 49, and

Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Also, the order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern primacy of electronic filing. A few stylistic changes are also made.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Former Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Former Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

Amended Rule 5(b)(2) provides that, for purposes of any deadlines for making service, service by a notice of case activity is complete as of the date of filing. But the amended rule provides that, for purposes of any deadlines that run from the date of service, service is complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there is a delay between the date the court receives a filing not made through the electronic-filing system and the date the court uploads that filing into the electronic-filing system, that delay will not diminish the time allowed to the party whose deadline runs from the date of service.

Amended Rule 5(b)(2)(A) carries forward the provision – previously found in former Rule 5(b)(2)(E) – that service by means of the court's electronic-filing system is not effective if the filer learns that it did not reach the person to be served.

Amended Rule 5(b)(2)(B) states that a court may provide by order or local rule that if a

paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of former Rule 5(b)(2), with two changes – one to the subdivision's introductory phrase and the other to what becomes Rule 5(b)(3)(E).

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives notices of case activity. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

Subdivision (b)(3)(E). The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2).

Subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served"; a similar provision is also included in Rule 5(b)(2)(A) with respect to service via the court's electronic-filing system.

Subdivision (b)(4). New Rule 5(b)(4) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(1)(B). Subdivision (d)(1)(B) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "through the court's electronic-filing system under Rule 5(b)(2)" in order to conform to the change to subdivision (b)(2).

Subdivision (d)(2)(B). Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. (The rule grants this presumptive authorization to an unrepresented 'party,' not an unrepresented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system.) If a district wishes to restrict unrepresented parties' access to the court's electronic-filing system, it must

199 adopt an order or local rule to impose that restriction.

201 New Rule 5(d)(2)(B)(ii) states that the court may set reasonable conditions and
202 restrictions on unrepresented parties' access to the court's electronic-filing system. For example,
203 access to electronic filing could be allowed only to unrepresented parties who are not
204 incarcerated (in light of the distinctive logistical considerations that apply in carceral settings),
205 who satisfactorily complete required training and/or certifications, and who comply with any
206 other reasonable conditions on access.

208 New Rule 5(d)(2)(B)(ii) expressly states that a reasonable restriction would include,
209 where appropriate, orders barring a specific unrepresented party from accessing the court's
210 electronic-filing system, or revoking a specific unrepresented party's access to the court's
211 electronic-filing system. Another example would be a local provision stating that certain types of
212 filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing
213 system.

215 However, new Rule 5(d)(2)(B)(ii) also expressly prohibits a court from barring all
216 unrepresented parties from using the court's electronic-filing system, unless the court also either
217 (1) includes reasonable exceptions to the prohibition, or (2) permits unrepresented parties to use
218 another electronic method for filing documents (such as by email or by upload through an
219 electronic document submission system) and an alternative electronic means for receiving notice
220 of court filings and orders (such as an electronic noticing program). [For example, local
221 provisions that require unrepresented parties who seek to use the court's electronic-filing system
222 to obtain permission from the judge to whom the case is assigned would count as including
223 reasonable exceptions, so long as such permission is not unreasonably withheld in practice.]

226 **Rule 6. Computing and Extending Time; Time for Motion Papers**

227 * * *

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

232 **Committee Note**

233
234 Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule
235 5(b)(3).

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

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

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing

System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person ~~as of the notice's date. But. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of~~

22 service, service [by a notice of case activity]¹ is complete as of the notice's date.

23 But these qualifications apply:

24 ~~((A))~~ such service is not effective if the filer learns that it did not reach the person
25 to be served; and

26 ~~(B))~~ a court may provide by order or local rule that if a paper is filed under seal,
27 it must be served by other means.

28 **(3) Service by Other Means in General.** A paper is may also be served under this rule

29 by:

30 (A) handing it to the person;

31 (B) leaving it:

32 (i) at the person's office with a clerk or other person in charge or, if no one

33 is in charge, in a conspicuous place in the office; or

34 (ii) if the person has no office or the office is closed, at the person's

35 dwelling or usual place of abode with someone of suitable age and

36 discretion who resides there;

37 (C) mailing it to the person's last known address—in which event service is
38 complete upon mailing;

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

40 (E) ~~sending it to a registered user by filing it with the court's electronic filing~~

41 ~~system or~~ sending it by other electronic means that the person has

42 consented to in writing—in either of which events service is complete

1 See Part III.B of accompanying memorandum.

upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person has consented to in writing—
in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~(3) Using Court Facilities.~~ [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)] ~~(4) Serving~~

~~Papers That Are Not Filed. Rule 5(b)(3) governs service of a paper that is not filed.~~

~~(5)~~ **(4) Definition of “Notice of Case Activity.”** The term “notice of case activity” ~~in this rule~~ includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court’s electronic-filing system to inform them of activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

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

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

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

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

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

77 **(3) ~~Electronic Filing and Signing.~~**

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

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

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

83 (i) **In General.** ~~A~~An unrepresented party ~~person not represented by an~~
84 ~~attorney:~~ (i) may file electronically only if allowed by use the
85 court's electronic-filing system to file papers and receive notice of
86 activity in the party's case, unless a court order or by local rule

prohibits the party from doing so.; and (ii) An unrepresented person may be required to file electronically only by court order in a case, or by a local rule that includes reasonable exceptions.

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

~~(iii) **Conditions and Restrictions on Access.** A court may set (ii) **Conditions and Restrictions on Access.** A court may set and enforce reasonable conditions and restrictions on unrepresented parties’ access to the court’s electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party’s case.~~

~~(iv) **Restrictions on a Particular Person.** A court may deny a particular person access to the court’s electronic filing system and may~~

~~revoke a person's previously granted access for not complying
with the conditions authorized in (iii).~~

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

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

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

(A) to the clerk; or

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

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

Committee Note

Rule 5 is amended to address two topics concerning unrepresented parties. (Concurrent amendments are made to ~~[add cites to Bankruptcy Rules]~~, 5005, 8011, and 9036, Criminal Rule 49, and Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Also, the order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern primacy of electronic filing. A few stylistic changes are also made.

139 **Subdivision (b).** Rule 5(b) is restructured so that the primary means of service – that is,
140 service by means of the court’s electronic-filing system – is addressed first, in subdivision
141 5(b)(2). ~~ExistingFormer~~ Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address
142 alternative means of service. New Rule 5(b)(4) ~~addresses service of papers not filed with the~~
143 ~~court, and new Rule 5(b)(5)~~ defines the term “notice of case activity” as any electronic notice
144 provided to case participants through the court’s electronic-filing system to inform them of a
145 filing or other activity on the docket.

146
147 **Subdivision (b)(2).** Amended Rule 5(b)(2) eliminates the requirement of separate
148 (paper) service (of documents after the complaint) on a litigant who is registered to receive a
149 notice of case activity from the court’s electronic-filing system. Litigants who are registered to
150 receive a notice of case activity include those litigants who are participating in the court’s
151 electronic-filing system with respect to the case in question and also include those litigants who
152 receive the notice because they have registered for a court-based electronic-noticing program.
153 (~~CurrentFormer~~ Rule 5(b)(2)(E)’s provision for service by “sending [a paper] to a registered user
154 by filing it with the court’s electronic-filing system” had already eliminated the requirement of
155 paper service on registered users of the court’s electronic-filing system by other registered users
156 of the system; the amendment extends this exemption from paper service to those who file by a
157 means other than through the court’s electronic-filing system.)

158
159 ~~[The last sentence of amended Rule 5(b)(2)] [Rule 5(b)(2)(B)] states that a court may~~
160 ~~provide by~~ Amended Rule 5(b)(2) provides that, for purposes of any deadlines for making
161 service, service by a notice of case activity is complete as of the date of filing. But the amended
162 rule provides that, for purposes of any deadlines that run from the date of service, service is
163 complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there
164 is a delay between the date the court receives a filing not made through the electronic-filing
165 system and the date the court uploads that filing into the electronic-filing system, that delay will
166 not diminish the time allowed to the party whose deadline runs from the date of service.

167
168 Amended Rule 5(b)(2)(A) carries forward the provision – previously found in former
169 Rule 5(b)(2)(E) – that service by means of the court’s electronic-filing system is not effective if
170 the filer learns that it did not reach the person to be served.

171
172 Amended Rule 5(b)(2)(B) states that a court may provide by order or local rule that if a
173 paper is filed under seal, it must be served by other means. This sentence is designed to account
174 for districts in which parties in the case cannot access other participants’ sealed filings via the
175 court’s electronic-filing system.

176
177 **Subdivision (b)(3).** Subdivision (b)(3) carries forward the contents of ~~currentformer~~ Rule
178 5(b)(2), with two changes: – one to the subdivision’s introductory phrase and the other to what
179 becomes Rule 5(b)(3)(E).

180
181 The subdivision’s introductory phrase (“A paper is served under this rule by”) is
182 amended to read “A paper may also be served under this rule by.” This locution ensures that

what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives notices of filing-case activity. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

Subdivision (b)(3)(E). The prior reference to “sending [a paper] to a registered user by filing it with the court's electronic-filing system” is deleted, because this is now covered by new Rule 5(b)(2).

~~[Subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender “learns that it did not reach the person to be served”; a similar provision is also included in subdivision (b)(2) with respect to service via the court's electronic filing system.] [Although subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender “learns that it did not reach the person to be served,” no such proviso is included in new subdivision (b)(2). This is because experience has demonstrated the general reliability of notice and service through the court's electronic filing system on those registered to receive notices of electronic filing from that system.] Rule 5(b)(2)(A) with respect to service via the court's electronic-filing system.~~

~~**Subdivision (b)(4).** New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a notice of case activity, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).~~

~~**Subdivision (b)(5).** New Rule 5(b)(5)~~

Subdivision (b)(4). New Rule 5(b)(4) defines the term “notice of case activity” as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. “Notice of case activity” is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word “electronic” is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(1)(B). Subdivision (d)(1)(B) previously provided that no certificate of service was required when a paper was served “by filing it with the court's electronic-filing system.” This phrase is replaced by ~~“[through the court's electronic-filing system]~~ under Rule 5(b)(2)” in order to conform to the change to subdivision (b)(2).

Subdivision (d)(2)(B). Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. (The rule grants this presumptive authorization to an unrepresented ‘party,’ not an unrepresented ‘person’; the rule

does not grant nonparty nonlawyers any right to use the court’s e-filing system.) If a district wishes to restrict unrepresented parties’ access to the court’s electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under New Rule 5(d)(2)(B)(ii),) states that the court may set reasonable conditions and restrictions on unrepresented parties’ access to the court’s electronic-filing system. For example, access to electronic filing could be allowed only to unrepresented parties who are not incarcerated (in light of the distinctive logistical considerations that apply in carceral settings), who satisfactorily complete required training and/or certifications, and who comply with any other reasonable conditions on access.

New Rule 5(d)(2)(B)(ii) expressly states that a reasonable restriction would include, where appropriate, orders barring a specific unrepresented party from accessing the court’s electronic-filing system, or revoking a specific unrepresented party’s access to the court’s electronic-filing system. Another example would be a local rule or general court order that bars parties not represented provision stating that certain types of filings – for example, notices of appeal – cannot be filed by an attorney from means of the court’s electronic-filing system.

However, new Rule 5(d)(2)(B)(ii) also expressly prohibits a court from barring all unrepresented parties from using the court’s electronic-filing system—must include, unless the court also either (1) includes reasonable exceptions, unless that court— to the prohibition, or (2) permits the unrepresented parties to use of another electronic method for filing documents—and receiving electronic notice of activity in the case. But Rule 5(d)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court’s electronic-filing system.

A court can comply with Rules 5(d)(2)(B)(ii) and (iii) by doing either of the following:— (1) Allowing reasonable access for unrepresented parties to the court’s electronic-filing system, or (2) providing unrepresented parties with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). That is, a [For example, local rule generally prohibiting access provisions that require unrepresented parties who seek to use the court’s electronic-filing system to obtain permission from the judge to whom the case is assigned would include “count as including reasonable exceptions” (within the meaning of the Rule) if it provided reasonable access to the court’s electronic-filing system., so long as such permission is not unreasonably withheld in practice.]

For a court that adopts the option of allowing reasonable access to the court’s electronic-filing system, the concept of “reasonable access” encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral settings) and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings—for example, notices of appeal—cannot be filed by means of the court’s electronic-filing system. [Some courts have adopted local rules that

271 permit unrepresented parties to use the court’s electronic filing system only if they obtain
272 permission from the judge to whom the case is assigned; such a local rule would meet the Rule’s
273 requirement of “reasonable access” so long as such permission is not unreasonably withheld in
274 practice.] Rule 5(d)(2)(B)(ii) refers to “a local rule—or any other local court provision that
275 extends beyond a particular litigant or case” to make clear that Rule 5(d)(2)(B)(ii) does not
276 restrict a court from entering an order barring a specific unrepresented litigant from accessing the
277 court’s electronic filing system.

278
279 For a court that opts to provide unrepresented parties with an alternative electronic means
280 for filing and an alternative electronic means for receiving notice of court filings and orders, the
281 rule does not require the court to accept emailed or uploaded files in any and all formats. A court
282 is free to set reasonable requirements such as that the files be in PDF format. [But see Civil Rule
283 83(a)(2) (“A local rule imposing a requirement of form must not be enforced in a way that causes
284 a party to lose any right because of a nonwillful failure to comply.”).]

285
286 Rules 5(d)(2)(B)(ii) and (iii) are intended to work in tandem. Where a local rule prohibits
287 unrepresented parties from using the court’s e-filing system, the “reasonable exceptions”
288 required by item (ii) should align with the types of “reasonable conditions and restrictions”
289 referenced in item (iii). That is, a local rule may allow unrepresented parties e-filing access only
290 in particular circumstances—such as after completing a training or agreeing to specified
291 formatting standards—provided those requirements are reasonable under item (iii).

292
293 Conversely, item (iii)’s authorization for courts to impose reasonable conditions on
294 unrepresented parties’ access also informs what counts as a reasonable exception under item (ii).
295 For example, a local rule that generally prohibits unrepresented parties from e-filing might
296 nonetheless provide an exception where the unrepresented party meets conditions similar to
297 those described in item (iii). The two provisions thus establish a flexible, complementary
298 framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures
299 that courts retain authority to structure access responsibly.

300
301 Rule 5(d)(2)(B)(iv) provides that the court may deny a specific unrepresented litigant
302 access to the court’s electronic filing system, and that the court may revoke an unrepresented
303 litigant’s access to the court’s electronic filing system.

1 2 **Rule 6. Computing and Extending Time; Time for Motion Papers**

3 * * *

4 **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a
5 specified time after being served and service is made under Rule 5(b)(23)(C) (mail), (D)

(leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

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

SRL provision comparison chart, March 20, 2026

This comparison chart shows – as clean rule text – the various SRL e-filing and service provisions, along with other related provisions in the affected rules.

Bankruptcy (not appellate)	Bankruptcy (appellate)	Appellate	Civil	Criminal
<i>E-filing general rule:</i>	<i>E-filing general rule:</i>	<i>E-filing general rule:</i>	<i>E-filing general rule:</i>	<i>E-filing general rule:</i>
Bankruptcy Rule 5005(a)(3)(A): (3) Electronic Filing and Signing. (A) By a Represented Entity--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.	Bankruptcy Rule 8011(a)(2)(B): (B) Electronic Filing By a Represented Entity—Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.	FRAP 25(a)(2)(B): (B) Electronic Filing by a Person Represented by Counsel--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.	Civil Rule 5(d)(2)(A): (2) Electronic Filing and Signing. (A) By a Person Represented by Counsel—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.	Criminal Rule 49(b)(2)(A): (2) Electronic Filing and Signing. (A) By a Party Represented by Counsel – Generally Required; Exceptions. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

<i>E-filing SRL default rule:</i>	<i>E-filing SRL default rule:</i>	<i>E-filing SRL default rule:</i>	<i>E-filing SRL default rule:</i>	<i>E-filing SRL default rule:</i>
Bankruptcy Rule 5005(a)(3)(B)(i): (B) By an Unrepresented Individual—When Allowed or Required. (i) In General. An unrepresented individual may use the court’s electronic-filing system to file papers and receive notice of activity in the case, unless a court order or local rule prohibits the individual from doing so. An unrepresented individual may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	Bankruptcy Rule 8011(a)(2)(C)(i): (C) Electronic Filing By an Unrepresented Individual—When Allowed or Required. (i) In General. An unrepresented individual may use the court’s electronic-filing system to file documents and receive notice of activity in the case, unless a court order or local rule prohibits the individual from doing so. An unrepresented individual may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	FRAP 25(a)(2)(C)(i): (C) Electronic Filing by an Unrepresented Party--When Allowed or Required. (i) In General. An unrepresented party may use the court’s electronic-filing system to file papers and receive notice of activity in the party’s case, unless a court order or local rule prohibits the party from doing so. An unrepresented person may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	Civil Rule 5(d)(2)(B)(i): (B) By an Unrepresented Party—When Allowed or Required. (i) In General. An unrepresented party may use the court’s electronic-filing system to file papers and receive notice of activity in the party’s case, unless a court order or local rule prohibits the party from doing so. An unrepresented person may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	Criminal Rule 49(b)(2)(B)(i): (B) By a Self-Represented Party – When Allowed. (i) In General. A self-represented party may use the court’s electronic-filing system to file papers and receive notice of activity in the party’s case, unless a court order or local rule prohibits the party from doing so.

<i>E-filing SRL conditions:</i>	<i>E-filing SRL conditions:</i>	<i>E-filing SRL conditions:</i>	<i>E-filing SRL conditions:</i>	<i>E-filing SRL conditions:</i>
Bankruptcy Rule 5005(a)(3)(B)(ii): (ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented individuals' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented individual). But the court may not prohibit all unrepresented individuals from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the case.	Bankruptcy Rule 8011(a)(2)(C)(ii): (ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented individuals' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented individual). But the court may not prohibit all unrepresented individuals from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case.	FRAP 25(a)(2)(C)(ii): (ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.	Civil Rule 5(d)(2)(B)(ii): (ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.	Criminal Rule 49(b)(2)(B)(ii): (ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on self-represented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular self-represented party). But the court may not prohibit all self-represented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.

<i>E-filing & signature:</i>	<i>E-filing & signature:</i>	<i>E-filing & signature:</i>	<i>E-filing & signature:</i>	<i>E-filing & signature:</i>
Bankruptcy Rule 5005(a)(3)(C): (C) Signing. A filing made through an individual's electronic-filing account and authorized by that individual, together with the individual's name on a signature block, constitutes the individual's signature.	Bankruptcy Rule 8011(e): (e) Signature Always Required. (1) Electronic Filing. Every document filed electronically must include the electronic signature of the individual filing it or, if an entity is represented, the counsel's electronic signature. A filing made through an individual's electronic-filing account and authorized by that individual—together with that individual's name on a signature block—constitutes the individual's signature. (2) Paper Filing. Every document filed in paper form must be signed by the individual filing it or, if an entity is represented, by the entity's counsel.	FRAP 25(a)(2)(D): (D) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.	Civil Rule 5(d)(2)(C): (C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.	Criminal Rule 49(b)(2)(D): (D) Signature. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature.

Service required:	Service required:	Service required:	Service required:	Service required:
<i>[NB: No need to revise Rule 5005(b) (“Sending Copies to the United States Trustee”), because it does not specify that sending must be “at or before the time of filing.” Rule 9036 does not include a provision requiring service.]</i>	Rule 8011(b): (b) Service of All Documents Required. Unless a rule requires service by the clerk or the document will be served through the court’s electronic-filing system under (c)(1), a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party's counsel.	FRAP 25(b): (b) Service of All Papers Required. Unless a rule requires service by the clerk or the paper will be served through the court’s electronic-filing system under Rule 25(c)(1), a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.	<i>[NB: No need to revise Civil Rule 5(a) (“Service: When Required”), because it does not specify that service must be “at or before the time of filing.”]</i>	<i>[NB: No need to revise Criminal Rule 49(a)(1) (“Service on a Party. What is Required”), because it does not specify that service must be “at or before the time of filing.”]</i>

Service by NCA:	Service by NCA:	Service by NCA:	Service by NCA:	Service by NCA:
Rule 9036(c)(1): (c) Notices from and Service by an Entity. (1) Notice of Case Activity Sent Through the Court’s Electronic-Filing System. A notice of case activity sent to an [individual] [entity] registered to receive it through the court’s electronic-filing system constitutes notice or service on that [individual] [entity], with these qualifications: (A) such notice or service is not effective if the filer [learns] [receives notice] that it did not reach the [individual] [entity] to be notified or served; and (B) a court may provide by order or local rule that if a document is filed under seal, neither service nor notice occurs under this paragraph (c)(1).	Rule 8011(c)(1): (c) Manner of Service. (1) Service by a Notice of Case Activity Sent Through the Court’s Electronic-Filing System. A notice of case activity sent to an [individual] [entity] registered to receive it through the court’s electronic-filing system constitutes service on that [individual] [entity], with these qualifications: (A) such service is not effective if the filer [learns] [receives notice] that it did not reach the [individual] [entity] to be served; and (B) a court may provide by order or local rule that if a document is filed under seal, it must be served by other means.	FRAP 25(c)(1): (c) Manner of Service. (1) Service by a Notice of Case Activity Sent Through the Court’s Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court’s electronic-filing system constitutes service on that person, with these qualifications: (A) such service is not effective if the filer learns that it did not reach the person to be served; and (B) a court may provide by order or local rule that if a paper is filed under seal or initiates a proceeding in the court of appeals under Rule 5, 6(c), 15, or 21, it must be served by other means.	Civil Rule 5(b)(2): (b) Service: How Made.... (2) Service by a Notice of Case Activity Sent Through the Court’s Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court’s electronic-filing system constitutes service on that person. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice’s date. But these qualifications apply: (A) such service is not effective if the filer learns that it did not reach the person to be served; and (B) a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means.	Criminal Rule 49(a)(3): (3) Service by a Notice of Case Activity Sent Through the Court’s Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court’s electronic-filing system constitutes service on that person. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice’s date. But these qualifications apply: (A) such service is not effective if the filer learns that it did not reach the person to be served; and (B) a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means.

Service / other electronic means:	Service / other means:	Service / other means:	Service / other means:	Service / other means:
[NB: Rule 9036 focuses on electronic notice & service, so its “other means” provision focuses only on other electronic means.] Rule 9036(c)(2): (2) Electronic Means Consented To. An entity may also send notice or serve a document by electronic means that the recipient consented to in writing, including by designating an electronic address for receiving notices. But such notice or service is not effective if the sender [learns] [receives notice] that it did not reach the entity to be notified or served.	Rule 8011(c)(2): (2) Service by Other Means. A document may also be served under this rule by: (A) personal delivery; (B) mail; (C) third-party commercial carrier for delivery within 3 days; or (D) electronic means that the entity served has consented to in writing, but such electronic service is not effective if the sender [learns] [receives notice] that it did not reach the entity to be served.	FRAP 25(c)(2): (2) Service by Other Means. A paper may also be served under this rule by: (A) personal delivery, including delivery to a responsible person at the office of counsel; (B) mail; (C) third-party commercial carrier for delivery within 3 days; or (D) sending it by electronic means that the person to be served has consented to in writing, but such electronic service is not effective if the sender learns that it did not reach the person to be served.	Civil Rule 5(b)(3): (3) Service by Other Means. A paper may also be served under this rule by: (A) handing it to the person; (B) leaving it: (i) at the person’s office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or (ii) if the person has no office or the office is closed, at the person’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; (C) mailing it to the person’s last known address—in which event service is complete upon mailing; (D) leaving it with the court clerk if the person has no known address;	Criminal Rule 49(a)(4): (4) Service by Other Means. A paper may also be served by: (A) handing it to the person; (B) leaving it: (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; (C) mailing it to the person's last known address – in which event service is complete upon mailing; (D) leaving it with the court clerk if the person has no known address;

			(E) sending it by electronic means that the person has consented to in writing—in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or (F) delivering it by any other means that the person has consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.	(E) sending it by electronic means that the person has consented to in writing – in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or (F) delivering it by any other means that the person has consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

Service / completeness:	Service / completeness:	Service / completeness:	Service / completeness:	Service / completeness:
Rule 9036(d): (d) When Notice or Service Is Complete; Keeping an Address Current. (1) Notice of Case Activity Sent Through the Court’s Electronic-Filing System. For any notice or service deadlines, notice or service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of notice or service, notice or service [by a notice of case activity] is complete as of the date of the notice of case activity. (2) Other Electronic Means. Electronic notice or service by other electronic means is complete upon sending.	Rule 8011(c)(3): (3) When Service Is Complete. (A) For Service by a Notice of Case Activity. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice’s date. (B) For Service by Other Electronic Means. Service by other electronic means is complete on sending. (C) For Service by Mail or Commercial Carrier. Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier.	FRAP 25(c)(4): (4) When Service Is Complete. (A) For Service by Mail or Commercial Carrier. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. (B) For Service by a Notice of Case Activity. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice’s date. (C) For Service by Other Electronic Means. Service by other electronic means is complete on sending.	<i>[Civil Rule 5 does not have a discrete subpart focused on completeness. Rather, the current rule addresses completeness in Rule 5(b)(2)(C), (E), and (F). The amended rule retains those mentions of completeness and addresses completeness for service by means of the NCA in Rule 5(b)(2).]</i> Civil Rule 5(b)(2): For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice’s date.	<i>[Criminal Rule 49 does not have a discrete subpart focused on completeness. Rather, the current rule addresses completeness in Rules 49(a)(3)(A) & (B) and 49(a)(4)(C) & (E). The amended rule retains (though relocates) three of these mentions of completeness and addresses completeness for service by means of the NCA in Rule 49(a)(3).]</i> Criminal Rule 49(a)(3): For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice’s date.

NB: The proposed language approved by the Criminal Rules Committee’s subcommittee (which originated the latest phrasing of this provision) did not include the bracketed language. The bracketed language is offered for consideration because it may be desirable to make entirely clear that the second sentence, like the first, pertains only to service by a notice of case activity and not service by other means.

NCA defined:	NCA defined:	NCA defined:	NCA defined:	NCA defined:
Rule 9036(c)(3): (3) Definition of “Notice of Case Activity.” The term “notice of case activity” includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court’s electronic-filing system to inform them of activity on the docket.	Rule 8011(c)(4): (4) Definition of “Notice of Case Activity.” The term “notice of case activity” includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court’s electronic-filing system to inform them of activity on the docket.	FRAP 25(c)(5): (5) Definition of “Notice of Case Activity.” The term “notice of case activity” includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court’s electronic-filing system to inform them of activity on the docket.	Civil Rule 5(b)(4): (4) Definition of “Notice of Case Activity.” The term “notice of case activity” includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court’s electronic-filing system to inform them of activity on the docket.	Crim Rule 49(a)(5): (5) Definition of “Notice of Case Activity.” The term “notice of case activity” includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court’s electronic-filing system to inform them of activity on the docket.

Certificate of service:	Certificate of service:	Certificate of service:	Certificate of service:	Certificate of service:
<i>[NB: Rule 5005 doesn't discuss service, and while Rule 9036 addresses service, it does not address proof of service.]</i>	<i>[NB: The overarching SRL project does not give rise to a need to revise Rule 8011(d)(1) ("Proof of Service. Requirements"), because it already uses the language "if it was served other than through the court's electronic-filing system," thus accommodating service (by means of the notice of case activity) of a filing made in paper form by a SRL. However, based on its review of bankruptcy-specific terminology, the Bankruptcy Rules Committee will update Rule 8011(d)(1) to use the terms "entity" and "individual" instead of "person."]</i>	<i>[NB: No need to revise FRAP 25(d)(1) ("Proof of Service"), because it already uses the language "if it was served other than through the court's electronic-filing system," thus accommodating service (by means of the notice of case activity) of a filing made in paper form by a SRL.]</i>	Civil Rule 5(d)(1)(B): (B) Certificate of Service. No certificate of service is required when a paper is served through the court's electronic-filing system under Rule 5(b)(2). When a paper that is required to be served is served by other means: (i) if it is filed, a certificate of service must be filed with it or within a reasonable time after service; and (ii) if it is not filed, a certificate of service need not be filed, unless filing is required by court order or by local rule.	Criminal Rule 49(b)(1): (b) Filing. (1) When Required; Certificate of Service. Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served through the court's electronic-filing system under Rule 49(a)(3). When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

TAB 11

MEMORANDUM

TO: Advisory Committee on Civil Rules

FROM: Andrew Bradt, Associate Reporter
Sarah Sraders, Counsel, Rules Committee Staff

RE: Privacy-Related Amendments to the Federal Rules of Procedure

DATE: March 24, 2026

This memorandum sets forth proposed amendments to Civil Rule 5.2, “Privacy Protection for Filings Made with the Court,” to correspond to anticipated amendments to the parallel privacy provisions in Criminal Rule 49.1. These proposed amendments are the culmination of a Standing Committee project initiated in 2022 to explore updated privacy protections across all relevant rule sets (Civil, Criminal, Bankruptcy, and Appellate). All four advisory committees anticipate action items in their spring 2026 meetings to approve their respective privacy amendments for publication and public comment. Assuming those votes are in the affirmative, the Standing Committee will then be able to review all four sets of amendments at its June 2026 meeting, and if appropriate, approve them for publication and public comment (with the comment period to begin in August 2026).

Background

With the advent of electronic public filing, the E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, “to protect privacy and security concerns relating to electronic filing of documents and the public availability ... of documents filed electronically.” Pub. L. No. 107-347, 116 Stat. 2914, § 205(c)(3)(A)(i). Pursuant to that directive, the rules of practice and procedure were amended, effective December 1, 2007, to include the following rules (the privacy rules)—Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. The Civil and Criminal Rules generally contain parallel provisions. The Appellate and Bankruptcy Rules reflect necessary variations in those types of proceedings.

Of relevance to the proposed amendments under consideration, the current privacy rules generally require redaction in any public court filing all but the last four numbers in an “individual’s social-security number [and] taxpayer-identification number” (SSNs and ITINs). The rules further require use of a “minor’s initials” for any individual named in the public filing “known to be a minor.”

In 2022, the Standing Committee formed a joint committee to determine if additional privacy protections were warranted. As discussed in greater detail in the [October 2025 agenda book](#), the joint committee project ultimately focused on whether to amend the existing privacy rules to require: (1) complete redaction of SSNs and ITINs; and (2) use of a pseudonym when identifying a minor in public filings, rather than the minor’s initials.

At their fall 2025 meetings, the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees provided feedback on the proposed drafts of each committee's respective amendments. The areas of discussion focused on four primary issues, as set forth below.

1. In general, whether complete redaction of individual social security numbers or taxpayer identification numbers is appropriate?

The Civil and Criminal Rules Committees have so far expressed no opposition to requiring complete redaction of SSNs and ITINs in public court filings. The Appellate Rules currently apply the privacy rules that applied to that case in the court below, but the Appellate Rules Committee supports amending Appellate Rule 25 to require complete redaction of SSNs and ITINs in appeals, regardless of the privacy requirements that applied in the proceeding below.

The Bankruptcy Rules Committee, however, determined that the unique nature of bankruptcy proceedings required adhering to the existing rule in Bankruptcy Rule 9037(a)(1) to redact all but the last four digits of SSNs and ITINs. For purposes of bankruptcy appeals, however, the Bankruptcy Rules Committee decided that Rule 8011, which is the counterpart to Appellate Rule 25, should treat appeals uniformly, regardless of the rule applied in the bankruptcy court. Thus, the Bankruptcy Rules Committee plans to propose amendments to Rule 8011 that would provide for complete redaction of SSNs and ITINs in appeals from bankruptcy courts to district courts and bankruptcy appellate panels.

2. Should Employer Identification Numbers (EINs) of both individuals and entities, and Adoption Taxpayer Identification Numbers (ATINs) be included in the privacy protections?

The privacy rules do not expressly address Employer Identification Numbers (EINs), which the IRS requires for individuals and entities that have employees and need to pay employment or other related taxes. An EIN is also required to operate a business entity. An Adoption Taxpayer Identification Number (ATIN) is a temporary taxpayer identification number for a child in a domestic adoption if the adoptive parents do not have and/or are unable to obtain the child's SSN while the final adoption is pending.

In its thorough review of the need to protect taxpayer identification information, the Criminal Rules Committee has evaluated whether there are risks associated with unredacted EINs and ATINs that would warrant the same protection as SSNs and ITINs. The issue of EINs and ATINs was discussed at the fall 2025 Civil and Criminal Rules Committee meetings. Recently, the Department of Justice (DOJ) has informed the Criminal Rules Committee that while it supports complete redaction of SSNs and ITINs in both civil and criminal cases, DOJ does not support redaction of EINs and ATINs because these numbers do not present a risk of identity theft and redacting them would create a significant burden. The Criminal Rule 49.1 Subcommittee is currently considering whether to recommend to the Criminal Rules Committee complete redaction of EINs and ATINs and plans to meet in early April 2026. An oral update on the Subcommittee's recommendation, if finalized by the Civil Rules meeting, will be provided at the meeting.

The Appellate Rules Committee has previously expressed no objection to requiring redaction of EINs and ATINs.

The Bankruptcy Rules Committee determined that it would be inappropriate, given the nature of their proceedings, to require complete or even partial redaction of EINs. It decided to continue to treat ITINs in the same way as individual SSNs (that is, by requiring redaction of all but the last four digits), but provide no additional protection for ATINs or EINs. Thus, the Bankruptcy Rules Committee suggests no change to existing Rule 9037 in this regard.

3. *In general, whether the redaction requirement relating to the names of minors should be changed from initials to pseudonyms?*

All four advisory committees expressed support for amending their privacy rules to require the use of pseudonyms, rather than initials, for minors.

4. *Should the redaction requirement be clarified to expressly indicate that it applies not only to filings, but also to exhibits and attachments?*

All four advisory committees expressed support for requiring redaction of exhibits and attachments.

Discussion

In light of this background and the desire of the Standing Committee to consider all proposed privacy amendments at its June 2026 meeting, the Civil Rules Advisory Committee is asked to consider the proposed amendments to Rule 5.2 detailed at the end of this memorandum (a redline version of Rule 5.2 is attached). This redline is consistent with the existing proposal to amend Criminal 49.1.

As mentioned previously, neither the Rule 49.1 Subcommittee nor the Criminal Rules Advisory Committee has met at the time of this writing, and additional revisions may be recommended at those meetings. To the extent that any proposed amendments to Rule 5.2 recommended and approved by the Civil Rules Advisory Committee differ from those approved by the Criminal Rules Committee, the Standing Committee can make revisions to harmonize any language between the two rule sets prior to approving both for publication and public comment.

Proposed Amendments to Rule 5.2

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) **Redacted Filings.** Unless the court orders otherwise, ~~in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial account number, a party or nonparty making the filing may include only;~~ an electronic or paper filing with the court, including any exhibit or attachment, must:

(1) ~~the last four digits of the~~ omit or completely redact all social-security number ~~and~~ or other taxpayer-identification numbers, including employer-identification numbers; and

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

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

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

~~(4)(C) the last four digits of the~~ a financial-account number.

* * * * *

Committee Note

In contrast to the current rule, which allows public filings to contain the last four digits of social-security and taxpayer identification numbers, the amendment requires the omission or redaction of all digits of social-security and taxpayer identification numbers in public filings. Recent federal policy guidance recommends avoiding the unnecessary display of any part of these numbers on forms, reports, and computers. The Committee concluded that even partial numbers are useful to identity thieves, and that the omission of these numbers from public filings will impose no hardship on either litigants or the courts. In cases in which this information is pertinent, Rule 5.2(f) allows a party to file an unredacted copy of a filing under seal.

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

The amendment's protection for "taxpayer-identification numbers" includes employer-identification numbers as well as individual taxpayer-identification numbers and adoption identification numbers. Although employer-identification numbers for some corporations may be

publicly available, smaller businesses and individuals who employ others have a privacy interest in these numbers, and there is also a potential for their misuse.

To enhance the protection of minors' privacy and safety, the amendment also requires the substitution of a pseudonym, rather than initials, in place of a minor's name in public filings. When it is feasible to do so, the use of gender-neutral pseudonyms is preferable. The use of gendered pseudonyms or pronouns, combined with other information contained in public pleadings, may make it easier to uncover the identity of a minor.

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

TAB 12

Rule 43(a)—Remote Trial Testimony

The Rule 43/45 Subcommittee continues to work on possible amendments to Rule 43(a) on remote trial testimony. As a reminder, this topic was originally raised by a proposal that whenever a trial witness could not be present to testify in the courtroom the court should arrange for that witness to testify by remote means.

At the Advisory Committee's October 2025 meeting, the subcommittee presented its ongoing work and received guidance from members of the Advisory Committee, as reflected in the minutes of that meeting included in this agenda book. Since that meeting, the subcommittee has met four times, and it now is reporting on its evolving focus. As set forth below, it invites full Advisory Committee reactions to its current focus and concerns.

One important development since the October Advisory Committee meeting is that during the January 2026 meeting of the Standing Committee, several members of that committee expressed reservations about the orientation of the subcommittee's deliberations. Those comments are reflected in the minutes of the Standing Committee's meeting, included in this agenda book. The reservations expressed call for careful consideration by this Committee, and since the Standing Committee meeting, the subcommittee has met repeatedly to evaluate the best route forward. It hopes for further guidance from the full Advisory Committee.

The Standing Committee had before it essentially the same thing the Advisory Committee had before it last October. The key ingredient of the amendment was the removal of the "compelling circumstances" requirements for remote trial testimony presently in Rule 43(a). As before this Committee last October, the change was introduced as taking account of both the widespread experience with remote proceedings during the COVID-19 pandemic and the greatly improved technology that can be used for remote participation now compared to the mid-1990s when the current rule provision was adopted (and testimony by telephone was the means for remote participation).

As reflected in the Standing Committee minutes, there was considerable pushback even though this was an information item, not an action item. One judge member of the committee reacted to the draft committee note's reference to the challenges of COVID-19 by cautioning that the note might be read to approve holding entire trials remotely. This judge noted possible constitutional or evidentiary objections to such remote trials.

A lawyer member of the Standing Committee reported on adverse experiences with whole trials being held remotely, and with remote testimony in general. In this member's view, making a rule change to facilitate remote witness participation is not a good idea. In particular, jurors would have difficulty assessing the credibility of the witness. The risks of improper coaching would increase. And judges might be presented with requests to authorize remote testimony whenever it is inconvenient for the witness to come to court to testify in person.

Another judge member of the Standing Committee observed that the "compelling circumstances" standard is actually not a particularly demanding standard. The "good cause" standard, by contrast, is relatively low. If it were the only requirement, this judge worried that

courts would be “besieged” by requests to authorize remote testimony. More guidance was needed if the “compelling circumstances” standard were removed from the rule.

Another concern was emphasized by a practitioner member of the Standing Committee based on an experience with an expert witness who testified remotely for this lawyer’s opponent. In this lawyer’s view, there were genuine questions about whether the expert was communicating with the other side’s lawyers by text or some other means while testifying. Moreover, too often technology misfires, further complicating matters.

Another judge member expressed worries that jurors would dislike remote testimony. Some might even resent having to come to court if witnesses did not need to do that

A judge member suggested that the improper communication concern could be remedied sometimes by directing that the opposing party have a representative in the room where the witness is testifying to monitor what is going on.

Finally, another judge suggested that the decisions under the current rule do not indicate that there really was a significant difference between the “good cause” provision and the “compelling circumstances” requirement, such that changing the rule to remove “compelling circumstances” would not actually produce different results.

With this guidance, the subcommittee reconsidered its orientation and met twice in January and again in March (as reflected in the meeting notes in this agenda book). It returns now with a revised possible amendment proposal and draft committee note on which it invites Advisory Committee input.

One reaction to these Standing Committee concerns was to have library research done to see whether reported cases show that the “compelling circumstances” standard was cited as a ground for denying motions to permit remote testimony. Sarah Sraders’ January 28, 2026, research memorandum on reported cases applying the present Rule 43(a) standard is included in this agenda book. It does not show that judges are issuing orders that say they would grant the motion if only “good cause” were required, but cannot because “compelling circumstances” must also be present.

But the research did indicate that one feature of the 1996 amendment package is constraining judges. The committee note to that rule change said that compelling circumstances would most often depend on a showing of some sort of unforeseeable, last-minute development that prevented a witness was who going to testify in person from doing so. That guidance was invoked by courts in applying the current rule.

The subcommittee has continued drafting efforts, leading to a discussion draft set forth below that illustrates a revised approach. In addition, during its March 11 meeting, it identified a number of questions on which full Committee guidance would be valuable. As reflected in the notes of the March 11 meeting, those issues are as follows:

(1) Retaining the commitment to in-person trials: The hallmark of American trials is that they depend on in-court testimony. The subcommittee is *not* in favor of “fully remote” trials, a

point that should be made clear going forward. Authorization for remote testimony depends on an individualized showing regarding a specific witness.

(2) Focusing on the choice between live remote testimony and a deposition substitute: “Fully remote” trials are not the goal, so it appears important to highlight that the choice the subcommittee is addressing is not between in-person and remote testimony so much as between remote live testimony and deposition testimony. Relying on depositions can produce many difficulties. The deposition may have occurred before certain facts came to light. And very often much time and expense (including the court’s time and energy) can be wasted in resolving disputes about what deposition testimony can be presented at trial, a process that often involves many iterations and a great deal of effort for counsel and the court.

(3) Access to justice concerns: For some witnesses or parties, for a variety of reasons, remote testimony may be the only practical option. And relying on depositions may not only require a great deal of extra work by the court and the parties, but also put some parties at a disadvantage if they cannot afford the cost of creating a video deposition and must rely instead on reading from transcripts. Moreover, allowing remote trial testimony may serve Rule 1 purposes (“just, speedy, and inexpensive” determinations) by ensuring effective presentation of key witness testimony.

(4) “Appropriate safeguards”: Rule 43(a) says that the court must also be assured that appropriate safeguards are in place to safeguard the reliability of the remote testimony. Since the pandemic, there likely has been much learning on this front. Relying on party agreement and judicial evaluation of individual cases seems workable.

(5) Specifying “approved” safeguard methods: Though there has by now been considerable experience with safeguards that work, whether by party agreement or court direction, it may be difficult to specify what safeguards are effective in given cases. But the subcommittee tried to develop a list of specific safeguards and found that too difficult. For one thing, safeguards that work in other cases may be ill-suited to the current case. Good lawyers recognize that safeguards are context-dependent, and they can work together to craft safeguards for the particular case. Having an “approved” list creates the risk that “approved” safeguards might be urged in cases in which they are not appropriate, and other safeguards that would be appropriate might be opposed on the ground that they are not “approved” under the amended rule. If we are not prepared to be specific about what suffices, we would wisely be prepared to explain why we think trying to do that is ill-advised.

(6) Strictness of “compelling circumstances” standard: The “compelling circumstances” standard was introduced in the amendment to Rule 43(a). It does not appear in any other Civil Rule. At least some Standing Committee members seem to regard this standard as suitably protective of the traditional trial and sufficiently flexible to enable judges to authorize remote testimony when really needed. Library research has not identified decisions that say, “I would authorize remote testimony in this case if the ‘compelling circumstances standard were not in the rule, but because it is there I can’t.” At least some judges seem to feel shackled. Whether there is a way to evaluate this concern is uncertain; it seems unlikely that many judges would go to the trouble of writing a decision if that were their view. It might be noted that the current draft

committee note tries to make it clear that the amendment does not require any judge to authorize remote testimony.

(7) Utility of “good cause” standard: The “good cause” standard permeates the Civil Rules. So far as appears, the “compelling circumstances” standard appears nowhere else in the rules. (Rule 37 does use “compelling,” but in the different context of a court order compelling discovery.) The note may be able to illuminate the flexibility of the standard while also making clear that it requires a real showing to justify remote trial testimony. Perhaps one source for this topic would be the set of considerations the Texas code has adopted regarding remote proceedings.

(8) Juror preferences: Different concerns have been raised. There was a suggestion that jurors may feel put upon if they are required to show up in court while some witnesses are not. And some jurors may think that being able to observe the witnesses in person is an important aid to making credibility determinations. But other reports suggest that jurors sometimes find remote testimony more useful than in-person testimony. For one thing, in some courtrooms the witness may be better seen on a screen. The alternative of relying on depositions not only can require a great deal of extra work for the court and the parties, but also impair juror comprehension. Jurors may have difficulty focusing on video depositions, and even more difficulty focusing on deposition testimony read from edited transcripts.

(9) Foreseeability issue from 1996 Committee Note: One thing that decided cases do indicate is that the statements in the 1996 committee note about whether the witness’s inability to come to court was foreseeable should be considered central. The 1996 note seems to say that the sudden last-minute problem is what the rule is addressing. But in many instances (e.g., officers of the far-away defendant company), the difficulty could be foreseen from the outset. Whether that should make remote testimony unavailable because it was always foreseeable that the distant witness could not be compelled by subpoena to appear in court may actually be a reason to change the rule. Restricting remote live testimony to the “last minute emergency” is dubious. Indeed, the pending amendment to Rule 26(a)(3) directing parties to indicate in their pretrial disclosures (due 30 days before trial) whether any witnesses will be offered remotely is not limited to last-minute emergencies.

(10) Risk of overuse and burden on courts: Some comments during the public comment period suggest that proponents of remote testimony may advance arguments for excusing in-court testimony in many cases. Though paid expert witnesses may readily be persuaded to travel to testify, others may not. Consider the argument about a treating doctor: “Well, we should not make the surgeon from the opposite coast take three days out of her professional schedule to spend three hours on the stand in court. There are lives on the line.” On the other hand, the burden of resolving disputes about the editing of depositions (whether in transcript or video form) may be much greater.

(11) Apex witness concern: A theme in the commentary from what one might call the plaintiff side is that the large company headquartered far away can require the employees it wants as witnesses to show up to testify at trial, but the other side has no way to compel live testimony from the company employees it wants to testify before the jury. The Rule 45(c)

amendment would partly address this question, but the concerns about abusive apex depositions might support caution about trial testimony as well.

(12) Changing Rule 43(c) as well: There was early consideration of changing Rule 43(c) as well, but on reflection doing so seems unnecessary and could cause difficulties. Rule 43(a) focuses on trial, which is different from the non-trial proceedings addressed by Rule 43(c). Blending the two could cause problems. Indeed, the subcommittee has recommended revising the committee note to the pending Rule 45(c) amendment (which is only about subpoenas for remote trial testimony) to avoid possible arguments that Rule 43(a) must be satisfied before remote testimony may be used in a non-trial proceeding.

Purely for purposes of discussion, it may be useful to focus also on a revised approach to a possible Rule 43(a) amendment. This is not an action item, and the Subcommittee is not proposing that it be recommended to the Standing Committee. Indeed, it includes questions about orientation and language. But concrete provisions often provide a fruitful approach to discussion of issues like the ones identified above:

Rule 43. Taking Testimony

- (a) ~~**In Open Court At trial.**~~ 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

In-person trial testimony has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility.

This amendment does not in any way represent a retreat from the rules' commitment to the centrality of live in-person witness testimony, which remains true under this amendment. The court is not required to authorize remote trial testimony even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only from specific trial witnesses when the court finds that a sufficient justification has been offered. The amendment has no effect on any other aspects of trial or the availability of remote testimony under Rule 43(c).

Sometimes critical trial witnesses are simply unable to appear in person in the courtroom, however. In 1996, Rule 43(a) was therefore amended to permit remote trial testimony when good cause was shown and appropriate safeguards were in place. The 1996 amendment also required "compelling circumstances." That very demanding requirement reflected the ongoing centrality

of in-person witness testimony. Judges have found this requirement too constricting in some cases.¹

This amendment removes the “compelling circumstances” requirement, but in no way retreats from the traditional importance of in-person interaction at trial between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner.

Developments since 1996 have prompted reexamination of that requirement at trial. Critically, technology has made important advances. While telephonic testimony may have been the only method available in 1996, 21st century technology offers a substitute much closer to in-person witness testimony. Many people, including jurors, have experience using this technology for business meetings and other important interactions. There are also reports that some jurors find live video a better method than in-person witness testimony. Not all courtrooms enable all jurors a view of an in-person witness that is equal to well-presented remote testimony.

In addition, the 2020-22 pandemic prompted, and sometimes forced, the courts to employ this new technology to manage cases and, sometimes, to receive remote witness testimony at trial. That judicial experience supports removing the “compelling circumstances” constraint. There have been many reports that this flexibility around remote participation has served the goal of Rule 1 to “secure the just, speedy, and inexpensive determination of every action” and also increased access to justice for all litigants, irrespective of their means.

When witnesses cannot attend trial, the choice is not between in-court testimony and remote testimony, but between remote live testimony and depositions taken before trial. When Rule 43(a) was amended in 1996, technology for remote testimony was in its infancy and the Committee Note suggested that deposition testimony would often be superior. Experience has shown that providing witness testimony by deposition at trial often has a negative effect on juror attentiveness. In addition, it may be that the deposition was taken long before trial and the testimony is as a consequence stale. And the task of designating portions of the deposition can prove contentious, often involving the court in time-consuming review that would largely be obviated by live remote testimony.

In making the choice whether to authorize remote trial testimony, the court properly may take account of many factors. A starting point is that witness inconvenience alone is not a reason for excusing in-person testimony. Good cause requires assessment of the circumstances of the case, never losing sight of the central importance of in-person testimony. [But the court may consider whether the testimony of this particular witness is central to the case and whether

¹ The prior version began by saying “numerous” or “some” judges had felt constrained. Sarah Sraders’ research sheds some light on this. Perhaps it’s best not to try to quantify.

assessment of credibility of this witness’s testimony will be important.]² [It may be that remote testimony raises fewer concerns in court trials than in jury trials.]³

Technological difficulties may sometimes prove important. 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 must satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

Besides evaluating the justification for relying on remote testimony and potential technological issues, the court must demand appropriate safeguards to protect the reliability of the remote testimony. This requirement has remained unchanged since 1996. 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. The parties may be able to reach a stipulation on appropriate safeguards for the court’s consideration.

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

Attachment(s):

- S. Sraders January 28, 2026 Memorandum
- Notes of March 11, 2026 Subcommittee Meeting
- Notes of January 30, 2026 Subcommittee Meeting
- Notes of January 14, 2026 Subcommittee Meeting
- Notes of December 15, 2025 Subcommittee Meeting
- Suggestion 26-CV-5 (Lawyers for Civil Justice)

² This bracketed sentence is designed to highlight something featured in prior drafts of the note and hinted at by the reference in the third paragraph of the draft note to “critical” witnesses. For example, a witness located far away may only be authenticating an exhibit. True, a Rule 36 request for admission could often solve such problems, as could deposition testimony. But having a witness travel across the country for 15 minutes on the stand to authenticate, for example, an exhibit offered only to counter a surprise development at trial seems exceedingly wasteful. Even if the witness could take two days off from work and the cost of last-minute transcontinental travel could be paid, a court might well conclude that under the circumstances good cause has been established to permit this witness to testify remotely.

³ Is this bracketed sentence worth including?

MEMORANDUM

TO: Rule 43/45 Subcommittee

FROM: Sarah Sraders, Counsel, Rules Committee Staff

DATE: January 28, 2026

RE: “Good Cause in Compelling Circumstances” Under Rule 43(a)

The Rule 43/45 Subcommittee is considering whether and how to amend Federal Rule of Civil Procedure 43(a), which currently allows a court to permit remote testimony at trial “[f]or good cause in compelling circumstances and with appropriate safeguards[.]” This memorandum analyzes how courts have applied this standard, and whether the case law suggests that it has prevented judges from authorizing remote testimony in situations in which such testimony is warranted.

Research did not uncover a wealth of (or even any) cases where judges expressed a desire to allow remote testimony that was thwarted by the current standard in Rule 43(a). (There are cases where the court notes that it is “sympathetic” to the witness’s circumstances as it denies the motion, but whether this truly indicates a desire to side with the movant is difficult to say.) However, the case law does show that courts closely follow the guidance in the Advisory Committee Note to the 1996 Amendments to Rule 43 (the 1996 Note) and view this as setting forth the applicable criteria for whether a movant has satisfied the Rule 43(a) standard. A review of these cases may help the Subcommittee determine whether this is still guidance that the Civil Rules Advisory Committee believes should be followed.

I. The 1996 Note

“Courts are guided by the Advisory Committee Notes on the 1996 Amendment to Rule 43 in determining whether a movant has demonstrated good cause and compelling circumstances.” *Clowdus v. Am. Airlines, Inc.*, No. 1:21-cv-23155-KMM, 2022 WL 6497311, at *2 (S.D. Fla. Sept. 21, 2022); *see also Halig v. Nat’l Bd. of Examiners of Optometry*, No. 22-2118-BAH, 2025 WL 2661785, at *3 (D. Md. Sept. 17, 2025) (“The Fourth Circuit Court of Appeals has not stated a test for determining what constitutes ‘good cause’ or ‘compelling circumstances,’ but the Advisory Committee Notes to the 1996 Amendments to Rule 43(a) provide some guidance.”) (quotations omitted); *Barbuto v. Ronquillo-Horton*, No. 22-C-569, 2024 WL 4212857, at *2 (E.D. Wis. Sept. 17, 2024) (“The court concludes from the text of Rule 43(a) and the Advisory Committee’s comments that [defendant’s] motion should be denied.”).

There are several key features in the 1996 Note that are worth exploring in further detail.

A. Foreseeability

The 1996 Note explains that

Attachment to Rule 43(a)—Remote Trial Testimony

[t]he most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. . . . A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

Courts have paid close attention to this statement—the phrase “unexpected reasons, such as accident or illness” appears in more than 100 decisions citing Rule 43. Foreseeability is a driving factor in many courts’ Rule 43(a) decisions, and “courts often deny leave to testify remotely when the proponent of the witness has long known of the reasons for its motion yet failed to file it until the eve of trial.” *Savinova v. Nova Home Care, LLC*, No. 3:20-cv-01612 (TOF), 2025 WL 1279076, at *3 (D. Conn. May 4, 2025).

Thus, courts have denied motions to testify remotely when the moving party “cannot reasonably argue that they did not know where these witnesses reside and/or work. They do not assert any late-breaking reasons rendering their presence at trial unusually inconvenient or impossible.” *J.D. v. Price*, 619 F. Supp. 3d 523, 530 (W.D. Pa. 2022). Conversely, courts tend to allow remote testimony when the motion is based on unforeseen developments. *See, e.g., Gonzalez v. US Human Rights Network*, No. CV-20-00757-PHX-DWL, 2023 WL 5333261, at *2 (D. Ariz. Aug. 18, 2023) (finding good cause in compelling circumstances where witness’s “ability to travel to Arizona to testify at trial has been impaired by a late-breaking medical condition”).

Some courts have refused to allow witnesses facing immigration or visa difficulties to testify remotely where these issues were long known. In *Goodman v. Goodman*, for example, the court denied the plaintiff’s opposed motion to testify at trial by video due to his inability to enter the United States, reasoning in part that “[b]ecause Mr. Goodman has known of his visa difficulties for years, there is nothing ‘unexpected’ or ‘compelling’ about the circumstances rendering him unable to testify in-person at trial.” No. 1:21-cv-10902-GHW, 2026 WL 18630, at *9 (S.D.N.Y. Jan. 2, 2026); *see also Carvajal v. Mijelum, L.L.C.*, No. EP-23-CV-00245-RFC, 2025 WL 2110013, at *1 (W.D. Tex. July 24, 2025) (“Courts have denied requests for remote testimony in cases where foreseeable visa issues have arisen.”); *Mobu Enters. Pty Ltd. v. John Galt Solutions, Inc.*, No. 3:23-cv-617-BN, 2025 WL 1426450, at *2 (N.D. Tex. May 16, 2025) (denying plaintiff’s opposed motion for Australia-based witness to testify remotely where plaintiff “offers no facts from which the Court may reasonably infer that [the witness’s] inability to travel to the United States is a new or sudden development”); *Li v. Walsh*, No. 9:16-cv-81871-KAM, 2024 WL 6887134, at *2 (S.D. Fla. Mar. 1, 2024) (finding that Chinese and other foreign plaintiffs seeking to testify remotely “have not come close to meeting the ‘good cause in compelling circumstances’ standard” where they “have had several years to make travel preparations and obtain visas to travel to the United States” but apparently failed to do so); *but see Zamora v. Ljubica Contractors LLC*, No. 18-CV-419 (VSB), 2025 WL 2494271, at *4 (S.D.N.Y. Aug. 29, 2025) (“Courts in this Circuit have found an exception to Rule 43(a) to be proper . . . where [plaintiffs] are unable to legally enter the United States due to their immigration status.”) (collecting cases); *Medina v. Angrignon*, No. 15-CV-427-RJA-MWP, 2024 WL 108669, at *3 (W.D.N.Y. Jan. 10, 2024) (allowing plaintiff to testify remotely when he was his sole witness, had been deported to the Dominican Republic, and the parties agreed that he could not re-enter the United States).

B. Mere Inconvenience

Courts also heed the 1996 Note’s guidance that contemporaneous remote transmission “cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.” This analysis routinely overlaps with the foreseeability concern, as courts denying motions to testify remotely due to distance or other obligations often emphasize that these were known to the movant in advance.

Courts have therefore denied requests for remote testimony where the movant argued that the witness would face professional or personal hardship by having to testify. *See Halig*, 2025 WL 2661785, at *1, *4 (finding no good cause in compelling circumstances where expert witness would be “required to request formal administrative leave [from work] for all days of travel,” noting that although the court “is sympathetic to the difficulties presented by travelling to provide trial testimony and any compensation for lost work that may result,” this is the case with every trial); *Savinova*, 2025 WL 1279076, at *4 (denying plaintiff’s opposed motion to testify remotely at trial where “she provides no authority for the proposition that caregiving responsibilities constitute ‘good cause’ or ‘compelling circumstances’” and had “known about these responsibilities for at least a year”); *Barbuto*, 2024 WL 4212857, at *2 (denying defendant’s motion to testify remotely where defendant was unable to take time off from a new job in the U.K., as defendant “should have made arrangements with her new employer to attend the previously scheduled trials”); *Maslic v. ISM Vuzem d.o.o.*, No. 21-cv-02556-BLF, 2024 WL 3279524, at *2 (N.D. Cal. June 14, 2024) (denying motion for witness to testify remotely where he “has an active practice as an orthopedic surgeon,” as a “scheduling conflict alone does not constitute good cause,” particularly where the case schedule was set two years prior).

On the other hand, some courts have found that such hardships provided the necessary justification given the circumstances of the particular case. *See, e.g., Rock v. Cummings*, No. CV-20-01837-PHX-DWL, 2025 WL 1270748, at *1 (D. Ariz. May 1, 2025) (finding good cause and compelling circumstances to allow remote testimony from disinterested witness who was being compelled to testify by subpoena where he was “scheduled to be on trauma call for a very busy level one trauma center” and failure to do so “would adversely compromise the health and safety of trauma patients”); *Childers v. TTI Consumer Power Tools, Inc.*, No. 3:23-cv-00547-HZ, 2025 WL 392462, at *7-8 (D. Or. Feb. 4, 2025) (denying motion for new trial based on court’s decision to allow remote testimony, where witness lived and worked in Michigan, had three children, and the need for his impeachment testimony arose during trial); *Foster v. United States*, No. 6:19-cv-164-REW-HAI, 2024 WL 5683137, at *2 (E.D. Ky. Feb. 23, 2024) (granting plaintiffs’ opposed motion for two expert witnesses to testify remotely due to “familial responsibilities” and a “scheduling conflict,” respectively, and noting that because the court had already assessed their expert credentials, “their remote testimony does not pose the same credibility concerns as, for example, remote testimony from fact witnesses”).

The costs of attendance, whether to the witness or to the party, are also often raised by parties as a ground to allow remote testimony. “[F]inancial hardship isn’t the type of unexpected reason that is typically required in a showing of good cause for telephonic testimony.” *Gil-Leyva v. Leslie*, 780 Fed. App’x 580, 587 (10th Cir. 2019) (cleaned up); *see Savinova*, 2025 WL 1279076, at *4 (denying motion for two plaintiffs who are “minimum wage earners who do not have the funds to travel to Connecticut for trial” to testify remotely, noting among other things that they

were voluntary parties to the case and could have raised claims of indigence a long time ago); *Monera v. Datis*, No. 24-80958-CIV-CANNON, 2025 WL 3776652, at *1 (S.D. Fla. Feb. 5, 2025) (holding that neither “the costs of foreign travel” nor “the purported difficulty associated with obtaining travel visas for [petitioner’s] non-party witnesses” established, on the existing record, compelling circumstances for witnesses to testify remotely); *Hilig*, 2025 WL 2661785, at *4 (expressing sympathy that costs of in-person expert witness testimony “present a significant financial hardship for Plaintiff,” but noting that “this was obviously a risk known to Plaintiff when she secured [the witness’s] services as an expert witness”); *cf. Kanuszewski v. Shah*, 650 F. Supp. 3d 575, 577 (E.D. Mich. 2023) (finding that parties’ joint request for remote testimony based on “circumstances that they could reasonably foresee: the witnesses live in other states, and it will cost them money to come to the trial” did not warrant leave to testify remotely, but nonetheless finding “the recent uncertainty of air travel” due to “strange winter conditions and unknown technological issues” to be an unexpected compelling circumstance warranting remote testimony).

On a similar note, parties have also requested permission for remote testimony where witnesses would have to travel a great distance to attend the trial, including internationally. In *High School Servicos Educacionais, LTDA v. Choi*, defendants sought to have two expert witnesses living more than 5,000 miles away in Brazil testify remotely. No. 4:21-cv-00029-DGK, 2023 WL 7346452, at *1 (W.D. Mo. Nov. 7, 2023). The court denied the motion, concluding that “[m]ere inconvenience of travel . . . is not a compelling circumstance . . . The geographic distance between Brazil and Kansas City was neither unknown nor unexpected and cannot support Rule 43(a)’s limited exception to live testimony.” *Id.*; *see also Video Artography LTD v. Champagne Cowgirl, LLC*, No. 3:24-cv-120-BN, 2025 WL 1116864, at *5 (N.D. Tex. Apr. 15, 2025) (“Rule 43(a) is not satisfied by the inconvenience caused by compelling that [plaintiff’s owner/officer witnesses who reside in Scotland] travel to Dallas” to testify); *but see Blackmore v. Ramirez*, No. 4:21-cv-00026-AMA-PK, 2025 WL 1311121, at *2 (D. Utah May 6, 2025) (finding good cause in compelling circumstances to allow fact witness in Palau to testify remotely even though his “residence in Palau is certainly not unexpected,” noting that travel from Palau to Utah “is not a situation of mere inconvenience”); *Virtual Architecture, Ltd. v. Rick*, 09 Civ. 5866 (SHS), 2012 WL 388507, at *2 (S.D.N.Y. Feb. 7, 2012) (citing cases where courts have found good cause “where the witness would have to face international travel, with its attendant costs of time and money,” and allowing witness residing in the Seychelles—8400 miles and a 20 hour and 40 minute flight from New York City—to testify remotely).

C. Preference for Depositions

The 1996 Note also provides that “[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses.” Some courts have also followed this guidance when determining whether to allow remote testimony. *See Mobu Enterprises*, 2025 WL 1426450, at *2 (“As the Advisory Committee Notes to Rule 43 reflect, depositions are ordinarily superior to remote testimony.”); *see also Nagel v. Global Growth Holdings, Inc.*, No. 6:23-cv-2256-JSS-UAM, 2025 WL 417969, at *2 (M.D. Fla. Feb. 6, 2025) (noting, when granting motion to introduce deposition transcript in lieu of witness’s live testimony, that “[t]he Advisory Committee Notes to Rule 43 express a preference for deposition transcripts over testimony by remote means”); *but see Foster*, 2024 WL 5683137, at *2 (stating that live video testimony from expert witnesses “is preferable to their deposition

testimony,” as it “will allow the parties and the Court to obtain proper follow-up or clarity from the experts on technical and complex issues”).

