
**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

April 29, 2026

TABLE OF CONTENTS
Meeting of the Advisory Committee on Criminal Rules
Washington, D.C. | April 29, 2026

	Page
I. Introductory Remarks	
Tab 1: Committee Roster	5
Tab 2: Subcommittee List	9
II. Approval of the Minutes (Action Item for Final Approval)	
Tab 3: Draft Minutes of November 2025 Advisory Committee Meeting.....	15
III. Report of the Rules Committee Staff	
Tab 4: Draft Minutes of the January 2026 Standing Committee Meeting	47
Tab 5: March 2026 Report to the Judicial Conference of the United States.....	83
Tab 6: Status of Proposed Amendments to the Federal Rules	92
Tab 7: Pending Legislation Chart (119th Congress).....	99
Tab 8: Federal Judicial Center Research and Education Memorandum	105
IV. Subpoena Authority (Rule 17) (Action Item for Final Approval) (22-CR-A)	
Tab 9: Reporters' Memorandum	112
Summary of Public Comments	141
Rule 17 (Post-Publication Redline) with Committee Note	145
Attachment Regarding Rule 17(c)(5)	167
Rule 17 (Clean)	169
Rule 17 (Cumulative Redline).....	191
IV. Reference to Minors by Pseudonyms and Redaction of Social-Security and Taxpayer-Identification Numbers (Rule 49.1) (Action Item for Publication) (22-CR-B, 24-CR-A, 24-CR-C)	
Tab 10: Reporters' Memorandum	215
Rule 49.1 (Redline) with Committee Note.....	225
Rule 49.1 (Clean)	229
Suggestion from Department of Justice (24-CR-A).....	231
Suggestion from American Association for Justice and the National Crime Victim Bar Association (24-CR-C).....	234

TABLE OF CONTENTS
Meeting of the Advisory Committee on Criminal Rules
Washington, D.C. | April 29, 2026

	Page
Suggestion from Senator Wyden (22-CR-B)	235
IV. Advice to Defendant (Rules 11 & 32) (Action Item for Publication) (25-CR-N)	
Tab 11: Reporters’ Memorandum	237
Rules 11 and 32 (Redline) with Committee Notes.....	241
Rules 11 and 32 (Clean)	244
Suggestion from Judge Patricia Barksdale (25-CR-N)	247
V. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District (Rule 40) (23-CR-H, 24-CR-D)	
Tab 12: Reporters’ Memorandum	249
Rule 40 Discussion Draft (Redline)	252
Rule 40 Discussion Draft (Clean)	258
Suggestion from Judge Zachary Bolitho (23-CR-H)	263
Suggestion from Magistrate Judges Advisory Group (24-CR-D).....	264
VI. Electronic Filing and Service by Self-Represented Litigants (Rules 49 and 45) (Action Item for Publication)	
Tab 13: Professor Catherine Struve’s Memorandum.....	281
Rules 49 and 45 (Current Draft).....	294
Rules 49 and 45 (Redline).....	303
Comparison Chart.....	314
VII. Depositions for Discovery (Rule 15) (25-CR-B and supporting suggestions)	
Tab 14: Reporters’ Memorandum	326
List of Suggestions	328
VIII. Attorney Admission (Oral Report)	
IX. Next Meeting: October 14, 2026, Boston, MA	

TAB 1

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair

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

Reporter

Professor Sara Sun Beale
Duke Law School
Durham, NC

Associate Reporter

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

Members

Honorable André Birotte Jr.
United States District Court
Los Angeles, CA

Honorable Jane Boyle
United States District Court
Dallas, TX

Honorable Timothy Burgess
United States District Court
Anchorage, AK

Honorable Thomas M. Durkin
United States District Court
Chicago, IL

A. Tysen Duva, Esq.
Assistant Attorney General (ex officio)
United States Department of Justice
Washington, DC

Honorable Michael Harvey
United States District Court
Washington, DC

Marianne Mariano, Esq.
Office of the Federal Public Defender
Buffalo, NY

Shazzie Naseem, Esq.
Berkowitz Oliver LLP
Kansas City, MO

Honorable Jacqueline H. Nguyen
United States Court of Appeals
Pasadena, CA

Honorable Carlos A. Samour, Jr.
Colorado Supreme Court
Denver, CO

Professor Jenia Turner
Southern Methodist University
Dedman School of Law
Dallas, TX

Mary Jo White, Esq.
Debevoise & Plimpton LLP
New York, NY

Liaison

Honorable Paul J. Barbadoro
(*Standing*)
United States District Court
Concord, NH

ADVISORY COMMITTEE ON CRIMINAL RULES

Clerk of Court Representative

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

ADVISORY COMMITTEE ON CRIMINAL RULES

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

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

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

TAB 2

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

<p>Rule 11 Subcommittee</p> <p>Judge Jane Boyle, Chair Judge Andre Birotte Ms. Marianne Mariano Ms. Sonja Ralston (DOJ) Judge Michael Mosman</p>	<p>Rule 17 Subpoenas Subcommittee</p> <p>Judge Jacqueline Nguyen, Chair Judge Thomas Durkin Ms. Marianne Mariano Ms. Sonja Ralston (DOJ) Ms. Mary Jo White Judge Michael Mosman</p>
<p>Rule 40 Subcommittee</p> <p>Judge Michael Harvey, Chair Judge Andre Birotte Judge Jane Boyle Ms. Marianne Mariano Ms. Sonja Ralston (DOJ) Judge Michael Mosman</p>	<p>Rule 49.1 Subcommittee</p> <p>Judge Michael Harvey, Chair Judge Andre Birotte Ms. Marianne Mariano Mr. Shazzie Naseem Ms. Sonja Ralston (DOJ) Judge Michael Mosman</p>
<p>Pro Se Filing Subcommittee</p> <p>Judge Timothy Burgess, Chair Judge Michael Harvey Ms. Marianne Mariano Mr. Shazzie Naseem Judge Michael Mosman</p>	
<p>Evidence Committee Liaison</p> <p>Judge Thomas Durkin</p>	

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
Newark, NJ

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
Detroit, MI

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Civil Rules

Chair

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

Reporter

Professor Richard L. Marcus
University of California
College of the Law, San Francisco
San Francisco, CA

Associate Reporter

Professor Andrew Bradt
University of California, Berkeley
Berkeley, CA

Advisory Committee on Criminal Rules

Chair

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

Reporter

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

Associate Reporter

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

Advisory Committee on Evidence Rules

Chair

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

Reporter

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

RULES COMMITTEE LIAISON MEMBERS

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

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

Carolyn A. Dubay, Esq.
Chief Counsel

Bridget M. Healy, Esq.
Counsel

Shelly Cox
Management Analyst

Sarah A. Sraders, Esq.
Counsel

Rakita Johnson
Administrative Analyst

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Staff**

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Director

Committee on Rules of Practice & Procedure
Tim Reagan, Ph.D., J.D.
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Bankruptcy Rules Committee
Carly Giffin, Ph.D., J.D.
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Civil Rules Committee
Emery G. Lee, Ph.D., J.D.
Senior Research Associate

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

Evidence Rules Committee
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 3

**ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 6, 2025**

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (the “Committee”) met by videoconference on November 6, 2025. The following members, liaisons, reporters, and consultants were in attendance:

Judge Michael Mosman, Chair (in-person in Washington, D.C.)
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Thomas M. Durkin
Judge Michael Harvey
Marianne Mariano, Esq.
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Sonja Ralston, Esq.¹
Justice Carlos Samour
Professor Jenia Turner
Mary Jo White, Esq.
Brandy Lonchena, Esq., Clerk of Court Representative
Judge James C. Dever, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter (in-person in Washington, D.C.)
Professor Nancy J. King, Associate Reporter (in-person in Washington, D.C.)
Professor Catherine T. Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee (in-person in Washington, D.C.)
Sarah Sraders, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff (in-person in Washington, D.C.)
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff (in-person in Washington, D.C.)

¹ Ms. Ralston represented the Department of Justice.

Opening Business

Judge Mosman opened the meeting and welcomed the attendees. He noted that there were no representatives from the Federal Judicial Center present, as they were unable to attend due to the ongoing government shutdown.

Judge Mosman then briefly introduced the three new members of the Committee. The new academic member, Jenia Turner, is the Amy Abboud Ware Centennial Professor of Criminal Law at Dedman School of Law at Southern Methodist University. Judge Mosman said that Professor Turner's work has had a real-world impact, and her article on transparency in plea bargaining was recently cited by the United States Supreme Court.

Judge Mosman next introduced Mary Jo White, a partner at Debevoise & Plimpton LLP. Judge Mosman stated that Ms. White's focus was on high-stakes criminal defense and pre-enforcement work, among other things. Ms. White was the first female United States Attorney in the Southern District of New York, and possibly the only person to ever have been U.S. Attorney in both the Eastern District and Southern District of New York. She also previously served as chair of the Securities and Exchange Commission.

Next, Judge Mosman introduced the third new member, Judge Thomas Durkin, now a senior judge in Chicago, and a highly experienced trial judge. Judge Mosman said Judge Durkin spent almost 20 years as a partner at Mayer Brown before taking the bench, and had a full career before that as an Assistant U.S. Attorney, including being the First Assistant in the Chicago office.

Judge Mosman then introduced a new Rules Committee staff member, Sarah Sraders, who joined the Rules Office over the summer. Ms. Sraders previously worked as a litigation associate in two law firms in D.C. and was a law clerk to Judge Mark Goldsmith in the Eastern District of Michigan.

Judge Mosman expressed his gratitude to the Rules Committee Staff for their help during the government shutdown. He noted that they were not being paid and recounted an email exchange with Carolyn Dubay before Phase II of the shutdown began. Judge Mosman had expressed his sympathies for how rough the situation must be. Ms. Dubay had hoped that it would be over soon, but said that either way, the Rules Committee Staff had a job to do and it would therefore get done. Judge Mosman described this as the epitome of public service and said that the Committee was thankful for their help.

Judge Mosman then explained how the virtual meeting would proceed. The small group present in Washington, D.C. would turn off the camera and sound in the conference room during breaks. Members who were attending remotely should use the "raise hand" feature on Teams, or raise their hand, if they have something to say. Otherwise, everyone should remain muted. Judge Mosman stated that there was no preference as to whether members' cameras were on when they were not presenting.

Judge Mosman then turned to the draft minutes from the April 2025 Advisory Committee meeting, and called for a motion to approve the minutes. The motion passed unanimously.

Noting that the agenda book included draft minutes from the June 2025 meeting of the Standing Committee and the September 2025 report to the Judicial Conference, Judge Mosman turned to Ms. Dubay for a report on the status of proposed amendments to the Federal Rules. Ms. Dubay directed the Committee's attention to page 134 of the agenda book and noted that there are currently no criminal rules set to be implemented as final rules. The rules that were submitted for final approval to the Judicial Conference were approved. They were transmitted to the Supreme Court on October 16, 2025, and she would deliver them to Congress in April 2026 to become effective next December.

Professor Beale then provided an update on Rule 17, which was published for public comment in August. She gave a brief description of how the process works in general for the benefit of new members and members who have not yet seen a rule work all the way through the process. Rule 17 is now out for public comment, meaning that it has been posted online and has been mailed to various persons who would naturally be interested. The comment period runs until mid-February. The last time that Professor Beale checked, only one comment had been submitted. She cautioned that this does not mean that there will not be a large number of comments, as her experience is that most of the comments come in at the very end of the comment period. The comments can range from very specific comments about the wording of a proposal to more general agreement or disagreement with the purpose of the amendment. The comments would all be considered by the Rule 17 Subcommittee.

Professor Beale also noted the possibility that there would be requests for a hearing. There have not been hearings in recent years, but this is a big enough change that it is possible. The Rule 17 Subcommittee would work through all of the comments received and then present a report to the full Committee at the April 2026 meeting. Professor Beale expressed her hope that the subcommittee would be able to propose that the amendment be approved for presentation to the Standing Committee and ultimately to the Supreme Court and then to Congress. Committee members should therefore expect to see the results of the public comment period at the April meeting, along with a recommendation from the subcommittee.

Judge Mosman noted that prior to becoming Chair of the Committee, he had been serving as liaison to the Evidence Rules Committee, and pointed out that the Status of Proposed Amendments chart in the agenda book contained three fairly significant proposed amendments to the Evidence Rules: Rules 801, 609, and new Rule 707.

Judge Mosman then asked Ms. Sraders to walk through the chart of pending legislation that would directly or effectively amend the federal rules. Ms. Sraders directed the Committee's attention to page 141 of the agenda book, highlighting the Rape Shield Enhancement Act of 2025. The Act would require the Judicial Conference to identify certain amendments to Rule 16 that would narrow the scope of permissible discovery requests to limit inquiries into the records or history of an alleged victim of sexual assault. Ms. Sraders noted that there had been no action taken on the bill since it was introduced, but that the Rules Committee Staff would continue to monitor it.

Rule 49.1

Judge Mosman then asked Judge Harvey for the Rule 49.1 Subcommittee's report. Judge Harvey explained that the subcommittee had been hard at work since the last meeting. It had met several times, resolved the remaining policy issues, and worked with the style consultants on drafting language to amend Rule 49.1, which governs privacy protections in public court filings. The subcommittee had also worked very hard on that proposed draft language amending the rule. Judge Harvey stated that this was his first time drafting language, and he had mistakenly expected it would be fairly simple. It was not simple—the draft language in the agenda book went back and forth with the style consultants several times. Judge Harvey said that the subcommittee was very grateful for their help and for the help of the reporters. He noted the excellent memo found at page 145 of the agenda book. Judge Harvey also thanked Kyle Brinker, the former Law Clerk to the Standing Committee, for his research memos, which had been invaluable to the subcommittee's work.

Judge Harvey directed the Committee to page 153 of the agenda book, where the proposed draft language started. There was a clean and red-lined version, as well as a draft committee note. He asked for the Committee's feedback, noting that despite all the work that had been done, errors could still occur. Judge Harvey pointed out that Ms. Ralston had discovered a word that slipped into the draft language which did not belong there, in subparagraph (a)(2)(C). This portion of the rule governs financial account numbers, which had been outside the scope of the subcommittee enquiry. The draft amended version required no redaction of "the last four digits of an individual's financial account number." Judge Harvey explained that current Rule 49.1(a)(2)(C), refers to financial account numbers, not "an individual's financial account number." Judge Harvey thought that the words "an individual's" should not be included, and the reporters agreed. This language would be removed from the draft.

Judge Harvey then highlighted some of the decisions that the subcommittee had made, which were reflected in this draft. He explained that the subcommittee's work focused on consideration of two substantive changes to Rule 49.1: (1) replacing the use of initials with pseudonyms for minors in public criminal filings; and (2) requiring the complete redaction of social-security numbers (SSNs) and other taxpayer-identification numbers from public filings.

As the subcommittee had previously reported, it had unanimously decided from the outset to require the use of pseudonyms instead of minors' initials in public filings. Both the Department of Justice and the victim advocacy organizations that submitted the proposals triggering this review had emphasized that using initials with respect to minors does not adequately protect their privacy or safety. Use of the minor's initials can allow identification when combined with other information in the record.

Judge Harvey further explained that, as the subcommittee had discovered, the use of pseudonyms was already standard practice for federal prosecutors, and this had not caused a problem for defense counsel or the courts. In a sense, he said, this part of the proposal was simply catching up to what is already occurring. Judge Harvey noted that the proposed draft also made clear that filers may either substitute a pseudonym or simply omit the minor's name entirely from the filing.

Judge Harvey stated that the subcommittee has also recommended language in the committee note encouraging gender-neutral or otherwise non-identifying pseudonyms where feasible. This is the result of a recommendation of one of the victim advocacy groups and is meant to reduce the risk that gendered names or pronouns, when combined with other case facts, could make it easier to identify a minor. Judge Harvey acknowledged that the government's evidence may sometimes not be gender-neutral, making the use of gender-neutral pseudonyms not feasible, which is why this was drafted as a recommendation in the note rather than a requirement in the text of the rule.

Judge Harvey observed that there were questions raised in the reporters' memo, and he asked for feedback from the full Committee. He first noted that someone (he believed someone from one of the other rules committees) had questioned whether the protection for minors in this rule would extend only to individuals who were minors at the time of the conduct at issue, or only to those who were minors during the pendency of the case. That is, should the protection apply only when the person is a minor, such that once the person turns 18, later filings would revert to using the individual's name unless the court orders otherwise? Judge Harvey noted that this question had been raised after the last subcommittee meeting, so the subcommittee had not discussed it, but was interested in hearing the full Committee's view.

Professor Beale added that these questions are being considered by all of the sister rules committees as well, because the current privacy rules are parallel to the extent possible. There was an ongoing effort to determine whether the Civil, Bankruptcy, and Criminal Rules were on the same page, and whether the Appellate Rules would continue to adopt the other rules by reference or require full redaction. She noted that there has been some discussion in the other committees this fall, and again emphasized that input from the full Committee to guide the Rule 49.1 Subcommittee would be helpful.

Professor Beale went on to say that the subcommittee has staked out a position beyond Senator Wyden's proposal (which only concerned social security numbers) to expand to taxpayer identification numbers, including employer identification numbers. She noted that Professor Marcus, in the Civil Rules Committee, had questioned why the subcommittee had gone beyond what Senator Wyden had proposed. Professor Beale stated that the Rule 49.1 Subcommittee thought that once it started looking at SSNs, it should also consider the closely related issue of taxpayer identification numbers. Once it started thinking about that issue, it considered whether its scope should be limited to just the individual taxpayer identification numbers or whether it should consider employer identification numbers as well. She stated that the subcommittee was looking for input from the Committee on those policy decisions as well as any comments about the specific language.

Professor Beale also echoed Judge Harvey's comment about the issue raised by Professor Hartnett regarding what should happen when an individual ages and is no longer a minor. She commented that it was surprising to her that this issue had not arisen since the privacy rules were originally enacted.

A member responded that the reason this had not previously come up was because there was often a protective order in such cases. It was not uncommon that some of the victims in sex offense cases—particularly victims of child pornography—are adults. She stated that these

individuals are protected with a pseudonym. Although she could not recall seeing such individuals called for a hearing, she was confident that in such cases, their identities would remain protected.

The member said that there may be a different type of offense where a family member is a minor. She said that even when such a person becomes an adult, their identity is usually considered protected information by an order of the court. The defense member said that for her, the issue concerns minors who are not victims, such as defendants who were minors during some portion of the offense. They may be a minor at one point and then an adult at a different point of a conspiracy. Those are not often identities that are protected. The member asked what happens in civil or bankruptcy cases when the minor is not a victim—for example, if a minor saw something happen, and then, by the time the case goes to trial, they are an adult. She observed that witnesses are generally not anonymized, and the public has a right to know who they are as part of the process.

The member suggested that the reason there is no case law on the issue was because there are very active protective orders protecting identities of people who were victimized as minors even once they are adults. This happened organically on a case-by-case basis. The member thought that this approach made more sense than trying to amend the rule, which would broadly affect other types of litigation.

Ms. Ralston agreed that this is currently how things work in practice. The DOJ's position is that for victims and witnesses, the protections apply based on the event in question (when the crime occurred). She further noted that 18 U.S.C. § 3509(a) defines "child" to include witnesses to a crime, and then subsection (d) provides the privacy protections for those people. She said that the DOJ therefore thought that, at least as applied to victims and witnesses, the protections should extend based on when the event happened that makes the person relevant to the case. The DOJ did not have a strong view on whether this happens through protective orders or local rules that are more specific. Ms. Ralston commented that it might be useful to clarify in the committee note that the Committee believes the rule applies to victims and witnesses. She also noted that the practice for juvenile defendants had been to refer to them by their initials, at least in indictments, but deferred to the defense member's experience in this regard as there are very few juvenile defendants in federal court.

Judge Harvey asked whether anyone else had thoughts on this issue. No one responded, and Judge Harvey then highlighted a few other aspects of the subcommittee's recommendation. He noted two other issues. First, the subcommittee thought it was clear that SSNs should be completely redacted or omitted from public filings. As reflected in the memo from Kyle Brinker, there is a vulnerability resulting from including these numbers. This is also consistent with best practices across federal agencies, so the Rule 49.1 Subcommittee felt confident that this was the appropriate position for the Criminal Rules.

The more difficult issue, Judge Harvey stated, is the treatment of taxpayer identification numbers. He explained that there are essentially three different numbers at issue: individual taxpayer identification numbers (ITINs), adoption taxpayer identification numbers (ATINs), and employer identification numbers (EINs). The subcommittee's recommendation is that all of these numbers should be treated like SSNs, and either fully redacted or omitted from public filings.

Judge Harvey noted a difference between what the subcommittee was proposing and what the present rule permits or requires with respect to EINs. In 2004, when this issue was first considered, the e-Government Committee decided to treat individual or personal taxpayer identification numbers different than EINs. At that time, they believed that EINs were only being used for tax purposes. Judge Harvey did not know whether that decision was right or wrong at the time, but stated that Kyle Brinker's research shows that EINs are now used far beyond simply filing taxes. Not unlike SSNs, they are part of applications made by businesses for credit, for loans, or for opening bank accounts. There are also issues with fraud with respect to EINs. The Rule 49.1 Subcommittee therefore believed that if the Committee can come forward with a rule that does not assist fraud, that would be a good thing.

Judge Harvey further stated that EINs can implicate personal privacy. They are used not only by businesses. Individuals who have nannies in their homes must obtain an EIN, and that EIN is nothing more than the business of having a nanny in the home. Judge Harvey found it compelling that the Tax Court requires full redaction of all of these taxpayer identification numbers, and the IRS treats them as confidential.

Judge Harvey emphasized that the subcommittee saw no need for any of these numbers to be disclosed in public criminal filings. Members could not recall any time when that would be necessary. To the extent the number was somehow relevant to a criminal proceeding, a party could file it under seal and file a redacted version publicly. He emphasized that the subcommittee was unwilling to accept even a modest risk of potential abuse of these numbers as a result of their disclosure in public criminal filings.

Judge Harvey did note, however, that this is a change. He also acknowledged that even though the research provided to the subcommittee demonstrated very real vulnerabilities with respect to SSNs, it became harder to see the vulnerabilities as one moved through the various tax identification numbers. ITINs are closest to SSNs in terms of the vulnerabilities, but at the other end of the spectrum are the ATINs, which are temporary. ATINs are required as part of the adoption process, but once the process is completed, that individual receives an SSN. Thus, ATINs are fleeting, and Judge Harvey could not recall any case law that even dealt with these on the criminal side. As for EINs, Judge Harvey noted that there are some requirements for public disclosure of EINS. Some companies must disclose their EINs in various public filings. He acknowledged that one could make the argument that, if the EINs must be publicly disclosed there, why should they not also be disclosed in criminal filings? Judge Harvey asked for the Committee's feedback on this issue.

Judge Mosman said that he suspected there was widespread agreement on some of the subcommittee's more basic assumptions. He asked the Committee whether anyone disagreed with the proposition that the Committee move forward with the suggestion to delete the last four digits of SSNs. No one did.

Judge Mosman then asked whether anyone disagreed with the removal of other forms of taxpayer identification numbers.

Ms. Ralston responded that it might be useful to break these into three pieces. In her view, the ITINs—which were clearly covered by the current rule and were similar to SSNs—

were differently situated from the other two types of numbers. And she thought that had been the subcommittee's view as well.

Judge Harvey agreed that the subcommittee had viewed ITINs as the "easiest" issue to deal with. They are treated the same as SSNs under the current rule, and are used like SSNs. He asked whether anyone objected to the subcommittee's proposal that ITINs should be fully redacted from public criminal filings. No one objected.

Judge Harvey next turned to ATINs, noting that these are the least prevalent, but do relate to an individual. He said they arguably fall under the current rule, which refers to individual taxpayer identification numbers. They do relate to an individual. And although the risk of misuse was not as great as that for ITINs and EINs, it was not zero. He asked whether anyone objected to treating ATINs the same as ITINs and social security numbers; that is, requiring their complete redaction from public criminal filings.

Ms. Ralston responded that there had been many discussions on this issue within the last month at the DOJ. The DOJ learned that no one had seen any fraud involving ATINs because they expire so quickly, and they are only used for tax purposes (to claim the child tax credit and to claim the child as a dependent on tax forms). Nor had the DOJ uncovered any instance of fraud on an EIN holder. There are many instances where a defendant will use an EIN to commit fraud on the government, but the DOJ had not seen identity theft of someone using an EIN.

Judge Harvey asked if the DOJ was taking a position on ATINs. Ms. Ralston responded that in the DOJ's view, consistency with the Civil Rules on this issue was important. If the Civil Rules Committee decided not to require redaction of ATINs, DOJ saw no need for the Criminal Rules to differ, because DOJ had not seen a real identity-theft-type risk related to ATINs. In contrast, for the ITINs, DOJ thought that they should be fully redacted in the Criminal Rules regardless of what the Civil Rules did. DOJ felt the same about the issue regarding the use of pseudonyms for minors.

Ms. Ralston also explained that because of the way certain documents are structured, certain numbers may end up being fully redacted regardless of whether the rule requires it. As an example, if someone is completing a tax form to claim a child as a dependent, the field may say "Social Security Number," and the person writes the ATIN in that field. People would later redact that number because the completed field was labeled "Social Security Number" and the person may not know that this is actually an ATIN that would (hypothetically) not require redaction. The DOJ representative said that the complexity of specifying this in the rule might outweigh the benefit.