II. Other Notable Aspects of Rule 43(a)

There are a few other noteworthy points that came up during this research.

First, several courts have applied the Rule 43(a) standard to non-trial proceedings. In *United States v. Thrift*, No. 2:14-cr-0308 DJC DB P, 2023 WL 5672862, at *1-2 (E.D. Cal. Sept. 1, 2023), the court analyzed whether the requirements of Rule 43(a) applied to an evidentiary hearing in a petitioner’s section 2255 proceeding. The petitioner sought to have a witness testify remotely from Germany, and argued that Rule 43(c) applied, which did not necessitate a good cause finding. *Id.* at *1. The court disagreed, reasoning that “the application of subsection (c) is explicitly limited to when a motion relies on facts outside the record. Section (a) of Rule 43, in contrast, applies in open court and ‘at trial,’ but the court does not find it is necessarily limited to trials as movant argues.” *Id.* at *2. The court nonetheless found that the Rule 43(a) standard had been met. *Id.* Other courts have similarly applied Rule 43(a) in non-trial proceedings. *See, e.g., Noshirvan v. Couture*, No. 2:23-cv-1218-JES-KCD, 2025 WL 1374954, at *1 (M.D. Fla. May 13, 2025) (applying Rule 43(a) standard to plaintiff’s opposed motion for out-of-state nonparty witnesses to appear remotely for an evidentiary sanctions hearing); *Jefferson Street Holdings, LLC v. Otter Prods., LLC*, No. 1:23-cv-01514-RMR-SBP, 2023 WL 11196897, at *1 (D. Colo. Oct. 27, 2023) (“[a]ssuming that Federal Rule of Civil Procedure 43—concerning the taking of testimony at trial—applies to pretrial hearings with equal weight” and determining whether movant had satisfied Rule 43(a) standard for remote testimony on a motion to disqualify counsel).

Second, several opinions in multi-district litigation (MDL) cases have imposed something of an alternative test for remote testimony, based on factors first set forth in *In re Washington Public Power Supply System Securities Litigation*, No. MDL NO. 551, 1988 WL 525314 (W.D. Wash. Aug. 9, 1988), which predated even the 1996 amendments to Rule 43. These factors, generally known as the “*Vioxx* factors” after their adoption in *In re Vioxx Products Liability Litigation*, are:

(1) the control exerted over the witness by the defendant; (2) the complex, multi-party, multi-state nature of the litigation; (3) the apparent tactical advantage, as opposed to any real inconvenience to the witness, that the defendant is seeking by not producing the witness voluntarily; (4) the lack of any true prejudice to the defendant; and (5) the flexibility needed to manage a complex multi-district litigation.

439 F. Supp. 2d 640, 643 (E.D. La. 2006). Although courts in MDL cases have found these factors instructive when determining whether good cause exists to allow remote testimony, *see, e.g., In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-2885, 2022 WL 504451, at *3 (N.D. Fla. Feb. 18, 2022), other courts have found that they have limited use outside of the MDL context, *see Blue Cross & Blue Shield of Florida, Inc. v. Davita, Inc.*, No. 3:10-cv-574-BJD-MCR, 2022 WL 18492515, at *2-3 (M.D. Fla. May 27, 2022) (“Other district courts have indicated . . . that the *Vioxx* factors are reserved for Rule 43 motions in multidistrict litigation only. . . [T]his Court instead turns to the advisory notes from Rule 43(a) to determine whether ‘good cause in

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compelling circumstances’ exist[.]”). Given the unique circumstances present in MDL cases, it is not clear that these factors reflect trial court considerations in non-complex cases.

Finally, as may be expected given the trial court’s discretion concerning remote testimony, research generally did not uncover appellate reversals of trial court decisions permitting or denying remote testimony. *See Gil-Leyva*, 780 Fed. App’x at 587 (finding no error with magistrate judge’s decision to deny request to testify remotely, nor with the magistrate judge’s subsequent decision to allow remote testimony); *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018) (in case implicating trial court’s authority to issue writ of habeas corpus as well as Rule 43(a), holding that trial court’s decision to allow inmate witnesses to testify only by video “was well within his discretion”); *Draper v. Rosario*, 836 F.3d 1072, 1082 (9th Cir. 2016) (concluding that district court did not abuse its discretion in denying motion for inmate to testify remotely where court “expressed reasonable concern over [the witness’s] ability to testify safely, even by contemporaneous video transmission”); *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (remarking that “[appellant] cites no case in which an appellate court has held that a trial court abused its discretion by *not* allowing remote testimony” and holding that district court did not abuse its discretion by refusing to allow telephonic testimony from two witnesses); *cf. Rodriguez v. Gusman*, 974 F.3d 108, 114 (2d Cir. 2020) (vacating district court’s decision to administratively close case after plaintiff was deported to the Dominican Republic, since Rule 43(a) would allow plaintiff to appear remotely).

Attachment to Rule 43(a)—Remote Trial Testimony

Notes of Teams Meeting
Rule 43/45 Subcommittee
March 11, 2026

The Rule 43/45 Subcommittee met by Teams on March 11, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, and Jocelyn Larkin. Also participating were Reporters Richard Marcus and Andrew Bradt, and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center. Sarah Sraders represented the Rules Office.

The meeting addressed two topics: (1) whether any changes should be made in the published preliminary draft of Rule 45(c) and 26(a)(3) amendments; and (2) ongoing issues regarding the work on Rule 43(a).

[The portion of the notes dealing with the Rule 45(c) change published for public comment is included in the Action Item presentation of that rule change, proposed for final adoption.]

(2) Rule 43(a)

The main discussion focused on the ongoing consideration of possibly amending Rule 43(a). As the Subcommittee is aware, several members of the Standing Committee, including judge members, expressed significant reservations about relaxing the limits on remote trial testimony during the January 2026 Standing Committee meeting.

At the last Advisory Committee meeting, in October 2025, that committee was presented with the then-current discussion of the Subcommittee. The Advisory Committee members were initially receptive to the Subcommittee's approach. But the Advisory Committee members were not aware of the Standing Committee concerns. And the Subcommittee will benefit from a full discussion of these issues during the April Advisory Committee meeting. It is important that the Advisory Committee give full consideration to the concerns raised by members of the Standing Committee.

The Subcommittee's present goal, therefore, is to put before the Advisory Committee the issues that have emerged, including the concerns of the Standing Committee members that expressed reservations. On this score, one thing worth noting is that even though Rule 43(a) was not included in the amendment package published in August 2025 quite a few witnesses addressed it in their testimony.

The remote trial testimony issue is not directly connected to the problem for service of a subpoena created by the Ninth Circuit decision. There might be many instances in which the Ninth Circuit view would make the subpoena effective (because the witness was located within the traditional "subpoena power") but that would not control the decision whether the court would authorize remote trial testimony. As addressed in the committee note paragraph being revised as stated above, the Rule 43(a) standard remains unchanged.

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Against that background, the discussion identified a number of issues on which Advisory Committee members might have views, including the following:

Retaining the commitment to in-person trials: The hallmark of American trials is that they depend on in-court testimony. The Subcommittee is *not* in favor of “fully remote” trials, a point that should be made clear going forward. Authorization for remote testimony depends on an individualized showing regarding a specific witness.

Focusing on the choice between live remote testimony and a deposition substitute: “Fully remote” trials are not the goal, so it appears important to highlight that the choice the Subcommittee is addressing is not between in-person and remote testimony so much as between remote live testimony and deposition testimony. Relying on depositions can produce many difficulties. The deposition may have occurred before certain facts came to light. And very often much time and expense (including the court’s time and energy) can be wasted in resolving disputes about what deposition testimony can be presented at trial, a process that often involves many iterations and a great deal of effort for counsel and the court.

Access to justice concerns: For some witnesses or parties, for a variety of reasons, remote testimony may be the only practical option. And relying on depositions may not only require a great deal of extra work by the court and the parties, but also put some parties at a disadvantage if they cannot afford the cost of creating a video deposition and must rely instead on reading from transcripts. Moreover, allowing remote trial testimony may serve Rule 1 purposes (“just, speedy, and inexpensive” determinations) by ensuring effective presentation of key witness testimony.

“Appropriate safeguards”: Rule 43(a) says that the court must also be assured that appropriate safeguards are in place to safeguard the reliability of the remote testimony. Since the pandemic, there likely has been much learning on this front. Relying on party agreement and judicial evaluation of individual cases seems workable.

Specifying “approved” safeguard methods: Though there has by now been considerable experience with safeguards that work, whether by party agreement or court direction, it may be difficult to specify what safeguards are effective in given cases. But it was noted that the Subcommittee had tried to develop a list of specific safeguards and found that too difficult. For one thing, safeguards that work in other cases may be ill-suited to the current case. Good lawyers recognize that safeguards are context-dependent, and they can work together to craft safeguards for the particular case. Having an “approved” list creates the risk that “approved” safeguards might be urged in cases in which they are not appropriate, and other safeguards that would be appropriate might be opposed on the ground that they are not “approved” under the amended rule. If we are not prepared to be specific about what suffices, we would wisely be prepared to explain why we think trying to do that is ill-advised.

Strictness of “compelling circumstances” standard: The “compelling circumstances” standard was introduced in the amendment to Rule 43(a). It does not appear in any other Civil Rule. At least some Standing Committee members seem to regard this standard as suitably

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protective of the traditional trial and sufficiently flexible to enable judges to authorize remote testimony when really needed. Library research has not identified decisions that say, “I would authorize remote testimony in this case if the ‘compelling circumstances standard were not in the rule, but because it is there I can’t.” At least some judges seem to feel shackled. Whether there is a way to evaluate this concern is uncertain; it seems unlikely that many judges would go to the trouble of writing a decision if that were their view. It might be noted that the current draft committee note tries to make it clear that the amendment does not require any judge to authorize remote testimony.

Utility of “good cause” standard: The “good cause” standard permeates the Civil Rules. So far as appears, the “compelling circumstances” standard appears nowhere else in the rules. (Rule 37 does use “compelling,” but in the different context of a court order compelling discovery.) The note may be able to illuminate the flexibility of the standard while also making clear that it requires a real showing to justify remote trial testimony. Perhaps one source for this topic would be the set of considerations the Texas code has adopted regarding remote proceedings.

Juror preferences: Different concerns have been raised. There was a suggestion that jurors may feel put upon if they are required to show up in court while some witnesses are not. And some jurors may think that being able to observe the witnesses in person is an important aid to making credibility determinations. But other reports suggest that jurors sometimes find remote testimony more useful than in-person testimony. For one thing, in some courtrooms the witness may be better seen on a screen. The alternative of relying on depositions not only can require a great deal of extra work for the court and the parties, but also impair juror comprehension. Jurors may have difficulty focusing on video depositions, and even more difficulty focusing on deposition testimony read from edited transcripts.

Foreseeability issue from 1996 Committee Note: One thing that decided cases do indicate is that the statements in the 1996 committee note about whether the witness’s inability to come to court was foreseeable should be considered central. The 1996 note seems to say that the sudden last-minute problem is what the rule is addressing. But in many instances (e.g., officers of the far-away defendant company), the difficulty could be foreseen from the outset. Whether that should make remote testimony unavailable because it was always foreseeable that the distant witness could not be compelled by subpoena to appear in court may actually be a reason to change the rule. Restricting remote live testimony to the “last minute emergency” is dubious. Indeed, the pending amendment to Rule 26(a)(3) directing parties to indicate in their pretrial disclosures (due 30 days before trial) whether any witnesses will be offered remotely is not limited to last-minute emergencies.

Risk of overuse and burden on courts: Some comments during the public comment period suggest that proponents of remote testimony may advance arguments for excusing in-court testimony in many cases. Though paid expert witnesses may readily be persuaded to travel to testify, others may not. Consider the argument about a treating doctor: “Well, we should not make the surgeon from the opposite coast take three days out of her professional schedule to spend three hours on the stand in court. There are lives on the line.” On the other hand, the

Attachment to Rule 43(a)—Remote Trial Testimony

burden of resolving disputes about the editing of depositions (whether in transcript or video form) may be much greater.

Apex witness concern: A theme in the commentary from what one might call the plaintiff side is that the large company headquartered far away can require the employees it wants as witnesses to show up to testify at trial, but the other side has no way to compel live testimony from the company employees it wants to testify before the jury. The Rule 45(c) amendment would partly address this question, but the concerns about abusive apex depositions might support caution about trial testimony as well.

Changing Rule 43(c) as well: There was early consideration of changing Rule 43(c) as well, but on reflection doing so seems unnecessary and could cause difficulties. Rule 43(a) focuses on trial, which is different from the non-trial proceedings addressed by Rule 43(c). Blending the two could cause problems. Indeed, the Subcommittee has recommended revising the committee note to the pending Rule 45(c) amendment (which is only about subpoenas for remote trial testimony) to avoid possible arguments that Rule 43(a) must be satisfied before remote testimony may be used in a non-trial proceeding.

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Notes of Teams Meeting
Rule 43/45 Subcommittee
January 30, 2026

The Rule 43/45 Subcommittee met by Teams on January 30, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, and Jocelyn Larkin. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk; Reporters Richard Marcus and Andrew Bradt; and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center. Sarah Sraders represented the Rules Office.

The focus of the meeting was on the revised proposed amendment and Committee Note circulated after the January 14 meeting of the Subcommittee. (Those materials are attached as an Appendix to these notes.)

Adding “by order” to the rule

The redraft includes “by order” in brackets in the rule. Such an addition might address concerns that have been expressed about (a) ensuring that remote testimony is subject to judicial control, and (b) guarding against over-use of the subpoena power to command witnesses to appear to provide remote testimony. Under the proposed pending amendment to Rule 26(a)(3), any party intending to offer remote witness testimony at trial would have to give notice of that intent in its Rule 26(a)(3) disclosures. And since 1996 there has been the opportunity to use a subpoena to compel witnesses within the court's “subpoena power” to show up for remote testimony, without any particular problem emerging. There seems little risk that a lawyer would expect to be able to walk into court for trial, hold up her cell phone, and announce that a witness would appear in that manner. In addition, the draft committee note says: “When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial.”

It was noted that one witness during the January 27 hearing on the pending proposed amendment to Rule 45(c) reported that sometimes she would issue a subpoena without first obtaining court approval, but the subpoena would state that it was contingent on getting court approval. The issue is only one of timing. And regarding timing, one might say “in advance of trial,” but the last-minute emergencies that the 1996 amendment emphasized can include developments while the trial is proceeding, such as the huge winter storm in the U.S. at the end of January of this year.

In addition, Rule 26(a) requires updating disclosures, which would include the intention to provide a witness by remote means.

The consensus was that “by order” need not be added to the rule.

Deferring Rule 45(c) amendment while 43(a) under consideration

During the January 27 hearing, some witnesses urged that an amendment to Rule 45(c) be held in abeyance until a decision was made about amending Rule 43(a). But the two changes do

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not seem to be related. Whether the remote testimony is to come from across town or across the country, Rule 43(a) guides the court in deciding whether to permit remote testimony. The Rule 45(c) issue could arise only in instances in which the court has decided the requisite showing to justify remote testimony has been made but the witness is unwilling to provide it without being subpoenaed. Under *In re Kirkland*, the witness could thus defeat the court's decision to permit remote testimony if the witness were located outside the "subpoena power" of the court. In *Kirkland* itself, the court had already made the Rule 43(a) decision to authorize remote testimony, but the witnesses refused to do so and challenged the subpoena. As the Ninth Circuit majority recognized, a rule change could alter the result it reached. The pending rule change is designed to do that.

Committee Note

The main discussion was about the revised note. A starting point, related to the discussion of "by order" was a revision at lines 160-61 of the draft note:

When a party wants to provide remote testimony at trial, it must timely obtain court approval for doing so ~~in advance of trial~~.

The discussion focused on other modifications of the new Note.

A first point was that the substance of the sixth paragraph of the note should be moved up to the second paragraph, perhaps as follows (with possible revisions discussed during the meeting):

But the amendment does not in any way represent a retreat from the rules' commitment to the centrality of in-person witness testimony. The default for trials is always live in-court witness testimony. The court is not ~~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. This rule amendment does not authorize entire remote trials, and relates only to specific witnesses at trial as to whom the court finds that a sufficient justification has been offered, and has no effect on other aspects of trial.

Though using "never" in this paragraph might stress the point, it was also noted that there might actually be circumstances in which it would be an abuse of discretion not to authorize remote testimony. For that reason, "not" may be preferred.

A caution was raised—we might in a sense "play offense" here by stressing the way in which remote testimony (based on a suitable showing) can actually further access to justice. This idea drew support—it would be desirable to work in Rule 1 and access justice explicitly, and earlier if possible. Another participant noted that for some litigants the cost of the deposition alternative can appear prohibitive, particularly for a video deposition. A written transcript can cost \$3,400 per day, and a video deposition may cost \$7,500 per day. This point might bear on the 1996 note's seeming endorsement of deposition testimony as superior to remote live testimony.

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Attention was drawn to line 147, which says that the proponent of remote testimony “ordinarily” must show that technological difficulties will not impede remote testimony. Does that suggest that sometimes the court should authorize such testimony without such assurance?

Appropriate Safeguards

The note does not try to enumerate techniques to provide safeguards. The explanation was, partly, that the rule has required them since 1996, and did not come with a list of “approved” safeguards then. Trying to provide a list now could be risky. For one thing, anything left off the list might be regarded as “unapproved.” For another, technology might develop new safeguards in the future that are not presently known.

A concern was raised. The last sentence of the note paragraph about safeguards says party stipulation “might be important.” It would be better to say: “The parties may be able to reach a stipulation on appropriate safeguards for the court’s consideration.” A reaction was that “the lawyers usually work this out.” But another reaction was to make it clear that party stipulation cannot bind the court.

Deposition testimony as an alternative

As noted above, depositions can present significant financial challenges to some litigants. More generally, it was suggested that it may be time to retire the idea in the 1996 note that depositions would be preferable to live remote testimony. That attitude seemed linked to the reality that the 1990s were “the infancy of remote technology,” and that more recent developments (and the stimulus of the pandemic) have worked a sea change.

One suggestion was to remove the draft reference to Zoom and Microsoft Teams. Product endorsements do not belong in a committee note, and other providers have already emerged, with more perhaps on the way. The solution is to remove the mention of specific products from the draft note.

Additional points were offered, besides cost. Much experience shows that jurors (and judges) frequently find even video depositions extremely boring to watch. Having a deposition transcript read is even more boring.

Moreover, the task of preparing deposition testimony for presentation at trial can be extremely burdensome for the parties, and often burdensome for the court when the parties cannot agree on the excerpts to be included. It would be useful to try to work these points into the note. Handling the testimony, though remote, “live” at trial may save the parties and the court much effort in addition to helping the jury engage when the trial is before a jury.

Relatedly, there is a loss of comprehension when the testimony is not presented live.

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Rule 43(c)

The Subcommittee has been considering whether to recommend that Rule 43(c) be changed to parallel the proposed amendment to Rule 43(a). But an informal research effort turned up no example of a court finding that current Rule 43(c) restricts it from permitting remote testimony during a motion hearing. The rule affirmatively authorizes use of affidavits, for example, which offer no opportunity to cross-examine.

Discussion supported leaving Rule 43(c) untouched. Rule 43(c) has remained relatively unchanged for a long time. In 1996, Rule 43(a) was amended to authorize remote trial testimony. As our proposal would amend it, Rule 43(a) retains limitations that do not appear in Rule 43(c)—good cause and appropriate safeguards. There is no jury involved in motion proceedings, which do not have to happen in open court.

At the same time, there is a risk that changing Rule 43(c) would support arguments that this amendment package constricts the ability of judges to receive remote testimony under Rule 43(c). One suggestion made was that if we do not propose an amendment to Rule 43(c) our note to the Rule 43(a) amendment can affirm that Rule 43(c) remains unchanged. Perhaps the note could even say that we are not revising Rule 43(c) because it has presented no problems. Another alternative would be to say the amendment to Rule 43(a) has no effect on Rule 43(c). The suggestion was amplified: this amendment “does not affect the continuing availability of remote oral testimony under Rule 43(c).”

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APPENDIX MEMO INTRODUCING JAN. 30 DISCUSSION

Post-January 30 Note drafting

This memo follows up on the material before the Rule 43/45 Subcommittee during the January 14, 2026 meeting. It is principally focused on changes to the draft committee note designed to address concerns raised at the Standing Committee’s January meeting.

As a reminder, here is the summary of the January 14 meeting: (1) Except for adding “by order” or “as approved” or something of the sort to the rule-amendment language that should not be changed; (2) Library research would be useful on the reported cases deciding whether to authorize remote testimony—does this shed light on whether the current rule is suitably flexible?; (3) We should flesh out the “why” of our proposal—the Rule 1 aspect, perhaps with state court or bankruptcy court examples; (4) We should try to provide information about the social science evaluation of remote testimony; (5) We can consider whether the note could usefully offer some examples of adequate safeguards. The notes from the January 14 meeting, slightly revised in response to suggestions from Dave Burman and Ed Cooper, should accompany this memo.

Not all those things have been done since January 14. Library research is ongoing. An effort has been made to add an invocation of Rule 1 to the note. To date, we do not have the social science materials, but those probably do not belong in a note anyway. And the question of offering examples of safeguards remains open.

As should be discussed further, there may be reasons to leave Rule 43(c) unchanged. In part, that would avoid the possibility that parallelism with Rule 43(a) might be used to imply that limits on remote trial testimony should also limit the court’s use of remote oral testimony during motion proceedings. When Rule 43(a) was amended to authorize remote trial testimony in 1996, no change was made to Rule 43(c), and the word “orally” was removed from Rule 43(a). Here is the explanation in the committee note to the 1996 amendment:

The requirement that testimony be taken “orally” is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Intriguing though it may be, this comment seems not to be about remote testimony; perhaps remote testimony by sign language or other means (via “computer or similar device”?) has been done or will be done in the future.

For the present, the reality is that Rule 43(c) still says the court “may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.” Though research may show otherwise, since this rule permits a decision to be based on affidavits or depositions as well as “oral testimony,” it does not seem to constrain the court from permitting that oral

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testimony to be provided by remote means. Below, the question whether to propose an amendment to Rule 43(c) is discussed.

Meanwhile, the Rule 43(a) amendment proposal remains unchanged except for the possibility of adding “by order,” but a revised Committee Note is presented below that attempts to follow up on the discussion on January 14. For purposes of comparison, this memo also presents the note that was before the Standing Committee and the revisions to that note after our December 15 meeting.

Rule 43(a)

Rule 43. Taking Testimony

- (a) ~~**In-Open Court At trial.**~~ 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 [by order]⁴ permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location.~~

COMMITTEE NOTE

In-person trial testimony has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility.

But sometimes critical witnesses are simply unable to appear in person in the courtroom. In 1996, Rule 43(a) was therefore amended to permit remote trial testimony when good cause was shown and appropriate safeguards were in place. The 1996 amendment also required “compelling circumstances.” That very demanding requirement reflected the ongoing centrality

⁴ Discussion on January 15 considered whether saying in the rule that an order is required would be a useful addition. It might even say “by prior order,” but (as suggested by a bracketed sentence at the end of the revised note) this seems implicit in the entire setup. Another idea was to say something like “as approved by the court” or “with advance approval by the court.” Given the Rule 26(a)(3) disclosure requirements regarding witnesses and depositions to be offered at trial, it is somewhat difficult to imagine how this matter could not come to the court’s attention well in advance of trial, unless the problem is a last-minute development. The bracketed note language below—“Prior court approval is essential to management of remote trial testimony”—may suffice.

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of in-person witness testimony. But [numerous] {some} judges have found this requirement too constricting in some cases.⁵

This amendment removes the “compelling circumstances” requirement, but in no way retreats from the traditional importance of 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. Developments since 1996 have prompted reexamination of that requirement.

Critically, technology has made important advances. While telephonic testimony may have been the only method available in 1996, 21st century technology (from providers such as Zoom, Microsoft Teams, and others) offers a substitute much closer to in-person witness testimony. Many people, including jurors, have gained much experience using this technology for business meetings and other important interactions. There are also reports that some jurors find live video a better method than in-person witness testimony. Not all courtrooms enable all jurors a view of an in-person witness that is equal to well-presented remote testimony.

In addition, the 2020-22 pandemic⁶ prompted, and sometimes forced, the courts to employ this new technology to manage cases and, sometimes, to receive remote witness testimony. That judicial experience supports relaxing the “compelling circumstances” constraint. There have been reports that this flexibility about remote participation, in both federal and state courts, has served the goals of Rule 1 and increased access to justice.

But the amendment does not in any way represent a retreat from the rules’ commitment to the centrality of in-person witness testimony. The default for trials is always live in-court witness testimony. The court is not ~~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. This amendment does not authorize entire remote trials, and relates only to specific witnesses as to whom a sufficient justification has been offered.

Often the choice is not, however, between in-court testimony and remote testimony, but between remote live testimony and depositions taken before trial, sometimes long before trial.

In making that choice, the court properly may take account of many factors. A starting point is that witness inconvenience alone is not a reason for excusing in-person testimony. Good cause requires assessment of the circumstances of the case, never losing sight of the central importance of in-person testimony. [It may be that remote testimony raises fewer concerns in court trials than in jury trials.]⁷

⁵ It would likely be good if we had examples to support this assertion. Perhaps it is implicit in the reports from judges we heard from during the July 30, 2025, online conference.

⁶ Is this safer than saying COVID? There was some push-back about explicitly mentioning COVID, which our prior Note did.

⁷ This idea was raised on Jan. 14. Is it a useful addition?

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Technological difficulties may sometimes prove important. 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.

Besides evaluating the justification for relying on remote testimony and potential technological issues, the court must demand appropriate safeguards to protect the reliability of the remote testimony. This requirement remains unchanged since 1996.⁸ 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.⁹ 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. [Prior court approval is essential to management of remote trial testimony.]¹⁰

[This is the Note that was before
the Standing Committee with our Dec. 15 revisions]

COMMITTEE NOTE

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

This amendment recognizes that developments since 1996—both in terms of technology and as a result of the Covid 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.~~

⁸ This point seems worth making. In 1996, there was probably almost zero experience with safeguards. Thirty years later, there ought to be much more.

⁹ It seems worth emphasizing that this is another burden the proponent of remote testimony must shoulder, beyond showing good cause.

¹⁰ This sentence might be an alternative to adding the need for a court order or court approval to the rule itself, a possibility suggested in brackets above. The need to get the court’s approval before the witness begins to testify flows directly from Rule 43(a), which says that “the court may permit” remote trial testimony. It is also consistent with the pending amendment to Rule 26(a)(3)(i).

Attachment to Rule 43(a)—Remote Trial Testimony

A starting point is that the court is not ~~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.¹¹ ~~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 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.~~¹²

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.

¹¹ This draft avoids getting into details about factors to be considered, preferring to leave that to courts and lawyers. Mentioning some might seem to make them more important than others, and the Standing Committee sometimes objects to committee notes that appear to be "practice manuals."

¹² This deletion avoids the question whether a deposition is better than remote live testimony, as the 1996 committee note seemed to say.

Attachment to Rule 43(a)—Remote Trial Testimony

The Rule 43(c) question

It is quite uncertain whether there is any need to propose a change to Rule 43(c). Adding the “good cause” and “appropriate safeguards” language to this rule might be questioned, and even suggest that the standard for remote testimony regarding motions is the same as the one for remote trial testimony. It seems to be a consensus that remote testimony on motions should not be so strictly policed as remote trial testimony. Such a wide array of matters can come up on motions, and the reasons why in-person testimony at trial is central do not apply to the wide variety of matters that bear on motions.

The rule already seems implicitly to authorize remote testimony, since it permits reliance on affidavits and on depositions. And adding “adequate safeguards” might be odd, since it is hard to conceive of the safeguards that attend preparation of an affidavit. At a deposition all parties may be represented, which provides a safeguard, but one would think that judges and lawyers could work these matters out.

And putting “good cause” into Rule 43(c) might call for a committee note to the Rule 43(c) change saying that what is good enough cause for remote testimony on a motion is not good enough for remote trial testimony. One might even be tempted to say that Rule 43(a) requires not only “good cause,” but “better cause.” At some point, we might seem to be counting angels on the head of a pin.

As pointed out on January 14, however, there are a lot more motion proceedings than trials. So we continue to consider this possible amendment. Below is what was before the Subcommittee on January 14.

One possibility would be to add a sentence 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. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.¹³

Another possibility before the Subcommittee on January 14 was to move Rule 43(c) up to follow Rule 43(a) or to be an additional provision in Rule 43(a). One reaction to those possibilities is that they might unhelpfully reinforce the notion that the standards for remote testimony are the same under Rule 43(a) and Rule 43(c). That seems undesirable (and, perhaps, inconsistent with the permission under the Bankruptcy Rules for remote participation in “contested matters”).

¹³ The bracketed language may be unnecessary, given that our draft for 43(a) refers to “contemporaneous remote testimony” and 43(c) already refers to “oral testimony.”

Attachment to Rule 43(a)—Remote Trial Testimony

Alternative 1

Rule 43. Taking Testimony

- (a) ~~**In Open Court At trial.**~~ 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.~~
- (b) **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. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.

~~(c)~~ **Affirmation Instead of an Oath.** * * * * *

Alternative 2

Rule 43. Taking Testimony

- (a) ~~**In Open Court Manner of Presentation.**~~
- (1) **At trial.** 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.~~
- (2) **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. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.

* * * * *

~~(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.~~

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Notes of Teams Meeting
Rule 43/45 Subcommittee
January 14, 2026

The Rule 43/45 Subcommittee met by Teams on Jan. 14, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, Jocelyn Larkin, and Mark Lanier. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk; Reporters Richard Marcus and Andrew Bradt; and Consultant Edward Cooper. Sarah Straders represented the Rules Office.

The meeting began with an introduction about the concerns raised by some Standing Committee members about the Rule 45(c) amendment draft during that committee's January 6 meeting. These are serious and important concerns that the subcommittee should address. At the same time, it has spent much more time addressing these issues, and it may still conclude that proceeding with an amendment is the best course.

One strand of concern reflected basic doubts about any relaxation of the "compelling circumstances" standard in current Rule 43(a). Additionally, there was concern that such a change would result in a "slippery slope" leading to jury trials regularly held entirely by remote means. Concern was also expressed about safeguards when witnesses testify remotely. Specifics in the committee note might be important on that topic. The possibility that someone is feeding the witness answers to questions calls for safeguards as close to airtight as possible. Another consideration is whether there is an adequate basis for thinking that the standard in the current rule has really prevented judges from authorizing remote testimony in situations in which remote testimony is warranted. Yet another concern was that jurors might react to remote witness testimony by thinking "How come the witness doesn't have to come to court, but I do?"

One summary of the current circumstances is that the concerns expressed by some Standing Committee members were not so much with the framing of the rule amendment but instead with (a) the basic question whether a rule amendment is needed, and (b) if so, how the committee note should explain the goal of the amendment.

Though holding a mini-conference proved impossible, the subcommittee was able in July 2025 to receive the benefits of an online conference with a number of judges who had very favorable experiences with remote witness participation in trials. The Standing Committee meeting points up a reality that some judges do not think the tethers on remote trial testimony are too constricting. But it may be that a better explanation, perhaps with examples, of situations in which the current rule could limit a judge's latitude in handing trial testimony would be valuable.

While recognizing that these concerns are important, one reaction was that the choice is not usually between live in-person testimony and remote contemporaneous testimony. Instead, it is between contemporaneous testimony and a video or transcript of a deposition taken before trial, sometimes long before trial. Though it is surely true that "mere inconvenience" is not, by itself, sufficient to justify authorizing remote testimony, inconvenience and expense might sometimes support authorizing such testimony. For example, suppose a witness's only role is to

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authenticate an exhibit, the work of perhaps fifteen minutes on the stand, but the expense and dislocation of requiring this witness to travel to a distant courtroom would support a finding of real hardship. Should the “compelling circumstances” standard deny the court the latitude to permit the witness to testify remotely?

A judge noted that the “appropriate safeguards” language would remain the same were our draft amendment to go forward. Since that term has been in the rule since 1996, it seems odd to say that it now requires extensive explanation. When it was introduced in 1996, the only thing the committee note said other than that advance notice should be given that there will be remote testimony was as follows:

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

The phrase “appropriate safeguards” does not appear elsewhere in the Civil Rules, or in the Appellate, Bankruptcy, or Criminal Rules.

Whether one could present a series of possible safeguards in a note is uncertain. But the starting point might be that the “good cause” standard itself is flexible, and to justify departing from the traditional insistence on in-person witness testimony at trial requires very good cause. So perhaps a starting point for our Note should be that the default is that witness testimony is presented in person, and that this expectation applies unless the court finds that there is a sufficient reason to depart from it

The Texas experience also involves a variety of considerations that bear on whether to permit remote testimony, including the case type, the sort of proceeding (trial, preliminary injunction, etc.), the number of parties and witnesses, whether it is a jury trial, whether the issues to be addressed by the witness are complex, whether the witness is familiar with the technology necessary for testifying, and the difficulties the witness might need to surmount to appear in court.

Another judge reported about hearing a “gazillion dollar” matter entirely via remote proceedings due to COVID. That is surely not something to do except in extreme circumstances.

Another judge reacted that it seems important to respond to the slippery slope worry. At some point the subcommittee had before it a list of possible safeguards, but it got pretty long. And even with a long list, there could be difficulties. On the one hand, one might be taken to be saying that in every case any one of them is sufficient all by itself. Say there are a dozen possible safeguards listed in the note. That does not mean that each of them is a sufficient stand-alone safeguard. And if there are a dozen in a committee note, is it not possible that technology change or something else will mean that no. 13 or no. 14 would be more suitable to a given case? A note can try to make clear that the list is merely of examples, but arguments that it is an exclusive list would be likely.

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A lawyer agreed that safeguards are important. But based on a dozen or more experiences with remote testimony, the reality is that the safeguards are worked out between the lawyers with reference to the particulars of the actual case. An example: the plaintiff was on his death bed but wanted to testify remotely. The lawyers for the defendant properly tried to make the arrangements as appropriate as possible. For example, the plaintiff would not be permitted to have the family bible next to him on the hospital bed. But it is unlikely that specifics beyond “adequate safeguards” will really provide much useful guidance.

Another lawyer agreed. Safeguards vary greatly. Other points that have come up also call for a reaction. The 1996 committee note creates something of a presumption in favor of a deposition transcript or video. Given the range of appropriate safeguards, that overlay seems to intrude too far on a judge’s discretion. The work done by Judge Fogel, and some social science studies, along with the Texas experience, provide support for flexibility in the rule. There is no evidence that permitting remote testimony in some circumstances leads directly to remote trials. Instead, there is now quite a lot of judicial experience with when to permit remote testimony and how to tailor the safeguards to the specifics of the given case.

A question was raised about whether the proposed amendment adequately demonstrates that prior approval by the court is necessary. Rule 43(a) does not say that a motion is required. Perhaps “as approved by order of the court” could be added to the rule to make that clear. Rule 7 makes it clear that a request to the court for an order must be by motion.

On the other hand, there is nothing about that in the current rule. But there is also no indication that anyone has attempted to “call” a witness for testimony in court via electronic means without obtaining prior approval from the court. Moreover, the proposed amendment to Rule 26(a)(3)(A)(i) would direct any party that proposes to present remote testimony at trial to include that fact in its pretrial disclosure. Even if there is a problem in this regard for motion proceedings governed by Rule 43(c), that should ensure adequate notice to everyone about trial testimony. In addition, the risk of technological obstacles to presenting remote testimony practically ensure that advance arrangements will be made. Some courts have local practices that require that all such requests be made a certain number of days before the hearing or trial involved.

But it was noted that not all circumstances justifying leave to present remote testimony can be foreseen. Indeed, one theme of the 1996 committee note was that compelling circumstances would not exist if the need for remote testimony could be foreseen – the sudden emergency such as an accident or illness were the example invoked in 1996. And reported cases provide evidence that courts have invoked delay in requesting leave as a ground for refusing to permit remote testimony. One possible consequence of our amendment would be to permit remote testimony from a witness we always knew would not be able to appear in person.

A judge pointed out that there are often last-minute needs or adjustments during trials.

A summary of the discussion was offered: Except for adding “as ordered by the court” or something like that to the text of the rule amendment, it does not seem like there is a need to consider a revision of the rule amendment. But it seems important to recast the committee note to

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reflect and address the concerns raised during the Standing Committee meeting. Besides doing that, the main issue is whether changing the rule is a good idea or a bad idea.

On that basic policy choice, it may be desirable to assemble more information for the Advisory Committee and the Standing Committee that we have not previously presented. There is some social science research that bears on how jurors react to in-person testimony and remote testimony.

One point here is that some work shows that jurors prefer remote testimony, even to assess credibility. As we have been told, jurors sometimes are seated far from the witness, and acoustics in courtrooms may vary.

There are a number of academic papers that explore the positive and negative possibilities of remote testimony. This would not so much be committee note material as it would be useful as an introduction in presenting the proposed amendment to the Advisory Committee and the Standing Committee. It might even be possible to provide a bibliography. The point, in part, is that this is not out of the blue. Though the data do not uniformly point in one direction, one point is that given even divided data it makes sense to permit the judge to make a choice about whether to permit remote testimony in a given case.

A suggestion was made: Judicial discretion is key to these issues. We need to be clear that the judge is never required to permit remote testimony, even if all the parties favor that method. So one way of looking at the question is whether the rule should prohibit judges who are persuaded remote testimony from a given witness is justified from authorizing it.

A lawyer sought to push back on resistance to this rule change. There is not a huge amount of remote testimony. Lawyers do not want that if they can present the witness in person before the jury. Indeed, one of the arguments against permitting a subpoena to compel a distant witness to provide remote trial testimony (the subject of our pending Rule 45(c) amendment out for public comment) is that some parties may feel that they have to bring the witness to court lest the jury hold it against the party that the witness did not bother to come to the courthouse to testify in person and insisted on proceeding by remote means. This concern has been mentioned by some attorneys who represent corporate defendants, for example. Moreover, there is little need to provide detailed guidance on safeguards. Lawyers can debate those and propose solutions for their cases.

A judge urged that this is really a Rule 1 issue—allowing judges flexibility on this topic is a way to make justice more accessible. Back when this rule was written 30 years ago, the alternative was testimony by telephone and even remote motion hearings were extremely rare. Now we have technology that has changed the way participation in court proceedings can proceed remotely, and the COVID experience has shown that many judges are comfortable with remote proceedings, or even prefer them. The experience of various state courts, particularly in larger states, confirms that this method can be a cure to an access to justice problem. Particularly with self-represented litigants who cannot readily come to court, being able to participate in a remote manner can be critical.

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True, some judges continue to insist on in-person participation even in motion hearings. Nothing in this amendment would direct them to change their preferences.

Another judge agreed. Indeed, it may be that the current rule has not been a huge obstacle for judges only because they are “winking” at the “compelling circumstances” requirement.

A summary was offered: (1) Except for adding “by order” or “as approved” or something of the sort to the rule-amendment language that should not be changed; (2) Library research would be useful on the reported cases deciding whether to authorize remote testimony—does this shed light on whether the current rule is suitably flexible?; (3) We should flesh out the “why” of our proposal—the Rule 1 aspect, perhaps with state court or bankruptcy court examples; (4) We should try to provide information about the social science evaluation of remote testimony; (5) We can consider whether the note could usefully offer some examples of adequate safeguards.

One additional question was raised—how about Rule 43(c)? The draft contains a possible parallel amendment to that rule about remote testimony on motions because the rule does not exactly say that. It might be useful to say that remote testimony is permitted on motions. But it is not clear that any such change is needed. As pointed out by a Standing Committee member during the January 6 meeting, Rule 43(c) permits the court addressing motions to rely on affidavits or depositions or “oral testimony.” It does not say that such oral testimony must be delivered by a witness present in the courtroom, and Rule 77(b) draws a distinction between “trial on the merits” and “[a]ny other act or proceeding.” The trial must be conducted in open court, but motions may be presented in chambers. Nothing in Rule 77(b) says the witness must be present in chambers to present that oral testimony. And we have not been told that judges that wanted to receive remote witness testimony for hearings have encountered difficulties due to the current rule. Maybe there is no need to change Rule 43(c).

And there may be reasons to leave Rule 43(c) alone to avoid difficulties. One is that inserting “good cause” and “appropriate safeguards” into Rule 43(c) may erect obstacles to use of remote testimony at motion hearings. Another is that suggesting that the standards for remote testimony in the two settings—motion proceedings and trials—are identical disregards the wide range of issues that may come up in a motion proceeding. Replicating the Rule 43(a) language in Rule 43(c) could thus produce negative results. Moreover, trying to draft a committee note for a Rule 43(c) change that somehow says that the standard for permitting remote testimony in motion proceedings is less demanding than the standard in Rule 43(a) for trials—even though they say the same thing—could be challenging.

A lawyer urged that it is important to continue to consider amending Rule 43(c). Trials are rare, and motion hearings are much more plentiful. It might seem that leaving Rule 43(c) untouched is inviting a “Wild West” approach to these issues in motion hearings. Whether there are actually instances of judges going “off the rails” when permitting remote testimony in motion proceedings is unknown.

The resolution for this meeting was that Professor Marcus would try to reflect this discussion in a recast committee note, and try to introduce into the Rule 43(a) amendment a directive that remote testimony can occur only by court order. The Subcommittee would meet

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again on **January 30 at 11:00 a.m. Eastern** to continue its discussions. The target is to have a proposal (perhaps with alternatives) to present to the Advisory Committee during its April 14 meeting, looking to asking the Standing Committee to approve a preliminary draft for publication for public comment at its June 2026 meeting.

Attachment to Rule 43(a)—Remote Trial Testimony

Notes of Teams Meeting
Rule 43/45 Subcommittee
December 15, 2025

The Rule 43/45 Subcommittee met by Teams on December 15, 2025, to discuss possible rule amendments to address remote testimony. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, Jocelyn Larkin, and Mark Lanier. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk; Reporters Richard Marcus and Andrew Bradt; and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center, and Sarah Sraders represented the Rules Office.

The meeting was introduced with the question whether the reframing proposal from Joseph Sellers, a former member of this subcommittee, should be pursued. Email exchanges over the past week suggest that doing so could raise unnecessary problems, including trying to prescribe a rule dealing with all “live” testimony, even in motion proceedings, and thereby create possible inconsistency with Rule 77(b). The consensus was that, though Mr. Sellers' approach was very creative, it probably would present difficulties best sidestepped while the subcommittee dealt with the primary issue presented by the “compelling circumstances” requirement in Rule 43(a) for remote trial testimony.

A separate observation was that at present Rule 43 looks like something of “a mess.” Some rearrangement might be a good way to clean it up and reorganize things in a user-friendly manner. One way to do that would be to move present Rule 43(c) up before present Rule 43(b), so that the contrast between methods of presenting testimony at trial and methods for presenting factual materials in motion hearings appear immediately after one another.

One possible concern with such rearrangement would be that existing citations to Rule 43(c) would not pop up on a computer-based research effort to locate prior caselaw if the provision were renumbered. On the other hand, that provision was renumbered 43(c) only after the Rule 43 provisions that dealt more extensively with evidence were removed from the Civil Rules when the Evidence Rules were adopted. It was Rule 43(e) before that.

A different consideration was whether current Rule 43(b) could simply be abrogated. There is a statute—28 U.S.C. § 1746—that, at least partly, addresses the oath requirement. If that were abrogated, the revised rule would present 43(c) right after 43(a). But that statute is not really about the same subject as current Rule 43(b). No problems with current Rule 43(b) have been brought to the Advisory Committee's attention.

Another alternative that had been suggested was to combine 43(a) and (c) into a single subdivision (a) and abrogate current 43(c) in favor of that treatment, leaving current 43(b) alone.

Attention turned to the rule language. A question was raised about the first sentence of Rule 43(a). Is this really needed? Rule 77(b) already directs that trials be conducted in open court. Though Rule 77(b) does not single out witness testimony, it would seem to accomplish

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what the first sentence of Rule 43(a) does. A reaction was that this sentence is presently in the rule, and there has not been any proposal to change or remove it.

A different concern had been raised in email exchanges leading up to this meeting: Should a rule change include a provision regarding required advance notice of a party's desire to present remote witness testimony? A reaction was that such a requirement could cause problems in some circumstances. For example, suppose the witness were suddenly unable to appear in person, possibly due to a flight cancellation, sudden illness, family emergency, or the like. Should a rule prevent or interfere with remote testimony in such circumstances? That comment prompted the reaction that the Committee Note to the 1996 amendment to Rule 43(a) suggested that a last-minute emergency was exactly the sort of situation that would constitute a compelling circumstance under the current rule. A notice requirement (say 2 days' notice) in the rule could cause problems.

Discussion shifted to the practicalities involved. Can a lawyer walk into trial and hold up her cell phone, proposing that a witness testify in that manner? Attorney members of the subcommittee affirmed that lawyers know they must get prior permission from the court. They also know they need to deal with possible technical problems with presenting such testimony. Even when allowed by court order, it can be frustrated by technical problems.

In addition, there is a major practical problem with what might fall under the "appropriate safeguards" heading—Will attorneys be allowed in the room with the witness?; How will exhibits be shown to the witness?; Will the court reporter be in the room?; How will the oath be administered?, etc. It is essential that lawyers alert the court to the need to address these concerns, but it's fair to expect them to do so. And to do so, they will have to raise these concerns in advance unless a sudden development makes that impossible.

On the other hand, with regard to motions (addressed in Rule 43(c)), there is not necessarily the sort of prehearing preparation that is provided by Rule 26(a)(3), which directs the parties to identify the trial witnesses they intend to call and those they may call if needed. Indeed, the subcommittee's proposed amendment to this rule to call for identifying any witnesses who will provide remote trial testimony is out for public comment now.

A judge noted that procedures for addressing such matters are often the subject of local rules, standing orders, etc. It's reasonable to expect that parties know that they need the court's approval before attempting to present remote testimony. And Rule 7(b) says that a request for a court order must be by motion, though it does not specify notice periods or the like. In that setting, building in special procedures for this issue seems unwarranted. Many courts have required notice periods for ordinary law and motion matters. Those are not prescribed in the national rules.

A consensus emerged that there is no need to include a specified notice period in the rule.

Discussion turned to the rough draft committee note to Rule 43(a) that Professor Marcus circulated before the meeting. A first question was about the second paragraph of that draft note including the following:

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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.

The email exchanges included a suggestion that the first clause of this sentence seems unnecessary. Does this sentence suggest that “good cause” in other rules is a standard that lacks real teeth? And discussion indicated that the remainder of the sentence probably overstates the urgency of obtaining this witness’s testimony. Removing these sentences seemed wise.

Another observation was that the following paragraph began by saying that the court is “never” required to permit remote testimony. Changing that to “not” was endorsed as preferable. That sufficiently drives home the point that one needs to get prior permission from the court to present remote testimony.

Another comment focused on the sixth paragraph of the draft note, and suggested that drawing a contrast with in-person testimony (which the draft says presents “nonexistent” difficulties) seems unnecessary and, according to what some said during the July 2025 online conference may also be inaccurate. At least on occasion, it seems jurors find a witness presented on screen preferable to an in-person witness seated far away. The suggestion was to revise that paragraph as follows:

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.

Attention also focused on the fourth paragraph of the draft, which emphasized that the importance of having *this* witness testify might be important. Though that is a possible antidote to the “apex witness” concern, it was suggested, surely the fact that a given witness is expected only to authenticate a given exhibit would not require a showing that nobody else could provide such authentication.

More generally, the desired focus seems to be on ascertaining whether credibility issues will be important in assessing this witness’s testimony.

Attention turned to motion practice, currently covered in Rule 43(c). One question was whether to invoke the good cause standard here as well. That would be parallel to the Rule 43(a) approach. It would also correspond to the new provision for remote participation in “contested matters” under Bankruptcy Rule 9014. But there has been concern about how to explain in a note that “good cause” for Rule 43(c) purposes need not be as “good” as it need be for trial testimony under Rule 43(a).

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A semi-consensus emerged to leave “good cause” out of Rule 43(c). The use of “may” authorizes a court order for remote testimony. Adding “appropriate safeguards” in Rule 43(c) alerts the court and the attorneys to the need to focus on setting guardrails. Party agreement may often suffice to support remote motion testimony.

There was discussion about likely resistance to a change like the one under discussion. One reaction was that, because this is up to the judge, it may be that judges will be comfortable with such a change. There does seem to be a considerable range of views among judges about remote testimony, but this rule does not say any judge who is uncomfortable must permit it.

From among lawyers, there may be strategic reasons for favoring or opposing relaxation of the constraints on remote testimony. The general expectation might be that plaintiff-side lawyers would endorse permission for remote testimony more enthusiastically than defense-side lawyers. But perhaps there could be exceptions. Consider, for example, the CEO of a corporate defendant who can be compelled by subpoena to testify at trial (in the same state, for example, under Rule 45(c)(1)(B)). That CEO might very much prefer to testify remotely rather than appear in person in court. There might even be security issues for the CEO. It may be likely that plaintiff counsel would not agree to remote testimony, but in general it would not seem that the CEO’s schedule would take priority over in-person testimony (subject to the court’s power under Rule 26(c) to grant a protective order excusing the CEO from testifying).

That prompted attention to a footnote in the draft note under discussion about whether remote testimony or a video deposition is superior. The 1996 committee note evinced a preference for the video deposition, but at a time when the only alternative to in-person testimony was by telephone. Contemporary methods are worlds away from that; hence (as suggested by the introduction to the draft committee note) the current willingness to remove the “compelling circumstances” constraint.

One possibility is that the witness’s deposition was taken before discovery produced new evidence the other side would want to use with this witness. That situation would seem to indicate that the deposition is not a suitable substitute. But how about a second deposition, limited (if possible) to evidence that surfaced after the first deposition?

Indeed, some lawyers may forgo deposing an important adverse witness to deny the witness the “practice” that the deposition would provide. That tactic may be particularly important with expert witnesses. And a different problem can arise because ordinarily counsel for the witness does not ask questions during a deposition, but prefers to save direct for trial. What if the witness is incapacitated or otherwise unavailable when the trial date arrives? Should that party be permitted to “supplement” the video deposition with the direct examination that could have but did not occur during the deposition?

The emerging consensus was that getting into these sorts of concerns in a Note is probably not wise, though calling attention to safeguards for remote testimony is important for motion proceedings.

The meeting concluded with some discussion of next steps. One is for Professor Marcus to attempt to provide a redraft of the draft under discussion during this meeting, including a

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committee note for a possible change to Rule 43(c). At the same time, alternatives might be proposed to move current Rule 43(c) up into (a), which would be subdivided into (a)(1) on trials and (a)(2) on motions.

Going forward, the subcommittee will try to meet again. Professor Marcus will endeavor to get out a discussion redraft this week, and Judge Lauck will try to identify a date in January that works for all for another meeting. Ideally, that meeting could support a recommendation to the full Advisory Committee for publication for public comment of draft amendments. It is likely that the agenda book for the Spring meeting of the Advisory Committee will be due in early March. If a published preliminary draft goes forward, the subcommittee will be able to revisit the proposals after the public comment period concludes.



**RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
RULE 43/45 SUBCOMMITTEE**

February 13, 2026

**THE “COMPELLING CIRCUMSTANCES” REQUIREMENT FOR REMOTE
TESTIMONY SHOULD NOT BE REMOVED FROM RULE 43(a)**

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules (“Advisory Committee”) and its Rule 43/45 Subcommittee (“Subcommittee”).

INTRODUCTION

Rule 43(a)’s “compelling circumstances” standard for remote trial testimony provides appropriate guidance and should not be omitted. The Advisory Committee’s observation that face-to-face testimony incentivizes truth telling and augments the assessment of witness demeanor, articulated in 1996 Committee Note,² remains true today. There is no need to loosen the standard; the “compelling circumstances” rule is not preventing judges from effectively handling remote testimony issues. The Advisory Committee recently reexamined the rules governing remote proceedings in light of the COVID-19 pandemic experience and concluded that the rules provide courts sufficient flexibility.

In contrast, omitting that standard and replacing it with a “good cause” default would spawn new motion practice as parties object to attempts to prevent them from confronting adverse witnesses in the physical presence of fact finders. It would also detract from the gravitas of the trial process—which the Advisory Committee warned decades ago “cannot be forgotten.”³ In-person testimony preserves “the interests of the justice system”—“the factfinder’s ability to fully evaluate [witness] testimony, the [opponent’s] ability to confront and cross examine, and the

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

² Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

³ *Id.*

Court’s ability to assure the integrity of the proceedings.”⁴ The “view that widescale allowance of virtual trial testimony fully serves this Court’s duty to evaluate credibility carefully and preserve the integrity of this proceeding” is “broad, presumptuous, and frankly uninformed.”⁵ Re-inventing the rules governing remote testimony would disrupt a balance that is working well now by introducing unintended and unwelcome disputes.

I. RULE 43(a) STRIKES THE RIGHT BALANCE FOR HANDLING DISPUTES OVER REMOTE TESTIMONY

A. The Preference for In-Court Testimony Should Remain in Place

In-person testimony provides the court, the jury, and the parties with the best opportunity to present and evaluate testimony. The Committee Note to the 1996 amendment of Rule 43(a) reflects this understanding:

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.⁶

Neither advances in remote technology, nor increased voluntary use of that technology because of the COVID-19 pandemic, have altered this rationale.⁷ Trials conducted materially or entirely via video are a dramatic departure from the well-formed traditions of American litigation.

⁴ *Reichert v. Hornbeck*, 2026 WL 91473, at *3 (D. Md. Jan. 13, 2026).

⁵ *Monera v. Datis*, 2025 WL 3776652, at *2 (S.D. Fla. Feb. 5, 2025).

⁶ Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

⁷ See *Hensley v. Bossio*, 2024 WL 2799261, at *4 (6th Cir. May 31, 2024) (rejecting “argu[ment] that the court should have permitted remote testimony via video transmission because current technology provides appropriate safeguards”); *Donnelly v. Anand*, 2025 WL 2494376, at *3 (S.D.N.Y. Aug. 29, 2025) (“in-person testimony is required in order . . . to assess [the witness’ demeanor and credibility]”); *Emerson v. Prudential Ins. Co. of Am.*, 2024 WL 4730422, at *2-3 (N.D. Cal. Nov. 7, 2024) (“The Court lacks confidence that the opportunity to assess [the witness’s] credibility could or would be adequately safeguarded anywhere except ‘in court.’”); *Kluth v. Spurlock*, 2024 WL 3329046, at *1 (D. Colo. July 8, 2024) (“Based on this Court’s recent experiences with remote testimony at trial, which included technological difficulties and subsequent delays, the Court is not inclined to permit remote testimony.”); *Alston v. Jones*, 2022 WL 1809422, at *3 (M.D.N.C. June 2, 2022) (“For remote testimony at a trial to be appropriate, the Court must be satisfied that the witness will treat the remote testimony as if he were in court, with no distractions or interruptions. [The witness] has offered no such assurances, and it would likely be difficult to establish appropriate safeguards in light of [his] apparent hostility towards testifying and the very few days before trial.”); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2022 WL 1143327, at *2 (N.D. Fla. Apr. 18, 2022) (“There is no technology to date that can substitute for a juror looking a witness in the eyes”) (citation and quotation marks omitted).

B. The Advisory Committee’s CARES Act Subcommittee Concluded that the Current Rules on Remote Testimony Worked Well During the Pandemic

Less than six years ago, the Judicial Conference authorized the use of video and teleconference systems for certain proceedings.⁸ After the exigent circumstances of the COVID-19 pandemic abated, the Advisory Committee’s CARES Act Subcommittee examined how the courts handled remote testimony in civil proceedings and considered whether rules changes were needed. The Subcommittee concluded that Rule 43(a) is sufficiently flexible to allow courts to handle the issue in the future. The Advisory Committee’s report to the Standing Committee stated, “Experience during the COVID-19 pandemic suggests that the present rules are well designed to meet needs for remote proceedings.”⁹ The Advisory Committee further explained:

[T]he inherent discretion and flexibility of the Civil Rules, coupled with existing provisions for relying on remote technology, have served the courts and parties well during the COVID-19 pandemic.¹⁰

No new facts have arisen since the Advisory Committee’s report that change this conclusion or warrant a radical revision of Rule 43(a).

C. The FRCP’s Existing Remedy for Unavailable Witnesses Is Well Accepted

Rule 43 provides a remedy for situations where a witness is unavailable at trial: deposition testimony. Although the use of depositions is not a perfect substitute for in-person testimony, it is widely used and well accepted. The Committee Note to the 1996 amendment to Rule 43 states:

Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying.¹¹

Nothing, including the availability of new technologies, has changed the viability of the use of depositions when appropriate in the absence of a witness at trial. This should heighten the Advisory Committee’s caution to avoid creating unintended consequences that are worse than the status quo. Creating a rules-based presumption that remote trial testimony is always superior to using deposition testimony for all witnesses in all trials would up-end over a century of established precedent and would cause many foreseeable problems for judges, parties, lawyers,

⁸ *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, available at:

<https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

⁹ Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 176,

https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.

¹⁰ Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 165,

https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.

¹¹ Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

and witnesses. In addition to the likely added burdens on party witnesses, such a change will also lead to significant burdens on distant non-party witnesses who could be subject to the rigors of a “trial deposition” and yet face the added burden of having to be available for trial testimony (which could be at inconvenient days/times) if a party decides it wants to have a second shot at the testimony for strategic or tactical purposes.

II. RULE 43(a) SHOULD NOT BE AMENDED TO REVERSE THE PRESUMPTION IN FAVOR OF LIVE, IN-COURT TESTIMONY OR TO REDUCE JUDICIAL DISCRETION

Rule 43(a) requires that only for good cause and under compelling circumstances should a trial witness’s testimony be permitted via contemporaneous transmission from a different location.¹² Reversing Rule 43(a)’s presumption by permitting (or requiring judges to permit) remote testimony regardless of the importance of any particular witness, including whether substitute witnesses are available, or factoring in other unique circumstances of a particular case, would have significant unintended consequences. A fundamental reason why judges need discretion over when to permit (or require) remote testimony is that not all witnesses are equally important to the case, let alone “necessary” or “essential,” as defined by Federal Rule of Evidence 403. Eliminating that discretion would reduce judges’ control over their courtrooms, interfere with parties’ litigation strategies, force some people to testify who otherwise would not, and substitute some witnesses who expect to testify for others who do not. The merits of such decisions cannot be contemplated in advance or otherwise mandated by a blanket rule such as the one proposed.

III. THE PROMULGATION OF FRCP AMENDMENTS RELATING TO REMOTE TESTIMONY WILL EMBROIL THE COMMITTEE IN A HEATED DISPUTE ABOUT APEX WITNESSES

Any changes to Rule 43(a) relating to remote trial testimony would have broad effect on many witnesses and a particularly significant impact on fights over so-called apex witnesses—high-ranking corporate or organizational leaders who could conceivably, but usually do not, have any first-hand knowledge of the facts and circumstances of a particular dispute. Satellite litigation over the appropriateness of apex witnesses is as contentious as it is common.¹³

A change to Rule 43(a) will also impact non-party witnesses. If the default becomes remote trial testimony regardless of witness location, then it is highly likely that counsel will reserve the right

¹² Fed. R. Civ. P. 43.

¹³ Most state appellate courts have restricted depositions of “apex” corporate officers. *See, e.g., National Collegiate Athletic Association v. Finnerty*, 191 N.E.3d 211, 221-23 (Ind. 2022) (order allowing apex deposition reversed and remanded); *General Motors, LLC v. Buchanan*, 874 S.E.2d 52, 64-66 (Ga. 2022) (same); *In re Amendments to Florida. Rule of Civ. Procedure 280*, 324 So.3d 459, 461-63 (Fla. 2021) (codifying apex deposition doctrine); *State ex rel. Massachusetts Mutual Life Insurance Co. v. Sanders*, 228 W. Va. 749, 760, 724 S.E.2d 353, 363-64 (2012) (order allowing apex deposition reversed and remanded); *Crest Infiniti, II, LP v. Swinton*, 174 P.3d 996, 1004-05 (Okla. 2007) (same); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607-09 (Mo. 2002) (same); *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995) (adopting apex deposition doctrine); *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 494 (Mich. App. 2010) (same); *Liberty Mutual Insurance Co. v. Superior Court*, 13 Cal. Rptr.2d 363, 367 (Cal. App. 1992) (same); *but see Stratford v. Umpqua Bank*, 534 P.3d 1195, 1201-03 (Wash. 2023) (declining to adopt apex deposition doctrine).

to call many, if not all, non-party witnesses even if they have a complete “trial deposition” video or transcript in hand. The uncertainties and burdens on non-parties are unquestionable, and it is entirely predictable that such witnesses will oppose appearing remotely, creating even more satellite litigation before and during trials.

CONCLUSION

Rule 43(a) strikes the appropriate balance for courts and parties, including the presumption in favor of in-person testimony and the ability to use deposition testimony when appropriate. Removing the “compelling circumstances” requirement would reduce courts’ discretion, change litigation strategies, and lead to more motion practice. Because courts and parties do not need a rule change in order to manage remote testimony issues, and the risks of unintended consequences is very high, the Advisory Committee should not amend Rule 43(a) governing remote trial testimony.

TAB 13

Third-Party Litigation Funding Subcommittee

The Third-Party Litigation Funding (TPLF) Subcommittee is continuing its work in considering a disclosure rule. As the October 23 conference at George Washington University made clear, there are many issues to be considered, and also some vehemence about which of those issues to emphasize. As several of the bills before Congress about litigation funding show, this is a matter of continuing concern. The agenda book contains the text of five bills before Congress and also four additional submissions received since the October 2025 Advisory Committee meeting.

At the same time, it does not seem that a disclosure rule could be “simple” and avoid major difficulties. The task of drafting a disclosure rule that will achieve desired results and avoid undesirable side effects is a major challenge. And the more aggressive the disclosure rule, the more it might cause controversy.

Tentative initial reactions to the last decade of discussion of a TPLF disclosure include (a) a sense that disclosing the fact of funding ought not often pose problems; (b) required disclosure of all details of the funding arrangement (including communications between counsel and the funder about counsel’s request for funding) would raise very serious (opinion) work product problems; and (c) there remain serious questions about what the court can do with information about funding arrangements.

Beyond disclosure, the European Union experience suggests that there may be many additional legal measures that might be adopted, but (whether or not they would be desirable) those measures might be hard to fit within the Rules Enabling Act authority.

Existing models

Original rule proposal

The original proposal in 2014 (14-CV-B) was to add the following new (v) to Rule 26(a)(1)(A):

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee for representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The proponents analogized this proposed new provision to the longstanding discovery (and now disclosure) provision about insurance coverage in Rule 26(a)(1)(A)(iv). That analogy is not airtight. For one thing, the insurance disclosure directive is limited to an “insurance agreement” from “an insurance business.” It may also be relevant that insurance companies are highly regulated in many places. California, for example, has a pretty substantial Insurance Code.

A second difference that may matter is that the main interest in the insurance policy was probably the indemnity feature, not the insurer’s undertaking to provide a defense (which may be somewhat analogous to what a litigation funder provides). It does not seem that litigation funders

have indemnified the parties they fund, even as to litigation-related sanctions, and usually the funded party is seeking a money award. Hence the proposal seems not to be directed at finding out about something that plays as prominent a role in resolving the action as the indemnity issue. But the committee note accompanying the addition of discovery of insurance coverage in 1970 did mention not only that “insurance is an asset ordinarily created specifically to satisfy a claim,” but also that “the insurance company ordinarily controls the litigation.”

When it first addressed this proposal in the fall of 2014, the Advisory Committee did not pursue it, in part because litigation funding was new and was changing and growing rapidly, making its contours and importance unclear.

From 2014 to 2024, there were several further submissions to the Advisory Committee. Some of those urged that the 2014 proposal be adopted. Some funders submitted opposing arguments, occasionally contending that the Advisory Committee’s limited fact-gathering constituted “findings” that no action was needed. Some of the submissions and inquiries came from members of Congress.