Judge Harvey stated that this was a good point, and he emphasized that this was not the last time that the Committee would see this proposal. The other rules committees have also been considering amendments to their own rules, and there may be disagreements between the committees. This might be an area where the desire for uniformity might change some subcommittee members' views about how ATINs or EINs should be treated. Judge Harvey stated that there would be another opportunity to discuss these issues at the spring meeting, with the benefit of input from the other rules committees.

Professor Beale said that the Committee has some input now, as the other committees had some discussion of this issue at their recent fall meetings. Further, the Committee knew that the Bankruptcy Rules Committee has all along taken the position that it will still require the last four digits of SSNs. She said that the question of uniformity is certainly going to be raised.

Judge Dever explained that this issue did come up at the Civil Rules Committee's recent meeting. He asked Ms. Ralston to coordinate with Ms. Shapiro, who had raised concerns about EINs at the Civil Rules Committee meeting. Judge Dever had told Ms. Shapiro and the Civil Rules Committee that this Committee would be discussing this proposal at this meeting.

Judge Dever further stated that the subcommittee's proposal was not saying that the courts cannot have this information. Instead, it is simply not included in a public filing. The Rule 49.1 Subcommittee did not see why this information needed to be made public, and its proposal was consistent with how the Tax Court and IRS treat EINs. Judge Dever questioned what policy reason there would be for the rule to not treat all taxpayer identification numbers, including EINs, the same. Judge Dever asked DOJ to think about what the policy reason is to have EINs publicly disclosed in court filings given the ability of people engaging in sophisticated fraud schemes to use that information to commit fraud.

Professor Struve echoed Judge Dever's comments, and she added that bankruptcy is a "different world" on EINs, because EINs are necessary for purposes of the automatic stay. In fact, there is a bankruptcy form that requires entire EINs. She said that in the Appellate Rules Committee, the current rule picks up whatever rule applied below, but that committee is considering the possibility of adopting a provision that would expand protection beyond what applied below to cover the full redaction requirement for SSNs and taxpayer identification numbers. Professor Struve said that this should not change what the Criminal Rules Committee is doing. The only operative question is whether there is any reticence about the differences with the Bankruptcy Rules Committee, the reasons for which are well-supported.

Ms. Ralston commented that it was in response to what happened at the Bankruptcy Rules Committee meeting that the Department of Justice was able to discuss the issue more in-depth internally. She had spoken with Ms. Shapiro at length and with DOJ leadership to come to the view that consistency among committees, to the extent possible, is DOJ's higher priority.

Ms. Ralston further stated that the argument against redacting is that there is a presumption of public information. There needs to be a reason to remove these numbers from the record, rather than the presumption being that these numbers are private and there should be a reason to have them publicly filed.

Professor Beale said that this was a very interesting question, whether there is a presumption that private, individual information should be known once there is a criminal or civil filing, particularly if, in the criminal context, neither the prosecution nor defense nor clerks of court could see any reason why this information was useful in a public filing. She said that the question what is the proper starting point presumption, was a great one. She noted that there are no demonstrated incidents of, for example, fraud or identity theft of ATINs. On the other hand, they are the records of individuals, and if there is no need for their inclusion in public filings, it tees up exactly that kind of question. As for employer identification, Professor Beale noted that

the subcommittee heard that issue come up—why, if someone is hiring a nanny or a housecleaner, do they need to have a number that is in public filings? Whose business is that?

Judge Harvey asked whether the reporters needed anything further from the Committee on this issue. Professor Beale answered that they will be able to move forward and will be finding out more information from the other committees. They hope to bring this to the April meeting for final action of a proposal that would then go forward through the amendment process.

Professor Beale flagged one last issue—whether the proposed rule should explicitly mention exhibits and attachments. This language was bracketed in the draft because the reporters thought that it might raise eyebrows, but she gathered that, in the other committees, it did not. Ms. Dubay confirmed that it did not raise eyebrows in the other committees. Professor Beale said that, unless anyone said otherwise, the proposal in April will include this language. She stated that this would address what the FJC found was the most common place that things which are already supposed to be redacted show up. She thought it seemed like a good idea to remind people, in the text of the rule, that the rule covers attachments and exhibits.

Judge Harvey thanked everyone for their consideration and said that this issue would be back before the Committee in the spring.

Rule 40

Judge Mosman then asked Judge Harvey to present the next issue. Judge Harvey told the Committee that the Rule 40 Subcommittee had met several times over the last several months and made substantial progress in clarifying how an amended Rule 40 should address procedures before the magistrate judge in the arresting district when a defendant is arrested on an out-of-district warrant alleging a violation of release conditions pending trial, sentencing, or appeal. The subcommittee has reached a tentative agreement on most of these principal policy issues, and Judge Harvey thanked the reporters and Kyle Brinker for their help.

Judge Harvey stated that the subcommittee did not yet have language to present to the Committee. Instead, the subcommittee wanted to update everyone on the decisions made to date and find out whether there is any feedback from the Committee on these issues.

The first issue, and one that the subcommittee thought was the most important, was whether the defendant should have a provisional detention hearing before the magistrate judge in the arresting district. Judge Harvey explained that at this hearing the defendant can seek release on conditions, for example, that he voluntarily report to the district that issued the warrant. Or, alternatively, the government can obtain the defendant's detention pending the defendant's transfer to the issuing district for further proceedings on the warrant. The Rule 40 Subcommittee unanimously felt that there should be such a hearing. This is what the case law has held, and it is the current practice in the vast majority of district across the country. Judge Harvey noted that there may be a handful of magistrate judges who proceed otherwise, and the subcommittee thought that it would be helpful to clearly state in Rule 40 that there is a right to such a hearing in the arresting district.

Judge Harvey said that the subcommittee had also agreed that the amended rule should cite to the relevant provision of the Bail Reform Act where the detention or release standard can be derived: Section 3142 for cases involving violation of pre-trial release; section 3143(a) for violations of post-conviction, pre-sentence release; and section 3143(b) for release pending appeal.

The second threshold issue was whether the Committee should clarify Rule 5 to the extent that some of the ambiguities in Rule 40 arise from issues with Rule 5. Judge Harvey stated that he was interested in exploring that further, but the subcommittee had decided that for now, it should stay focused on the assignment at hand, clarifying Rule 40.

The subcommittee has come up with a list of procedures, not unlike those in Rule 5 or Rule 32.1, to assist the magistrate judge in the arresting jurisdiction. Judge Harvey explained that those additional procedures would include reminding defendants that they have a right to consult with their existing counsel when Rule 40 issues arise. The defendants have already appeared in the charging jurisdiction and already have an attorney. It is important that they are allowed an opportunity to consult with their existing counsel or, if they are unrepresented, that they have a right to appointed counsel. The subcommittee had also discussed acknowledging the common practice of allowing local public defenders in the arresting district to serve as stand-in or courtesy counsel after consulting with counsel in the charging or issuing district.

Judge Harvey said that the subcommittee also thought it important that the amended rule include a reminder of the defendant's right to remain silent, recognizing that defendants in Rule 40 situations are often appearing in an unfamiliar district and without ready access to their regular counsel. The subcommittee thought that it could not hurt to tell defendants again that they have a right to remain silent.

The subcommittee had also concluded that there is no right to a preliminary hearing in this situation. Case law is consistent on this point. No case has recognized a right to a preliminary hearing with respect to violations of pre-trial, pre-sentence, or post-conviction release. The subcommittee had therefore agreed not to include any notification of a right to a preliminary hearing at the proceeding before the magistrate judge in the arresting district.

The subcommittee did think that it was important that the defendant be allowed an identity hearing. Judge Harvey explained that it is always important to make sure that the correct individual has been detained when they are brought in on a warrant. The defendant is allowed a hearing unless they waive it.

The subcommittee also thought that the government should be required to produce the warrant in the case, consistent with what Rule 5 requires. The subcommittee also favored carrying over the language from Rule 5 that requires the clerk's office in the arresting district to transfer all the papers and any bail to the issuing district. However, the subcommittee had deferred its decision on whether the government should also be required to produce the paperwork underlying the warrant; that is, the actual application filed by pre-trial services that caused the warrant to be issued. The subcommittee wanted to look more closely at what the practice is and ensure that the paperwork is available to pre-trial in the arresting district.

With respect to video conferences, Judge Harvey explained that the subcommittee was not anticipating any change to what is already available in Rule 40. The rule permits video appearances in a Rule 40 proceeding. The defendant may be in jail or some other holding facility and appear before the magistrate judge by video, if the defendant consents. The subcommittee disagreed with the Magistrate Judges Advisory Group's suggestion that Rule 40 should permit video between the defendant and the district that issued the warrant, to hold an initial proceeding on the warrant, the initial detention hearing, or a revocation hearing remotely. Judge Harvey said that this would be a large change in present practice, and there would be many logistical difficulties trying to allow for the charging district to have remote proceedings in the arresting districts for these Rule 40 warrants.

Judge Harvey said that the subcommittee saw no need to restate advice about the circumstances under which the defendant may secure pre-trial release. This is in Rule 5, and the defendant would have already been told that at their initial appearance on the underlying charge in the charging district. The subcommittee saw no reason to repeat this in Rule 40. In any event, the magistrate judge does not need to describe to the defendant the circumstances for pre-trial release, because the hearing in which the defendant will be seeking release happens almost immediately. Similarly, the subcommittee saw no need to repeat advice about consular notification or the possibility of a Rule 20 transfer. This does not fit in with what is happening in the Rule 40 context.

The subcommittee also decided not to address in Rule 40 whether the magistrate judge in the issuing district may modify a detention or release order entered by a magistrate judge in the arresting district. Judge Harvey noted that this was an issue of some confusion in the case law, and that he had encountered this in his own district as well. A defendant who appears in front of Judge Harvey has been detained by a magistrate judge in another district, or has been released on conditions. In both situations, Judge Harvey said that one side or the other is appealing to him to change those conditions or seek the release order or detention order issued by the magistrate judge in the arresting district. There is some confusion as to what a magistrate judge in one district can do to change the order of a magistrate judge in another district. But this issue extends beyond the Rule 40 context. Indeed, it comes up far more often under Rule 5 or Rule 32.1, which deals with warrants arising from a violation of a supervised release. For this reason, the subcommittee concluded it was beyond the scope of what was being considered under Rule 40.

Judge Harvey concluded by saying that this is where things currently stand with respect to Rule 40. The subcommittee still wants to examine whether Rule 40 should also include procedures for what happens when there is a warrant for a pre-trial release violation and the initial proceeding is held in the charging district, because there is no description anywhere in the rules as to what the magistrate judge is supposed to do in that scenario. Rules 5 and 32.1 have provisions for both out-of-district hearings and in-district hearings on warrants, but the subcommittee has not yet decided whether Rule 40 should mirror those provisions. Judge Harvey highlighted one other section of Rule 40 that the subcommittee had not yet addressed: paragraph 40(a)(2), which covers arrests for failure to appear and arrests for failure to appear on a subpoena. This provision has been in the rule for many years, and the subcommittee needs further clarification about how these proceedings may differ. Judge Harvey requested the Committee's feedback with respect to the decisions made so far.

Professor King chimed in to explain the broader picture for members who were new to this project. Rule 5 spells out in some detail what to do at a first appearance on a warrant. Rule 32.1 spells out in some detail what happens when a person is arrested for violating supervised release. But Rule 40 is a very cryptic and unhelpful description of what is supposed to happen when a person is arrested for other types of violations—including pre-trial release—in a different district. It refers to the entire Bail Reform Act, which includes provisions about violation of release pending sentencing and pending appeal, and also includes a provision on material witnesses. Rule 40 also covers failure to appear as required by a subpoena. Professor King explained that the subcommittee thought it would pick the easiest and most frequent issues first—violations of pre-trial release and possibly release pending sentencing and appeal—and put off what to do about warrants for witnesses. At some point, though, the subcommittee will be coming back to the Committee for feedback on that issue. Professor King concluded by saying that it would be very helpful to hear from Committee members, particularly if they disagree with any of the subcommittee’s tentative decisions.

A member said that the memo and presentation were very helpful. She noted that the memo says that the subcommittee thought videoconferencing with the judge in the charging district would not work because it does not reflect current practice and because there are serious logistical hurdles. She asked what these logistical hurdles are. In her view, there would be some advantages of having the teleconferencing with the charging district rather than with the arresting district. The member acknowledged that there would have to be counsel in both places for this to work, but she was curious as to what logistical hurdles the subcommittee saw.

Judge Harvey responded that these are essentially warrant returns—there are all different kinds of warrants, and these, warrants for violation of conditions of release, are just one subset of those. Traditionally and across the nation, it is magistrate judges who hear those warrant returns. Judge Harvey explained that there are logistical reasons for this. People are arrested every day and there are prompt presentment concerns with respect to any warrant; someone cannot be housed in jail for days on end. Magistrate judges are set up across the country. There is always a magistrate judge on duty, and one of the primary things that they do is to have initial proceedings on the warrant. This means that district judges do not handle warrants. The whole system is set up to have a duty magistrate judge, a duty AUSA, and a duty public defender; these people deal with all of the new arrests and all of the bench warrant returns on a given day.

Judge Harvey explained that the proposal was that it would be better for the charging district to address and deal with its own warrants, over Zoom. This is not the practice, and Judge Harvey thought it would be difficult to change the system in a way such that the district judge signing the warrant would have to handle these initial proceedings.

A member agreed and offered several additional thoughts. First, it would cause delay to attempt to set up videoconferencing from the charging district. Second, there is no ability to broadcast proceedings. People need to be in a courtroom. The current rules allow for a defendant who consents to participate by video, but the proceeding itself is being held in a courthouse, in a courtroom that is open to the public. Now that the CARES Act has sunsetted, there is no ability under the Criminal Rules to have remote proceedings. Moreover, this particular rule applies to individuals on pre-trial release in several different scenarios. If the person has absconded and is picked up randomly someplace else in the country, they are going to be brought before a judge in

that district where the proceeding will happen. The other type of example is that the person has been residing in this other district—where they work, participate in whatever treatment programs they are in, and are supervised by a probation office. From the member’s perspective, it made sense that this appearance is held in that arresting district even though there are some logistical difficulties (for example, the individual’s attorney is not going to be present but will instead talk to the lawyer who will be at the hearing). There is an urgency to this first proceeding in the arresting district. The member said that it is valuable to have the hearing to address the conditions of release and whatever incident occurred right there, without the defendant needing to be detained and transported back to the charging district in the first instance. Of course, there will eventually be a proceeding in the charging district, and for that proceeding, it is possible that the defendant could participate by video while everyone else is in the courtroom.

A member asked Judge Harvey if he had experienced situations where counsel in another district appears remotely on behalf of a defendant who has been arrested in his district as the arresting district. In other words, the charging district’s counsel appears by video to contest either the arrest or the violation. The member recognized that practicality may require that a local public defender or local counsel step in, but he said that by the time someone is on pretrial release, their counsel has a better sense for who the defendant is and would be better suited to advocate for them than would stand-in counsel.

Judge Harvey responded that he has had multiple cases where stand-in counsel had indicated that they had spoken to counsel, and counsel was comfortable with them moving forward and making certain representations. He could not recall a time when he had permitted counsel to appear remotely or even received a request to delay a hearing so that counsel could appear. The more typical situation is that the federal public defender calls counsel, gets their input, and then makes the arguments and representations with the understanding and agreement of the defendant. Judge Harvey asked whether the other member’s experience was different.

A defense member answered that she had, on occasion, had an attorney on the phone in the courtroom, but the federal public defender was always present and handling the representation. Sometimes the attorney will have information that the judge wants to hear directly from them. But usually, the federal public defender has talked to counsel and is able to convey what was told to them by the attorney. The member recalled one instance where the client asked for a delay so that their lawyer could come to the district. The court accommodated that, and there was no question that a defendant can request that. But the person was held in custody.

Judge Harvey said that typically, the defendant wants to have a quick hearing. There is a federal public defender present who knows the magistrate judge, knows the district, and has spoken to the defendant’s counsel. So most times defendants want to move forward rather than delay.

A member asked whether there was any discussion of supervised release violations being added to the list. He has had a number of instances where people on supervised release disappear and get arrested—typically in Indiana, because it is very close to Chicago. He assumes that those people went before a magistrate judge in that district. But it is not infrequent that he has people on supervised release lose touch with their probation officer and end up arrested somewhere else.

Judge Harvey responded that Rule 32.1 handles supervised release. Rule 40 addresses only violations of pre-trial release or release pending sentencing or appeal. It used to be that everything was under Rule 40, but at some point, the portion of the rule dealing with supervised release was moved to Rule 32.1. Judge Harvey said that whoever drafted Rule 32.1 did a great job of putting together the list of what the magistrate judge should do when that occurs—when there is a warrant in front of them involving a supervised release violation. Rule 40 does not have that list, so the Rule 40 Subcommittee had been trying to create it. Judge Harvey acknowledged that far more cases arise with respect to supervised release violations than Rule 40 scenarios.

Judge Mosman suggested that the Committee go through the list of things that the subcommittee wants to put into Rule 40 and see whether the Committee agrees or disagrees with each item.

Professor Beale said that these are enumerated on pages 164 to 168 of the agenda book. She said that this was not the last opportunity for someone to speak up about these issues, but asked that Committee members please speak now if they have any thoughts.

A member said that one of the questions in the memo was, why the rule excludes the “adjacent district,” which is in Rules 5 and 32.1. She asked whether the subcommittee was planning to include that.

Judge Harvey answered that yes, it was. This was not on the list, but he thought the subcommittee had previously decided that this was something that would be included.

Judge Harvey asked for any other thoughts or concerns, and there were none. Judge Mosman thanked Judge Harvey and the Rule 40 Subcommittee for their work.

Electronic Filing and Service by Self-Represented Litigants

Judge Mosman asked Judge Burgess to address the next issue. He expressed his gratitude for Judge Burgess’s sacrifice in attending the meeting from Alaska, noting that he had spoken with Judge Burgess by phone this morning and afterward realized that it was 3:30 a.m. in Anchorage.

Judge Burgess began by thanking the Pro Se Filing Subcommittee and Professor Struve for their work on this project. He said that over the course of the summer, Professor Struve had submitted questions to the subcommittee. The subcommittee met in September and discussed the questions at length. Judge Burgess said that he would like to highlight these questions and the input from the subcommittee, and invite any further suggestions, comments, or questions that Committee members may have.

Judge Burgess said that Professor Struve’s memo, on page 170 of the agenda book, broke down the topic into three sections. The first section is the most recent developments. The second section contains the eight questions he referenced. The third section is the rejection of a filing for non-compliance with rules governing electronic filing. He invited Professor Struve to provide a brief highlight of new developments since the last meeting.

Professor Struve thanked Judge Burgess, the subcommittee, Judge Harvey, Ms. Lonchena, and the reporters for all of their work on this project. She explained that there are two basic pieces of the project, one of which concerns service. This was inspired by the practice in the Southern District of New York, which eliminates the requirement of separate paper service of documents, after the initial start of the case, on a litigant that is receiving the notice of case activities through the court's electronic filing system. The second piece is to increase access by presumptively permitting self-represented litigants to file electronically, unless there is an affirmative court provision barring them from doing so, and to provide that a local rule or other local provision that bars them from doing so must include reasonable exceptions, or allow for the use of another electronic method for filing documents and receiving electronic notices in the case. These are reflected in the proposed amendments to Criminal Rule 49(a) and (b), which start on page 219 of the agenda book.

Professor Struve said that this Committee is the latest committee to consider the progress of the project at the fall committee meetings. As of last spring, it was unclear whether the Bankruptcy Rules Committee would participate in this project at all, because they had identified particular concerns, specific to the bankruptcy context, which led them to be skeptical about these changes for the Bankruptcy Rules in particular. Their subcommittee discussed further over the summer, and at the fall meeting, based on the subcommittee's recommendation, the Bankruptcy Rules Committee decided to participate in the project. However, Professor Struve cautioned that this participation was specifically for purposes of publication. The package of proposals for the Standing Committee will include changes for the Bankruptcy Rules as well as for the Criminal, Civil, and Appellate Rules. But the Bankruptcy Rules Committee is keeping open the option to reconsider its participation in light of public comment. Professor Struve also noted that the general idea of limiting this project to only the Criminal, Civil, and Appellate Rules was presented to the Standing Committee last January, and the committee was not fazed by the idea that there could be inconsistency with the Bankruptcy Rules.

The Appellate and Civil Rules Committees also discussed the project at their fall meetings. Professor Struve reported that the Appellate Rules Committee focused on the question raised in part three of her memo, whether to expand the project to encompass a review of the clerk-refusal and local-form rules. The Appellate Rules Committee felt that this was an important topic, but was decidedly against expanding the project to include it. On the other hand, the Civil Rules Committee as a whole did not voice a view on this, but the clerk liaison voiced some interest in seeing whether further work might be done on the topic.

Judge Burgess then turned to the eight questions posed by Professor Struve. The first, on page 174 of the agenda book, was whether to delete item (ii) from proposed Criminal Rule 49(b)(2)(B). This item discusses local provisions for prohibiting access. One comment was that a simpler approach would be to add some additional language to item (iii) and eliminate item (ii). Judge Burgess reported that the subcommittee's conclusion was not to eliminate (ii) to make sure that there are reasonable alternatives for self-represented litigants if a court bars their use of electronic filing, either by local rule or by order of a particular judge in a case. In other words, the court can bar the use of electronic filing, but it must make sure that there are some reasonable alternatives available to self-represented litigants.

Professor Struve agreed, saying that this connects with the second topic that will be addressed. She said that she is very sympathetic to the goal of simplifying the rule. However, she suggested that there is the value that Judge Burgess mentioned to retaining the text of the rule provision in item (ii), so the subcommittee tried to explain in an expanded committee note how items (ii) and (iii) interrelate.

Professor Beale noted that there is obvious overlap between (ii) and (iii), and framed the question as whether to take out of (ii) whatever is distinctive and put it in (iii), or move whatever is in (iii) into (ii). She said she believed Professor Struve's position is that if a court has a local provision prohibiting access, then there are two choices, the reasonable exceptions or another electronic option. Putting this in item (ii) highlights the alternative electronic option and tells the courts, "You have to do something, and here are your two options for doing it." Otherwise, you have reasonable exceptions and conditions and restrictions on access, which all feel very similar.

Professor Struve said that this was exactly right. One of the important things that the subcommittee was trying to do was to work within the existing landscape. Courts increasing access have adopted two distinctive approaches. The first allows self-represented litigants into CM/ECF. The other is to provide a different accommodation, such as a portal to upload documents or accepting filings by email. This second option varies by court and what each court's technology team can support. It was very important to a number of participants in the process that the subcommittee listen to what is working on the ground, and allow clerks' offices as many options as possible to adjust to what the rule is nudging them towards. In Professor Struve's view, this was the added value of spelling that out in (ii). She agreed that items (ii) and (iii) are complementary, because the goal is to rule out complete bars on electronic filing. Either the court must give reasonable access to CM/ECF or it needs to build something else, as many courts are doing.

Judge Burgess highlighted that one of the alternative options was to eliminate (ii) and add language to (iii) that says, "but must not bar access by all self-represented litigants without reasonable exception." This was considered by the subcommittee, but in the end, the consensus was to leave (ii) as-is.

Judge Burgess then turned to the second question posed by Professor Struve's memo, which was whether to use reasonable exceptions or reasonable conditions and restrictions regarding self-represented e-filing access. The view of the subcommittee was to presumptively permit self-represented litigants to file electronically, unless prohibited by local order or local rules, and to provide that local rules or general court orders that bar self-represented litigants from using the court's electronic filing system must include reasonable exceptions or must permit the use of other electronic filing or receiving notice of case activity. He welcomed any questions, comments, or thoughts from Committee members.

Judge Mosman said that his understanding was that the goal was to tell courts that they cannot have a local rule that prohibits access. But the way this is expressed in the rule is that it says, "If you do have a local rule that prohibits access, you have to have reasonable exceptions." Judge Mosman said that this seemed to him as though the Committee is trying to walk through the "back door" instead of the "front door." He asked why the language did not say that courts cannot prohibit reasonable access.

Professor Struve said that if the Committee broadened the language to say that courts cannot bar access by self-represented litigants, then problems may arise with, for example, incarcerated individuals who may not have internet access. The working group and the clerk participants in particular were very concerned about a provision that says courts cannot bar self-represented litigants access (other than as to an individual litigant, which is a different provision). The key point, Professor Struve said, is to flip the presumption and say that courts definitely need to avoid a local provision that generally bars self-represented litigants from access. However, the court can impose conditions, such as saying that litigants cannot be incarcerated, or litigants must take a course before using the electronic filing system.

Professor Struve conceded that the goal of the project is somewhat modest, but said that there are some districts across the country that flatly ban all self-represented litigants from electronic access, without any exceptions. One of the primary goals of this provision is to take that option off the table, but to be maximally flexible as to what those courts must then do to comply with the new rule. The idea is to accommodate whichever method courts feel will work best for them.

Judge Mosman said that it seemed as though the Committee was saying that the court needs to have reasonable exceptions, but after reading item (iii) and the committee note, the reader learns that “reasonable exceptions” means “reasonable access.” Why does the rule not just say then that the court must provide reasonable access?