Rep. Issa Bill

In January 2025, Rep. Issa introduced H.R. 1109, which proposed a new § 1660(a) for the Judicial Code (Title 28) requiring counsel of record to:

- (1) disclose in writing to the court and all other named parties to the civil action the identity of any person (other than counsel of record) that has a right to receive any payment or thing of value that is contingent on the outcome of the civil action or a group of actions of which the civil action is a part; and
- (2) produce to the court and to each other named party to the civil action, for inspection and copying, any agreement creating a contingent right referred to in paragraph (1), including any ancillary agreement or document, except as otherwise stipulated or ordered by the court.

This proposal differs from the 2014 submission in several ways. It speaks of receiving “any payment or thing of value that is contingent on the outcome of the civil action.” So it might also apply to a suit for non-monetary relief. That might be even broader. Consider the famous suit by Hulk Hogan against Gawker, which was reportedly funded by Silicon Valley billionaire Peter Thiel. It may be that though Hogan got a money judgment, Thiel had no right to a share of that money. If he was seeking to harm Gawker, that might be the “thing of value” for him. And in a suit for injunctive relief or other non-monetary relief, that might be the “thing of value.”

The Issa bill also speaks of a “group of actions of which the civil action is a part.” This provision sounds like it is about multidistrict litigation (MDL) proceedings. But how does that affect state court Roundup actions in relation to the pending MDL in federal court about the same substance? Given the reported emergence of “inventory funding,” this might also apply in that sort of situation, though it is less clear how that would work.

The Issa bill also contains a section (b) which would exclude from the disclosure requirement any instance in which the funding agreement entitles the funder to receive only repayment, or repayment plus interest at a relatively low rate specified in the statute, or for reimbursement of attorney's fees.

This bill also has a section (c), which expressly addresses timing—disclosure must occur within ten days of execution of the funding agreement or at the time of the filing of the action, whichever is later. Finally, in section (d) it requires supplementation or correction of prior disclosures.

Foreign Funding

Also pending in the House is H.R. 2675, the Protecting Our Courts from Foreign Manipulation Act of 2025. This bill would add a different § 1660 to the Judicial Code. It focuses on funding from a “foreign person,” as defined in the Foreign Intelligence Surveillance Act of 1978, or a foreign state, or a sovereign wealth fund. It requires disclosure not only to the court and other parties to the action, but also to the Attorney General and the Principal Deputy Assistant Attorney General for National Security of details about the “foreign person” that has “a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise.”

It requires disclosure also of agreements providing a “right to receive any payment that is contingent in any respect on the outcome of any matter within a portfolio that includes the civil action and involves the same counsel of record.” This provision seems to reach the portfolio funding situation but not to address “malign” U.S. litigation brought to disrupt the defendant's activities rather than obtain a money judgment.

Proposed section (c) of this § 1660 (entitled “Prohibition on Third-Party Funding Litigation by Foreign States and Sovereign Wealth Funds”) would make it unlawful for any party or counsel of record to enter into a funding agreement with such a “foreign party.”

Possible Rule 16 or 16.1 approach

Rule 16 might be a place to add a provision about TPLF. It calls for the court to become involved early on in managing the action. Suggesting that this judicial oversight include consideration of funding arrangements might facilitate a response tailored to the particular case.

Rule 16.1 addresses only MDL proceedings. But at least some who have commented on TPLF issues contend that funding is common in relation to some MDL proceedings. Eight years ago, funding did not seem to be particularly prominent in MDL proceedings, but circumstances may have changed. So another approach might be to try to identify sorts of proceedings in which funding issues often appear and limit a rule to those proceedings. On the other hand, if patent infringement proceedings are also commonplace funding targets, such a “sectoral” approach might not be promising.

District of New Jersey Local Rule

Effective June 21, 2021, the District of New Jersey added its Local Rule 7.1.1, requiring disclosure of Third-Party Funding:

(a) Within 30 days of filing an initial pleading or transfer of the matter to this district * * * all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance:

1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is affirmative, the nature of the terms and conditions relating to that approval; and
3. A brief description of the nature of the financial interest.

(b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

(c) Nothing here in precludes the Court from ordering such other relief as may be appropriate.

The adoption of this local rule generated considerable controversy (somewhat along the lines of submissions received by the Advisory Committee). Preliminary inquiry by FJC Research has not revealed any major problems, however. The main difficulty was that many lawyers thought they had to file "disclosures" saying that they did not have funding. The court eventually issued some sort of notice alerting lawyers that disclosure was unnecessary in the absence of funding.

This provision adheres to the Civil Rules format, but treats this disclosure as akin to Civil Rule 7, not part of Rule 26(a)(1)(A). Presumably, that means that the sanctions of Rule 37(c)(1) would not apply to failure to disclose. It is not clear what enforcement mechanism applies to instances of failure to comply with the disclosure requirement.

This provision applies to funding for attorneys' fees and expenses, but would not seem to apply to the "consumer" situation in which the funding is for the party's living expenses.

This provision addresses both a “financial interest” and a “non-monetary result” in the litigation, and therefore could apply in situations in which there is no contemplated pay-out of settlement financial proceeds to the funder. Though it requires a “brief description of the nature of the financial interest,” it seems not to require any disclosure of the “non-monetary result.”

This provision keys on control of the litigation or settlement of the action. It focuses only influence on “material” decisions, though it is not clear which decisions are not “material.”

In section (b) the provision permits “additional discovery.” It is not clear that this is discovery, particularly since it is a Rule 7 analogue (though there could be discovery in situations now addressed by Rule 7, such as the existence of diversity). Arguably, the authorization for further discovery may be had only with regard to control, but the discovery is also authorized if “necessary to any issue in the case.”

More detailed information about the actual experience under this rule would be informative. Some questions might be:

1. How frequently are disclosures of funding made? Is it in 30% or 1% of filed cases? (This would exclude the “false negatives” that resulted from early confusion about whether one must affirmatively disclose that there is no funding in a given case.)
2. In what sorts of cases are these disclosures made? (We have heard a lot about patent infringement cases, for example. We have also heard a great deal about mass tort cases, particularly MDL proceedings.)
3. Have there been instances in which the court ordered follow-up discovery in light of the disclosures made? What sorts of showings were offered to justify such follow-up discovery?
4. What kinds of “financial interests” have been disclosed? Has there been any instance of disclosure of an interest in a “non-monetary result”?
5. Did disclosures or follow-up discovery lead to any significant action by the court? Possibilities include sanctions against the funded party or the one pursuing the funding discovery, reference to the state bar, etc.

No doubt additional questions could be pursued. An untutored and informal reaction is that despite the considerable controversy about adopting this local rule, the actual experience over the last four plus years has not caused tumult.

State court provisions

Several years ago, Wisconsin adopted a funder disclosure requirement as a part of legislative tort reform legislation. An informal effort by the reporter (contacting Wisconsin law professors) did not indicate that this disclosure provision produced waves.

The Chamber of Commerce has lobbied the legislatures in other states to adopt similar provisions, sometimes successfully.

It is quite unclear whether there is a way to get firm information about the results of these state court provisions. The National Center for State Courts might have some information.

ELI/UNIDROIT disclosure approach

Below there will be some mention of EU proposals that go beyond disclosure. Regarding disclosure, it seems worth mentioning Rule 245(1) of the proposed Model European Rules of Civil Procedure, promulgated by the European Law Institute (modeled on the American Law Institute) and the International Institute for the Unification of Private Law (UNIDROIT) says:

A party who receives funding for the proceedings from a professional third-party funder or from a crowd-funder shall disclose this fact and the identity of the funder to the court and the other party at the commencement of proceedings. The details of such a third-party funding arrangement are, however, not subject to this requirement.

This provision is only a proposal to EU member states. It offers several notable features. First, it focuses on “a professional third-party funder.” That would seem to exclude Uncle Fred who supports his niece after her car crash. But it includes “a crowd-funder.” It requires disclosure “at the commencement of proceedings,” and thus would not seem to include funders who only fund costs on appeal after success in the trial court. It says nothing about litigation control by the funder. It also does not seem to focus on whether the funding is recourse or non-recourse. The NAACP Inc. Fund would seemingly be subject to this disclosure requirement. It calls for disclosure to the opposing party, not just the court. But it excludes the “details of such a third-party funding arrangement” from the disclosure directive, and does not authorize discovery probing for more information. (It bears noting that discovery in EU legal systems is vastly more limited than American discovery. For discussion, see Marcus, *Reflections of an Outlier: An American Reaction to the EU Rules on Evidence*, 11 Int’l J. Procedural Law 106 (2021).)

Drafting issues going forward

The introduction above (and the very helpful October 23 conference at GW Law School) suggest a lot of drafting issues that might first be addressed at the level of determining what we want a rule to do.

Scope—What arrangements must be disclosed?

Except for mass torts, there seems not to be much appetite for disclosure of funding of personal injury claims. An early session on TPLF in Berkeley in about 2016 included a representative of what might be called the funding of “car crash” cases, and that seemed to be a high volume activity in which funder control would not be an issue because the funder would not know enough about all the cases it was funding to exercise control, even over settlement.

Nonetheless, defining what must be disclosed in light of the manifold accusations directed towards TPLF activity is a challenge, and drafting something that is workable, while presenting the usual drafting challenges, begins by deciding what one wants to include. It seems

that the definition of what triggers the disclosure requirement is the biggest obstacle. Here are at least some of the issues.

Focus only on funding for attorney fees and litigation expenses: The District of New Jersey rule seems to exclude those cases by focusing on funding for “some or all of the attorney’s fees and expenses for the litigation.” That would seem to exclude the “Uncle Fred” situation in which Fred loans money to his niece to pay living expenses while her claim progresses, but expects to be paid back if the case pays off.

Exclude funding that does not seem designed to make the funder a profit: Another approach is suggested by Representative Issa’s bill—exclude any instance in which the payout is either only repayment or repayment plus a modest interest add-on. Much “social justice” funding probably would be excluded even though this is funding for litigation costs. Much of the lobbying for disclosure assumes that there is a big profit to be had for the funder; excluding instances in which that is not part of the deal could be a good idea, though figuring out what interest rate or profit is acceptable could get tricky.

Include crowd funding?: There is some indication that this activity has been involved in litigation funding in the U.S. How exactly it works is not clear to this reporter. Mentions of crowd funding in the press usually seem to deal with financial support for people who have suffered catastrophic injuries or other serious harms (including possible eviction). It is not clear how the provider of such funding would seek or obtain repayment of the amount provided.

Address litigation seeking non-monetary relief?: The original proposal seemed only to address the big bucks judgment or settlement. Others have taken account of additional litigation outcomes that would benefit funders in other ways. To the extent, however, that one is concerned about malicious litigants trying to use American litigation to bring down American companies that compete with foreign competition, however, there may be no payout contemplated; the goal could be simply to make trouble, not win money. Whether that really happens in litigation (possibly putting aside *Hulk Hogan v. Gawker*) is unclear. But maybe a variant could happen if Big Pharma Co. *A* finances patent holder’s suit against Big Pharma Co. *B* to achieve a commercial objective by sullyng the reputation of Co. *B* or tying it up in court. Similarly, perhaps, environmental litigation might be funded by competitors of the company accused by the “stooge” of environmental violations. In California, for example, litigation under the California Environmental Quality Act is sometimes characterized as principally designed to hamstring proposed projects in the hope that the developer will eventually give up.

Limit disclosure to “funders”: As mentioned below, in the EU it has been proposed that litigation funders be licensed. That might be more analogous to disclosure of insurance by “an insurance business.” Others who provide indemnity need not disclose. But as noted above, the insurance situation seems a special case. The EU Model Rules focus on “a professional third-party funder.” Maybe that is to be linked to licensing of such entities.

Exclude “social justice” funders?: The NAACP Inc. Fund might be an example of a “social justice” funder. In the present day, there are many groups that seem to fund “cause” litigation. For example, it seems that the Chamber of Commerce funds such litigation, at least at the appellate level. Indeed, that current reality appears to be one reason for considering expanded

disclosures in the Appellate Rules with regard to amicus filings in the appellate courts. Probably most or all such funding could be exempted under something like the exclusion in H.R. 1109 for arrangements that do not call for a profit beyond a low percentage rate.

Include crowd-funding?: The EU Model Rules include funding “from a crowd-funder.” Certainly there are many reports of crowd-funding efforts to achieve a variety of objectives, such as providing support for the victims of disasters. It is not clear whether any of these arrangements call for repayment or permit the “funder” to control what the recipient does with the funding. Are those who contribute ever repaid? Can they turn a profit?

A special rule for patent infringement cases?: This sort of litigation surely has gotten a lot of attention. But the Civil Rules supposedly govern all cases, not only cases of a certain type. About a decade ago, there were stirrings in Congress about legislation to address the problem of “patent trolls.” Some of that legislative effort focused directives to the rules process to develop rules to solve the reported problems.

Funding only appeals: In the U.S., some funders focus on appeals, mainly or solely. Thus, if plaintiff wins a whopping verdict at trial the funder will provide funding to cover defendant’s appeal for a share of the proceeds if the appeal does not wipe out the judgment. But that cannot be known until the trial court litigation is over or nearly over.

Address “portfolio funding”?: Particularly with mass torts, but perhaps with patent infringement cases also, one notion is that funders may not limit themselves to a single case. Instead, they may fund a law firm’s portfolio of cases of a certain sort (e.g., Camp Lejeune claims). In the Camp Lejeune example, there have been reports that millions were spent on lobbying Congress to get what claimants’ lawyers wanted in the bill that has led to the outburst of claims. Where all that money came from is not clear, but it is difficult to see how a funder could be funding not-yet-existing claims. Ongoing recruitment of claimants for some MDL mega-proceedings (e.g., Roundup and Zantac) are clearly widespread and must pay off in some way.

Including only non-recourse funding: A recurrent feature of the push for disclosure is that the funder gets nothing back unless the litigation is successful. The “portfolio funding” wrinkle is related to this concern. If the funder has provided funding for a share of all Camp Lejeune claims the firm has, and 50% are unsuccessful but the other 50% are successful, is that non-recourse funding or more like a law firm line of credit, in which the firm has pledged all its receivables as collateral. (True, the line of credit might also call for personal guarantees by the partners of the firm, but we are moving closer to a bank line of credit.) The claim that funders fund patent infringement claims hoping for a few big strikes alongside many failures may be similar.

Disclosure of what?

Fact of funding and identity of funder: The District of New Jersey local rule requires disclosure of the fact of funding (however defined) and the identity of the funder. That alone might avoid difficulties. In 2019, for example, a funder so suggested. *See* Michael German,

Sensible Disclosure Rule for Litigation Finance is Right Balance, U.S. Law Week, March 15, 2019.

“Control”: The District of New Jersey local rule also requires disclosure of what it defines as “control.” If one wants to exempt those funding arrangements that do not include such features, one would need a definition (going to the scope of the disclosure obligation). Otherwise, one could insist on disclosure of all covered funding arrangements and add this sort of disclosure feature. But defining what constitutes “control” could be difficult. Must the funding be a blank check because otherwise the funder can “control” the litigation by refusing further funding? Presumably the funder could condition further funding on adopting certain litigation tactics. One concern expressed by some proponents of disclosure is that funders will press claimants to settle for less than they could get by persisting in the litigation effort, and that their lawyers would disobey their duty of loyalty to the client to please the funder. On the other hand, the notion that getting funding may be critical to the ability of some claimants to pursue their claims at all suggests that, by definition, there is an element of control—the initial decision whether to provide funding. (Commercial funders say they provide funding in only a small percentage of the applications they receive.)

Additional details?: The District of New Jersey local rule also requires disclosure of “a brief description of the nature of the financial interest.” It is not immediately clear what that adds to disclosure of “control.” Perhaps it means whether this is non-recourse funding (if that is not a part of the definition of what arrangements must be disclosed). As suggested by the much more aggressive EU ideas on regulating litigation funding (briefly described below), it might also key on whether the funder has the financial wherewithal to provide the promised funding.

Adding Rule 7.1 types of disclosures regarding the funder: The Advisory Committee has recently dealt with expanding the Rule 7.1 disclosure requirements to identify corporate “grandparents,” etc. It has often been asserted that disclosure is required to alert judges to the possible need to recuse. Rule 7.1 focuses on parties to litigation, not the funder of those parties. If one regards the recusal issue as important, some disclosure about corporate affiliations of the funder might be in order. There is an undercurrent in some of the writing expressing concern about patent infringement litigation that cleverly-contrived and interlocked funders are hiding from sight. Trying to devise a rule that would ferret them out would be a challenge.

The entire funding agreement: The original disclosure provision mirrored the insurance disclosure provision already in the rules and called for the disclosure of the entire agreement. That could pinpoint things about “control” and other things that might justify authorizing further investigation via discovery. But one can say that this disclosure is different from insurance disclosure because, in the insurance situation, one is likely focused on “settlement for the policy limits.” That, of course, lies behind tort claims against insurers for bad faith refusal to settle. In the TPLF context, on the other hand, unless litigation funding must be a blank check, disclosure of details may provide the opposing party with a guide to exhausting its opponent’s resources (perhaps via expensive discovery forays about funding arrangements).

Communications leading up to execution of the funding agreement: As noted above, funders say they provide funding in response to only a small proportion of the requests for funding they receive. Commercial funders often say they have expert in-house lawyers who can

assess the claim and know what to ask of the lawyers requesting funding. That would often include core opinion work product. But eliciting details about the assurances, etc., that led up to the agreement might also shed light on “control” issues. Thus far, proposals do not seem to call for this sort of disclosure, but it may be that follow-up discovery efforts would target these communications.

Disclosure to whom?

The court alone: There seems to be little question that the court may direct disclosure, particularly on a case-specific basis. The District of New Jersey local rule has not been challenged as violating the strictures of Rule 83 (so far as has been reported to us). So it is not at all clear that a rule saying courts may direct disclosure would add significant authority to what already exists. Perhaps adding this possibility to Rule 16 would be a way to flag the question for the court. If so, one might add it to the laundry list in Rule 26(f) as well.

To other parties: Ordinarily proponents of disclosure insist on disclosure to other parties. They are thinking about the adverse parties, and they claim that disclosure to the court alone is a forbidden “ex parte” communication. Disclosure proponents sometimes say that they can identify topics in the funding arrangements that the court needs to pursue but may not recognize. On this score, it has not been said, but comes to mind, that funding might be of interest to co-parties. For example, suppose some plaintiffs have funding and others do not. Of course, co-parties are fully free to make disclosures to one another. (Compare the common-interest exception to waiver of privilege when attorney-client or work-product materials are shared among co-parties.) So probably the focus should be on adverse parties, but if disclosure is required to them it presumably would be made to co-parties as well.

To bar associations, etc.: Proponents of disclosure often suggest that plaintiff attorneys who receive funding may be tempted to breach their duty of loyalty to their clients because they are beholden to the funders. Maybe there are sometimes concerns that would warrant disclosure to regulators of lawyer ethics. To date, despite these intimations from disclosure advocates, this has not been an included ingredient.

Explicitly authorizing further discovery

The District of New Jersey local rule explicitly alerts the judge about possible discovery, but seemingly limited to issues of “control” or a showing of a conflict of interest. Perhaps that expands the scope of discovery on the notion that funding arrangements are not within Rule 26(b)(1). But one might expect that if disclosure to adverse parties is required, they would seek discovery on whatever ground they could devise. For example, in terms of discovery of communications between the funder and the attorney seeking funding, one argument might be that there are Rule 11 issues that call for further revelations. Unless there is some concern that—absent a provision authorizing discovery—courts might consider themselves constrained by the scope of discovery from ordering it in appropriate cases, it is not clear why this sort of provision is needed.

Alternatively, it might be that a rule could explicitly *forbid* certain sorts of discovery. By way of comparison, Rule 26(b)(3)(B), which applies when the court concludes that a party has

made a sufficient showing to justify discovery of fact work product, directs that the court “must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” *Compare* Cal. Code Civ. Proc. § 2018.030(a) (“A writing that reflects an attorney’s impressions, conclusion, opinions, or legal research or theories is not discoverable under any circumstances.”).

The EU regulatory contrast

The introduction includes the disclosure provision included in the ELI/UNIDROIT Model European Rules of Civil Procedure (2020). The EU has moved on beyond that as discussed in Marcus, *The “Advanced” Systems Grapple With Third Party Litigation Funding*, 29 ZZPInt. 129 (2025). In 2022, the EU Parliament adopted a resolution on “Responsible private funding of litigation.” *See* European Parliament Resolution of 13 September 2022 with recommendation to the Commission on Responsible private funding of litigation (2020/2130 (INL)). In early 2025, an agency of the EU released a 700-page study entitled *Mapping Third Party Litigation Funding*. This study does not show that most EU member states have yet taken up the cudgel recommended in the 2022 document. But it may be useful to describe elements of that 2022 set of proposals for purposes of comparison:

Definition of covered activities: The 2022 proposal was that a “litigation funder” be a commercial entity “which has the primary aim of receiving a return on an investment it makes.” That might well exclude the deal between Peter Thiel and Hulk Hogan, and funding by malign foreign governments trying to use American litigation to achieve malign purposes but not to make money directly from the litigation. But unless the funder is primarily or solely engaged in litigation funding (as opposed, perhaps, to “hedge funds” looking for profit-making activities of whatever sort), such a definition might not catch some the proponents of disclosure would prefer that a rule identify.

Regulation of funders: The EU 2022 resolution also urges that member states “create a system for the authorisation and monitoring of the activities of litigation funders.” This sounds like the way most or all states treat insurers. This regulatory setup would include “an independent supervisory department or authority tasked with granting, suspending, or withdrawing authorisations for litigation funders and supervising the activities of litigation funders.”

Registration of funders: The EU resolution also urges that member states provide that funders “conduct their activities through a registered office in a Member State.” That is probably true of insurers in the U.S. to some extent, under existing state regulation of insurers.

Adequate financial resources: Member state regulation should require that a funder demonstrate “adequate financial resources to * * * fund all stages of any proceedings they have committed to.” Regulatory authorities should ensure that their supervisory authorities can verify the funder’s financial capacity, and the regulators should “set up a specific insurance fund to cover all the outstanding costs of claimants * * * in case a litigation funder becomes insolvent.”

Acting in the best interests of claimants: The 2022 resolution also proposes that the regulators require funders to adhere to “a fiduciary duty of care requiring them to act in the best

interests of a claimant.” This recommendation seems to focus on the risk the funder would pressure the lawyer to violate the lawyer’s duty of loyalty to the client by imposing a similar duty on the funder.

Contents of funding agreements: The 2022 resolution calls for member states that permit litigation funding to direct that funding agreements do not include any provision that gives the funder control. Such agreements may not guarantee the funder a minimum return, and (absent “exceptional circumstances”) include anything that would dilute the share paid through to the claimant below 60% of the total award.

Withdrawing funding: Agreements should provide that the funder cannot withdraw funding unless the court has authorized termination of the agreement. It is not entirely clear if this sort of provision would give the recipient of funding a blank check.

Judicial authority to modify the funding agreement: Disclosure to the court is also required, and the court is to be given authority to modify the agreement so that it conforms to the requirements mentioned above. The court would be authorized to determine whether the agreement would give the funder “an unfair, disproportionate or unreasonable share of any award,” and to take account of “the value of a litigation funder’s financial contribution.”

* * * * *

In a sense, one might say that this list of detailed requirements and prohibitions with regard to the funding agreement resembles the sort of regulation states often impose on insurers. It is difficult to imagine that the Rules Enabling Act authorizes the Advisory Committee to propose rules along these lines. This thumbnail description is not offered to suggest that this committee can do these things, but it may provide a context for evaluating what this committee can propose.

Moving forward from here

One conclusion that might be said to flow from various discussions of TPLF disclosure was put into words by litigation funders:

Neutral bodies attempting to objectively evaluate disclosure proposals are perpetually presented with the diametrically opposed narratives of the defense bar, on the one hand, and the commercial funding industry, on the other.

Dai Wai Chin Feman & William Weisman, *Litigation Funders Seek Transparency in Disclosure Debate*, Law 360, Nov. 23, 2022.

One might say there is a lot of underbrush to clear away to devise a possible rule amendment proposal. Ideally, reviewing all these ideas and assertions will enable choices to be made about what should be included and what need not be included.

Attachment(s):

- Litigation Transparency Act of 2025, H.R. 1109, 119th Cong. (2025)

Attachment to Third Party Litigation Funding

- Protecting Our Courts from Foreign Manipulation Act of 2025, H.R. 2675, 119th Cong. (2025)
- Protecting TPLF from Abuse Act, H.R. 7015, 119th Cong. (2026)
- Litigation Funding Transparency Act of 2026, S. 3826, 119th Cong. (2026)
- Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025)
- Suggestion 26-CV-8 (Lawyers for Civil Justice)
- Suggestion 25-CV-T (American Association for Justice)
- Suggestion 25-CV-R (12 Attorneys and Advisors)
- Suggestion 25-CV-P (Alliance for Responsible Consumer Funding)

119TH CONGRESS
1ST SESSION

H. R. 1109

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2025

Mr. ISSA (for himself, Mr. COLLINS, and Mr. FITZGERALD) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Litigation Trans-
5 parency Act of 2025”.

6 **SEC. 2. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY**
7 **BENEFICIARIES IN CIVIL CASES.**

8 (a) IN GENERAL.—Chapter 111 of title 28, United
9 States Code, is amended by adding at the end the fol-
10 lowing:

1 **“§ 1660. Third-party beneficiary disclosure**

2 “(a) IN GENERAL.—Except as provided in subsection
3 (b), in any civil action, a party or any counsel of record
4 for a party shall—

5 “(1) disclose in writing to the court and all
6 other named parties to the civil action the identity
7 of any person (other than counsel of record) that
8 has a right to receive any payment or thing of value
9 that is contingent on the outcome of the civil action
10 or a group of actions of which the civil action is a
11 part; and

12 “(2) produce to the court and to each other
13 named party to the civil action, for inspection and
14 copying, any agreement creating a contingent right
15 referred to in paragraph (1), including any ancillary
16 agreement or document, except as otherwise stipu-
17 lated or ordered by the court.

18 “(b) EXCEPTION.—The requirements under sub-
19 section (a) shall not apply with respect to a person that
20 has a right to receive payment described in subsection
21 (a)(1) if the right to receive payment is solely—

22 “(1) the repayment of the principal of a loan;

23 “(2) the repayment of the principal of a loan
24 plus interest that does not exceed the higher of 7
25 percent or a rate two times the annual average 30-
26 year constant maturity Treasury yield, as published

1 by the Board of Governors of the Federal Reserve
2 System, for the year preceding the date on which the
3 relevant agreement was executed; or

4 “(3) the reimbursement of attorney’s fees.

5 “(c) TIMING.—The disclosures required by subsection
6 (a) shall be made not later than the later of—

7 “(1) 10 days after the execution of any agree-
8 ment described in subsection (a)(2); or

9 “(2) the time of the filing of the action before
10 the court.

11 “(d) DUTY TO CORRECT.—A party or counsel of
12 record that made a disclosure required by this section shall
13 supplement or correct each such disclosure in a timely
14 manner—

15 “(1) if such party or counsel of record learns
16 that the disclosure is or has become incomplete or
17 incorrect in some material respect, if the additional
18 or corrective information has not otherwise been
19 made known to the other parties during the dis-
20 covery process or in writing; or

21 “(2) as ordered by the court.”.

22 (b) CLERICAL AMENDMENT.—The table of sections
23 for chapter 111 of title 28, United States Code, is amend-
24 ed by adding at the end the following:

“1660. Third-party beneficiary disclosure.”.

4

1 **SEC. 3. APPLICABILITY.**

2 The amendments made by this Act shall apply to any
3 civil action pending on or commenced after the date of
4 enactment of this Act.

○

119TH CONGRESS
1ST SESSION

H. R. 2675

To amend chapter 111 of title 28, United States Code, to increase transparency and oversight of third-party funding by foreign persons, to prohibit third-party funding by foreign states and sovereign wealth funds, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 2025

Mr. CLINE introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 111 of title 28, United States Code, to increase transparency and oversight of third-party funding by foreign persons, to prohibit third-party funding by foreign states and sovereign wealth funds, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protecting Our Courts
5 from Foreign Manipulation Act of 2025”.

1 **SEC. 2. TRANSPARENCY AND LIMITATIONS ON FOREIGN**
2 **THIRD-PARTY LITIGATION FUNDING.**

3 (a) IN GENERAL.—Chapter 111 of title 28, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 **“§ 1660. Transparency and limitations on foreign**
7 **third-party litigation funding**

8 “(a) DEFINITIONS.—In this section—

9 “(1) the term ‘foreign person’—

10 “(A) means any person or entity that is
11 not a United States person, as defined in sec-
12 tion 101 of the Foreign Intelligence Surveil-
13 lance Act of 1978 (50 U.S.C. 1801); and

14 “(B) does not include a foreign state or a
15 sovereign wealth fund;

16 “(2) the term ‘foreign state’ has the meaning
17 given that term in section 1603; and

18 “(3) the term ‘sovereign wealth fund’ means an
19 investment fund owned or controlled by a foreign
20 state, an agency or instrumentality of a foreign state
21 (as defined in section 1603), or an agent of a for-
22 eign principal (as defined in section 1 of the Foreign
23 Agents Registration Act of 1938, as amended (22
24 U.S.C. 611)).

25 “(b) DISCLOSURE OF THIRD-PARTY LITIGATION
26 FUNDING AND FOREIGN SOURCE CERTIFICATION BY

1 FOREIGN PERSONS, FOREIGN STATES, AND SOVEREIGN
2 WEALTH FUNDS.—

3 “(1) IN GENERAL.—In any civil action, each
4 party or the counsel of record for the party shall—

5 “(A) disclose in writing to the court, to all
6 other named parties to the civil action, to the
7 Attorney General, and to the Principal Deputy
8 Assistant Attorney General for National Secu-
9 rity—

10 “(i) the name, the address, and, if ap-
11 plicable, the citizenship or the country of
12 incorporation or registration of any foreign
13 person, foreign state, or sovereign wealth
14 fund, other than the named parties or
15 counsel of record, that has a right to re-
16 ceive any payment that is contingent in
17 any respect on the outcome of the civil ac-
18 tion by settlement, judgment, or otherwise;

19 “(ii) the name, the address, and, if
20 applicable, the citizenship or the country of
21 incorporation or registration of any foreign
22 person, foreign state, or sovereign wealth
23 fund, other than the named parties or
24 counsel of record, that has a right to re-
25 ceive any payment that is contingent in

1 any respect on the outcome of any matter
2 within a portfolio that includes the civil ac-
3 tion and involves the same counsel of
4 record or affiliated counsel; and

5 “(iii) if the party or the counsel of
6 record for the party submits a certification
7 described in subparagraph (C)(i), the
8 name, the address, and, if applicable, the
9 citizenship or the country of incorporation
10 or registration of the foreign person, for-
11 eign state, or sovereign wealth fund that is
12 the source of the money;

13 “(B) produce to the court, to all other
14 named parties to the civil action, to the Attor-
15 ney General, and to the Principal Deputy As-
16 sistant Attorney General for National Security,
17 except as otherwise stipulated or ordered by the
18 court, a copy of any agreement creating a con-
19 tingent right described in subparagraph (A);
20 and

21 “(C) for a civil action involving an agree-
22 ment creating a right to receive any payment by
23 anyone, other than the named parties or coun-
24 sel of record, that is contingent in any respect
25 on the outcome of the civil action by settlement,

1 judgment, or otherwise, or on the outcome of
2 any matter within a portfolio that includes the
3 civil action and involves the same counsel or af-
4 filiated counsel, submit to the court a certifi-
5 cation that—

6 “(i) the money that has been or will
7 be used to satisfy any term of the agree-
8 ment has been or will be directly or indi-
9 rectly sourced, in whole or in part, from a
10 foreign person, foreign state, or sovereign
11 wealth fund, including the monetary
12 amounts that have been or will be used to
13 satisfy the agreement; or

14 “(ii) that the disclosure and certifi-
15 cation criteria set forth in subparagraph
16 (A)(iii) and clause (i) of this subparagraph
17 do not apply to the civil action.

18 “(2) TIMING.—

19 “(A) IN GENERAL.—The disclosure and
20 certification required by paragraph (1) shall be
21 made not later than the later of—

22 “(i) 30 days after execution of any
23 agreement described in paragraph (1); or

24 “(ii) the date on which the civil action
25 is filed.

1 “(B) PARTIES SERVED OR JOINED
2 LATER.—A party that enters into an agreement
3 described in paragraph (1) that is first served
4 or joined after the date on which the civil action
5 is filed shall make the disclosure and certifi-
6 cation required by paragraph (1) not later than
7 30 days after being served or joined, unless a
8 different time is set by stipulation or court
9 order.

10 “(3) FOREIGN SOURCE DISCLOSURE AND CER-
11 TIFICATION FORMAT.—

12 “(A) IN GENERAL.—A disclosure required
13 under paragraph (1)(A) and a certification re-
14 quired under paragraph (1)(C) shall—

15 “(i) be made in the form of a declara-
16 tion under penalty of perjury pursuant to
17 section 1746 and shall be made to the best
18 knowledge, information, and belief of the
19 declarant formed after reasonable inquiry;
20 and

21 “(ii) be provided to all other named
22 parties to the civil action, to the Attorney
23 General, and to the Principal Deputy As-
24 sistant Attorney General for National Se-
25 curity by the party or counsel of record for

1 the party making the disclosure and cer-
2 tification, except as otherwise stipulated or
3 ordered by the court.

4 “(B) SUPPLEMENTATION AND CORREC-
5 TION.—Not later than 30 days after the date
6 on which a party or counsel of record for the
7 party knew or should have known that the dis-
8 closure required under paragraph (1)(A) or a
9 certification required under paragraph (1)(C) is
10 incomplete or inaccurate in any material re-
11 spect, the party or counsel of record shall sup-
12 plement or correct the disclosure or certifi-
13 cation.

14 “(c) PROHIBITION ON THIRD-PARTY FUNDING LITI-
15 GATION BY FOREIGN STATES AND SOVEREIGN WEALTH
16 FUNDS.—

17 “(1) IN GENERAL.—It shall be unlawful for any
18 party to or counsel of record for a civil action to
19 enter into an agreement creating a right for anyone,
20 other than the named parties or counsel of record,
21 to receive any payment that is contingent in any re-
22 spect on the outcome of a civil action or any matter
23 within a portfolio that includes the civil action and
24 involves the same counsel of record or affiliated
25 counsel, the terms of which are to be satisfied by

1 money that has been or will be directly or indirectly
2 sourced, in whole or in part, from a foreign state or
3 a sovereign wealth fund.

4 “(2) ENFORCEMENT.—Any agreement entered
5 in violation of paragraph (1) shall be null and void.

6 “(d) FAILURE TO DISCLOSE, TO SUPPLEMENT;
7 SANCTIONS.—A disclosure, production, or certification
8 under subsection (b) is deemed to be information required
9 by rule 26(a) of the Federal Rules of Civil Procedure and
10 subject to the sanctions provisions of rule 37 of the Fed-
11 eral Rules of Civil Procedure.”.

12 (b) TECHNICAL AND CONFORMING AMENDMENT.—
13 The table of sections chapter 111 of title 28, United
14 States Code, is amended by adding at the end the fol-
15 lowing:

“1660. Transparency and limitations on foreign third-party litigation funding.”.

16 **SEC. 3. REPORT TO CONGRESS.**

17 Not later than 1 year after the date of enactment
18 of this Act, and annually thereafter, the Attorney General
19 shall submit to the Committee on the Judiciary of the Sen-
20 ate and the Committee on the Judiciary of the House of
21 Representatives a report on the activities involving foreign
22 third-party litigation funding in Federal courts, including,
23 if applicable—

24 (1) the identities of foreign third-party litiga-
25 tion funders in Federal courts, including names, ad-

1 dresses, and citizenship or country of incorporation
2 or registration;

3 (2) the identities of foreign persons, foreign
4 states, or sovereign wealth funds (as such terms are
5 defined in section 1660 of title 28, United States
6 Code, as added by section 2 of this Act) that have
7 been the sources of money for third-party litigation
8 funding in Federal courts;

9 (3) the judicial districts in which foreign third-
10 party litigation funding has occurred;

11 (4) an estimate of the total amount of foreign-
12 sourced money used for third-party litigation fund-
13 ing in Federal courts, including an estimate of the
14 amount of such money sourced from each country;
15 and

16 (5) a summary of the subject matters of the
17 civil actions in Federal courts for which foreign
18 sourced money has been used for third-party litiga-
19 tion funding.

20 **SEC. 4. APPLICABILITY.**

21 The amendments made by this Act shall apply to any
22 civil action pending on or commenced on or after the date
23 of enactment of this Act.

○

119TH CONGRESS
2D SESSION

H. R. 7015

To amend title 28, United States Code, to protect legal proceedings from manipulation and provide for transparency and oversight of third-party beneficiaries in civil actions.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 12, 2026

Mr. ISSA (for himself, Mr. FITZGERALD, and Mr. BAUMGARTNER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to protect legal proceedings from manipulation and provide for transparency and oversight of third-party beneficiaries in civil actions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protecting Third Party
5 Litigation Funding From Abuse Act” or the “Protecting
6 TPLF From Abuse Act”.

1 **SEC. 2. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY**
2 **BENEFICIARIES IN CIVIL CASES.**

3 (a) IN GENERAL.—Chapter 111 of title 28, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 **“§ 1660. Initial disclosures regarding third-party**
7 **beneficiaries**

8 “(a) IN GENERAL.—Except as provided in subsection
9 (b), in any civil action, a party or any counsel of record
10 for a party shall—

11 “(1) disclose in writing to the court and all
12 other named parties to the civil action the identity
13 of any person (other than counsel of record) that
14 has a legal right to receive any payment or thing of
15 value that is contingent in any respect on the out-
16 come or proceeds of the civil action or a group of
17 civil actions of which the civil action is a part, in-
18 cluding—

19 “(A) any portion of a settlement, a judg-
20 ment, or an award of attorney’s fees from the
21 civil action or group of civil actions; or

22 “(B) any other proceeds from the civil ac-
23 tion or group of civil actions;

24 “(2) produce to the court, for in camera review,
25 any agreement creating a legal right described in

1 paragraph (1), including any ancillary agreement or
2 document; and

3 “(3) after the review conducted under para-
4 graph (2), produce to each other named party to the
5 civil action, for inspection and copying, each docu-
6 ment produced under paragraph (2), subject to any
7 protective order, use limitation, or any other limita-
8 tion or exclusion ordered by the court, including—

9 “(A) any limitation or exclusion relating to
10 attorney-client privilege, the attorney work
11 product doctrine, or any other applicable privi-
12 lege; or

13 “(B) any limitation or exclusion to protect
14 from disclosure to any party or non-party the
15 identity of any member, donor, or associate of
16 the person that has a legal right described in
17 paragraph (1), except to the extent that the
18 member, donor, or associate also has a legal
19 right to receive any payment or thing of value
20 described in subsection (a)(1) and is not ex-
21 cepted from disclosure under subsection (b)(1).

22 “(b) EXCEPTIONS AND LIMITATIONS.—

23 “(1) IN GENERAL.—The requirements under
24 subsection (a) shall not apply with respect to a per-
25 son that has a legal right to receive any payment or

1 thing of value described in subsection (a)(1) if the
2 legal right is solely regarding—

3 “(A) the repayment of the principal of a
4 loan;

5 “(B) the repayment of the principal of a
6 loan plus interest that does not exceed the high-
7 er of 10 percent or a rate three times the an-
8 nual average 30-year constant maturity Treas-
9 ury yield, as published by the Board of Gov-
10 ernors of the Federal Reserve System, for the
11 year preceding the date on which the relevant
12 agreement was executed;

13 “(C) the reimbursement of attorney’s fees
14 paid to counsel of record for services provided
15 in the civil action; or

16 “(D) the reimbursement of a grant.

17 “(2) DONOR, MEMBER, AND ASSOCIATE IDEN-
18 TITY.—The requirements under subsection (a)(1)
19 shall not apply with respect to any donor, member,
20 or associate of the person that has a legal right de-
21 scribed in subsection (a)(1) unless the donor, mem-
22 ber, or associate also has a legal right to receive any
23 payment or thing of value described in subsection
24 (a)(1) and is not excepted from disclosure under
25 subsection (b)(1).

1 “(3) DONOR AND MEMBER LIST.—The require-
2 ments under subsections (a)(2) and (a)(3) shall not
3 require the production of lists of members, donors,
4 or associates, and the court shall permit redactions
5 of the identity of any member, donor, or associate
6 from materials disclosed pursuant to subsection
7 (a)(3), unless that member, donor, or associate also
8 has a legal right to receive any payment or thing of
9 value described in subsection (a)(1) and is not ex-
10 cepted from disclosure under subsection (b)(1).

11 “(4) ADMISSIBILITY AND DISCOVERY.—Nothing
12 in this Section may be construed to render admis-
13 sible any disclosure, document, or thing provided
14 under this Section, or any information therein, or to
15 affect whether any disclosure, document, or thing is
16 discoverable except as expressly provided in this sec-
17 tion.

18 “(c) TIMING.—The disclosures required by subsection
19 (a) shall be made not later than the later of—

20 “(1) 10 days after the execution of any agree-
21 ment described in subsection (a)(2);

22 “(2) the time of initial disclosures made pursu-
23 ant to Federal Rule of Civil Procedure 26(a)(1); or

24 “(3) the time set by the court for such disclo-
25 sures.

1 “(d) DUTY TO CORRECT.—A party or counsel of
2 record that made a disclosure required by this section shall
3 supplement or correct each such disclosure in a timely
4 manner—

5 “(1) if such party or counsel of record learns
6 that the disclosure is or has become incomplete or
7 incorrect in some material respect, if the additional
8 or corrective information has not otherwise been
9 made known to the other parties during the dis-
10 covery process or in writing; or

11 “(2) as ordered by the court.”.

12 (b) CLERICAL AMENDMENT.—The table of sections
13 for chapter 111 of title 28, United States Code, is amend-
14 ed by adding at the end the following:

“1660. Third-party beneficiary disclosure.”.

15 **SEC. 3. APPLICABILITY.**

16 The amendments made by this Act shall apply to any
17 civil action pending on or commenced after the date of
18 enactment of this Act.

○

119TH CONGRESS
2D SESSION

S. 3826

To amend title 28, United States Code, to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 11, 2026

Mr. GRASSLEY (for himself, Mr. TILLIS, Mr. KENNEDY, and Mr. CORNYN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Litigation Funding
5 Transparency Act of 2026”.

1 **SEC. 2. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY**
2 **LITIGATION FUNDING IN CLASS AND MASS**
3 **ACTIONS.**

4 (a) IN GENERAL.—Chapter 115 of title 28, United
5 States Code, is amended by adding at the end the fol-
6 lowing:

7 **“§ 1747. Third-party litigation funding disclosure**

8 “(a) DEFINITIONS.—In this section:

9 “(1) CLASS ACTION.—The term ‘class action’
10 has the meaning given the term in section 1711.

11 “(2) COMMERCIAL ENTERPRISE.—The term
12 ‘commercial enterprise’—

13 “(A) means any entity formed for the on-
14 going conduct of lawful business; and

15 “(B) does not include any entity that, in a
16 covered civil action, has a right or expectation
17 of payment based on any activity, right, or in-
18 terest described in subparagraph (A) or (B) of
19 paragraph (8) that is limited to—

20 “(i) the repayment of the principal of
21 a loan;

22 “(ii) the repayment of the principal of
23 a loan plus interest that does not exceed
24 the greater of 10 percent or a rate 3 times
25 the annual average 30-year constant matu-
26 rity Treasury yield, as published by the

1 Board of Governors of the Federal Reserve
2 System, for the year preceding the date on
3 which the relevant agreement was exe-
4 cuted; or

5 “(iii) the reimbursement of fees or
6 grants paid or given to counsel of record
7 for services provided in a covered civil ac-
8 tion.

9 “(3) COVERED CIVIL ACTION.—The term ‘cov-
10 ered civil action’—

11 “(A) means—

12 “(i) any civil action transferred to or
13 filed in coordinated or consolidated pretrial
14 proceedings established by the judicial
15 panel on multidistrict litigation pursuant
16 to section 1407;

17 “(ii) any class action; and

18 “(iii) any civil action filed in a coordi-
19 nated or consolidated proceeding before a
20 district court of the United States that in-
21 cludes not fewer than 100 civil actions;
22 and

23 “(B) does not include any action brought
24 or funded by a nonprofit legal organization
25 funded by donors that is providing funding or

1 representation to clients on a pro bono basis if
2 the donations to the nonprofit organization that
3 are used to bring or fund the action were not
4 provided by a foreign state, a foreign person, a
5 sovereign wealth fund, or a commercial enter-
6 prise, any of which is controlled by or owned by
7 a foreign state, foreign person, or sovereign
8 wealth fund.

9 “(4) FOREIGN PERSON.—The term ‘foreign per-
10 son’—

11 “(A) means any person that is not a
12 United States person; and

13 “(B) does not include a foreign state or a
14 sovereign wealth fund.

15 “(5) FOREIGN PRINCIPAL.—The term ‘foreign
16 principal’ has the meaning given the term in section
17 1 of the Foreign Agents Registration Act of 1938,
18 as amended (22 U.S.C. 611).

19 “(6) FOREIGN STATE.—The term ‘foreign state’
20 has the meaning given the term in section 1603.

21 “(7) SOVEREIGN WEALTH FUND.—The term
22 ‘sovereign wealth fund’ means an investment fund
23 owned or controlled by a foreign state, an agency or
24 instrumentality of a foreign state, or an entity a ma-
25 jority of the shares or other ownership interest of

1 which is owned or controlled by a foreign state or by
2 an agency or instrumentality of a foreign state.

3 “(8) THIRD-PARTY FUNDER.—The term ‘third-
4 party funder’ means any commercial enterprise, for-
5 eign state, foreign person, or sovereign wealth fund,
6 other than counsel of record, that—

7 “(A) provides or agrees to provide direct or
8 indirect monetary support to a party, counsel,
9 or law firm for purposes of funding the initi-
10 ation or litigation of a covered civil action in
11 which neither the commercial enterprise, foreign
12 state, foreign person, or sovereign wealth fund,
13 as applicable, nor a subsidiary corporation
14 thereof (as defined in section 424(f) of the In-
15 ternal Revenue Code of 1986, determined by
16 substituting ‘corporation which is the commer-
17 cial enterprise, foreign state, foreign person, or
18 sovereign wealth fund described in section
19 1747(a)(8) of title 28, United States Code,’ for
20 ‘employer corporation’ each place it appears), is
21 a named party; or

22 “(B) as a nonparty, has a right to receive
23 in return anything that is greater in value than
24 what is given or granted that is related in any
25 respect to proceeds from a covered civil action

1 or a group of actions of which the covered civil
2 action is a part, by settlement, judgment, attor-
3 ney's fees, or otherwise.

4 “(9) UNITED STATES PERSON.—The term
5 ‘United States person’ has the meaning given the
6 term in section 101 of the Foreign Intelligence Sur-
7 veillance Act of 1978 (50 U.S.C. 1801).

8 “(b) DISCLOSURE.—In any covered civil action, a
9 party or any counsel of record for a party shall—

10 “(1) disclose in writing to the court and all
11 other named parties to the action the identity of any
12 third-party funder of the action;

13 “(2) disclose in writing to the court and all
14 other named parties to the action whether any third-
15 party funder of the action is a foreign state, foreign
16 person, sovereign wealth fund, or a commercial en-
17 terprise that is directly or indirectly controlled by or
18 owned by a foreign state, foreign person, or a sov-
19 ereign wealth fund;

20 “(3) produce for inspection and copying to the
21 court and to all other named parties to the action
22 any agreement concerning the provision of monetary
23 support described in subsection (a)(8)(A) or creating
24 the right described in subsection (a)(8)(B), unless
25 otherwise ordered by the court; and

1 “(4) transmit to the Administrative Office of
2 the United States Courts copies of any disclosures
3 made under paragraph (2), or any productions made
4 under paragraph (3) in any case in which a disclo-
5 sure is required under paragraph (2).

6 “(c) TIMING.—The disclosures and notifications re-
7 quired by subsection (b) shall be made not later than the
8 later of—

9 “(1) 10 days after the execution of any agree-
10 ment described in subsection (b)(3); or

11 “(2) the time of service of the action.

12 “(d) DUTY TO CORRECT.—A party or counsel of
13 record that made a disclosure required by this section shall
14 supplement or correct each such disclosure in a timely
15 manner—

16 “(1) if such party or counsel of record learns
17 that the disclosure is or has become incomplete or
18 incorrect in some material respect, if the additional
19 or corrective information has not otherwise been
20 made known to the other parties during the dis-
21 covery process or in writing; or

22 “(2) as ordered by the court.

23 “(e) ENFORCEMENT.—The obligations set forth in
24 subsection (b) shall be deemed to be disclosures required
25 by rule 26(a) of the Federal Rules of Civil Procedure and

1 shall be subject to the sanction provisions of rule 37 of
2 the Federal Rules of Civil Procedure.

3 “(f) WEBSITE UPDATE; REPORT.—Not later than
4 180 days after the date of enactment of this section, and
5 every 120 days thereafter, the Administrative Office of the
6 United States Courts shall submit to Congress, the Attor-
7 ney General, and the Principal Deputy Assistant Attorney
8 General for National Security and shall post on the United
9 States Courts website a report that lists—

10 “(1) each foreign state, foreign person, sov-
11 ereign wealth fund, or commercial enterprise that
12 was identified in a covered civil action in response
13 to subsection (b)(2) or subsection (g) during the
14 preceding 120 days;

15 “(2) the caption and docket number of the ac-
16 tion described in paragraph (1);

17 “(3) the court in which the action described in
18 paragraph (1) is pending;

19 “(4) the amount of any monetary support pro-
20 vided by the person identified in paragraph (1); and

21 “(5) the total amount each foreign state, for-
22 eign person, sovereign wealth fund, or commercial
23 enterprise listed in paragraph (1) has provided in
24 support of any covered civil action during the pre-
25 ceding 120 days.

1 “(g) LITIGATION INTEGRITY.—

2 “(1) IN GENERAL.—No third-party funder in a
3 covered civil action shall exert or be afforded the
4 right to exert, by contract or otherwise, influence,
5 control, or discretion regarding the litigation strat-
6 egy, decision-making, or settlement negotiations of a
7 party.

8 “(2) CONTEMPT.—The court presiding over a
9 covered civil action may—

10 “(A) hold in contempt any person that vio-
11 lates paragraph (1); and

12 “(B) for purposes of issuing and enforcing
13 a contempt order under subparagraph (A), ex-
14 ercise the powers of a district judge in any dis-
15 trict.

16 “(h) PROTECTION OF PROPRIETARY INFORMATION
17 ACQUIRED DURING THE DISCOVERY PROCESS.—

18 “(1) IN GENERAL.—In a covered civil action, no
19 third-party funder or any agent, counsel, or rep-
20 resentative of a third-party funder may obtain, in-
21 spect, copy, or otherwise view any discovery mate-
22 rials that are produced in the action subject to a
23 protective order issued pursuant to rule 26(c)(1)(G)
24 of the Federal Rules of Civil Procedure, unless spe-
25 cifically authorized by the court.

1 “(2) CONTEMPT.—The court presiding over a
2 covered civil action may—

3 “(A) hold in contempt any person or entity
4 that violates paragraph (1); and

5 “(B) for purposes of issuing and enforcing
6 a contempt order under subparagraph (A), ex-
7 ercise the powers of a district court in any dis-
8 trict.”.

9 (b) TECHNICAL AND CONFORMING AMENDMENT.—
10 The table of sections for chapter 115 of title 28, United
11 States Code, is amended by adding at the end the fol-
12 lowing:

“1747. Third-party litigation funding disclosure.”.

13 **SEC. 3. APPLICABILITY.**

14 The amendments made by this Act shall apply to any
15 case pending on or commenced after the date of enactment
16 of this Act.

○

119TH CONGRESS
1ST SESSION

S. 1821

To amend the Internal Revenue Code of 1986 to establish a tax on income from litigation which is received by third-party entities that provided financing for such litigation.

IN THE SENATE OF THE UNITED STATES

MAY 20, 2025

Mr. TILLIS introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 to establish a tax on income from litigation which is received by third-party entities that provided financing for such litigation.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Tackling Predatory
5 Litigation Funding Act”.

1 **SEC. 2. LITIGATION FINANCING.**

2 (a) IN GENERAL.—Subtitle D of the Internal Rev-
3 enue Code of 1986 is amended by adding at the end the
4 following new chapter:

5 **“CHAPTER 50B—LITIGATION FINANCING**

“Sec. 5000E–1. Tax imposed.

“Sec. 5000E–2. Definitions.

“Sec. 5000E–3. Special rules.

6 **“SEC. 5000E–1. TAX IMPOSED.**

7 “(a) IN GENERAL.—A tax is hereby imposed for each
8 taxable year in an amount equal to the applicable percent-
9 age of any qualified litigation proceeds received by a cov-
10 ered party.

11 “(b) APPLICABLE PERCENTAGE.—For purposes of
12 subsection (a), with respect to any taxable year, the appli-
13 cable percentage shall be the amount (expressed as a per-
14 centage) equal to the sum of—

15 “(1) the highest rate of tax imposed by section
16 1 for such taxable year, plus

17 “(2) 3.8 percentage points.

18 “(c) APPLICATION OF TAX FOR PASS-THRU ENTI-
19 TIES.—In the case of a covered party that is a partner-
20 ship, S corporation, or other pass-thru entity, the tax im-
21 posed under subsection (a) shall be applied at the entity
22 level.

23 **“SEC. 5000E–2. DEFINITIONS.**

24 “In this chapter—

1 “(1) CIVIL ACTION.—

2 “(A) IN GENERAL.—The term ‘civil action’
3 means any civil action, administrative pro-
4 ceeding, claim, or cause of action.

5 “(B) MULTIPLE ACTIONS.—The term ‘civil
6 action’ may, unless otherwise indicated, include
7 more than 1 civil action.

8 “(2) COVERED PARTY.—

9 “(A) IN GENERAL.—The term ‘covered
10 party’ means, with respect to any civil action,
11 any third party (including an individual, cor-
12 poration, partnership, or sovereign wealth fund)
13 to such action which—

14 “(i) receives funds pursuant to a liti-
15 gation financing agreement, and

16 “(ii) is not an attorney representing a
17 party to such civil action.

18 “(B) INCLUSION OF DOMESTIC AND FOR-
19 EIGN ENTITIES.—Subparagraph (A) shall apply
20 to any third party without regard to whether
21 such party is created or organized in the United
22 States or under the law of the United States or
23 of any State.

24 “(3) LITIGATION FINANCING AGREEMENT.—

1 “(A) IN GENERAL.—The term ‘litigation
2 financing agreement’ means, with respect to
3 any civil action, a written agreement—

4 “(i) whereby a third party agrees to
5 provide funds to one of the named parties
6 or any law firm affiliated with such civil
7 action, and

8 “(ii) which creates a direct or
9 collateralized interest in the proceeds of
10 such action (by settlement, verdict, judg-
11 ment or otherwise) which—

12 “(I) is based, in whole or part,
13 on a funding-based obligation to—

14 “(aa) such civil action,

15 “(bb) the appearing counsel,

16 “(cc) any contractual co-
17 counsel, or

18 “(dd) the law firm of such
19 counsel or co-counsel, and

20 “(II) is executed with—

21 “(aa) any attorney rep-
22 resenting a party to such civil ac-
23 tion,

24 “(bb) any co-counsel in the
25 litigation with a contingent fee

1 interest in the representation of
2 such party,

3 “(cc) any third party that
4 has a collateral-based interest in
5 the contingency fees of the coun-
6 sel or co-counsel firm which is re-
7 lated, in whole or part, to the
8 fees derived from representing
9 such party, or

10 “(dd) any named party in
11 such civil action.

12 “(B) SUBSTANTIALLY SIMILAR AGREE-
13 MENTS.—The term ‘litigation financing agree-
14 ment’ shall include any contract (including any
15 option, forward contract, futures contract, short
16 position, swap, or similar contract) or other
17 agreement which, as determined by the Sec-
18 retary, is substantially similar to an agreement
19 described in subparagraph (A).

20 “(C) EXCEPTIONS.—The term ‘litigation
21 financing agreement’ shall not include any
22 agreement—

23 “(i) under which the total amount of
24 funds described in subparagraph (A)(i)

1 with respect to an individual civil action is
2 less than \$10,000, or

3 “(ii) in which the third party de-
4 scribed in subparagraph (A)—

5 “(I) has a right to receive pro-
6 ceeds which are derived from, or pur-
7 suant to, such agreement that are lim-
8 ited to—

9 “(aa) repayment of the prin-
10 cipal of a loan,

11 “(bb) repayment of the prin-
12 cipal of a loan plus any interest
13 on such loan, provided that the
14 rate of interest does not exceed
15 the greater of—

16 “(AA) 7 percent, or

17 “(BB) a rate equal to
18 twice the average annual
19 yield on 30-year United
20 States Treasury securities
21 (as determined for the year
22 preceding the date on which
23 such agreement was exe-
24 cuted), or

1 “(cc) reimbursement of at-
2 torney’s fees, or

3 “(II) bears a relationship de-
4 scribed in section 267(b) to the
5 named party receiving the payment
6 described in subparagraph (A)(i).

7 “(4) QUALIFIED LITIGATION PROCEEDS.—

8 “(A) IN GENERAL.—The term ‘qualified
9 litigation proceeds’ means, with respect to any
10 taxable year, an amount equal to the realized
11 gains, net income, or other profit received by a
12 covered party during such taxable year which is
13 derived from, or pursuant to, any litigation fi-
14 nancing agreement.

15 “(B) ANTI-NETTING.—Any gains, income,
16 or profit described in subparagraph (A) shall
17 not be reduced or offset by any ordinary or cap-
18 ital loss in the taxable year.

19 “(C) PROHIBITION ON EXCLUSION OF CER-
20 TAIN AMOUNTS.—In determining the amount of
21 realized gain under subparagraph (A), amounts
22 described in section 104(a)(2) and 892(a)(1)
23 shall not be excluded.

1 **“SEC. 5000E-3. SPECIAL RULES.**

2 “(a) WITHHOLDING OF TAX ON LITIGATION PRO-
3 CEEDS.—Any applicable person having the control, re-
4 ceipt, or custody of any proceeds from a civil action (by
5 settlement, judgment, or otherwise) with respect to which
6 such person had entered into a litigation financing agree-
7 ment shall deduct and withhold from such proceeds a tax
8 equal to 50 percent of the applicable percentage (as deter-
9 mined under section 5000E-1(b)) of any payments which
10 are required to be made to a third party pursuant to such
11 agreement.

12 “(b) APPLICABLE PERSON.—For purposes of this
13 section, the term ‘applicable person’ means any person
14 which—

15 “(1) is a named party in a civil action or a law
16 firm affiliated with such civil action, and

17 “(2) has entered into a litigation financing
18 agreement with respect to such civil action.

19 “(c) APPLICATION OF WITHHOLDING PROVISIONS.—

20 “(1) LIABILITY FOR WITHHELD TAX.—Every
21 person required to deduct and withhold any tax
22 under this chapter is hereby made liable for such tax
23 and is hereby indemnified against the claims and de-
24 mands of any person for the amount of any pay-
25 ments made in accordance with the provisions of this
26 chapter.

1 “(2) WITHHELD TAX AS CREDIT TO RECIPIENT
2 OF QUALIFIED LITIGATION PROCEEDS.—Qualified
3 litigation proceeds on which any tax is required to
4 be withheld at the source under this chapter shall be
5 included in the return of the recipient of such pro-
6 ceeds, but any amount of tax so withheld shall be
7 credited against the amount of tax as computed in
8 such return.

9 “(3) TAX PAID BY RECIPIENT OF QUALIFIED
10 LITIGATION PROCEEDS.—If—

11 “(A) any person, in violation of the provi-
12 sions of this chapter, fails to deduct and with-
13 hold any tax under this chapter, and

14 “(B) thereafter the tax against which such
15 tax may be credited is paid,

16 the tax so required to be deducted and withheld
17 shall not be collected from such person, but this
18 paragraph shall in no case relieve such person from
19 liability for interest or any penalties or additions to
20 the tax otherwise applicable in respect of such fail-
21 ure to deduct and withhold.

22 “(4) REFUNDS AND CREDITS WITH RESPECT TO
23 WITHHELD TAX.—Where there has been an overpay-
24 ment of tax under this chapter, any refund or credit
25 made under chapter 65 shall be made to the with-

1 holding agent unless the amount of such tax was ac-
2 tually withheld by the withholding agent.”.

3 (b) EXCLUSION FROM DEFINITION OF CAPITAL
4 ASSET.—Section 1221(a) of the Internal Revenue Code
5 of 1986 is amended—

6 (1) in paragraph (7), by striking “or” at the
7 end,

8 (2) in paragraph (8), by striking the period at
9 the end and inserting “; or”, and

10 (3) by adding at the end the following new
11 paragraph:

12 “(9) any financial arrangement created by, or
13 any proceeds derived from, a litigation financing
14 agreement (as defined under section 5000E–2).”.

15 (c) REMOVAL FROM GROSS INCOME.—Part III of
16 subchapter B of chapter 1 of the Internal Revenue Code
17 of 1986 is amended by inserting after section 139I the
18 following new section:

19 **“SEC. 139J. QUALIFIED LITIGATION PROCEEDS.**

20 “Gross income shall not include any qualified litiga-
21 tion proceeds (as defined in section 5000E–2).”.

22 (d) CLERICAL AMENDMENTS.—

23 (1) Section 7701(a)(16) of the Internal Rev-
24 enue Code of 1986 is amended by inserting
25 “5000E–3(c)(1),” before “1441”.

1 (2) The table of chapters for subtitle D of the
2 Internal Revenue Code of 1986 is amended by in-
3 serting after the item relating to chapter 50A the
4 following new item:

“CHAPTER 50B—LITIGATION FINANCING”.

5 (3) The table of sections for part III of sub-
6 chapter B of chapter 1 of such Code is amended by
7 inserting after the item relating to section 139I the
8 following new item:

“Sec. 139J. Qualified litigation proceeds.”.

9 (e) EFFECTIVE DATE.—The amendments made by
10 this section shall apply to taxable years beginning after
11 December 31, 2025.

○



U.S. Chamber of Commerce
Institute for Legal Reform

**RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
TPLF SUBCOMMITTEE**

**A REVISED PROPOSAL: AMEND RULE 26(a)(1)(A) TO GUIDE COURTS AND
PARTIES ON TPLF DISCLOSURE WHILE PRESERVING JUDICIAL DISCRETION
AND PROTECTING PARTIES' ASSERTIONS OF PRIVILEGE**

March 10, 2026

Lawyers for Civil Justice (“LCJ”)¹ and the U.S. Chamber of Commerce Institute for Legal Reform (“ILR”)² respectfully reiterate the suggestion that the Advisory Committee on Civil Rules (“Advisory Committee”) and its TPLF Subcommittee promulgate a rule requiring disclosure of the presence of third-party litigation funding (“TPLF”) in federal civil litigation and the underlying contracts,³ and propose an amendment to Rule 26(a)(1)(A).

¹ LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

² A program of the U.S. Chamber of Commerce (the “Chamber”), ILR’s mission is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world’s largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

³ See Lawyers for Civil Justice and US Chamber of Commerce Institute for Legal Reform, Rule Suggestion, *It Is Time to Address the Patchwork of Inadequate Practices: How the Lack of FRCP Guidance Is Failing Courts and Parties Who Need a Uniform and Credible Procedure for Understanding Third-Party Litigation Funding*

INTRODUCTION

Rule 26(a)(1)(A) is the appropriate place for TPLF disclosure guidance. The suggested rule text (“Proposed Rule”) and note language (“Proposed Note”) included herewith would resolve two “rules problems” because (1) federal courts lack uniform procedures for addressing TPLF disclosure, and (2) courts are divided as to the meaning of Rule 26(b)(1)—specifically, whether the rule’s “relevance” standard bars disclosure of TPLF.⁴ It would do so by defining nonparty financial interests in a commonsense manner, protecting judicial discretion, minimizing judicial burden, allowing flexibility over what is to be disclosed, and protecting parties’ ability to seek protective orders under Rule 26(c). This proposal answers the nine questions posed by the Subcommittee (the “Subcommittee Questions”)⁵ and delivers much-needed TPLF disclosure while avoiding unintended consequences.

The reasons for adopting a rule are compelling. Federal courts are deeply split on TPLF disclosure. According to a study conducted by the litigation funders’ lead lobbying group, federal district courts grant 40 percent of TPLF disclosure motions and deny the other 60 percent.⁶ Some federal appellate and district courts have adopted local rules requiring automatic disclosure of TPLF usage or of any persons with financial interests in a case, but they vary.⁷ In

Agreements, Oct. 2, 2024, https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_rule_26_tplf.pdf.

⁴ *Id.* at 5-6.

⁵ Memo 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, Dec. 5, 2025, 10-11, (“TPLF Subcommittee Questions”), Agenda Book, Committee on Rules of Practice and Procedure, Jan. 6, 2026, 203-04, https://www.uscourts.gov/sites/default/files/document/2026-01_standing_committee_agenda_book_final_0.pdf.

⁶ Letter from the International Legal Finance Association to the Committee on Rules of Practice and Procedure, Oct. 1, 2025 (“ILFA letter”), 22, (“Regarding disclosure, we identified over 100 relevant court orders resolving motions to compel, quash, or strike. Approximately 60% denied disclosure in its entirety and approximately 40% provided some form of disclosure based on a case-specific analysis.”), https://www.uscourts.gov/sites/default/files/document/25-cv-o_suggestion_from_international_legal_finance_association_-_tplf.pdf.

⁷ Most recently, the U.S. Court of International Trade adopted a mandatory TPLF disclosure requirement. *See* CIT Form 13, Question 4, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013.pdf>; CIT Specific Instructions, Form 13, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013%20Specific%20Instructions%20251211.pdf>. *See also* N.D. Cal. L.R. 3-15 (dictates identification of “an individual or entity . . . that provides funding for the litigation and that has a financial interest in the outcome”); D.N.J. L.R. 7.1.1 (mandates disclosure of filing of “any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis in exchange for” either a contingent financial interest in the results of the litigation or a non-monetary result). A fuller list of such local rules can be found on the Federal Judicial Center website, <https://www.fjc.gov/content/333092/third-party-litigation-financing-local-rules-and-forms>.

In addition, some individual district court judges have issued standing orders requiring TPLF disclosure as to matters on their respective dockets. *See, e.g.*, Rule 26(f) Report of the Parties (Judge Calabrese, N.D. Ohio), <https://www.ohnd.uscourts.gov/sites/ohnd/files/Rule%2026%28f%29%20Report%20of%20the%20Parties%20%2812.2026%29.pdf>; Standing Order Requiring Disclosure of Third-Party Litigation Funding (Judge Moe (M.D. Fla.)), <https://www.flmd.uscourts.gov/judges/anne-leigh-gaylord-moe>; Standing Order Regarding Third-Party Litigation Funding Arrangements (Chief Judge Connolly (D. Del.)),

sum, our courts are employing disparate approaches and reaching different conclusions due to the lack of FRCP guidance.⁸

TPLF contracts typically give a nonparty funder the right to benefit, directly or indirectly, from the outcome of a lawsuit and provide tools for such funders to exercise varying degrees of control or influence over litigation and settlement decisions⁹—and this is unrefuted.¹⁰ Repeatedly, funders have flatly told the Advisory Committee that they exercise no control over the lawsuits they finance.¹¹ But they say exactly the opposite to their investors¹² and to courts.¹³

<https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf>.

⁸ Lawyers for Civil Justice, *Uniform Disclosure of Third-Party Litigation Funding Contracts Is Necessary to Inform Judges' And Parties' Key Case Management Decisions*, Sept. 3, 2025, (“LCJ Examination of TPLF Contracts”), 2-3, https://www.uscourts.gov/sites/default/files/document/25-cv-1_suggestion_from_lcj_-_rule_26_tplf.pdf.

⁹ See, e.g., *In re Broiler Chicken Antitrust Litig.*, 167 F.4th 430, 444-45 (7th 2026) (Maldonado, J., concurring) (“it bears stating the obvious: Sysco and Pilgrim’s were on the cusp of finalizing a settlement agreement before the intervention of Sysco’s litigation funder, Burford Capital Limited.... Carina’s—that is, Burford’s—appeal before us is motivated far more by its speculative financial investment than by a desire to seek justice for Sysco, the true injured party. Having turned the courtroom into a trading floor, and calculated that continued litigation was more profitable than settlement, Burford wrested total control over the settlement of Sysco’s claims. And but for this legal maneuvering, this litigation could have been resolved long ago.”). See also, Samir Parikh, *Opaque Capital and Mass Tort Financing*, 133 Yale L.J.F. 32, 47-56 (2023), https://yalelawjournal.org/pdf/ParikhYLFForumEssay_ugvhskwa.pdf; and Emily Siegel, *Fortress Billions Quietly Power America’s Biggest Legal Fights*, Bloomberg Law (Oct. 16, 2024), <https://news.bloomberglaw.com/business-and-practice/fortress-billions-quietly-power-americas-biggest-legal-fights>; Emily Siegel, *Mass Tort Lawyers Trapped in a Cycle of Debt as Cases Drag On*, Bloomberg Law (Nov. 18, 2024), <https://news.bloomberglaw.com/business-and-practice/mass-tort-lawyers-trapped-in-cycle-of-debt-as-cases-drag-on>; LCJ Examination of TPLF Contracts, *supra* note 8, at 4-10.

¹⁰ Although opponents of TPLF disclosure assert that the nine contracts in LCJ’s Examination of TPLF Contracts are “cherry picked,” no one has questioned the authenticity of the contracts attached to LCJ’s Examination of TPLF Contracts or LCJ’s, disputed LCJ’s analysis of their control provisions, or produced a large trove of actual TPLF contracts that are unlike the ones LCJ examined.

¹¹ See Letter from Christopher P. Bogart, Chief Executive Officer, Burford, to Ms. Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, Sept. 1, 2017 (“Burford’s practice—and, to the best of its knowledge, the practice of other large litigation finance companies—is that it does not obtain any contractual right to control the decisions of the litigant and its counsel with respect to the litigation”); ILFA Letter at 4 (“Litigation funders do not control litigation strategy.”).

¹² See Burford Investor Day Slides, Slide 76 (enumerating respects in which funder is involved in “case management”), https://s206.q4cdn.com/737820215/files/doc_presentation/2025-04-03-Burford-2025-Investor-Day-FINAL-1543020-1.pdf.

¹³ See, e.g., *In re Pork Antitrust Litig.*, 2024 WL 511890, at *1 (Mag. D. Minn. Feb. 9, 2024) (describing litigation), *adopted*, 2024 WL 2819438 (D. Minn. June 3, 2024) (describing Burford’s assertions of contractual rights in litigation).

Opponents of TPLF disclosure adamantly disavow any role in litigation, insisting that they are neither parties nor lawyers.¹⁴ They ask the Advisory Committee not for uniformity, clarity, and predictability in procedural rules, but rather for a special favor: to give their industry a unique pass as to the basic transparency required of everyone else who has an economic interest in or influence over proceedings in public courts—and even some who do not.¹⁵ They ask special treatment for their contracts (presumably, arms-length business agreements with nonparties to litigation) with a categorical presumption of protection that does not apply even to the most sensitive documents courts routinely handle, be they health records, intellectual property, or employment documents.¹⁶ The opponents of disclosure further insist that, because their industry arguably could benefit some litigants, it should be exempt from identifying its involvement in cases and excused from the normal processes by which courts determine whether some or portions of documents are protected. And they assert that, without this special treatment, those benefits would evaporate, as if revealing the content of a TPLF contract would render the arrangement impossible.¹⁷

In reality, the Advisory Committee has already considered the arguments against disclosure of nonparty contracts affecting litigation—and rejected them. It did so in 1970, by adopting Rule 26(a)(1)(A)(iv) requiring automatic disclosure of insurance contracts, which is the appropriate model for TPLF disclosure. At the time, just like now, courts were split between granting disclosure of insurance contracts and denying it.¹⁸ The Advisory Committee defined the problem both as a lack of uniformity and also as a disjunction with Rule 26(b)(1)’s “relevancy” standard:

¹⁴ Letter from Christopher P. Bogart, Chief Executive Officer, Burford, to Ms. Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, Sept. 1, 2017 (“litigation funders are not “parties” as defined by Rule 17, and they do not serve as the litigant’s counsel”), https://www.uscourts.gov/sites/default/files/17-cv-xxxxx-suggestion_burford_0.pdf.

¹⁵ The procedural rules require various types of disclosures from parties and all manner of nonparties with a connection to the litigation—even from nonparties with no direct participation, including amicus filers and corporate parents. *See* FED. R. CIV. P. 17. (actions must be prosecuted in the name of the real party in interest); FED. R. CIV. P. 7.1. (parent companies and public companies holding 10% of a party’s stock must file disclosure statements regardless of any role in the litigation); FED. R. CIV. P. 26(a)(1)(A)(iv) (insurance agreements must be disclosed); FED. R. APP. P. 29 (filers of amicus briefs must disclose their name, their lawyer, their funding, and who wrote the brief); and numerous local rules require disclosure of anyone with a financial interest in a case.

¹⁶ None of these categories of information enjoys a presumption against disclosure. Rather, parties seeking to withhold some or all such documents may pursue stipulations or protective orders. If necessary, courts often review such documents *in camera* to determine the presence and extent of protected information. The presence of protected information within a document typically does not render an entire document privileged. In contrast, ILFA seeks a rule that would establish a novel and unprecedented procedure of *ex parte* review of TPLF contracts, not for determining whether there is a basis for protection, but rather for substantive contract interpretation “to confirm that control of litigation remains where it belongs.” ILFA letter at 25. The Code of Judicial Conduct strongly admonishes against the use of *ex parte* communications for substantive legal determinations such as contract interpretation, *see, infra*, and many judges would lack expertise to interpret complicated TPLF contracts in the absence of adversarial briefing.

¹⁷ FED. R. CIV. P. 26(a)(1)(A)(iv)’s requirement to disclose insurance contracts has not stopped insurance companies from providing liability insurance.

¹⁸ FED. R. CIV. P. 26(b)(2), advisory committee’s note to 1970 amendment (“Both cases and commentators are sharply in conflict on the question whether defendant’s liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue on the case.... The division in reported cases is close.”).

should insurance coverage be disclosed “when the insurance coverage itself is not itself admissible and does not bear on another issue in the case”?¹⁹ The Advisory Committee considered both sides of the argument and “resolve[d] this issue in favor of disclosure.”²⁰ The same decision is appropriate today. The courts that deny disclosure based on the 26(b)(1) “relevance” standard “avoid considerations of policy, regarding them as foreclosed”²¹ as did the pre-1970 decisions denying disclosure of insurance agreements. Like insurance agreements, TPLF contracts can give nonparties a stake in the litigation and some degree of influence over the conduct and resolution of litigation that is not expressly contemplated by Rule 26(b)(1)’s test of “relevant to any party’s claim or defense.”²²

No one disputes that courts and parties must know “who is in the courtroom”—that is, who benefits directly from court judgments and has a role in litigation and settlement decisions—in order to manage cases effectively and avoid conflicts. Although courts have inherent authority to obtain and provide this information to parties, they lack the tools and guidance for doing so efficiently and consistently. The Proposed Rule would relieve courts of having to expend judicial resources to decipher on an *ad hoc* basis whether a particular agreement should be disclosed in a particular case. It would provide judges and parties with clear guidance while helping all parties make informed strategic and settlement decisions based on a “realistic appraisal of the case.”²³

I. THE PROPOSAL AND HOW IT WILL WORK

A. Text of the Proposed Amendment

The Advisory Committee should add the following provision to the list of required “initial disclosure[s]” in Rule 26(a)(1)(A):

(v) the name, address, and telephone number of any nonparty individual or entity (other than counsel of record) that, whether directly or indirectly, is providing funding for the action and has a financial interest therein and, for inspection and copying as under Rule

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² The Advisory Committee rejected the notion that the Rule 26(b) “relevancy” analysis should limit the disclosure of insurance agreements when it promulgated Rule 26(a)(1)(A)(iv). Fed. R. Civ. P. 26 advisory committee’s note to 1970 amendment. At the time, “most of the decisions denying discovery (of liability insurance coverage), some explicitly, reasoned from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence.” *Id.* Those courts “avoid[ed] considerations of policy, regarding them as foreclosed.” *Id.* The Advisory Committee concluded that the policy considerations transcend “relevancy” and necessitate the disclosure of insurance agreements.

²³ As the Advisory Committee said about disclosure of insurance contracts, a rule requiring disclosure of TPLF contracts “will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.” Fed. R. Civ. P. 26 advisory committee’s note to 1970 amendment.

34, any agreements or other documentation concerning the terms of the funding for the action or the financial interest therein.

This Proposed Rule, together with the Proposed Note, is attached as Exhibit A.

B. Commonsense Definition of Nonparty Financial Interests

The Proposed Rule requires identification of nonparties who are (a) “providing funding for” and (b) have “a financial interest” in a case. This language, which is taken from N.D. Cal. Local Civil Rule 3-15, is sufficiently broad to include the key nonparty stakes in the case without risking over-particularization that would obfuscate the issues and invite gamesmanship in the parsing of terms.²⁴ The Proposed Rule does not require the court to determine the purpose of the funding or whether the nature of the nonparty’s financial interest is contingent on the outcome. The language thus achieves the commonsense result of identifying material nonparty interests in the litigation and answers Subcommittee Question #1 of how to describe the arrangements that trigger disclosure. The Proposed Note²⁵ explains that the term “funding” includes both past payment and future obligation to pay some or all attorney’s fees, costs, or expenses (including client recruitment expenses) related to the action, whether directly or through an intermediary nonparty. It also clarifies that the rule does not apply to funding in the nature of contingency-fee arrangements, insurance, or ordinary personal and bank loans. These concepts are drawn from the TPLF disclosure requirement recently adopted by the U.S. Court of International Trade.²⁶ The Proposed Note also explains that the disclosure requirement does not extend to individuals or entities that are pre-existing donors to, shareholders of, members of, or investors in a party to the action.

C. Flexible Definition of What Is To Be Disclosed

The Proposed Rule requires disclosure of the identity of the interested nonparty and the operative documents that provide and define their interest in the case.²⁷ The phrase “any agreements or other documents concerning the terms of the funding” or financial interest is sufficiently flexible to reach the information necessary to understand the nature of the nonparty’s involvement in the case while foreclosing fishing expeditions for peripheral correspondence and materials that are not central to defining the nonparty interests.

²⁴ In answer to the Subcommittee Questions #2 and #3, the Proposed Rule does not limit disclosure to certain types of litigation or to certain dollar amounts because TPLF may exist in all types of civil cases and the problems of non-disclosure exist at any dollar amount. The Proposed Rule answers the Subcommittee Question #5 because contracts for “inventory funding” would qualify as “providing funding” and “a financial interest” in the case.

²⁵ See Exhibit A. The Proposed Note is styled to track the Advisory Committee Note to the 1970 amendment to FED. R. CIV. P. 26(b)(2) that added the liability insurance disclosure requirement.

²⁶ See CIT Form 13, Question 4, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013.pdf>; CIT Specific Instructions, Form 13, <https://www.cit.uscourts.gov/sites/cit/files/Form%2013%20Specific%20Instructions%2051211.pdf>. The specific reference to “client recruitment expenses” is particularly important because funders increasingly appear to be securing interests in cases by supplying money to locate and sign up plaintiffs, which some may not consider to be a cost of prosecuting the litigation.

²⁷ This answers the Subcommittee Question #6 about what is to be disclosed.

D. Preserving Judicial Discretion and Minimizing Judicial Burden

The Proposed Rule remedies the burdens of the status quo—where virtually all TPLF disclosure requests require individualized judicial attention—by establishing a regular process that requires disclosure without a motion but preserves judicial discretion to grant protective orders when requested and warranted. Its placement in Rule 26(a)(1)(A) means disclosure occurs either as specified (that is, automatic production at the indicated time without need for any request) or “as otherwise stipulated or ordered by the court.”²⁸ As with other initial disclosures, when litigants comply without objection or with a modified requirement by stipulation, the court will not be involved.²⁹ Moreover, the Proposed Rule’s language, “any agreements or other documentation,” provides courts and parties sufficient flexibility to customize disclosures depending on the complexity of particular TPLF arrangements.³⁰ Of course, the Proposed Rule does not impinge on the availability of *in camera* judicial review of materials should a protective order be sought.

E. Protecting Privileged Material in the Normal Course of Litigation

The Proposed Rule ensures that a party may move for a protective order before making disclosures. In this respect it is no different from other initial disclosures under Rule 26(a)(1) and the FRCP discovery rules generally. Whenever disclosure of materials could include protected material, Rule 26(c) provides the protective procedures that courts use every day. Stipulations, standard redaction procedures, and, if necessary, *in camera* review of contested material, will protect any genuinely privileged information in TPLF documents, just as with any other document. The possibility of protected material being implicated is no reason to eschew a default disclosure rule. The Proposed Note explains that normal court procedures govern the Proposed Rule.

Opponents of disclosure are wrong to equate TPLF disclosure with revealing funders’ case evaluations and investment decisions. Disclosure of the operative agreement does not encompass a funder’s internal analyses—even if such information were included in a contract, a remote possibility at best.³¹ Forestalling disclosure of TPLF contracts under this rationale is unsupported by customary practice or settled law. Attorney retainer agreements are discoverable³² even though attorney-client communications and work product may be protected.

²⁸ FED. R. CIV. P. 26(a)(1).

²⁹ This answers the Subcommittee Question #6 about to whom disclosure is made—it is made to the parties unless a stipulation or court order provides otherwise. It also answers the Subcommittee Question #8 about what the court is to do with the information—typically, nothing beyond informing case management, unless an unusual circumstance is brought to the court’s attention.

³⁰ This answers the Subcommittee Question #7 concerning whether disclosure will lead to “time-consuming discovery forays that distract from the merits of the underlying cases.” Such forays will occur only if the court allows it. By providing the operative documents, the Proposal will preclude discovery “forays” by answering the presently unanswered question of what disclosure is appropriate and requiring that such disclosures be made without need for discovery requests.

³¹ The opponents of disclosure have not asserted that any of the nine contracts appended to LCJ’s Examination of TPLF Contracts contain work product.

³² See, e.g., *Ayangbile v. Children’s Health Servs. of Texas*, No. 3:24-CV-01075-N, 2025 WL 1182089, at *6 (N.D. Tex. April 22, 2025) (“the retainer agreement is relevant because [plaintiffs] seek attorney’s fees and costs”; not privileged); *Adams v. Gissell*, No. CV 20-11366-PBS, 2022 WL 14772785, at *2 (D. Mass. Oct. 26, 2022) (ordering

Insurance policies are disclosed even though underwriting analysis is ordinarily protected. Corporate structures are disclosed despite acquisition strategies being protected. Documents conferring settlement authority provisions may be discovered, but not settlement strategy. Similarly, TPLF agreements should be disclosed (showing financial interest and control features) even if funders' internal investment memoranda or case evaluations remain protected.

II. WHY THE PROPOSED RULE IS NEEDED

A. The Proposed Rule Addresses Two Compelling “Rules Problems”

Courts are sharply divided on whether TPLF information and agreements are subject to disclosure.³³ The courts that require disclosure tend to do so to ensure necessary transparency (that is, to address conflicts, nonparty control, and issues of relevance to claims and defenses),³⁴ while many courts rejecting disclosure cite the Rule 26(b)(1) “claims or defenses” relevance standard as the reason.³⁵ This lack of uniformity is a “rules problem” because similarly situated parties in different geographic locations are being subjected to starkly different interpretations of the FRCP and inconsistent access to much-needed information. Because there is little if any avenue for appellate review of TPLF disclosure decisions, there is no plausible mechanism for achieving uniformity on TPLF disclosure procedures outside the rulemaking process.³⁶ Some federal courts are attempting to create clarity by adopting local rules or judge-specific mandates requiring TPLF disclosures³⁷—typically, without need for a request. Although those local rules

production as relevant to reasonableness of fees); *SPV-LS, LLC v. Transamerica Life Ins. Co.*, No. 4:14-CV-04092-LLP, 2016 WL 3923099, at *4 (D.S.D. July 15, 2016) (“the normal rule [is] that fee agreements are generally not privileged”; retainer allegedly forged); *Torres v. Toback, Bernstein & Reiss LLP*, 278 F.R.D. 321, 322 (E.D.N.Y. 2012) (retainer agreements “do not fall within the attorney-client privilege” and were relevant to reasonableness of fees; discovery ordered after *in camera* review); *Pugliese v. I. C. Sys., Inc.*, No. 2:09-CV-11831, 2010 WL 11545062, at *4 (E.D. Mich. July 21, 2010) (“claims that attorney retainer or fee agreements are protected from disclosure by the attorney-client privilege have repeatedly been rejected by the Federal courts”).

³³ ILFA letter at 22.

³⁴ See, e.g., *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. 23-MD-03084-CRB (LJC), 2025 WL 2201056, at *2–3 (N.D. Cal. Aug. 1, 2025) (ordering disclosure of litigation funding arrangement to avoid judicial conflicts of interest); *MSP Recovery Claims Services, LLC v. Sanofi-Aventis U.S. LLC*, No. 2:18-CV-02211 (BRM) (RLS), 2024 WL 4100379, at *6 (D.N.J. Sept. 6, 2024) (affirming special master’s order requiring disclosure of litigation funding arrangements and documentation due to concerns about funder control of litigation); *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (requiring production of third-party funding agreement, explaining that it “is relevant to the adequacy [of representation] determination” required for class certification).

³⁵ See, e.g., *Akiane LLC v. Art & Soulworks LLC*, No. 19 C 2952, 2020 WL 5593242, at *5-6 (N.D. Ill. Sept. 18, 2020) (quashing discovery request on relevancy grounds); *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 313 (D. Nev. 2019) (same); *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (same).

³⁶ The Advisory Committee observed that “It appears to be difficult if not impossible to obtain appellate review of the issue” when considering the amendment to require disclosure of insurance agreements. Fed. R. Civ. P. 26 advisory committee’s note to 1970 amendment.

³⁷ See, e.g., USCIT Form 13 (requiring identification of “each third-party litigation funder”); N.D. Cal. L.R. 3-15 (dictates identification of “an individual or entity . . . that provides funding for the litigation and that has a financial interest in the outcome”); N.J. L.R. 7.1.1 (mandating statement with information “regarding any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-

and standing orders are enhancing transparency where they apply, the courts' multifarious approaches only exacerbate the lack of uniformity.

That courts rely on Rule 26(b)(1)'s relevance standard as barring disclosure is another "rules problem." These holdings conflict with the widespread belief that courts have inherent authority to order disclosure of TPLF documents and that Rule 26(b)(1) does not circumscribe that authority. The Proposed Rule clarifies the important distinction between disclosure and discovery, and the Proposed Note explains that, because disclosure under the Proposed Rule is not "discovery," documents produced under the rule are not subject to Rule 26(b)(1) restrictions.

B. The Proposed Rule Serves Important Case Management Purposes

Courts and parties need TPLF disclosure to: (1) understand who is actually "in the courtroom"—who they are actually litigating against and negotiating with; (2) know who has settlement authority;³⁸ (3) identify potential conflicts of interest; (3) assess proportionality for discovery disputes; (4) understand the actual dynamics of the case before them, and (5) refute baseless "David vs Goliath" arguments.

None of these purposes is "unfair," as some opponents of disclosure assert.³⁹ Rather, non-disclosure is what leads to unfairness, including the following problems:

- Courts unable to manage settlement conferences effectively;
- Parties wasting time negotiating with purported "parties" who lack authority;
- "Zombie litigation" that continues at the behest of hidden TPLF despite all of the formal parties desiring to settle;⁴⁰
- Hidden conflicts of interest, often involving counsel;
- Inability to evaluate alternative litigation outcomes because hidden actors obscure benefit evaluations;
- Surreptitious violation of confidentiality orders;

recourse basis in exchange for" either a contingent financial interest in the results of the litigation or a non-monetary result). Numerous federal courts have adopted rules broadly requiring disclosure of nonparties with financial interests, which presumably would include litigation funders with direct or indirect revenue expectations attributable to a funded action. *See, e.g.*, 5th Cir. R. 28.2.1 (dictating identification of persons "financially interested in the outcome of the litigation"); C.D. Cal. L.R. 7-1.1 (requiring disclosure of persons who "may have a pecuniary interest in the outcome of the case"); N.D. Ga. L.R. 3.3 (mandating identification of persons with "either a financial interest in or other interest which could be substantially affected by the outcome"); S.D. Iowa L.R. 7.1 (requiring identification of persons with "a direct or indirect pecuniary interest in the plaintiff's outcome in the case").

³⁸ Subcommittee Question #9 asks whether judges should "be concerned that settlement decisions are controlled by funders whose involvement is not known to the court?" The Proposed Rule relieves that concern by providing that information to the court.

³⁹ American Association for Justice, Rules Suggestion, Dec. 22, 2025 ("AAJ Rules Suggestion"), 2, https://www.uscourts.gov/sites/default/files/document/25-cv-t_suggestion_from_american_association_for_justice_-_tplf.pdf.

⁴⁰ Maya Steinetz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy & Zombie Litigation: Claim Aggregation, Litigant Autonomy & Funders' Intermeddling*, Cornell L. Rev. (2024) (forthcoming), available at: https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4964&context=faculty_scholarship.

- Insulation of responsible hidden actors from court-ordered sanctions.

Some TPLF agreements expressly give the funder the right to control litigation and direct counsel.⁴¹ For example, the Burford/Sysco Agreement⁴² provides that, in the event of a breach by the funded plaintiff, the funder may take over the conduct and settlement of the litigation, including instructing or replacing counsel. The contract contemplates that the funder will “act in the name of” the plaintiff—and requires the plaintiff to continue to appear “at any hearings” at the direction of the funder.⁴³

Disclosure of TPLF contracts is particularly important where such provisions can, currently unbeknownst to judges, shape substantive outcomes and undermine court orders. Contracts that require the plaintiff to pay the funder the monetary value of any injunctive relief or specific performance awarded⁴⁴ impose strong disincentives against non-monetary relief that can skew what remedies are presented to, and ultimately ordered by, the court. Some contracts mandate that the plaintiff and counsel provide all documents obtained in the course of litigation to the funders,⁴⁵ a provision inconsistent with most protective orders. And some contracts undermine court orders to pay costs and sanctions by obligating plaintiffs to pay all such penalties⁴⁶—even where the sanctioned misconduct originated with the funder or its selected-and-controlled counsel, not with the funded party. Absent disclosure of TPLF contracts, courts and litigants remain unaware of such provisions and have no insight into how they might impact various aspects of their cases.

The Proposed Rule would lead to disclosure of these types of provisions, helping courts and parties understand why the named plaintiff may not be directing—or even participating in—the litigation. It would inform case management by making courts and parties aware of any control exercised by a nonparty with separate financial interests and strategic objectives for the case. It would allow affected parties to seek protection from unethical and otherwise sanctionable litigation conduct.

C. The Proposed Rule Provides a Necessary Tool that “Inherent Authority” Lacks

The Proposed Rule gives courts important tools that they lack when forced to rely solely on “inherent authority”—despite assertions by opponents of disclosure that no rule is necessary because judicial discretion suffices.⁴⁷

⁴¹ LCJ’s Examination of TPLF Contracts at 4-14.

⁴² *Id.* at Exhibit C, Second Amended and Restated Capital Provision Agreement between The Counterparty and The Capital Providers, Dec. 22, 2020, §13.1.

⁴³ *Id.*

⁴⁴ LCJ’s Examination of TPLF Contracts at 8-9.

⁴⁵ *Id.* at 17-18.

⁴⁶ *Id.* at 18-19.

⁴⁷ AAJ Rules Suggestion at 5-7.

Despite having inherent authority to order TPLF disclosure, courts face uncertainty about when to order disclosure, what to look for in TPLF agreements,⁴⁸ and how to decide what standards for disclosure should apply. Courts can be confused by boilerplate disavowals of control and funder statements that contradict contractual provisions,⁴⁹ and thus overlook important provisions proving otherwise. Further, judicial examination of complex contracts without briefing is undoubtedly burdensome. Parties face unpredictability about disclosure obligations, expensive motion practice in every case, inconsistent treatment across jurisdictions, strategic gamesmanship about when/whether to disclose, and forum shopping.

No amount of inherent authority can avoid the documented problems that undisclosed TPLF can bring. In the *Sysco* case, the settlement that the parties wanted collapsed because undisclosed TPLF contracts controlled settlement authority, but that was revealed only after extensive litigation. In this type of “zombie litigation,” where the litigation continues despite the parties’ desire to settle,⁵⁰ courts have no idea that funders control decisions until it is too late to provide appropriate case management to prevent wasted resources. And in conflict situations, judges preside over cases without knowing that funders have relationships requiring recusal or cross-examination and may not discover the issues until after months or years of proceedings. These are problems caused by absence of rule guidance and are not addressed by inherent authority.

Before the 1970 amendment requiring insurance disclosure, judges had inherent authority to require disclosure of insurance information on a case-by-case basis—and in fact, many did so. Yet the Advisory Committee determined that a uniform rule was necessary because: *ad hoc* requests create uncertainty, inconsistency, and unnecessary motion practice; parties should not have to guess when disclosure is required; uniform rules promote efficient case management; and automatic disclosure is more efficient than case-by-case determination.

Inevitably, relying on inherent authority means that some judges order disclosure while others do not; standards vary across courts and jurisdictions; parties face uncertainty about disclosure obligations; extensive motion practice wastes time and resources; and forum shopping occurs based on disclosure practices and local rules.

Indeed, a fundamental problem is that many judges are not even aware that funding exists in their cases. Parties do not volunteer this information, often because TPLF contracts prohibit them from doing so.⁵¹ Without a rule, no trigger for inquiry exists. The result is that funding agreements remain hidden, and problems surface only after it is too late for judicial management.

Even when judges suspect funding, parties (and their funders) resist disclosure absent a clear rule requirement. If courts ask informally about “litigation funding,” parties may avoid disclosure due to the lack of a written definition. Or a funding contract may be entered into after the judge’s inquiry, with no express obligation to update any prior negative response absent a rule.

⁴⁸ *In re Fresh Acquisitions, LLC*, No. 21-30721-SGJ-11, 2025 WL 2231870, at *9 (Bankr. N.D. Tex. Aug. 5, 2025) (observing that even purported TPLF “experts” have “only seen a few actual litigation funding agreements”).

⁴⁹ LCJ’s Examination of TPLF Contracts at 14-16.

⁵⁰ *See supra* n. 40.

⁵¹ LCJ’s Examination of TPLF Contracts at 17.

Disputes over disclosure—and about the uncertain applicability of Rule 26(b)(1)’s “relevance” standard—consume time and resources.

When judges do obtain agreements, *ex parte* review to determine the meaning of contractual provisions (in order to decide whether those provisions justify disclosure) deprives courts and parties of the adversary process necessary for uncovering facts buried in complex documents. It also deprives courts and parties from the benefits of case law development. The resulting repetition of similar disputes uses more resources and leads to inconsistent analysis and results.

The proliferation of local rules and standing orders demonstrates two things: first that TPLF non-disclosure is a problem that necessitates a judicial response, and second that relying on individual judges’ discretion has yielded inconsistent outcomes and serious inefficiencies, highlighting the need for a clear, uniform rule.

D. The Proposed Rule Reduces Judicial Burdens

The Proposed Rule would provide guidance to judges that would largely eliminate the current burdens of managing TPLF disclosures on a case-by-case basis. The opposing argument that any rule should be discretionary and have only a limited scope⁵² fails to address that case-by-case management requires:

- Judges first guess when funding might exist;
- Motion practice about whether to require disclosure;
- Briefing on applicable disclosure standards;
- Review of conflicting caselaw untethered to a rule standard;
- *In camera* review of complex and often inconsistent contractual provisions to determine their meaning and practical effect; and
- Potential repeated analysis in each case.

In contrast, the Proposed Rule reduces the need for judicial engagement by providing:

- Defined initial disclosures, eliminating case-by-case adjudication;
- No judicial involvement unless disputes arise, reducing motion practice;
- Standard, familiar procedures for asserting and ruling on motions for protective order;
- A framework for developing interpretive precedent; and
- One-time rule execution in most cases.

This is a commonsense solution reflecting the fundamental purpose of the civil rules. The FRCP do not require courts to make case-by-case decisions as to whether insurance disclosures, corporate disclosures, or expert disclosures are helpful. Rather, the FRCP provide regular procedures for these to ensure consistent practice, prevent gamesmanship, reduce motion practice, enable efficient case management, and create clear expectations. If judicial discretion based on inherent authority were always superior to rule guidance, none of these disclosure rules would exist or be needed.

⁵² AAJ Rules Suggestion at 9.

E. The Proposed Rule Allows Normal *In Camera* Review in Response to a Motion for Protective Order but Rejects Inappropriate Use of *Ex Parte* Communications to Determine the Meaning of Contracts

Courts are accustomed to reviewing documents *in camera* when necessitated by motions for protective orders. The Proposed Rule would ensure this “regular order” for TPLF contracts while rejecting the starkly different notion that courts should automatically review TPLF contracts *ex parte* to decide for themselves if the meaning of their provisions warrants discretionary disclosure.

Opponents of disclosure argue that any rule, if there is to be one, should mandate *ex parte in camera* review of all TPLF contracts to determine whether “the agreement presented a conflict of interest or that funders were exerting improper control over the litigation.”⁵³ That type of *ex parte* review would not only dramatically increase judicial workloads, but also and more fundamentally violate basic jurisprudential principles. The Code of Conduct for U.S. Judges (Canon 3(A)(4)) discourages *ex parte* communications, with exceptions limited to “scheduling, administrative, or emergency purposes.” Examining TPLF contracts to reach legal conclusions about control provisions falls well beyond the Judicial Code’s narrow exceptions because it:

- Deprives opposing parties of opportunity to respond on substantive legal issues;
- Violates adversarial system principles;
- Prevents parties from identifying problematic provisions for courts to consider;
- Creates no record, thereby making appellate review effectively impossible;
- Creates information asymmetries that distort settlement;
- Relies entirely on inherently biased presentations from the parties opposing disclosure;
- Makes the judge the sole possessor of knowledge about potential problems; and
- Deprives courts and future litigants of the development of precedential standards, including:
 - Other courts cannot learn from decisions,
 - No precedent establishing what TPLF provisions mean or matter,
 - Standards remain unclear, and
 - Each judge reinvents the wheel.

The notion of greatly expanded *ex parte* review of contracts is inconsistent with other disclosure requirements, including:

- Insurance agreements: disclosed to parties, adversarial briefing of disputes;
- Corporate disclosure: public filing;
- Discovery disputes: adversarial briefing creating a full record, potential interlocutory appellate review;
- Privilege and confidentiality claims: privilege logs, adversarial motion practice, and *in camera* review only as last resort, potential interlocutory appellate review.

TPLF agreements do not warrant special procedural treatment compared to all other types of discoverable or disclosable documents, none of which are reviewed *ex parte* in the first instance,

⁵³ *Id.*

absent a motion for protective order. TPLF agreements are no more sensitive than these other presumptively disclosable documents that might sometimes contain trade secrets, attorney-client privilege, work product, or other confidential material. Discovery disputes are uniformly handled through normal procedures.

F. The Proposed Rule Provides Optimal Disclosure, Not Under-Disclosure

The Proposed Rule provides courts and parties with an optimal level of TPLF disclosure. Without mandatory disclosure, parties under contract with nonparty funders have incentives, or sometimes obligations, to: avoid mentioning funding exists, argue funding is irrelevant when discovered, claim broad privilege over entire agreements, propose *ex parte* review to avoid party-to-party disclosure, and delay disclosure until problems arise. The result is that information remains hidden until it causes problems—exactly when disclosure is least helpful for case management. In contrast, the Proposed Rule makes information available from the outset of a case, gives courts the ability to structure case management appropriately, informs parties about settlement dynamics early, allows conflicts to be identified before they cause problems, and encourages efficient pro-active case management.

G. The Proposed Rule Addresses Problems with Parties’ Ability to Discuss Resolution, Enhancing Judicial Management

Some TPLF contracts expressly give the funder the right to accept or reject settlement offers—and some even forbid the plaintiff from having “any communication with any Defendant” or defense representative.⁵⁴

Most courts consider it good case management to ensure that all decision makers are in the room, or at least available, during settlement conferences. The Proposed Rule allows courts to involve third-party funders directly (as is routinely the case with insurers). Further, presiding judges will be able to appreciate why settlement discussions stall, why plaintiffs are unable to respond to seemingly reasonable offers, or why cases continue to be litigated despite apparent willingness by the named parties to resolve their disputes. The Proposed Rule also allows defense counsel to negotiate with those having actual settlement authority and understand the settlement dynamics created when, for example, funders have veto power over reasonable offers, minimum recovery requirements, or strategic reasons for prolonging litigation that have nothing to do with the underlying dispute (including interests in other “portfolio” cases that are part of the TPLF arrangement).

Moreover, when a court is called upon to ensure that a settlement is fair and reasonable—for example, as Rule 23(e) requires in class actions—the Proposed Rule will allow the court to incorporate in its analysis whether a significant portion of the proceeds is being paid to a nonparty, and on what terms. The Proposed Rule is necessary because a TPLF contract may preclude the plaintiff or counsel from disclosing the existence of funding or any details about the arrangement.

⁵⁴ LCJ’s Examination of TPLF Contracts at 6-7.

III. THE PROPOSED RULE IS CONSISTENT WITH THE ADVISORY COMMITTEE’S DECISION TO REQUIRE INSURANCE DISCLOSURE

Opponents of disclosure argue that the Advisory Committee’s decision to require insurance disclosure is irrelevant because insurance and TPLF are different financial products.⁵⁵ They essentially argue that disclosure should depend on the commercial purpose of the financial product, not on its effect on litigation dynamics. But the purpose of FRCP disclosure requirements is to promote judicial administration, not financial product regulation. What matters is not whether TPLF and insurance serve the same commercial purposes (which they do not), but whether both can create nonparty interests requiring disclosure for effective case management because both broadly affect the litigation.

A. The “Different Purposes” Argument Misunderstands Why Insurance Must Be Disclosed

Opponents of disclosure claim that TPLF and insurance serve different purposes.⁵⁶ True, but irrelevant for FRCP purposes. When the Advisory Committee considered whether to require insurance disclosure, it did not concern itself with the purposes of insurance, but rather focused on what mattered when creating a disclosure rule: litigation dynamics—who has financial interests and who controls decisions affecting case resolution. The Advisory Committee determined that disclosure enables parties to “make the same realistic appraisal of the case, so that settlement and litigation strategy are based upon knowledge and not speculation.” This rationale applies identically to TPLF because: (1) parties need to make realistic case appraisals, and doing so requires knowledge of how funding affects settlement dynamics; (2) settlement strategy must be based on knowledge, which means the court and parties must know who controls settlement authority; and (3) eliminating speculation requires courts and parties to know who benefits from judgments and settlements.

Thus, the “purpose” of disclosing insurance and TPLF is the same, even if the “purposes” of the underlying products differ in other, extraneous ways.

B. Timing of Execution Is Irrelevant to the Need for Disclosure

Opponents of disclosure also argue that TPLF contracts differ from insurance agreements because they are created post-incident. This distinction is often false as a matter of fact and always irrelevant as a matter of jurisprudence.

Some nonparty funding of litigation, particularly in the mass tort context, is on a portfolio basis.⁵⁷ New plaintiffs making the same claims simply become additional fodder for existing TPLF arrangements. Funding arrangements thus frequently predate the lawsuit, and indeed are predicated on generating additional lawsuits. The opposition argument is thus factually erroneous.

⁵⁵ ILFA Letter at 19-20; AAJ Rules Suggestion at 4-5.

⁵⁶ AAJ Rules Suggestion at 4-5.

⁵⁷ LCJ’s Examination of TPLF Contracts at 13-14.

Nor does it matter. If an insurance policy were obtained or modified post-incident, the timing would not seem to exempt it from disclosure under Rule 26(a)(1)(A)(iv). Moreover, the timing of insurance agreements was nowhere mentioned as a factor for the 1970 rulemaking in the Committee Note.

No other disclosure rule is dependent on when the information at issue came to be. Corporate disclosures under Rule 7.1 do not exempt entities from disclosure based on when ownership was acquired. Rule 17's requirement for cases to be litigated in the name of the real party in interest cannot be evaded based on when the interest was obtained or transferred—for example, when assignment of claims occurs.⁵⁸

C. The “Case Evaluation” Distinction Actually Supports Disclosure

Opponents of disclosure also claim that TPLF agreements contain attorney and funder evaluation of case strengths and weaknesses, making them more like work product. This argument ignores that, like insurance policies, many TPLF agreements are form contracts, and that some insurance contracts may also contain an insurer's evaluation of risk.

When the Advisory Committee concluded in 1970 that insurance disclosure allows the parties to “make the same realistic appraisal of the case, so that settlement and litigation strategy are based upon knowledge and not speculation,” it surely contemplated that courts and parties need to know what financial pressures the contracts create, and whether settlement positions reflect case merits or some nonparty's financial calculations.

Even supposing that case evaluation information were to appear in a contract—which is unlikely⁵⁹—it would not make the entire agreement privileged. The existence of funding and basic terms (control, financial interest) are not privileged. In an unusual case, courts would be capable of protecting genuinely privileged portions through standard Rule 26(c) procedures.

D. The “Reserve Amount” Analogy Fails

Opponents of disclosure claim that TPLF disclosure would be like requiring insurers to disclose reserve amounts. The argument is fundamentally flawed because reserve amounts are internal financial accounting, not contractual terms with nonparties affecting litigation control. An insurer's reserve is not determinative of its settlement authority. The factually appropriate analogy is to an insurer's policy limits – specifying the amount of nonparty financial exposure, just as does the amount of TPLF contingent investment.

In contrast, TPLF contracts contain contractual provisions specifying who controls settlement decisions, terms establishing who benefits from judgments and resolutions, and creating enforceable rights of nonparties. Thus, disclosing TPLF agreements is exactly equivalent to disclosing insurance policies—both are contracts with nonparties affecting litigation control and

⁵⁸ *E.g., Winn v. Amerititle, Inc.*, 731 F. Supp. 2d 1093, 1099 (D. Idaho 2010) (Rule 17 “real party in interest” status can be created by an “assign[ment . . .] after the action has been instituted”).

⁵⁹ None of the nine contracts in LCJ's Examination of TPLF Contracts did so.

participation in litigation outcomes. Both sides need to know the contractual terms and exposure limits that affect case control and resolution.

CONCLUSION

The Proposed Rule will provide the information necessary for good case management, and it will do so while protecting judicial discretion and maintaining well-established procedures of stipulations, motions for protective orders, and, when necessary, *in camera* review. It will create a uniform procedure and provide clear guidance for courts and parties. Rule 26(a)(1)(A) is the appropriate place for TPLF disclosure guidance. As with other initial disclosures, when litigants comply with no objection or by stipulation, the court will not be involved. When a motion for protective order is filed under Rule 26(c), it will be adjudicated in the normal course.

The opponents of disclosure are not asking the Advisory Committee for uniformity, clarity, or predictability in procedural rules. They are asking for special treatment. Although their contracts allow them to share in court judgments and settlements, and often include specific provisions by which they influence or control litigation decisions, settlements, and even counsel, they ask to be exempt from the disclosure requirements that generally apply to real parties in interest, insurers, nonparties who may or may not influence litigation, such as corporate parents, and even nonparties who by definition do not have any role in the litigation, such as *amici curiae*.

The opposing “unfair advantage” argument ignores the case management problems caused by undisclosed nonparty engagement in litigation—and the Advisory Committee rejected the same arguments against insurance disclosure in 1970. The “different purposes” argument misunderstands why disclosure is required: not because of product purpose, but because courts and parties need to know about actual nonparty financial interests and control. The “no rule necessary” argument ignores the numerous documented failures that have occurred despite courts’ inherent authority. The “discretionary, limited disclosure” proposal would impose substantial burdens on courts, designed to deter them from ordering disclosure rather than enable it, and it would create unique *ex parte* procedural requirements that violate judicial ethical norms.

Exhibit A

Proposed Rule Amendment and Committee Note

Rule 26 Duty to Disclose; General Provisions Regarding Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

- (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under [Rule 34](#) the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
- (iv) for inspection and copying as under [Rule 34](#), any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; **and**
- (v) the name, address, and telephone number of any non-party individual or entity (other than counsel of record) that, whether directly or indirectly, is providing funding for the action and has a financial interest therein and, for inspection and copying as under Rule 34, any agreements or other documentation concerning the terms of the funding for the action or the financial interest therein.

Proposed Notes of Advisory Committee on Rules — 2027 Amendment

Subdivision (a)(1)(A)(v)—Litigation Funding Agreements. Existing case law sharply conflicts on the question whether information about litigation funding usage and agreements are subject to discovery when such facts normally are not themselves admissible and do not bear on other issues in the matter. Examples of federal precedents requiring disclosure are: *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. 23-MD-03084-CRB (LJC), 2025 WL 2201056, at *2–3 (N.D. Cal. Aug. 1, 2025) (ordering disclosure of litigation funding arrangement to avoid any judicial conflicts of interest); *MSP Recovery Claims Services, LLC v. Sanofi-Aventis U.S. LLC*, No. 2:18-CV-02211 (BRM) (RLS), 2024 WL 4100379, at *6 (D.N.J. Sept. 6, 2024) (affirming special master’s order requiring disclosure of litigation funding arrangements and documentation due to concerns about funder control of litigation); *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-

SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (requiring production of third-party funding agreement, explaining that it “is relevant to the adequacy [of representation] determination” required for class certification). Examples of federal cases rejecting disclosure are: *Akiane LLC v. Art & Soulworks LLC*, No. 19 C 2952, 2020 WL 5593242, at *5-6 (N.D. Ill. Sept. 18, 2020) (quashing discovery request on relevancy grounds); *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 313 (D. Nev. 2019) (same); *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (same). It appears to be difficult (if not impossible) to obtain appellate review of the issue.

Some federal appellate and district courts have sought to resolve the question by adopting varying local rules specifying that disclosures must be made about litigation funding without need for request. *See, e.g.*, USCIT Form 13 (requires identification of “each third-party litigation funder”); N.D. Cal. L.R. 3-15 (dictates identification of an individual or entity . . . that provides funding for the litigation and that has a financial interest in the outcome”); N.J. L.R. 7.1.1 (mandates filing of statement with information “regarding any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis in exchange for” either a contingent financial interest in the results of the litigation or a non-monetary result). Numerous federal courts have adopted rules broadly requiring disclosure of non-parties with financial interests, which presumably would include litigation funders with direct or indirect revenue expectations attributable to a funded action. *See, e.g.*, 5th Cir. R. 28.2.1 (dictates identification of persons “financially interested in the outcome of the litigation”); C.D. Cal. L.R. 7-1.1 (requires disclosure of persons who “may have a pecuniary interest in the outcome of the case”); N.D. Ga. L.R. 3.3 (mandates identification of persons with “either a financial interest in or other interest which could be substantially affected by the outcome”); S.D. Iowa L.R. 7.1 (requires identification of persons with “a direct or indirect pecuniary interest in the plaintiff’s outcome in the case”).

Resolution of the disclosure question by rule amendment is indicated. The question is essentially procedural, since it bears upon preparation for trial and settlement before trial. Regardless of outcome, courts confronting the question have generally treated the question as procedural and governed by the rules. Further, as noted, many courts have adopted varying local rules requiring disclosure. Since litigation funding is ubiquitous in the federal court system, a uniform, nationwide rule on this issue is advisable.

The amendment resolves this issue in favor of mandatory litigation funding disclosure to the court and parties without need for request. As such, the amendment follows the approach taken to resolve a similarly sharp split among federal courts regarding the question whether defendants’ liability insurance agreements should be disclosed. *See* Rule 26(a)(1)(A)(iv) and Advisory Committee Note (1970 Amendment). Most decisions denying litigation funding disclosure reason from the text of Rule 26(b) that it permits discovery only of matters that will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy considerations, regarding them as foreclosed. *See V5 Techs. v. Switch, Ltd., supra*. Those policy considerations, however, favor disclosure. Decisions requiring disclosure have noted, irrespective of relevance considerations, the desirability of the court and parties to know who (other than named parties and counsel of record) may exercise control or influence over the conduct of the litigation, particularly for purposes of participating in settlement efforts. *See MSP, supra*. In class actions, some courts ordering disclosure have

emphasized that funding agreements are relevant to the adequacy of representation determination under Rule 23(a). *See Gbarabe v. Chevron Corp, supra*. And yet other courts requiring disclosure have done so on the ground that such disclosure is necessary to better assess and avoid judicial conflicts of interest. *See In re Uber Techs., Inc., Passenger Sexual Assault Litig., supra*.

Disclosure of litigation funding will enable counsel for both sides to make the same realistic appraisal of the case, so that litigation and settlement strategies will be more efficient—based on knowledge, not speculation. It will allow the court and parties to know all persons and entities (a) who are monetarily supporting the prosecution or defense of an action, (b) who may exert control or influence over the conduct of the litigation, (c) whose presence may create conflicts of interest for the courts or counsel, (d) who arguably might be held responsible for actions in the litigation, and (e) who should be included in any settlement discussions.

Disclosure is required when any non-party (other than counsel of record) is directly or indirectly (a) providing funding for the action and (b) has a financial interest therein. For purposes of this Rule, the term “nonparty” does not include individuals or entities that are donors to, shareholders of, members of, or investors in a party to the action. The term “funding” includes any past or potential future payments for attorney’s fees, costs, or expenses (including law firm payments for identifying and recruiting clients) related to the litigation, whether directly or through an intermediary non-party. The term does not include funding in the nature of contingency fee arrangements, insurance, or ordinary personal and bank loans (that is, loans with prevailing standard terms and interest rates). “Financial interest” should be interpreted broadly to include any potential for direct or indirect compensation from the matter, including money flowing from securitized interests in law firm income from the litigation.

If disclosure is required, the name, address, and telephone number of any person or entity providing funding should be presented. Further, any agreements or other documentation concerning the provision of funding for the litigation should be produced. The “other documentation” reference is included to ensure that any side agreements or descriptions are made available, particularly materials that may describe respects in which proceeds from the litigation may be forwarded to others by a funder.

Under the existing language of Rule 26(a), the obligation to produce agreements and documentation would be subject to the proviso “[e]xcept as otherwise stipulated or ordered by the court.” Thus, before the required mandatory production occurs, a party could confer with the other litigants about entering into stipulations that certain items need not be produced or may be produced with redactions. If stipulations are not reached, the party could move the court pursuant to Rule 26(c)(1) for a protective order excusing the production of certain items or requiring redactions. Per normal procedure, the court would then conduct an *in camera* review of the materials at issue in determining whether to grant the requested protective order.

The agreements and documentation that must be produced under the amended rule are not discovery and therefore are not subject to the relevancy and proportionality standards of Rule 26(b)(1). Like the insurance agreements that must be provided under Rule 26(a)(1)(A)(iv), the materials to be produced without awaiting a discovery request under this amendment may not be resisted on the grounds that their content is not relevant to the merits of the action.

December 22, 2025

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
One Columbus Circle, NE
Washington, DC 20544
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RE: Third Party Litigation Funding

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice (“AAJ”) submits the following, expressing its general opposition to rulemaking related to third party litigation funding (“TPLF”), as most recently suggested by Lawyers for Civil Justice (“LCJ”) and opposed by the International Legal Finance Association (“ILFA”) and commercial litigation funding practitioners.¹ With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. Members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions and regularly use the Federal Rules of Civil Procedure in their practice.

AAJ previously expressed its opposition to rulemaking related to TPLF during consideration of the multi-district litigation rule, and its position remains unchanged.² A rule requiring disclosure of TPLF agreements would be unfair, because it would provide corporate defendants with an unjustifiable litigation advantage by revealing information about the financial wherewithal of plaintiffs and their attorneys, who disproportionately use funding that is contingent on monetary recovery. A rule is unnecessary, because there is no existing impediment to judges managing the use of TPLF agreements in their courtrooms, including on an *ex parte* and *in camera* basis. A rule is not warranted, because proponents have offered nine cherry-picked agreements to support a request for a sweeping rule that would apply to all agreements, regardless of the number of parties and the types of claims. A rule could result in unnecessary recusals by judges based on purported conflicts of interest unrelated to matters before the courts.

This comment addresses TPLF provided to attorneys and law firms, whether for the purpose of supporting a case, a specific portfolio of cases, or to cover general business expenses.³

¹ Lawyers for Civ. Just. Rules Suggestion 25-CV-L (Sept. 3, 2025) [hereinafter LCJ Suggestion], <https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/lawyers-civil-justice-25-cv-l>; Int’l Legal Fin. Ass’n Rules Suggestion 25-CV-O (Oct. 1, 2025) [hereinafter ILFA Suggestion], <https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/international-legal-finance-association-25-cv-o>; 12 Attorneys and Advisors Rules Suggestion 25-CV-R (Oct. 15, 2025) [hereinafter Commercial Litigation Funding Practitioners Suggestion], <https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/12-attorneys-and-advisors-25-cv-r>.

² Am. Ass’n for Just. Rules Suggestion 18-CV-B (Jan. 17, 2018), <https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/american-association-justice-18-cv-b>.

³ TPLF Subcommittee Report, *in* Advisory Committee on Civil Rules Agenda Book 271 (Apr. 1, 2025), <https://www.uscourts.gov/sites/default/files/2025-03/2025-04-civil-rules-committee-agenda-book-final-updated-3.28.25.pdf> (discussing financing used by law firms to “pay the rent, pay salaries, hire expert witnesses, etc.,” and

I. Mandatory Disclosure Provides an Unfair Litigation Advantage to Which Corporate Defendants Are Not Entitled

TPLF agreements lay bare the financial wherewithal of an attorney to pursue a case and a firm to continue to operate, providing a roadmap of dollar amounts provided, the schedule of repayment, and even milestones upon which more funding becomes available.⁴ The absence of funding from TPLF agreements is just as useful in evaluating the financial wherewithal of an attorney or law firm. A rule patterned on Rule 26(a)(1)(A)(iv) requiring disclosure of TPLF agreements would provide an unfair advantage to corporate defendants because plaintiffs' attorneys disproportionately use funding that is contingent on monetary recovery as compared to defendants. Moreover, TPLF agreements can reveal litigation strategies that would not be available to defendants, expose information unrelated to the pending matter, and stymie new entrants into complex litigation.

A. A rule would result in one-sided, unnecessary, and overly broad disclosure

Requiring disclosure of funding that is contingent on the outcome of a case would result in one-sided disclosure by plaintiffs to defendants. While the most recent LCJ Suggestion omits model rule language, previous submissions from LCJ have offered the following:

“any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action.”⁵

Plaintiffs bring claims and most funding used to bring those claims will be, in some way, contingent on the damages recovered. A rule relying on a broad definition risks ensnaring traditional bank loans and lines of credit used by plaintiff attorneys and firms, because the fees a firm uses to repay those loans would be sourced from clients the firm represents on a contingency basis.

Disclosure of financing provided to support the general operations of a firm or a particular practice area could also reveal legal matters that are still under investigation and generate recusal issues unrelated to the pending matter. Overly broad disclosures would take time away from addressing the matter at hand while resolving none of the issues raised by the proponents of a rule.

financing agreements that “permit[] the funder to acquire an interest in multiple lawsuits [which] one [may] say verges on a line of credit.”).

⁴ Financing offered to attorneys and law firms can be used to cover everything from the specific litigation expenses of a case or practice area to a firm's general operating expenses.

⁵ U.S. Chamber Inst. for Legal Reform et al. Rules Suggestion 17-CV-O, at app. B (June 1, 2017), <https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/us-chamber-institute-legal-reform-et-al-17-cv-o> (including LCJ as signatory); U.S. Chamber Inst. for Legal Reform et al. Rules Suggestion 14-CV-B, at app. A (Apr. 9, 2014), <https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/us-chamber-institute-legal-reform-american-insurance-association-american-tort-reform-association> (including LCJ as signatory).

B. A rule would encourage gamesmanship

There is close to an unhealthy obsession with TPLF agreements by certain segments of the defense bar.⁶ Although sometimes couched in concern about identifying a judge's possible conflict of interest, proponents' maximalist position, requiring disclosure of the entire agreement to defense counsel, is better explained by gamesmanship.⁷

The real purpose of requiring disclosure of the entirety of a TPLF agreement is to provide a strategic advantage to defendants: to understand when and how to pressure a plaintiff to settle, to obtain information that the defendant is not entitled to know, and to pit plaintiffs' attorneys against one another by revealing information about the financial resources of a firm that is not otherwise widely available. In multi-district and complex litigation, knowledge of funding available to a plaintiffs' firm could result in defendants advocating for a firm with fewer resources to lead the litigation to increase a defendant's chances of successfully defending against the claims.

Beyond the courtroom, corporate defendants and insurers have and would likely continue to leverage their market power to punish disclosed funders of and investors in claims they would rather not have to defend against. Chubb, one of the nation's largest insurers, has threatened to no longer do business with "asset managers, lawyers, banks and brokers" who are associated with the litigation financing industry.⁸ Corporate defendants could do the same. While they are entitled to do business with whomever they wish, including by not choosing to support businesses they believe operate contrary to their interests, they are not entitled to the complicity of the Federal Rules of Civil Procedure in identifying targets for retribution.

⁶ The U.S. Chamber Institute for Legal Reform lists "eliminating TPLF in five years" as one of its "bold, long-term objectives." Board of Directors Meeting Agenda, U.S. Chamber Inst. for Legal Reform (Sept. 5, 2024), <https://events.uschamber.com/ilr-boardofdirectors-september-meeting-2024/5682885>. As early as 2012, it proposed a "prohibition on contracts between TPLF investors and lawyers." U.S. CHAMBER OF INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 11 (Oct. 2012), https://instituteforlegalreform.com/wp-content/uploads/2020/10/TPLF_Solutions.pdf. Earlier this year, the U.S. Chamber of Commerce, among others, supported legislation restricting the ability of plaintiffs' firms to access capital, including traditional loans and lines of credit, by imposing a punitive tax on litigation funding. ILFA Suggestion, *supra* note 1 at 8-9.

⁷ Lawyers for Civil Justice acknowledged "that [it] is probably true" that "ascertaining potential judicial conflicts of interest probably only requires identification of the funder as opposed to disclosure of the terms of the funding agreement," while arguing that the other issues it raised would require "disclosure of the terms themselves." U.S. Chamber Inst. for Legal Reform, et al. Rules Suggestion 17-CV-GGGGGG, at 4 n.21 (Nov. 3, 2017), <https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/us-chamber-institute-legal-reform-et-al-17-cv-gggggg>. Compare LCJ Suggestion, *supra* note 1, at 3 ("Simple disclosure of the TPLF contract provides . . . knowledge [of a non-party who may have significant control over litigation and settlement decisions], with no burden on judicial resources."), with ILFA Suggestion, *supra* note 1, at 18 ("In jurisdictions where courts have permitted discovery into funding, parties routinely seek sweeping production requests.") (citing appendix of subpoena exemplars).

⁸ Adam McNestrie & Farhin Lilywala, *Chubb Threatens to Cut Off Suppliers If They Profit from Litfin Industry*, INSIDER (May 7, 2025), <https://www.insuranceinsider.us.com/article/2erqilzapip32rnu2y6m8/lines-of-business/casualty-gl/chubb-threatens-to-cut-off-suppliers-if-they-profit-from-litfin-industry>; see also ILFA Suggestion, *supra* note 1, at 18 n.31 ("Defendants may also attempt to interfere with the funding agreement, either to circumvent counsel or disrupt the provision of capital.").

C. The comparison between TPLF and insurance agreements is inapt

TPLF and insurance agreements fulfill different purposes, and arguments from the corporate defense bar that TPLF agreements should be disclosed because insurance agreements are disclosed misconstrue the purpose of these products and the information the contracts contain. While insurance agreements reveal whether and to what extent a third party “may be liable to satisfy . . . a possible judgment” against a defendant, TPLF agreements reveal the financial resources available to a plaintiff to pursue a claim against a defendant and the valuation of that particular claim by the plaintiff, attorney, and funder.⁹ Underwriting of insurance policies is generally done on a prospective basis. Knowledge of the availability of coverage would not provide a plaintiff with insight into a defendant’s or insurer’s perception of anticipated liability for a particular product or course of conduct. Knowledge of a defendant’s insurance policies is relevant to the appraisal of a case because defendants often use the alleged absence of insurance coverage to encourage a plaintiff to accept less money in a settlement than they would otherwise.

In contrast, TPLF agreements are generally executed after the incident giving rise to a claim, incorporating an attorney’s and a funder’s appreciation of the relative strengths or weaknesses of a claim. The TPLF Subcommittee has recognized the sensitivity of this attorney work-product, involving “candid and complete disclosure regarding the strengths and weaknesses of the cases on which lawyers seek funding.”¹⁰ Knowledge of a TPLF agreement provides defendants with granular insight, inherent in the terms of the TPLF agreement itself, of a plaintiff’s, attorney’s, and funder’s perception, of not only the value of a claim, but the time and resources necessary to vindicate the claim. This information can be further weaponized if defendants are able to discover communications related to funding.¹¹ Proponents of disclosure have not demonstrated that plaintiffs and their attorneys are using the presence of litigation funding to encourage a defendant to offer more money in a settlement than they would otherwise.

The Advisory Committee on Civil Rules (“Advisory Committee”) distinguished between insurance agreements and “any other facts concerning defendant’s financial status . . . because [among other things] insurance is an asset created specifically to satisfy the claim [and] the insurance company ordinarily controls the litigation.”¹² The information contained in a TPLF agreement—the plaintiff’s financial position—is exactly the kind of information that the Advisory Committee explicitly distinguished from the information the rule requires disclosed.¹³ And, control is not a feature of litigation funding, unless the Advisory Committee were to adopt LCJ’s expansive view of control, under which the mere fact of funding implicates control because future funding could be declined.¹⁴ Meanwhile, insurers do ordinarily control litigation through the subrogation of claims.¹⁵

⁹ Fed. R. Civ. P. 26(a)(1)(A)(iv).

¹⁰ TPLF Subcommittee Report, *supra* note 3, at 271-72.

¹¹ ILFA Suggestion, *supra* note 1, at 18 (“In jurisdictions where courts have permitted discovery into funding, parties routinely seek sweeping production requests.”) (citing appendix of subpoena exemplars).

¹² See Fed. R. Civ. P. 26 advisory committee’s note to 1970 Amendment (Subdivision (b)(2)—Insurance Policies).

¹³ *Id.*

¹⁴ LCJ Suggestion, *supra* note 1, at 10 (“The funders’ right to discontinue funding allows funders to control the case and resolution.”).

¹⁵ See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 729–30 (N.D. Ill. 2014) (“There is nothing in those [TPLF] agreements that remotely supports Caterpillar’s attempt to equate Miller’s funding agreement to the relationship between an insured and its insurer. Unlike an insurer, the funder in this case has not paid nor will ever pay Miller for any losses caused by Caterpillar’s claimed misappropriation of trade secrets and breach of contract; it

A better analogy to requiring disclosure of a TPLF agreement would be to require a defendant to disclose its litigation budget or for an insurer to disclose the amount of money it has reserved to defend against a particular claim. The Advisory Committee likely would not indulge such a rulemaking request for good reason. Regulating a party's litigation strategy, including budgetary decisions executing that strategy, is neither amenable to a uniform rule nor within the scope of the federal rules. On the other hand, establishing (as an initial matter) whether a judgment could be satisfied, is. If the defendant does not have the wherewithal to pay a claim, then it is a waste of both court and party resources to litigate.