Professor Struve said that this was a superb line of questioning. Her view was that the Committee wants to preserve some degree of articulation of the different ways that this reasonable access can happen. By breaking it out into (ii) and (iii), the rule sets out the baseline principle that the court must either include reasonable exceptions to the bar or allow alternative methods. Then, in item (iii), the rule says that you can impose reasonable conditions and restrictions, and those are the mirror image of reasonable access. She added that another reason to break the rule out in this way was because it gives clerk representatives something to point to when a self-represented litigant says, “Why did you put this limit on my access?” The clerks can say, “Well, because it’s a reasonable condition or restriction on the access.” Nonetheless, Professor Struve said that the working group was open to ways of redrafting that would preserve all of those concepts.

A member said that as the subcommittee was discussing the issue in September, there had recently been some nationwide ECF concerns. He thought there was probably concern amongst the judiciary and clerks that unfettered, unrestricted access to the electronic court filing system would open it up to potential abuse. Having the limitation in place as the standard, then finding exceptions to it, would still allow reasonable access with some barrier to entry. Courts can find a way to provide self-represented litigants with access beyond that. The member said that the second issue discussed by the subcommittee was that self-represented litigants would not have the benefit of an attorney to advise them against filing documents of a certain nature. Allowing the court to set what reasonable access would be would prevent potential unintended abuse of the ECF system—for example, if someone wants to file a proffer that someone gave, and they are not familiar with the rules of redaction or the sensitivity of the documents that they would be filing. That might put other defendants and other parties at risk.

The member said that he had not thought of the issue in the way that Judge Mosman had framed it, but he thought that what Judge Mosman said made sense. He wanted to offer up some of the subcommittee's thoughts to provide context behind the discussions that were not necessarily reflected in the agenda book materials.

Judge Burgess then offered two follow-up thoughts. First, the subcommittee did discuss the idea that some courts may never provide any reasonable access because they do not want self-represented litigants filing. That was a concern. Second, the approach seemed to Judge Burgess to be an incremental approach. The Committee could start with this, and see if down the road, Judge Mosman's suggestion could be adopted.

The clerk representative explained that from the clerk's perspective, part of the approach to keeping both (ii) and (iii) was a practical approach for self-represented litigants to (ii)—prohibiting access and providing an alternative method. Some courts may not want litigants filing directly into ECF, but may create a portal, where documents can be filed into the portal first then filed in ECF by the clerk's office. She also said that much of the drafting was done to make it easier for self-represented litigants to understand. An incremental approach between (ii) and (iii), as well as some of the wording in the committee note and the extra wording used elsewhere in the rule, were all designed to be easier for self-represented litigants to understand. It also gave the clerk's office something to point to if self-represented litigants had questions about the court's approach.

Professor King said that she had been an advocate of eliminating item (ii) and adding more words in item (iii). But if the consensus was that, for the reasons mentioned, the Committee should spell everything out, she thought that it might make more sense to make the language in item (ii) part of item (iii). This would tell courts that they can set reasonable conditions and restrictions, then provide an example of what is not reasonable and what courts must do if they have this kind of a restriction. Professor King's view was that the rule may be easier to understand if, instead of first saying, "If courts prohibit access, here is what they must do," and then saying that a court may set reasonable conditions, the rule says this in the reverse order. That is, state the general rule first, then the specific application, which is what the Style book recommends. Because (ii) is a specific application of the general rule in (iii), the Committee should swap the order of these two, or put one inside the other.

A member asked whether the language in item (iii) stating that a court may set reasonable conditions meant not only by local rule, but also on a case-by-case basis. Judge Burgess answered that this was referring to an order of a judge. The member thanked him, saying she just wanted to clarify this because (ii) is just referring to local rules.

Professor Struve agreed with that and thanked Professor King for her drafting suggestion. Professor Struve expressed a concern, however, that item (ii) is not an example or an implementation of (iii). She did not think that allowing self-represented litigants to file in another electronic portal or file by email is a reasonable condition or restriction on access to the e-filing system itself. Rather, it is an alternative system if courts want to bar self-represented litigants from the CM/ECF system entirely. Professor Struve agreed that these provisions were implementing similar concepts, but did not think that item (ii) was a subset of a condition on access to the CM/ECF filing system unless one were to say that it is reasonable to bar self-

represented litigants entirely because the court is giving them a different option. This argument did not seem intuitive to her.

Judge Mosman stated that the concerns he had about “back door” exceptions would be eliminated by switching the order of (ii) and (iii), because the rule would talk about the “front door” first, then the “back door.”

Judge Mosman announced that the Committee would be taking a lunch break and would reconvene in thirty minutes.

After the lunch break, Judge Burgess announced that he had learned that Professor Struve was recently the recipient of the Harvey Levin Award for Teaching Excellence at the University of Pennsylvania. This award is given by the graduating class of the law school. Judge Mosman congratulated Professor Struve. She thanked him for his comments and said the award illustrated how very kind her students were.

Judge Mosman asked whether anyone had additional comments. Ms. Ralston said that she understood that item (i) states what the party should do. Because items (ii) and (iii) state what the court should do, she asked whether the working group had considered putting the provisions about the court first. This would not be switching the order of (ii) and (iii), but rather putting any provisions addressing what the court must do first, then stating that the party must, or may, or can use the system that has been established in item (i).

Professor Struve responded that Ms. Ralston was correct that item (i) talks about what the party can do, and (ii) and (iii) talk about what the court can do. Items (ii) and (iii) apply only if the court decides to do something. She explained that the initial provision is the default rule that would operate if a court did not say anything about electronic filing. Although (i) is phrased in terms of what the party may do, this will force the court to do something. It follows logically from that that if the court decides to do the thing referenced in item (i)—that is, adopt a “court order or local rule [that] prohibits the party from doing so”—then items (ii) and (iii) come into play.

Professor Struve further stated that the working group was hoping to bring these proposals back to the Committee in the spring for potential publication approval. She expressed an eagerness to work further on items (ii) and (iii) given the guidance received by the Committee today. She understood that the Committee wished to meld (ii) and (iii) together. It would say that the court must provide reasonable access to the court’s electronic filing system. Then, as a specific application of that, completely barring access would not be reasonable access unless it provided an alternative means of electronic access, like a portal or filing by email. Professor Struve cautioned that this would mean that the text of the rule itself would tell fifteen or so district courts that completely bar access and do not provide alternative means of electronic submission that they are being unreasonable. The current text of the proposed draft does not say whether that would be reasonable or unreasonable. It simply says that the court needs to provide reasonable access or permit the use of another method.

Judge Burgess asked whether anyone else had comments, questions, or suggestions on this topic. No one did. Judge Burgess then turned to the next question proposed by Professor

Struve’s memo, which was whether to retain the caveat regarding learning of non-receipt. In other words, if a filer learns that the recipient has not received a document or a filing, then it is deemed not filed. The subcommittee felt that this language should be retained. There were no comments, questions, or suggestions in response to this question.

Judge Burgess then turned to the next question proposed by Professor Struve’s memo, which was whether to use the provision addressing service of papers that are not filed. He noted that this could be useful guidance to self-represented litigants, but said that the subcommittee had suggested seeking input from district clerks. No one from the Committee voiced any comments, questions, or suggestions, so Judge Burgess stated that the subcommittee would seek input from clerks on this issue.

Next, Judge Burgess turned to question five, which was whether to use “notice of case activity” rather than “notice of filing.” The subcommittee’s recommendation was to use “notice of case activity,” and no Committee member voiced concerns or questions about that approach.

Judge Burgess turned to the next question—whether to use the term “unrepresented” or “self-represented” litigant. The subcommittee had preferred the term “self-represented,” but was aware of complications this term could cause due to the use of “unrepresented” in existing rules. He asked whether Judge Dever had any concerns about an inconsistency with these terms. Judge Dever said that he did not. No Committee member voiced concerns or questions about using “self-represented.”

The next question was whether to use the term “person” or “party” in the new rule. Judge Burgess said that the subcommittee had decided to use “party” to avoid any suggestion that a person who is not a participant in the case can file simply because they are a “person.”

A member asked whether the rule could refer to a “party or nonparty,” as Rule 49.1 does. She explained that she was thinking of potentially self-represented nonparties who might file a motion to quash a subpoena.

Professor Struve responded that the consensus from the clerks was that it was very important to say “party. Otherwise, the rule could allow someone entirely uninvolved in a case to say that the rule allows them to use the CM/ECF system. This becomes an issue now because the proposed rule flips the default presumption to say that this person can have electronic access unless the court bars it. Professor Struve opined that Rule 49.1(a) was different because there, the goal is to protect the information of people whether they are a party or not.

Professor Struve noted that a victim with rights under the Crime Victims’ Rights Act (CVRA) may wish to participate in the proceeding. The proposed amendment would leave that person in the same position that they are in now. If the local district court wants to give them electronic access, it can, but the rule would not force the court to do so. Professor Struve asked the Committee members how often someone who is asserting rights under the CVRA does so themselves, as opposed to having the U.S. Attorney speaking for them.

Ms. Ralston said that this is an area where the DOJ feels strongly that using “party” would be particularly useful, for several reasons. First, the DOJ wants to continue to make clear that there is no rule of intervention in criminal cases. Second, the DOJ cares very deeply about

the Rule 49.1 privacy protections and other protected information, such as cooperators' identities. The DOJ feels very comfortable that attorneys are following all of the necessary rules and are not filing anything on the public docket that should not be made public. However, self-represented litigants may inadvertently file something that should not be public. Clerks are not necessarily reviewing all documents for compliances with the applicable rules, but when filings are served on the government, that allows the DOJ the opportunity to make whatever motion is appropriate to deal with that. Finally, the DOJ's experience has been that statements or information pertaining to victims is almost always filed by the attorney for the government and is properly redacted or sealed. When a victim is acting on their own—perhaps because there is a dispute about whether they are a victim—those people are represented. Ms. Ralston said that the practitioners surveyed had never seen a situation where a self-represented victim or would-be victim was filing, so she did not think that this was an issue. As for people hoping to quash a subpoena, or forfeiture claimants, the status quo deals appropriately with this small number of filers.

Ms. Ralston also pointed out that the title of proposed subparagraph (b)(2)(A) refers to a “person” represented by counsel in the title, but the text refers to a “party.” She suggested that this could be clearer. She said that this also presents another question about whether the rules should be different for someone who is represented by counsel, if the concerns about misuse of the system do not apply to attorneys. If a media organization seeking a release of documents, or someone seeking to quash a subpoena, is represented by counsel, perhaps they should be able to file their motion electronically, because the lawyer is subject to all of the rules that lawyers are subject to. The DOJ does not have a position on what the outcome of that discussion should be, but thinks that it is different when people are represented by attorneys.

Judge Mosman added that in his experience, more than ninety percent of motions to quash subpoenas are filed by corporations.

A member agreed, saying that motions to quash were filed almost exclusively by corporations represented by large law firms.

Professor Struve thanked Ms. Ralston for pointing out the disjuncture between represented “person” and “party,” and said that she would make sure that those accord. She pointed out that the current language in that provision, in what would become subparagraph (b)(2)(A), is taken from the existing rule. The existing rule says that a party represented by an attorney must file electronically. Therefore, the subcommittee will carry forward the existing rule unless the Committee says that it would like to do something different with respect to represented parties.

Professor King said that she had been reading criminal cases involving applications for writs, which are often filed by third parties, people who are not parties. She is also aware that nonparties like media representatives and subpoena recipients file in criminal cases. She has seen individuals filing motions to quash, and she assumed that these people are represented. She acknowledged that everyone has said that it is rare that nonparties want to file things, and if they do, they are almost always represented by counsel. If they are not represented, the status quo addresses how they file. Professor King asked, however, whether anything in the amended rule

speaks to what a self-represented nonparty has to do. How should a self-represented nonparty know what to do?

Professor Struve answered that they will not know what to do based on the rule. The Committee could add language that says that a self-represented nonparty must file non-electronically, unless allowed to file electronically by court order or local rule. If the national rule does not say this, these people would need to look at their court's local provisions or call the clerk's office.

Professor King said that her concern is that by staying silent on this issue, the rule would be interpreted to bar self-represented nonparties from electronic filing entirely. Perhaps that is what the Committee would like the rule to say.

Professor Struve said that the rule would simply not address the issue, and the Committee could put in the committee note that the rule does not speak to this topic. But if the Committee feels that by saying nothing, this would remove the court's ability to designate at a local level how it would like to receive filings by self-represented nonparties, the Committee could put this into the text of the rule.

Judge Burgess asked whether Judge Mosman would like the subcommittee to take a look at this issue, in addition to the work it would be doing with items (ii) and (iii). Judge Mosman said that he would.

Judge Burgess then turned to the next question posed by Professor Struve's memo, which was whether to use explicit wording as it pertains to self-represented litigants. The subcommittee felt that there was value in doing so, as this makes it easier for self-represented litigants to understand the rule. No one expressed any comments, questions, or concerns with this approach.

Judge Burgess then turned to the last question in the memo, which was whether to exclude the prison mailbox rules from the scope of the project. The subcommittee had decided to do so. No one expressed any questions, comments, or concerns about this approach.

Judge Burgess said that the final issue he wanted to discuss was raised in section three of Professor Struve's memo. He asked her to give a brief summary of the issue for the Committee.

Professor Struve explained that Professor Hartnett had raised this issue over the summer. His question was, given that the project currently encompasses a change to the architecture of how self-represented litigants will be allowed to file, does that implicate, to some extent, the question of what happens when they do it incorrectly? There are two existing rules that speak to (or could be read to speak to) that question. Rule 49(b)(5) is an example of what Professor Struve calls the "clerk refusal" rules. It says that the clerk must not refuse to file a paper just because it is not in the form prescribed by these rules or a local rule or practice. There are cognates of this in the other Federal Rules. The other (potentially) implicated rule is Rule 57(a)(2), which says that a local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement. This was adopted in 1995 along with other cognate provisions in the other sets of rules.

Professor Struve said that there are three different kinds of scenarios where these rules may come into play. First, someone may try to file using a method that the court does not permit, under circumstances where the result is that the filing never enters the physical building of the court or the court's electronic system. There is a circuit split between the Second, Sixth, Seventh, and Ninth Circuits, which have applied these rules to protect a filer who uses the non-permitted method, and the D.C. Circuit, which has held to the contrary. Second, someone may file using a permitted method, but submits the filing in a non-permitted format. There is some limited case law on this scenario. Third, someone may be allowed to use CM/ECF but does not do it successfully. They may manage to file something, but it contains technical errors. In the Second, Sixth, and Seventh Circuits, this is accepted despite the technical errors. However, there are cases where someone files a notice of appeal, proceeds to the payment screen, but does not progress to the final screen for CM/ECF submission. Three circuits have said that this person did not validly submit the notice of appeal.

Professor Struve said that the basic point was that these rules have been invoked by people who run into problems in their interactions with electronic filing systems, and the circuits disagree as to what the rules say about that. In an ideal world, where the committees had unlimited time and scope for this particular project, it could be very interesting and beneficial to expand the project to encompass the question of whether these rules are the right fit for the circumstances of misadventures in electronic filing (and if not, where there is a better way to do it).

Professor Struve recounted that a participant in one of the prior committee's discussions suggested creating a rule that is modeled on the U.S. Supreme Court's rule, which says that if there is a problem with a filing, the clerk's office will inform the filer and provide a grace period to fix the problem. If the filer fixes it, it is deemed filed as of the date of the original attempt. This proposal was discussed at the Appellate Rules Committee meeting, and there was resistance to trying to create a provision like this for use in the lower courts. The committee's view was that this practice may work for the U.S. Supreme Court, but the complications that could ensue in the lower courts would be considerable. Additionally, this facet of the project, while meritorious and worthy, would expand beyond the scope of what the project was trying to do with self-represented litigants. Professor Struve conceded that this was correct, because once one changes the architecture of how the rules deal with the failures of filing, it affects not only self-represented litigants but also everyone else. Her foray into the case law amply illustrated that lawyers and their assistants have challenges with compliance with all of these systems as well.

Professor Struve reported that the Appellate Rules Committee firmly decided not to expand its version of the self-represented litigant project to encompass this topic. As for the Civil Rules Committee, it did not reach a view on this, but its very wise and experienced clerk representative said that this was an intriguing idea and he would like to work on drafting something. The Bankruptcy Rules Committee was not presented with this question because it was at the antecedent step of deciding whether it wanted to participate in this project at all.

Judge Mosman said that he did not think the project should be expanded to include the clerk refusal issue. The project was already a significant advance, and he did not want this additional issue to slow down that effort.

Judge Burgess confirmed that the subcommittee would look into two issues: the interplay between items (ii) and (iii), and the party/nonparty issue. The subcommittee will report back at the April meeting.

Attorney Admissions

Judge Mosman asked Professor Struve to present the next issue on the agenda.

Professor Struve noted, for new members, that there are materials in the agenda book for the Standing Committee's January 2025 meeting that encapsulate where this project has been so far. This is a project for which Professor Struve and Professor Andrew Bradt are co-reporters. There is an inter-committee subcommittee, on which Judge Birotte is a member and Ms. Recker previously served as a member.

Professor Struve explained that this project originated in the observation by Dean Alan Morrison and others that the district courts take varying approaches to attorney admission, with the more restrictive districts requiring that an applicant for admission to the district court bar be admitted to practice in the courts of the state in which the relevant district courts sits. There are four such states that have no reciprocity with other states, such that a lawyer wishing to be admitted to practice in a district court in those states has to take the state bar exam in order to gain admission to the district court. This prompted their initial submission in 2023, which prompted the formation by Judge Bates of the subcommittee. Dean Morrison had three different proposals, but consideration in the project has narrowed them to two. The first is a national rule that would provide that admission to any federal district court entitles a lawyer to practice before any other federal district court. The other is a national rule that would bar district courts from requiring, as a condition of admission to that district court's bar, that the applicant reside in or be a member of the bar of the state in which the district court is located.

Professor Struve reported that the subcommittee has been in information-gathering mode. It has looked at the practice in the courts of appeals, where Appellate Rule 46 takes a relatively permissive approach to the question. The subcommittee has also been exploring the link between these topics and requirements that lawyers practicing before a district court associate with local counsel. It has also thought about ways in which this might link to questions of unauthorized practice of law. The subcommittee is now gathering information concerning the practices of districts that take varying approaches to this topic.

Judge Mosman asked whether there was any input on this subject, and there was none. He noted that he thinks he may be the only district judge in the country who has been reversed by the court of appeals for denying someone admission to the district court bar.

Rule 15

Judge Mosman noted that there are now three categories of new suggestions, and asked Professor Beale to explain the first category.

Professor Beale explained that, as continuing members may remember, two suggestions to amend Rule 15 to provide for a limited number of depositions under some circumstances were placed on the study agenda at the last meeting. The memo on page 271 of the agenda book

describes six more letters supporting the idea of adding depositions to Rule 15. The Rules Committee Staff also informed her that an additional eight suggestions supporting the same idea came in over the last seven days. Professor Beale said that she would only be describing those which arrived in time for inclusion in the agenda book. She would not describe the first two, which kicked off this process, and would not try to speed-read the most recent letters. She said that she was aware of them, however, and they will be digested moving forward.

Professor Beale highlighted some elements of particular new proposals that might be of special interest. In general, the proposals supported the initial Kelly Acosta proposal. They discussed the need for depositions in order to even the playing field, to provide very important and useful information to improve the fairness of the criminal justice process. Several of them drew on a state practice permitting depositions.

Suggestion 25-CR-H, from John Cline, like the others, has a general description of the need for depositions and many of the same themes as in the first two suggestions. In Professor Beale's view, what was particularly new and noteworthy about Mr. Cline's suggestion was his emphasis on New Mexico's current procedural rules. New Mexico provides for something called a "statement," which is an unsworn interview often taken very informally. There is typically no court reporter and no procedural fanfare. Someone turns on their phone; it is very inexpensive and efficient. New Mexico also has formal depositions by either agreement of the parties or by order of the court upon a showing that it is necessary to prevent injustices. The New Mexico Rules provide for protective orders as needed. Mr. Cline described his very positive experiences with the New Mexico rules.

Suggestion 25-CR-J is from John F. Murphy, the Executive Director of the Federal Defender Program in the Northern District of Illinois. Professor Beale said that Mr. Murphy set the stage by talking about the recurring problems that arise under the current rules, where the defense simply does not have the necessary information. He said that it was like flying blindly, and he also described the many reasons why voluntary interviews with witnesses are unsuccessful from the defense point of view. He argued that limited pre-trial depositions with court supervision would address those problems, allowing defense counsel to be able to make informed decisions. He highlighted several features of the Kelly Acosta proposal that he considered to be critically important. First, except for exceptional cases, it is limited to five depositions. Mr. Murphy thought that that number would minimize costs and necessarily require the defense to focus on the most important witnesses necessary to be able to advise their clients and make decisions about whether to plead guilty. He also stressed the proposal's safeguards to protect witnesses and promote judicial efficiency, including the requirement of the defense motion and a judicial finding that the depositions would be in the interest of justice. He drew attention to the success of depositions in other states, and he noted that Florida's depositions were found by a blue-ribbon study committee to be a necessary and valuable part of the criminal justice system to ensure fairness and equal administration of justice.

Suggestion 25-CR-K is from David Oscar Marks. Professor Beale said that he wrote in strong support of amending the rule as a matter of basic fairness. He talked about a tilt in favor of the government and the need to make life-altering decisions. He focused on the Florida depositions that Mr. Murphy said were affirmed by a blue ribbon committee, and noted that the depositions in Florida make the process more fair and efficient. They shorten trials and lead to

appropriate resolutions without trials, because parties are not blind-sided. Mr. Marks also asserted that Florida has ample tools to address concerns about witness safety or intimidation.

Next, Professor Beale described Suggestion 25-CR-L, submitted by Jonathan Blunt. This suggestion described his experiences in Indiana, one of the several states that now allow pretrial depositions in criminal cases. Noting he had been an AUSA and now a defense lawyer, he described the positive effects of pretrial depositions, the search for truth, and practical advantages for the prosecution. Professor Beale highlighted one distinctive aspect of Mr. Blunt's letter, which is that the defendant obtains valuable face-to-face confrontation and gives the defendant a sense that they had a fair opportunity to evaluate all of the evidence. This reminded Professor Beale of the research by Tom Tyler and others that people accept the results in the criminal justice process much better if they feel they have been treated fairly. Mr. Blunt asked the Committee to think about that element. He also said that he and his colleagues were unaware of any abuse or misuse of the Indiana process.

Suggestion 25-CR-M came from a group of lawyers at Hecker Fink. Trish Anderson was the first signatory, but 16 other partners at this law firm also signed the letter. It struck Professor Beale as unusual that they all put their own names on the letter. She stated that the letter was distinctive in describing a particular representation in a parallel civil and criminal securities fraud case in the Southern District of New York. Because the defendant had not yet been extradited, the civil case went forward first. The criminal prosecutors had not yet been able to obtain the defendant's presence, so full civil discovery was completed. The letter describes how different that discovery was from what would have been available under Rule 16, even though what the defendant was facing in the criminal case was a more serious potential sanction, incarceration. The letter described the importance of the information that they received and how beneficial that was to the correct and proper advice they were able to give in resolution of the criminal case. Hecker Fink then added its view that this is not just important in civil fraud cases, which may be very complex and include a great deal of information. Depositions would be at least equally as important in drug, gun, and immigration prosecutions. Moreover, in those cases, witnesses are often law enforcement agents and officers for whom concerns that might arise about witness intimidation or threats to witnesses are actually not likely to be significant.

Professor Beale turned to the last letter, 25-CR-O, from Lawrence S. Mosberg. He also wrote in support of the Kelly Acosta proposal. He was speaking from his position not only as co-chair of the White Collar Investigations section of his law firm, but also as a director of a fellowship in public interest and constitutional law. Like the other letters do, he wrote about the need to level the playing field and described the importance, for example, of being able to shed light on possible *Brady* violations. He urged that post-COVID, practitioners have the experience and technology to take and defend depositions, many of which could, should, and would take place remotely. He said that depositions would be especially helpful at this time, when an increasing number of cases involve witnesses from around the world who may be unable to travel to the United States.

A defense member stated that she had not had a chance to survey her colleagues on this topic at the spring meeting, but had done so since that time. She stated that she had also been in touch with Mr. Kelly and Mr. Acosta, whom she believed had joined the meeting. In addition to the letters referenced by Professor Beale, the member stated that she had 21 letters signed by 59

lawyers—some from very prominent large law firms, some from boutique law firms, and some from solo practitioners, from all across the country. Three federal defenders submitted letters in support, in addition to the letter from Mr. Murphy in the agenda book. The defense member represented that the federal defender community as a whole would support moving forward with the proposal to amend Rule 15. If now is not the time, she hoped that in the spring, the Committee would consider forming a subcommittee. She thought that there are many issues worth vetting in this proposal.

Anecdotally, the member shared that she has talked to a handful of relatively new defenders who previously worked in states that allow depositions. In New York, they do not, so when she hires someone new, the biggest surprise to them is sentencing. Her colleagues who had depositions in state court express surprise at the limitation here in federal court. The member also echoed the important ideals of such an amendment, which include leveling the playing field and ensuring that *Brady* is secure. She said that her colleagues have stressed to her that this resolves cases, because the parties are in a room, talking about the case, talking to a particular witness, and suddenly things start to move. The defense member emphasized that the defender community strongly supports moving forward with Rule 15 amendments.

Judge Harvey asked for an explanation of what it means when a suggestion is put off for study.

Judge Mosman said that he would answer that question and also let the Committee know what he, as chair, intended to do. He had had a chance to read the new submissions, and they are also in the same vein of what Professor Beale had already described. He stated that several of them hit an issue that is not hit quite as hard in the earlier submissions, which is that this is a resolution to *Brady* problems. Taken altogether, Judge Mosman thought that these submissions raised a very serious and important issue. He said that he had spoken with two of the newest Committee members, and they had both expressed an interest in that project.

A new member asked what the process was, because—to state the obvious—this would be a sea change. It is intended to be a sea change. She expressed no doubt of the thoroughness of this Committee and the work it does, but noted that the Committee would want very robust comment from the prosecutorial community as well, particularly in states that have such a rule already, and from DOJ. She asked how the process would work, because this is a heavy-duty issue, to say the least.

Judge Mosman agreed that this is an important issue. He said that this is also what he would call a “gigantic” issue, because it would require a hard look at the experience in the various states, and they are not uniform. They have very significant differences in their approaches. It raises, in Judge Mosman’s mind, questions about what impact it will have on speedy trial protections. Judge Mosman thought it would be important to get at the nature of the problem the Committee is trying to solve here. Are these proposals trying to solve a *Brady* problem? Is the Committee doing this because, as the defense member suggested, it helps resolve cases better? There are many reasons. Of those reasons, which ones do depositions solve and which ones do they not solve?

Judge Mosman said that this is a very big project, and in his view as chair, the Committee is in the middle of some other very big projects. The Committee has Rule 17, that is nowhere near the finish line yet, although it is on the right path. He noted that Professor Beale had previously used the metaphor of an anaconda swallowing an antelope to describe where the Committee is right now. He said he wanted to wait to let that process work itself out. Judge Mosman did not think that the Committee had the bandwidth, right now, to undertake this project. He stated, candidly, that he thought this project would happen. Judge Mosman reiterated that he took this project very seriously and that he wanted to devote the right effort to it at the right time. He therefore placed it on the study agenda, which allows the Committee to do several things. First, it allows the Committee to keep hearing from more people, so, for example, the defense member's most recent submissions would be added. The Committee would read them. It would also do other things to gain more information, so that if and when the day came that the Committee established a subcommittee, they would have something to start with instead of starting with a blank slate.

Rule 53

For the next agenda item, Professor Beale directed the Committee to page 306 of the agenda book. She explained that Judge Edmond Chang has asked the Committee to consider two different possible amendments to Rule 53, which is a blanket prohibition on broadcasting from the courtroom. The first would make explicit that the “broadcasting” bar, as that term is used in Rule 53, would cover transmission to single individuals, not just to the general public. His second suggestion is to consider good-cause exceptions that would do one or possibly two things: (1) create a good-cause exception that would permit broadcasting to “victims,” as defined in the CVRA, and possibly remote participation by victims; and (2) create a good-cause exception permitting broadcasting to, and remote participation by, third-party custodians at bail hearings.

Professor Beale explained, as background, that in 2024, the Rule 53 Subcommittee did a thorough review of the rule and considered multiple suggestions for changes to the rule to allow some broader availability of broadcasting. In the fall of 2024, the Committee accepted the subcommittee's recommendation that there be no change to Rule 53. Subsequently, in addition to the Chang proposal, Congress recently passed the Lockerbie Victims Access Act, providing for remote access under very limited circumstances for the victims. The agenda book provides the decision in *Al-Marimi*, in the District Court for the District of Columbia, where the court looked at what it would need to do to provide this access to victims, and came up with a long list of requirements and procedures.

Professor Beale said that the question is whether to make any change in what has been done with Rule 53.

Judge Mosman said that there is not a hard-and-fast written rule that if the Committee takes a hard look at a rule, it will not take another hard look one year later. However, he noted that it is “pretty close” to an unwritten rule that the Committee does not do that. Judge Mosman noted that Judge Chang's suggestion is much narrower in scope than what the Committee looked at previously, and said that he would not be opposed to undertaking a much narrower look at Rule 53 at some future point. But he was unwilling to devote resources right now, in the middle of a busy

time for the Committee, to a rule that the Committee just looked at a very short time ago. Judge Mosman tabled this suggestion as well.

Rule 11

The Committee next turned to Professor King to discuss the Rule 11 suggestion. This proposal came from Judge Patricia Barksdale, who suggested deleting language from Rule 11(b)(1)(M). As the Committee knows, Rule 11(b)(1) includes all of the advice that a judge must give a defendant who is pleading guilty or *nolo contendere*. The language at issue here is the advice that, “in determining a sentence, the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a).” The proposal is to take out the language “possible departures under the Sentencing Guidelines,” because the Sentencing Commission has eliminated the departures in the Guidelines in the wake of *Booker*.

The question for the Committee was what to do with this proposal. Professor King noted that this issue is possibly simple enough that no subcommittee would be needed. If there is a consensus that the right thing to do is to eliminate those five words from Rule 11(b)(1)(M), then she and Professor Beale could draft an amended rule and prepare a memo for the spring meeting. At that point, the Committee would vote on the proposal. Professor King asked whether the Committee members thought this issue was that simple, or if there was something more to look at.

Judge Mosman said that, from a sentencing judge’s perspective, the Committee was talking about what a judge is obligated to tell a defendant under Rule 11 in order to get a plea. Judges are obligated to tell defendants about possible departures under the Guidelines as part of what was a three-step analysis. There are still departures, but there is no longer three-step analysis. Now it is just two steps. So the proposal would be that judges no longer tell defendants at Rule 11 colloquy about possible departures under the Sentencing Guidelines since that is no longer a formalized step in sentencing someone. It would eliminate that language from Rule 11.

Ms. Ralston thought this was a good suggestion, as DOJ had pointed out to the Sentencing Commission in its letter over the summer, saying that it might consider suggesting this change to the Criminal Rules Committee. The Sentencing Commission declined. But the representative stated that DOJ thought that it might be useful to have a subcommittee meet, even if just once, to discuss this issue. She thought that this would be a little more complicated than just deleting a couple of words, because the substantial assistance provision remains in the Guidelines and is not part of the Guidelines range. She did not know whether that needed to be dealt with. Although it is not part of the statute nor part of the Guidelines range, it is still relevant. She also said that Rule 32(h) should also be considered, because it contains a similar reference to notice about departures that the Supreme Court struck down fifteen years ago. In her view, if the Committee is going to change Rule 11, it should also consider amending Rule 32(h). It may be useful to have some people on the Committee talk about this issue a little more in depth once or twice.

A member said that she had been thinking along the same lines, but not that a subcommittee is necessarily needed (although she expressed her willingness to participate in

one). She stated that the first line, which referred to properly calculating the Guidelines range, should encompass everything that is in the Guidelines now. She suggested that that make its way into the committee note, that it is in the three-step process, but the fact is there is still the 5(k)(1) departure, which is part of that Guideline calculation. She thought it would be pretty easy to address this. She had not looked at the other provision, but agreed that it had been struck by the Supreme Court. If the language was there, though, she stated that this is definitely not the law.

Judge Mosman said that he takes these suggestions seriously. He would do one of two things: either he would create a subcommittee, or he would ask the DOJ representative and the defense member to talk with Professor King about the issue.

Closing Comments

Judge Mosman noted that there is no report from the FJC, as they were unable to attend the meeting. Professor Beale nonetheless noted that there is a written report in the agenda book.

Judge Dever expressed his gratitude for Professor Struve, saying that she is not only an award-winning teacher, but has also done extraordinary work in the Rules process since 2006. She first worked as a reporter to the Appellate Rules Committee for almost a decade, then was an associate reporter to the Standing Committee, and has been the reporter to the Standing Committee since 2019. Because of a whole host of commitments, Professor Struve will cease being the reporter in mid-February of 2006, although she will still be a consultant to the Standing Committee. Judge Dever said that everyone present has been the beneficiaries of her extraordinary scholarship, disposition, and effort on behalf of the Rules process, in addition to her many other obligations that she had. Judge Dever said that Professor Edward Hartnett, who is currently the reporter for the Appellate Rules Committee, will become the reporter to the Standing Committee, and Professor Steven Sachs at Harvard Law School will become the reporter for the Appellate Rules Committee in mid-February.

Judge Dever wished to publicly thank Professor Struve for her extraordinary work on behalf of the Rules process, which thankfully will continue in just a slightly different capacity. Judge Mosman echoed these comments.

Professor Struve thanked Judge Dever and Judge Mosman for their comments. She also thanked the Committee, saying that it has been a pleasure and a privilege to learned from everyone (particularly Professor Beale and Professor King, as her long-time reporter colleagues).

Judge Mosman informed the Committee that the next meeting will take place on April 29, 2026, in Washington, D.C. He thanked everyone for their very helpful participation and adjourned the meeting.

TAB 4

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 Criminal Rules:
Judge Michael W. Mosman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate 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 Evidence Rules:
Judge Jesse M. Furman, Chair
Professor Daniel J. Capra, 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)

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

TAB 5

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

TAB 6

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

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
	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.	

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

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
	<p>pretrial disclosures as to whether testimony at trial will be offered in person or by remote means.</p> <p>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.</p> <p>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.”</p>	
CV 81	<p>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.</p>	
EV 609	<p>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.”</p>	
EV 707	<p>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.</p>	

TAB 7

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

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Prohibiting Political Prosecutions Act of 2026	<p>H.R. 7575 <i>Sponsor:</i> Goldman (D-NY)</p> <p><i>Cosponsors:</i> Norton (D-DC) Gomez (D-CA) Larson (D-CT)</p>	CR 6, 16, 48	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr7575/BILLS-119hr7575ih.pdf</p> <p>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).</p>	<ul style="list-style-type: none"> • 2/13/2026: Introduced in House and referred to Committee on the Judiciary
Litigation Funding Transparency Act of 2026	<p>S. 3826 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Cosponsors:</i> Tillis (R-NC) Kennedy (R-LA) Cornyn (R-TX)</p>	CV 26	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/s3826/BILLS-119s3826is.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> • 2/11/2026: Read twice and referred to the Committee on the Judiciary
Protecting TPLF From Abuse Act	<p>H.R. 7015 <i>Sponsor:</i> Issa (R-CA)</p> <p><i>Cosponsors:</i> Fitzgerald (R-WI) Baumgartner (R-WA)</p>	CV 26	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr7015/BILLS-119hr7015ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> • 1/12/2026: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
<p>Sunshine for Regulatory Decrees and Settlements Act of 2025</p>	<p>H.R. 6622 <i>Sponsor:</i> Cline (R-VA)</p> <p><i>Cosponsor:</i> Tiffany (R-WI)</p>	<p>CV 24, 41</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr6622/BILLS-119hr6622ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> 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
<p>Back the Blue Act of 2025</p>	<p>S. 3366 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Cosponsors:</i> 38 Republican Cosponsors</p>	<p>§ 2254 Rule 11</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/s3366/BILLS-119s3366is.pdf</p> <p>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.”</p>	<ul style="list-style-type: none"> 12/4/2025: Introduced in Senate; referred to Judiciary Committee
<p>Protecting Our Courts from Foreign Manipulation Act of 2025</p>	<p>H.R. 2675 <i>Sponsor:</i> Cline (R-VA)</p> <p><i>Cosponsors:</i> 19 bipartisan cosponsors</p>	<p>CV 26</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> 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
<p>Litigation Transparency Act of 2025</p>	<p>H.R. 1109 <i>Sponsor:</i> Issa (R-CA)</p> <p><i>Cosponsors:</i> 24 Republican cosponsors</p>	<p>CV 5, 26</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> 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
<p>Protecting Our Courts from Foreign Manipulation Act of 2025</p>	<p>S. 3180 <i>Sponsor:</i> Kennedy (R-LA)</p>	<p>CV 26</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/s3180/BILLS-119s3180is.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> • 11/18/2025: Introduced in Senate; referred to Judiciary Committee
<p>Protecting Our Democracy Act</p>	<p>S. 2838 <i>Sponsor:</i> Schiff (D-CA)</p> <p><i>Cosponsors:</i> 9 Democratic and Independent Cosponsors</p>	<p>CV – New Rule(s)</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> • 9/17/2025: S. 2838 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs
<p>Lawsuit Abuse Reduction Act of 2025</p>	<p>H.R. 5258 <i>Sponsor:</i> Collins (R-GA)</p> <p><i>Cosponsors:</i> Gill (R-TX) Tiffany (R-WI) Hageman (R-WY)</p>	<p>CV 11</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> • 9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
<p>Restoring Artistic Protection Act of 2025</p>	<p>H.R. 4678 <i>Sponsor:</i> Johnson (D-GA)</p> <p><i>Cosponsors:</i> 20 Democratic cosponsors</p>	<p>EV 416</p>	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> • 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	<p>H.R. 3596 <i>Sponsor:</i> Mace (R-SC)</p>	EV 412; CV 26; CR 16	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> 5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2025	<p>S. 1814 <i>Sponsor:</i> Whitehouse (D-RI)</p> <p><i>Cosponsors:</i> 27 Democratic and Independent cosponsors</p>	AP 29	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> 5/20/2025: S. 1814 introduced in Senate; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2025	<p>S. 1133 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Cosponsors:</i> Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)</p>	CR 53	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf</p> <p>Summary: Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.</p>	<ul style="list-style-type: none"> 3/26/2025: Introduced in Senate; referred to Judiciary Committee
Trafficking Survivors Relief Act of 2025	<p>H.R. 1379 <i>Sponsor:</i> Fry (R-SC)</p> <p><i>Cosponsors:</i> 17 bipartisan cosponsors</p>	CR 29	<p>Most Recent Bill Text: https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf</p> <p>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.</p>	<ul style="list-style-type: none"> 2/14/2025: H.R. 1379 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
<p>Alexandra’s Law Act of 2025</p>	<p><u>H.R. 780</u> <i>Sponsor:</i> Issa (R-CA)</p> <p><i>Cosponsors:</i> Kiley (R-CA) Obernolte (R-CA)</p>	<p>EV 410</p>	<p>Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf</u></p> <p>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.</p>	<ul style="list-style-type: none"> • 1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees
<p>Protect the Gig Economy Act of 2025</p>	<p><u>H.R. 100</u> <i>Sponsor:</i> Biggs (R-AZ)</p>	<p>CV 23</p>	<p>Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf</u></p> <p>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.”</p>	<ul style="list-style-type: none"> • 1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 8



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.

TAB 9

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 17

DATE: April 6, 2026

This memorandum describes the Subcommittee’s review of the testimony and comments received during the period for public comment on Rule 17, and its recommendation that the Committee approve the proposed amendment for transmission to the Standing Committee with minor changes to the text and Committee Note.

If the Committee thinks changes may be warranted, it must consider whether each particular change would require republication, which would occur in August of 2027 at the soonest. The Judicial Conference of the United States (JCUS) procedures, as set forth in the *Guide to Judiciary Policy*, § 440.20.50(b), state:

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 work of the rules committees.

If a proposed change is “substantial,” that presumptively requires republication. However, republication is not required if the advisory committee thinks it is not needed to obtain adequate public comment or to assist the rules committees. Republication is needed if the Committee determines that the public would feel blind-sided by a change made post-publication and without another opportunity for comment.

Section I sets the stage by providing an overview of the positions presented in the public comments, and Section II provides a brief description of the Subcommittee’s conclusions. Section III contains a section-by-section analysis of the comments and the Subcommittee’s recommendations.

I. OVERVIEW OF COMMENT POSITIONS

The thirteen comments¹ on Rule 17 reveal a division between supporters of clarifying and expanding Rule 17 subpoenas, and victims’ rights advocates who strongly oppose expansion. Eight commenters—including individuals, defense organizations, the Federal Magistrate Judges Association, and the Judicial Conference Committee on Criminal Law—supported the

¹ This count includes Professor Garvin’s testimony, but not Comment USC-RULES-CR-2025-003-0010 by International Attestations, LLC, which mentions Rule 17 only in a footnote listing all of the published rules and merely states “they are worthy of comment as well.” It took no position on Rule 17 and made no other comments or suggestions concerning it.

amendments with varying degrees of enthusiasm and a variety of suggested modifications. Several urge modifications to the proposed amendments that would provide greater access to information in the hands of third parties. Three commenters—Professor Cassell, Professor Garvin, and Volare’s representative Ms. Eliason—strongly opposed the changes, based on victims’ rights concerns. They urged rejection of the published modifications that would further restrict access to third-party information. Finally, two comments took no position on the amendment as a whole but raised particular questions or issues.

The proposed amendments, which were endorsed unanimously by all of the judicial, prosecution, and defense members of the Committee and unanimously approved for publication by the Standing Committee, reflect a series of compromises. The public comments include renewed advocacy for stronger positions on several of these key issues.

- Evidentiary standard: Defense advocates renewed their call for the “relevant and material” standard, but victims’ advocates sought retention of the *Nixon* standard or stronger protections. The published standard of “likely to be admissible” was chosen as middle ground.
- Scope of proceedings: The National Association of Criminal Defense Lawyers (NACDL) argued subpoenas should be available for any evidentiary hearing, while victims’ advocates wanted subpoenas to be limited to trials. Alternatively, they proposed carve-outs for violent crimes. The published rule took a middle position, listing certain hearings in (c)(2)(A) and requiring judicial permission for others.
- Ex parte procedures: Defense advocates strongly supported the availability of ex parte applications, which allow them to protect trial strategy, work product, and client confidences. Victims’ advocates argued ex parte proceedings violate the Crime Victims’ Rights Act (CVRA) right to consult with the prosecution and would enable abuse. The published amendment again took a middle position, permitting ex parte applications but allowing a local rule to require disclosure that one party is seeking or has served the subpoena to the other party.
- Direct production to counsel: Defense advocates strongly supported the authority to permit production to a counsel for a party seeking the subpoena, and they argued judges should not have the option of ordering returns to the court. But victims’ advocates strongly opposed direct returns to defense counsel, citing the lack of court review before disclosure to the defense of sensitive materials and the potential harm to victims. The published amendment provided a default of production to the court for self-represented defendants; otherwise, it allowed direct production to counsel unless otherwise ordered by the court or by local rule.
- Motion and order for all subpoenas seeking personal or confidential information. One commenter urged the Committee to reconsider its decision to limit the requirement for a motion and order to only those subpoenas seeking a victim’s personal or confidential information. He contended that judicial review should be required when anyone’s personal or confidential information is being subpoenaed. But judges and practitioners alike expressed strong views during the November 2024 Committee

meeting against requiring motions and notice and stringent standards for every subpoena seeking protected information. The published amendment left motions and notice in place for subpoenas seeking personal or confidential information about a victim, but also as a compromise added restrictions for other subpoenas (such as the requirement of advance judicial authorization to proceed *ex parte*, and a motion requirement for all subpoenas sought by self-represented defendants).

II. THE SUBCOMMITTEE’S RECOMMENDATIONS

As described in greater detail below, the Subcommittee concluded that in the main the compromises reflected in the published amendments struck the right balance between the competing positions and considerations. It declined to revise the fundamental elements of the published amendment, endorsing these features of the published rule:

- the relaxation of the *Nixon* standard, including the evidentiary standard of “likely to be admissible”;
- the expansion of the scope of proceedings for which subpoenas may be sought, including hearings on detention, suppression, sentencing, and revocation and, with the court’s permission, other evidentiary hearings; and
- the explicit authorization of *ex parte* applications upon a showing of good cause.

The Subcommittee also reaffirmed its support for allowing direct production of material produced to counsel, although, as noted below, it recommends adding to the text a presumption of production to the court when a subpoena seeks personal or confidential information about a victim.

The Subcommittee recommends three revisions to the text (with accompanying committee note language as needed), and one additional change to the committee note.

Recommended revisions to the text (with accompanying committee note language)

- **17(a)**—technical correction making explicit that a subpoena can require testimony, production, or both testimony and production (**page 4 *infra***)
- **17(c)(3)(A)**—clarifying that a motion and order for a subpoena seeking personal or confidential information about a victim from a third party is required when the third party receiving the subpoena is a victim (**pages 16-19 *infra***)
- **17(c)(5)**—addition of presumptive requirement of return to the court for subpoenas requiring the production of personal and confidential information about a victim (**pages 23-27 *infra***)

Recommended revision to the Committee Note with no change in text

- **17(c)(3)(B)** – clarifying limits of “exceptional circumstances” that provide exception to requirement victim receive notice of subpoena seeking victim’s personal or confidential information, in light of new ex parte provision (**pages 19-22 infra**)

A division on the Subcommittee

Finally, the Subcommittee was evenly divided on whether to add a presumptive requirement to 17(c)(5) that any subpoena requiring the production of personal or confidential information about persons who are not victims must be returned by the recipient to the court, and not counsel of the requesting party, in order to provide greater judicial oversight of such subpoenas. (**pages 23-27 infra**)

III. SECTION-BY-SECTION DISCUSSION OF THE SUBCOMMITTEE’S RECOMMENDATIONS

Rule 17(a) carries forward the current requirements for the contents of subpoenas, including the proceeding’s title and court’s seal, etc. The text that was published had been revised to clarify that it applies to both subpoenas for producing items as well as those for testimony. However, as the National Association of Criminal Defense Lawyers (NACDL) noted in its submitted comments, the language of proposed Rule 17(a) does not appear to include subpoenas to testify and produce items at the same hearing. USC-RULES-CR-2025-0003-0015 at 2. As published, (a) provides that a subpoena must “require the recipient to attend and testify or produce designated items at a specified time and place.”

The Subcommittee agreed that the text of (a) should be clarified to recognize that subpoenas may require testimony, production, or both. Accordingly, it recommends the following (style-approved) revision of the first sentence of (a):

A subpoena must state the court’s name and the proceeding’s title, include the court’s seal, and require that the recipient—at a specified time and place—attend and testify, produce designated items, or do both.

No change in the committee note is needed for this correction of the text, since the new language and the published committee note already reflect the current understanding of Rule 17(a), which the Subcommittee intended to carry forward. If this change is accepted, it will be included in the listing and explanation of the changes since publication.

Rule 17(b) governs subpoenas to testify. It received no public comments, and the Subcommittee recommends no changes.

Rule 17(c) governs subpoenas for the production of data, objects, or other items.

Rule 17(c)(1) describes the items that may be obtained. Only one comment addressed this provision, urging an addition to the committee note to clarify the rule’s application to digital evidence. Joseph Zaki (USC-RULES-CR-2025-0006) urged a lengthy addition to clarify the Rule’s application to digital evidence. For example, he suggested that the committee note state

that designated items “may include ordinarily associated integrity artifacts (for example, access logs, audit logs, export logs, hashes, and time stamps) when necessary for evidentiary use.” USC-RULES-CR-2025-0006 at 1. Because the detail and specificity of the proposal went far beyond the appropriate scope of committee notes, the Subcommittee recommends no change.

Rule 17(c)(2)(A) governs the proceedings at which non-grand-jury subpoenas are available, expanding the availability of subpoenas to the additional proceedings listed in (c)(2)(A) (hearings on detention, suppression, sentencing, or revocation). These proceedings were chosen because the Rules provide that the defendant has a right to present evidence at these proceedings, but there is no avenue other than Rule 17 to obtain evidence from third parties to present in court. Although some courts already allow subpoenas to be employed for these hearings, others do not.

Victim concerns about expanding the scope of the proceedings

Victim advocates expressed strong opposition to authorizing the availability of subpoenas to proceedings other than trial, arguing that this would have a very serious detrimental effect on victims.

Professor Paul Cassell argued that because 95% of cases are currently resolved by pleas, expanding subpoenas to non-trial settings would expand “the possible situations where victims could be subpoenaed by something like 20-fold—i.e., around 2000%.” Cassell Revised Statement, USC-RULES-CR-2025-0003-0016 at 7 (hereinafter Cassell Revised Statement). He argued, for example, that allowing defense subpoenas for detention hearings in a violent crime case would permit routine subpoenas for all of the victim’s medical and psychological records in an effort to undercut the government’s arguments regarding the level of danger the defendant presents. *Id.* at 7. He questioned the Committee’s assumption that detention hearings happen so swiftly such subpoenas will be rare. *Id.* He noted that the Committee’s “consensus” on this point reflected only the views of judges, prosecutors, and defense counsel—but not victim advocates. Indeed, Cassell suggests that defense attorneys in a violent crime case would ordinarily move to subpoena the victim’s medical and treatment records. He expressed doubt that the other requirements (particularity, reason to believe that the recipient possesses the material sought, and not reasonably available from another source) would be difficult to overcome or provide much of a safeguard. *Id.* at 8-9. Similarly, he argued that at sentencing hearings defense counsel could use subpoenas as the functional equivalent of cross-examining victims by examining their confidential records. He emphasized that victims are not currently subject to cross-examination, so this would be a significant change, greatly increasing the victim’s trauma. *Id.* at 9.