II. Rulemaking Is Unnecessary Because Judges Are Successfully Using *Ex Parte* and *In Camera* Review to Manage TPLF in Their Courts

There is no impediment to judges requiring disclosure of TPLF agreements, and the examples cited by LCJ and others demonstrate that judges are successfully balancing the need to maintain the integrity of litigation against providing one party with an undue litigation advantage, militating against the need for rulemaking.¹⁶

Judge Polster's Order in *In re National Prescription Opiate Litigation* required attorneys to:

submit to the Court *ex parte*, for in camera review, the following: (A) a letter identifying and briefly describing the [third-party contingent litigation financing]; and (B) two sworn affirmations – one from counsel and one from the lender – that the [third-party contingent litigation financing] financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement.¹⁷

The Order warned that “[t]he Court will deem unenforceable any . . . agreements that are not compliant” and that “any attorney or lender whose affirmations prove to be untrue will be subject to sanction.”¹⁸ Finally, “absent extraordinary circumstances,” discovery would not be permitted into TPLF agreements, based on the work-product doctrine.¹⁹

will never be a plaintiff seeking indemnification from Caterpillar. Rather, it is contractually obligated to provide Miller with an agreed amount of funds to assist Miller in defraying expenses incurred in suing Caterpillar to recover for its claimed losses. If Miller loses, that is the end of the matter. Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one. Just so here. Calling Miller's funder a subrogee does not make it one.”); *see also* 16 Couch on Ins. § 222:5 (Definition and nature of subrogation).

¹⁶ ILFA Suggestion, *supra* note 1, at 22-23 & app. B at 8 (*In Camera* Citations) (“Our research identified approximately 30 cases where courts ordered *in camera* review of funding materials. In the majority of these cases—as well as others where opposing parties receive some level of funding-related disclosure—there was no subsequent motion practice regarding funding at all, let alone any impropriety or negative impact of funding on the course of the litigation.”).

¹⁷ Order Regarding Third-Party Contingent Litigation Financing at 1-2, *In re National Prescription Opiate Litigation*, No. 1:17-MD-2804 (N.D. Ohio May 7, 2018) (ECF No. 383) (cited by Lawyers for Civ. Just. & U.S. Chamber Inst. for Legal Reform Rules Suggestion 24-CV-V, at 3 n.13 (Oct. 2, 2024) [hereinafter LCJ-ILR Suggestion], https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_-_rule_26_tplf.pdf).

¹⁸ *Id.* at 2.

¹⁹ *Id.*

Judge Rosenberg's Pretrial Order #16 in *In re Zantac (Ranitidine) Products Liability Litigation* directed applicants for plaintiffs to provide to the Special Master answers to the following question, among others:

- e. Do you or your firm have any financing that is contingent upon this litigation? If yes, the following questions shall be answered:
 - i. Does the litigation funder have any control (direct or indirect, actual or apparent or implied) over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer?
 - ii. Does the financing (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent judgment, (4) give to the lender any control over litigation strategy or settlement decisions (as to either the common benefit work done by counsel or work for individual retained clients), or (5) affect party control of settlement?
 - iii. Briefly explain the nature of the financing, the amount of the financing, and submit a copy of the documentation to the Special Master.²⁰

The Order noted that, as it relates to litigation funding, the Court and the Special Master's review would "include but not be limited to obtaining an explanation of the nature of the financing, the amount of the financing, and a review of the contract/documentation."²¹

Even in *In re: Valsartan NMDA Contamination Litigation*, which the LCJ Suggestion cites with approval for the proposition that suggestions of funder control are "good cause for TPLF disclosure," Judge Schneider denied defendant's request for "automatic or carte blanche disclosure" of plaintiffs' TPLF agreements in favor of *in camera* review, "if good cause exists to believe a litigation financier has control or input into plaintiffs' litigation decisions."²²

Suggestions that judges are unable to understand the terms of a TPLF agreement and "taking a significant risk to their credibility" by reviewing agreements *ex parte* are misplaced.²³ LCJ and the U.S. Chamber Institute for Legal Reform have accused judges who engage in *ex parte* and *in camera* review of "ceding day-to-day control over their case[s]" to lawyers by accepting their representations and violating the Code of Conduct for United States Judges, but reality reflects judges engaging in appropriate, case specific measures when they deem oversight is necessary.²⁴ Local rules and standing orders are similarly

²⁰ Pretrial Order #16 at 12, *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 20-2924 (S.D. Fla. Apr. 3, 2020) (ECF No. 557), https://www.govinfo.gov/app/details/USCOURTS-flsd-9_20-md-02924/USCOURTS-flsd-9_20-md-02924-3 (cited by LCJ-ILR Suggestion, *supra* note 17, at 3 n.13).

²¹ *Id.* at 13.

²² LCJ Suggestion, *supra* note 1, at 5 n.27; *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 620 (D.N.J. 2019).

²³ LCJ Suggestion, *supra* note 1 at 19.

²⁴ LCJ-ILR Suggestion, *supra* note 17 at 6-7 (citing the Code of Conduct for United States Judges, Canon 3(A)(4)). The allegation that judges violate the Code of Conduct by engaging in *ex parte* review of TPLF agreements gets the admonition against *ex parte* proceedings wrong. *Ex parte* communications are disfavored when they exclude a party with an interest in the matter being discussed. Corporate defendants are not a party to these agreements, so while they may very much want to know more about the contractual relationship between a plaintiff, plaintiff's attorney, and a funder, a defendant's exclusion does not implicate Canon 3(A)(4).

measured, declining to require automatic production of TPLF agreements to the opposing party or at least requiring good cause before allowing additional discovery.²⁵

States have also embraced the existing authority of judges to review agreements *in camera* and *ex parte*, either through statute or judicial rulemaking. In Louisiana and Colorado, statute explicitly defers to existing rules of civil procedure to govern the discovery of the existence of a TPLF agreement.²⁶ In Kansas, statute provides for *in camera* review of a TPLF agreement by the court, without requiring production of the entire agreement to the opposing party.²⁷ In August 2025, the Supreme Court of Arizona amended its Rules of Civil Procedure to allow for the *ex parte* submission and *in camera* review of TPLF agreements upon good cause shown, only providing for disclosure to other parties “if the court determines the disclosure will not run afoul of the work-product privilege, the party seeking the agreement shows a substantial need, and then only if no less intrusive option is feasible.”²⁸

²⁵ D. N.J. L.R. 7.1.1(b) (“The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case”), <https://www.njd.uscourts.gov/sites/njd/files/CompleteLocalRules.pdf>; Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement § 17 (N.D. Cal. Nov. 30, 2023) (“identifying”), https://cand.uscourts.gov/sites/default/files/standing-orders/Standing_Order_All_Judges-11-30-2023.pdf; Standing Order of Chief Judge Connolly Regarding Third-Party Litigation Funding Arrangement § 2 (D. Del., Apr. 18, 2022) (“Parties may seek additional discovery of the terms of a party's arrangement with any Third-Party Funder upon a showing that the Third-Party Funder has authority to make material litigation decisions or settlement decisions, the interests of any funded parties or the class (if applicable) are not being promoted or protected by the arrangement, conflicts of interest exist as a result of the arrangement, or other such good cause exists.”), <https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf>.

²⁶ H.B. 25-1329, 2025 Reg. Session (Colo. 2025) (to be codified at Colo. Rev. Stat. §13-16-126(7)), <https://leg.colorado.gov/bills/hb25-1329>; La. Rev. Stat. §3580.13(B).

²⁷ S.B. 54, 2025 Session (Kan. 2025) (to be codified in relevant part at Kan. Stat. Supp. 2024 § 60-226(b)(3)(B)(i)-(ii)), https://www.kslegislature.gov/li/b2025_26/measures/documents/sb54_enrolled.pdf.

²⁸ Order Amending Rule 8 of the Rules of Civil Procedure, No. R-25-003, at 4 (Rule 8(j)(4)) (Ariz. Aug. 28, 2025), https://www.azcourts.gov/Portals/0/20/2025%20Rules/R-25-0003%20FinalRulesOrder.PDF?ver=LMqhxtC4uFvknf_TpWAgRg%3d%3d; see also Petition to Amend Rule 8, Rules of Civil Procedure, No. R-25-003, at 5 (Jan. 8, 2025), <https://rulesforum.azcourts.gov/Rules-Forum/aft/1683> (“While some argue these agreements should be disclosed like insurance contracts, the Task Force believed they are different. Insurance contracts are often standard and relevant to settlement negotiations, whereas third-party litigation funding agreements involve internal business practices and litigation strategy, potentially protected by attorney work product privilege. However, courts can review these agreements *in camera* or disclose them to opposing parties if there is good cause.”).

III. Rulemaking Should Not Proceed Based on Nine Cherry-Picked TPLF Agreements

Proponents seek a rule requiring production of all TPLF agreements, regardless of the number of parties and the types of claims, on the basis of nine agreements that practitioners of litigation finance law have characterized as an “an odd assortment of stale, foreign, and/or plainly idiosyncratic agreements . . . [that] do not reflect prevailing norms in the U.S. commercial litigation funding market” and whose “actual terms [do not] support LCJ’s arguments.”²⁹

Seven of the agreements highlighted by LCJ are not representative of the kinds of cases AAJ members bring. Two were executed in foreign jurisdictions or concerned matters before foreign courts or international tribunals, which a Federal Rule of Civil Procedure could not address.³⁰ Two relate to specialized litigation, specifically patent and bankruptcy.³¹ And the remaining three (really two, as one is an amendment to one of the other two agreements) concern commercial litigation between sophisticated parties.³²

Two of the agreements concern personal injury and civil rights claims: (1) an agreement executed between a United Kingdom-based litigation funder and counsel, also licensed to practice in California, relating to a purported class action against Chevron for an oil rig explosion in Nigeria filed in the Northern District of California, and (2) an agreement executed between a litigation funder and an individual to support the individual’s filing of claims for violations of the Americans with Disabilities Act.³³ The Northern District of California compelled discovery of the former, ultimately rejecting the proposed class.³⁴ The District of Colorado compelled discovery of the latter after *in camera* review of the TPLF agreement and related communications.³⁵ Both district courts used their existing authority to identify, review, and dispose of discovery issues related to the agreements, all without requiring initial disclosure of the entire agreement to defense counsel.

²⁹ Commercial Litigation Funding Practitioners Suggestion, *supra* note 1, at 3.

³⁰ LCJ Suggestion, *supra* note 1, Exhibits A (relating to an Australian class action in the Supreme Court of Victoria) & F (relating to investor-state arbitral proceedings under the United States-Panama Bilateral Investment Treaty & U.S.-Panama Free Trade Agreement).

³¹ *Id.* at Exhibits H (patent litigation) & I (bankruptcy proceedings).

³² *Id.* at Exhibits C (commercial antitrust litigation involving Fortune 500 companies), D (an amendment to the Exhibit C agreement), & G (commercial litigation between a pharmaceutical company and a contract research organization).

³³ *Id.* at Exhibits B & E.

³⁴ Order Granting in Part Defendant’s Motion to Compel, Denying Motions to File Under Seal and Denying Plaintiff’s Motion for Sanctions, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (compelling discovery, requiring production of agreement instead of *in camera* review); Order Denying Plaintiff’s Motion for Class Certification, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628 (N.D. Cal. Mar. 13, 2017).

³⁵ Order on Discovery Motions, *Mize v. Kai*, No. 17-cv-00915-NYW, 2018 WL 1035084, at *2, *9 (D. Colo. Feb. 23, 2018).

IV. Disclosure, If Necessary, Should be Made to the Court, Not Defense Counsel

AAJ's position is that the Advisory Committee should not proceed with rulemaking related to TPLF. There is no impediment to judges reviewing TPLF agreements and ordering production to other parties, and the purported concerns regarding improper control and influence raised by proponents are better addressed by other rules of civil procedure or other authorities, like state bar associations. A broad rule would not help courts manage specific issues of concern that may arise in limited situations; rather, it would hamper a court's ability to manage its caseload by forcing it to spend time reviewing the business and financial health of law firms instead of TPLF agreements directly related to the pending litigation.

Were the Advisory Committee to consider a TPLF disclosure rule, it should be discretionary and only apply to agreements specifically related to the pending matter, exclusively providing for *in camera* and *ex parte* review of an agreement upon request by the court or after the non-disclosing party were to demonstrate good cause that the agreement presented a conflict of interest or that funders were exerting improper control over the litigation. While AAJ maintains no such rule is necessary, a discretionary rule providing for *ex parte*, *in camera* review for good cause shown would allow courts to avoid: (1) being bogged down by mandatory review of TPLF agreements unrelated to the merits of pending claims, and (2) affording the non-disclosing party with access to information regarding the litigation that could significantly disadvantage the plaintiff, influence decision-making, delay settlement, result in failure to negotiate in good faith, or otherwise needlessly delay the litigation.

V. Conclusion

The American Association for Justice appreciates the opportunity to submit its views on rulemaking related to third party litigation funding. The Advisory Committee should not proceed with rulemaking on TPLF, as disclosure would provide defendants with a litigation advantage to which they are not entitled, judges are already able to review TPLF agreements and order production to other parties, and any rule would risk sweeping in traditional loans and lines of credit used by plaintiffs' attorneys and law firms. For any questions, please contact Sue Steinman, Senior Director of Policy and Counsel (susan.steinman@justice.org) or Geoffrey Loudon, State Affairs Counsel (geoffrey.louden@justice.org).

Respectfully submitted,



Bruce M. Plaxen
President
American Association for Justice

October 15, 2025

Via E-Mail: RulesCommittee_Secretary@ao.uscourts.gov

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
Attention: Third-Party Litigation Funding Subcommittee

Re: Third Party Litigation Funding

We are a group of attorneys and advisors who practice regularly in the commercial litigation funding field.¹ Our firms routinely represent litigation funders, funded parties, law firms, insurers and insurance brokers, institutional investors, creditors, and other interested parties with respect to commercial litigation funding transactions. Individually, we have served in legal and business capacities internally at litigation funders, as fund managers ourselves, as well as in other related roles. Collectively, we have been involved in structuring, underwriting, negotiating, documenting, and continuing to advise on hundreds of transactions, including investments made by every major commercial litigation funder active in the United States, in every major type of commercial dispute.

We accordingly have substantial and direct experience with all facets of commercial litigation funding.² We provide the following information to the Advisory Committee in connection with its Third-Party Litigation Funding Subcommittee's ongoing study of issues related to litigation funding disclosure.

The Passive Nature of Commercial Litigation Funding

Commercial litigation funding is a passive investment business. In its Rules Suggestion (the "*LCJ Suggestion*"), Lawyers for Civil Justice advocates for broad, automatic litigation funding disclosure rules on the basis that "TPLF agreements give non-party funders specific mechanisms of control or significant influence over litigation and settlement decisions."³ We disagree.

LCJ is wrong for several legal and factual reasons. These range from unequivocal and binding contractual terms, to ethical guardrails, to practical realities.

1. Contractual Terms. Passivity is a central pillar of for-profit third-party commercial litigation funding. Although funding arrangements are bespoke in nature, they originate from form agreements containing standard terms, conditions, and provisions. We regularly draft and negotiate such agreements. They typically contain multiple provisions cementing the funders' passivity, including broad disclaimers of control recognizing (a) the funded party's ability to settle unilaterally, including with the advice of their counsel, (b) non-interference with the attorney-client relationship, and (c) the controlling nature of counsel's ethical obligations in the event of any conflict. Notably, these provisions are rarely subject

¹ Please see the footnotes to our signature blocks for our relevant industry experience and recognitions.

² Our comments are limited to for-profit, non-recourse, third-party commercial litigation funding.

³ Lawyers for Civil Justice, [Rules Suggestion](#), 25-CV-L, at 2.

to any substantive negotiation, given the parties' mutual understanding from the outset—and affirmation throughout the investment process—that the funding will be passive in nature.

With respect to the balance of agreement terms, a commitment to fund litigation is not *carte blanche*.⁴ Rather, funding contracts reflect a negotiated allocation of economic risk between litigants, capital providers, and/or counsel. This allocation is principally embodied in terms such as fee and expense budgets,⁵ proceeds waterfalls, and mechanisms to monetize non-monetary outcomes.⁶ It is also reflected in a litigant's obligation to pursue meritorious claims in good faith, an essential term in light of funders' lack of control rights.⁷

We therefore dispute LCJ's assertions that litigation funders are "directing" or "have significant control over litigation decisions,"⁸ and that "boilerplate disavowals of funder control" are associated with "federal judges and litigants [being] deceived."⁹ Control disclaimers are material terms of litigation funding agreements. Moreover, a contractual requirement to act within the bounds of an economic agreement does not constitute "control."¹⁰ And even where a funder has the ability to terminate funding in the event of breach, the exercise of termination rights is rare. That is because the cessation of funding could result in the dismissal of or the inability to pursue the action, and the resulting loss of

⁴ All commercial litigation funders with meaningful assets under management are institutionally-backed and government-regulated managers that oversee diversified portfolios of legal assets. They must maintain strict policies to prudently commit their assets under management, pursuant to fiduciary and risk-management obligations.

⁵ It is common for budgets to be staged over case milestones. Budgets are negotiated with input from law firms and outside vendors and can be directly correlated with case strategy. For example, budgets are influenced by factors such as the contemplated types of expert witnesses and other costs associated with the legal theories to be pursued, the estimated number of depositions to be taken, and whether to pursue certain defendants and claims.

⁶ If the litigation results in non-monetary proceeds that benefit the funded party, it is reasonable for the funding party to be compensated for that result. Funders routinely underwrite the potential for a case to resolve for non-monetary consideration. They will typically decline to invest in a situation where such potential is high, unless the non-monetary consideration can be monetized in a straightforward way.

⁷ This is an important protection against moral hazard, particularly since commercial litigation funders increasingly provide working capital and other funds to litigants that are not used for the ongoing payment of legal fees and expenses. See [The Westfleet Insider, 2024 Litigation Finance Market Report](#) ("Notably, allocations to monetization deals increased substantially, and we have observed a steady trend in this regard for the last four years"). Absent a litigant's obligation to pursue meritorious claims in good faith, a funder would face unacceptable risk of bad faith discontinuance of the action.

⁸ LCJ Suggestion at 5.

⁹ LCJ Suggestion at 16.

¹⁰ The most common sources of tension in funding arrangements relate to budget overage or working capital demands. Funders frequently receive requests to make accommodations or amend agreements in response to changing circumstances, such as unanticipatedly high legal fees and expenses. They are not always able to accommodate such requests for various reasons.

the funder's investment.¹¹ The unwarranted exercise of termination rights would also be damaging to a funder's reputation in the marketplace.

LCJ's allegations are also belied by our experience. We have been involved in hundreds of commercial litigation finance transactions¹² and are not aware of funders having an "indirect—but still powerful—influence"¹³ on cases. Tellingly, as opposed to presenting case studies that are actually representative of the U.S. commercial litigation funding market, the LCJ Suggestion is supported by an odd assortment of stale, foreign, and/or plainly idiosyncratic agreements.¹⁴ These agreements do not reflect prevailing norms in the U.S. commercial litigation funding market. Nor do their actual terms support LCJ's arguments.¹⁵

2. Ethical Guardrails. Litigation funding agreements must coexist with legal retention agreements. Ethical rules prevent funders from interfering with the attorney-client relationship. In third-party payor scenarios, Rule of Professional Conduct 1.8(f) explicitly prohibits "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Attorneys must also comply with the terms of protective orders as set forth below.

3. Practical Realities. With limited exceptions (such as post-judgment scenarios and outright claim assignments), funded parties steadfastly insist on maintaining full control of their claims.¹⁶ Furthermore, funders, litigants, and counsel are acutely aware of the scrutiny on the litigation funding industry, due to efforts by LCJ and similar interest groups. This operates as an additional check. Funders must be extremely mindful of designing their arrangements to fit properly within the sacrosanct framework of the attorney-client

¹¹ Litigation investing is generally regarded as a high-risk asset class. Passivity compounds that risk, particularly in situations involving the prototypical financed litigant, which lacks the financial wherewithal to self-fund its claims. Therefore, the litigant is also unlikely to have resources available to recompense the funder for damages in the event of breach (particularly if the breach leads to an unsuccessful case outcome).

¹² Our experience also includes counterparty disputes regarding the terms of funding agreements. Such disputes are uncommon, and typically involve issues such as budget increases and the division of litigation proceeds.

¹³ LCJ Suggestion at 2.

¹⁴ Of the nine litigation funding contracts attached to the LCJ Suggestion, three have a non-U.S. orientation (ILP: Australia; Chevron: England; Dominion: England); a fourth is a non-profit funder of ADA claims (LMFS); and a fifth is a well-known anomaly in the industry in which Burford Capital established, via a contractual amendment, a consent right over settlement decisions by Sysco only in the wake of Sysco's material breach of its original contract with Burford. In that case, it is undisputed that the original capital provision agreement did *not* contain the consent right.

¹⁵ See, e.g., LCJ Suggestion at Ex. I, § 4.1 ("[Plaintiff] shall have the sole and exclusive right to Settle . . . all or any portion of the Litigations"), § 5.1 ("[Plaintiff] has the sole and exclusive right to control, act or refrain from acting in respect of any act, request or decision in connection with the Litigations"), and § 5.4 (stating that, as an overarching exception to the plaintiff's covenants regarding the conduct of the litigation, "none of the foregoing shall require [plaintiff] to continue a Litigation to the extent [plaintiff] reasonably determines that a Litigation no longer has merit").

¹⁶ Parties wishing to sell their claims or intellectual property can do exactly that (provided the claims are assignable) and will command a premium for forgoing control and upside. But that is different from—and less common than—"third-party litigation funding."

relationship and applicable laws (such as champerty), and to avoid becoming a real party in interest under Fed. R. Civ. P. 17.

Finally, confidentiality designations foreclose funders' ability to direct litigation strategy. Most funded commercial litigation is complex in nature and involves matters related to confidential information (such as trade secrets and other internal corporate materials). Courts routinely enter protective orders in such cases, and parties liberally designate productions and testimony as confidential, highly confidential, or attorneys' eyes only. The parties' attorneys are the first-line enforcers of these protective orders, at the risk of sanctions including loss of their professional credentials if they share information and documents with anyone who should not have access. As a result, in our experience, violations of protective orders are exceedingly rare (and already impermissible). This leads to funders' inability to review materials produced in discovery as well as information redacted on dockets. Thus, even if funders could control litigation (which they cannot), it would be impractical and imprudent to do so without access to critical evidence and rulings shielded by protective orders.

Disclosure

The for-profit, third-party commercial litigation funding industry serves a growing need in today's capital-intensive litigation environment. Market participants are economically rational and support the efficient settlement of meritorious claims, many of which could not be pursued without outside funding. While we support balanced transparency in principle, we caution against a disclosure regime that treats litigation funding contracts as inherently suspect and that, in turn, could counteract the very leveling of the playing field that litigation finance enables on behalf of financially disadvantaged litigants.¹⁷

In closing, we note that a disclosure rule would not solve the purported "problems" identified by LCJ unless broadly expanded beyond "third-party litigation funding" to all potential influences on litigant behavior. Under LCJ's view, virtually any contractual term, whether material or not, could be construed as potentially exerting direct or indirect control over a litigant.¹⁸ If anything can arguably be construed as "control," disclosure would necessarily encapsulate all other "direct or indirect" considerations for both plaintiffs *and* defendants and their counsel—whether contractual or not. This could logically include everything from recourse lenders and other creditors,¹⁹ to private equity or venture capital backers, to law firm partners, to shareholders, to

¹⁷ It is important to note that neither litigants nor their litigation funders have any visibility into their adversaries' budget or litigation strategies.

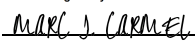
¹⁸ While investments have terms and conditions, they have no more influence than any other economic, business, or practical forces that could impact a litigant's decision-making.

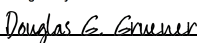
¹⁹ Non-recourse litigation investors have significantly less rights than recourse lenders. It is not uncommon for litigants to carry debt, particularly those involved in "David vs. Goliath" bet-the-company disputes. Lenders can exert pressure on litigants and even foreclose on legal claims. This pressure also applies equally to defendants, which often have creditors secured by assets at dispute in the litigation, as well as key decisionmakers that may have personal liability and their own indebtedness considerations.

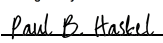
customers, to family and friends, to personal reputational considerations.²⁰ Such an approach would obviously be imprudent, with no purpose other than serving as a point from which to launch costly fishing expeditions for strategic advantage.

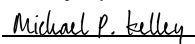
We thank the Advisory Committee for its thoughtful consideration of this topic.

Respectfully submitted,

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Marc J. Carmel²¹

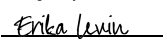
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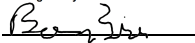
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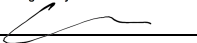
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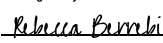
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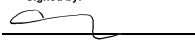
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Christopher Leonardo²⁵

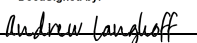
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Erika Levin²⁶

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Boris Ziser²⁷

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Charles Agee²⁸

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Rebecca Berrebi²⁹

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Ted Farrell³⁰

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Andrew Langhoff³¹

²⁰ Under LCJ's reasoning, there is no need to limit influences to those that are monetary in nature.

²¹ Submitting in individual capacity. Member of McDonald Hopkins LLC. Former Director of Longford Capital. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²² Partner of Levenfeld Pearlstein, LLC. Former General Counsel of Gerchen Keller Capital and Director & Senior Counsel of Burford Capital. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²³ Partner of Crowell & Moring LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁴ Partner of Parker Poe Adams & Bernstein LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁵ Partner of Gilbert LLP. Former Director of Parabellum Capital, Managing Member of 1875 Capital, and Outside General Counsel of Juridica Investments. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁶ Submitting in individual capacity. Partner of Fox Rothschild LLP. Former Senior Vice President and General Counsel of The Judge (a litigation finance and insurance company). Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁷ Partner of McDermott Will & Schulte LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁸ CEO of Westfleet Advisors. Former Executive Vice President & Chief Operating Officer of Augusta Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

²⁹ Co-CEO of Litigation Finance Advisors. Former Head of Corporate Affairs of Tenor Capital Management. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

³⁰ Co-CEO of Litigation Finance Advisors. Former Managing Director of Vannin Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

³¹ Founder of Red Bridges Advisors. Former Principal of Gerchen Keller Capital and Chief Operating Officer of Burford Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
c/o Rules Committee Staff
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, D.C. 20544

Re: Third-Party Litigation Finance

Memorandum to the Committee on Rules of Practice and Procedure

Subject: Consumer Legal Funding is Not Litigation Financing

Submitted by: Alliance for Responsible Consumer Legal Funding (ARC)

Date: October 2025

Executive Summary

This memorandum provides clarification regarding the critical distinction between Consumer Legal Funding (CLF) and litigation financing. Although both terms are sometimes referenced in policy discussions, they describe fundamentally different activities with different purposes, participants, and regulatory implications. Consumer Legal Funding provides non-recourse financial assistance to consumers to meet personal living expenses while they await resolution of a legal claim. It does not fund litigation, influence counsel, or introduce control or conflicts into the judicial process.

Litigation financing, on the other hand, refers to institutional or commercial arrangements in which investors or firms provide substantial capital to fund the costs of litigation itself, attorney fees, expert witnesses, discovery, or trial expenses, in exchange for a portion of the proceeds. This is a commercial practice that raises issues such as control, conflicts, and foreign investment exposure. None of these apply to Consumer Legal Funding.

The purpose of this memorandum is not to suggest rulemaking is needed, but to ensure conceptual clarity. Consumer Legal Funding is not litigation financing. It funds lives, not lawsuits, and serves a humanitarian and access-to-justice purpose distinct from any commercial or institutional litigation investment.

I. The Importance of Accurate Definitions

Sound rulemaking and judicial interpretation depend upon accurate definitions. When terms such as 'litigation financing' are used broadly, they can sweep in unrelated activities and create unintended consequences. Precision in language is not mere semantics, it is a safeguard of justice and effective governance. The term 'Consumer Legal Funding' has a distinct and consistent meaning in statutes across the United States: a non-recourse financial transaction where funds are provided to consumers for personal and household use, contingent upon the outcome of a pending claim.

By contrast, 'litigation financing', often referred to as Third-Party Litigation Financing (TPLF), describes the provision of capital to fund litigation itself. This includes paying for lawyers, expert witnesses, discovery costs, and other litigation-related expenses. The key distinction lies in purpose and control. Litigation financing is about underwriting the costs of pursuing legal action. Consumer Legal Funding is about helping people survive the wait for justice.

II. The Purpose and Function of Consumer Legal Funding

Consumer Legal Funding allows individuals with pending legal claims to access small amounts of non-recourse funding, typically a few hundred to a few thousand dollars, to cover essential living expenses such as rent, mortgage payments, utilities, food, and transportation. These funds are not used to pay for litigation costs or attorney fees. The funding company has no control over the case and no ability to influence the client's legal representation or strategy.

The structure of CLF is straightforward: a funding company purchases from the consumer a contingent right to receive a small portion of the potential proceeds of their claim. If the consumer receives nothing, the company receives nothing. This transaction is explicitly defined as non-recourse in all states that regulate it. Statutes governing CLF, such as those in Georgia, Maine, Missouri, Nebraska, Ohio, Oklahoma, Utah, and Vermont, prohibit funders from influencing litigation strategy or settlement.

The purpose of CLF is humanitarian, not commercial. It enables injured or financially distressed individuals to maintain stability during litigation delays, preventing coerced settlements driven by financial desperation. Without CLF, many consumers would be forced to accept low offers or abandon valid claims simply to meet basic needs.

III. Litigation Financing: A Different and Distinct Practice

Litigation financing, in contrast, involves large-scale investment by institutions, hedge funds, or specialized firms in the costs of legal proceedings. These arrangements may include capital provided to law firms to finance case portfolios or to corporations to pursue or defend high-value litigation. In many cases, investors negotiate rights to monitor or even influence litigation decisions to protect their investments.

None of these features exist in Consumer Legal Funding. CLF does not involve investors seeking profit from litigation outcomes. The amounts are small, the purpose is personal, and the transaction does not alter the dynamics of the legal case. Equating CLF with litigation financing simply because both involve money connected to lawsuits is a categorical error—akin to confusing medical insurance with hospital ownership.

IV. Judicial and Legislative Recognition of the Distinction

Courts and legislatures throughout the country have recognized that Consumer Legal Funding and litigation financing occupy separate policy spheres. Arizona, Colorado, Louisiana, and Kansas have enacted statutory language expressly excluding CLF from definitions of litigation finance or loan products. California's Assembly Bill 931 defines Consumer Legal Funding as a non-recourse transaction for personal or household use, consistent with this principle.

Courts have also weighed in. In Arizona, for example, the state's rules of civil procedure expressly carve out Consumer Legal Funding, recognizing that these transactions are unrelated to litigation financing and should not be treated as such. Likewise, when the Texas Supreme Court considered proposed rules surrounding litigation financing, the Court ultimately declined to proceed. While no new rule was adopted, the process made clear that Consumer Legal Funding was not intended to be part of the conversation. These laws and judicial actions acknowledge that CLF is not a form of litigation investment and poses no risks of control or interference.

V. Consumer Legal Funding and the Principles of Access to Justice

Consumer Legal Funding serves one of the judiciary's most important missions: ensuring equal access to justice regardless of economic status. Prolonged litigation often imposes significant financial strain on individuals and families. Without access to interim financial support, consumers may be forced into settlements that do not reflect the true value of their claims simply to avoid financial catastrophe. CLF alleviates this pressure, allowing cases to be resolved on their merits rather than the litigant's bank account.

Justice Lewis Powell, Jr. expressed this ideal when he wrote: 'Equal justice under law is perhaps the most inspiring ideal of our society. It is fundamental that justice should be the same, in substance and availability, without regard to economic status.' Consumer Legal Funding operationalizes that promise. By providing small, non-recourse funds to those most in need, CLF preserves dignity, independence, and the ability to participate meaningfully in the legal process.

For the judiciary, the benefits are tangible. Litigants supported by CLF can make informed decisions, maintain continuity with counsel, and pursue fair outcomes. Cases proceed on a balanced footing, reducing the pressure for rushed settlements and strengthening the integrity of judicial outcomes.

VI. The Dangers of Conflating Consumer Legal Funding with Litigation Financing

Mischaracterizing CLF as litigation financing risks substantial harm to consumers and the justice system. Mistakenly treating CLF as a form of litigation investment, it may be subjected to disclosure or regulation regimes intended for institutional funding arrangements. Such conflation would expose consumers' personal financial information, chill access to a legitimate service, and create procedural inequities.

Maintaining definitional clarity ensures that judicial resources remain focused on areas where actual risk exists, not where consumers simply seek temporary financial relief.

VII. Conclusion

Consumer Legal Funding is not litigation financing. It does not fund, control, or influence lawsuits—it supports people living through them. The two products differ in purpose, structure, participants, and legal implications. Recognizing and maintaining this distinction protects consumers, preserves access to justice, and ensures that the judiciary's focus remains where it belongs: on fairness, integrity, and the rule of law.

TAB 14

Rule 23—Class Actions

At the October 2025 meeting, the Advisory Committee discussed three proposed amendments to Rule 23:

- a provision to resolve a circuit split on the legality of service awards to class representatives;
- a provision that would expand judges’ authority to review settlements between a class representative and a defendant prior to class certification; and
- a provision that would explicitly allow judges to consider privately administered out-of-court remedies (such as refunds and recalls), as opposed to only “other methods for fairly and efficiently adjudicating the controversy,” when applying the superiority requirement of Rule 23(b)(3).

At that meeting, the Committee decided to keep these items on the agenda and directed the reporters to continue monitoring them, pending further consideration in light of the Committee’s evolving agenda and priorities. In the months since the October meeting, the reporters have engaged in continuing research on these proposals, as well as monitoring evolving case law. The Advisory Committee has also received three new submissions on these issues, each of which provides useful information for further study.¹ These new suggestions are appended to this memorandum.

Also, Judge Vance and the reporters presented these matters as information items at the January 2026 Standing Committee meeting. As the draft minutes of that meeting reflect, several Standing Committee members expressed skepticism about the Advisory Committee’s taking on these particular projects on the ground that it would be unlikely that these particular issues could be handled discretely, outside of a more comprehensive evaluation of Rule 23, which would be a substantial, if not all-consuming, project. One lawyer member of the Standing Committee who typically represents class-action defendants stated that there are several other potential amendments that he considers more important than those currently on the Committee’s docket that he would like the Advisory Committee to investigate were it to take on Rule 23. Another lawyer member who typically represents plaintiff classes agreed, expressing that of all of the Rule 23 issues that she would encourage the Advisory Committee to investigate, those on the Advisory Committee’s docket would not be among her top three. A brief look at recent academic and legal-journalism commentary reveals (as always) many ideas for rethinking class actions, including class actions for injunctive or declaratory relief under Rule 23(b)(2) in the wake of the Supreme Court’s nationwide-injunctions decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

The main questions for the Advisory Committee remain: whether to take any or all of these proposals on, and whether that could or should be done discretely or as part of a broader

¹ The three suggestions are: 26-CV-4, a proposal from the Committee to Support the Antitrust Laws (COSAL) that a rule make clear that incentive awards are permissible; 26-CV-9 from Alexis Collins, Associate General Counsel of Amazon, encouraging expanding superiority analysis to include out-of-court remedies; and 26-CV-10 from Fred Burnside, of Davis Wright Tremaine, also in favor of expanding the superiority analysis.

project on Rule 23. Such a project may be worthwhile, but whether to undertake it must be considered in the context of the Advisory Committee's current priorities and resources, since history reveals that class actions are both a lightning rod and a subject on which reform proposals abound. It will be useful to hear committee members' views on whether, how, and when to consider a Rule 23 project.

Attachment(s):

- Suggestion 26-CV-4 (Committee to Support the Antitrust Laws)
- Suggestion 26-CV-9 (Amazon)
- Suggestion 26-CV-10 (Fred Burnside)



February 13, 2026

Submitted Electronically

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Comments Regarding Whether to Amend the Federal Rules to Expressly Permit “Incentive” or “Service” Awards by the Committee to Support the Antitrust Laws

Dear Committee on Rules of Practice and Procedure:

The Committee to Support the Antitrust Laws (COSAL) submits these comments to express its support for an amendment to Rule 23 of the Federal Rules of Civil Procedure unequivocally stating that reasonable “incentive” or “service” awards to class representatives are permitted under the Federal Rules. Such an amendment would resolve any uncertainty created by the Eleventh Circuit’s decision in *Johnson v. NPAS Solutions, LLC*, which remains the only circuit court ruling to impose a per se bar on such awards.

COSAL is a nonprofit organization that was established in 1986 to promote and support the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. COSAL’s members are law firms throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL closely monitors and comments on congressional and administrative activity with respect to antitrust policy and plays a leadership role in building support for the antitrust laws. Accordingly, COSAL has an interest in ensuring that class representatives in antitrust actions are adequately compensated for the time and effort they devote in representing a class, along with the reputational or financial risks they undertake in doing so—thereby incentivizing others to serve as class representatives in future cases and furthering private antitrust enforcement.

The provision of “incentive” or “service” awards to class representatives has long been a routine, uncontroversial feature of class action settlements.¹ “An incentive award is paid out of the

¹ See 5 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17.2 (6th ed. 2025) (describing these awards as “ha[v]ing] been present in class action law for close to a half century”); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1310–11 (2006)

class’s common fund and the class representative, as a member of the class, is, by definition, entitled to a portion of the common fund. So framed, the legal entitlement question is simple and straightforward.”² Indeed, until recently, *all* the courts of appeals to address these awards had deemed them lawful in at least some circumstances.³

The Eleventh Circuit’s decision in *Johnson v. NPAS Solutions, LLC*⁴ marked a sharp departure from established practice. In that case, the district court had approved an approximately \$1.4 million settlement—yielding about \$79 per class member—which included a \$6,000 award to the named plaintiff.⁵ On appeal, a divided panel of the Eleventh Circuit held that these awards were categorically prohibited under two nineteenth-century Supreme Court precedents, uncritically dismissing such awards as “part salary and part bounty.”⁶

As the Second Circuit has recently explained, the Supreme Court cases upon which the Eleventh Circuit relied are of little relevance because they “have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned” these precedents.⁷ Moreover, the *Johnson* majority disregarded the purpose of these awards—“to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function.”⁸ As an amicus brief submitted by various nonprofit legal and advocacy organizations serving vulnerable communities explained, “[c]lass representatives routinely engage in all aspects of the litigation, including:

- coordinating decision-making among class members;

(“Beginning around 1990, . . . [c]ases approving incentive awards proliferated and tests developed to identify the appropriate conditions for the grant of an award.” (footnote omitted)).

² NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17.4 (footnote omitted).

³ *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022); *Moses v. N.Y. Times Co.*, 79 F.4th 235, 256 (2nd Cir. 2023); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (en banc); *Berry v. Schulman*, 807 F.3d 600, 613–14 (4th Cir. 2015); *Joes v. Singing River Health Servs. Found.*, 865 F.3d 285 (5th Cir. 2017) (vacating a class action settlement with an incentive award on other grounds and affirming the same settlement after district court provided additional analysis in 742 F. App’x 846 (5th Cir. 2018)); *Pelzer v. Vassalle*, 655 F. App’x 352, 361 (6th Cir. 2016); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722–23 (7th Cir. 2001); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786–87 (9th Cir. 2022); *Tennille v. W. Union Co.*, 785 F.3d 422, 434–35 (10th Cir. 2015); *Cobell v. Salazar*, 679 F.3d 909, 922–23 (D.C. Cir. 2012).

⁴ 975 F.3d 1244 (11th Cir. 2020).

⁵ *Id.* at 1250–51.

⁶ *Id.* at 1255, 1258–59 (citing *Trs. v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885)).

⁷ *Moses*, 79 F.4th at 254.

⁸ NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17.3; *see also* Benjamin Gould, *On the Lawfulness of Awards to Class Representatives*, 2023 CARDOZO L. REV. DE NOVO 1, 4–5 (2023) (collecting cases).

- working closely with lawyers and other professionals in investigating and developing the case and claims;
- reviewing the complaint and other major filings;
- responding to interrogatories and reviewing documents; and
- preparing for and participating in depositions and mediations, including travel.⁹

As the dissenting judge in *Johnson* explained, employing a visual metaphor, incentive awards recognize that named plaintiffs “incur[] costs serving in [their] roles,” “includ[ing] time and money spent, along with all the slings and arrows that accompany present day litigation.”¹⁰ Notwithstanding these arguments, the Eleventh Circuit denied rehearing en banc by a slim 6–5 margin, with the dissenters warning that “the panel majority’s opinion threatens the very viability of class actions in this circuit”—especially “in small-dollar-value class actions, where incentive awards help to encourage potential plaintiffs to serve as class representatives despite having to take on significant additional responsibilities while receiving the same modest recovery as other class members.”¹¹

In light of *Johnson*, COSAL believes that the Standing Committee should adopt a straightforward amendment to Rule 23 clarifying that reasonable incentive awards are permitted. Such a rule would restore uniformity among the federal circuits and prevent any chilling effect on class actions in the Eleventh Circuit. Importantly, such a rule would not eliminate limits on incentive awards. For decades, “[f]ederal courts have . . . been careful to set limits on class-representative awards.”¹² For example, courts have rejected settlements that provided incentive awards conditioned on support for a class settlement.¹³ Additionally, courts have often disfavored awards they deem excessive.¹⁴ Such limitations carefully balance the aforementioned values of incentive awards with “the concern that class representatives may sell out the rest of the class to get extra money for themselves.”¹⁵ But the Eleventh Circuit’s decision in *Johnson* abandoned any pretense of balance and unsurprisingly remains an outlier with respect to incentive awards. The

⁹ Brief for Impact Fund et al. as Amici Curiae Supporting Plaintiff-Appellee, *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138 (11th Cir. 2022) (No. 18-12344) (citation modified).

¹⁰ *Johnson*, 975 F.3d at 1264 (Martin, J., concurring in part and dissenting in part); see, e.g., *Fla. Educ. Ass’n v. Dep’t of Educ.*, 447 F. Supp. 3d 1269, 1278–79 (N.D. Fla. 2020) (emphasizing “participati[on] in mediation and settlement discussions” and assumption of “reputational risk” in approving award); *Hosier v. Mattress Firm, Inc.*, 2012 WL 2813960, at *5 (M.D. Fla. June 8, 2012) (approving award for “participating in the investigation, discovery, and mediation which make a settlement possible”).

¹¹ *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1140 (11th Cir. 2022) (Pryor, J., dissenting from the denial of rehearing en banc).

¹² Gould, *supra* note 8, at 5; see also *Johnson*, 975 F.3d at 1266 (Martin, J., concurring in part and dissenting in part) (“Many other circuits, including this one, look to the fairness of an award to a named class representative.”).

¹³ See, e.g., *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013).

¹⁴ Newberg and Rubenstein on Class Actions § 17.18 (collecting cases).

¹⁵ Gould, *supra* note 8, at 5

amendment proposed in this comment would rectify the Eleventh Circuit's erroneous and shortsighted reasoning and realign its legal principles with modern class-action practice.

Sincerely,

Joseph C. Bourne

Joseph C. Bourne
Lockridge Grindal Nauen PLLP
Chair,
COSAL Federal
Rules Committee

Sincerely,

Meegan Hollywood

Meegan Hollywood
Shinder Cantor Lerner LLP
Vice Chair,
COSAL Federal
Rules Committee

Sincerely,

Candice J. Enders

Candice J. Enders
Berger Montague
Secretary,
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Alexis Collins
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March 10, 2026

Via email delivery: RulesCommittee_Secretary@ao.uscourts.gov

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

Re: Rule 23 Proposal for Possible Clarification for the Rule 23(b)(3) Superiority Requirement

Dear Ms. Dubay:

Amazon respectfully requests the Committee on Rules of Practice and Procedure (the “Committee”) consider whether to clarify Federal Rule of Civil Procedure 23(b)(3) to explicitly confirm that trial courts have discretion to consider out-of-court remedies and government settlements when evaluating whether class treatment is superior under Rule 23.

The current Rule 23(b)(3) language creates conflicting interpretations across circuits and even within individual districts. Courts disagree on a fundamental question: whether out-of-court resolutions—including government settlements and voluntary consumer remedies—are relevant to the “superiority” analysis. For example, the Ninth Circuit’s decision in *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 n.4 (9th Cir. 2023), rejects refund programs as relevant to superiority because they lack “adjudication.” Yet, other courts allow for voluntary refund programs to preclude class certification. *See, e.g., Pagan v. Abbott Labs, Inc.*, 287 F.R.D. 139, 141 (E.D.N.Y. 2012) (class action not superior where voluntary recall and refund program was better suited to provide relief). There are further splits as to whether government settlements that offer consumer refunds should preclude class actions. *Compare Kamm v. California City Development Co.*, 509 F.2d 205, 208 (9th Cir. 1975) (finding that class actions are not superior when a state attorney general settlement already exists because litigation would duplicate prior governmental work), *with Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973) (Rule 23(b)(3) superiority requirement “focus[es] on the question whether one suit is preferable to several,” and that “the rule was not intended to weigh the superiority of a class action against possible administrative relief.”). Trial courts in these circuits and beyond continue to adopt these differing approaches and reach conflicting results.¹ These contradictions leave trial courts and parties uncertain.

¹ Some courts expressly consider administrative enforcement actions. *See Conde v. Sensa*, 2019 WL 4277414, at *9–11 (S.D. Cal. Sept. 10, 2019) (applying *Kamm* in context of an FTC settlement and refusing to certify), whereas others do not, *see B.P. v. Bahwani*, 2021 WL 4077008, at *2 (9th Cir. Sept. 8, 2021) (affirming class certification; holding *Kamm* does not mean “a prior public settlement necessarily defeats superiority for future class actions”).

March 10, 2026

The problem is not theoretical. For example, in 2021, Amazon and the FTC settled claims regarding alleged tip withholding from Flex drivers, with Amazon agreeing to pay \$61.7 million.² The FTC explicitly stated that this sum represented “the full amount that Amazon allegedly withheld from drivers and will be used by the FTC to compensate drivers.”³ Less than two weeks after the FTC announced the settlement,⁴ the same claims were filed as a class action in *Miller v. Amazon.com*, No. 21-cv-204-BJR (W.D. Wash. 2021). After years of litigation, Judge Rothstein denied class certification, finding that class treatment was not superior given the existing FTC remedy. The Ninth Circuit denied plaintiff’s petition for review in that case in August 2025. While Judge Rothstein’s reasoning was sound, litigants should not be subjected to years of costly litigation to achieve that sound result, and there is no guarantee other courts will follow this approach. This judicial uncertainty defeats the very goals the rule was designed to achieve and creates three harmful consequences:

1. Discourages Corporate Voluntary Remediation. If companies face duplicative class litigation regardless of government settlements or preemptive remedies, there are fewer incentives to resolve disputes with regulators or voluntarily fix issues. Regulators consider voluntary remediation when making critical decisions around litigation, settlement, and potential customer remedies. Rule 23 should work to support that positive policy goal. Instead, Rule 23 works against it by allowing copycat lawsuits filed in hopes of securing duplicative settlements for the exact same conduct and issues previously resolved by either voluntary action and/or a robust government settlement.

2. Reduces Consumer Compensation. If class litigation is guaranteed despite prior remedies, companies face incentives to withhold voluntary redress to customers—reserving compensation for negotiated class-action settlements. This results in *less* total consumer recovery because any class relief will typically subtract attorneys’ fees from the settlement fund and these fee awards can be substantial.⁵

Some courts raise material public policy considerations in support of at least consideration of government settlements: “[I]f courts consistently allow parallel or subsequent class actions in spite of state action, the state’s ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it.” *Thornton v. State Farm Mut. Auto Ins. Co.*, 2006 WL 3359482, *2–3 (N.D. Ohio Nov. 17, 2006). Other courts take a literal approach and refuse to consider government settlements. *See de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 346 (S.D.N.Y. 2021) (“Rule 23 ... was drafted ‘with the legal understanding of ‘adjudication’ in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.” (alteration in original) (citation omitted)).

² See Amazon Flex, The Federal Trade Commission, <https://www.ftc.gov/legal-library/browse/cases-proceedings/1923123-amazon-flex> (last updated Nov. 2, 2021).

³ *Id.*; see also Amazon Flex, The Federal Trade Commission, <https://www.ftc.gov/enforcement/refunds/refunds-amazon-flex-drivers> (last updated May 2025).

⁴ *Amazon To Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers*, The Federal Trade Commission (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>.

⁵ David Thomas, *Legal Fee Tracker: Settlements Spur Big Fee Awards with More to Come in 2025*, Reuters (Dec. 19, 2024), <https://www.reuters.com/legal/legalindustry/legal-fee-tracker-settlements-spur-big-fee-awards-with-more-come-2025-2024-12-19/> (describing several \$200M+ fee requests).

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3. Wastes Judicial Resources. Duplicative litigation over conduct already addressed by regulatory authorities squanders federal judges' time and resources on disputes that have already been resolved. The *Miller* case exemplifies this problem: the litigation consumed years of court time before the court ultimately determined that the plaintiffs sought identical relief the FTC had already secured. This unnecessary duplication imposed real costs on the judicial system. The court was forced to resolve several motions and issue multiple opinions—all in a case related to issues the regulatory process had already settled. This expenditure of judicial resources was entirely avoidable, and all courts should be able to consider as part of the superiority process whether affected class members have already been provided relief.

Amazon respectfully requests that the Committee clarify Rule 23(b)(3) to confirm that trial courts may consider out-of-court remedies, government settlements, and voluntary consumer programs when determining superiority. This proposed change benefits all participants in the legal system by increasing efficiency and promoting voluntary customer restitution programs and robust government settlements.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Alexis Collins".

Alexis Collins



March 4, 2026

Via Email Delivery

RulesCommittee_Secretary@ao.uscourts.gov

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

Re: Proposal to Clarify the Rule 23(b)(3) Superiority Requirement.

Dear Ms. Dubay,

I write to urge the Advisory Committee on Civil Rules to take up for consideration the suggestion to amend Rule 23(b)(3)'s superiority requirement to give trial courts the discretion to consider out-of-court resolutions. I enclose my forthcoming law review article on the topic, titled "Catch 23: Putting Superior Back Into the Superiority Prong of Rule 23(b)(3)," 38 Loyola Consumer Law Review 1 (2026) (the "Article").

In the Article, I trace the history of Rule 23(b)(3)'s superiority prong to show that the rule drafters *always* intended that the courts have the discretion to consider out-of-court remedies as part of the superiority analysis. The Article confirms that rule drafters Benjamin Kaplin, Charles Alan Wright, Judge Weinstein, and Sherman Cohn, believed that other methods of "disposing" of a controversy—including out-of-court remedies—were part of the relevant considerations for a trial court judge. *See id.* at 7-10. These views were presented to and accepted by Justices Fortas and Brennan, without controversy. *Id.* at 10 (citing Abraham L. Freedman, Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States, 42 F.R.D. 437, 564(1967)). At least one judge specifically requested that this Committee provide clarity on the Rule 23(b)(3), urging that the drafters clarify the rule to allow courts to consider out-of-court relief. *See In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig.*, 293 F.R.D. 21, 34-35 (D. Me. 2013) (alteration in original).

The Article examines Oregon's class-action rule to provide real-world evidence that a clarification to this prong of Rule 23(b)(3) is modest and achievable. The Oregon rule requires that, before a class action for damages may proceed, the plaintiff must make a request for relief and, if the defendant provides an adequate remedy, then class treatment is not superior. The cases in Oregon confirm that adding this tool to the trial-court judge's consideration is beneficial to all

Carolyn A. Dubay,
March 4, 2026
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involved. Such consideration is not a get-out-of-jail free card for defendants—courts have held that unilateral but insufficient relief does not defeat superiority. But it does save time and judicial resources so as to permit the court to weigh whether class treatment is in fact superior.

Many trial court judges assume they already have the ability to consider out-of-court remedies in determining whether a class action is superior. Indeed, the Advisory Committee notes to the 1966 amendment to Rule 23 expressly state that the listed factors were “listed, **non-exhaustively**, as pertinent to the findings” for superiority. *See* Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure, 39 F.R.D. 69, 104 (1966) (emphasis added); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615–16 (1997) (“Rule 23(b)(3) includes a non-exhaustive list of factors pertinent to a court’s ‘close look’ at the predominance and superiority criteria”).

If the Committee take this issue up, it would find that trial court judges are well equipped to handle this type of analysis. It is no greater task that trial court judges currently undertake when considering preliminary injunctions and temporary restraining orders, or weighing of evidence and experts at class certification. Thus, contrary to the suggestion in the Committee’s October 1, 2025, memorandum (Tab 13 in the Agenda Book for the last meeting), this revision is not “a significant project, and potentially a significant change” to Rule 23(b)(3). It is in fact simply clarifying the rule drafters’ original intent.

In addition to restoring judges’ ability to learn about existing remedies at the certification stage, clarifying the superiority requirement would also help solve the current Catch-22 problem that defendants often face when considering affirmative measures to mitigate potential claims. If a defendant settles with the government or preemptively offers even a 100% refund to affected consumers, it is virtually certain to be rewarded with a follow-on class action. This can make defendants reluctant to settle with the government or to provide complete relief, knowing that it may need to hold back some additional amount of recovery for the inevitable class action (and likely settlement) that will follow doing the right thing.

The Civil Rules should not deter defendants from doing the right thing either through a consent agreement or through voluntary refunds or recalls. And simply restoring the rule to its original intent to allow courts to consider of out-of-court remedies, does no injustice to existing case law, the rules, or any party. (The lack of class treatment does not bar even those who have obtained relief from bringing their own action, if dissatisfied.) Courts are more than capable of determining whether, in light of all relevant factors, a class action is superior (not just as good as, or worse than) other means of resolving the dispute. For these reasons, and for the reasons outlined in the Article, I urge the Committee to consider taking up this potential rule clarification.

Carolyn A. Dubay,
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Sincerely,

A handwritten signature in blue ink, appearing to read "Fred Burnside", is centered below the word "Sincerely,".

Fred Burnside

Enclosure
Fred B. Burnside, *Catch 23: Putting Superior Back Into the Superiority Prong of Rule 23(b)(3)*, 38 Loyola Consumer Law Review 1 (2026).

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**Catch 23: Putting Superior Back Into the Superiority Prong of
Rule 23(b)(3)**

Fred Burnside

2025

Catch 23

Putting the “Superior” Back Into Superiority: A Modest Proposal for Rule 23(b)(3).¹

Fred Burnside

I. INTRODUCTION

To determine whether to certify a damages class action under Federal Rule of Civil Procedure 23(b)(3), federal courts must assess whether class treatment is “superior to other available methods for the fair and efficient adjudication of the controversy.”² (Courts and practitioners often refer to provision as the “superiority” prong of Rule 23(b)(3).) Rule 23(b)(3) lists factors courts should consider in examining superiority, including “(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.”³ The purpose of the superiority analysis is to “determine[e] ... whether the class action is superior to, and not just as good as, other available methods for handling the controversy; such a determination lies in an area where the trial court’s discretion is paramount.”⁴

Courts differ in assessing whether a class action is superior where the defendant has reached resolution with the government (e.g., a consent decree or stipulated judgment) or instituted a voluntary recall or refund program. In such cases, the affected putative class may have already received an adequate remedy, precluding the need for further judicial proceedings or splitting of any remedy with class counsel. If affected putative class members have already received relief, allowing a class action to proceed defeats judicial economy, is contrary to Federal Rule of Civil Procedure 1, and will discourage voluntary recalls or the willingness of companies to resolve disputes with the government for fear of additional liability. Allowing tag-along class actions where a class has already been offered (or even received) an

¹ Fred B. Burnside, Partner, Davis Wright Tremaine LLP. A portion of this article’s analysis of Oregon Rule of Civil Procedure 32 was originally drafted and included in the Oregon Chapter of the ABA’s Survey of State Class Action Law, which appears as a supplement to Newberg and Rubenstein on Class Actions.

² Fed. R. Civ. P. 23(b)(3).

³ *Id.*

⁴ *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

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adequate remedy is not superior. But because Rule 23(b)(3) uses the word “adjudication” in reference to the superiority analysis, some judges feel obligated to ignore non-court-based alternative remedies that may provide greater relief to affected putative class members. The history of Rule 23, the policies behind Rule 23, and real-world examples from a jurisdiction that not only allows but requires this consideration, confirm that courts can and should consider out-of-court remedies as part of the superiority analysis.

This article proposes a modest reform to Rule 23(b)(3)’s superiority factors, to allow courts to consider the nature and extent of available remedies in determining whether class treatment is superior. This proposal is tethered to the desire of Rule 23(b)(3)’s drafters to weigh the procedural device of the class action against other methods for “disposing” of litigation, and is modeled on the success of a similar set of rules Oregon adopted decades ago. Under the Oregon rule, courts may avoid duplicative class actions where the defendant has already offered or provided an adequate remedy.⁵ Adopting a similar discretionary factor for consideration under Rule 23(b)(3)’s superiority prong will further judicial economy, encourage prompt resolution of disputes, and facilitate greater and quicker relief to potentially affected putative class members. Trial courts should conduct a rigorous—not restrained—class-certification analysis. Trial courts are in the best position to use their discretion to determine whether the class-action device is superior to other alternatives and the Rules Advisory Committee should amend Rule 23 to ensure that courts have this discretion.

I. ANALYSIS

A. Why Some Courts Do Not Consider Extra-Judicial Remedies Under Rule 23(b)(3).

The text of Rule 23(b)(3) requires comparison of the class-action device against other “methods for the fair and efficient **adjudication** of the controversy.”⁶ The Seventh Circuit’s *Aqua Dots* decision is the leading case to reject extra-judicial remedies as “adjudication” under the superiority prong, holding that “a district court’s conclusion that it has a better idea does not justify disregarding the text of Rule 23.”⁷ But many other courts have

⁵ See Or. R. Civ. P. 32H-32J.

⁶ Fed. R. Civ. P. 23(b)(3) (emphasis added).

⁷ *In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748, 751 (7th Cir. 2011).

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grappled with the issue and held that considerations outside of adjudication were improper under Rule 23(b)(3).⁸ In fact, one court suggested the thesis of this article, by advocating that the Rules Advisory Committee consider an amendment make explicit the ability to consider out-of-court options when assessing superiority under Rule 23(b)(3):

[As] much as I too favor parties being able to resolve their controversies without expensive litigation, I observe that Rule 23(b)(3) does not address superiority as a matter of abstract economic choice analysis, but asks if a class action is “superior to other available methods for fairly and efficiently adjudicating the controversy” —i.e., other possible adjudication methods such as individual lawsuits or a consolidated lawsuit [Defendant] Hannaford may or may not have a good program to satisfy aggrieved customers, but [] the Hannaford program is not relevant to my superiority determination under the class certification decision.⁹

... [T]he recovery of generous fees for plaintiffs’ attorneys and large cy pres awards with little money going to actual class members call[s] into question the integrity of the class action process for resolving

⁸ See, e.g., *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973) (“Rule 23(b)(3) superiority requirement “focus[es] on the question whether one suit is preferable to several,” and that “the rule was not intended to weigh the superiority of a class action against possible administrative relief.... We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy” (alteration in original)); *de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 346 (S.D.N.Y. 2021) (“Rule 23 ... was drafted ‘with the legal understanding of ‘adjudication’ in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.” (alteration in original) (quoting *In re Scotts EZ Seed Litig.* 304 F.R.D. at 415)); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 415 (S.D.N.Y. 2015) (“[a]s an initial matter, the Court is not convinced non-adjudicative forms of redress may even be considered under Rule 23(b)(3)’s superiority analysis,” citing “adjudication” (alteration in original)). See also *Dukich v. IKEA USA Retail LLC*, 343 F.R.D. 296, 309 (E.D. Pa. 2022) (“the question of whether administrative remedies should be considered in a Rule 23(b)(3) analysis remains unanswered.”); *Rojas v. Bosch Solar Energy Corp.*, No. 18-cv-05841, 2022 WL 717567, at *16 (S.D. Cal. 2022) (“District courts within the Ninth Circuit are split as to whether private processes should be considered when determining whether a class action is the superior method for adjudicating a controversy.”).

⁹ *In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig.*, 293 F.R.D. 21, 34-35 (D. Me. 2013) (alteration in original).

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lawsuits. ... [M]y concern here that this is a de minimis class action where virtually no one will bother to make a claim and that any recovery will serve solely the lawyers (and perhaps some modest measure of corporate deterrence) ***present[s] questions for those who write the class action rules and for Congress, not for this individual judge***

applying the language of the Rule. ... Although reasonable people can certainly maintain that as a matter of policy other solutions are preferable to litigation, I do not see how that argument has a place in the class certification decision under the current Rule.¹⁰

In *Hannaford Bros.* (a data breach case), the defendant “created a refund program for fees related to credit card replacement arising out of the data theft.”¹¹ The refund program did not require “proof of causation or even loss” to recover, and provided putative class members “a comparable or even better remedy than they could hope to achieve in court.”¹² This existing out-of-court program gave the Court concern “that if this case proceeds as a class action, few class members will ultimately be interested in taking the time to file the paperwork necessary to obtain the very small amount of money that may be available if there is a recovery.”¹³ This prospect of “recovery of generous fees for plaintiffs’ attorneys and large *cy pres* awards with little money going to actual class members call into question the integrity of the class action process for resolving lawsuits.”¹⁴ Despite these risks, the trial court felt bound to ignore out-of-court options, holding that “those are policy issues for Congress ***or for the Federal Rules drafters.***”¹⁵ Feeling bound by the word “adjudicate” in Rule 23(b)(3), the court in *Hannaford Bros.* recognized that “reasonable people can certainly maintain that as a matter of policy other solutions are preferable to litigation,” but did not believe the Court could consider those alternative solutions “under the current Rule.”¹⁶

¹⁰ *Id.* at 26 (alteration in original) (emphasis added).

¹¹ *Id.*

¹² *Id.* at 34 (alteration in original).

¹³ *Id.* at 26.

¹⁴ *See also id.*

¹⁵ *Id.* (emphasis added); *see also id.* (noting that the concern over “a de minimis class action where virtually no one will bother to make a claim and that any recovery will serve solely the lawyers (and perhaps some modest measure of corporate deterrence) ***present questions for those who write the class action rules*** and for Congress”) (emphasis added).

¹⁶ *Id.* at 29.

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A leading class-action treatise (Newberg and Rubenstein on Class Actions) offers five core arguments against consideration of extra-judicial remedies as part of the superiority analysis:

- The text of Rule 23(b)(3) references “adjudication,” such that examining a remedy that does not involve an in-court “adjudication” is improper;
- Settlement negotiations are considered inadmissible evidence, such that asking a court to consider a settlement offer outside the adjudicatory process is in tension with other rules (*e.g.*, Federal Rule of Evidence 408);
- A judge’s review of a settlement offer at the outset of the case may bias the judge;
- Weighing the value of a settlement offer made before litigation is commenced is “procedurally, if not constitutionally problematic”; and
- Allowing a defendant to avoid class action litigation by offering an out-of-court resolution gives defendants too much control over class action litigation.¹⁷

With all due respect to Professor Rubenstein, aside from the textual argument, these points are overwrought, lack support, and other prominent treatises appropriately reject them.¹⁸ For example, settlement negotiations are inadmissible to establish liability, but not for other purposes.¹⁹ Indeed, existing federal rules already allow the court to consider settlement offers in related contexts.²⁰ For example, if a defendant makes an offer of judgment for everything a plaintiff can obtain, and the plaintiff refuses that offer, the defendant can submit it to the court and

¹⁷ William B. Rubenstein, *Newberg and Rubenstein on Class Actions*, (6th ed. 2024).

¹⁸ *See, e.g.*, Mary Kay Kane & Robert Klonoff, *Federal Practice and Procedure (Wright & Miller)*, (3d ed., June 2024 Supp.) (“The court need not confine itself to other available ‘judicial’ methods of handling the controversy in deciding the superiority of the class action.”) (citations omitted); Joseph M. McLaughlin, *McLaughlin on Class Actions Scope Information*, (21st ed. Oct. 2024 Supp.) (“the majority of courts to consider the question have held that a defendant-administered refund program may be found superior to a class action, and denied certification on that basis”) (citations omitted).

¹⁹ *See* Fed. R. Evid. 408.

²⁰ *See* Fed. R. Civ. P. 68.

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demand entry of judgment to end the litigation and cut off accrual of additional attorneys' fees (if the claim allows for such fees).²¹ Likewise, the idea that the mere offer of a competing method of resolution would "bias" a judge strains credulity. Judges are more than capable of remaining unbiased. They often weigh the likelihood of success on the merits at the outset of a case, *e.g.*, where temporary restraining order or preliminary injunction is sought, and nobody contends that doing so impermissibly biases the judge thereafter.²² Moreover, there is no case, statute, or other explanation offered for how weighing a settlement offer made before litigation is commenced offends procedure or raises constitutional issues. As to the final objection over control, the authors appear to assume that an out-of-court refund acts as *res judicata* for every customer who is given an offer (or even takes one). Not so. An out-of-court refund offer, whether accepted or rejected, does not prevent that consumer from bringing his or her claim individually to the extent any potential claim remains, it just means that consumer cannot represent others because a class action is not superior.²³ An out-of-court offer is simply relevant to whether the procedural device of the class action is worth the time and energy of the courts, counsel, and the public; in other words, whether it is superior. That class counsel may not obtain one-third of a remedy they did nothing to bring about is a reason to deny class certification, not grant it.

B. The History of Superiority Under Rule 23(b)(3).

The modern version of Rule 23 was adopted in 1966 after years of consideration, revisions, comments, and analysis. The primary reporter of the 1966 amendments to Rule 23 was Benjamin Kaplan, along with Professor Charles Alan Wright. The available materials from that era confirm that, as drafted, Rule 23(b)(3)'s superiority analysis was designed to address whether a class action was the superior method to "dispose" of the controversy, not necessarily adjudicate the controversy. It appears Kaplan and Wright adopted the "adjudicate" nomenclature based on some comments from Judge Weinstein about other ways to manage complex cases, not as a talismanic requirement that all options must occur in court.

²¹ See, *e.g.*, *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999) ("You cannot persist in suing after you've won. ... Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be reasonably incurred." (alteration in original) (emphasis in original)).

²² See *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

²³ See, *e.g.*, *Stewart v. Albertsons*, 308 Or. App 464, 487 n.16 (2021) (rejecting argument that out-of-court remedy sufficient to defeat superiority of class action affects constitutional right because loss of procedural right does not alter merits of substantive claims).

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Specifically, Kaplan explained the modern Rule 23 amendments in a 1967 article as requiring a Court to find that “a class action is ‘superior’ to other means of *disposing* of the particular set of quarrels.”²⁴ The “adjudication” language appears to have arisen in context from the next sentence in Kaplan’s article, where he cites an article by Judge Weinstein addressing other in-court methods of resolving disputes: “...procedural alternatives are hardly confined to the class action, on the one side, and individual uncoordinated lawsuits, on the other; there are often other possibilities ranging from use of a model action to consolidation or coordination of the numerous individual actions for all or selected purposes.”²⁵ There are no materials cited or otherwise referenced suggesting that non-procedural alternatives (*e.g.*, government resolutions, recalls, or refund programs) were prevalent at that time. But the context of the amendments and surrounding dialogue strongly suggest that the analysis was intended to consider *any* methods for disposing of litigation that might otherwise take up valuable judicial resources.²⁶

Indeed, the very article by Judge Weinstein that Professor Kaplan references as a basis for the 1966 Rule 23 amendments regarding superiority emphasizes that class actions are superior *if* they fill a gap in administrative enforcement.²⁷ Judge Weinstein examined *Kovarsky v. Brooklyn Union Gas Co.*—a case involving a gas company imposing improper service charges and where the Public Service Commission failed to provide an administrative remedy.²⁸ Judge Weinstein described this case as an “excellent example of a situation where a class action was appropriate,” but *only* because of “the **absence of an effective administrative remedy**” in that case.²⁹ By contrast to *Kovarsky*, Judge Weinstein references another case, where a class action was *not* superior, precisely because the defendant already provides an adequate remedy:

... the court appeared to have been justified in denying a judgment in favor of a class, *since the*

²⁴ Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 (1967) (emphasis added).

²⁵ *Id.* at 390-91

²⁶ See W. W. H. Jr., *Proposed Rule 23: Class Actions Reclassified*, 51(4) Va. L. Rev. 629, 643-44 (1965) (describing proposed Rule 23 and noting that under proposed Rule 23(b)(3), “the judge must determine that the class action is superior to other ways of adjudicating the controversy,” including whether, among other things, an “extrajudicial procedure may be a more appropriate solution.”).

²⁷ See Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF L. REV. 433, 461 (Spring 1960).

²⁸ *Id.* (citing 279 N.Y. 304, 18 N.E.2d 287 (1938)).

²⁹ *Id.* (emphasis added).

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telephone company had always provided a method approved by the Public Service Commission for making proper adjustments on an individual basis all that could be accomplished by the suit. To issue an order incorporating this practice would accomplish nothing of any practical benefit to the class and would result solely in a benefit in the way of a fee to plaintiff's attorney.³⁰

Thus, the drafters of Rule 23 understood that the class-action device was superior only where there was an absence of a ready out-of-court remedy, not in spite of one.

Likewise, another author who was involved in the rule drafting process described the superiority provision as follows:

For a (b)(3) action, the court must make an affirmative finding that the class action device is superior to *other available methods of disposing of the controversy*; this is reminiscent of the equitable origin of the class action in that it may be barred if an adequate remedy at law exists.³¹

This explanation is notable, not just because it referenced other methods of “disposing” of a controversy, but because it talked about consideration of “other available methods,” which suggests an openness to any methods of resolution, not merely court proceedings. This view is confirmed by Professor Wright, who confirmed that courts should consider out-of-court options. “Just six years after the 1966 amendment was enacted, [he] explained in the first edition of his seminal treatise that a court “need not confine itself to other available ‘judicial’ methods of handling the controversy in deciding the superiority of the class action.”³² He reiterated that the superiority amendment meant that

³⁰ *Id.* at 462 (emphasis added); see also Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299, 303 (1973) (“One aspect that I think the judges ought to consider is whether there is available a public administrative body capable and willing to grant relief. ... Sometimes the matter can be handled on a cooperative basis.”)

³¹ Sherman L. Cohn, *The New Federal Rules Of Civil Procedure*, 54 GEO. L. J. 1204, 1216 (Summer 1966) (emphasis added).

³² Eric P. Voigt, *A Company's Voluntary Refund Program For Consumers Can Be A Fair And Efficient Alternative To A Class Action*, 31 Rev. Litig. 617, 626-27 (2012) (citing 7A Charles Alan Wright et al., *Federal Practice and Procedure* §1779 (1972)); see also *id.* at 627 (quoting Wright, § 1779 (“Since the purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy, it seems consistent with that purpose to determine whether any administrative methods of settling the dispute exist.”)).

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superiority should be in reference to “all other means of disposing of the controversy,” rather than solely adjudication.³³

Moreover, in the Proceedings Of The Twenty-Ninth Annual Judicial Conference Third Judicial Circuit Of The United States, Professor Wright is quoted in the Rule 23 discussion with Supreme Court Justices Brennan and Fortas (among other participants), as follows:

Under Rule (b)(3) you may now have a class action if the questions of law or fact common to the members of the class predominate over the questions which are individual, and ***a class action is superior to all other means of disposing of the controversy.***³⁴

Again, the repeated use of the word “disposing,” suggests that the drafters of Rule 23(b)(3)’s superiority prong did not have solely court proceedings (or adjudication) in mind. Indeed, the Advisory Committee notes to the 1966 amendments expressly observed that the factors under 23(b)(3)(A)–(D) were “listed, ***non-exhaustively***, as pertinent to the findings” for superiority.³⁵ This is further confirmed by the Rules Advisory Committee comments in 1966, which confirm that a damages class action under Rule 23(b)(3) is “not as clearly called for” as one for injunctive relief, “but it may nevertheless be convenient and desirable depending upon the particular facts,” where allowing class treatment “would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”³⁶ Considering out-of-court remedies is precisely the type of “particular facts” that bear on “economies of time, effort, and expense,” as well as “undesirable results,” that the rule drafters envisioned.

³³ Charles Allen Wright, Recent Changes in the Federal Rules of Procedure, Address Before the 29th Annual Judicial Conference of the Third Circuit (Sept. 19, 1966), 42 F.R.D. 437, 564 (1967-68).

³⁴ Abraham L. Freedman, *Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States*, 42 F.R.D. 437, 564 (1967),

³⁵ Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure, 39 F.R.D. 69, 104 (1966) (emphasis added); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615–16 (1997) (“Rule 23(b)(3) includes a *non-exhaustive* list of factors pertinent to a court’s ‘close look’ at the predominance and superiority criteria”) (emphasis added).

³⁶ Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure, 39 F.R.D. 69, 102–03 (1966).

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Early analysis of Rule 23 echoed these sentiments. Professor Homburger, who was Chairman of the Committee to Advise and Consult with the Judicial Conference of the State of New York on Civil Practice Law and Rules—and who later almost singlehandedly drafted New York’s version of Rule 23—commented on Federal Rule 23 in an influential law review article in 1971.³⁷ After review of all committee materials, articles, and submissions relating to the 1966 Federal Rule 23 amendments, he observed as to superiority that “if adequate relief is available through administrative agencies, a class action is unnecessary and, indeed, undesirable under any subdivision of the rule.”³⁸ This analysis again confirms the view that Rule 23’s superiority analysis is not limited to consideration of court proceedings.

Finally, later analysis from those on the Rules Advisory Committee in 1966 confirms that courts need not limit superiority considerations to other litigation. William T. Coleman provided a statement to the Rules Advisory Committee thirty years later, in 1996, on proposed Rule 23 amendments. He called for clarification of Rule 23(b)(3)’s superiority prong, noting how it has been interpreted in a manner contrary to the intent of the drafters:

Rule 23(b)(3)’s superiority requirement should be clarified. Unfortunately, some counsel file class actions that simply piggy-back inquiries launched by federal or state agencies. For example, if the Consumer Product Safety Commission announces that it is examining the safety of a particular product, you can bet that the next day, multiple class actions will be filed on behalf of the product’s owners. This is more than wasteful; the lawsuits often interfere with the administrative process and make a mockery of the class action device.

To stop such abuse, Rule 23’s superiority requirement should make clear that where the claims asserted could be resolved through federal or state administrative processes, class certification usually should be denied. ***The rule really says that now, but since some courts arguably have***

³⁷ See Adolf Homburger, State Class Actions and the Federal Rule, 71 COLUM. L. REV. 609 (1971).

³⁸ *Id.* at 636.

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*construed the rule differently, the point should be clarified.*³⁹

These materials confirm that Rule 23’s superiority prong needs clarification to confirm the intent of the authors, the purpose of the rule, and to ensure that the class action devise is consistent with Rule 1.

Indeed, in one of the first class actions filed after the 1966 amendments, *Berley v. Dreyfus & Co.*, the court expressly rejected class certification based on the fact that the defendant had already provided a remedy before the plaintiff initiated the putative class action.⁴⁰ In *Berley*, the defendant promoted a stock for sale that was later suspended from trading because it was not properly registered.⁴¹ The plaintiff filed a putative class action almost immediately and the defendant quickly offered a refund to all purchasers of the stock, causing the plaintiff to seek an injunction against the defendant to prevent elimination of the class action.⁴² The court examined Rule 23’s superiority prong in connection with pending motions and held that, despite the fact that a refund was not an “adjudication,” a class action was not superior in light of the immediate refund:

Although Dreyfus & Co.’s offer to refund the purchase price to its customers is not quite ‘another method for the fair and efficient *adjudication* of the *controversy*,’ we think that subparagraph (b)(3) read as a whole reflects a broad policy of economy in the use of society’s difference-settling machinery. One method of achieving such economy is to avoid creating lawsuits where none previously existed.

This is in part why ‘the extent and nature of any litigation... already commenced’ is pertinent to the required finding. If a class of interested litigants is not already in existence the court should not go out of its way to create one without good reason.

³⁹ See William T. Coleman, Statement On the Proposed Amendments to Fed. R. Civ. P. 23, at 1, 7-8, Before the Civil Rules Advisory Committee, in Working Papers of the Advisory Committee at 449, 456 (Administrative Office of the United States Courts Vol. 4, 1997) (emphasis added) (citation omitted), available at <https://www.uscourts.gov/rules-policies/records-rules-committees/fjc-studies-and-related-publications>.

⁴⁰ *Berley v. Dreyfus & Co.*, 43 FRD 397, 399 (S.D.N.Y. 1967).

⁴¹ *Id.* at 397–98.

⁴² *Id.* at 398.

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Dreyfus appears to have amicably settled its differences (if indeed there were any) with most of its customers. The plaintiffs would have us enjoin any further such settlements and give notice of this litigation to all of Dreyfus' customers and certain others. In our view, this would needlessly replace a simple, amicable settlement procedure with complicated, protracted litigation. In addition, such an injunction would serve no useful purpose. The settlement forms that Dreyfus mailed to its customers along with its refund offer do not purport to release Dreyfus from any liability whatsoever. Dreyfus has thus left these people with the best of both worlds. They can have their money back now, and still be free to bring an action for further damages if the present suit is successful. To enjoin Dreyfus from paying these customers their money would be manifestly unfair to them.⁴³

From the outset, then, courts understood the superiority analysis was holistic, and whether class treatment was superior was not limited to comparison against in-court remedies and procedures.

C. Courts Can (And Should) Consider Extra-Judicial Remedies In Connection With any Superiority Analysis.

Class action complaints often follow public government investigations. State and local government actions are designed to provide relief to the public at large, without lawyers taking a portion of those proceeds. Particularly where evidence of current damages is speculative—*e.g.*, a data breach with no evidence that stolen material has been seen or used—a government settlement requiring certain measures or providing certain remedies (*e.g.*, credit monitoring) may provide the relief the putative class could want, so that a class action is no longer the “superior” method of resolution. Where a defendant has already provided the majority of relief that a class could hope to obtain, a class action is unnecessary and not superior, as the only people benefitting from the case at that point are class counsel, not class members. Indeed, a class action Complaint that merely parrots a government action

⁴³ *Id.* at 398-99 (emphasis in original).

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likely violates Rule 11.⁴⁴ “Class actions can ... be inefficient, costly, and unnecessary, particularly if government law enforcement has solved or is likely to solve the problem the proposed class putatively addresses.”⁴⁵

For example, a few courts have recognized that where there has already been a governmental investigation and resolution on behalf of the public, class treatment is unsuitable.

Proceedings by the state, whether in a judicial or an administrative forum, are presumably taken with the best interests of state residents in mind. Reasonable settlement by the accused should be encouraged. Indeed, potential class members will often recover more than they would in a private action when costs and attorneys’ fees are factored in. However, if courts consistently allow parallel or subsequent class actions in spite of state action, the state’s ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it.”⁴⁶

⁴⁴ See, e.g., *In re Connecticut Corp. Sec. Litig.*, 542 F. Supp.2d 996, 1004-06 (N.D. Cal. 2008) (striking allegations from Complaint based entirely on SEC Complaint as inconsistent with Rule 11 obligations); *Johns v. Bayer Corp.*, 2010 WL 476688, at *2–*3 (S.D. Cal. 2010) (striking allegations based on separate consent decree as violating Rule 11); *Fraker v. Bayer Corp.*, 2009 WL 586587 (E.D. Cal. 2009) (striking allegations based on FTC action as violating Rule 11); *Veal v. LendingClub Corp.*, 423 F. Supp. 3d 785, 812 (N.D. Cal. 2019) (plaintiffs “may not rely on facts alleged in [an] FTC Action without providing any independent corroboration”); see also *In re Razorfish Inc. Sec. Litig.*, 143 F. Supp.2d 304, 306 n.1 (S.D.N.Y. 2001) (“One can only wonder whether the edicts of Rule 11 ... were followed in the investigation and drafting of these copycat complaints.”).

⁴⁵ D. Bruce Hoffman, To Certify or Not: A Modest Proposal for Evaluating the “Superiority” of a Class Action in the Presence of Government Enforcement, 18 Geo. J. LEGAL ETHICS 1383, 1392–93 (2005).

⁴⁶ See, e.g., *Thornton v. State Farm Mut. Auto Ins. Co.*, 2006 WL 3359482, at *2–*3 (N.D. Ohio 2006) (citing *Brown v. Blue Cross & Blue Shield of Mich., Inc.*, 167 F.R.D. 40, 46 (E.D.Mich.1996) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975) and denying a motion for class certification where “[t]he agreement entered into by the State and defendant covers all members of the proposed class ... and provides full co-pay relief on all but de minimis claims”); *Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2001) (explaining that the Maryland Insurance Agency had investigated the accused practices and that “[i]n any event, as a supplement to administrative proceedings, the small claims courts” are perfectly adequate); *Wechsler v. Southeastern Properties, Inc.*, 63 F.R.D. 13, 16–17 (S.D.N.Y.1974) (finding that

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This same logic has convinced some courts to dispose of class allegations when the defendant, through an agreement with regulatory authorities or otherwise, provides relief to the putative class that is adequate under the circumstances.⁴⁷ Indeed, where an

an action in state court by the attorney general justified dismissal of class action); *Freeman Indus. LLC v. Eastman Chem. Co.*, 2004 WL 1102435, at *9 (Tenn. App. May 18, 2004) (holding that the “involvement of the attorneys general and the undesirability of concentrating the class litigation in Tennessee is enough to destroy predominance and superiority”), *rev’d in part on other grounds*, 172 S.W.3d 512 (Tenn. 2005); D. Bruce Hoffman, *To Certify or Not: A Modest Proposal for Evaluating the ‘Superiority’ of a Class Action in the Presence of Government Enforcement*, 18 GEO. J. Legal Ethics 1383, 1387 (2005).

⁴⁷ See, e.g., *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975); *Wechsler v. SE Props., Inc.*, 63 FRD 13, 15-17 (S.D. N.Y. 1974) (where attorney general’s action resulted in notice to class members and return of stock proceeds to 97% of the class, private class action was not superior and therefore could not be certified); *Brown v. Blue Cross & Blue Shield of Mich.*, 167 F.R.D. 40 (E.D. Mich. 1996); *In re PPA Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (no superiority because of product refund program); *Pagan v. Abbott Labs, Inc.*, 287 F.R.D. 139, 141 (E.D.N.Y. 2012) (class action not superior where voluntary recall and refund program was better suited to provide relief); *Webb v. Carter’s Inc.*, 272 F.R.D. 489, 504-05 (C.D. Cal. 2011) (“a class action is not superior because Carter’s is already offering the very relief that Plaintiffs seek”); *Turcios v. Carma Laboratories, Inc.*, 296 F.R.D. 638, 648-49 (C.D. Cal. 2014). (“The Court is unconvinced that a class action is superior in this case” because “Defendant already offers consumers a full refund of the amount paid for the product for any reason”); *Harvey v. Centene Mgmt. Co. LLC*, 2020 WL 2411510, at *4 (E.D. Wash. 2020) (no superiority “where a defendant itself offers a mechanism by which putative class members may obtain relief”); *Johnson v. Harley-Davidson Motor Co. Group, LLC*, 285 F.R.D. 573, 584 (E.D. Cal. 2012) (class action not superior where allegedly defective motorcycles were subject to the NHTSA, allowing the buyer to petition NHTSA to investigate the alleged safety issues, and requiring NHTSA to order a recall of the motorcycles and fix the defects, if any); *Rowden v. Pacific Parking Systems, Inc.*, 282 F.R.D. 581, 586-87 (C.D. Cal. 2012) (class action not superior method for resolving a dispute regarding whether the city parking lot violated FACTA by printing parking receipts containing the expiration date of credit cards; individual remedies were sufficient and administrative process was capable of quickly processing claims); *Ramirez v. Dollar Phone Corp.*, 668 F. Supp. 2d 448, 467-68 (E.D.N.Y. 2009) (class action was not superior to national regulation and enforcement of the calling-card industry by FTC or other agency; final injunctive or declaratory relief would engage court in inappropriate detailed continuing supervision); *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 488-89 (S.D. Cal. 2013) (class action is not a superior remedy because plaintiff was pursuing a remedy that was already available: “recall or refund programs kill superiority”); *Ford Motor Co. v. Magill*, 698 So.2d 1244, 1245-46 (Fla. App. 3 Dist. 1997) (reversing class certification order as to a recall and economic injury subclass based on fact that the NHTSA had negotiated recall mandates and extended warranties with Ford); *Daigle v. Ford Motor Co.*, 2012

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administrative resolution providing complete relief exits, the court may need to dismiss the class action as prudentially moot.⁴⁸ Where an executive-branch agency has resolved a dispute with a defendant in a class action over the same conduct, “Congress and the Executive have committed to ensure [Plaintiff] precisely the relief she seeks.”⁴⁹ Allowing a class action to proceed “might duplicate [agency and defendant] efforts and waste finite public resources in the process.”⁵⁰ This “would... surely add new transaction costs for [the defendant] and perhaps reduce the incentive manufacturers have to initiate recalls... all while offering not even a sliver of additional relief for [Plaintiff] and members of the class she seeks to represent.”⁵¹ In such cases, plaintiffs’ “lawyers would benefit if this would-be class action labored on through certification, summary judgment, and beyond,” but “it’s hard to see how anyone else could.”⁵²

In the Ninth Circuit, *Kamm* provides a useful example. There, investors claimed that land promoters did not properly describe and disclose the property and its risks. Before class certification, the California Attorney General negotiated a settlement for restitution, entry of injunction, and “best efforts” to resolve future claims.⁵³ The trial court held that relief provided through the Attorney General was adequate, and that a class action was not superior, noting that “[s]uperiority must be looked at from the point of view of (1) the judicial system, (2) the potential class members, (3) the present plaintiff, (4) the attorneys for the litigants, (5) the public at large and (6) the defendant.”⁵⁴ The Court noted that a class action would require needless “expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level,” that individual

WL 3113854, at *5–*6 (D.Minn. 2012) (class action not superior because recall and refund program); *Patton v. Topps Meat Co., LLC*, 2010 WL 9432381, at *10 (W.D.N.Y. 2010) (refund program defeats superiority); *Farno v. Ansure Mortuaries of Ind., LLC*, 953 N.E.2d 1253, 1272–76 (Ind. App. 2011) (court can consider extra-judicial remedies in determining superiority); *Appalachian Land Co. v. Equitable Production Co.*, 2018 WL 3097318, at *11 (E.D. Ky. 2018) (denying class certification in part because majority of customers accepted reimbursement and thus “they have received what was previously deducted without losing a cut to the class action mechanism,” so class certification “is not necessary for their redress, and “inclusion in the class action at this point would simply subject them to protracted and unnecessary litigation”; allowing certification of class members who refused reimbursement).

⁴⁸ See, e.g., *Winzler v. Toyota Motor Sales USA, Inc.*, 681 F.3d 1208, 1210–12 (10th Cir. 2012).

⁴⁹ *Id.* at 1211.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Kamm*, 509 F.2d at 208.

⁵⁴ *Id.* at 212.

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Plaintiffs could still bring claims if they believed the relief was inadequate, and that forcing defendants to re-litigate the issues would duplicate the time spent working on a resolution with the state.⁵⁵ Although the Attorney General did not protect “all members of the class” or “recover an amount ... even close to that sought in the class action,” the Court held that “[a] class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work” done by the Attorney General.”⁵⁶ On these facts, the district court in *Kamm* held “the class action was not a superior method of resolving the controversy.” *Id.* The *Kamm* decision is well reasoned. If any defendant that enters a consent decree will face duplicate liability in a civil action, defendants will be less likely to settle government claims, which will result in increased costs and burden to the legal system.⁵⁷

Other courts have reached similar conclusions on similar facts.⁵⁸ “Class actions can ... be inefficient, costly, and

⁵⁵ *Id.*

⁵⁶ *Id.* at 211–12.

⁵⁷ See also *Pattillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980) (“any claims paid through the class action procedures would be reduced by the costs of suit and attorneys’ fees that plaintiffs sought. The ... court cannot be unaware of the fact that the principal beneficiaries of the class action would be plaintiffs’ attorneys.”); *Hahn v. Breed*, 606 F. Supp. 1557, 1563 (S.D.N.Y. 1985) (“an action [should not] be permitted to proceed as a class action, despite the desirability of providing small claimants with a forum in which to seek redress, when it is unlikely to benefit anyone but the lawyers who bring it”).

⁵⁸ See *Conde v. Sensa*, 2019 WL 4277414, *9–11 (S.D. Cal. 2019) (applying *Kamm* in context of an FTC settlement); *Imber-Gluck v. Google Inc.*, 2015 WL 1522076, at *2–3 (N.D. Cal. 2015) (denying certification in light of FTC settlement); *In re PPA Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (no superiority because of product refund program); *Lohse v. Dairy Comm’n of the State of Nev.*, 1977 WL 1523, *7 (D. Nev. 1977) (no superiority in light of Nevada Attorney General action; “This kind of state action is much preferred to a punitive treble damage antitrust private civil remedy the proceeds from which will only slightly benefit any individual plaintiff.”); *Cortez v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 9710571, *5–6 (W.D. Tex. 2007) (attorney general’s assurance of voluntary compliance defeated superiority; “The potential availability of treble damages or even compensatory damages higher than the payout offered under the AVC does not, as Plaintiffs argue, make the AVC inadequate.”); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 462–65 (D. N.J. 1998) (refusing to certify class action based on lack of superiority where reimbursement was available through recall program and administrative remedy); *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 399 (S.D.N.Y. 1967) (where the defendant “amicably settled its differences (if indeed there were any) with most of its customers,” the court refused to certify a class action seeking injunctive relief and damages, holding that a class action “would needlessly replace a simple, amicable settlement procedure with complicated, protracted

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unnecessary, particularly if government law enforcement has solved or is likely to solve the problem the proposed class putatively addresses.”⁵⁹

Because Rule 23(b)(3)’s superiority analysis references other methods of “adjudication,” however, some courts refuse to consider alternative refund or recall remedies under 23(b)(3). This is because those remedies are not, strictly speaking, part of an “adjudication.” Nonetheless, creative courts have considered such remedies under Rule 23(a)(4)’s adequacy prong. For example, the Seventh Circuit relied on a refund program in affirming a denial of class certification in *In re Aqua Dots Products Liability Litigation*.⁶⁰ But because that case involved a voluntary refund program, rather than an adjudicatory proceeding, the Seventh Circuit found the district court should not have assessed the issue under the rubric of superiority. Instead, the Court found plaintiffs failed to establish Rule 23’s adequacy requirement: “Plaintiffs want relief that duplicates a remedy that most buyers already have received [through the refund program], and that remains available to all members of the putative class. A representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred at the class members’ expense to obtain a refund that already is on offer is not adequately protecting the class members’ interests.”⁶¹ This analysis confirms that courts can and do consider the utility of class actions in light of existing options, but struggle to fit the square peg of existing relief into the round hole that is Rule 23’s expressly enumerated (but not exhaustive) existing factors.

litigation”); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743, 748 (N.D. Ohio 1975) (“Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute”); *In re Conagra Peanut Butter Prod. Liab. Litig.*, 251 F.R.D. 689, 699–700 (N.D. Ga. 2008) (finding Defendant’s voluntary refund program superior to class certification).

⁵⁹ D. Bruce Hoffman, To Certify or Not: A Modest Proposal for Evaluating the “Superiority” of a Class Action in the Presence of Government Enforcement, 18 Geo. J. Legal Ethics 1383, 1392–93 (2005).

⁶⁰ *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011).

⁶¹ *Id.* at 752.

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D. An Alternate Approach: Borrowing From ORCP 32

1. Oregon’s Evolving Class Action Process.

Oregon has allowed representative claims for 140 years.⁶² Oregon courts were historically reluctant to grant class certification, agreeing with other courts that “class actions should be closely scrutinized and should be permitted only in clear cases.”⁶³ Indeed, until 1973, class actions were limited to equitable claims.⁶⁴ That changed when the Legislative Assembly enacted a class action statute allowing for damages.⁶⁵ In 1978, Oregon’s class-action statute was converted into its present form as a procedural rule when the Oregon Council on Court Procedures (CCP) promulgated ORCP 32.

Oregon’s class action rule was revised to address perceived class action abuses. As originally proposed, Oregon’s class action statute was an exact duplicate of Federal Rule of Civil Procedure 23.⁶⁶ In response to management concerns perceived to be

⁶² *Trustees of the M.E. Protestant Church v. Adams*, 4 Or. 76, 88 (1870) (holding that “where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole”).

⁶³ *Lonsford v. Bailey*, 200 Or. 497, 508, 267 P.2d 208, 214 (1954).

⁶⁴ *Am. Timber & Trading Co. v. First Nat’l Bank*, 263 Or. 1, 500 P.2d 1204 (1972)

⁶⁵ *Bernard v. First Nat’l Bank of Or.*, 275 Or. 145, 149-50, 550 P.2d 1203, 1207–08 (discussing enactment of O.R.S. § 13.220 et seq.). In drafting the bill that would become Oregon’s class-action statute, the legislature heard testimony that “the best type of consumer remedy would be one which is efficient in providing relief to the damaged consumer (at a low cost), is effective in preventing wrongs and is speedy...” Minutes, Senate Consumer and Business Affairs Committee, SB 163, February 1, 1973, 3 (testimony of Ron Loew). Mr. Loew also argued “that rather than adopt [Federal] Rule 23, it would be better to write the type of class action that would avoid the problems encountered under that Rule.” Minutes, Senate Consumer and Business Affairs Committee, SB 163, February 13, 1973, 5 (testimony of Ron Loew). The ultimate compromise, which later became ORCP 32H & ORCP 32 I, was that the bill “would get rid of virtually all the abuse in class actions” by “allow[ing] the defendant to change their procedures” and thereby avoid defending a class action where it could provide an immediate remedy. Minutes, House Committee on Judiciary, SB 163, June 13, 1973, 2 (testimony of Sen. Keith Burns). Laird Kirkpatrick summarized the final version of the law as follows: “It gives a meaningful class action remedy to consumers while at the same time providing substantial protections to honest businessmen.” House Judiciary Committee Archive, SB 163, Statement of Laird Kirkpatrick.).

⁶⁶ *Bernard*, 275 Or. at 150–51, 550 P.2d at 1208; *Pearson v. Philip Morris, Inc.*, 208 Or. App. 501, 504, 145 P.3d 299, 300 (2006), *rev’d on other grounds*, 257 Or. App. 106 (2013), *rev’d on other grounds*, 358 Or. 88 (2015).

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inherent to the Federal Rule however, the Oregon Senate Judiciary Committee requested that the proponents and opponents together draft amendments. These amendments were ultimately incorporated into the bill.⁶⁷ Reviewing this history, the Oregon Supreme Court emphasized that there “can be no doubt that the purpose of these amendments was to prevent abuses perceived under Rule 23,” and that the Oregon rule “was intended to be circumscribed to a greater extent than is the case under ... Rule 23.”⁶⁸ Oregon’s class action rule further departed from its federal counterpart in 1992, when the CCP discarded the three categories of class actions, instead adopting a unitary form of class action.⁶⁹ Under the new rule, the previous requirements corresponding to Federal Rules 23(b)(1), (b)(2), and (b)(3), are now only “matters pertinent” to the court’s required finding that “a class action is superior to other available methods of the fair and efficient adjudication of the controversy.”⁷⁰ The CCP believed the distinctions between the types of classes were causing confusion and unnecessary procedural obstacles, and that strict adherence to the requirements of each category was “unduly rigid.”⁷¹

The 1992 amendments to ORCP 32 adopting a unitary class action mechanism were intended to avoid arguments concerning the category of class action for which the plaintiff should be seeking certification. Instead, the class certification process now adheres to the spirit of what Federal Rule 23 sought to achieve—a determination as to whether “a class action would achieve economies of time, effort, and expense, and promote uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results.”⁷² The post-1992 version of ORCP 32B provides eight factors “pertinent” to the superiority analysis.⁷³ These factors are not a checklist⁷⁴ and courts do not count them mechanistically as “for” or “against” certification; rather courts weigh these factors in exercising discretion.⁷⁵ This flexibility is at the heart of Oregon’s less-rigid class-action device.

⁶⁷ *Bernard*, 275 Or. at 150–51.

⁶⁸ *Id.* at 152, 550 P.2d at 1208–09.

⁶⁹ *See* ORCP 32B.

⁷⁰ *Id.*

⁷¹ *See* Amendments to Oregon Rules of Civil Procedure, Council on Court Procedures, at 17 Staff Comment (1992), available at https://counciloncourtprocedures.org/Content/Promulgations/1992_promulgations.pdf.

⁷² *Bernard*, 275 Or. at 152 n.3, 550 P.2d at 1208 n.3 (quoting Fed. R. Civ. P. 23 Advisory Committee Notes, 39 F.R.D. 69, 102–03 (1966)).

⁷³ ORCP 32B(1)–(8).

⁷⁴ *Shea v. Chicago Pneumatic Tool Co.*, 164 Or. App. 198, 207, 990 P.2d 912 (1999).

⁷⁵ *Pearson*, 2006 WL 663004, at *9.

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Trusting in the discretion of trial courts, ORCP 32 permits certification if the class representatives (a) establish all requirements of ORCP 32A, (b) show that under ORCP 32B a class action is superior to other available methods for the fair and efficient adjudication of the controversy (considering eight different discretionary factors), and (c) in damages actions, satisfy the pre-suit remedy and notice requirements of ORCP 32H.⁷⁶

The concern over whether a class-action is superior undergirds the entirety of ORCP 32. Indeed, ORCP 32B(8) requires the court to examine whether the class members' claims are too small (taking into consideration the complexities of the issues and expenses of the litigation) and to provide any significant relief to the class members (in light of the costs and burdens involved).⁷⁷ There is no expressly analogous provision in the Federal Rules, although Federal Rule of Civil Procedure 1 embodies this core theme. The original statutory version of ORCP 32B(8) was taken “verbatim” from American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972) (ACTL Report), which was “highly critical of class actions as they have been conducted under Rule 23.”⁷⁸ The recommendations from that report provide the best analysis of what ORCP 32B(8) seeks to achieve in assessing superiority of class actions. The superiority analysis was intended to prevent class actions from going forward where the amount of recovery for the class members was minimal when compared with the interests involved, and where the main beneficiaries of the action would be class counsel. The ACTL Report’s recommendation (adopted in ORCP 32B(8)) was that Federal Rule 23 “be revised to clearly indicate that not every wrong committed in our society should be the subject of a class action.”⁷⁹ The ACTL Report observed that many small-value class actions “primarily benefit the attorneys who initiate them,” and that “the public interest issue may well be so in-significant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering,” because “scarce” judicial resources “cannot be allocated on the vindication of every individual wrong however slight.”⁸⁰

This skepticism toward the superiority of small-dollar class action claims was recognized by the Oregon Supreme Court in

⁷⁶ See ORCP 32A, 32B, 32H-32I.

⁷⁷ See ORCP 32B(8).

⁷⁸ See *Bernard*, 275 Or. at 151, 550 P.2d 1208 (citing American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972) (“ACTL Report”)).

⁷⁹ ACTL Report, at 27–28.

⁸⁰ *Id.*

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Bernard, where the Court noted that although Oregon’s rule allows aggregation of small value claims, it does so only where a class action was otherwise clearly called for.⁸¹ The basis for this skepticism is that experience under the Federal Rule showed that courts too often sacrifice the procedural safeguards established by the Constitution, congressional statutes, and the Federal Rules of Civil Procedure “to make the class action manageable where it presently is not.”⁸² The result of that approach was “almost always confusion of thought and irrational, emotional, and unsound decisions” by “those whose intentions may be above reproach.”⁸³

It is the pre-suit remedy and notice requirements that bear most relevance to this article’s proposal for amending Rule 23(b)(3) to allow for consideration of such remedies in determining whether a class action is the superior method of resolution.

2. ORCP Pre-Suit Notice Requirement For Damages Class Actions.

Oregon’s primary departure from the federal class action rules was the addition of rules that are now labeled ORCP 32H, ORCP 32I, and ORCP 32J. Those rules require that, at least 30 days before a plaintiff may bring a class action seeking damages, he or she must give written notice to the defendant of the claims and demand correction of the alleged wrong.⁸⁴ In response, if the defendant later provides an appropriate remedy (which need not be the same remedy demanded), then the plaintiff may not bring a damages class action.⁸⁵

Compliance with this notice process also bears on the ORCP 32A requirements, which largely mirror Federal Rule of Civil Procedure 23(a). But as an additional obligation for the class representative, the plaintiff must show compliance with ORCP 32A(5) which mandates that in any class action for damages, the named plaintiff must provide proof of satisfaction of the prelitigation notice requirement contained in ORCP 32H.⁸⁶

As drafted, ORCP 32H, 32I, and 32J create a specific process for evaluating whether it is “worth it” to allow a class action for damages to proceed. These rules were an intentional departure from Federal Rule 23 to give the court more flexibility in

⁸¹ *Bernard*, 275 Or. at 152 & n.3, 550 P.2d at 1208–09 & n.3.

⁸² *Id.* at 159–60 & n.5, 550 P.2d 1213 & n.5 (citations omitted).

⁸³ *Id.*

⁸⁴ ORCP 32H(1)–(2).

⁸⁵ ORCP 32I.

⁸⁶ ORCP 32A(5).

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handling class actions.⁸⁷ Under ORCP 32H, then, before a plaintiff may bring a class action for damages, he must first give the defendant 30 days' notice (via certified or registered mail) of the claims that plaintiff intends to bring and a demand that the defendant correct or rectify the alleged wrong.⁸⁸ More important than the 30 days' notice requirement (which other states have adopted for specific claims),⁸⁹ ORCP 32I bars a plaintiff from maintaining a class action for damages if the defendant has ceased engaging in the allegedly improper activity, identified the putative class members and offered to remedy the alleged wrong upon request.⁹⁰ The full text of those provisions is here:

H. Notice and demand required prior to commencement of action for damages.

(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of sections A and B of this rule, the potential plaintiffs' class representative shall:

(a) Notify the potential defendant of the particular alleged cause of action; and

(b) Demand that such person correct or rectify the alleged wrong.

(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, in the case of a corporation or limited partnership not authorized to transact business in this state, to the principal office or place of business of the corporation or limited partnership, and to any address the use of which the class representative knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

I. Limitation on maintenance of class actions for damages.
No action for damages may be maintained under the

⁸⁷ See Don S. Willner, *More Justice Under Law*, 55 Or. L. Rev. 183, 191 (1976) (Oregon's 30-day notice requirement is a "fundamental difference[]" between Federal Rule 23 and the Oregon class action rule).

⁸⁸ ORCP 32H.

⁸⁹ See Cal. Civ. Code § 1782(a).

⁹⁰ ORCP 32I.

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provisions of sections A and B of this rule upon a showing by a defendant that all of the following exist:

- (1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;
- (2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;
- (3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and
- (4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.⁹¹

The purpose of the prelitigation notice is to allow the defendant an opportunity to remedy the alleged wrong and avoid the negative publicity and expense associated with class actions complaint for damages.⁹²

3. Interpretation of Oregon’s Pre-Litigation Notice and Remedy Requirements.

Until 2021, no appellate cases addressed ORCP 32I, but the language of the rule, trial court decisions, and its legislative history confirm that courts should (and do) strictly apply the rule to deny certification where a defendant “has voluntarily addressed the alleged wrong with regard to all class members.”⁹³ In the trial

⁹¹ ORCP 32H, 32I.

⁹² See Laird Kirkpatrick, *Procedural Reform in Oregon*, 56 Or. L. Rev. 539, 547 n.48 (1977) (one of the “[m]ost significant differences” between the federal rule and Oregon’s rule is that the “Oregon Act provides that, prior to filing a class action for damages, a plaintiff must send a thirty-day pre-litigation notice that *allows the defendant to avoid the adverse publicity of a class action by voluntarily redressing the alleged wrong with regard to all class members*”) (emphasis added).

⁹³ *Kirkpatrick, supra*, n.89, 56 Or. L. Rev. at 547 n.48; *Gibson v. Providence Health Sys. Or.*, 2007 WL 3339229, *1 (Or. Cir. 2007) (striking class allegations as a result of ORCP 32I remedy provided), *aff’d on other grounds sub nom.*, 237 Or. App. 584, 240 P.3d 1110 (2010), *aff’d*, 351 Or. 587, 273 P.3d 106 (2012); *Bravo v. Taco Bell Corp.*, 1997 WL 34650259 (Or. Cir. 1997) (staying

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courts, the pre-suit remedy process has been effective. In one case—an alleged data breach—the trial court struck the class allegations after the defendant agreed to provide relief requested and entered into an Assurance of Voluntary Compliance with the Attorney General’s Office providing all of the relief that plaintiff’s counsel had sought.⁹⁴ In another case, the trial court stayed the case to allow the defendant enough time to complete the proposed class-wide remedy.⁹⁵ But ORCP is not a “get-out-of-jail-free” card. In another case, the trial court rejected as insufficient a defendant’s attempt to strike class allegations where it failed to show that it provided adequate relief and where the defendant provided limited relief without context, merely stating that it has discovered an “error” and was providing a “small amount of back pay.”⁹⁶ Because ORCP requires the defendant to provide notice of the “alleged wrong”—not merely defendant’s characterization of an “error”—and to make a “showing” that it provided appropriate relief, the failure to explain the nature of claims or substantiate the relief provided was insufficient.⁹⁷

In 2021, the Oregon Court of Appeals conducted a lengthy analysis of ORCP 32I in *Stewart v. Albertson’s Inc.*⁹⁸ After an exhaustive review of the history and text of the Rule, the court examined both the process for evaluating offers under ORCP 32I as well as the varying standards of review involved. As to process, the Court held:

discovery to permit opportunity to complete ORCP 32I cure); Berne & Wright, CCP, *supra*, Ch. 16 at 5–6 (1994) (Oregon rule stops “unnecessary litigation” by giving defendant the chance to give appropriate [class] relief”).

⁹⁴ *Gibson v. Providence Health Sys. Or.*, 2007 WL 3339229, *1 (Or. Cir. 2007) (striking class allegations as a result of ORCP 32I remedy provided), *aff’d on other grounds sub nom.*, 237 Or. App. 584, 240 P.3d 1110 (2010), *aff’d*, 351 Or. 587, 273 P.3d 106 (2012); *see also Paul v. Providence Health Sys. Or.*, Respondent’s Brief and Supp. Excerpts of Record, 2008 WL 8156935, *34–*36 & n.18 (Or. App. Aug. 2008) (summarizing remedies provided under ORCP 32I).

⁹⁵ *Bravo v. Taco Bell Corp.*, No. 9708-06832, 1997 WL 34650259, at 1-2 (Or. Cir. Ct. Dec. 4, 1997) (staying discovery to permit opportunity to complete ORCP 32I cure).

⁹⁶ *See Allison v. Dolich*, No. 14CV07294, 2021 WL 9699444, at 7-8 (Or. Cir. Ct. Oct. 16, 2021) (denying the motion to strike class allegations based on inadequate explanation or context).

⁹⁷ *See id.* at 3, 7-8 (“Defendants have not supplied the Court with sufficient evidence that documents full payment (or a showing that such payment will be given in a reasonable time) to all employees of the putative Minimum Wage Class, including sufficient documentation of payment of penalty wages under either of the penalty provisions of § 652.150.”).

⁹⁸ *Stewart v. Albertson’s, Inc.*, 481 P.3d 978 (Or. Ct. App. 2021).

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When a trial court is called upon to evaluate a defendant's showing under ORCP 32 I, the court must make a series of determinations. It must consider the pleadings to determine the alleged wrong and the extent of available remedies under the substantive law that applies to that wrong. It must consider the defendant's evidentiary showing about the remedy offered, including resolving any factual disputes in that regard. And then it must determine whether, in light of what the substantive law treats as available and just relief, the defendant's proposed cure is the appropriate compensation, correction, or remedy under the circumstances.⁹⁹

As to the standard of review, the Court acknowledged differing standards depending on the nature of the challenge to the use of ORCP 32I, including review of the decisions about the out-of-court remedies available:

We review the court's ultimate determination that a proposed cure provides the appropriate compensation, correction, or remedy for an abuse of discretion; however, to the extent that the court's exercise of discretion is predicated on conclusions about what a plaintiff has alleged and the available remedies for the alleged wrong, we review for errors of law; and to the extent that the ruling is predicated on factual findings about a defendant's showing as to the proposed cure, we review for any evidence in the record to support them.¹⁰⁰

Finally, the court in *Stewart* also held that the 30-day notice provision of ORCP 32I does not require that the defendant actually provide the proposed cure or remedy during the 30-day window between notice and the filing of a damages action, and that a defendant may make an offer under ORCP 32I even after plaintiff brings a class action for damages.¹⁰¹

4. Oregon's Superiority Approach Makes Sense for All Sides.

Stewart confirms the appropriate consideration of non-court remedies as bearing on class certification and the superiority of class treatment. The decision confirms that a defendant must make a "showing"—not merely a representation—that it has provided an

⁹⁹ *Id.* at 991.

¹⁰⁰ *Id.* at 991-92.

¹⁰¹ *Id.* at 983-85.

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appropriate class-wide remedy. Courts are well equipped to determine, based on evidentiary submissions, whether a proposed resolution is “fair, adequate, and reasonable” in the class settlement context.¹⁰² This task is likely easier outside the settlement context because, rather than having both sides urging for approval of a resolution, only the defendant is doing so where it seeks to strike the class allegations otherwise oppose class certification. This adversarial process is more likely to allow the court to make an informed decision as to the relative merits of the proposed resolution. Courts are well-equipped to review the evidence and make a “judgment call ... about what is suitable, fit, or proper, taking into account the facts and applicable legal principles” in a given case.¹⁰³

This balanced approach prevents either side from dictating the final result. Just as a defendant cannot provide an inadequate remedy and walk away, the plaintiff cannot insist on an unavailable remedy simply to prevent the defendant from providing an adequate one: “[M]ore than one remedy can be ‘appropriate’ for the same alleged wrong,” because the rule addresses “the terms ‘correction’ and ‘remedy,’” indicating that “a solution other than damages (‘compensation’) can also be the appropriate means of redress for that same wrong.”¹⁰⁴ That said, the court in *Stewart* reversed the trial court’s decision to strike the class allegations because the defendant’s remedy did not include mandatory statutory damages of \$200 per class member for reckless or knowing (as opposed to merely willful) violations as sought by the plaintiff.¹⁰⁵ Thus, a defendant cannot unilaterally ignore a remedy that is mandatory under a given statutory scheme and still obtain the benefit of striking class claims.¹⁰⁶ Any “remedial action must be suited to what has been alleged to be wrong—not what the potential defendant, after receiving the notice, might believe to be the actual wrong,” because class certification is not the place to litigate the merits of “liability for the ‘alleged wrong,’ only to show that it “has provided or will provide an appropriate remedy for the particular wrong that has been alleged.”¹⁰⁷ This is a significant protection for plaintiffs because “substantive law, not a procedural mechanism like [a class action], is the place that courts look to determine the nature of the

¹⁰² Fed. R. Civ. P. 23(e)(2).

¹⁰³ *Stewart*, 481 P.3d at 988.

¹⁰⁴ *Id.* at 989.

¹⁰⁵ *Id.* at 994.

¹⁰⁶ Because a defendant can provide a proposed cure during the litigation and before class certification, a defendant can, in theory, litigate such an issue—e.g., willfulness versus recklessness—and then make an offer to cure in the lesser amount, if the court rules in its favor. This approach is complicated, however, because such a showing may need to be made in connection with a motion for summary judgment in whole or part.

¹⁰⁷ *Stewart*, 481 P.3d at 989.

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harm and legally permissible or required remedies,” and the relevant remedy cannot “be untethered from the legally available relief for an alleged wrong under the applicable substantive law.”¹⁰⁸

E. The Rules Advisory Committee Should Amend Rule 23(b)(3) to Allow Trial Courts to Expressly Consider Any Appropriate Resolution in Deciding Whether Class Treatment is Superior.

The history, application, and interpretation of Oregon’s novel class action rule shows that in determining whether a class action is “superior” to other methods of resolution, examination of out-of-court remedies promotes the efficiency and judicial discretion at the heart of Rule 23. The Rules Advisory Committee need not adopt a whole-sale rule change similar to Oregon’s rule. Rather, the Rules Advisory Committee should give trial courts the discretion the rule drafters originally contemplated to examine whether, under the facts of a given case, a class action is necessary (*i.e.*, superior). Nothing in the history or Rule 23 suggests that the word “adjudication” was essential to the drafting or interpretation of Rule 23(b)(3) and that the goal was to make a common-sense determination as to whether the procedural device of the class action would achieve necessary economies. If an available remedy already does so, there is no need for a class action.

The Oregon experience supports adding a factor to (or revising) Rule 23(b)(3)’s superiority prong to expressly allow courts to consider whether there is an existing remedy already available or provided in determining whether a class action is superior. There is no evidence that the Oregon rule has been difficult for courts to implement, and indeed, the cases suggest that the rule has been effective, efficient, and appropriate.

II. CONCLUSION

The rationale for limiting in-court adjudications as the basis for determining whether a class action is superior does not withstand scrutiny either as a matter of historical context, logic, or efficiency. Using Oregon’s class-action rules as a model and case study confirms that a rule modification to allow alternative remedies beyond court proceedings can work and achieve the efficiencies Rule 23 was designed to achieve.

¹⁰⁸ *Id.* (“[N]othing in the text suggests that the ‘appropriate’ remedial action can be partial or less than complete compensation, correction, or remedy for the alleged wrong.”) (citation omitted).

TAB 15

Fair Labor Standards Act Collective Actions

Judge Michael Baylson (E.D. Pa.), a former Advisory Committee member, has submitted a proposed rule addressing management of collective actions under the Fair Labor Standards Act (FLSA) (25-CV-N).

The collective action provision of the Act predates the 1966 amendments to Rule 23 by nearly three decades. Under the Act, an action “may be maintained against any employer (including a public agency) . . . by any one or more employees for and in behalf of himself or themselves and any other employees similarly situated.”¹ Unlike class actions under Rule 23(b)(3), these FLSA actions are commonly referred to as “collective actions” because each claimant must affirmatively “opt in” to the action. That is, in contrast to Rule 23(b)(3), under which a class member is bound if he does not timely opt out, the FLSA provides that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”² In order to join, or be bound by, an FLSA collective action, one must file a consent form with the court. Because of this feature, the Eleventh Circuit has opined that the FLSA collective action is a “a fundamentally different creature than the Rule 23 class action.”³

Judge Baylson did not submit any explanatory material with his suggested new rule, but one can intuit that the driver of his proposal is the case-management challenge created by the different procedures associated with an FLSA collective action, particularly when it is joined with related state-law class action claims brought under Rule 23. Although the proposed rule is addressed to “collective actions” more generally (though it is unclear how many other recurring examples exist that arise under federal or state law),⁴ the driver appears to be the FLSA.

In full, Judge Baylson’s proposed new rule reads:

1. In a case brought as a collective action, the Court’s Rule 16(b) procedures shall include a date by which the plaintiff will move for approval of a collective action.
2. The Court need not schedule a “temporary” or “preliminary” approval.

¹ 29 U.S.C. § 216(b).

² *Id.* It is theoretically possible that a Federal Rule requiring all class or collective actions to be of the “opt out” variety would pass muster under the Rules Enabling Act and therefore supersede the FLSA’s “opt in” requirement, but this would be an unusually aggressive use of the rulemaking power, even if permissible.

³ *Cameron-Grant v. Maxim Healthcare Servs.*, 347 F.3d 1240, 1249 (11th Cir. 2003); *see also* Manual for Complex Litigation 4th § 32.42 (“Rule 23 and § 216(b) class actions are ‘mutually exclusive and irreconcilable’[.]”) (quoting *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1006 (11th Cir. 1996)).

⁴ For instance, the Age Discrimination in Employment Act (ADEA) explicitly borrows from the FLSA. *See* 29 U.S.C. § 626(b) (“The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.”).

3. The Court may set a date by which the parties should complete briefing on this issue.
4. If the Court approves a collective action, it must set a date by which “opt-ins” shall file their notice of an opt-in.
5. The procedures in existence for Rule 23 class actions may be used as a foundation for further orders in a collective action, provided that the FLSA’s opt-in requirement is protected.
6. In a hybrid case asserting both FLSA claims and class action claims under Rule 23, the settlement must provide for relief under both types of claims.

In sum, Judge Baylson suggests a new rule that would more closely align litigation of FLSA collective actions with the management provisions of Rule 23. This convergence may be especially useful in cases where a district judge must comply with the applicable circuit law regarding both the FLSA and Rule 23.

Although the simultaneous applicability of the FLSA (and the decades’ worth of cases interpreting its collective action provisions) and Rule 23 does present difficulties, it would be especially useful to hear whether Advisory Committee members have found these problems especially troublesome or intractable in practice. While it is not unheard of for the Federal Rules to address particular types of claims (e.g., Rule 9’s heightened pleading standards for fraud or mistake; Rule 23.1 on derivative actions; Rule 23.2 on actions related to unincorporated associations), the Advisory Committee does not typically take on projects directed toward claims of a particular type or brought under a specific federal statute. Prudential reasons for this include maintaining the trans-substantive character of the rules and respecting the limits of the Advisory Committee’s expertise when compared to more specific expertise about the practice of law in a specialized area. Moreover, while Judge Baylson’s suggestion implicitly supports using Rule 23 as a basis for handling various matters, there may be reasons to treat FLSA actions differently that would be best considered by Congress.

All that said, joinder of FLSA collective actions and Rule 23 class actions does create challenges. Although some of Judge Baylson’s proposed fixes (perhaps sections 1, 3, and 4) may be currently allowed under Rule 16(b) (which applies to all actions “[e]xcept in categories of actions exempted by local rule,” including presumably FLSA action), the others would work a change of practice in FLSA cases. For instance, courts disagree on whether a proposed settlement of “opt-out” class action claims may also release “opt-in” FLSA claims of class members.⁵ Moreover, although Judge Baylson’s suggestion that Rule 23 “may be used as a foundation for further orders in a collective action, provided that the FLSA’s opt-in requirement is protected” is potentially a useful jumping-off point, there may be particular aspects of Rule 23 that do not fit

⁵ Compare *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 452 (5th Cir. 2016) (enforcing “opt-out” class-action settlement that released FLSA claims) with *Stokes v. Interline Brands, Inc.*, No. 12-CV-05527, 2014 WL 5826335 (N.D. Cal. Nov. 10, 2014) (holding that an “opt-out” class settlement that releases FLSA claims would be a “end run” around the statutory requirement that plaintiffs “opt in” in order to be bound by an FLSA collective action).

well with FLSA actions. Some courts have held that certification requirements for FLSA and Rule 23 actions differ, and others use varying preliminary certification and notice processes for FLSA actions that may conflict with the procedures of Rule 23.⁶ There is, therefore, some appeal to the idea that the procedures in FLSA collective actions and state-law class actions should converge and be uniform throughout the circuits.

At this stage, however, Advisory Committee feedback on whether the interaction between FLSA and state-law class claims presents real-world problems that seem solvable through rulemaking. Another question is whether consideration of how the FLSA coexists with Rule 23 should wait until the Advisory Committee decides whether to move forward with a more general Rule 23 project.

Attachment(s):

- Suggestion 25-CV-N (Honorable Michael Baylson)

⁶ These varying processes are described well in a recent student note, Maguire Tausch, *Defying Goldilocks: Why the FLSA Collective Action Notice Standard Set Forth in Lusardi is Just Right*, 74 Emory L.J. 1513 (2025).

**UNITED STATES DISTRICT COURT
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September 30, 2025

RulesCommittee_Secretary@ao.uscourts.gov

RE: Proposed New Rule of Civil Procedure for “Collective Actions”

Dear Secretary:

1. In a case brought as a collective action, the Court’s Rule 16(b) procedures shall include a date by which the plaintiff will move for approval of a collective action.
2. The Court need not schedule a “temporary” or “preliminary” approval.
3. The Court may set a date by which the parties should complete briefing on this issue.
4. If the Court approves a collective action, it must set a date by which “opt-ins” shall file their notice of an opt-in.
5. The procedures in existence for Rule 23 class actions may be used as a foundation for further orders in a collective action.

Sincerely,

Michael M. Baylson
United States District Judge

cc: Professor Richard Marcus
UC Law-San Francisco
marcusr@uclawsf.edu

Professor Andrew Bradt
UC Berkeley Law
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TAB 16

Right of Representative to Attend Rule 35 Examinations

The American Association for Justice (AAJ) proposes that Rule 35(a) be amended to add new paragraphs entitling the party subject to examination to have a representative present at the examination and/or to record the examination. The proposed changes are as follows:

Rule 35. Physical and Mental Examinations

(a) Order for an Examination

- (1) ***In General.*** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.
- (2) ***Representative at Examination.*** The party being examined may have a representative present at the examination, who may observe but not disrupt the examination.
- (3) ***Recording of Examination.*** Unless otherwise ordered by the court, the party being examined or that party’s representative may record the examination by video or alternative means, which shall be made in an unobtrusive manner.

(42) * * * * *

AAJ reports that it is making this proposal “after hearing extensive complaints about discrepancies in the application of the rule by the courts, especially when compared to similar state rules.” It urges that it is timely to review the rule, which was last amended in 1991.

To some extent, it seems that this proposal has been prompted by different practices in state courts from those ordinarily employed under Rule 35. But an article cited in footnotes 4 and 5 of the submission says both that (1) “The federal courts have been largely uniform in rejecting the right for an attorney to be present at an IME,” and (2) “The federal district courts generally hold that recording devices will not be allowed unless good cause for its use is shown.”

Probably the great majority of such examinations are of individual plaintiffs. At least some of those plaintiffs are likely to be nervous about the prospect of submitting to an examination, particularly by an “expert.” The submission points out that the “suitably licensed or certified examiner” is very different from the plaintiff’s own doctor, and may routinely be employed on the defense side, perhaps repeatedly on the defense side and desirous of continuing this income stream. Presumably that bias issue could be brought out in cross-examination at trial, but the submission asserts a “considerable risk that the exam could become a de facto deposition.” It also says that the examination can be traumatizing for some plaintiffs. The submission also offers the following concern:

If the plaintiff attorney brings the matter of the improper medical exam to limit evidence outside the scope of the order, it is often not well-received and properly limited by the court. Even worse, juries are often more inclined to believe a well-spoken and well-dressed medical professional—even one who denies wrongdoing on the stand—than a plaintiff from a lower socioeconomic background who may have difficulty articulating the harm caused by a barrage of questioning. This is especially true when the plaintiff is already suffering from underlying physical or mental injury let alone understanding the medical terminology used by the medical professional.

The proposal is to offer either of two alternative cures to this problem or to direct that they operate in tandem. The first protection is having a representative present. The amendment would say that this representative “may observe but not disrupt the examination.” At the same time, the submission says that “if the CME results in disparagement or beratement of the party being examined, the representative can assist in stopping the harassment.” It could be that the dividing line between “disruption” and “protection” would sometimes be uncertain.

Directing by rule that the party subject to the examination could instead or also record the examination could be “especially helpful for the plaintiff who does not wish for a representative to be present during a psychological examination.” A recording could provide a way to demonstrate that the examiner engaged in inappropriate behavior outlined on p. 4 of the submission and described in the 100-page article cited in footnotes 6, 7, and 9 of the submission.

The AAJ reports that many states (e.g., California, Oklahoma, Arizona, Idaho, Illinois, Pennsylvania and Washington) have “updated” their rules to include provisions like the ones proposed for Rule 35(a).

There is a considerable body of federal experience bearing on these questions. *See* C. Wright, A. Miller & R. Marcus, 8B Fed. Prac. & Proc. Civ. § 2236 (3d ed.) (“Persons Present at Examination). For further discussion, *see* Wyatt & Bales, *The Presence of Third Parties at Rule 35 Examinations*, 71 Temple L. Rev. 103 (1998). The Federal Practice and Procedure treatise recognizes and examines the sorts of contending concerns raised by this submission. Operating under the current rule, federal courts have made what appear to be individualized determinations about whether to have an observer present, or to record the examination. *See* C. Wright, A. Miller & R. Marcus, 8B Fed. Prac. & Proc. Civ. § 2236, nn.8.50, 12.50 (citing cases).

Though these concerns are unquestionably of great practical importance in given cases, it is less clear that a rule change like the one proposed would improve matters over the current case-by-case evaluation. The proposal seems to deny the judge authority to exclude the preferred “representative” (combative counsel?) while permitting the court to order that the examination not be recorded. In terms of the combative lawyer who disrupts the examination, presumably that would be a ground for an order excluding this person. Does the party then have a right to name another person to take the place of combative counsel? Are no qualifications required for this representative? We surely want the judge to be able to scrutinize the credentials of the examiner. Indeed, the rule says the judge is supposed to do that. If there is to be a right to bring a representative of choice, should the judge be permitted to scrutinize the qualifications of that person as well? If so, when? In sum, this proposal appears to provide a flat rule on the representative and flip the default on recording.

It is likely that some Advisory Committee members have considerable experience with these issues. Should this amendment idea be pursued, it would probably be important to gather information about the experiences of the state courts that operate under different directions.

Attachment(s):

- Suggestion 26-CV-1 (American Association for Justice)



January 12, 2026

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Proposed Amendment to Rule 35: Physical and Mental Examinations

Dear Committee on Rules of Practice and Procedure:

The American Association for Justice (“AAJ”) submits this suggestion to amend Rule 35 regarding compulsory medical examinations (“CMEs”)¹ after hearing extensive complaints about discrepancies in the application of the rule by the courts, especially when compared to similar state rules. Rule 35 has not been amended since 2007, when the Advisory Committee on Civil Rules (“Advisory Committee”) completed its general restyling of the Federal Rules of Civil Procedure. The last substantive change to the rule was made by amendment in 1991. It seems timely to review Rule 35 and issues in its application that have arisen in the decades since it was last amended. With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, civil rights cases, consumer cases, class actions, and other civil actions, and regularly represent clients who are subjected to improper questioning and abuse during CMEs.

I. A Medical Exam Under Rule 35 Differs from a Patient Seeking Medical Care

Under Rule 35, a court may order a party whose mental or physical condition is in controversy to undergo a physical or mental examination by a licensed or certified examiner chosen by the party to the litigation. This medical examination has been referred to by many different names, including an independent medical examination (“IME”) and a defense medical examination (“DME”). But these terms are inapt and imprecise. For instance, using the term “independent” is inaccurate, as the medical examiner is retained by the requesting party and is not truly providing an independent opinion.² While these examinations disproportionately affect

¹ Courts in Clay County, Florida, refer to the medical examinations as “compulsory medical examinations” or “CMEs” because the physician or healthcare provider was not chosen by the court” and thus, cannot be referred to as “independent” to the jury. CLAY COUNTY CLERK OF COURT, [GUIDELINES FOR COUNSEL REGARDING COMPULSORY MEDICAL EXAMINATIONS](#) (CME) CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360(A)(1)(A) & IF ORDERED (B), AS WELL AS 1.360(B) AND 1.390(B) & (C) (Nov. 2, 2020).

² The independent nature of the medical evaluation is especially questionable when insurers hire the evaluators. Shanil Ebrahim et al., *Ethics and Legalities Associated with Independent Medical Evaluations*, 186(4) CAN. MED. ASS’N J. 248 (Mar. 4, 2014); Robert F. Spencer, Letter to the Editor, *Are Independent Medical Examiners Truly Independent?*, PAIN PHYSICIAN J., 2010, at 92 (“When physicians receive a substantial portion of their income from

plaintiffs bringing personal injury claims, they can be ordered for any party; thus, DME is too narrow a term.³ AAJ believes that compulsory medical examination or “CME” accurately captures the nature of these examinations, which are outside the scope of a standard doctor-patient relationship and are not voluntary.