In her testimony, Professor Meg Garvin also expressed concern that “all parts of Rule 17 affect victims,” that the combined effect of the amendments would increase the number of subpoenas for victim information, and that the expansion to proceedings other than trial would permit what she called “persistent subpoenas” for this information. Jan. 22, 2026 Tr. of Hr’gs on Prop. Amends. to Rule 17, at 27-28. She stressed that “the lower practical barriers to repeated demands for information are going to expose victims” to trauma, as well as the difficulty of navigating the unfamiliar criminal justice system at an earlier time in the proceedings “where relevance is more up in the air and the rules of evidence are not necessarily in play at all or are in play in a restricted fashion.” *Id.* at 28-29. She expressed special concern about fishing

expeditions, especially in sexual assault cases. *Id.* at 29. Similarly, Ms. Kirstin Eliason expressed concern that the revised standard of admissibility is ill suited to non-trial proceedings in which the Rules of Evidence are not applicable or the applicability of evidentiary rules is “illusory.” Eliason Revised Statement, USC-RULES-CR-2025-0003-0017 at 7 (hereinafter Eliason Revised Statement). She urged that the “‘likely to be admissible’ standard” offers “almost no shelter at all” for victims and expressed concern that judges might become more likely to grant subpoenas for efficiency’s sake because of the workload generated by the increased number of subpoenas. *Id.*

The Subcommittee’s response

The Subcommittee declined to revise Rule 17(c)(2)(A) to restrict the scope of application to trial alone or to edit the list of proceedings where subpoenas are presumptively available. Although the concerns raised by the victim advocates are substantial, subpoenas are already available for some (or all) of these pretrial proceedings as well as others in a significant number of districts, and there has been no indication that the serious consequences Professor Cassell and other victim advocates fear are occurring now in those districts.

In making this decision, the Subcommittee reconfirmed its understanding that subpoenas are now in use for these purposes in many districts. It reviewed research that identified many districts in which courts have recognized Rule 17 subpoenas proceedings for the proceedings identified Rule 17(c)(2)(A), as well as two circuits recognizing that subpoenas may be permitted for sentencing.² It noted that a leading treatise states that Rule 17 subpoenas are not limited to trials and may be issued for purposes including a deposition or a determination of an issue of fact raised by a pretrial motion.³ A Subcommittee member confirmed that in her district, they are able to subpoena documents and materials for court proceedings other than trial, including detention hearings, suppression hearings, and violation hearings.

Making subpoenas available for these proceedings facilitates the rights provided in other rules. The Rules for the pretrial proceedings identified in the proposed amendment already give the defendant a right to present evidence, or assume that the judge will allow the defendant to do so. Rule 17 provides the only avenue for obtaining evidence from third parties to present in those proceedings. Rule 46 requires compliance with the Bail Reform Act, 18 U.S.C. § 3142(f), which provides that at the detention hearing, a person “has the right . . . to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.” A defendant may need to testify or introduce evidence at a suppression hearing. The government too may occasionally turn to Rule 17 to obtain evidence from third parties for a pretrial hearing, for example, to rebut a defendant’s factual allegation. As for post-trial hearings, Rule 32 does not grant any right to introduce evidence at the sentencing hearing, but Rule 32(i)(2) states that “The court may permit the parties to introduce evidence on the

² *United States v. Winner*, 641 F.2d 825, 833 (10th Cir. 1981); *United States v. Krane*, 625 F.3d 568, 574 (9th Cir. 2010).

³ 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 272 (4th ed.) states (footnotes omitted):

Rule 17 is not limited to subpoenas for the trial. A subpoena may be issued for a preliminary examination, a grand jury investigation, a deposition, for determination of an issue of fact raised by a pre-trial motion, or for post-trial motions.

objections,” and Rule 32(i)(4)(ii) states the court must “permit the defendant to speak or present any information to mitigate the sentence.” At revocation hearings, however, Rule 32.1(b)(2)(C) expressly includes an entitlement of the person to “present evidence[] and question any adverse witness[.]”

The victim advocates did not claim that the harms they described are occurring in the districts where such subpoenas are already permitted. When asked specifically at the January 22 hearing about problems in districts in which subpoenas are already permitted in proceedings other than trial, Professor Garvin noted she always sought to limit Rule 17 subpoenas to trials (though she was not always successful), and she acknowledged that when subpoenas were authorized for other hearings, she had been able to litigate issues such as relevance and particularity. Jan. 22, 2026 Tr. of Hr’gs on Prop. Amends. to Rule 17, at 33-35. Professor Cassell and Ms. Eliason did not directly address that issue. Similarly, at the November 2024 Committee meeting in New York, the speakers who opposed the expansion of Rule 17 did not present information or argue that the problems they anticipated were actually occurring in districts with expanded subpoena practice.⁴

The published rule also includes multiple options for a court to respond to any issues it may encounter with subpoenas at non-trial proceedings. It expressly states that a court is free to regulate subpoenas, for example, by requiring a motion and order of the court before service, *see* Rule 17(c)(2)(C), and/or by requiring that items required to be produced by a subpoena, a category of subpoenas, or all subpoenas be returned to the court and not directly to the requesting party, *see* Rule 17(c)(5). In addition, judges may use protective orders as they wish. In other words, a court can tailor the scope of its oversight to any concerns that may arise from subpoena practice in its individual district. On the use of subpoenas for non-trial proceedings, as well as several other issues, the proposed rule recognizes the need to provide district judges with flexibility and trusts them to exercise it wisely.

Although the victim advocates sought to narrow the scope of the rule to trials, NACDL’s comment requested that the rule should be broadened to presumptively permit a subpoena for *any* evidentiary hearing. USC-RULES-CR-2025-0003-0015, at 3-4. The Subcommittee did not find this persuasive. The rule provides the necessary discretion to allow subpoenas for other evidentiary hearings when warranted. The amendment assumes that not only will judges exercise their discretion to provide more oversight should parties misuse subpoenas for proceedings other than trial if needed, it trusts judges to be gatekeepers for the proper use of subpoenas at evidentiary hearings other than those enumerated.

Rule 17(c)(2)(B) governs the standard for the contents of subpoenas and includes the Committee’s revision of the strict *Nixon* standard:

- (B) *Required Content and Limitations.* The subpoena must describe each designated item with reasonable particularity and seek only items that:

⁴ Deputy Assistant Attorney General Lisa Miller did provide examples of cases in which information disclosed to the defendant by the government during discovery under Rule 16 had been used by the defendant to harm and intimidate third parties, Minutes of Criminal Rules Advisory Committee, November 6-7, 2024, at 32, but those examples did not involve Rule 17 subpoenas.

- (i) are likely to be possessed by the subpoena's recipient;
- (ii) are not reasonably available to the party from another source; and
- (iii) are, or contain information that is, likely to be admissible as evidence in the designated proceeding.

Multiple comments urged the Committee to revise this standard. Defense commentators renewed their support for the more generous "relevant and material" standard, and the victim advocates urged a return to the *Nixon* standard.

The comments from the New York City Bar's White Collar Committee, the New York County Lawyers Association's Federal Courts Committee, NACDL, and individual commenter Morgan Noel all expressed support for the broader standard of "relevant and material." See USC-RULES-CR-2025-0003-0013 (New York City Bar Association, White Collar Crime Committee); USC-RULES-CR-2025-0003-0015 (NACDL); USC-RULES-CR-2025-0003-0011 (New York County Lawyers Association (NYCLA) Federal Courts Committee); and USC-RULES-CR-2025-0003-0005 (Morgan Noel).

Defense witnesses at both of the Committee's meetings in Phoenix and New York argued that in many districts the *Nixon* standard was applied so strictly that it was impossible, as a practical matter, to obtain pretrial subpoenas. In contrast, they stated that the more relaxed standards worked well in other districts. Despite their strong opposition to this change, the victim advocates provided no information about increased problems in those districts with more relaxed standards, and similarly the speakers at the New York Committee meeting in November 2024 who opposed the expansion of Rule 17 did not present information or argue that the problems they anticipated were already occurring in districts with expanded subpoena practice. Indeed, in response to Judge Nguyen's question whether the Department of Justice thought there was a greater risk to victims and witnesses in districts that interpret *Nixon* more permissively compared to districts that have no subpoena practice or interpret *Nixon* very strictly, Deputy Assistant Attorney General Lisa Miller "said that she had not noted a trend," and "Mr. Randall said that he also did not have a sense of current abuses." Minutes of Criminal Rules Advisory Committee, November 6-7, 2024, at 34.

On this point, the only new element in the post-publication statements and testimony by the victim advocates is the argument that this change to the *Nixon* standard would operate in tandem with the other changes discussed, and thus cumulatively have a serious impact on victims. Professor Cassell recognized that "[t]he Advisory Committee appears to have believed this standard was, de facto, the operating rule in some districts[.]" Cassell Revised Statement at 15. But he responded that "the existing rule—and the incorporated *Nixon* standard—was tethered to trials. By specifically expanding the rule to many other proceedings without the same evidentiary restrictions associated with trial (e.g., detention and sentencing hearings), the proposed rule clearly begins to resemble an anything-goes approach." *Id.* As noted above, the Subcommittee recommends no change in the availability of subpoenas for those proceedings.

The Subcommittee recommends no changes in Rule 17(c)(2)(B). It concluded that the issues raised in the comments had been carefully considered during the development of the

published rule, which reflects a compromise between the competing positions. The districts that already permit the use of subpoenas under a relaxed *Nixon* standard and those that allow subpoenas for purposes other than trial do not appear to have experienced the serious consequences feared by the victim advocates.

Rule 17(c)(2)(C) provides that—with the exception of subpoenas seeking personal or confidential information about victims and subpoenas sought by self-represented defendants—no motion and order are required before service unless otherwise required by a local rule or court order. During the consideration of the amendment, both defense lawyers and judges expressed serious concerns about the burdens of filing and adjudicating motions for subpoenas, burdens that would increase substantially if motions and orders were required for additional categories of subpoenas. Because this provision mediated the workload of both counsel and the courts, and expressly left discretion to court to require motions for additional subpoenas through local rules or other orders, this provision received strong support in the Committee.

But one commenter, Mr. Wroblewski, argued that the amendments should be revised to require a motion and court order whenever a subpoena seeks personal or confidential about anyone. USC-RULES-CR-2025-0003-0003. In *Court Review Should Be Required Before Our Personal Information is Subpoenaed*, a Substack posting submitted as part of his comment, he expressed great concern about one aspect of the proposal: that except for subpoenas seeking personal or confidential information about victims, it generally authorizes prosecutors and defense attorneys to prepare and serve a subpoena “without any motion and thus without any review by a court.” He noted that when personal or confidential information about a person other than a victim is sought, the subpoena can be issued without any notice to the person whose information is being sought. He argued this is troubling for two reasons. First, the rule would provide no protection for personal privacy and the “unconstitutional uses of subpoenas.” And second, the amendment creates an honor system, in which interested parties determine whether a subpoena they seek meets the standards set by the amended rule.

Mr. Wroblewski’s argument was policy based (though he added a constitutional dimension discussed below). This argument was initially persuasive to the Subcommittee when it first drafted a possible amendment, that provided more judicial oversight of subpoenas and protection for individual privacy interests. The Subcommittee’s discussion draft, presented at the Committee’s November 2024 meeting in New York, required a motion and order for *all* Rule 17(c) non-grand jury-subpoenas, and heightened procedures for protected information, which it defined to include not only personal or confidential information about a victim, but also “[the type of] information that [may/is likely to be] protected by [a privilege, confidentiality protection, or privacy protection under federal or state law].” *See* Discussion Draft of Rule 17, in Agenda Book for Advisory Committee on Criminal Rules, November 6-7, 2024, at 445-46, lines 21-29. The personal and confidential information Mr. Wroblewski seeks to protect would fall within that definition. But judges and practitioners alike expressed strong views during that meeting against requiring motions for *all* subpoenas seeking such protected information. At that point, the Committee understood that a proposal requiring motions and a court order for all subpoenas seeking protected information would generate substantial opposition. Accordingly, it moved forward with a compromise proposal that required motions, a court order, and notice for subpoenas seeking personal and confidential information about victims, and it added a requirement of advance judicial authorization to proceed *ex parte* as well as a motion for all

subpoenas sought by self-represented defendants. This compromise received unanimous support in the Subcommittee, and later in the full Committee, and later approved for publication by the Standing Committee. Thus Mr. Wroblewski’s policy arguments were, in effect, rejected as part of the compromises required to obtain full support for the amendments.

Mr. Wroblewski’s submission supported his policy arguments with a constitutional argument based on *Carpenter v. United States*, 585 U.S. 296 (2018), which held that the Fourth Amendment required the government to seek a warrant to obtain cell site location information (CSLI) held by third parties.⁵ But *Carpenter* did not hold that subpoenas in general are subject to the Fourth Amendment. To the contrary, the *Carpenter* Court described its decision as “a narrow one.” 585 U.S. at 316. It stressed that its decision was a narrow one that emphasized the “detailed, encyclopedic, and effortlessly compiled” nature of CSLI records, and the prevalence of cellphones, which could accord the government “near perfect surveillance” of an individual’s movements. *Id.* at 309, 312. Accordingly, the Court ruled that, under the Fourth Amendment, the government must obtain a search warrant in order to access historical CSLI records. Thus subpoenas seeking CSLI—and perhaps other broad-scope digital information—raise special (and perhaps unique) privacy concerns, and the government may have to seek a warrant based on probable cause.

The Subcommittee’s response to the renewed proposal to require a motion and order

The Subcommittee was not persuaded that *Carpenter* required revising the published amendment to mandate a motion and order for any subpoena seeking personal or confidential information about anyone. Few Rule 17 subpoenas will seek information that would be considered as “detailed and encyclopedic” as the CSLI records in that case. And it is unclear whether court’s coercive power to enforce a subpoena is sufficient to constitute the state action necessary to bring the Fourth Amendment into play when a subpoena is sought by a criminal defendant. (If it is, that argument would seem to apply equally to parties in civil proceedings, who rely on the court’s power to enforce subpoenas, which issue without requiring a motion or judicial review. *See* Fed. R. Civ. P. 45.)

In any event, under the published rule, any constitutional arguments based on *Carpenter* can be raised and adjudicated in particular cases by a motion to quash the subpoena under Rule 17(c)(2) (renumbered as 17(c)(7) in the published amendment). Additionally, a court concerned about potential use of subpoenas seeking personal and confidential information of persons who are not victims can require a motion for any such subpoena, as many courts already do.

⁵ In a passage cited by Mr. Wroblewski, the Court stated that it “has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy.” 585 U.S. at 317. Mr. Wroblewski contends that *Carpenter* thus established “both that subpoenas implicate the Fourth Amendment—in some circumstances at least—and that information held by third parties—also in some circumstances—is protected.” USC-RULES-CR-2025-0003-0003 (emphasis added.)

The Subcommittee's consideration of other options to provide more judicial oversight

Although it was not persuaded by Mr. Wroblewski's arguments that a motion and order should be required before service of every subpoena seeking any personal or confidential information about anyone, the Subcommittee was evenly divided on the question whether there should be some other adjustment in the balance reflected in the published amendment.

Three members of the Subcommittee thought that these arguments for greater judicial oversight of subpoenas seeking personal and confidential information of non-victims had been carefully considered over the three years the amendment was under consideration, and no revision of the published rule was warranted. During that time, the Subcommittee had proposed more requirements for subpoenas seeking personal and confidential information generally, including requiring a motion and court order. It moved away from those positions in the face of resistance from prosecutors, defense lawyers, and judges, who argued the burdens on the courts and the parties would be substantial. They argued those burdens are also unnecessary, based on reports from the districts in which subpoenas are relatively easily available—where without motion there have been no widespread problems or abuses, and no showing that additional judicial oversight is needed. Mr. Wroblewski's comments provided no new information on that point. These members, however, expressed support for exploring options other than revising the published rule that would encourage best practices, including an addition to the Bench Book or model orders or local orders, or possibly a suggestion in the committee note.

Three other members expressed support for some adjustment in the text to tip the balance towards greater judicial oversight for subpoenas seeking personal or confidential information about anyone, not just victims. These members did not advocate for Mr. Wroblewski's proposal, but were most interested in two options.

One option, favored by Ms. Ralston, was to require a party filing a subpoena seeking personal or confidential information about a person other than a victim to file a sealed notice of that subpoena with the court before service. This option, she said, would not require the court to take any action but was intended to provide an opportunity for the court to require a motion and order before service. Members voiced a variety of practical concerns about this suggestion, including concerns that the sealing process would be itself be burdensome, and that decisions in some circuits might not permit sealing. And despite the fact that Ms. Ralston provided examples of other rules that now require a party to file a notice, there was no clear precedent for a notice of this nature. Given the relative novelty of the proposal and questions about how it would be implemented, more input would be needed, and republication required to get public comment. Ms. Ralston said that pursuing this option (or perhaps another to provide some additional protection for personal or confidential information) was sufficiently important to slow the amendment process down to allow full consideration. The reporters suggested that, as an alternative, that the amendment could move forward as published and this proposal could be studied in the near future, along with any other issues that might arise as the amendments take effect.

The other option, which garnered the support of the other two members who favored modification of the text to provide more judicial oversight, was a default rule requiring a subpoena recipient to produce personal or confidential information about a person other than a

victim to be made to the court, rather than counsel, unless the court ordered otherwise. This option would not require the court to review the material in camera or take any other action once it received the items, but it would provide an opportunity for judicial oversight that otherwise might not be available if the party that served the subpoena had not secured a court order before doing so, or the recipient had not moved to quash. It would parallel the requirement in the published amendment of production to the court for subpoenas sought by self-represented parties, as well as the Subcommittee's recommendation to revise the published rule to require production to the court for subpoenas seeking such information about victims. It would provide an opportunity for the court to review the materials produced, and—as has often been true when personal and confidential information concerning victims has been produced to the court—to impose a protective order, limitations on use, and redactions or the excision of extraneous material.

The three Subcommittee members who preferred not to amend the published text opposed adding a presumptive requirement that a subpoena recipient must return to the court all items requested by any subpoena requiring personal or confidential information of anyone. They predicted increased litigation about what personal and confidential means once it is extended outside of the victim context, where there appears to be very little litigation on that point. At least one member expressed the view that the defense bar might view imposing a default of production to the court as a major change, and that this would require republication to allow for public comment. Unlike codifying a presumptive return to the court for that well-understood category of subpoenas seeking victim information, which many courts require anyway, codifying a presumptive return to the court for this larger category of subpoenas is a more significant change. One member also commented on a posting by Mr. Wroblewski, who argued that recent cases showed the potential for abusive subpoenas and the need for judicial oversight. The member was not persuaded by his argument that a motion or required screening by the judge is essential to protect against abusive subpoenas by the government. The member noted that motions to quash—with no prior or post screening by the judge—continue to be acceptable judicial oversight on the government's use of subpoenas in the grand jury context, including grand jury subpoenas for personal and confidential information about a victim.

The Subcommittee reached no conclusion on the question whether the adoption of any new text affording greater judicial oversight would require republication, and most members did not address it. One member expressed the view that any revision to provide more judicial oversight would be a significant change requiring republication to allow for public comment to guide the Committee, though the member expressed a willingness to support an amendment to the note to emphasize the court's ability to provide oversight.

Given the division on the Subcommittee, the Committee has three options.

- (1) make no change in the text concerning subpoenas seeking personal or confidential information about non victims, while addressing the concerns about privacy with an amendment to the committee note and by facilitating best practices
- (2) revise the published amendment to add a presumption that all subpoenas seeking personal and confidential information about victims must be returned to the court *without* republication

- (3) revise the published amendment to add a presumption that all subpoenas seeking personal and confidential information about victims must be returned to the court and *require* republication

Option 1. We will not repeat the arguments discussed above for and against a revision of the text to provide greater judicial oversight. All Subcommittee members expressed support for facilitating best practices, including an addition about judicial protection of personal and confidential information in the Note. The reporters asked members for any language they could suggest to add to the Committee Note to encourage practices that provide protection for privacy. After the meeting, as requested, one member provided the reporters with this suggestion, which, with a revision in brackets, is shown at lines 494-499 of the attached post-publication redline draft:

And to provide greater judicial oversight [for subpoenas requiring the production of personal or confidential information], the rule permits a court, by local rule or court order, to require the return of [such] information to chambers before disclosure to the requesting party.

Because this suggested addition to the note merely draws attention to the discretion that the published rule provides, it would not require republication.

Other ideas for facilitating best practices would not be incorporated in the rule or text and would involve the Subcommittee chair and the reporters working with individuals and groups outside the rules process. This process has worked well on other occasions. For example, Judge Raggi, the Criminal Rules Committee chair, worked with the Federal Judicial Center's Benchbook Committee to develop a comprehensive new section on *Brady/Giglio* obligations.⁶

Alternatively, the Committee could reject Option 1 and approve a revision of (c)(5) to require production to the court, rather than counsel, for all subpoenas seeking personal or confidential information, not just those seeking such information about victims. The **Attachment Regarding Rule 17(c)(5)** provides language and a revised committee note making that change. It would replace lines 95-119 (text) and 441-499 (committee note) in the post-publication redline version.

Approval of such a revision would raise the question whether to republish the proposed amendments (Option 3) or to revise without republishing (Option 2). As noted on page 1, the standard for republication is whether the change would be "significant" and, if so, whether additional public input is needed.

⁶ The minutes for the Committee's spring 2013 meeting report this successful collaboration:

Judge Raggi reported to the Committee that the FJC's Benchbook Committee had acted on the Criminal Rules Committee's suggestion that a discussion of *Brady/Giglio* obligations be included in the next edition of the Benchbook. A copy of the new Benchbook's detailed and comprehensive section on *Brady/Giglio* was included in the Committee's agenda book. Judge Raggi expressed her gratitude to the Benchbook Committee for allowing her to participate in its discussions leading to the preparation of this new section.

Minutes of Criminal Rules Advisory Committee, April 25, 2013, at 15.

We think that this would be a significant change. At all stages of the consideration of the amendment, the balance between the need for judicial oversight and burdens that oversight imposed was one of the central issues. It was debated by the speakers who attended the Committee's meetings in Phoenix and New York, by the Committee itself, and in the comments to the published amendment. A new default requirement of production to the court would be intended to provide additional protection for personal privacy, but it may slow the subpoena process and impose burdens on practitioners seeking subpoenas. It is not clear whether there would be an additional burden on the courts, since production would provide an opportunity for—but not require—specific judicial action. For that reason, it is also uncertain how courts would respond, and how much additional protection would be afforded.

Moreover, as Subcommittee members noted, the proposal would substantially increase the number of instances in which practitioners (and eventually the courts) would be required to determine the meaning of “personal or confidential” as it might apply to a wide variety of materials sought by subpoena.

Assuming that the change would be significant, the second step in the analysis is whether additional public input would be needed to assist the Committee. This enquiry includes the question whether members of the public would believe they had not had an opportunity to address significant issues.

As noted above, there has been substantial public input on the need for and burdens imposed by judicial oversight. Although comments from the defense bar and some other commenters support the balance struck by the published amendments, the public comments also include concerns that the published rule goes too far in both expanding the availability of subpoenas by relaxing the *Nixon* standard and at the same time expanding the scope of proceedings at which subpoenas are available.

Republication is not always needed when a committee changes its position in response to public comments. When the options have been thoroughly vetted by the Committee and members of the public, republication may not be needed if the Committee changes its position in response to the strength of public comments.

But here, although the Committee received extensive public comment on the need for and burdens of judicial oversight, it did not previously focus specifically on requiring production of all personal and confidential information to the court, rather than to the requesting counsel. Nor was this part of the published rule, so the public had no occasion to comment on it. Issues on which public input might be helpful include the following:

- How effective would this procedure be in providing greater judicial oversight for personal or confidential items?
- How much of a burden would this procedure impose on persons seeking subpoenas?
- Would persons seeking subpoenas properly identify those seeking personal or confidential items?

- How much of a burden would this procedure impose on the courts?
- Would some other procedure be preferable?

In making the decision among the three options, the Committee may wish to consider the mechanics of republication. Any material to be published in August 2026 would need to be approved at the Committee's April 2026 meeting and forwarded to the Standing Committee for approval at its meeting in June 2026. If more time is needed to prepare and approve revisions, then republication would be deferred until August 2027 at the earliest.

Also, one issue raised in the Subcommittee was how soon the Committee might turn again to Rule 17 if the current amendments are not revised to provide more oversight for personal or confidential information. No hard and fast rule governs this question. If the Committee approves the revised amendments and recommends them for approval by the Standing Committee at its meeting in June 2026, the soonest they might become effective is December 1, 2027. At that time, it would be appropriate for the Committee to begin to track any issues raised by the revisions that might require attention, and to take up any issues it deferred.

One final consideration may weigh in favor of Option 1 and against either adding a court-production requirement for personal or confidential information of non-victims without republication, or withdrawing the rule now so that the Committee can further develop and seek comment on such an addition. The rule as published provides only presumptive requirements regulating production. It assumes that some districts and some judges will continue to adopt their own policies for regulating subpoena returns, policies that may vary somewhat from the rule's default positions. Given the continuation of this experiment in district variation, we question whether further Committee deliberations focusing on this issue before revising and publishing it again for public comment will result in a policy prescription for subpoena returns that is more informed, more workable, and more fair than the model practices that courts will inevitably craft and test under the revised rule, especially if additional guidance is provided in the Benchbook or committee note.

Rule 17(c)(2)(E) requires the court, for good cause, to permit a party to file a motion *ex parte*. The committee note explains the rationale for this provision:

Proceeding *ex parte* is important when disclosure to another party of what the subpoena requests, the identity of the recipient, or the explanation why the subpoena complies with (c)(2)(B) could lead to damage to or loss of the items that the party is attempting to obtain, or divulge trial strategy, witness lists, or attorney work-product. Without the *ex parte* option, defense counsel may face the impossible choice of either not seeking a subpoena and violating the ethical duty to prepare a plausible defense, or seeking the subpoena and disclosing their trial strategy, work-product, and other confidential information to the government and co-defendants (who may have adverse interests).