II. Federal Courts Have Applied the Rule Narrowly, Resulting in Unfair and Traumatizing Treatment of Injured Plaintiffs

Unlike many state court rules, there is no requirement in Rule 35 that a plaintiff be accompanied to a medical examination by a representative⁴ or that the examination be recorded⁵. Frequently, this results in an examination well beyond the scope authorized in the court’s order under Rule 35(a)(2)(B). If the plaintiff, who is subjected to the examination, questions the medical professional performing the examination, they are often met with disparagement, belittling, and worse. In some instances, the plaintiff may be afraid to question the authority of the medical professional or may not have the confidence, language skills, or fortitude to do so. For plaintiffs who suffer from a variety of serious injuries, including traumatic brain injuries, post-traumatic stress disorders, or psychological disorders, these hostile interactions can inflict additional harm. Inappropriate, aggressive medical examination questions are designed to confuse and even trap plaintiffs, who just want the examination to stop but are unable to interrupt the relentless nature of certain medical professionals.

Importantly, the medical examination is not performed by a neutral third party, but by an examiner engaged by an adverse party—completely different from medical treatment sought by the plaintiff. There is considerable risk that the exam could become a de facto deposition, where privileged and irrelevant subjects may be discussed and reported without any knowledge of plaintiff’s counsel. Additionally, some medical professionals repeatedly are engaged by defense interests, such as insurance companies, to perform CMEs. Whereas an individual plaintiff is only undergoing the examination due to a court order, the medical professional has an existing relationship with opposing counsel.⁶

If the plaintiff attorney brings the matter of the improper medical exam to limit evidence outside the scope of the order, it is often not well-received and properly limited by the court. Even worse, juries are often more inclined to believe a well-spoken and well-dressed medical

performing IMEs (or if their hourly rate for IMEs is significantly greater than their hourly rate for patient care), they will not be independent.”).

³ *Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964) (“Rule 35, on its face, applies to all ‘parties,’ which, under any normal reading, would include a defendant.”).

⁴ See Samuel D. Hodge, Jr., Melissa Thomas, & Connor Lacy, *A Guide to the Independent Medical Examination*, 25(2) ALB. L.J. SCI & TECH 339, 358 (2015) (“The federal courts have been largely uniform in rejecting the right for an attorney to be present at an IME.”).

⁵ *Id.* at 366 (“The federal district courts generally hold that recording devices will not be allowed unless good cause for its use is shown.”).

⁶ Dorothy Sims, Chris Dove, & Richard Frederick, *Transparency in Forensic Exams*, 24 NEV. L.J. 531, 537 (2024) (“Because the expert is paid by the defendant, the expert can expect future business or referrals if her testimony is successful at defeating the claim or suppressing the settlement value of the claim in the event the jury goes with the defense expert’s opinion.”).

professional—even one who denies wrongdoing on the stand—than a plaintiff from a lower socioeconomic background who may have difficulty articulating the harm caused by a barrage of questioning. This is especially true when the plaintiff is already suffering from underlying physical or mental injury let alone understanding the medical terminology used by the medical professional.

III. Two Proposed Rule Changes Would Solve the Problem

AAJ proposes two changes to the rules that would address these troubling issues. The first change would allow for a representative of the party being examined to be present at the medical examination. Not only does the presence of representative prevent disparagement of the plaintiff, but it would also ensure that the plaintiff's attorney can properly assess whether the medical examination was properly given and reported.⁷ Second, AAJ recommends adding an option in the rule to record the examination. The changes would ensure that any inconsistencies on what transpired at the examination can be reviewed and resolved by the court while maintaining any privacy concerns of the person being examined.

A. Add an optional representative for the party being examined

The presence of the representative would be discretionary to ensure that the party undergoing the medical exam is comfortable with the presence of an additional person during the medical examination. The proposed text (attached) would make clear that the representative may not disrupt the examination. If the medical examination is conducted properly, there should be no disruption whatsoever. However, if the CME results in disparagement or beratement of the party being examined, the representative can assist in stopping the harassment. The accompanying Committee Note could provide examples of individuals who are considered appropriate representatives, including the counsel of record and other persons designated by the counsel of record. Importantly, the parent or guardian of a minor child should *not* be considered the designated representative under this amendment, as that individual may also need to attend a medical examination with the child to provide care and comfort.⁸

B. Add a recording option

The second change would permit the party being examined—or that party's representative—to record the examination. Again, the recording is a discretionary option, but may be especially helpful for the plaintiff who does not wish for a representative to be present during a psychological examination. A recording ensures accountability and impartiality in the medical examination and deters a medical professional from conducting an exam where the plaintiff is manipulated, exposed to severe distress or psychological exploitation, or treated in an

⁷ *Id.* at 540 (“When courts deny an injured party’s request to videorecord their examination by a defense medical or psychological expert, the court deprives the injured party of a meaningful way of determining whether the expert properly administered the test and then correctly reported the results.”).

⁸ *See, e.g., Fla. R. Civ. P. 1.360(a)(1)(C)* (providing that “[a]ny minor required to submit to examination pursuant to this rule shall have the right to be accompanied by a parent or guardian at all times during the examination, except upon a showing that the presence of a parent or guardian is likely to have a material, negative impact on the minor's examination”).

unprofessional manner. Recordings could be audio only or video, depending on the type of examination with the option of allowing the party to select the type of recording.

Studies of recorded CMEs reveal a number of disturbing behaviors by medical professionals, even by those who knew they were being recorded. These documented failures include: (1) tests that were never administered by a trained professional; (2) misrepresentation of tests, including falsely claiming that tests were performed; (3) complete abandonment of standardized procedures; and (4) changing or improperly influencing test answers.⁹ A recording can document whether the medical examination was properly conducted and whether the reported results comport with the examination and even help determine whether the medical professional was competent to perform the exam.¹⁰

C. Privacy concerns are adequately addressed with the proposal

Privacy concerns are not a valid reason to oppose this suggestion. While AAJ strongly supports privacy protections for plaintiffs, the recording would be optional for the party undergoing the examination and is designed to ensure transparency. The privacy interest belongs to the person undergoing the examination, not the medical professional conducting the examination.¹¹

Some arguments against video recording (and a representative attending the examination) ignore the realities of modern litigation as well as expectations regarding video recordings. At numerous stages in a case, including depositions, hearings, and trial, parties are questioned and recorded with multiple people present.¹² People are aware that mobile phones and cameras are capturing their movements and are aware that their images are frequently captured on camera. Precluding a party from recording the exam affords the medical professional more protection than if they simply walked across the street and were video recorded by CCTV cameras or other people.¹³

⁹ The article details a litany of problems with medical exams, including medical examinations that were not actually conducted, a medical examination conducted by a secretary instead of a licensed medical professional, stating that the results of the medical examination were normal when the video recording indicated otherwise, altering the answers provided by the examinee, conducting the examination next to a construction site, and providing prompts to the plaintiff to answer the question. See Sims et al., *supra* note 6, at 549–55.

¹⁰ A recent article regarding examinations performed in Washington state documented problems with the medical examinations, including over-reliance on doctors well-past retirement age: “In a recording of Lorick’s [injured truck driver’s] most recent exam in September 2024, the examiner appears to urinate on himself. The doctor, in his late 80s, is shown standing over Lorick during the exam. As the doctor turns to the camera, a dark spot on his pants can be seen where there was not a spot before. The doctor then quickly exits the room, returning shortly afterward to finish the exam. ‘He seemed to be so mentally out-of-it that he didn’t even notice it was a concern,’ said David Lauman, a lawyer at the firm representing Lorick.” Lizz Giordano, *Retired Docs Earn Millions Examining Injured Washington Workers*, Cascade PBS, Aug. 22, 2025.

¹¹ Hodge, Jr., et al., *supra* note 4, at 364 (“The privacy interest at an independent medical examination is that of the patient’s and not the doctor’s privacy right. Therefore, it is the patient’s decision to waive their privacy right and allow the exam to be videotaped.”).

¹² Sims et al., *supra* note 6, at 581.

¹³ *Id.*

IV. State Courts Rules Provide Successful Examples

Many state courts have updated their rules and provide a template for modernizing Rule 35.¹⁴ One state to consider is California, which authorizes both an “observer” and the recording of the proceeding:

(a) The attorney for the examinee or for a party producing the examinee, or that attorney’s representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination.

(b) The observer under subdivision (a) may monitor the examination, but shall not participate in or disrupt it.¹⁵

The California rule also affirmatively permits a motion for a protective order if either the medical examiner or the observer become abusive.¹⁶

Washington state has a similar rule which provides for both an observer and an opportunity to make an audiotape recording of the examination with a videotape recording available by consent of the parties or order of court:

Unless otherwise ordered by the court, the party being examined or that party’s representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner. A videotape recording of the examination may be made on agreement of the parties or by order of the court.¹⁷

More updated state rules permit video recordings as the optimal method to record medical examinations. Some states may specify that, “The plaintiff also has the right to designate an additional person to be present and video record the examination.”¹⁸ These rules provide greater flexibility for who accompanies the party to the medical examination. Arizona’s rule similarly specifies that the person recording the examination may be a different person than the representative attending on behalf of the person to be examined.¹⁹ Finally, while Florida’s rule²⁰ is similar to the federal rule, extensive local rules provide for both representatives to

¹⁴ See, e.g., OKLA. STAT. ANN. tit. 12, § 3235; Ariz. R. Civ. P. 35(b)–(c); Idaho R. Civ. P. 35(a)(3); 735 ILL. COMP. STAT. ANN. 5/2-10039(d); and Pa. R. Civ. P. 4010(a)(4)–(5).

¹⁵ Cal. Civ. Proc. Code § 2032.510.

¹⁶ While this language might serve as a deterrent, it is not needed at the federal level where Rule 26 would already permit a party to seek a protective order.

¹⁷ Wash. Super. Ct. Civ. R. 35.

¹⁸ 735 ILL. COMP. STAT. ANN. 5/2-10039(d).

¹⁹ Ariz. R. Civ. P. 35(b)–(c) (requiring 30 days’ notice of the examination, including whether, how, and by whom it will be recorded).

²⁰ Fla. R. Civ. P. 1.360.

examinations and recordings to be made by the party undergoing examination.²¹ These rules provide additional protections to the party undergoing examination, such as prohibiting questions from the medical examiner to the party being examined regarding fault and prohibiting the defense attorney from recording the examination.²² While this section is not a comprehensive review of state rules, it may provide the Advisory Committee with some helpful guidance on the success of some states in addressing the problems caused by traumatizing CMEs.

V. Conclusion

AAJ urges the Advisory Committee to revise Rule 35 to protect parties from abusive and traumatizing treatment when undergoing court-ordered medical examinations through two simple, discretionary changes: (1) providing for a representative to attend with the party, and (2) allowing for a recording of the examination that would protect the party from traumatic or inappropriate treatment while ensuring flexibility when it may be needed. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,



Bruce Plaxen
President
American Association for Justice

²¹ See SEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA, [GUIDELINES REGARDING COMPULSORY MEDICAL EXAMINATIONS CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360\(A\)\(1\)\(A\) AND 1.360\(B\)](#) (April 2017), (“One of Plaintiff’s counsel, or a representative thereof, a videographer, a court reporter, an interpreter, if necessary, and, if a minor, a parent or guardian may attend the compulsory medical examination. No other persons may attend without specific order of the Court.”).

²² [Order Compelling 1.360 Examination](#), Hon. Paul L. Huey, 13th Judicial Circuit, Hillsborough Cnty. Fla. (last visited Dec. 17, 2025) (requiring “all parties involved” to observe enumerated conditions, such as “2. Questions pertaining to fault, when the Plaintiff hired his/her attorney, who referred the Plaintiff to any doctor, and what the Plaintiff to his attorney or any investigators are NOT permitted” and “6. Neither Defendant’s attorney nor any of Defendant’s representatives may attend, or observe, record or video the exam.”).

ATTACHMENT

Rule 35. Physical and Mental Examinations**(a) Order for an Examination.**

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Representative at Examination.* The party being examined may have a representative present at the examination, who may observe but not disrupt the examination.

(3) *Recording of Examination.* Unless otherwise ordered by the court, the party being examined or that party's representative may record the examination by video or alternative means, which shall be made in an unobtrusive manner.

(4)(2) *Motion and Notice; Contents of the Order.* The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) *Request by the Party or Person Examined.* The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) *Failure to Deliver a Report.* The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) *Scope.* This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

TAB 17

Artificial Intelligence Hallucinations

One can hardly turn around nowadays without reading in the press about how artificial intelligence (AI) is intruding into everything—business operations; the stock market; childhood and education; romance; politics; warfare; and medical treatment. The list goes on and on. Surely litigation would not be spared.

It is now widely, perhaps universally, known that AI may sometimes “hallucinate” and make up things that do not actually exist. Pertinent to civil litigation is the recurrent phenomenon of AI-drafted court documents that cite “authority” that does not actually exist, often supposed cases.

Such imaginary authorities are also found in other disciplines. For example, a report by the Make America Healthy Again Commission was found to have errors a medical journalism professor said were “characteristic of the use of generative artificial intelligence, which has led to similar issues in legal filings and more.” Dani Blum & Maggie Astor, *White House Health Report Included Fake Citations*, N.Y. Times, May 29, 2025.

In the legal sphere, the problem is not limited to U.S. courts. The High Court of England, for example, has “warned lawyers . . . that they could face criminal prosecution for presenting false material generated by artificial intelligence, after a series of cases cited made-up quotes and rulings that did not exist.” Lizzie Dearden, *English High Court Warns Lawyers to Stop Citing Fake A.I.-Generated Cases*, N.Y. Times, June 6, 2025.

The Evidence Rules Committee has responded to the use of AI to create evidence by proposing a new Rule 707:

Where 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.

On civil case motions, these developments could constitute one more burden for judges. See Evan Ochsner, *AI-Faked Cases Become Core Issue Irritating Overworked Judges*, Bloomberg Law News, Dec. 29, 2025. Since 2023, there have been reports of a “patchwork” of approaches from different courts or judges. See Shweta Watwe, *Judges Reflect on GenAI Use One Year after ChatGPT’s Debut*, Bloomberg Law News, Nov. 28, 2023 (referring to a “patchwork of approaches in AI Standing Orders”); Jessiah Hulle, *AI Standing Orders Proliferate as Federal Courts Forge Own Paths*, Bloomberg Law News, Nov. 8, 2023; see also Suzanne Monyak, *Ninth Circuit Creates Panel to Study Artificial Intelligence*, Bloomberg Law News, Jan. 25, 2024.

Lawyers have begun to express concern about the considerable variety of judicial responses. Jessiah Hulle reported:

While early AI orders materialized to address the problem of fake case citations, judicial guidance is expanding to address a wider breadth of AI issues. For instance, the 30th, 78th, and 89th District Courts of Wichita County, Texas, have issued

standing orders prohibiting the use of AI to record, listen to, or transcribe courtroom proceedings. The San Diego County Superior Court has issued a similar general order with an exception for court-approved recordings. * * * A study from the University of Michigan suggests that generative AI transcription tools can hallucinate just like research tools, adding made-up information to transcripts.

Jessiah Hulle, *Litigators Must Do Court-by-Court Homework as AI Rules Flourish*, Bloomberg Law News, Nov. 12, 2024.

On the other hand, David Lat argues that such rules are redundant because lawyers are already required to do what such rules command. *See* David Lat, *AI Use in Law Practice Needs Common Sense, Not More Court Rules*, Bloomberg Law News, Feb. 28, 2026, Thus, in one case the judge imposed sanctions on the lawyers “using good old-fashioned Rule 11—no fancy new AI rule needed.” *Id.*

There has also been discussion of judges using AI to prepare their decisions. *See, e.g.,* Xavier Rodrigues, *Judging AI: How U.S. Judges Can Harness Generative AI Without Compromising Justice*, 109 *Judicature* 10 (2025); Allie Reed, *AI Greenlit for Attorneys, Judges by Illinois Supreme Court*, Bloomberg Law News, Dec. 18, 2024; Jennifer Kay, *Delaware Judges, Law Clerks Cleared to Use Generative AI Tools*, Bloomberg Law News, Oct. 22, 2024. But there are risks. *See* Megan Cassidy, *Man Who Lost Motion to Musk Alleges S.F. Judge Used Bad AI*, S.F. Chronicle, Dec. 20, 2025.

Part of this set of issues has now arrived on the Committee’s doorstep.

25-CV-S is a December 16, 2025 Law360 article entitled *A Uniform Federal Rule Would Curb Gen AI Missteps in Court*, by Mark Behrens and Jacob Bennett. It reports that a French researcher has identified over 670 reported cases involving such hallucinated “authorities,” most from the U.S. The authors find “laissez-faire approaches” to these problems unsatisfactory, but also warn that outright bans on use of AI would “throw out the baby with the bathwater,” particularly to the disadvantage of pro se litigants who may be more likely to rely on AI bots for assistance with court filings.

But they also caution against disclosure requirements, which have been adopted by some courts, because that “risks stigmatizing practitioners who make responsible use of AI and may chill the use of tools that can be beneficial.” They propose an addition to Rule 11(a):

I certify that I or an individual under my supervision has reviewed all content in this filing created with the assistance of generative artificial intelligence to ensure that the authorities cited therein exist, have been accurately cited, and support the propositions for which they have been cited. I further acknowledge that the court may take corrective action, including imposition of sanctions, if hallucinated content is submitted to the court.

Suggestion 25-CV-S at 3.

25-CV-V, from Jonathan Moseley, also focuses on Rule 11. He urges that the rule be “expanded” to require certification that the signer “has actually reviewed the precedents or other

citations relied upon in the pleading[.]” Suggestion 25-CV-V at 2. He also urges that Rule 11 apply to criminal cases and on appeal. But Federal Rule of Civil Procedure 1 says that the Civil Rules “govern the procedure in all *civil* actions” (emphasis added). Federal Rule of Criminal Procedure 1(a)(1), on the other hand, says that the Criminal Rules “govern the procedure in all *criminal* proceedings” (emphasis added). (Bankruptcy Rule 9011 contains provisions parallel to Civil Rule 11.)

The question for the present is whether the time has come to try to draft a Civil Rule that responds to these concerns. One simplistic reaction is that we already have one. Rule 11(b)(2) already says that, by submitting a paper to the court, the person who signs it certified that “the claims, defenses, and other legal contentions are warranted by existing law[.]” That would seem, at a minimum, to verify that those authorities exist. Probably the bigger debate in many cases is whether actual authority really stands for the proposition for which a party cited it. The proposed amendment quoted above adds a certification that the “real” authorities cited “support the propositions for which they have been cited.” That could open the door to much broader sanction authority; citing real “authority” might not be sufficient if the court determined that it was actually not applicable to the current case.

But many of the reports of hallucinations seem to be about situations in which there is no such authority; it is invented by the AI device. One would think that checking citations by using Westlaw, or Lexis or the like is pretty simple; all one needs is the citation given in the document to search to see if it exists.

As suggested above, the thornier problem long antedates ChatGPT—litigants claiming that actual authorities support positions they do not actually support. It is likely that every lawyer has, on reading the cases cited by the other side, been able to argue forcefully that those authorities do not support the other side’s position. Maybe that shows a violation of Rule 11(b)(2), but it seems quite different from the hallucination problem.

Perhaps, then, one could argue that any disclosure requirement adopted by local rule, court order, etc. could be said to violate Rule 83 because it goes beyond the national rule, and Rule 83 says a local rule must be consistent with the national rules. That seems an overbroad reading of Rule 83, however.

If the problem is that different courts (or different judges) take different attitudes toward disclosure requirements, it might be that a national rule specifying disclosure requirements would be useful. Depending on the wording, that might invalidate all existing local rules, etc. that specify how a given court regards use of AI for court filings.

One thing that should be true, however, is that a Civil Rule cannot control how a judge uses AI in analyzing issues or preparing rulings.

So the basic question remains whether it is time to venture into this new terrain. In a sense, this question can seem reminiscent of the difficulty the Advisory Committee encountered a quarter century ago in adapting the discovery rules to deal with discovery of digital material. That project took nearly a decade. And during that time the nature of digital materials changed vastly.

It may well be that AI is evolving rapidly in ways that the Committee would probably have to try to understand to design rule changes that suitably respond to the hallucination problem or other issues presented by use of AI.

One challenge might well be to define “generative AI” in a way suitable for a rule. Surely Boolean searches using Westlaw or Lexis (which have been around for nearly half a century) would not qualify. But Westlaw and Lexis now offer services they call “artificial intelligence.” Does that mean that special rule provisions should apply to contemporary use of those services?

And presumably the various “true” AI services that are competing in the marketplace are not all identical with one another. Would a definition apply to some but not others? Might a definition that currently applies to all the pertinent services not apply to new methods developed in coming years? With digital discovery, one goal of rule amendments was to be “technology neutral.” It would seem that the same goal applies here.

For present purposes, then, the first question is whether to try the potentially demanding educational process necessary to craft an appropriate rule. Maybe that time has not actually arrived.

Attachment(s):

- Suggestion 25-CV-V (Jonathan Moseley)
- Suggestion 25-CV-S (Mark Behrens and Jacob Bennett)

From: Jonathon Moseley
Sent: Wednesday, October 29, 2025 12:45 PM
To: RulesCommittee Secretary
Subject: PROPOSED RULE: Expand FRCP Rule 11 to exclude Artificial Intelligence

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

Re: Proposed Alteration to Rule 11 of Federal Rules of Civil Procedure regarding spreading "fad" of Artificial Intelligence.

I am no luddite. In high school, my sister alleged that the school mainframe computer was my girlfriend because I spent all my time there. Nevertheless, tools must be properly used. Over-excitement and fads frequently lead to mis-use of technology and tools. Sometimes the right tool for a job is a pencil. Sometimes it s a super-computer.

FRCP RULE 11 requires that (1) an attorney's signature on a court pleading or verbal motion in court constitutes the certification of the attorney and (2) the certification requires that the attorney has researched both the legal claim asserted legally and factually and its application to the circumstance, along with some other details.

"ARTIFICIAL INTELLIGENCE" -- though poorly defined and often meaning different things to different people -- has taken on the quality of a full-blown social fever of over-excitement.

I ask the Standing Committee to consider that it is not possible for an attorney to comply with Rule 11 using artificial intelligence to do legal research or draft arguments.

Unless by "AI" we mean dictionary checks to look for mis-spelled words or maybe alerts (left to the drafter's decision) of possible grammatical mistakes.

Perhaps red flags of questioned or bad legal precedents could be an AI application consistent with an attorney's obligation under Rule 11. Legal research tools do this, but even a more advanced / automated version could be a proper use consistent with Rule 11.

But an attorney cannot digest a situation and file a motion or respond to a motion without applying the trained, skilled, and licensed abilities of the attorney.

Current allegedly "AI" systems will now not only draft a motion or response to a motion but decide by scanning a pleading what arguments to make in an AI generated pleading in reply.

That skill-based task cannot be delegated to a computer program.

Similarly, legal research cannot be delegated to a computer program, unless in the form of offering suggestions for an actual attorney to read.

Frankly, the search functions of some legal research tools are poor (inefficient) and improvements in presenting candidate precedents for an attorney's review would be appropriate and beneficial.

But ultimately, a licensed attorney must ultimately review precedents to understand them, verify them, and decide how to use them. (It is not unusual for a precedent to cover 5 topics, 90% of the precedent is on unrelated issues, but 1 paragraph at the end is the only precedent that can be found but is a powerful precedent.)

When I served on the George Mason School of Law Law Review, one of our assignments regularly was to do "spade work" to verify every citation included in a law review article or law note.

In law school at George Mason, we were warned not to use the "squib" headings in the reporters, but to be careful to actually read the precedent.

THEREFORE, I would like to propose that:

FRCP Rule 11 be expanded to require the certification that the signing / moving attorney (or perhaps a licensed associate or subordinate attorney) has actually reviewed the precedents or other citations relied upon in the pleading, and has crafted the arguments and/or claims based on the attorney's review and understanding of the case and his client's interests.

Although many judges over-use Rule 11, and they should be reminded that simply "being wrong" is not a violation of Rule 11. Losing a motion is not grounds for Rule 11. Furthermore, arguable cases (not clear if Rule 11 is violated or not) should never constitute a Rule 11 violation.

Nevertheless, Rule 11 really needs to apply also with criminal cases and appellate cases.

But it should be clarified that Rule 11 is much more narrow than what many judges have drifted into.

To violate Rule 11 one must both (1) be objectively wrong, (2) be unreasonably wrong, (3) be wrong in more than just a *de minimis* way, (4) **but also that the attorney did not bother to check.** Simply being wrong is not enough for Rule 11 to apply.

Jonathon A. Moseley

A Uniform Federal Rule Would Curb Gen AI Missteps In Court

By **Mark Behrens and Jacob Bennett** (December 16, 2025)

Editor's note: Law360 welcomes opinionated commentary and debate in our Expert Analysis section. To submit op-eds or rebuttals, or to speak to an editor about submissions, please email expertanalysis@law360.com.

In his 2023 Year-End Report on the Federal Judiciary, Chief Justice John Roberts expressed optimism that artificial intelligence has the "welcome potential to smooth out any mismatch between available resources and urgent needs in our court system."^[1]

AI can help lawyers practice more efficiently, such as by gathering and summarizing information or creating initial drafts of documents. And AI tools are already being used in self-represented litigations, and have allowed pro se litigants — some of the most disadvantaged users of the civil justice system — to win cases.^[2]

Justice Roberts noted, however, that the "use of [generative] AI requires caution,"^[3] because the emerging technology is prone to making mistakes — one of generative AI's "shortcoming[s] [is] known as hallucination."^[4]

As an IBM article explains, "AI hallucination is a phenomenon where ... a large language model" — a computer program that generates new information based upon texts or other media it has analyzed — "perceives patterns that are nonexistent, ... creating outputs that are nonsensical or altogether inaccurate."^[5]

For instance, AI can generate fictitious cases and attribute fictitious language to real cases.^[6] Programs such as ChatGPT, Anthropic's Claude and Google's Gemini are all powered by large language models and thus capable of hallucinating.^[7]

French lawyer and researcher Damien Charlotin has identified over 670 cases where generative AI produced hallucinated content, mostly in the U.S.^[8] The New York Times reported in November that Charlotin used to find "three or four examples in a month. Now he often receives that many in a day."^[9]

The same article said that Los Angeles-based lawyer Robert Freund, who also tracks legal AI misuse globally, "has publicly flagged more than four dozen examples this year."^[10]

Courts are beginning to take notice. In September, Chief U.S. District Judge Sheryl Lipman of the U.S. District Court for the Western District of Tennessee wrote in *Mid-America Apartment Communities Inc. v. Philipson* that "[t]he increased use by lawyers and non-lawyers of artificial intelligence to draft legal documents has resulted in a scourge of fictitious case citations in court documents in recent years."^[11]

Similarly, in an October ruling in *U.S. v. McGee*, U.S. District Court Judge Terry Moorner Jr. of the U.S. District Court for the Southern District of Alabama described the problem of fake AI-generated case citations as an "epidemic [that] continues unabated."^[12]



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The Guardian reported in November that courts as far away as Australia have complained that judges must now serve as "human filters" for an "unsustainable" surge in AI-generated content.[13]

Thus far, the burden of policing AI hallucination has mostly fallen on individual courts, which have adopted a patchwork of rules and standing orders.[14] These provisions fall into five broad categories:

- At one end of the spectrum, the U.S. Court of Appeals for the Fifth Circuit has declined to adopt AI-specific rules, concluding that general prohibitions on filing frivolous appeals suffice to deter attorneys' use of hallucinated authorities.[15]
- Many federal trial courts take a similar hands-off approach, but warn litigants about the possibility of hallucination.[16] These warnings put litigants on notice of the risks of using generative AI, making it easier for a court to sanction attorneys who rely on hallucinated authority.
- Some courts allow litigants to use generative AI, but require counsel to disclose whether generative AI — sometimes referred to as just "AI" — was used in a filing, and to certify that any citations have been checked for accuracy.[17] Other courts require litigants to identify the specific portions of documents that AI was used to generate.[18]
- Some courts permit the use of AI, but limit the programs litigants may use.[19]
- Finally, some courts prohibit the use of generative AI.[20]

Laissez-faire approaches allow missteps to flourish and waste party and court resources trying to locate false citations, identify other AI-based errors, and conduct sanctions proceedings.[21]

Conversely, blanket bans on the use of generative AI throw the baby out with the bathwater, eliminating the risk of hallucination but depriving litigants of the technology's potential benefits. Pro se parties who may depend on AI tools may be disproportionately harmed.

As New York University School of Law professor Stephen Gillers told Bloomberg Law in October, "The judge who bars use of AI under any circumstance is misguided." [22] Instead, Gillers said, "[w]hat the judge should say is learn how to use AI, [and] use it carefully." [23]

There are also problems with approaches taken by courts that have tried to strike a balance between innovation and deterrence by adopting certain disclosure requirements and rules limiting the applications litigants may use.

First, requiring a litigant to disclose whether AI was used does not actually prevent hallucinations.

Further, requiring disclosure of the use of AI risks stigmatizing practitioners who make responsible use of AI and may chill the use of tools that can be beneficial. That risk is higher when the disclosure requirement applies to practitioners who use any sort of AI as opposed to generative AI specifically.[24]

For these reasons, none of the strategies adopted by courts so far has achieved universal acceptance. We propose a rule requiring litigants to certify that they have checked all AI-generated citations and other content for accuracy.

As U.S. District Judge P. Kevin Castel of the U.S. District Court for the Southern District of New York said in a 2023 ruling in *Mata v. Avianca Inc.*, "there is nothing inherently improper about using a reliable artificial intelligence tool for assistance," but lawyers retain "a gatekeeping role ... to ensure the accuracy of their filings." [25]

The American Bar Association has likewise held that a lawyer's "duty to provide competent representation" may require "an appropriate degree of independent verification or review" of an AI tool's output. [26]

We propose an amendment to Rule 11(a) of the Federal Rules of Civil Procedure to require the following certification in any document containing citations that is filed with a court:

I certify that I or an individual under my supervision has reviewed all content in this filing created with the assistance of generative artificial intelligence to ensure that the authorities cited therein exist, have been accurately cited, and support the propositions for which they have been cited. I further acknowledge that the court may take corrective action, including imposition of sanctions, if hallucinated content is submitted to the court.

This language would put attorneys on notice as to their obligations and deter blind reliance on generative AI, without deterring the use of potentially beneficial tools. The proposed rule would also remind judges of the pitfalls of AI and encourage best practices, potentially allowing members of the judiciary to avoid embarrassing missteps too.

The proposed rule fits neatly in the framework of Rule 11(a). [27] Under that rule, lawyers are required to sign papers they submit to a court and include several pieces of information in their signature blocks. Adding a certification below the attorney's signature line would not be burdensome, and it would remind attorneys of their obligation to use AI responsibly when submitting a motion or brief.

Moreover, Rule 11(a) offers a built-in remedy for failure to include the information it demands in the form of a requirement that courts strike the offending filing with leave to refile. This mandatory — but light and easily resolvable — sanction complements and effectuates the proposed rule's purpose of ensuring that attorneys pause to consider whether they have used AI responsibly.

As reported in *Bloomberg Law* on Dec. 1, U.S. Magistrate Judge Allison Goddard of the U.S. District Court for the Southern District of California counsels, "The best approach is to run toward technology, not away from it," and that goes for generative AI, as well. [28]

But running toward technology does not mean running blindly. A rule would help address the recent and growing number of missteps by lawyers as a result of the use of generative AI in court filings.

We encourage the federal judiciary's Advisory Committee on Civil Rules to consider the proposed rule or a similar federal court rule to replace the current patchwork of orders.

As U.S. District Judge Marina Garcia Marmolejo of the U.S. District Court for the Southern District of Texas said in a November article in *Ars Technica*, courts have "scant resources to

spare ferreting out erroneous AI citations in the first place, let alone surveying the burgeoning caselaw on this subject." [29]

A uniform federal rule would also provide a model for the states. Our proposed rule would provide clarity to the bar, curb AI abuses and relieve judges from time spent policing fake AI-generated citations.

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[1] Chief Justice John G. Roberts, Jr., Supreme Court of the United States, 2023 Year End Report on the Federal Judiciary, at 5, <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>.

[2] Jared Perlo & Angela Yang, These People Ditched Lawyers for ChatGPT in Court, NBC News.com (Oct.8, 2025), <https://www.nbcnews.com/tech/innovation/ai-chatgpt-court-law-legal-lawyer-self-represent-pro-se-attorney-rcna230401>.

[3] 2023 Year End Report on the Federal Judiciary, *supra*, at 5.

[4] *Id.* See also, Daniel E. Ho, Hallucinating Law: Legal Mistakes With Large Language Models are Pervasive, Stan. Human-Centered A.I. (Jan.11, 2024), <https://hai.stanford.edu/news/hallucinating-law-legal-mistakes-large-language-models-are-pervasive> (recording hallucination rates between 69% and 88% for law-related queries).

[5] IBM.com, What Are AI Hallucinations?, <https://www.ibm.com/think/topics/ai-hallucinations>; see also Cloudflare.com, What is a Large Language Model (LLM)?, <https://www.cloudflare.com/learning/ai/what-is-large-language-model/>.

[6] See *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023) (sanctioning attorney for submitting brief containing nonexistent cases); *Coomer v. Lindell*, 2025 WL 1865282 (D.Colo. July 7, 2025) (sanctioning attorneys in connection with brief containing AI-generated misattributions of case law).

[7] Open AI, <https://chatgpt.com/>; Anthropic, <https://www.anthropic.com/claude>; Google, <https://gemini.google.com/app>.

[8] Damien Charlotin, AI Hallucination Cases, https://www.damiencharlotin.com/hallucinations/?q=&sort_by=-date&period_idx=0.

[9] Evan Gorelick, Vigilante Lawyers Expose the Rising Tide of A.I. Slop in Court Filings, N.Y. Times (Nov. 7, 2025), <https://www.nytimes.com/2025/11/07/business/lawyers-ai-vigilantes.html>.

[10] Id.

[11] Mid-America Apartment Cmties., Inc. v. Philipson, 2025 WL 2625359, at *2 (W.D. Tenn. Sept. 11, 2025).

[12] United States v. McGee, 2025 WL 2888065, at *3 (S.D. Ala. Oct. 10, 2025).

[13] Tom McIlroy. Judges Have Become Human Filters as AI in Australian Courts Reaches Unsustainable Phase, Chief Justice Says, The Guardian (Nov.20, 2025), <https://www.theguardian.com/law/2025/nov/21/judges-have-become-human-filters-as-ai-in-australian-courts-reaches-unsustainable-phase-chief-justice-says>.

[14] LexisNexis tracks federal and state court rules on generative AI and collects these orders in one location.

[15] Nate Raymond, Fifth Circuit Scraps Plan to Adopt AI Rule After Lawyers Object, Reuters (June 11, 2024), <https://www.reuters.com/legal/transactional/5th-circuit-scraps-plans-adopt-ai-rule-after-lawyers-object-2024-06-10/>; see also Garces v. Hernandez, 2025 WL 2401001, at *2 (5th Cir. Aug. 19, 2025) (per curiam) ("litigant-users of AI ... must verify the accuracy of AI-generated information, mindful that citing authorities that are generated by AI may violate appellate rules 32 and 38"), cert. denied, 2025 WL 3131905 (U.S. Nov. 10, 2025).

[16] See, e.g., In Re: Use of Generative Artificial Intelligence in Court Filings, Gen. Order No.2025-04 (S.D.Tex. May 7, 2025), https://www.txs.uscourts.gov/sites/txs/files/general-orders/General_Order_2025-04_Use_of_Generative_AI_in_Court_Filings.pdf; Haikala Chambers Initial Order, Hon. Madeline H. Haikala (N.D.Ala.), <https://www.alnd.uscourts.gov/sites/alnd/files/MHH%20Initial%20Order%20as%20of%207-8-24.pdf>; Case Procedures, Hon. Iain D. Johnson (N.D.Ill.), https://www.ilnd.uscourts.gov/judge_display.php?LastName=Johnston.

[17] See, e.g., Guidelines to Parties and Counsel in Civil Cases Proceeding Before the Hon. Tiffany Johnson, Hon. Tiffany Johnson (N.D.Ga.), https://www.gand.uscourts.gov/sites/gand/files/TRJ_CVStandingOrder.pdf; Standing Order Re Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson, Hon. Michael M. Baylson (E.D.Pa.), <https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf>.

[18] See, e.g., Judge Evelyn Padin's General Pretrial and Trial Procedures, Hon. Evelyn Padin (D.N.J.), <https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf>; Judge Arteaga's Policies and Procedures, Hon. Jose Raul Arteaga (E.D.Pa.), <https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/artpol.pdf>.

[19] In re Use of Artificial Intelligence, No.3:24-mc-101 (W.D.N.C. June 18, 2024).

[20] Case Procedures, Hon. Sharon Johnson Coleman (N.D.Ill.), https://www.ilnd.uscourts.gov/judge_display.php?LastName=Coleman.

[21] See generally Jessica R. Gunder, Rule 11 is No Match for Generative AI, 27 Stan. Tech. L. Rev. 308 (2024) (arguing against Rule 11-only approach to AI hallucination).

[22] Justin Henry, Judges Admit to Using AI After Made-Up Rulings Called Out, Bloomberg L. (Oct. 23, 2025), <https://news.bloomberglaw.com/business-and-practice/judges-called-out-for-nonfactual-rulings-admit-to-use-of-ai>.

[23] Id.

[24] Compare Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson, Hon. Michael M. Baylson (E.D.Pa.) (requiring disclosure when AI "has been used in any way") with Judge Evelyn Padin's General Pretrial and Trial Procedures, Hon. Evelyn Padin (D.N.J.) (requiring disclosure when a litigant uses "generative artificial intelligence").

[25] Mata, 678 F.Supp.3d at 448; see also Dan Mangan, Judge Sanctions Lawyers for Brief Written by A.I. With Fake Citations, CNBC.com (June 22, 2023), <https://www.cnbc.com/2023/06/22/judge-sanctions-lawyers-whose-ai-written-filing-contained-fake-citations.html>.

[26] Am. Bar Ass'n Standing Comm. on Ethics & Prof. Responsibility, Formal Opinion 512, Generative Artificial Intelligence Tools, at3-4 (July 29, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf.

[27] Fed. R. Civ. P. 11(a) reads:

Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

[28] Alex Ebert, Judges' AI Blunders Spark Debate on Technology Use in Courts, BloombergL. (Dec. 1, 2025), <https://news.bloomberglaw.com/business-and-practice/judges-ai-blunders-spark-debate-on-technology-use-in-courts>.

[29] Ashley Belanger, You Won't Believe The Excuses Lawyers Have After Getting Busted for Using AI, Ars Technica (Nov. 11, 2025), <https://arstechnica.com/tech-policy/2025/11/lawyers-keep-giving-weak-sauce-excuses-for-fake-ai-citations-in-court-docs/>.

TAB 18

Rule 58—“Separate Document” Requirement

Brad Baranowski, Visiting Assistant Professor at Boston University Law School, has submitted a proposal to amend Rule 58(a) to include orders subject to appeal under the collateral-order doctrine among the list of orders exempt from the requirement that a judgment be set out in a “separate document.” *See* Suggestion 25-CV-Q.

His suggestion is inspired by a recent split between the Fifth and Ninth Circuits regarding the time limit for appeal of an order rejecting a defense of qualified immunity. Such an order qualifies as a “judgment” under Rule 54(a), because it is appealable under the judge-made collateral-order doctrine. So, per Rule 58(a), it should be set out in a separate document entered on the docket. But if the court fails to enter such a separate document, Rule 58(c)(2)(B) defines the time of entry of the “judgment” as after “150 days have run from the entry in the civil docket” of the order denying qualified immunity.

The question then becomes: what is the time limit for filing a notice of appeal of the order? The Fifth Circuit concluded that the answer is 180 days, that is, 150 days from the entry of the order plus the 30 days allowed by Appellate Rule 4(a)(1)(A).¹ The Ninth Circuit, for its part, concluded that the time to appeal was only 30 days, because 28 U.S.C. § 2107(a) provides that “no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.” To the extent that the text of Rule 58 extends that time limit to 180 days, it is abrogated by the statute, which the court characterized as jurisdictional in nature.² Professor Baranowski contends that the prevalence of cases involving qualified-immunity defenses and appeals warrants a rule-based solution.

His proposal is to include among the list of orders exempt from the “separate document” requirement any order “that results in an appealable collateral order.” At first glance, this is an elegant solution: by exempting such orders (including orders denying qualified immunity) from the separate document requirement, under Rule 58(c)(1), the “judgment” would be deemed entered when the order is docketed, thus opening the 30-day window to appeal under Appellate Rule 4(a).

This, however, is not a new problem, nor is this an unanticipated issue with the Rule. The interaction between appealable collateral orders, the regime created by Rules 54 and 58, and Appellate Rule 4 is a long-recognized problem that is discussed in the committee note from the last round of amendments to Rule 58 in 2002, which, along with the Appellate Rules committee, addressed “many and horridly confused problems.”³

As background, Rule 58 was substantially revised in 2002 in conjunction with amendments to Appellate Rule 4(a) to resolve several problems regarding the interaction of the time limits for filing a notice of appeal and orders on various post-trial motions. The solution was to exempt orders disposing of motions made under Rules 50(b), 52(b), 54, 59, and 60 from the “separate document” requirement—that is, orders on such motions do not require a separate

¹ *Ueckert v. Guerra*, 38 F.4th 446, 453-55 (5th Cir. 2022).

² *McNeil v. Gittere*, 150 F.4th 1205, 1207 (9th Cir. 2025).

³ Rule 58 committee note on 2002 amendments.

document be entered on the docket, and the various time limits begin running as soon as the order is entered. The committee note recognized that the amendment did not address the appeal time for orders issued under the collateral-order doctrine. The note stated that drastic revisions would be necessary to accomplish this, and the Committee concluded that the problem did not warrant such effort at that time. The 2002 committee note to Rule 58 explains (emphasis added):

The new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered. If the 150-day provision in Rule 58(b)(2)(B)—designed to integrate the time for post-judgment motions with appeal time—serves no purpose, or would defeat the purpose of another rule, it should be disregarded. In theory, for example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document—there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2). **Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate.**

The Committee’s reasoning in 2002 may be instructive here. As a practical matter, although there is a circuit split, it is not clear that this is a major real-world problem. Although this is a known issue, only two circuits appear to have been confronted with the timeliness question. This is perhaps because defendants whose qualified-immunity defense has been rejected pretrial are likely to appeal immediately (of course, they do not have to—they might also appeal after a final judgment). It also does not appear as though defendants are using Rule 58 to delay filing appeals in the hopes that it will delay trial-court proceedings—if that were the case, one would expect more district court opinions addressing the rule.

Furthermore, simply adding collateral orders to the list of orders exempt from the separate document requirement as proposed would create major practical problems. To begin, many kinds of orders are subject to appeal under the collateral-order doctrine (including some, but not all, immunity defenses, qualified or otherwise); worse, in theory *any* order might be subject to appeal under the collateral-order doctrine if the requirements of that doctrine are met, potentially expanding the exception to the separate-document requirement exponentially (or infinitely), and at least creating major uncertainty in the district courts. Beyond the collateral-order doctrine, there are many *other* immediately appealable orders that might warrant such an exemption for similar reasons, so going down this road may create an endless set of candidates to be added to the list of exceptions to Rule 58(a), swallowing the rule. One benefit of the current rule is that district judges are not left to guess whether every order requires entering a separate document on the docket to trigger the time to appeal.

Although “pragmatic disregard,” as it is described in the 2002 committee note, of the problem Professor Baranowski describes may not be an entirely satisfactory answer, history

suggests it may be superior to upending the current system without a plausible plan for how to replace it. At least with respect to the specific issue of qualified immunity, it may be that additional opinions are forthcoming that will demonstrate that benign neglect of these issues creates serious practical problems requiring a new approach to integrating these rules.

Against this checkered background, it may be worth beginning by asking whether present Rule 58 has caused significant difficulties in the experience of members of the Advisory Committee. Should the Advisory Committee be interested in moving forward with this issue, coordination with Appellate Rules would be essential, including getting their views on whether this is a recurring issue in the courts of appeals. Although the elegant solution in 2002 did not cover every possible situation, unless there is a real-world problem that would be solved by taking this on, it may well be that the best choice is to leave things as they are.

Attachment(s):

- Suggestion 25-CV-Q (Brad Baranowski)

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October 13, 2025

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendment to Federal Rule of Civil Procedure 58(a)
(Requirements of Separate Documents for Every Judgment)

Dear Secretary Dubay:

I encourage the Advisory Committee on Civil Rules (“Advisory Committee”) to consider amending Federal Rule of Civil Procedure 58(a). A split has emerged among the United States courts of appeals over whether an appealable order denying qualified immunity must be separately docketed under that Rule. Some courts say yes, another says no, and others have yet to weigh in on the issue.¹

This merits rulemaking. Because denials of requests for qualified immunity are both common in the district courts and implicate the jurisdiction of appellate courts, and because both sides of the circuit split are grounded either in the Rule’s text or Notes, ambiguity about what Rule 58(a) demands here has led to real-world confusion about when a defendant must file a notice of appeal. The Advisory Committee should clarify that a denial of qualified immunity is not a “judgment” under Rule 58(a) and that a district court does not need to docket a separate document before a defendant can appeal such a denial.

I. The Problem

As with other provisions of the Federal Rules of Civil Procedure (“FRCP”), Rule 58(a) can affect litigants’ appeal rights.² It all comes down to timing. Prospective

¹ See *infra* Part II (describing the split in more detail). Others have noticed this split, too. See Bryan Lammon, *The Month in Federal Appellate Jurisdiction: August 2025*, FINAL DECISIONS PLLC (Sept. 9, 2025), <https://finaldecisions.org/the-month-in-federal-appellate-jurisdiction-august-2025/>.

² See generally Brad Baranowski & Emery G. Lee III, *Remaking Rulemaking: Lessons from the History of Federal Rule of Civil Procedure 54(b)*, 73 CLEV. ST. L. REV. 617, 620, 675–82 (2025) (discussing instances when district court procedures affect appellate finality).

appellants in civil suits must file their notice of appeal “within thirty days” of the district court’s “entry” of the “*judgment, order or decree*.”³ That requirement is jurisdictional.⁴ Barring certain statutory exceptions, the failure to file a notice of appeal within this thirty-day period will extinguish a litigant’s right to appeal.⁵ Simple enough.

Understanding what a litigant must do to preserve these rights when the district court denies a request for qualified immunity is more complicated. Whether decided at the motion-to-dismiss or summary-judgment stage, such denials are a subset of interlocutory orders. Interlocutory orders normally are not immediately appealable, so they normally do not create a timing issue.⁶ But qualified-immunity denials are different. Because qualified immunity is immunity from suit, orders denying defendants this immunity fall within the collateral order doctrine.⁷ Thus, these denials are immediately appealable upon their entry.⁸

When, however, does their “entry” occur? Enter the complexity. Rule 58 governs the procedures for entering judgment in the district court.⁹ Relevant here, Rule 58(a) reads:

(a) SEPARATE DOCUMENT. Every *judgment* and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

- (1) for judgment under Rule 50(b);
- (2) to amend or make additional findings under Rule 52(b);
- (3) for attorney’s fees under Rule 54;
- (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
- (5) for relief under Rule 60.¹⁰

³ 28 U.S.C. § 2107(a) (emphases added); *see also* FED. R. APP. PRO. 4(a)(1)(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.”).

⁴ *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam) (“It is well settled that the requirement of a timely notice of appeal is ‘mandatory and jurisdictional.’” (quoting *Browder v. Dir., Dep’t. of Corr.*, 434 U.S. 257, 264 (1978))).

⁵ *See* *Bowles v. Russell*, 551 U.S. 205, 208 (2007) (detailing alternative scenarios); *see also* 28 U.S.C. § 2107(c) (the statutory basis for said alternatives).

⁶ *E.g.*, *Dupree v. Younger*, 598 U.S. 729, 734 (2023) (“Interlocutory orders—those that do not dispose of the whole case, like denials of summary judgment—are typically not immediately appealable under § 1291.”).

⁷ *See generally* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949) (explaining requirements of the collateral-order doctrine).

⁸ *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that denials of qualified immunity are appealable under the collateral-order doctrine).

⁹ FED. R. CIV. P. 58.

¹⁰ *Id.* at 58(a) (emphasis added).

At first glance, this Rule shouldn’t cause any trouble for an unlucky, qualified-immunity-seeking defendant. A denial of that request is an *order*, not a *judgment*.¹¹ Unlike a judgment, which is a final determination of the parties’ rights, interlocutory orders like qualified-immunity denials do not terminate the litigation.¹² Therefore, the district court need not enter a separate document with the denial under Rule 58(a), and the defendant need not—and probably should not if they want to preserve their rights—wait until the court does so to appeal.

Yet looks deceive. Elsewhere, the FRCP provide their own definition of judgment: “Judgment’ as used in these rules include a decree and *any order* from which an appeal lies.”¹³ A denial of qualified immunity fits that definition. After all, those orders are appealable.

Because these decisions are not listed as one of the exceptions to Rule 58(a)’s separate-document requirement, a defendant appears to have three options. First, wait until the district court enters such a document before appealing.¹⁴ Or, if 150 days have passed and the district court hasn’t entered this document,¹⁵ appeal within 30 days of then.¹⁶ Or if antsy, the defendant can waive the separate-document requirement altogether and appeal within 180 days of when the district court issued its decision.¹⁷ Should the defendant need to, they can also request that the district

¹¹ See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (“As we have said, an *order* denying qualified immunity, to the extent it turns on an ‘issue of law,’ is immediately appealable.” (emphasis added) (quoting *Mitchell*, 472 U.S. at 530)).

¹² See 10 MARY KAY KANE & ADAM N. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* § 2651 (4th ed. 2025) (“A judgment is the final determination of an action and thus has the effect of terminating the litigation.”); *Judgment*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A court or other tribunal’s final determination of the rights and obligations of the parties in a case; also, the act or action of making such a determination.”); see also *Catlin v. United States*, 324 U.S. 229, 233 (1945) (“A ‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”). But see FED. R. CIV. P. 54(b) (“When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”).

¹³ FED. R. CIV. P. 54(a) (emphasis added).

¹⁴ FED. R. APP. P. 4(a)(7)(A)(ii).

¹⁵ *Id.*; see also FED. R. CIV. P. 58(c)(2)(B) (same period).

¹⁶ FED. R. APP. P. 4(a)(1)(A).

¹⁷ Even if a separate document is necessary, a district court’s failure to enter one “does not affect the validity of an appeal from that judgment or order.” FED. R. APP. P. 4(a)(7)(B). That provision codified the Supreme Court’s holding that “the separate-document requirement of Rule 58 [is not] such a categorical imperative that the parties are not free to waive it.” *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 384 (1978). See also *Peng v. Mei Chin Penghu*, 335 F.3d 970, 975 n.4 (9th Cir. 2003) (“The [2002] amendments [to Federal Rule of Appellate Procedure 4] further clarify that the decision to waive the entry of a separate document is for the appellant alone so that an appellee cannot object and require the appellant to go back to district court to get a final judgment entered.”). Defendants could also request that the district court enter a separate document. FED. R. CIV. P. 58(d).

court extend the period to appeal.¹⁸ In short, the text of the relevant Rules appear to provide ample time to file a notice of appeal.

But the picture is messier still. In 2002, the Advisory Committee amended Rule 58 to harmonize it with Federal Rule of Appellate Procedure 4(a).¹⁹ The Committee almost seemed to have qualified-immunity denials in mind when it drafted the accompanying Note. “Appealability under [the] collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document,” the Note states.²⁰ Rather, “[a]ppel time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2).”²¹ Whereas the timeline for appeal above could run up to 180 days without seeking an extension, this one is only 30 days.

Thus, while the Rules seem to require a separate document before a defendant can appeal a denial of qualified immunity, the Notes say otherwise. In essence, the Notes appear to modify the Rules’ meaning by making collateral orders one of Rule 58(a)’s exceptions without adding it to the list of exceptions. That is inappropriate. The Notes should not say something different than the Rules.²² Rather, the two should be in sync. So much for simplicity.

II. The Split

Faced with these ambiguities, the United States courts of appeals have split on whether Rule 58(a) applies to qualified-immunity denials. Notably, in reaching opposite conclusions about whether the separate-document requirement applies, lower courts have emphasized the different aspects of the Rule sketched above:

- **The Text-of-Rule-58(a)-Applies Approach.** In *Ueckert v. Guerra*, the Fifth Circuit picked this approach.²³ The Court wasn’t exactly pleased with this outcome, complaining that “[a]ppellants now have an enormous 180-day window to file interlocutory appeals unless the district court engages in time-wasting paper-pushing, entering separate ‘judgments’ containing their holdings on every interlocutory motion that might be

¹⁸ FED. R. APP. P. 4(a)(5).

¹⁹ See FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment (“Rule 58 is amended . . . to address a problem that arises under Appellate Rule 4(a).”).

²⁰ *Id.*

²¹ *Id.*

²² Cf. Edward H. Cooper, *Restyling the Civil Rules: Clarity without Change*, 79 NOTRE DAME L. REV. 1761, 1784 (2004) (“[T]he Advisory Committee cannot change a note without amending the rule.”).

²³ *Ueckert v. Guerra*, 38 F.4th 446, 453, 454–55 (5th Cir. 2022).

susceptible to appeal.”²⁴ But the court felt bound to reach this result by the Rules’ text.²⁵

- **The Note-Alters-Rule-58(a) Approach.** More recently, the Ninth Circuit parted ways with the Fifth Circuit.²⁶ According to the Ninth Circuit in *McNeil v. Gittere*, the interaction of FRCP 54(a), 58(a), and Federal Rule of Appellate Procedure 4(a)’s text would create a time for appeal that conflicted with 28 U.S.C. § 2107(a)’s deadline.²⁷ Because jurisdictional statutes trump procedural rules, the court opted to follow the approach behind Rule 58(a)’s Note and not require that denials of requests comply with the separate-document requirement.²⁸

As explained further below, both paths are reasonably guided by either the FRCP’s text or Rule 58(a)’s accompanying Notes as each are currently drafted. For those courts which have yet to face the issue, the decision of which route to choose will come down to differences of opinion over broader interpretative philosophies.²⁹ That bolsters the case for rulemaking here.

III. The Implications

Although a circuit split may not always justify rulemaking, this split leaves the appeal rights of litigants uncertain in an important area of federal jurisdiction.³⁰ Section 1983 and, to a lesser extent, *Bivens* litigation is a sizable portion of the federal district courts’ dockets. For example, in 2024, there were 16,476 non-prisoner, federal

²⁴ *Id.* at 455.

²⁵ *See id.* (“We have instead applied the separate order requirement to interlocutory appeals because that is what the plain meaning of the rules requires.”).

²⁶ *McNeil v. Gittere*, 150 F.4th 1205, 1207 (9th Cir. 2025). The Ninth Circuit didn’t note this fact, but the fact remains that it created a split. *See* Lammon, *supra* note 1 (“Unmentioned in *McNeil* is that the decision splits from the Fifth Circuit, which held that Rule 4(a)(7) applies to qualified-immunity appeals.”).

²⁷ *McNeil*, 150 F.4th at 1209.

²⁸ *Id.* at 1210.

²⁹ The D.C. Circuit once took the Fifth Circuit’s approach, but under an older version of Federal Rule of Appellate Procedure 4(a). *Abdulwali v. Wash. Metro. Area Transit Auth.*, 315 F.3d 302, 303–04 & n.1 (D.C. Cir. 2003).

³⁰ The Advisory Committee has, however, justified rulemaking based on circuit splits in the past. *See, e.g.*, ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK 36 (Oct. 2024) (concluding that Rule 41 should be revised to resolve a circuit split over its application), https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf. So too with outlier decisions. *See* ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK 226 (Oct. 2025), <https://www.uscourts.gov/sites/default/files/document/2025-10-civil-agenda-book-final.pdf> (“[T]he Advisory Committee did recently undertake such an effort in response to the Ninth Circuit’s decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023).”).

question “Other Civil Rights” cases filed in federal court.³¹ The numbers are higher for analogous prisoner filings.³² It is safe to say that thousands of the filings from these two groups were § 1983 and *Bivens* cases.

Requests for qualified immunity are ubiquitous in these cases. So too are appeals of these decisions. “From 2010 through 2020, at least 5,526 cases before federal appellate courts raised qualified immunity on appeal, an average of about 500 cases a year.”³³ And these appeals have only grown in frequency over time.³⁴ In other words, the circuit split could affect a sizeable number of litigants, creating different time frames for appeal in different circuits.

And the split isn’t limited just to denials of requests for qualified immunity. Although *Ueckert* and *McNeil* were qualified-immunity cases, any order subject to appeal under the collateral-order doctrine could be subject to their logics. Again, any appealable collateral order will be both a “judgment” as defined by Rule 54(a) and clearly not what the Advisory Committee intended Rule 58(a) to cover.

Moreover, the split is intractable. Rule 58(a)’s current text is at odds with its accompanying Note. Rule 58(a) follows a classic rule-exception structure: first, it states the rule (“[e]very judgment . . . must be set out in a separate document”), then it lists exceptions to the rule (five of them in all). Under the canon of *expressio unius est exclusio alterius*, that list can reasonably be interpreted as the entirety of the exceptions to the separate-document requirement.³⁵ And because a judgment under the FRCP is anything that is appealable, there are strong textualist reasons for a denial of qualified immunity needing to follow the separate-document requirement.

Then there are the Notes. Those state the opposite of what the Rules’ text suggest. And understandably so. As the Committee detailed, “there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion

³¹ United States Courts, Table C-2—U.S. District Courts—Civil Judicial Business (September 30, 2024), JUDICIAL BUSINESS, September 2024, at 2, https://www.uscourts.gov/sites/default/files/2024-12/jb_c2_0930.2024.pdf (last visited Oct. 13, 2025).

³² *Id.* at 3.

³³ JASON TIEZZI ET AL., UNACCOUNTABLE: HOW QUALIFIED IMMUNITY SHIELDS A WIDE RANGE OF GOVERNMENT ABUSES, ARBITRARILY THWARTS CIVIL RIGHTS, AND FAILS TO FULFILL ITS PROMISES 16 (2024), <https://ij.org/report/unaccountable/> (last accessed Oct. 3, 2025).

³⁴ As the study previously cited details:

In the first half of our study period (2010 through 2015), the courts decided an average of 458 qualified immunity appeals a year. But in the second half (2016 through 2020), that figure jumped to 555, an increase of roughly 20%. Over that same timeframe, the total number of civil appeals in the circuit courts dropped by 10%, indicating that qualified immunity appeals are growing in both absolute and comparative terms.

Id. The driver of this growth appears to have been excessive-force claims. *Id.*

³⁵ ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012) (discussing canon).

as the court of appeals.”³⁶ On the whole, the collateral-order doctrine is too unpredictable to base appealing under it on a “mechanical” requirement like the separate-document requirement.³⁷ Courts are thus forced to choose between text and purpose, with reasonable minds differing on that choice.³⁸

In 2002, the Advisory Committee predicted that lower courts would approach any issue about whether collateral orders needed to comply with Rule 58(a)’s separate-document requirement with “pragmatic disregard.”³⁹ That prediction hasn’t aged well. Because the Rule’s text and Note lead to different interpretative choices, because the scenario that will force courts to make these choices is a common one, and because lower courts have already made different choices here, the Advisory Committee should amend Rule 58(a) to clarify what, if anything, it demands when a district court denies a defendant’s request for qualified immunity.

IV. The Solution

Between the two approaches taken by lower courts, the Ninth Circuit’s is better. The Committee should codify that approach in the Rules’ text.

Rule 58(a) was drafted to deal with a particular problem. Before the Rule, there was confusion about when a district court issued a judgment. Sometimes, a court would issue an opinion with directive language and the clerk did not think a separate document was needed. Sometimes, there was a separate document. Considering these disparate practices, courts of appeals had to adjudicate which document constituted the judgment and started the time to appeal, with some litigants losing out because they identified the wrong docket entry.⁴⁰

Denials of qualified immunity do not present this which-document-governs problem. Unlike judgments, such collateral orders do not resolve the rights of the parties. They just resolve the issue at hand. And they are otherwise immediately appealable. Indeed, these denials create timing problems only insofar as it is unclear whether Rule 58(a)’s separate-document requirement seems to apply to them, which is exactly what the Advisory Committee sought to avoid when it amended the

³⁶ FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment.

³⁷ *United States v. Indrelunas*, 411 U.S. 216, 222 (1973) (per curiam); *see also* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1243 (2007) (calling the collateral order doctrine a “cumbersome-yet-unhelpful framework”).

³⁸ *See generally* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006). That divide tracks different jurists’ views of the Notes. *Compare* *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) (explaining how the Notes are “a reliable source of insight into the meaning of a rule”), *with* *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 557 (2010) (Scalia, J., concurring) (“[T]he Committee’s *intentions* have no effect on the Rule’s meaning.”).

³⁹ FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment.

⁴⁰ *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 385 (1978) (detailing history that led to Rule 58(a)’s separate-document requirement).

Rule. By not requiring a separate document be entered on the docket for qualified-immunity denials, the Ninth Circuit captured the spirit, if not the letter, of what Rule 58(a) was trying to accomplish.

Rule 58(a)’s language should embody this spirit. That would avoid the Notes improperly modifying the meaning of the Rules. And it would avoid other Circuits adopting the understandable—but, in my view, unfortunate—reading that the Fifth Circuit recently adopted. To achieve this goal, the Advisory Committee could add language like the following to the end of Rule 58(a):

“(6) that results in an appealable collateral order.”

Such language would enshrine in the Rule’s text what the Note otherwise makes clear: denials of qualified-immunity requests and other orders subject to the collateral-order doctrine need not be separately docketed before being appealed. Such a change would also place no additional work on district court judges’ shoulders, avoiding the concern raised in the Note about forcing them “to speculate about the appealability of every order.”⁴¹ On the contrary, placing the exclusion of appealable collateral orders makes life easier for district courts as it avoids courts adopting the Fifth Circuit’s approach and its application of the separate-document requirement to these orders.⁴²

Alternatively, the Advisory Committee could revisit the confusing definition of “judgment” in Rule 54(a). In general, the FRCP do not define terms. Avoiding exceptions to this rule may be well founded, at least here. Rule 54(a)’s definition of “judgment” is part of the reason for the circuit split. That said, the Advisory Committee appeared to consider this option in 2002 and decided that it would amount to “[d]rastic surgery.”⁴³ A simpler solution is for the Advisory Committee to adopt the language advocated here or some similar language as Rule 58(a)(6).

Thank you for your consideration.

Respectfully submitted,

Brad Baranowski
Visiting Assistant Professor
Boston University School of Law

⁴¹ FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment.

⁴² Although appellants can sidestep this requirement even under the Fifth Circuit’s approach, *see* FED. R. APP. P. 4(a)(7)(B), the extended window to file a notice of appeal remains an issue.

⁴³ FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment. For example, Rule 79(b), which requires that the clerk “keep a copy of every *final judgment* and *appealable order*” could be among the operations that the Advisory Committee would need to perform given that both a final judgment and an appealable order are judgments under Rule 54(a)’s definition. FED. R. CIV. P. 79(b) (emphases added).

TAB 19

Attorney Admissions

Item 19 will be an oral report.

TAB 20

“Algorithmic Spoliation”

Joseph Anthony Reyna has submitted 25-CV-U, addressing “Algorithmic Spoliation and Metadata Suppression under FRCP 26 & 37(e).” According to the submission, Reyna is the founder of the Dreams Over Dollars Foundation, a 501(c)(3) organization.

The submission asserts that in “modern systems” algorithms can cause deletion or alterations of digital data. Such events “evade the definitional threshold of ‘intent.’” To deal with this “procedural gap,” the submission makes five requests. Three of them seem to be directed to this Committee. The other two are about the Evidence Rules. Here are the three related to Civil Rules:

1. **Recognize algorithmic spoliation** as a distinct evidentiary risk within Rule 37(e) commentary or future amendment notes.
2. **Clarify certification duties** for automated systems – including model-version control, retention disablement logs, and dataset immutability confirmation.