Though the defense commenters expressed strong support for the *ex parte* procedure, the victim advocates expressed alarm about the impact of allowing *ex parte* motions. Ms. Eliason expressed concern that this will “open[] the floodgates to essentially limitless *ex parte*

communication between defense counsel and the court that will leave victims and their attorneys in the dark.” Eliason Revised Statement, at 11. Moreover, she argued, *ex parte* defense subpoenas will dramatically undercut federal prosecutors’ ability to safeguard the rights of victims, as required by the CVRA. *See* 18 U.S.C. § 3771(a)(5) (reasonable right to confer with attorney for government in case), (c)(1) (government attorney to make best efforts to see victims are accorded their rights under CVRA), (d)(1) (attorney for the government may assert victim’s rights under CVRA).

Professor Cassell also argued that the *ex parte* provisions would also facilitate “gag orders” barring the victim from consulting with the prosecutor. Cassell Revised Statement, at 26-33. Focusing on subpoenas issued directly to a victim, Professor Cassell explained that for production to be “effectively *ex parte*, the recipient of the subpoena must be required not to notify the government.” *Id.* at 27. He cited an unreported 2016 case from the District of Columbia Superior Court in which the court issued such a gag order, and states that he has been informed by victims’ rights organizations that other such cases exist. *Id.* at 28. Professor Cassell contended that by preventing victims from conferring with prosecutors such gag orders would violate both CVRA and the First Amendment.

The Subcommittee recommends no change in Rule 17(c)(2)(E) as published. Authorizing *ex parte* applications—which are permitted in other contexts—does not provide a basis for a gag order restricting the speech of the recipient. It appears that in federal proceedings the only example of such an order came in the unreported D.C. Superior Court case noted above. (It is unclear whether the other orders reported to Professor Cassell by victim organizations were federal cases.)

The Subcommittee also addressed concerns about the effect of this provision on victims in connection with proposed changes in the committee note to (c)(3)(B), discussed *infra* at pages 19-22, and to the text of (c)(5) and the accompanying committee note, discussed *infra* at pages 23-27.

Rule 17(c)(3) governs grand jury subpoenas for personal or confidential information about a victim. The Subcommittee recommends one revision in the published amendment (and accompanying committee note) and one in the committee note.

Rule 17(c)(3)(A) allows “a non-grand jury subpoena requiring the production of personal or confidential information about a victim to be served on a third party only by court order upon motion.”

Subpoenas to be served directly on victims

Professor Cassell argued that there was an error in the 2008 revision of Rule 17(c)(3), limiting the requirement of a motion and order to subpoenas is to be served on a third party, and not when service is to be made directly on the victim. Cassell Revised Statement, at 11-12. He argued that even if this limitation may have made sense when Rule 17 was effectively limited to trial subpoenas, since the victim might be expected to testify, the proposed revisions would allow subpoenas to victims for a wide variety of personal or confidential information before trial—and under a standard more relaxed than *Nixon*—without the critical safeguard of judicial screening. *Id.* Professor Cassell acknowledged that although one might argue that the victim is a “third

party” to the case, the rule seems to distinguish between the victim and the third party from whom victim information is being sought. *Id.* at 11.

Our research identified two cases which support Professor Cassell’s concern, concluding that victims are not “third parties” under current Rule 17(c)(3).⁷ Given the concerns raised by Professor Cassell and the confusion on this point indicated by the cases cited in note 7, the Subcommittee recommends this clarification in the text.

- (A) *Motion and Order Required.* After a complaint, indictment, or information is filed, a non-grand-jury subpoena requiring the production of personal or confidential information about a victim may be served on a third party, including a victim, only by court order upon motion.

The proposed note explaining this change states (lines 423-430 of post-publication redline):

The amendment also responds to a few decisions that had interpreted the rule as applicable only to subpoenas for personal or confidential information served on third parties other than a victim. The amendment adds the words “including a victim” to clarify that the requirement of a motion and court order before a subpoena seeking personal or confidential information about a victim may be served on a third party applies when that third party is a victim.

⁷ In *United States v. You*, No. 2:19-CR-14, 2024 WL 1404378, at *2-3 (E.D. Tenn. 2024), the court reasoned:

The 2008 Advisory Committee Notes for Rule 17(c)(3) state that Rule 17(c)(3) “implements the Crime Victims’ Rights Act[.]” The Crime Victims’ Rights Act states that crime victims have “the right to be treated with fairness and respect for the victim’s dignity and privacy,” as implemented in part by Rule 17(c)(3). 18 U.S.C. § 3771(a)(1)(8); Fed. R. Crim. P. 17(c)(3) advisory committee’s note to 2008 amendment. The 2008 Advisory Committee Notes go on to explain that “[t]hird party subpoenas raise special concerns because a third party may not assert the victim’s interests, and the victim may be unaware of the subpoena. Accordingly, [Rule 17(c)(3)] requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party.” Fed. R. Crim. P. 17(c)(3) advisory committee’s note to 2008 amendment.

The Court, therefore, concludes that Rule 17(c)(3) should not be construed to read “victim” and “third party” as possible synonyms, which the Government’s interpretation requires. Rule 17(c)(3) exists to protect victims who would not otherwise be made aware of a request for sensitive content such as their employment history, medical history, academic or truancy records, or other private, personal information. As explained persuasively by the Southern District of Florida in *United States v. Sandoval*, interpreting Rule 17(c)(3) to read “third party” as merely a third party to the litigation rather than a party other than the victim and the defendant is a misunderstanding of Rule 17(c). No. 10-20243-CR-ALTONGA/Brown, 2010 WL 2757188 at *2, 2010 U.S. Dist. LEXIS 78726 at *5–*6 (S.D. Fla. July 13, 2010). The Victim Companies are not a “third party” as comprehended by Rule 17(c)(3); they are victim-witnesses who will be served directly and therefore will be afforded the opportunity to respond in opposition. *See id.* The Victim Companies, as the direct recipient of any issued subpoena, will have the opportunity to oppose Defendant’s subpoenas that Rule 17(c)(3) was drafted to protect. In light of the foregoing, the Court declines to find that Rule 17(c)(3) is applicable to the Victim Companies.

Sandoval, quoted in *You*, reached the same conclusion.

There should be little if any opposition to clarifying in the text that the term “third-party” includes victims. Victims are not parties in criminal cases. In criminal cases they are generally considered “third-parties” like nonparty media representatives, nonparty subpoena recipients, nonparty asset owners, etc. If the disclosure of victim’s personal and confidential information is so sensitive that it mandates judicial screening of a subpoena in advance so the judge can reject or narrow the scope of the request and put in place an appropriate protective order to safeguard the information, then judges should be exercising the same oversight for *any* subpoena seeking that type of victim information, whether the recipient is a third party who is not a victim, a victim other than the victim whose information is sought, or the victim whose information is sought. The only policy rationale for excluding “a victim” from the term “third party” rests on two dubious assumptions: (1) that “a victim” who receives a subpoena will always be the victim whose information is sought, *and* (2) that a crime victim with no right to counsel will ordinarily be in a position to obtain, by filing and litigating a motion to quash, at least as much protection from unwarranted and harmful disclosure of her private information as prescreening by a judge would provide.

Because the Subcommittee viewed the revision as making explicit the intention of the 2008 amendments and resolving an ambiguity that came to light during the public comment period, it did not deem the change to be “substantial,” and it does not think additional public input would be beneficial. Accordingly, it recommends the revision be made without republication.

Expanding the scope of the motion and order requirement

Writing on behalf of the Judicial Conference Committee on Criminal Law, Judge Edmond Chang suggested that Rule 17(c)(3)(A) be amended to require a motion and order when a subpoena has a “reasonable possibility” of requiring the production of personal or confidential information about a victim. USC-RULES-CR-2025-0003-0014 at 2. Judge Chang explained that this standard “will capture a broader set of subpoenas and expand victim protections.” *Id.* His letter acknowledged that the Committee was not aware of any significant misapplication of the current language. *Id.* But because the Criminal Law Committee believed it likely that the proposed amendment would increase the number of subpoenas, his letter expressed concern about the risk that the current language would be read narrowly as requiring a motion and order only when the party seeking the subpoena “knows to a *certainty* that the subpoena will result in the production of a victim’s personal or confidential information.” *Id.* (emphasis in original). That, he wrote, would “inadequately protect[] victim privacy.” *Id.*

The Subcommittee recommends no revision of the published amendment. The suggested change rests on speculation that the current language of the rule will be read very narrowly by persons seeking subpoenas for personal or confidential victim information. The Subcommittee had no way of assessing the likelihood this would occur. Additionally, the change would probably require publication to gather public comment. Judge Chang’s statement the revision would “capture a broader set of subpoenas and expand victim protections” suggested that it may be seen as a significant change.

Clarifying the phrase “personal or confidential”

NACDL expressed concern that the term “personal or confidential” has not been defined, leaving the motion and order requirement “open to abuse, to the detriment of defendants’ due process rights and the legitimate exercise of the defense function.” USC-RULES-CR-2025-0003-0015 at 4. Accordingly, it suggests that the committee note be amended “to clarify that ‘personal or confidential,’ as used in this provision, is to be narrowly construed.” *Id.* NACDL suggests that “[i]t should be made clear, for example, that criminal history information, security camera footage in the hands of a third party, non-content telephone toll and usage records, and bank records of alleged crime victim, for example, are not ‘personal or confidential’ within the meaning of this new rule.” *Id.* at 4-5.

The Subcommittee does not recommend this change. It would go far beyond issues considered by the Committee, and it expresses views the Subcommittee has not discussed. During the development of the published amendment, no one had expressed concern that the scope of the term “personal or confidential” required greater definition, that the phrase “personal or confidential” had been interpreted improperly by courts, or that there had been any “abuse” of the motion and order requirement.

Rule 17(c)(3)(B) requires notice to the victim before an order is entered allowing a subpoena for the victim’s personal or confidential information.

Exceptional circumstances when notice to the victim is not required

Both Ms. Eliason and Professor Cassell emphasized the link between ex parte motions and what they saw as a critical gap in the requirement that victims receive notice when a party seeks a subpoena requiring the production of personal or confidential information about a victim. Current Rule 17(c)(3) requires a court order to subpoena this personal or confidential information, and states that absent “exceptional circumstances,” the court must require giving notice to the victim before entering the order. The published amendment did not disturb this language, which was part of the original (c)(3) provision added to Rule 17 in 2008.

The victim advocates’ principal concern was that the courts will find “exceptional circumstances” and grant ex parte orders for personal or confidential information without giving the victims notice to permit them to move to quash the subpoena or otherwise object.⁸ Indeed, in that situation, the victim might be unaware that their confidential information had been provided by a third party.

Professor Cassell and Ms. Eliason focused on the underlined language in the 2008 committee note to Rule 17(c):

⁸ If there is a hearing on the ex parte motion, Professor Cassell also urged that the CVRA guarantees victims the right to notice of any public court proceeding involving the crime and a right not to be excluded from such a public court proceeding. 18 U.S.C. § 3771(a)(1) & (2). Cassell Revised Statement at 21. We are not certain whether courts would hold hearings to determine whether there was good cause to file an ex parte motion, and, if so, whether such a hearing would be a “public court proceeding.”

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2)—or object by other means such as a letter—on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

In their view, it will nearly always be possible for the defense seeking a subpoena for victim information to argue that defense strategy would be prematurely disclosed. Moreover, they urged, that problem is compounded by the last sentence, which permits the court to make that judgment ex parte “without notice to anyone.” This, defense advocates argued, violates the courts’ duty under the CVRA to ensure that victims are treated with fairness and with respect for their dignity and privacy. *See* 18 U.S.C. § 3771(a)(8). And notice to the victim of the fact a subpoena is being sought is critical, because it is the necessary predicate to the victim’s ability to contest the subpoena or seek its modification.

The Subcommittee recommends an addition to the published committee note to respond to this concern about the impact of the new ex parte provision in (c)(2)(E) on the statutory duty of notice in (c)(3). Specifically, the recommended addition draws attention to the distinction between disclosing to the other party the detailed explanation of reasons for requesting an ex parte subpoena, and notifying the victim that a party is seeking his or her confidential or personal information by subpoena from a particular recipient.

The new provision authorizing ex parte motions recognizes that requiring the defendant to provide the government with *a detailed rationale* for the motion may prematurely disclose the defendant’s trial strategy. In contrast, notifying the victim that there is a subpoena asking a particular recipient to produce personal and confidential information for the defense would not ordinarily reveal confidential defense strategy that could be relayed to the government. Becoming aware that a subpoena is being sought is not the same as being handed a roadmap of how the defense will use the material. The suggested addition to the published note is shown in red, below:

Rule 17(c)(3) retains the requirement in former (c)(3) of a motion and court order for a subpoena seeking personal and confidential information about a victim, now in subparagraph (A), as well as the requirement of prior notice to a victim absent exceptional circumstances, now in subparagraph (B). Both requirements were added to the Rule in 2008 to implement the Crime Victim’s Rights Act and are unchanged, except for the addition of style revisions, including adding the term “non-grand-jury” to (A).

The amendments also add a provision permitting ex parte applications for good cause, but it is important to distinguish that good cause requirement from the

“exceptional circumstances” concept in (c)(3). Exceptional circumstances under (c)(3) would include that evidence might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. It will be uncommon that a notice to a victim will meaningfully implicate the concern about disclosing defense strategy because, unlike subpoena applications under this Rule, a notice merely informs the victim of the request, not the reasons why the subpoena is sought. In contrast, the showing of “good cause” to file a motion ex parte would require an explanation of the reason.

In the Subcommittee’s view, this addition to the note would not require republication. The first step in the republication analysis is whether the change is substantial. The limited role of committee notes supports the conclusion that republication is not required. Committee notes are not permitted to change, restrict, or expand the rule stated in the text. Given the limited role played by committee notes, inclusion of the new language in the committee note—not the text of the rule—provides support for the view that the change is not substantial.

Moreover, the proposed addition to the note is consistent with the language in the 2008 committee note for (c)(3). It carries forward language explaining that both loss of evidence *and* unfair prejudice by premature disclosure of a sensitive defense strategy may constitute exceptional circumstances, while providing an explanation why disclosure to the victim that a subpoena is being sought will seldom result in the latter.

Specifying that the court must require the government to give notice

Writing on behalf of the Judicial Conference Committee on Criminal Law, Judge Edmond Chang suggested another change in Rule 17(c)(3)(B), specifying that the *government* must give notice to the victim when a subpoena seeks personal or confidential information about the victim. USC-RULES-CR-2025-0003-0014 at 3. His letter stated that this would “align the text’s rule with actual practice.” *Id.* Professor Cassell made a similar suggestion, proposing the addition of the following language to (c)(3):

(C) Service of any subpoena on an unrepresented victim must be facilitated through counsel for the attorney for the government. Service of any subpoena on a represented victim must include notice to the attorney for the government.

Cassell Revised Statement at 36.

The Subcommittee recommends no change in this provision as published, which does not change the current language about notice in (c)(3). Our research found that the change would not appear to “align” with practice in all districts. In *United States v. Ray*, 337 F.R.D. 561, 573-74 (S.D.N.Y. 2020), the court held:

... [I]f the subpoena calls for personal or confidential information of a victim, the Court must require that the party requesting to serve the subpoena have given notice to the victim—and in ample time for the victim to move to quash or modify—before

the subpoena is served. It is not sufficient to place the responsibility on the receiving party or just to demand reasonable efforts to provide notice.

....

The party requesting authorization for the subpoena to be served also is responsible for ensuring that notice has been provided. That is the process under the Federal Rules of Civil Procedure, where the party serving the subpoena must provide notice. It also places responsibility where that responsibility must logically rest and with the person most interested in discharging that responsibility.

It seems unwise to assume that other districts do not follow the same practice (though of course federal prosecutors and Department of Justice victim/witness coordinators may also provide notice).

The proposal also fails to take account of the situation in which the defense is able to show good cause for an *ex parte* application for a subpoena seeking personal or confidential information about a victim, and although the court or the requesting party provides notice of the subpoena to the victim, the court orders that it need not be disclosed to the government. The suggestion that the government must give the victim notice assumes that the government itself will always learn of the subpoena request before it is issued. It is possible in some cases that the government would lack this awareness. Thus the Criminal Law Committee's suggestion appears to be in tension with the portion of the amendment authorizing *ex parte* applications for good cause.

Even if the amendment were modified or interpreted to require that the government always receive the information required for notice—that is, notice that a subpoena seeking the victim's personal and confidential information from X has been requested by the defense—the Criminal Law Committee's recommended change may not be warranted. As noted above, it is not clear that mandating the government always be the one to notify the victim is the universal practice, nor that relieving the court of all responsibility for determining who must notify the victim is the best policy. It may or may not be, but the Committee did not examine this issue when developing the amendment, nor has it solicited the views of judges, the Department of Justice or the defense bar about the wisdom of this change.

Accordingly, republication for public comment and additional Committee consideration would be desirable if the suggested language were to be added to Rule 17(c)(3)(B). The change to this key provision in Rule 17 could be substantial, and to date there has been no opportunity for public comment.

Rule 17(c)(4) governs subpoenas sought by self-represented parties, requiring them to file a motion, make the showing required in (2)(D), and obtain an order before serving a subpoena. One commentator, Mitchell Berger, questioned why self-represented parties appear to be treated differently under the proposed amended Rule 17. USC-RULES-CR-2025-0003-0012. He argued that requiring pro se parties to file a motion, make the showing, and obtain an order subjects them to a higher standard than represented parties, potentially undermining their Sixth Amendment rights. *Id.* at 1.

The Subcommittee recommends no change in (c)(4). It reflects a deliberate choice to avoid the potential for abuse by persons who lack legal training and are not bound by the ethical rules that would deter misuse of the court's compulsory authority. Moreover, because subpoenas sought by unrepresented defendants is a very small subset, the motion and order requirement in those cases would not add significantly to the courts' burden.

Rule 17(c)(5) states that "A non-grand-jury subpoena requested by a represented party may require the recipient to produce the designated items to that party's counsel." For subpoenas sought by a self-represented party, however, the subpoena must require production to the court unless the court orders otherwise. The published committee note explains:

... [(c)(5)] clarifies when a subpoena must order the recipient to produce designated items to the court, and when it need not do so. Again, the text in former (c)(1) stating that the "court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence" produced conflicting decisions on this point. Some courts read the rule as always requiring returns to the court, others that it required returns to the court whenever a subpoena ordered production before trial, and still others that it permitted returns directly to the requesting party unless the court ordered items produced to it. The Committee concluded that judges should have discretion to determine where (and how) production should take place. To the extent the prior text of the rule was leading to unnecessary limits on the discretion of the court to allow returns to the requesting party, it created needless burdens for courts and required revision.

Accordingly, subsection (c)(5) sets two defaults, both subject to departure by court order.

First, it provides that a subpoena requested by a self-represented party must require the recipient to produce the designated items to the court. Judicial oversight at both the issuance and production stages is added assurance that parties without legal training or ethical responsibilities will not deliberately or unintentionally access inappropriate or non-compliant information that a judge would be able to intercept if the recipient were required to provide the items to the court.

The second default in (5) is for all other non-grand-jury subpoenas, namely those sought by represented parties. It provides the subpoena may require the recipient to produce the designated items to that party's counsel, reflecting present practice in many districts.

The rule places no restrictions on the court's discretion to vary from these default rules. For example, when a subpoena is likely to produce private or privileged information, it is common practice for courts to order in camera review before disclosure to anyone.

Defense commenters expressed strong support for this provision for the reasons stated in the published committee note, but NACDL claimed that there is an error in the following statement in the committee note at lines 322-326 which requires correction: "the court has

discretion ... to order that the recipient produce the items to the court instead of directly to the requesting party's counsel (see (c)(5))." *See* USC-RULES-CR-2005-0003-0015 at 4 n.3. NACDL argued that "under proposed (c)(5) such judicial discretion applies *only* to subpoenas issued by *pro se* defendants." *Id.* (emphasis added). The court's discretion, in NACDL's view, is limited to only subpoenas sought by self-represented defendants, "where greater judicial control is required to compensate for the lack of professional responsibility and judgment that counsel representation ensures." *Id.* Accordingly, NACDL argued, the court has no discretion to restrict the location of production when subpoenas are sought by represented parties.

In contrast to NACDL's insistence that the rule should clarify that courts lack discretion to require production to the court rather than defense counsel, the victim advocates expressed strong opposition to any direct production to defense counsel, contending that (c)(5) would strip away another critical safeguard for victims. Professor Cassell stated that direct production would "cut[] the district court out of its statutorily required role of protecting crime victims" as required by 18 U.S.C. § 3771(b)(1). Cassell Revised Statement at 15. Moreover, since the proposed rule permits *ex parte* motions, prosecutors may also be prevented from discharging their statutory duties to use their "best efforts" to see crime victims are notified of and accorded their rights under the CVRA. *Id.* at 15-16. Ms. Eliason expressed alarm that direct production would "make it easier for [victims'] intimate information to be directly accessed by defendants, exacerbating victims' retraumatization, revictimization, and safety risks." Eliason Revised Statement at 8. She described how the current process of return to the court protects victims:

... victims typically have at least the chance to seek protective orders from the court with respect to documents produced to defendants. These protective orders often redact portions of the documents to preserve victims' privacy, or tailor the manner in which defendants access the personal information altogether. A staff attorney at Volare who regularly assists victims with redactions describes it as a "time-consuming process." Each subpoena request can entail a series of proposed redactions back and forth between the victim, the defendant, and the court, often requiring specific data sharing platforms like Box that a victim may be unfamiliar with using. ...

But the amendments to Rule 17 will enable defendants and defense counsel's access to significantly more sensitive and private information from victims directly—such as reproductive health, mental health, and citizenship records—because Rule 17 will no longer contemplate the court's involvement as both the court's responsibility under the Crime Victims' Rights Act (CVRA) and as a safeguard in ensuring that victims are afforded their rights. Because documents will be delivered directly to defense counsel, the court, victims, and their counsel will not have the opportunity to redact, contest, or remove non-responsive portions of records.

Id. (footnotes omitted). Ms. Eliason emphasized that "[w]ithout review of records turned over to defense, the court is no longer able to strike nonresponsive requests, implement redactions, and create guardrails around defendants' access to sensitive information *before* defense has access to the information. The amended rule alienates judges from their rightful duty to ensure victims are afforded their rights." *Id.* at 9. Moreover, she expressed concern that production without judicial oversight can create the risk of serious harm to victims. For example, without redaction,

subpoenaed material might provide information about the times and locations of medical or therapy sessions, creating an opportunity for further crimes against victims. *Id.* at 8-9.

Noting that NACDL’s submission identified an ambiguity in the published rule and Committee Note,⁹ the Subcommittee favored clarifying the rule to remove this ambiguity. It concluded that the text should clearly state a default requiring production of personal and confidential information about a victim to the court—rather than directly to counsel—unless the court orders otherwise.

The Subcommittee initially favored adding this regulation of the production of personal or confidential information about victims to (c)(3)—with the other provisions concerning victims. Members thought that is where victims and their advocates would expect to find it. If the default rule were placed in (3), the Subcommittee also favored adding a cross reference to (5) (or a provision reiterating this requirement). But placement in (3) was not acceptable to the style consultants, who noted that the caption of (5)—“Place to Produce the Designated Items”—gives all readers including victims and their representatives clear notice. Moreover, because (5) itself gives clear notice, they advised that a cross reference in (3) was not needed, and indeed it would set a bad precedent. After collaboration with the style consultants, the Subcommittee recommends the following text for (c)(5). For clarity, we show a clean version.

- (5) ***Non-Grand-Jury Subpoena—Place to Produce the Designated Items.*** Unless the court orders otherwise, a non-grand-jury subpoena:
- (A) must require the recipient to produce the designated items to the court if the subpoena:
 - (i) is requested by a self-represented party; or
 - (ii) requires the production of personal or confidential information about a victim.
 - (B) may require the recipient to produce the designated items to that the requesting party’s counsel if the subpoena:
 - (i) is requested by a represented party; and
 - (ii) does not require the production of personal or confidential information about a victim.

⁹ NACDL’s interpretation of the rule is not unreasonable—though it is not consistent with the committee note nor, we believe, with the intent of the Committee. In contrast to the first sentence of (c)(5), which references the court’s ability to vary the default rule regarding self-represented defendants, the remainder of (c)(5) states only that “[a] non-grand-jury subpoena requested by a represented party may require the recipient to produce the designated items to that party’s counsel.” This language might be read as granting permission to the *party seeking the subpoena* to determine whether to require production directly to counsel. If (c)(5) is read together with (c)(2)(C), which allows subpoenas to be filed without a motion or order unless (c)(3) or (4) or a local order requires them, that interpretation becomes less reasonable, because those provisions recognize the court’s discretion to require production to be made to the court to permit in camera review, either by an order in an individual case, or by local rule.

The changes are shown on lines 95-119 of the post-publication redline version. The proposed revision of the committee note explains (at lines 441-494):

Rule 17(c)(5) is also new. It clarifies when a subpoena must order the recipient to produce designated items to the court, and when it need not do so. Again, the text in former (c)(1) stating that the “court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence” produced conflicting decisions on this point. Some courts read the rule as always requiring returns to the court, others that it required returns to the court whenever a subpoena ordered production before trial, and still others that it permitted returns directly to the requesting party unless the court ordered items produced to it. The Committee concluded that judges should have discretion to determine where (and how) production should take place. To the extent the prior text of the rule was leading to unnecessary limits on the discretion of the court to allow returns to the requesting party, it created needless burdens for courts and required revision.

Accordingly, subsection (c)(5) sets ~~two~~ three defaults, ~~both each~~ subject to departure by court order.

First, ~~it~~ (5)(A)(i) provides that a subpoena requested by a self-represented party must require the recipient to produce the designated items to the court. Judicial oversight at both the issuance and production stages is added assurance that parties without legal training or ethical responsibilities will not deliberately or unintentionally access inappropriate or non-compliant information that a judge would be able to intercept if the recipient were required to provide the items to the court.

The second default in (5) is for ~~all other~~ non-grand-jury subpoenas that require the production of personal or confidential information about a victim, namely those sought by represented parties. Paragraph (5)(A)(ii) provides that unless the court orders otherwise, such subpoenas must require the recipient of such subpoenas to produce the designated items to the court, not directly to counsel. Production to the court provides an opportunity for the court, before the information produced is disclosed to the requesting party, to review the information produced in camera, require redactions, restrict access, regulate retention, add other protective orders, or take other actions to protect the victim’s dignity and privacy.

The third default, in (5)(B), is that unless the court orders otherwise, it provides the a subpoena that is requested by a represented party and that does not require the production of personal or confidential information about a victim may require the recipient to produce the designated items to that the requesting party’s counsel, reflecting. This default reflects present practice in many districts.

The rule places no restrictions on the court’s discretion to vary from these default rules. For example, when a subpoena is likely to produce private or

privileged information, it is common practice for courts to order in camera review before disclosure to anyone.

Rule 17(h)—the last subsection of the Rule—governs information that is not subject to subpoena, and states that Rule 26.2 governs.

The New York City Bar Association’s White Collar Crime Committee urged consideration of a revision to Rule 17(h) to address what it describes as an error that occurred in the 2002 restyling of the Rule, inadvertently extending the provision which had been based on the Jencks Act, 18 U.S.C. § 3500, and Rule 26.2 to the production of witness statements held by third parties. USC-RULES-CR-2025-0003-0013. NACDL also supported this proposal. USC-RULES-CR-2025-0003-0015 at 5. The Jencks Act and Rule 26.2 address only statements possessed by the government or the defense.

The White Collar Crime Committee noted that the 2002 restyling was not intended to effect any substantive change, but nonetheless courts have taken different positions on the question whether Rule 17(h) now bars subpoenas for witness statements held by third parties, rather than the government or the defense.

The Subcommittee recommends against the proposed change to the rule as published. This issue was not among those raised by practitioners (and judges) during the Committee’s sessions in Phoenix and New York, was not debated in the Subcommittee and full Committee, and was not included in the package now under consideration. Because the provision is at least arguably significant and there has been no public input, its inclusion at this point would require republication of the entire amendment.

IV. COMMENTS NOT ADDRESSED TO SPECIFIC PORTIONS OF RULE 17

A. Carve Outs to Protect Victims

The victim advocates contended if the published rule did move forward—despite their strong opposition—then two major carve outs would be needed to limit the impact on victims. It is not clear where the proposed carve outs would be located in the rule. The Subcommittee does not support the proposed revisions.¹⁰

Violent crimes and sexual offenses

Professor Cassell and Ms. Eliason both urged that Rule 17 should carve out violent crime and all sexual offenses (including trafficking cases), as well as domestic violence and stalking cases. Cassell Revised Statement at 37-38; Eliason Revised Statement at 16-17. They proposed a

¹⁰ Professor Cassell also urged the Committee to consider “promulgating rules (or urging the enactment of statutes) that will assist in the appointment of legal counsel for crime victims who might otherwise be forced to litigate complicated privacy and other issues pro se.” Cassell Revised Statement at 38. He included a proposed Rule 44.1 to recognize the court’s discretionary authority to appoint counsel for a victim. *Id.* at 39.

Because this suggestion involves the need to promulgate a new rule, the proposal for the appointment of counsel fell outside the proposed amendments to Rule 17.

definition of violent crime for this purpose drawn largely from U.S.S.G. § 4B1.2(a). Cassell Revised Statement at 37-38 (suggesting modifications of § 4B1.2(a) and any comparable state law crimes prosecuted under the Assimilative Crimes Act); Eliason Revised Statement at 16-17 (suggesting in the alternative that the Committee could use the definition in 18 U.S.C. § 16).

The victim advocates stressed that violent crime cases present special privacy-related concerns, as well as concerns for victim safety, and they do not present the same concerns as the white collar cases that appear to have motivated the Committee. They contended that it would be consistent with the Committee’s incremental approach to tailor the proposed amendments to cases not arising from violent crimes.

The proposed limitation would be a major departure from the design of the Federal Rules of Criminal Procedure, which apply to all federal criminal offenses, though providing some adjustments rules for petty offenses and misdemeanors. *See* Fed. R. Crim. P. 58.

The District of Columbia

Ms. Eliason urged in the alternative that Rule 17 should expressly exclude cases from the District of Columbia “to prevent their application in the DC Court system.” Eliason Revised Statement at 17. She described a local law passed in 2022 that requires judges in the D.C. Superior Court to (1) serve the victim with notice of the potential disclosure of confidential information from eight kinds of professionals (including physicians, mental health professionals, and sexual assault counselors/advocates) and (2) give the victim fourteen days to object and provide an explanation for why the disclosure is not in the interest of justice. *Id.* at 12. It also requires the court to consider the rights of crime victims under the CVRA in determining whether disclosure would be in the interest of justice. *Id.* at 13. Ms. Eliason urged that the amendments to Rule 17 would severely impair victims’ ability to protect their rights in the District of Columbia, whose local rules generally mirror the Federal Rules of Criminal Procedure. *Id.* at 15. She explained that the D.C. Code provides that the Federal Rules of Criminal Procedure are the default in the District, and a process must be initiated to reject any amendments to the Federal Rules. *Id.*

It is unclear whether the law adopted in 2022 would remain applicable if the proposed amendments to Rule 17 go into effect. In the hearing, Ms. Eliason suggested that victim advocates would argue it would remain in effect. *See* Jan. 22, 2026 Tr. of Hr’gs on Prop. Amends. to Rule 17 at 18 (stating “[e]ven if Rule 17 in the District Superior Court gets amended to reflect the federal rules, we will have a District law that essentially our argument would be overrides the federal—or, sorry, the District’s rule that reflects the federal rule.”)

The proposed limitation would be a major departure from the design of the Federal Rules of Criminal Procedure, which apply in all districts. Their application to cases in the D.C. Superior Courts is governed by District of Columbia Code § 11-946, which states that “[t]he Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes and adopts rules which modify those Rules.” Thus the D.C. Code itself provides a procedure for reviving or preserving the protections afforded by the law that was adopted in 2022.

B. Allowing local rules and court orders to modify the procedures established in the amendments

NACDL objected to the “allowance of an override of each of these reforms by local rule.” USC-RULES-CR-2025-0003-0015 at 4. It emphasized the general standard of uniformity and consistency for federal criminal procedure, arguing that it should be applied here. In NACDL’s view, there is no reason to allow local rules to override the reforms when orders in individual cases can still be employed if warranted.

The Subcommittee was not persuaded by this argument, and it recommends no change in the published rule. The Committee carefully considered the degree of local variation on each issue with an eye towards making the published amendments acceptable and workable nationwide. The Committee sought to provide a blueprint for greater availability of subpoenas while still allowing for variations among districts, and among different judges in the same district. And it calibrated the degree of variation permitted, for example providing in (c)(2)(E) that “[t]he court must, for good cause, permit the party to file the motion ex parte.” Providing for local variations was part of the many compromise that allowed unanimous support for the published rule, and the comment raises no new information that would warrant undermining that compromise.

C. Questions raised by Anonymous

This commenter raises a series of questions and concerns, including the meaning of “when available” in (c)(2)(A), the potential that the “likely to be admissible” standard might be read to reach material when there is only “a slight chance it could be admissible,” the need for court orders to apply for credibility determinations, the meaning of “good cause” under 17(c)(2)(E), and the potential that ex parte subpoenas could be abused. *See* USC-RULES-CR-2025-0003-0009.

The Subcommittee concluded these briefly stated questions and comments did not warrant any revision of the published amendments.

Public Comments and Testimony on Rule 17

USC-RULES-CR-2025-0003-0003 (Jonathan Wroblewski). Mr. Wroblewski supports the provisions that update the rule to define the proceedings to which it would apply, when production must be made to the court or may be made to counsel, and when subpoenaed material must be disclosed to the opposing party. He also supports the proposed relaxation of the *Nixon* standard as “modest and reasonable.” But he urges two important changes: (1) requiring a motion, notice to the party whose information is being sought, and court review for all subpoenas seeking private or confidential information from third parties, and (2) providing a default protective order for such information when a subpoena is approved by the court. He argues that the constitution requires the protection of everyone’s personal or confidential information—not just information about victims—and that judicial scrutiny of motions seeking such information is necessary to promote consistent applications and ensure that subpoenas meet the standards in 17(c).

USC-RULES-CR-2025-0003-0005 (Morgan Noel). Mr. Noel generally supports the proposed changes, which improve clarity and now make it clear that subpoenas are available for non-trial proceedings. However, he prefers the NYC Bar Committee’s “relevant and material” standard, rather than “likely to be admissible.”

USC-RULES-CR-2025-0003-0006 (Joseph Zaki). Mr. Zaki supports the rule’s objective but proposes committee note clarifications regarding digital evidence, such as the ability to designate integrity artifacts, objective identifiers for reasonable particularity, and protective structuring for sensitive information.

USC-RULES-CR-2025-0003-0008 (Federal Magistrate Judges Association—FMJA). The FMJA “enthusiastically endorsed” the amendments because they “will provide much needed clarity and lead to consistency across districts.”

USC-RULES-CR-2025-0003-0009 (Anonymous). This commenter raises several questions and concerns, including the meaning of “when available” in (c)(2)(A), the potential that the “likely to be admissible” standard might be read to reach material when there is only “a slight chance it could be admissible,” the need for court orders to apply for credibility determinations, the meaning of “good cause” under 17(c)(2)(E), and the potential that ex parte subpoenas could be abused.

USC-RULES-CR-2025-0003-0010 (International Attestations, LLC). The International Attestation submission focuses on the proposed Civil Rules, but footnote 1 of the submission noted in passing that “the other proposed rules changes,” including Criminal Rule 17, “are worthy of comment as well.” However, International Attestations took no position on Rule 17 and made no suggestions.

USC-RULES-CR-2025-0003-0011 (New York County Lawyers Association—NYCLA—Federal Courts Committee). The NYCLA commends the effort to modernize Rule 17 but argues that the proposed changes do not go far enough. While endorsing the clarification that Rule 17(c) applies to sentencing, suppression, detention, and revocation hearings, and supporting the replacement of *Nixon*’s specificity requirement with “reasonable particularity,” the

Committee argues the proposed “likely to be admissible” standard will continue to create inconsistent applications. NYCLA advocates for the NYC Bar’s “relevant and material” standard instead. It notes that Rule 17(c) subpoenas are a criminal defendant’s only vehicle to compel production from third parties—in contrast to prosecutors who have grand jury subpoenas and search warrants—making broader access essential to defendants’ constitutional rights to compulsory process and a meaningful opportunity to present a complete defense.

USC-RULES-CR-2025-0003-0012 (Mitchell Berger). Mr. Berger questions why self-represented parties appear to be treated differently under the proposed amended Rule 17. He argues that requiring pro se parties to file a motion, make the showing described in (c)(2)(D), and obtain an order (per proposed Rule 17(c)(2)(I)(i)) subjects them to a higher standard than represented parties, potentially undermining their Sixth Amendment rights.

USC-RULES-CR-2025-0003-0013 (New York City Bar Association, White Collar Crime Committee). NYCBA’s White Collar Crime Committee believes the amendments “will promote clarity, uniformity, fairness, and, ultimately greater trust in our criminal justice system.” The amendments “represent a substantial step in the right direction towards much-needed reform.” Though the Committee fully supports the proposed amendments, it suggests a revision to 17(c) and an amendment to 17(h). Relaxing the stringent *Nixon* standard imposed by certain courts is a significant step, but it does not go far enough. The published “likely to be admissible” standard may still lead to differing interpretations. The Committee urges adoption of its original “relevant and material” standard. The Committee also proposes amending Rule 17(h) to clarify that witness statements can be obtained from third parties by subpoena, resolving a circuit split on this issue. It states that the proposed rule’s safeguards (requiring motions for personal or confidential victim information, judicial gatekeeping, and notice requirements) adequately protect victims while preserving defendants’ constitutional rights.

USC-RULES-CR-2025-0003-0014 (Judicial Conference Committee on Criminal Law). Writing on behalf of the Committee, Judge Edmond Chang agrees amendments are needed to clarify Rule 17 because the existing guidance is “ambiguous and incomplete, and it has produced conflicting interpretations that afflict multiple aspects of subpoena practice.” He offers two suggestions intended to avoid potential confusion and ensure effective application. (1) Revise Rule 17(c)(3)(A) to require a motion and order when a subpoena has a “reasonable possibility” of requiring the production of personal or confidential information about a victim. This would counter the risk the parties might interpret the rule as requiring notice only when they are certain such material would be produced. (2) Revise Rule 17(c)(3)(B) to specify that the court must require the government to give notice to a victim whose personal or confidential information is being sought. This would align the rule with the current practice.

USC-RULES-CR-2025-0003-0015 (National Association of Criminal Defense Lawyers—NACDL). Although its preferred approach would have made ex parte subpoenas available to the defense for investigative purposes as soon as charges had been filed, NACDL characterizes the published draft as a “significant improvement” and supports it subject to several suggested changes. NACDL strongly supports the relaxation of the *Nixon* standard and the explicit authorization of returns to counsel’s office. It supports the expansion to four kinds of evidentiary hearings other than trial, but objects to limiting subpoenas to only those proceedings. NACDL suggests several modifications: (1) clarifying the relationship between (a) and (c);

(2) disallowing overrides of numerous provisions by local rules and orders; (3) clarifying the meaning of “personal or confidential,” which should be narrowly construed; (4) correcting the statement in the note to (c)(5) that the court has discretion to require production to the court rather than to counsel; and (5) clarifying Rule 17(h) “does not extend Jencks Act-type limitations to otherwise-permissible subpoenas to third parties.”

USC-RULES-CR-2025-0003-0016 (Prof. Paul G. Cassell). Professor Cassell provided a revised version of his written statement following the January 22, 2026, public hearing. Professor Cassell argues the proposed amendments represent a dramatic and unjustified expansion that will harm crime victims while providing minimal benefit to defendants. His central arguments are: (1) most crime victims (over 85%) lack legal counsel and cannot effectively litigate subpoena challenges; (2) expanding subpoenas from trials to detention, suppression, sentencing, and revocation hearings would represent approximately a 20-fold increase in proceedings where information about victims could be subpoenaed; (3) the lowered “likely to be admissible” standard would provide no protection at detention and sentencing hearings where evidence rules do not apply; (4) the proposal carries over a drafting error in the present rule, which does not require a motion and order to subpoena personal or confidential information about a victim directly from the victim; (5) direct production to defense counsel would bypass judicial review, which is required by the Crime Victims’ Rights Act (CVRA); (6) allowing ex parte motions to avoid disclosure of “trial strategy” would violate victims’ CVRA rights to confer with prosecutors; and (7) the proposed ex parte procedures would facilitate gag orders on victims in violation of both the CVRA and the First Amendment. Professor Cassell proposes specific remedies including carve-outs for violent crimes, sexual offenses, and domestic violence cases, and a new Rule 44.1 confirming the authority of courts to appoint counsel to assist crime victims in exercising their rights.

USC-RULES-CR-2025-0003-0017 (Volare). Volare, a Washington D.C. nonprofit providing free legal services to crime survivors, strongly opposes the Rule 17 amendments based on their experience representing victims. Kristin Eliason, Esq., submitted revised testimony following the January 22, 2026, public hearing. Volare’s central concerns are: (1) less than 1% of DC crime victims receive legal representation, leaving them unable to effectively challenge subpoenas; (2) the proposed “likely to be admissible” standard will dramatically increase the number of scenarios where subpoenas may be issued, (3) the amendments authorize subpoenas for additional non-trial proceedings, exponentially expanding the settings in which victims’ personal or confidential information may be sought, and in many of these proceedings the Rules of Evidence do not apply, (4) the new rule’s provision for direct production to defense counsel bypasses the judicial review that currently protects victims; (5) allowing ex parte motions to avoid prematurely disclosing “trial strategy” will lead to the proliferation of secret proceedings of which victims will have no notice; (6) the changes will operate “in tandem” to create untenable circumstances for victims; (7) the proposed changes would impair victims’ ability to protect their rights in the District of Columbia, which currently has more protective procedures. If the proposed amendments move forward, Volare proposes carve-outs for violent crimes and explicit exclusion of the District of Columbia from the rule changes given the unique impact on their local court system. The submission includes testimony from “Jane,” a crime victim who chose not to report her assault specifically because she feared the invasive discovery process.

Testimony of Meg Garvin (Executive Director, National Crime Victim Law Institute; Professor of Law Lewis & Clark). Professor Clark testified in opposition to the proposed amendments, stating that they would undermine the rights provided by the Crime Victims’ Rights Act, which guarantees victims’ rights to be treated with fairness and respect for their dignity and privacy, and places an affirmative duty on the courts to “ensure that victims are afforded their rights.” Victims will be affected by all parts of the amendments, which will increase the number of subpoenas seeking their information, potentially allow that information to go directly to defendants, and lower the practical barriers to repeated demands for information that will expose victims to trauma earlier in the proceedings, while applying a lower standard than *Nixon*. She stressed the emotional, financial, and psychological toll on victims, particularly the potential for repeated subpoenas and disputes.

Redline of Post-Publication Changes

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE¹

- 1 **Rule 17. Subpoena**
- 2 **(a) In General.** A subpoena must state the court’s name
3 and the proceeding’s title, include the court’s seal,
4 and require that the recipient ~~to attend and testify or~~
5 ~~produce designated items~~ at a specified time and
6 place attend and testify, produce designated items,
7 or do both. The clerk must issue a blank subpoena—
8 signed and sealed—to the requesting party, who must
9 fill in the blanks before the subpoena is served.
- 10 **(b) Subpoena to Testify—Defendant Unable to Pay**
11 **Costs and Witness Fees.** Upon a defendant’s ex
12 parte application, the court must order that a
13 subpoena be issued for a named witness if the
14 defendant shows the necessity of the witness’s

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

Redline of Post-Publication Changes

2 FEDERAL RULES OF CRIMINAL PROCEDURE

15 presence for an adequate defense and an inability to
16 pay the witness's fees. The process costs and witness
17 fees will then be paid as they are for witnesses
18 responding to government subpoenas.

19 **(c) Subpoena to Produce Data, Objects, or Other**
20 **Items.**

21 **(1) *In General—Items Obtainable.*** A subpoena
22 may require the recipient to produce any
23 item, including any data or information or
24 any book, paper, document, or other object.

25 **(2) *Non-Grand-Jury Subpoena—When***
26 ***Available; Required Content and***
27 ***Limitations; Issuance; Disclosure.***

28 **(A) *When Available.*** A non-grand-jury
29 subpoena is available for a trial; for a
30 hearing on detention, suppression,
31 sentencing, or revocation; or—with
32 the court's permission in an

Redline of Post-Publication Changes

33 individual case—for any additional
34 evidentiary hearing.

35 (B) *Required Content and Limitations.*

36 The subpoena must describe each
37 designated item with reasonable
38 particularity and seek only items that:

39 (i) are likely to be possessed by
40 the subpoena’s recipient;

41 (ii) are not reasonably available to
42 the party from another source;

43 and

44 (iii) are, or contain information
45 that is, likely to be admissible
46 as evidence in the designated
47 proceeding.

48 (C) *Motion and Order Not Ordinarily*

49 *Required.* A motion and order are not

50 required before service of a non-

Redline of Post-Publication Changes

4 FEDERAL RULES OF CRIMINAL PROCEDURE

51 grand-jury subpoena unless (3) or (4),
52 a local rule, or a court order requires
53 them.

54 (D) *Necessary Showing In a Required*
55 *Motion.* The movant must:

56 (i) describe each designated item
57 with reasonable particularity;
58 and

59 (ii) state facts showing that each
60 item satisfies (2)(B) (i)-(iii).

61 (E) *Ex-Parte Motion.* The court must, for
62 good cause, permit the party to file
63 the motion ex parte.

64 (F) *Disclosure When No Motion Is*
65 *Required.* When no motion is
66 required, a party need not disclose to
67 any other party that it is seeking or has
68 served the subpoena, unless a local

Redline of Post-Publication Changes

69 rule or court order provides
70 otherwise.

71 **(3) *Non-Grand-Jury Subpoena for Personal or***
72 ***Confidential Information About a Victim.***

73 (A) *Motion and Order Required.* After a
74 complaint, indictment, or information
75 is filed, a non-grand-jury subpoena
76 requiring the production of personal
77 or confidential information about a
78 victim may be served on a third party,
79 including a victim, only by court
80 order upon motion.

81 (B) *Notice to a Victim.* Unless there are
82 exceptional circumstances, the court
83 must, before entering the order,
84 require giving notice to the victim so
85 that the victim can move to quash or

Redline of Post-Publication Changes

6 FEDERAL RULES OF CRIMINAL PROCEDURE

86 modify the subpoena or otherwise
87 object.

88 (4) *Subpoena by a Self-Represented Party.* A
89 subpoena is available to a self-represented
90 party only after the party:

91 (A) files a motion;

92 (B) makes the showing described in
93 (2)(D); and

94 (C) obtains an order.

95 (5) ~~*Non-Grand-Jury Subpoena—Place to*~~
96 ~~*Produce the Designated Items.*~~ Unless the
97 court orders otherwise, a non-grand-jury
98 subpoena:

99 ~~(A) requested by a self-represented party~~
100 must require the recipient to produce
101 the designated items to the court: if
102 the subpoena:

Redline of Post-Publication Changes

- 103 (i) is requested by a self-
104 represented party; or
- 105 (ii) requires the production of
106 personal or confidential
107 information about a victim;
108 and
- 109 (B) ~~A non-grand jury subpoena requested~~
110 ~~by a represented party may require~~
111 the recipient to produce the
112 designated items to ~~that~~ the
113 requesting party's counsel if the
114 subpoena:
- 115 (i) is requested by a represented
116 party; and
- 117 (ii) does not require the
118 production of personal or
119 confidential information
120 about a victim.

Redline of Post-Publication Changes

8 FEDERAL RULES OF CRIMINAL PROCEDURE

- 121 **(6) *Disclosing to Other Parties the Items***
122 ***Received.*** A party must disclose to an
123 opposing party an item the party receives
124 from a subpoena’s recipient only if the item
125 is discoverable.
- 126 **(7) *Quashing or Modifying the Subpoena.*** On
127 motion made promptly, the court may quash
128 or modify the subpoena if compliance would
129 be unreasonable or oppressive. A party
130 responding to a motion to quash a non-grand-
131 jury subpoena must make the showing
132 described in (2)(D).
- 133 **(d) *Service.*** A marshal, a deputy marshal, or any
134 nonparty who is at least 18 years old may serve a
135 subpoena. The server must deliver a copy to the
136 witness or to the subpoena’s recipient and must
137 tender to the witness one day’s witness-attendance
138 fee and the legal mileage allowance. But the server

Redline of Post-Publication Changes

139 need not tender the attendance fee or mileage
140 allowance if the United States, a federal officer, or a
141 federal agency has requested the subpoena.

142 **(e) Place of Service.**

143 **(1) *In the United States.*** A subpoena requiring a
144 witness to attend a hearing or trial—or
145 requiring a recipient to produce designated
146 items—may be served at any place within the
147 United States.

148 **(2) *In a Foreign Country.*** If the witness is in a
149 foreign country, 28 U.S.C. § 1783 governs
150 the subpoena’s service.

151 **(f) Subpoena for a Deposition.**

152 **(1) *Issuance.*** A court order to take a deposition
153 authorizes the clerk in the district where the
154 deposition is to be taken to issue a subpoena
155 for any witness named or described in the
156 order.

Redline of Post-Publication Changes

10 FEDERAL RULES OF CRIMINAL PROCEDURE

157 (2) *Place.* After considering the convenience of
158 the witness and the parties, the court may
159 order—and the subpoena may require—the
160 witness to appear anywhere the court
161 designates.

162 (g) **Contempt Order for Disobeying a Subpoena.** The
163 court (other than a magistrate judge) may hold in
164 contempt a witness or subpoena recipient who,
165 without adequate excuse, disobeys a subpoena issued
166 by a federal court in that district. Under 28 U.S.C. §
167 636(e), a magistrate judge may hold in contempt a
168 witness or subpoena recipient who, without adequate
169 excuse, disobeys a subpoena issued by that
170 magistrate judge.

171 (h) **Information Not Subject to a Subpoena.** No party
172 may subpoena a statement of a witness or of a
173 prospective witness under this rule. Rule 26.2
174 governs the production of the statement.