* * *

5. **Issue uniform guidance** to prevent local-rule divergence (Rule 83) that could fracture discovery standards between districts.

It is not entirely clear whether this submission should be understood to propose a specific change to the Civil Rules. Though it is proposed that something be added to “Rule 37(e) commentary,” this Committee cannot alter committee notes issued about prior rule amendments; a committee note may be issued only in conjunction with a rule amendment.

The submission also refers to “certification duties,” but it is not entirely clear what those duties are. Rule 26(g)(1) does say that disclosures and discovery responses must be signed, and that the signature constitutes a certification that it is “complete and correct as of the time it is made.” Whether that precisely addresses Mr. Reyna’s concern is uncertain.

The submission also invokes Rule 83 and a concern about local rules that are not uniform. But Rule 83 does not command that local rules adhere to uniform provisions. Instead, Rule 83(a)(1) says local rules must be consistent with the Civil Rules and U.S. statutes. It does not say they all have to be identical.

It appears that the main focus of this submission is Rule 37(e). Thus, Mr. Reyna offers to “provide anonymized documentation and empirical examples demonstrating metadata drift, AI retraining during preservation, and forensic mismatch between static and dynamic data versions.” Suggestion 25-CV-U at 2.

The Committee has a fairly long history of adapting the discovery rules to meet the challenges of digital data. These challenges were first raised during a mini-conference in January 1997, which led to study over nearly a decade that produced the “D-Discovery Amendments” to the rules that went into effect in 2006. For background, *see* Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 Fordham L. Rev. 1 (2004).

The 2006 amendments included an initial version of Rule 37(e). But within a few years problems emerged under this provision. During the Duke Conference in May 2010, there was an entire panel focusing on the challenges of data preservation in light of the numerous and evolving methods used to communicate in the 21st century. A subcommittee was formed to develop an improved Rule 37(e). That effort included at least one all-day mini conference.

A great deal of effort went into preparing a preliminary draft of a replacement provision, which was published for public comment in 2013. After the public comment period, further work produced a revised amendment proposal that was included in the agenda book for the Committee's April 2014 meeting. Work continued even after that agenda book was issued, producing a further revision circulated on the first day of the two-day April 2014 meeting. Based on the discussion that day, the proposal was revised further after dinner that night and the revised proposal was submitted to the Committee on the morning of the second day. The amendment drafted after dinner was adopted on the second day of the meeting, and went into effect on December 1, 2015.

Current Rule 37(e) was designed to adapt to changing patterns of use of digital data, and to be "technology neutral." Its provisions were designed to be applied to specific cases, taking account of applicable technology. Thus, the rule authorizes court action only when electronically stored information (ESI) that "should have been preserved" (trigger) is "lost because a party failed to take reasonable steps to preserve it." Throughout the long efforts to adapt to digital discovery, one of the recurrent themes was that automatic deletion or "recycling" systems might overwrite material unless they were turned off. Taking "reasonable steps" could often involve turning off such automatic systems. The goal was a rule that could address the concerns seemingly raised by Mr. Reyna.

Assuming a party failed to preserve ESI as required, under Rule 37(e)(1), the court may order curative measures on finding that the failure to preserve caused the moving party prejudice. These measures may be rather draconian, but aim to cure the prejudice found by the court. Pertinently, there is no need to prove intent to justify such measures.

Intent is relevant under Rule 37(e)(2), however, which does not depend on a finding of prejudice but rather that a party "acted with the intent to deprive another party of the information's use in the litigation." Under Rule 37(e)(2), the court can impose sanctions up to and including dismissal or default.

The 2015 committee note explained this orientation:

As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation.

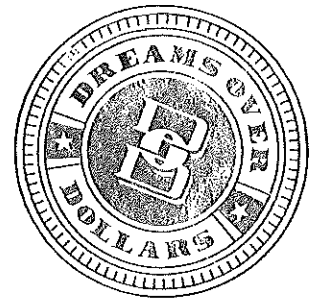
Thus, the current rule and committee note appear to address the situation raised by this submission and equip the court to determine whether judicial action is required.

It is suggested that this submission be removed from the agenda.

Attachment(s):

- Suggestion 25-CV-U (Joseph Reyna)

To: The Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, D.C.



From:

Joseph Anthony Reyna (JoeCat®)
Public-Interest Litigant · Founder, Dreams Over Dollars Foundation (501(c)(3))

Subject: Procedural Submission —
Algorithmic Spoliation and Metadata Suppression under FRCP 26 & 37(e)

Dear Members of the Committee,

I submit this correspondence for the record as a matter of procedural reform rather than personal grievance. The subject is *algorithmic spoliation*—the automatic alteration or decay of digital evidence through self-modifying systems such as cloud retention policies, data deduplication, or machine-learning retraining loops. These processes often operate beyond a litigant’s control, yet they materially alter the evidentiary record after a duty to preserve has attached.

The Federal Rules of Civil Procedure presume evidence governed by human intention. In modern systems, intent is diffused across automation. When an algorithm deletes, overwrites, or retrains on contested data, the result mirrors willful destruction while evading the definitional threshold of “intent.”

This procedural gap undermines both *Rule 37(e)* and the interpretive expectations of “reasonably accessible” under *Rule 26(b)(2)(B)*.

I respectfully request that the Committee:

1. **Recognize algorithmic spoliation** as a distinct evidentiary risk within Rule 37(e) commentary or future amendment notes.
2. **Clarify certification duties** for automated systems—including model-version control, retention disablement logs, and dataset immutability confirmations.

3. **Address self-modifying evidence** under *FRE 901(b)(9)* by requiring authentication of process versions and training parameters, not merely system identity.
4. **Study privilege risk** under *Rule 502* where AI summarization or classification occurs during legal hold.
5. **Issue uniform guidance** to prevent local-rule divergence (Rule 83) that could fracture discovery standards between districts.

This letter also aligns with the Advisory Committee's current *Technology Subcommittee* agenda examining AI's impact on discovery. I ask that this submission be logged as a public comment or procedural inquiry under the next published agenda, per the Committee's standard docketing process. If assigned a reference number, please confirm for tracking.

To assist the Committee's evaluation, I am willing to provide anonymized documentation and empirical examples demonstrating metadata drift, AI retraining during preservation, and forensic mismatch between static and dynamic data versions.

Disclaimer and Preservation Request

This communication is issued in good faith for procedural consideration under *Fed. R. Evid. 901*, *Fed. R. Civ. P. 26, 34, 37(e)*, and related Judicial Conference authorities.

It does not allege misconduct, seek ex parte relief, or request confidential information.

Receipt constitutes notice of a matter with foreseeable procedural relevance.

All responses—or non-responses—may be cited solely for the limited purpose of demonstrating notice to the rulemaking body responsible for evidentiary uniformity.

Closing

I recognize the Committee's workload and institutional boundaries. My intent is not to lobby, but to ensure the rulebook evolves at the same pace as the evidence it governs.

If further material is unwelcome, please confirm, and I will refrain from additional correspondence except to supply clarifying data upon formal request.

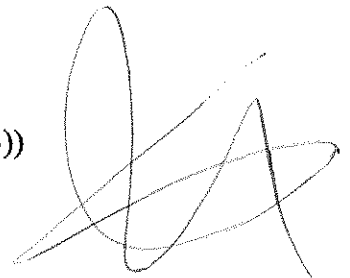
Respectfully submitted,

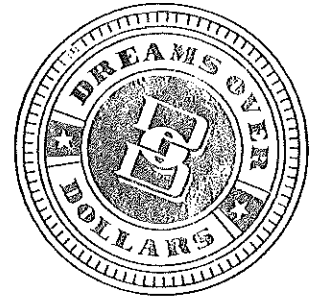
/s/ **Joseph Anthony Reyna (JoeCat®)**

Public-Interest Litigant · Founder, Dreams Over Dollars Foundation (501(c)(3))

Executed under 28 U.S.C. §1746 on October 28, 2025

UndercoverSuperheroes.com





To: The Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, D.C.

From:

Joseph Anthony Reyna (JoeCat®)
Public-Interest Litigant · Founder, Dreams Over Dollars Foundation (501(c)(3))

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This procedural gap undermines both *Rule 37(e)* and the interpretive expectations of “reasonably accessible” under *Rule 26(b)(2)(B)*.

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3. **Address self-modifying evidence** under *FRE 901(b)(9)* by requiring authentication of process versions and training parameters, not merely system identity.
4. **Study privilege risk** under *Rule 502* where AI summarization or classification occurs during legal hold.
5. **Issue uniform guidance** to prevent local-rule divergence (Rule 83) that could fracture discovery standards between districts.

This letter also aligns with the Advisory Committee's current *Technology Subcommittee* agenda examining AI's impact on discovery. I ask that this submission be logged as a public comment or procedural inquiry under the next published agenda, per the Committee's standard docketing process. If assigned a reference number, please confirm for tracking.

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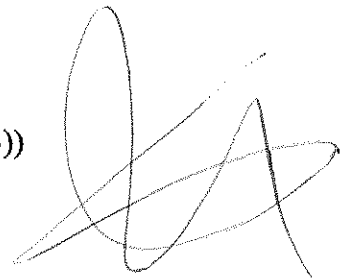
Respectfully submitted,

/s/ **Joseph Anthony Reyna (JoeCat®)**

Public-Interest Litigant · Founder, Dreams Over Dollars Foundation (501(c)(3))

Executed under 28 U.S.C. §1746 on October 28, 2025

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TAB 21

Protective Order “Templates”

Suggestion 26-CV-6 calls attention to “the growing use of standard protective order templates by United States District Courts” and urges that this development calls for amending Rule 26(c) or Rule 83, or a new rule addressing “the circumvention of Rule 26(c)’s good cause requirement.”

The submission is from Ashley Gjovik, who apparently has received a J.D. degree but apparently is not admitted as a member of a state bar. She was employed by Apple, Inc. (seemingly in a nonlegal capacity), and in September 2023 sued Apple. *See Gjovik v. Apple, Inc.*, 3:23-cv-04597-EMC. It appears that experiences in that litigation bear on this submission. Thus, the submission says that it includes as Exhibit E a transcript of a telephone conference with a magistrate judge in the N.D. Cal. that included discussion of that court’s model protective order. (It appears this exhibit was not submitted with 26-CV-6.)

The submission says that there is “an emerging structural problem in the administration of discovery” due to the “growing use of model protective order templates” that “inverts federally assigned burdens of proof, compels parties to make hollow recitals of agreement regardless of mutual assent, and creates mechanisms that can be exploited to impose unconstitutional prior restraints on speech about matters of public record and concern.” Suggestion 26-CV-6 at 2.

Protective order practice has been a focus of attention for a long time. *See, e.g.*, Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983); Marcus, *The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457 (1991); Marcus, *A Modest Proposal: Recognizing (At Last) That the Federal Rules Do Not Declare That Discovery is Presumptively Public*, 81 Chi.-Kent L. Rev. 331 (2006). More recently, a number of prominent proceduralists undertook an exhaustive study of court dockets and concluded that judges seemed not to scrutinize stipulated protective orders as vigorously as the authors thought justified. *See Engstorm, et al., Secrecy by Stipulation*, 84 Duke L.J. 99 (2024) (based on an analysis of a dataset of over 2.2 million federal cases).

Protective orders have also been the focus of legislation and rulemaking over the decades. In 1995, a preliminary draft of an amendment to Rule 26(c) addressing stipulated orders was published for public comment, but was not ultimately adopted. Instead, the Judicial Conference returned the proposal for further study. At its March 1998 meeting, the Advisory Committee decided not to proceed further. As reported in the minutes of that meeting:

The possibility of amending Rule 26(c) has been on the Committee agenda for several years. The topic first arose in response to bills [in Congress] that reflected concern that discovery protective orders may prevent public access to information that is important to protect public health and safety. Throughout the period of Committee study and public reactions to published proposals, the Committee was unable to find any persuasive evidence that present practice in fact defeats public access to such information. The proposal published in September, 1995, was designed to capture good practices that are generally followed * * * After considering the testimony and comments on this proposal, the Committee

concluded that there was no urgent need for action and carried the proposal forward for further consideration as part of the broader discovery project [which was launched in 1996].

As the discovery project has unfolded [since begun in 1996], the Committee again has found that richly experienced lawyers, from all fields of practice, find no need to change present protective-order practice. At the Boston College conference [a two-day conference as part of the discovery project], plaintiff and defense lawyers alike seemed to agree on this.

Further discussion expressed concern that when the Judicial Conference returned this proposal [to amend Rule 26(c) regarding stipulated orders] for further study, some members may have misunderstood its reach and effect. Even that possibility was not found a ground for renewing the proposal, however, given the lack of apparent need for present amendments. The Committee voted unanimously to terminate consideration of the 1995 Rule 26(c) proposal.

Minutes of the Advisory Committee on Civil Rules, March 16-17, 1998, at 23.

Meanwhile, during several sessions of Congress, proposed “sunshine in litigation” acts were introduced but not adopted. *See, e.g.*, Sunshine in Litigation Act of 2014, S. 2364, 113th Cong. (2014). In some states, such provisions were adopted as a matter of state law. *See, e.g.*, Fla. Stat. § 69.081; Tex. R. of Civ. Proc. 76a(2)(c).

It should be apparent that protective order issues generate controversy. This submission focuses not only on Rule 26(c) issues, but also on courts that provide litigants with model forms for various routine litigation purposes. The Northern District of California, which seems to be the focus of the submission, appears to have more than 100 forms available in pdf form on its website dealing with a wide variety of litigation topics. In general, that would seem a helpful thing, particularly for self-represented litigants.

This submission appears to regard the Northern District of California model stipulated protective order as unauthorized rather than helpful. (Exhibit F to the submission appears to be a Central District of California stipulated protective order form, suggesting that Ms. Gjovik does not think the Northern District of California rule is unique.)

The challenge to such forms in general appears to be that they are invalid because they were not adopted through the process required for local rules. The argument is that these forms “achieve the functional effect of local rules.” If the Committee undertakes a project on district court forms, it would probably be necessary to catalog the variety of such forms and come to a judgment on whether some could be adopted only as local rules.

But the focus of this submission seems limited to protective orders, and perhaps only to protective order forms, or perhaps only the Northern District of California protective order form. It seems that one objection is that this is “coerced speech” and “a coerced ‘stipulation.’” The submission asserts that the problems on which it focuses “would be systemic rather than case- or court-specific,” perhaps suggesting the need for nationwide review of the forms of every district court.

The nine recommendations (starting on page 14 of the submission) call for a broad-ranging review of the “protective order template system[] as currently administered in some United States District Courts.” Suggestion 26-CV-6 at 17. Ms. Gjovik “requests that the Advisory Committee place this issue on its study agenda,” and recommends that “advisory letters or guidance documents directed towards the courts currently piloting these model templates may be prudent in order to put these courts on notice of an examination and scrutiny of their new processes.” *Id.* at 18.

Past Committee efforts to refine or improve protective order practice have not borne fruit. Controversy continues to arise on occasion about protective order issues. It may be time to take up those issues. A more general project on district court forms would be a larger undertaking. It is not clear that there is a need for either undertaking.

It is suggested that this submission be dropped from the agenda.

Attachment(s):

- Suggestion 26-CV-6 (Ashley Gjovik)

**BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUDICIAL CONFERENCE OF THE UNITED STATES**

**PETITION FOR RULEMAKING
REGARDING CIVIL RULE 26(c), RULE 83;
AND COURT SPONSORSHIP OF MODEL PROTECTIVE ORDERS
IN THE UNITED STATES DISTRICT COURTS**

Attention: Secretary of the Committee on Rules of Practice and Procedure,
Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts,
Thurgood Marshall Federal Judiciary Building,
One Columbus Circle, NE, Room 7-300, Washington, DC 20002.
RulesCommittee_Secretary@ao.uscourts.gov

Subject: Request for the Advisory Committee to study the growing use of standard protective order templates by United States District Courts and to consider amendments to Federal Rule of Civil Procedure 26(c), Rule 83, or a new Rule addressing the constitutional and procedural deficiencies identified herein, including the circumvention of Rule 26(c)'s good cause requirement, the inversion of federally assigned burdens, the imposition of prior restraints on speech without adequate procedural safeguards, and the evasion of congressionally mandated rulemaking processes.

Date: Feb. 23 2026

Submitted by: Ashley M. Gjovik, J.D.
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Submitted pursuant to 28 U.S.C. § 2073(a)(1), which provides that the Judicial Conference “shall prescribe and publish the procedures for the consideration of proposed rules” and (c)(1) where Rule Committee meetings “shall be open to the public” and in response to “How to Suggest a Change to Federal Court Rules and Forms,” posted on the United States Courts website.¹

¹ United States Courts, How to Suggest a Change to Federal Court Rules and Forms, “*The Judiciary invites the public to participate in refining the Rules of Practice and Procedure, Rules of Evidence, and court forms. Submitting a suggestion to one of the advisory committees triggers this cooperative process. Suggestions come*

SUMMARY OF THE PETITION

This petition requests that the Advisory Committee on Civil Rules study an emerging structural problem in the administration of discovery in federal civil litigation: the growing use of model protective order templates by United States District Courts in a manner that circumvents the requirements of Federal Rule of Civil Procedure 26(c), evades the rulemaking process mandated by Congress under 28 U.S.C. §§ 2071–2077 and Rule 83, inverts federally assigned burdens of proof, compels parties to make hollow recitals of agreement regardless of mutual assent, and creates mechanisms that can be exploited to impose unconstitutional prior restraints on speech about matters of public record and concern.

Rule 26(c) serves a legitimate and important function but the Protective Order template system, as administered in a growing number of district courts, has diverged from the rule it purports to implement in ways that are constitutionally significant, procedurally irregular, and practically harmful—particularly to individual litigants in public interest cases, civil rights cases, and cases involving allegations of criminal or discriminatory conduct by powerful institutional defendants. This petition identifies several specific deficiencies in the emerging model template system, documents constitutional and procedural concerns, and proposes amendments and guidance for the Committee’s consideration.

I. THE CURRENT PRACTICE: HOW PROTECTIVE ORDER TEMPLATES OPERATE

A growing number of United States District Courts have adopted standard protective order templates that are posted on the court’s website and referenced in standing orders or local rules. The practice is particularly prevalent in high-volume districts with large commercial, technology, and entertainment dockets, including the Northern District of California and the Central District of California. The Northern District of California appears to be leading this effort nationally.

The framework operates where a standing order provides that parties in civil cases shall use the court’s standard protective order template and parties who wish to use a different form, or who oppose entry of a protective order altogether, must file a motion explaining why the court’s

from many sources, including judges, practicing attorneys, government agencies, academia, and bar associations.”
<https://www.uscourts.gov/forms-rules/about-rulemaking-process/how-suggest-a-change-federal-court-rules-and-forms> (last accessed Feb. 23 2026).

template is inadequate. (for example, Exhibit C). The template itself is presented on the court’s website as a stipulated order: it recites that “*the parties agree*” to the existence of confidential information warranting protection, establishes a framework for designating discovery material at various confidentiality tiers, creates a challenge procedure for disputed designations, and provides that designations are binding pending resolution of any challenge. (Exhibit B).

The templates may be derived from or modeled on the Federal Judicial Center’s model protective order, adapted by local committees or individual judges but they are not adopted through the notice-and-comment rulemaking process required for local rules under Rule 83(a) and 28 U.S.C. § 2071(b). They also are not formally reviewed by circuit judicial councils for consistency with the Federal Rules. They are, in form, suggested form templates. In practice, they may function as mandatory default rules governing the speech rights, discovery obligations, and sanctions exposure of litigants.

II. IDENTIFIED DEFICIENCIES

A. INVERSION OF THE RULE 26(C) BURDEN

Rule 26(c)(1) provides that a protective order may be issued “for good cause shown” by the party seeking protection. The burden is on the movant. This allocation is deliberate and well-established: the default in federal litigation is openness, and departures from that default require affirmative justification. *See, e.g., Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (“[G]ood cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure.”).

The template system inverts this burden. The standing order defaults to the protective order’s entry. The party who *opposes* protection (who seeks the default position of openness that Rule 26(c) presumes), faced with a motion from the opposing party seeking to compel the order, must file letters or motions and may be forced to make an affirmative showing for departure. (See for example, Exhibit D). The party seeking protection need not demonstrate anything; they simply accept the court’s default and ask to have to ordered, regardless of the opposing party’s position.

This is a substantive amendment to Rule 26(c)’s burden allocation, accomplished not through the Rules Enabling Act process but through a template form, standing orders, and

“procedural” and “administrative” discovery management. The Advisory Committee did not approve this reallocation. Congress did not review it. The public did not comment on it. It is, in effect, a *sub rosa* amendment to a Federal Rule of Civil Procedure.

B. CIRCUMVENTION OF THE GOOD CAUSE REQUIREMENT

A court must independently determine whether ‘good cause’ exists under Rule 26(c). *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992). However, the Northern District’s model template’s recital that “the parties agree” to the existence of confidential information serves a specific legal function in that it substitutes for the independent judicial finding of good cause that Rule 26(c) requires. Some Northern District Standing Orders place a burden and restrictions on anyone seeking to modify the model order, including this recital. (See Exhibit C, for example).

With this mandatory recital compelling an assertion that the parties have “agreed” to the need for the Protective Order, then the court apparently need not make its own determination that protection is warranted. As such, the stipulation becomes the good cause showing. However, that is not what the Federal Rules require. “A party seeking a protective order must show good cause by demonstrating harm with specificity... Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1182 (9th Cir. 2006).

In cases where one party opposes the order’s entry and is pressured by the court or the standing order’s default structure into signing nonetheless (see Exhibit D-E), the “agreement” is fictional, the recital is compelled speech, and state contract law may even nullify the legal effect of the compulsory recital, and thus voiding the legal basis for the order. In that circumstance, the recital states a “fact” that even the docket history directly contradicts. The good cause finding that Rule 26(c) requires cannot be made by the court through this process as it is manufactured by a template that assumes its own predicate, and may be entered through administrative coercion.

The Committee should consider whether Rule 26(c) should be amended to clarify that a protective order requires an independent judicial finding of good cause that cannot be satisfied solely by a template’s recital of party agreement, particularly where one or more parties have filed objections to the order’s entry.

C. EVASION OF THE RULEMAKING PROCESS

Under 28 U.S.C. § 2071(b), local rules must be adopted after “appropriate public notice and an opportunity to comment.” Rule 83(a) imposes the same requirement and adds that local rules must be “consistent with” the Federal Rules and Acts of Congress. Section 2071(c) provides that local rules must be furnished to the circuit judicial council, which may modify or abrogate rules found inconsistent with federal law.

These requirements exist for a reason. The rulemaking process is the mechanism Congress established to ensure that procedural rules (which directly affect litigants’ rights) are vetted for constitutional compliance, checked for consistency with the Federal Rules, and subject to input from the affected public before they take effect.

These model Protective Order templates achieve the functional effect of local rules—they govern practice in every civil case, impose obligations on every litigant, restrict constitutional rights, and reallocate federally assigned burdens but without any of the procedural safeguards that local rules require. They are not adopted through notice and comment. They are not reviewed by circuit judicial councils. They are not tested for consistency with Rule 26(c). They are drafted, posted, and imposed through standing orders, bypassing every checkpoint that Congress created to prevent exactly the problems this petition identifies.

If the content of a protective order template is significant enough to be binding on litigants and enforceable through contempt, then it is significant enough to go through the process Congress required for rules that bind litigants. The current practice represents a structural evasion of the rulemaking framework. (“It is currently unclear what, if anything, gives courts the authority to sanction parties for violating protective orders.”²)

D. THE SANCTIONS GAP

Courts sometimes assume that Rule 37(b) provides authority to sanction parties for violating Rule 26(c) protective orders. the Advisory Committee Notes indicate that assumption is almost certainly incorrect for the vast majority of protective orders. Rule 37(b)(2)(A) authorizes

² Josephs, Adam M. “The Availability of Discovery Sanctions for Violations of Protective Orders,” *University of Chicago Law Review*: Vol. 80: Iss. 3, Article 8. (2013) <https://chicagounbound.uchicago.edu/uclrev/vol80/iss3/8>

sanctions when a party “fails to obey an order *to provide or permit discovery*.” The use of the infinitive construction is significant. The Rule does not say “an order providing or permitting discovery” (which would describe the order’s effect) but rather it says “an order *to provide or permit discovery*” — which describes what the order directs a party to do.

To trigger Rule 37(b), the order must command a party to produce or allow discovery. *See* Josephs, “The Availability of Discovery Sanctions for Violations of Protective Orders,” 80 U. Chi. L. Rev. 1355, 1371–72 (2013) (analyzing the infinitive construction and its implications for the scope of Rule 37(b)). Traditional protective orders do the opposite. They do not direct a party to produce discovery but rather they restrict the receiving party’s use of material that has already been or will be produced. These are orders *about* discovery.

Some courts have attempted to bridge this gap by arguing that protective orders “enable” or “allow” discovery to proceed. *See, e.g., Smith & Fuller, PA v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 489 (5th Cir. 2012). But this reasoning proves too much. Any order issued during litigation (a scheduling order, a venue ruling, a motion to dismiss decision) could be characterized as “enabling” discovery in some abstract sense. Without a limiting principle, this reading would extend Rule 37(b) to virtually any court order, which cannot be what the Rule contemplates.

Rule 26(c) authorizes two distinct types of orders: protective orders and discovery orders (directing a party “to provide or permit discovery”). The Rule 26 Advisory Committee Notes to the 1970 Amendment resolve the ambiguity, stating that the subdivision “contains new matter relating to sanctions” and that “[w]hen a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery.” In *Lipscher v. LRP Publications, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001), the Eleventh Circuit held that “a Rule 26(c) protective order is not ‘an order to provide or permit discovery,’ and therefore, such orders do not fall within the scope of Rule 37(b)(2).”

Another enforcement mechanism is the court’s inherent sanctioning authority, but under *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–47 (1991), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980), inherent authority sanctions (particularly the more severe sanctions like fee-shifting and contempt) are generally limited to cases of bad faith or willful disobedience. It’s unclear what kind of violation of these model Protective Orders could justify sanctions through this

authority but not have independent basis for sanctions under a more founded legal authority (such as related to mishandling Trade Secrets, etc.).

The Committee should consider whether the enforcement framework for protective orders should be clarified through an amendment to Rule 37(b), as Josephs proposes, and if so, whether any such amendment should be accompanied by the safeguards identified in the original Petition—self-executing scope exclusions, prohibition on designating public information, and a requirement of judicial review before designations may restrict speech about matters of public record. Ideally, the enforcement authority and the substantive safeguards should be addressed together.

E. THE PRIOR RESTRAINT PROBLEM: DESIGNATION WITHOUT JUDICIAL REVIEW

The most constitutionally consequential feature of the standard template is the interaction between two provisions that appear in the Northern District’s version: a scope exclusion for publicly available or already-known information, and a challenge procedure providing that designations are treated as binding pending resolution of any dispute.

When these provisions are read together, they create the following ambiguity: a party may designate any discovery material as “confidential,” and the designation is immediately binding on the receiving party. But does this apply regardless of whether the material falls within the order’s scope? If the receiving party believes the designation is improper (including because the material is publicly available and thus excluded from the order’s coverage) then must the receiving party still initiate a formal challenge process, during which the designation remains in effect?

In practice, that would mean that a private party can impose an immediately effective speech restriction on an opposing party with respect to any information, including information that is already public, with no judicial review at the point the restriction takes effect. The restriction is then enforced by the court’s contempt power. Its duration is controlled by the pace of the challenge process, which the designating party can extend through slow-walking meet-and-confer and the restricted party faces the risk of sanctions for any speech during the interim period.

If any court applied the order that way, even if voluntary and consensual entered, this creates an unlawful prior restraint on speech. It is imposed without prior judicial review, it may be used to restrict speech about matters of public record, and it is enforced by the administrative

machinery of the federal courts rather than substantive judicial review. Under *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), protective orders restricting discovery material are only constitutionally permissible when they do not prevent parties from speaking about information they independently know or that is publicly available. *Id.* at 37. A template mechanism that permits the designation of public information as confidential, with binding interim effect, crosses the constitutional line that *Seattle Times* drew, even before considering the coercive compelled entry.

Protective Orders cannot not be used to preclude public access to evidence of misconduct, nor may they operate to adjudicate contested legal issues under the guise of discovery. See, *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131–32 (9th Cir. 2003). This problem is further compounded if the designating party asserts that the receiving party’s complaints about the designation itself are also confidential and subject to the order, creating a recursive silencing structure in which the restricted party cannot speak about the subject matter and cannot disclose that they have been prevented from speaking. This structure is functionally identical to a secret prior restraint—the most constitutionally disfavored form of speech restriction in American law.

F. COMPELLED SPEECH

As discussed above, the template’s recital that “the parties agree” to the existence of confidential information compels parties to affirm a proposition they may dispute. This is constitutionally significant under *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), which establish that the government may not compel individuals to affirm beliefs or make statements they disagree with.

The compelled speech through coerced recital performs an unauthorized legal function in that it establishes the evidentiary basis for the order’s entry, substituting for the good cause finding that Rule 26(c) independently requires. The compelled speech thus creates the judicial justification for the order that compelled the speech—a self-referential structure that undermines the integrity of the Rule 26(c) process. Compelled Speech is the enemy of the “fixed start in our constitutional constellation” that “no official high or petty, can prescribe... matters of opinion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

In this circumstance, a party is left with few options if a court pressures it to sign this model order. In order to escalate the matter from a Magistrate Judge they may first have to choose to defy

that Magistrate Judge’s Order compelling them to sign the Model Protective Order, which could leave them facing threats of sanctions or contempt. The courts must allow a meaningful opportunity to oppose these orders. *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009) holds that district courts must allow parties to make meaningful objections when court procedures affect constitutional or statutory rights.

If the Courts require “stipulation” to a model Protective Order despite a public interest Plaintiff’s objection and make the stipulation a requirement for the litigation to proceed, the courts also create a Unconstitutional Condition, denying benefits and rights on a basis that infringes on constitutionally protected interests. This is also directly contrary to the rule where courts will ordinarily subject government actions that compel speech to heightened (not reduced) constitutional scrutiny.

G. IMPACT ON PUBLIC INTEREST LITIGATION AND NON-WAIVABLE RIGHTS

The Model Protective Order system’s deficiencies are not equally distributed across case types. They fall most heavily on individual plaintiffs in public interest litigation, civil rights cases, employment discrimination cases, and cases alleging criminal conduct by institutional defendants. In these cases, the plaintiff often has a strong interest in public discussion of the case—both as a matter of First Amendment right and as a practical element of accountability for alleged misconduct.

The defendant, conversely, has a strong interest in suppressing such discussion, especially if evidence of their misconduct may be of strong public interest. The model template system’s default (protective order in place, designations binding, burden on the party seeking openness) systematically advantages the party seeking secrecy over the party seeking transparency. This is particularly concerning in districts where the template system appears to have developed in response to aggressive protective order practice by powerful institutional defendants (i.e. Silicon Valley, Hollywood, etc.). In such districts, the template may function less as a neutral case management tool and more as an institutionalized accommodation of the preferences of repeat-player defendants who benefit from default secrecy especially in public policy cases.

The court’s administrative convenience interest in reducing protective order litigation is legitimate (“judicial economy”), but it cannot be served by a mechanism that preemptively grants one category of litigant its preferred outcome at the expense of the other’s constitutional rights. Even a facially neutral local rule cannot be used to abridge the rights guaranteed by the Federal Rules or Constitution. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Wooley v. Maynard*, 430 U.S. 705 (1977) citing *Board of Education v. Barnette*.

Additionally, in cases involving state law claims (particularly in states with robust self-executing constitutional protections such as California) the template may purport to waive rights that state law designates as non-waivable. California’s Constitution provides independent protections for rights related to privacy (Article I, Section 1), free speech (Article I, Section 2), and crime victims’ rights under Marsy’s Law (Article I, Section 28(b)). A federal court sitting in California cannot enforce a stipulation that waives these rights if California law does not permit such waiver, especially through coerced “stipulation” to model templates and forms.

The template, if treated as a stipulated agreement, could be unenforceable under state contract law due to duress, unconscionability, and the purported waiver of non-waivable rights. Court policies and productivity documents certainly cannot operate to silence constitutional claims or restrict judicial access when protected disclosures are at issue. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887–88 (2009). In which case, the burden to prove the need for the agreement and order is nullified and not present, invalidating the overall order.

III. THE TEMPLATE’S AMBIGUOUS LEGAL IDENTITY

A threshold difficulty in addressing the template system is that the template’s legal character is undefined, and it is treated as different things at different moments depending on what is convenient. (“*Nowhere does [Rule 37(b)] mention protective orders or Rule 26(c)...A protective order rarely relates directly to a single claim or defense. Protective orders more often deal with such amorphous concerns as ‘embarrassment [or] oppression,’ . . . or broader considerations of public policy.*” See, *Coleman v American Red Cross*, 23 F.3d 1091, 1098-1099 (6th Cir. 1994), Ryan dissenting).

When the court wishes to enter the order without an independent good cause finding, the template may be treated as a *stipulation*—a voluntary agreement between the parties that the court

merely approves. When a party challenges the order's terms, it may be treated as a *court order*—enforceable through contempt, not subject to unilateral modification, requiring formal motion practice to challenge. When asked why it did not go through the Rule 83 rulemaking process, it may be characterized as *just a template*—a convenience, not a rule. When its terms are challenged as unconstitutional, it may be defended as a *case management decision* entitled to deferential review.

Each of these characterizations carries different legal requirements for validity:

- A ***stipulation*** requires genuine mutual assent and is subject to contract law principles.
- A ***court order*** requires an independent legal basis and must comply with the Constitution and Federal Rules.
- A ***local rule*** must go through the Rule 83 process.
- A ***case management decision*** must be a reasonable exercise of discretion.

The template, as currently administered, satisfies the requirements of none of these categories while claiming the benefits of all of them.

The structure of legal authority in which federal court orders operate is well-established. The Constitution is supreme. Federal statutes enacted pursuant to constitutional authority, including the Rules Enabling Act (28 U.S.C. § 2072), follow. The Federal Rules of Civil Procedure, promulgated through the Rules Enabling Act process, come next. Local rules adopted under Rule 83(a) and 28 U.S.C. § 2071 must be consistent with the Federal Rules and Acts of Congress. Standing orders and individual judge practices occupy the lowest tier, subject to all of the above. *See Fed. R. Civ. P. 83(b).*

A model protective order template sits below all of these authorities. It is not a statute. It is not a federal rule. It is not a local rule adopted through the Rule 83 process. It is not even a formally promulgated standing order in most respects. It is a form document, drafted through no formal process, posted on a website, and signed in individual cases at the court's direction.

As demonstrated throughout this Petition and supplement, the template system as currently administered operates in conflict with higher authority at every level of the hierarchy.

- It overrides **Rule 26(c)** by inverting the good cause burden. Rule 26(c) requires the party seeking protection to demonstrate good cause. The template system requires the party opposing protection to make a showing for departure.

- It overrides the **Rules Enabling Act** by abridging substantive rights through a procedural mechanism. The Rules Enabling Act provides that procedural rules “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). Speech rights are substantive rights. The template, if interpreted to permit unilateral prior restraints on speech about public information, abridges substantive rights in a manner that even the Federal Rules themselves could not authorize.
- It overrides the **First Amendment** by restricting speech without the procedural safeguards that prior restraints require—no prior judicial review, no narrow tailoring, no finding of necessity, and a recursive silencing mechanism that prevents the restricted party from identifying the restriction.
- It overrides **state constitutional rights** by purporting to waive, through a coerced “stipulation,” rights that state law designates as non-waivable.
- It overrides **Rule 37(b)** by assuming an enforcement mechanism that the Rule’s text and Advisory Committee Notes do not support for traditional protective orders.

The Committee should consider whether the Federal Rules should explicitly address the legal status of protective order templates—defining what they are, what authority they carry, what process is required for their adoption, and what limitations apply to their use.

IV. SCOPE OF THE PROBLEM & APPARENT ABSENCE OF APPELLATE REVIEW

The apparent deficiencies identified in this petition, if confirmed by the Committee, would be systemic rather than case- or court- specific. They would arise from the structure of any model protective order template system itself, not from any individual judge’s application of it. Every case in a district that uses a template system may be subject to the same burden inversion, the same compelled speech recital, the same prior restraint mechanism, and the same rulemaking evasion.

Meaningful appellate review of these issues is structurally unlikely for several reasons including that protective order disputes are interlocutory and generally not immediately appealable; litigants who object to the template are focused on their underlying case and lack the resources or inclination to pursue collateral appellate litigation over discovery procedures; the practical coercion of the system (sign the template or face judicial displeasure in the case you care about) discourages the preservation of objections that would be necessary for appellate review; and the parties most harmed by the system (individual plaintiffs with fewer resources) are the least able to bear the cost of challenging it.

To make matters worse, the practical enforcement of protective orders in districts often occurs not through formal motion practice with full briefing and hearing, but through informal mechanisms: joint letter briefs, short individual letters, telephonic discovery conferences, and brief minute orders. These streamlined procedures are designed for routine discovery disputes (disagreements over the scope of interrogatories, privilege assertions, scheduling modifications) but they are not designed for (and are constitutionally inadequate to address) disputes that implicate fundamental speech rights.

Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the adequacy of procedural safeguards is evaluated by weighing the private interest affected, the risk of erroneous deprivation through the procedures used, and the government’s interest in the streamlined procedure. Applied here: the private interest is speech, a fundamental constitutional right; the risk of erroneous deprivation through letter-brief adjudication is high, because the legal issues are complex, fact-intensive, and constitutional in dimension; and the government’s interest in administrative efficiency does not justify streamlined procedures when the thing being adjudicated is whether a party may speak publicly about pre-existing public information.

However, once a model Protective Order is compelled and entered, the party the order has then already fallen into the de facto procedural space where a court now uses administrative procedures to manage active disputes about constitutional rights. Thus, this matter is precisely the type of problem and circumstance in which rulemaking, rather than case-by-case adjudication, is the appropriate corrective. The Advisory Committee exists to identify systemic procedural problems that are unlikely to be resolved through the normal appellate process and to address them through amendments to the Federal Rules. The protective order template problem is such an issue.

V. JUDICIAL ECONOMY HAS ITS LIMITS

The implicit justification for the template system is administrative convenience—it reduces the court’s workload in managing protective order disputes. This is a legitimate interest in designing procedures, but it has never been held sufficient to override constitutional rights, and it certainly cannot justify bypassing the rulemaking process that Congress established to prevent exactly the problems identified here. See *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016) (inherent authority “must be a reasonable response to the problems and needs confronting the court’s fair

administration of justice”); *Chambers*, 501 U.S. at 47 (inherent powers “must be exercised with restraint and discretion”).

Moreover, the administrative convenience interest is not neutral in its application. In districts where the template system developed in response to aggressive protective order practice by powerful institutional defendants (San Jose, San Francisco, Los Angeles, etc.), the “convenience” being served may simply be the convenience of not having to adjudicate repeated defense requests for secrecy. The court’s solution (granting secrecy by default) eliminates the dispute by preemptively adopting one side’s preferred outcome. That is not neutral case management. It is the institutionalization of one category of litigant’s preferences, accomplished through a mechanism that bypasses every safeguard designed to prevent exactly that result.

A compelling government interest in efficient case management cannot be served by a mechanism whose practical effect is to facilitate the suppression of speech by less-resourced litigants at the behest of more-resourced litigants. The model template becomes a government “remedial” action for the benefit of corporations and wealthy individuals to eliminate avenues for constitutional objections and public interest legal arguments.

Regardless, if the administrative burden of adjudicating protective order requests case by case is genuinely unmanageable, and the template’s beneficial outcome for corporations is simply coincidental, then the proper response is still rulemaking through the processes Congress established – not the adoption of a form document that circumvents those processes while restricting constitutional rights.

VI. PROPOSED RECOMMENDATIONS

Petitioner respectfully submits the following proposals for the Committee’s consideration. These are offered as starting points for study, not as final drafted rule text. Petitioner recognizes that the Committee’s deliberative process is the appropriate venue for refining these concepts.

A. CLARIFY THAT THE RULE 26(c) GOOD CAUSE REQUIREMENT CANNOT BE SATISFIED BY A TEMPLATE’S RECITAL

The Committee should consider an amendment to Rule 26(c) or an Advisory Committee Note clarifying that entry of a protective order requires an independent judicial finding of good cause, and that a template’s recital of party agreement does not satisfy this requirement,

particularly where one or more parties have formally objected to the order's entry. This would restore the burden allocation that Rule 26(c) establishes and that the template system has eroded.

B. CLARIFY THE ENFORCEMENT FRAMEWORK FOR PROTECTIVE ORDERS UNDER RULE 37(B)

The Committee should study whether Rule 37(b) authorizes sanctions for violations of Rule 26(c)(1) protective orders and, if it determines that the current text does not, consider an amendment expressly extending Rule 37(b) to such orders.

Any such amendment should be accompanied by the substantive safeguards proposed in the original Petition, ensuring that the enforcement authority and the limitations on its exercise are established together. Enforcement authority without safeguards would ratify the existing practice of sanctioning parties for violating constitutionally deficient orders.

C. PROHIBIT BURDEN INVERSION THROUGH STANDING ORDERS OR TEMPLATES

The Committee should consider an amendment to Rule 26(c) or Rule 83 providing that no local rule, standing order, or standard form may require a party opposing a protective order to make an affirmative showing for 1) departure from a default protective order or 2) opposition to a protective order unless the other side first makes a showing for the need for that order.

The Rule 26(c) burden belongs to the party seeking protection, and it cannot be reallocated through administrative mechanisms without running foul of the Rules and Constitution.

D. REQUIRE THAT STANDARD PROTECTIVE ORDER TEMPLATES GO THROUGH THE RULE 83 PROCESS

If a district court wishes to adopt a standard protective order template that functions as a default template in civil cases, the template should be subject to the same adoption process required for local rules: public notice, opportunity to comment, judicial council review, and consistency check against the Federal Rules.

This would ensure that templates receive the scrutiny that their practical significance warrants and would close the gap between the template's functional authority and its procedural legitimacy.

E. ESTABLISH THAT SCOPE EXCLUSIONS IN PROTECTIVE ORDERS ARE SELF-EXECUTING

The Committee should consider a rule provision or Advisory Committee Note establishing that where a protective order excludes certain categories of information from its scope (such as publicly available or already-known information) that exclusion operates independently and is self-executing.

Assumably, a party shares information which falls in a scope exclusion (such as public records) would not be required to use the order's challenge procedure to establish what the order's text already provides, and a designation of excluded information has no binding interim effect. But this may need to be expressed directly and in a formal rule to ensure adherence.

This would prevent the weaponization of the “treat as designated pending challenge” convention against information that the order, by its own terms, does not cover. It would also help to resolve the constitutional difficulty: if scope exclusions are self-executing, the template does not authorize prior restraints on speech about public information, and the *Seattle Times* framework remains satisfied.

F. PROHIBIT PROTECTIVE ORDERS FROM RESTRICTING SPEECH ABOUT LITIGATION CONDUCT

The Committee should consider a rule provision establishing that a protective order does not restrict a party's right to publicly discuss the conduct of the litigation itself, including, generally, comments on an opposing party's use of confidentiality designations, the filing of motions, or other procedural events. A protective order governs discovery material; it does not and constitutionally cannot function as a gag order on meta-commentary about the litigation process.

G. REQUIRE JUDICIAL REVIEW BEFORE DESIGNATIONS RESTRICT SPEECH ABOUT PUBLIC INFORMATION

The Committee should consider a provision requiring that before a confidentiality designation may restrict a party's speech about information that is already in the public record (including information contained in publicly filed pleadings, court orders, or other public documents) the designating party must obtain a court order specifically authorizing the designation after a showing that the standard for a prior restraint on speech has been met.

The “treat as designated pending challenge” default should never apply to information that is already public, because the constitutional interest in suppressing public information is, by definition, nonexistent. However, unless directly communicated, there’s opportunity for abuse.

H. ADDRESS THE TEMPLATE’S LEGAL IDENTITY

The Committee should consider a rule provision or Note addressing the legal status of protective order templates. This may need to address the requirements of Rule 26(c), the First Amendment, and/or the Rules Enabling Act.

I. PROHIBIT COURTS FROM COMPELLING PARTIES TO SIGN TEMPLATE ORDERS OVER CONSTITUTIONAL OBJECTIONS WITHOUT A HEARING

The Committee should consider a rule provision establishing that when a party raises a formal constitutional objection to the entry of a protective order, the court must hold a hearing and issue a written ruling addressing the constitutional arguments before entering the order.

A party may not be compelled to sign a stipulated order or punished for refusing to sign while a constitutional objection remains unresolved. This would help to ensure the “meaningful opportunity to oppose” required by *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009).

VII. CONCLUSION

The protective order template system, as currently administered in some United States District Courts, represents a significant departure from the framework Congress established for the regulation of discovery and the protection of litigants’ rights.

It inverts burdens that the Federal Rules deliberately assign. It may manufacture consent through compelled recitals. It can restrict constitutional rights through mechanisms that bypass the rulemaking process. It creates the potential for private parties to impose prior restraints on speech about public information, enforced by the coercive power of the federal courts, without any judicial review at the point the restriction takes effect. They are structural features of the template system that can be, and have been, exploited by well-resourced litigants to suppress speech by less-resourced opponents in cases involving matters of significant public interest.

The Advisory Committee is uniquely positioned to address this problem. The appellate process is structurally unlikely to produce a comprehensive solution, because the parties most

harmed by the system are the least able to pursue appellate relief, and the interlocutory nature of protective order disputes limits appellate access. Rulemaking is the appropriate vehicle.

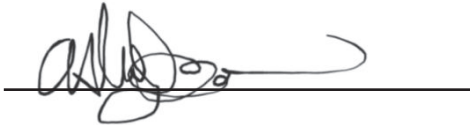
Petitioner respectfully requests that the Advisory Committee place this issue on its study agenda, solicit input from the bench, bar, and public, and consider amendments to the Federal Rules that would restore the protections that the template system has eroded—while preserving the legitimate administrative benefits that well-designed protective orders provide.

In the meantime, advisory letters or guidance documents directed towards the courts currently piloting these model templates may be prudent in order to put these courts on notice of an examination and scrutiny of their new processes.

The existing system works when everyone acts in good faith and has built in checks for parties who do not act in good faith. The Federal Rules provide safeguards that operate even when (especially when) good faith is absent. That is what this petition asks the Committee to ensure it occurs with protective orders and that Constitutional rights cannot be waived or bypassed by administrative templates.

* * *

Respectfully submitted,



/s/ Ashley M. Gjovik, J.D.

Dated: Feb. 23 2026
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Ashley M. Digitally signed
Gjovik, by Ashley M.
J.D. Gjovik, J.D.
Date: 2026.02.23
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LINKED EXHIBITS

- **EXHIBIT A:** Northern District of California, Model Protective Orders (“The protective orders on this page are court-approved model forms... With the exception of Patent Local Rule 2-2, the Local Rules do not require the parties to use any of the model protective orders and counsel may stipulate to or move for another form of protective order.”) <https://cand.uscourts.gov/rules-forms-fees/northern-district-guidelines/model-protective-orders>
- **EXHIBIT B:** Northern District of California, MODEL STIPULATED PROTECTIVE ORDER (for standard litigation), 12 pages, https://cand.uscourts.gov/sites/default/files/documents/CAND_StandardProtOrd.Feb2022_0.pdf
- **EXHIBIT C:** Northern District of California, Magistrate Judge Standing Order Example: (“*If parties believe a protective order is necessary, they shall, where practicable, use one of the model stipulated protective orders (URL). Parties shall file one of the following with their proposed protective order: (a) a declaration stating that the proposed order is identical to one of the model orders except for the addition of case-identifying information or the elimination of language denoted as optional; (b) a declaration explaining each modification to the model order, along with a redline version comparing the proposed protective order with the model order; or (c) a declaration explaining why use of one of the model orders is not practicable.*”) https://cand.uscourts.gov/sites/default/files/standing-orders/KAW-CivilStandingOrder-12-19-2025_0.pdf
- **EXHIBIT D:** Northern District of California, Example of U.S. Judge’s denial of party’s request for full briefing prior to Magistrate Judge compelled all-party “stipulation” to model protective order with Constitutional objections filed, (See, Case 3:23-cv-04597, Order at Dkt. 213 dated May 14 2025 responding to Motion to Quash compelled Protective Order at Dkt. 211 and attempted Petition for Appeal at Dkt. 208)(“ The Court also notes that [party’s] request for relief seems premature in several ways: (1) [Magistrate Judge] has not issued a final ruling on the terms of a protective order governing, inter alia, discovery; and (2) even if [defendant] designates certain documents as confidential, that does not bar [plaintiff] from contesting a designation... the Court DENIES the request for an order requiring full briefing on the matter of a protective order,”) and example of U.S. Judge’s denial of party’s request for full briefing and public hearing for judicial review of allegations of “breach” of Model Protective Order, (see, Case 3:23-cv-04597, Order at Dkt. 287 dated Feb. 20 2026, responding to Motion to Quash an informal telephonic conference as hearing for sanctions, compelled action, and prior restraint arising from Model Protective Order as a legal authority denying objections and request to quash).
- **EXHIBIT E:** Northern District of California, July 2 2025 Telephonic Conference transcript, Magistrate Judge to pro se Plaintiff objecting to Protective Order in public interest litigation: (“all of the district judges and magistrate judges in the Northern District got together and agreed on that Model Order. So we put it on the court's website so that the parties could simply just use it... you might think that there's something, you know, improper or -- you know, in

this case, I think you're feeling somewhat ambushed about it. But it's really just a very standard procedure for parties to enter into this protective order. And, in fact, we expect people to use it.... that cuts down on the amount of work all of us have to do... I'm prepared to just enter the protective order as it is written because that's the Model Protective Order. And then that will govern how you -- how the parties deal with confidential information... what I'm talking about is just getting this protective order done and getting it signed by the parties and filed so that I can sign off on it.... this is the standard Model Protective Order approved by all the judges on this court. So, you know, you're not being forced to do anything that's against your rights... if we're finished with that issue and you're prepared to go ahead and just sign off on the Model Protective Order, then we can move on to the next issue... I think that the parties should just get it signed as soon as possible and then get it to me.... So [objecting party], can you sign it as soon as possible?.. That becomes the court's order..." Case 3:23-cv-04597, Dkt. 230-233, Transcript pp. 4-17).

- **EXHIBIT F:** Central District of California, example of a "Stipulated Protective Order" (*"Discovery in this action is likely to involve production of confidential, proprietary or private information for which special protection from public disclosure and from use for any purpose other than pursuing this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulated Protective Order."*) <https://www.cacd.uscourts.gov/sites/default/files/documents/JDE/AD/Stipulated%20Protective%20Order.pdf%20rev%202.16.18.pdf>

TAB 22

Mandatory Assistance for Pro Se Litigants

In Suggestion 26-CV-3, Billie Glazier proposes the adoption of a new Rule 83.1:

Rule 83.1. Mandatory Pro Se Assistance Upon Verified Unavailability of Counsel

- (a) **Trigger.** Upon a verified showing that a litigant has made reasonable, good faith efforts to obtain counsel and that no attorney is willing to accept representation, the court shall order Pro Se Assistance under this Rule.
- (b) **Scope of Assistance.** Pro Se Assistance shall include: (1) procedural guidance regarding pleadings, motions, and deadlines; (2) access to standardized forms and checklists; (3) a non-adversarial conference to clarify issues for adjudication; and (4) limited, neutral assistance to ensure filings comply with applicable rules.
- (c) **Neutrality.** Assistance provided under this rule shall be non-advocacy in nature and shall not include legal advice on the merits or strategic decision-making.
- (d) **Administration.** Assistance may be provided by a court-appointed Pro Se Assistance Officer or an equivalent program designated by the court.
- (e) **No Right to Counsel Created.** Nothing in this rule creates a right to appointed counsel.
- (f) **Record.** The court shall make a brief record of assistance provided under this Rule.

Suggestion 26-CV-3 at 1-2.

The submission urges that such a rule is needed to implement constitutional rights of access to justice because “[w]e cannot refuse judicial guidance to sick and hurting people.” *Id.* at 3. The submission invokes Glazier’s “extensive experience as an instructor in emergency response, patient assessment, and triage.” *Id.* at 4.

There are many challenges for self-represented litigants (SRLs) and courts addressing cases involving SRLs. Our recent study of Rule 55 included attention to the growing importance of state courts (not federal courts) as “debt-collection” machines. The American Law Institute has launched a project about such challenges.

With regard to the federal government, the Office of Economic Opportunity established a network of legal services centers in the 1960s that provided legal representation to people of limited financial means. In California, for example, California Rural Legal Assistance repeatedly obtained injunctive relief in federal court halting state programs adopted while Ronald Reagan was governor. Governor Reagan made efforts to cut off CRLA’s federal funding.

After the 1980 presidential election, there were several efforts to curtail federal legal services programs. For background, see Andrea Saltzman, *Private Bar Delivery of Civil Legal Services to the Poor: A Design for a Combined Private Attorney and Staffed Office Delivery System*, 34 *Hast. L. J.* 1165 (1983); Note, *The Need for Legal Aid Reform: A Comparison of English and American Legal Aid*, 9 *Cornell Int'l L.J.* 379 (1991). The federal program was not entirely eliminated, but it was substantially curtailed. It is now operated under the auspices of the Legal Services Corporation, headquartered in Washington, D.C., which funds local nonprofit providers of legal services to the poor.

Throughout, the federal courts have on occasion appointed counsel to represent litigants in some civil cases. Some districts instituted programs to enlist willing lawyers on panels available to accept such appointments. In some states, there have been programs under which state court clerk's offices provide guidance of the sort recommended here to SRLs. California had a particularly expansive program when Ron George was Chief Justice of the Supreme Court of California. In the 1990s, the Chief Judge of the Ninth Circuit, appointed an ad hoc committee to study ways in which the federal courts might undertake similar efforts.

There can be no question that providing assistance to litigants in court is a valuable way to ensure access to justice. But that is difficult to regard as a "procedural" matter governed by the Civil Rules. This proposal directs district courts to employ Pro Se Assistance Officers. Many districts now have Pro Se Law clerks who develop expertise in handling certain sorts of matters (often prisoner petitions) and assist the court in evaluating those cases. But that was not something mandated by a Civil Rule. The rule proposal includes assistance such as guidance and standardized forms and checklists, but at least some of that sort of activity might well be regarded as practice of law under the law of several states. True, the proposal says the advice "shall not include legal advice on the merits or strategic decision-making," but it might well be that advice would only be useful if it included something of that sort.

The challenge of SRLs in federal civil cases exists. In this agenda book, for example, there is a proposal to change Rule 5 regarding electronic filing by SRLs. But there are limits to what the Civil Rules can do under the Rules Enabling Act, and this worthy effort seems a stretch too far.

It is recommended that this be dropped from the agenda.

Attachment(s):

- Suggestion 26-CV-3 (Billie Glazier)

Attachment to Mandatory Assistance for Pro Se Litigants

Rules Suggestion Under the Rules Enabling Act

Proposed Amendment to the Federal Rules of Civil Procedure

Mandatory Pro Se Assistance When Counsel Is Unavailable

Submitted to: Secretary of the Judicial Conference Committee on Rules of Practice and Procedure

Relevant Advisory Committee: Advisory Committee on Civil Rules

Purpose: To ensure ethical access to justice and prevent irreparable harm when Americans cannot secure counsel in time-sensitive civil matters.

Executive Summary

This submission proposes a targeted amendment to the Federal Rules of Civil Procedure establishing a mandatory, court-administered Pro Se Assistance mechanism when a litigant demonstrates good-faith inability to secure counsel. The proposal is grounded in constitutional principles, ethical obligations of the judiciary, and practical realities of time-sensitive civil litigation involving health, safety, and life itself.

Proposed Rule Text (Recommended: New Rule 83.1)

Rule 83.1. Mandatory Pro Se Assistance Upon Verified Unavailability of Counsel

Attachment to Mandatory Assistance for Pro Se Litigants

(a) **Trigger.** Upon a verified showing that a litigant has made reasonable, good-faith efforts to obtain counsel and that no attorney is willing to accept representation, the court shall order Pro Se Assistance under this Rule.

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(f) **Record.** The court shall make a brief record of assistance provided under this Rule.

Ethical Imperative: Fear, Decline, and the Duty to Hear

When an American is enduring fear of medical decline, fear of impending death, or fear for the life of a child, it is unethical for the justice system to

Attachment to Mandatory Assistance for Pro Se Litigants

leave that person unheard. Courts exist to protect life, liberty, and redress abuse.

Constitutional Foundations:

There are no footnotes in the Constitution of the United States requiring Americans to master procedural formalities before exercising their rights. Rights belong to the People, not only to those trained in legal semantics. We cannot refuse judicial guidance to sick and hurting people at even the possible expense of human lives for the sake of administrative issues.

Judicial Delay and Irreparable Harm

Ongoing life or health decline is always subject to expiration. Judicial delay converts time into harm. Delay equals harm, and in urgent cases, delay may equal death.

The People as the Rightful Beneficiaries of Courtroom Power

The courtroom derives its authority from the People. Lives must rise above font size and sentence structure when pleas invoke constitutional protection.

Declarant Perspective and Professional Basis

As a lifelong learner and former public safety responder and instructor to medical professionals, I affirm that when children are reportedly suffering, refusal to hear urgent claims defies ethical integrity.

Attachment to Mandatory Assistance for Pro Se Litigants**Plain-Language Analogy Illustrating Urgency and Ethical Duty**

True to my history of extensive experience as an instructor in emergency response, patient assessment, and triage, I communicate most effectively through analogy. In life-saving disciplines, analogies are not rhetorical devices; they are instructional tools. They translate urgency, risk, and ethical duty across different circumstances so that the listener understands what is at stake and why delay is unacceptable.

In emergency medicine and public safety, there is no margin for error when human life is involved. The same principle applies to justice.

Imagine a moment—past or possible—when emergency services were absolutely necessary: a child struck by a car, or a spouse with a closed airway who cannot breathe. An American dials 911. The caller is terrified. Some cry. Some explain everything they witnessed. Others recite medical histories. A few pray aloud. They speak differently, shaped by their experiences and education, but they share one common expectation: someone will answer, and help will come.

They wait anxiously until they hear sirens and see red lights. In that moment, Americans trust that handing their most vulnerable circumstance to a stranger was the right decision.

Attachment to Mandatory Assistance for Pro Se Litigants

That same trust is placed in the federal judiciary when all other avenues have failed—when rights are ignored, when power is abused, or when harm is ongoing. Americans expect that the courtroom will answer when the stakes are life, health, safety, or the welfare of a person who cannot find a meaningful path alone.

As the system currently operates, I have lost confidence that this expectation is still understood. The Constitution that I have depended upon to guarantee a path to “right” is barricaded by today’s judicial system. This rule I am proposing is one step towards correcting this imbalance of justice we are experiencing.

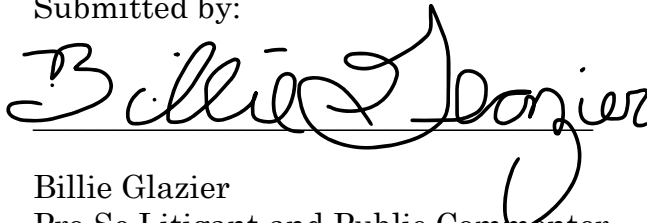
What I am witnessing—while educated in emergency response and convinced that many Americans face real danger in the pursuit of institutional or financial priorities—is the equivalent of an unanswered emergency call. It is as if the call for help is received, but no sirens follow. No lights appear. Instead, those with a duty to act debate punctuation, formatting, and sentence structure while harm continues. In a courtroom, these patterns would demand remedy and the responders could face imprisonment.

In emergency response, delay equals harm. In justice, the same is true. When pleas for protection are met with procedural silence rather than meaningful assistance, the ethical integrity of the system itself is placed at risk.

Attachment to Mandatory Assistance for Pro Se Litigants**Conclusion and Notice**

Timely, Mandatory Pro Se Assistance is a narrow and necessary reform. A comprehensive evidentiary dossier addressing systemic failures is in final preparation and will be submitted promptly, as immediate protective action is required to safeguard Americans, even children, from further harm.

Submitted by:

A handwritten signature in black ink, appearing to read "Billie Glazier", written over a horizontal line.

Billie Glazier
Pro Se Litigant and Public Commenter
Enterprise, Alabama
billie@glazierresources.com
02/02/2026

Rules Suggestion Under the Rules Enabling Act

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Submitted by:

A handwritten signature in black ink that reads "Billie Glazier". The signature is written in a cursive style with a large, looping "B" and a long, sweeping underline that extends across the text.

Billie Glazier
Pro Se Litigant and Public Commenter
Enterprise, Alabama
billie@glazierresources.com
02/02/2026

TAB 23



Date: March 13, 2026

To: Advisory Committees on Rules of Practice and Procedure

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

Re: Federal Judicial Center Research and Education

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

RESEARCH

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

Deepfakes and Authenticity

The Evidence Rules Committee is exploring whether the authenticity standard should be made more stringent than it now is for potentially fabricated evidence created by artificial intelligence. The committee asked the Center to survey all federal judges to ascertain their experiences and views.

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 new 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 interim weights were approved by the Judicial Conference in September to be used until the next comprehensive district-court case-weighting study is conducted.

Current Research for Other Judicial Conference Committees

Harm to Cooperators

At the request of the Court Administration and Case Management Committee, the Criminal Law Committee, and the Committee on Defender Services, the Center is updating its 2016 research on harms and threats of harm to government cooperators in criminal prosecutions (www.fjc.gov/content/310414/survey-harm-cooperators-final-report).

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Included in 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.

Case Weights for Bankruptcy Courts

The Center has completed 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.

JUDICIAL GUIDES

Completed

Benchbook for U.S. District Courts

The Center has published a seventh edition of its compilation of information that federal judges have found useful for immediate bench or chambers reference in civil and criminal proceedings (www.fjc.gov/content/397447/benchbook-us-district-courts-seventh-edition). The benchbook contains sections on such topics as assignment of counsel, taking guilty pleas, standard voir dire questions, sentencing, and contempt.

Reference Manual on Scientific Evidence

The Center collaborated with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (www.fjc.gov/content/396456/reference-manual-scientific-evidence-fourth-edition). The reference manual includes chapters on the admissibility of expert testimony and how science works and reference guides on forensic feature comparison evidence, human DNA identification evidence, eyewitness identification, statistics and research methods, multiple regression and advanced statistical models, survey research, estimation of economic damages, exposure science and exposure assessment, epidemiology, toxicology, medical testimony, neuroscience, mental health evidence, engineering, computer science, and artificial intelligence.

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).

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).

HISTORY

Resources for Public Speaking

These materials were developed for judges and court staff who wish to speak to groups about various aspects of federal-court history (www.fjc.gov/history/public-speaking-resources). The following units were added in 2026: “Defining the Boundaries Between Article III and Non-Article III Courts,” “Differences Between Federal and State Courts,” “Judicial

Administration,” “Legal Interactions Between Federal and State Courts,” “The Judiciary During the Gilded Age,” “The Judiciary During the U.S. Civil War,” “U.S. Bankruptcy Judges,” and “U.S. Magistrate Judges.”

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 for evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments.

EDUCATION

Specialized Workshops

Employment Law Workshop 2025

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

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.

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.

Court Web

This periodic webcast included as recent episodes “Federal Sentencing Update” (featuring Northern District of Ohio Judge Benita Pearson and U.S. Sentencing Commission Education Director Alan Dorhoffer) and “Supreme Court: October Term 2025” (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).

Consumer Case-Law Update for Bankruptcy Judges

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

Business Case-Law Update for Bankruptcy Judges

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

A Review of Ninth Circuit Bankruptcy Decisions

This annual webcast features judges on the Ninth Circuit Bankruptcy Judges Education Committee discussing significant decisions by the Supreme Court, the Ninth Circuit's court of appeals, and the Ninth Circuit's bankruptcy appellate panel.

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.

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 Eleventh Circuit.

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.