Redline of Post-Publication Changes

175

Committee Note

176 The amendments to Rule 17 respond to gaps and
177 ambiguities in its text that have contributed to conflicting
178 interpretations in the courts and difficulties in application.
179 The changes include revisions that clarify the procedures for
180 subpoenas to produce data, objects, or other items and the
181 availability of such subpoenas for proceedings other than
182 trial, as well as revisions that delineate which provisions
183 apply to certain types of subpoenas. The amendments also
184 include stylistic revisions to text and headings.

185 **Rule 17(a).** In addition to stylistic changes, the text
186 in (a)(1) has been revised to clarify that it applies to
187 subpoenas for producing items as well as those for
188 testimony.

189 **Rule 17(b)** formerly headed “Defendant Unable to
190 Pay,” has been retitled to clarify that it applies only to
191 subpoenas for testimony. Changes to the text are stylistic
192 only.

193 **Rule 17(c),** covering subpoenas to produce data,
194 objects, or other items, has been revised to address multiple
195 issues with the prior language that had contributed to
196 conflicting interpretations in the courts. Formerly it had
197 three subsections, now it has seven. The changes are
198 intended to promote clarity about what the Rule requires,
199 while safeguarding the discretion of courts to tailor subpoena
200 practice to the circumstances of a district or case. The
201 section’s heading —“Subpoena to Produce Information,
202 Objects, or Other Items”—has been revised to more
203 accurately describe the amended language in (c)(1).

204 **Rule 17(c)(1)** continues to describe what a subpoena
205 may obtain, but it has been revised to refer to “items” that
206 include not only data, but also any “information” or objects.

Redline of Post-Publication Changes

12 FEDERAL RULES OF CRIMINAL PROCEDURE

207 This recognizes that parties use subpoenas to obtain
208 electronically stored information and other intangible items
209 in addition to “data,” “documents” or other objects.

210 Perceived ambiguities in the language of the last two
211 sentences of former (c)(1) contributed to several conflicts in
212 case law, including when a subpoena may be sought ex parte,
213 and the rules for production and disclosure. The revised rule
214 replaces these two sentences with separate provisions
215 containing explicit direction about each of these issues.

216 **Rule 17(c)(2)** is new. The language formerly in (c)(2)
217 about motions to quash is now (c)(7). **Subparagraph (2)(A)**
218 clarifies that non-grand-jury subpoenas are available to
219 produce items for trial as well as proceedings where
220 subpoenas are most likely to be needed, presently used
221 regularly in many districts, or for which there is statutory or
222 rule authority for parties to present evidence: detention
223 hearings under the Bail Reform Act, sentencing hearings
224 under Rule 32, pre-trial suppression hearings, and
225 revocations. There is no other mechanism available to
226 compel evidence from third parties at these proceedings,
227 even though both parties may need to do so. Some decisions
228 have interpreted the prior text of the Rule to bar the use of
229 Rule 17 subpoenas to produce items at any hearing other
230 than grand jury proceedings and trial. This change to the
231 Rule’s text expressly authorizes the use of a non-grand-jury
232 subpoena to obtain evidence for introduction at the listed
233 hearings.

234 The ending clause explicitly recognizes the
235 discretion of the court in an individual case to permit a
236 Rule 17 subpoena to produce items in other evidentiary
237 hearings not listed in the Rule in which a party may be
238 allowed to present witnesses or evidence. Examples include
239 preliminary hearings and new trial hearings. The present use

Redline of Post-Publication Changes

240 of Rule 17 subpoenas for items in such proceedings is not as
241 common, in part because of the difficulties, costs, and delays
242 that may arise when subpoena practice is imported into these
243 less formal or more expedited proceedings.

244 Rule 17's provisions are not applicable to hearings
245 under § 2254, where a court may apply subpoena provisions
246 in the Federal Rules of Civil Procedure. *See* Rule 12 of the
247 Rules Governing § 2254 Proceedings. Rule 12 of the Rules
248 Governing §2255 Proceedings allows application of either
249 the Civil or Criminal Rules in § 2255 proceedings.

250 **Subparagraph (c)(2)(B)**, along with the
251 requirements in **(c)(2)(D)**, articulates a modified version of
252 the test announced by the Supreme Court in *Nixon v. United*
253 *States*, 418 U.S. 683 (1974), which interpreted the previous
254 text of Rule 17. Applying *Nixon*, all but a handful of lower
255 courts have read Rule 17 as limiting non-grand-jury
256 subpoenas to produce documents or other items to those that
257 met specificity, relevance, and admissibility requirements.
258 Many courts added one or more of the additional following
259 criteria: that the items sought were not otherwise obtainable
260 by due diligence, that advance inspection was needed to
261 properly prepare and avoid delay, and that the subpoena was
262 not a “fishing expedition.”

263 The Committee agreed that the basic character of
264 Rule 17 subpoenas as seeking evidence for a particular
265 proceeding should remain unchanged, and that the rule
266 should continue to prohibit the use of subpoenas for general
267 discovery from third parties. But it also determined that the
268 admissibility requirement, as well as other aspects of the
269 prevailing interpretation of the prior language, was being
270 applied inconsistently, resulting in harmful uncertainty and
271 unnecessarily restricted access to evidence needed from
272 third parties for trial and other proceedings.

Redline of Post-Publication Changes

273 The new text now codifies a modified version of the
274 *Nixon* standard intended to provide an adequate and more
275 predictable opportunity for both the prosecution and defense
276 to obtain from third parties the evidence they need for the
277 proceeding designated in the subpoena. The new text
278 imposes upon a party the duty to ensure that every subpoena
279 to produce items meets this standard, including those
280 obtained and served without motion.

281 As to specificity and the prevention of “fishing
282 expeditions,” **(c)(2)(B)** first requires that the subpoena
283 “describe each designated item with reasonable
284 particularity.” This requirement serves at least two functions.
285 First, it informs the recipient what is being requested so that
286 the recipient can decide how to comply and whether to file a
287 motion to quash. Second, it prevents parties from using such
288 subpoenas for discovery and “fishing expeditions,” which
289 can create unacceptable burdens for recipients, courts, and
290 those individuals and entities whose information the
291 recipient is ordered to produce. The requirements in
292 **(c)(2)(B)(i) and (ii)** advance this same goal by limiting the
293 subpoena to items “likely to be possessed by the subpoena’s
294 recipient,” and “not reasonably available to the party from
295 another source.”

296 The text of **(c)(2)(B)(iii)** requires that each item
297 either be, or contain information that is, “likely to be
298 admissible as evidence in the designated proceeding.” In
299 using “*likely* to be admissible,” the Committee deliberately
300 rejected stricter formulations applied by some courts. In
301 some circumstances, it will be impossible to be certain
302 *before* a proceeding begins that a precisely identified item
303 will be admissible. Such circumstances include when an
304 item’s admissibility depends on whether the opposing party
305 first presents other evidence. For example, impeachment
306 evidence should be available to a party by subpoena for use

Redline of Post-Publication Changes

307 at trial when a party knows that a witness will or is likely to
308 testify. That evidence should not be unavailable simply
309 because admissibility cannot be determined definitively
310 until after the witness has actually testified. The “likely to be
311 admissible” standard is already used by some courts
312 applying Rule 17 and more accurately describes the
313 appropriate inquiry. There is no separate reference to
314 “relevance” in **(c)(2)(B)** because it is not likely that
315 information would be admissible unless it was relevant.

316 If a court is concerned that without judicial oversight
317 some categories of subpoenas—such as those seeking
318 particular types of information, or seeking information for a
319 particular type of proceeding—pose a special risk of
320 noncompliance with the requirements in **(c)(2)(B)**, the court
321 has discretion to require that those subpoenas be authorized
322 by court order upon motion (*see (c)(2)(C)*) and/or to order
323 that the recipient produce the items to the court instead of
324 directly to the requesting party’s counsel (*see (c)(5)*).

325 The provisions in **Subparagraphs (c)(2)(C)-(F)**
326 resolve several disputed issues about obtaining subpoenas to
327 produce items that arose under the prior language of the
328 Rule.

329 **Rule 17(c)(2)(C)** defines when a motion and court
330 order are required before a party may serve a non-grand-jury
331 subpoena to produce items. Courts have disagreed about if
332 or when the former language in **(c)(1)**—which stated “the
333 court may direct the witness to produce the designated items
334 in court before trial or before they are offered in evidence”—
335 required a court to first approve a subpoena under 17(c). The
336 resulting practice has differed greatly from court to court
337 (and in some cases judge to judge), with some courts
338 requiring motions for every subpoena to produce items,
339 others permitting parties to obtain and serve such subpoenas

Redline of Post-Publication Changes

340 without judicial involvement (unless the subpoena sought
341 victim information under (c)(3)), and still others insisting on
342 prior approval in certain circumstances but not others.

343 The Committee concluded that mandating a motion
344 and court order for every subpoena to produce items—or for
345 every subpoena that seeks production before trial, as some
346 courts had interpreted the former language in (a)—places
347 unnecessary burdens on courts and parties alike and is
348 contrary to existing practice in many districts. Other
349 requirements stated in the Rule or otherwise available to the
350 court, such as protective orders, are adequate to control
351 potential abuse of the subpoena process by the parties.
352 Districts that have required, under the prior language of the
353 rule, a motion and court order whenever a subpoena seeks
354 production prior to trial may continue that practice by local
355 rule or court order. That level of judicial oversight before
356 service, however, is no longer required by the revised text of
357 the Rule.

358 The amended rule clearly specifies the circumstances
359 that will always require prior court approval via motion, and
360 it preserves the discretion of judges to require motions in
361 other situations. It provides that a motion and order are not
362 required before service of a non-grand-jury subpoena to
363 produce items “unless (3) or (4), a local rule, or a court order
364 requires them.”

365 **Rule 17(c)(2)(D).** When a motion is required for a
366 non-grand-jury subpoena, new (c)(2)(D) states exactly what
367 a party must do in the motion to prove that the proposed
368 subpoena does indeed comply with (c)(2)(B)’s requirements.
369 Rule 17(c)(2)(D)(i) requires the party to demonstrate to the
370 court that the subpoena describes each designated item with
371 reasonable particularity. And (2)(D)(ii) requires the party to
372 “state facts,” showing each item is “likely to be possessed by

Redline of Post-Publication Changes

373 the subpoena’s recipient,” “not reasonably available to the
374 party from another source,” and “likely to be admissible as
375 evidence in the designated proceeding.” Requiring a factual
376 basis is intended to prevent the use of Rule 17 subpoenas
377 based upon unsubstantiated guesses or mere speculation.

378 **Rule 17(c)(2)(E)** ensures that a court must, for good
379 cause, allow a party to file a motion for a subpoena to
380 produce items ex parte. Whether a party may seek a
381 subpoena ex parte has been another contested question under
382 the prior language of Rule 17(c). Although some courts have
383 read the Rule to preclude ex parte subpoena practice, most
384 allow it, some by local rule. Proceeding ex parte is important
385 when disclosure to another party of what the subpoena
386 requests, the identity of the recipient, or the explanation why
387 the subpoena complies with (c)(2)(B) could lead to damage
388 to or loss of the items that the party is attempting to obtain,
389 or divulge trial strategy, witness lists, or attorney work-
390 product. Without the ex parte option, defense counsel may
391 face the impossible choice of either not seeking a subpoena
392 and violating the ethical duty to prepare a plausible defense,
393 or seeking the subpoena and disclosing their trial strategy,
394 work-product, and other confidential information to the
395 government and co-defendants (who may have adverse
396 interests).

397 **Rule 17(c)(2)(F)** clarifies that unless required by a
398 local rule or court order, a party has no duty to inform the
399 other parties about a subpoena when no motion is required.

400 **Rule 17(c)(3)** retains the requirement in former
401 (c)(3) of a motion and court order for a subpoena seeking
402 personal and confidential information about a victim, now in
403 subparagraph (A), as well as the requirement of prior notice
404 to a victim absent exceptional circumstances, now in
405 subparagraph (B). Both requirements were added to the Rule

Redline of Post-Publication Changes

18 FEDERAL RULES OF CRIMINAL PROCEDURE

406 in 2008 to implement the Crime Victim’s Rights Act and are
407 unchanged, except for the addition of style revisions,
408 including adding the term “non-grand-jury” to (A).

409 The amendments also add a provision permitting ex
410 parte applications for good cause, but it is important to
411 distinguish that good cause requirement from the
412 “exceptional circumstances” concept in (c)(3). Exceptional
413 circumstances under (c)(3) would include that evidence
414 might be lost or destroyed if the subpoena were delayed or a
415 situation where the defense would be unfairly prejudiced by
416 premature disclosure of a sensitive defense strategy. It will
417 be uncommon that a notice to a victim will meaningfully
418 implicate the concern about disclosing defense strategy
419 because, unlike subpoena applications under this Rule, a
420 notice merely informs the victim of the request, not the
421 reasons why the subpoena is sought. In contrast, the showing
422 of “good cause” to file a motion ex parte would require an
423 explanation of the reason.

424 The amendment also responds to a few decisions that
425 had interpreted the rule as applicable only to subpoenas for
426 personal or confidential information served on third parties
427 other than a victim. The amendment adds the words
428 “including a victim” to clarify that the requirement of a
429 motion and court order before a subpoena seeking personal
430 or confidential information about a victim may be served on
431 a third party applies when that third party is a victim.

432 **Rule 17(c)(4).** This new provision extends the
433 motion requirement to a subpoena requested by a self-
434 represented party. Two reasons underlie this decision. First,
435 self-represented parties are not bound by ethical rules that
436 deter an attorney’s misuse of the court’s compulsory
437 authority, raising the risk that the subpoena would not
438 comply with (c)(2)(B). Second, requiring judicial oversight

Redline of Post-Publication Changes

439 of this very small subset of subpoenas would not
440 significantly add to the courts' burden, even in districts
441 where there is relatively little motion practice under Rule 17.

442 **Rule 17(c)(5)** is also new. It clarifies when a
443 subpoena must order the recipient to produce designated
444 items to the court, and when it need not do so. Again, the text
445 in former (c)(1) stating that the “court may direct the witness
446 to produce the designated items in court before trial or before
447 they are to be offered into evidence” produced conflicting
448 decisions on this point. Some courts read the rule as always
449 requiring returns to the court, others that it required returns
450 to the court whenever a subpoena ordered production before
451 trial, and still others that it permitted returns directly to the
452 requesting party unless the court ordered items produced to
453 it. The Committee concluded that judges should have
454 discretion to determine where (and how) production should
455 take place. To the extent the prior text of the rule was leading
456 to unnecessary limits on the discretion of the court to allow
457 returns to the requesting party, it created needless burdens
458 for courts and required revision.

459 Accordingly, subsection (c)(5) sets—~~two~~ three
460 defaults, ~~both~~ each subject to departure by court order.

461 First, ~~it~~ ~~(5)(A)(i)~~ provides that a subpoena requested
462 by a self-represented party must require the recipient to
463 produce the designated items to the court. Judicial oversight
464 at both the issuance and production stages is added assurance
465 that parties without legal training or ethical responsibilities
466 will not deliberately or unintentionally access inappropriate
467 or non-compliant information that a judge would be able to
468 intercept if the recipient were required to provide the items
469 to the court.

Redline of Post-Publication Changes

20

FEDERAL RULES OF CRIMINAL PROCEDURE

470 The second default in (5) is for ~~all other~~ non-grand-
471 jury subpoenas, ~~namely those sought by represented parties.~~
472 that require the production of personal or confidential
473 information about a victim. Paragraph (5)(A)(ii) provides
474 that unless the court orders otherwise, such subpoenas must
475 require the recipient of such subpoenas to produce the
476 designated items to the court, not directly to counsel.
477 Production to the court provides an opportunity for the court,
478 before the information produced is disclosed to the
479 requesting party, to review the information produced in
480 camera, require redactions, restrict access, regulate
481 retention, add other protective orders, or take other actions
482 to protect the victim’s dignity and privacy.

483 The third default, in (5)(B), is that unless the court
484 orders otherwise, a subpoena that is requested by a
485 represented party and that does not require the production of
486 personal or confidential information about a victim ~~It~~
487 ~~provides the subpoena~~ may require the recipient to produce
488 the designated items to ~~that~~ the requesting party’s counsel,
489 ~~reflecting.~~ This default reflects present practice in many
490 districts.

491 The rule places no restrictions on the court’s
492 discretion to vary from these default rules. For example,
493 when a subpoena is likely to produce private or privileged
494 information, it is common practice for courts to order in
495 camera review before disclosure to anyone. And to provide
496 greater judicial oversight [for subpoenas requiring the
497 production of personal or confidential information], the rule
498 permits a court, by local rule or court order, to require the
499 return of such information to chambers before disclosure to
500 the requesting party.

501 New **Rule 17(c)(6)** states, “A party must disclose to
502 an opposing party an item the party receives from a

Redline of Post-Publication Changes

503 subpoena’s recipient only if the item is discoverable under
504 these rules.” This provision resolves another dispute about
505 the meaning of the Rule’s prior text, which some courts read
506 as requiring that each party have access to any item that a
507 subpoena recipient produces to another party. That position
508 undermines the careful calibration of discovery and
509 disclosure in Rule 16 and other discovery rules. For
510 example, even if every item produced by a subpoena is
511 admissible, it does not follow that the requesting party will
512 decide to use all of those items in its “case-in-chief at trial.”
513 And a defense subpoena may produce inculpatory evidence
514 the government did not know about, as well as evidence the
515 defense hopes to use at the designated proceeding. The new
516 text recognizes that disclosure of information and other
517 items between parties, including information and items the
518 party may obtain by subpoena, is regulated by the
519 Constitution, Rule 16, and other discovery rules. Rule 17
520 does not modify that carefully developed law.

521 **Rule 17(c)(7)** contains the text about motions to
522 quash previously in (c)(2). A second sentence has been added
523 clarifying that the showing described in new (c)(2)(D) must
524 be made by the party responding to a motion to quash a non-
525 grand-jury subpoena to produce items.

526 The second sentence of **Rule 17(d)** now includes the
527 words “or to the subpoena’s recipient” after “witness” to
528 clarify that it applies to both subpoenas for testimony and
529 subpoenas to produce items. The last sentence has been
530 restyled, adding “But” at the beginning and replacing
531 “when” with “if.”

532 **Rule 17(e)(1)** contains an addition similar to that in
533 (d) to clarify its application to subpoenas to produce items as
534 well as subpoenas for testimony.

535 The heading of **Rule 17(f)** has been restyled.

Redline of Post-Publication Changes

22

FEDERAL RULES OF CRIMINAL PROCEDURE

536 **Rule 17(g)** includes three changes: (1) the heading
537 has been revised to better describe its content; (2) “or
538 subpoena recipient” has been added to clarify its application
539 to both subpoenas for testimony and subpoenas to produce
540 items; and (3) the reference to 28 U.S.C. §636 has been
541 restyled.

Attachment Regarding Rule 17(c)(5)

Drop in if Committee prefers to add presumptive requirement to Rule 17(c)(5) that any subpoena requiring production of personal or confidential information, not limited to information about a victim, require production of designated items to the court and not directly to the requesting party's counsel. Changes noted with yellow highlighting.

* * * * *

(5) *Non-Grand-Jury Subpoena—Place to Produce the Designated Items.* Unless the court orders otherwise, a non-grand-jury subpoena:

(A) ~~requested by a self-represented party~~ must require the recipient to produce the designated items to the court if the subpoena:

(i) is requested by a self-represented party; or

(ii) requires the production of personal or confidential information about a victim; and

(B) ~~A non-grand jury subpoena requested by a represented party~~ may require the recipient to produce the designated items to ~~that~~ the requesting party's counsel if the subpoena:

(i) is requested by a represented party; and

(ii) does not require the production of personal or confidential information about a victim.

* * * * *

Committee Note

Rule 17(c)(5) is also new. It clarifies when a subpoena must order the recipient to produce designated items to the court, and when it need not do so. Again, the text in former (c)(1) stating that the “court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence” produced conflicting decisions on this point. Some courts read the rule as always requiring returns to the court, others that it required returns to the court whenever a subpoena ordered production before trial, and still others that it permitted returns directly to the requesting party unless the court ordered items produced to it. The Committee concluded that judges should have discretion to determine where (and how) production should take place. To the extent the prior text of the rule was leading to unnecessary limits on the discretion of the court to allow returns to the requesting party, it created needless burdens for courts and required revision.

Accordingly, subsection (c)(5) sets ~~two~~ three defaults, ~~both~~ each subject to departure by court order.

Attachment Regarding Rule 17(c)(5)

30 First, ~~it~~ (5)(A)(i) provides that a subpoena requested by a self-represented party must
31 require the recipient to produce the designated items to the court. Judicial oversight at both the
32 issuance and production stages is added assurance that parties without legal training or ethical
33 responsibilities will not deliberately or unintentionally access inappropriate or non-compliant
34 information that a judge would be able to intercept if the recipient were required to provide the
35 items to the court.

36 The second default in (5) is for ~~all other~~ non-grand-jury subpoenas that require the
37 production of personal or confidential information about a victim, ~~namely those sought by~~
38 ~~represented parties~~. Paragraph (5)(A)(ii) provides that unless the court orders otherwise, such
39 subpoenas must require the recipient of such subpoenas to produce the designated items to the
40 court, not directly to counsel. Production to the court provides an opportunity for the court, before
41 the information produced is disclosed to the requesting party, to review the information produced
42 in camera, require redactions, restrict access, regulate retention, add other protective orders, or
43 take other actions to protect the victim's dignity and privacy.

44 The third default, in (5)(B), is that unless the court orders otherwise, It provides the a
45 subpoena that is requested by a represented party and that does not require the production of
46 personal or confidential information about a victim may require the recipient to produce the
47 designated items to ~~that~~ the requesting party's counsel, ~~reflecting~~. This default reflects present
48 practice in many districts.

49 The rule places no restrictions on the court's discretion to vary from these default rules.
50 For example, when a subpoena is likely to produce private or privileged information, it is common
51 practice for courts to order in camera review before disclosure to anyone. And to provide greater
52 judicial oversight [for subpoenas requiring the production of personal or confidential information],
53 the rule permits a court, by local rule or court order, to require the return of such information to
54 chambers before disclosure to the requesting party.

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

1 **Rule 17. Subpoena**

2 **(a) In General.** A subpoena must state the court’s name
3 and the proceeding’s title, include the court’s seal,
4 and require that the recipient—at a specified time and
5 place—attend and testify, produce designated items,
6 or do both. The clerk must issue a blank subpoena—
7 signed and sealed—to the requesting party, who must
8 fill in the blanks before the subpoena is served.

9 **(b) Subpoena to Testify—Defendant Unable to Pay**
10 **Costs and Witness Fees.** Upon a defendant’s ex
11 parte application, the court must order that a
12 subpoena be issued for a named witness if the
13 defendant shows the necessity of the witness’s
14 presence for an adequate defense and an inability to
15 pay the witness’s fees. The process costs and witness

16 fees will then be paid as they are for witnesses
17 responding to government subpoenas.

18 **(c) Subpoena to Produce Data, Objects, or Other**
19 **Items.**

20 **(1) *In General—Items Obtainable.*** A subpoena
21 may require the recipient to produce any
22 item, including any data or information or
23 any book, paper, document, or other object.

24 **(2) *Non-Grand-Jury Subpoena—When***
25 ***Available; Required Content and***
26 ***Limitations; Issuance; Disclosure.***

27 **(A) *When Available.*** A non-grand-jury
28 subpoena is available for a trial; for a
29 hearing on detention, suppression,
30 sentencing, or revocation; or—with
31 the court’s permission in an
32 individual case—for any additional
33 evidentiary hearing.

- 34 (B) *Required Content and Limitations.*
- 35 The subpoena must describe each
- 36 designated item with reasonable
- 37 particularity and seek only items that:
- 38 (i) are likely to be possessed by
- 39 the subpoena's recipient;
- 40 (ii) are not reasonably available to
- 41 the party from another source;
- 42 and
- 43 (iii) are, or contain information
- 44 that is, likely to be admissible
- 45 as evidence in the designated
- 46 proceeding.
- 47 (C) *Motion and Order Not Ordinarily*
- 48 *Required.* A motion and order are not
- 49 required before service of a non-
- 50 grand-jury subpoena unless (3) or (4),

51 a local rule, or a court order requires
52 them.

53 (D) *Necessary Showing In a Required*
54 *Motion.* The movant must:

55 (i) describe each designated item
56 with reasonable particularity;
57 and

58 (ii) state facts showing that each
59 item satisfies (2)(B) (i)-(iii).

60 (E) *Ex-Parte Motion.* The court must, for
61 good cause, permit the party to file
62 the motion ex parte.

63 (F) *Disclosure When No Motion Is*
64 *Required.* When no motion is
65 required, a party need not disclose to
66 any other party that it is seeking or has
67 served the subpoena, unless a local

68 rule or court order provides
69 otherwise.

70 **(3) *Non-Grand-Jury Subpoena for Personal or***
71 ***Confidential Information About a Victim.***

72 (A) *Motion and Order Required.* After a
73 complaint, indictment, or information
74 is filed, a non-grand-jury subpoena
75 requiring the production of personal
76 or confidential information about a
77 victim may be served on a third party,
78 including a victim, only by court
79 order upon motion.

80 (B) *Notice to a Victim.* Unless there are
81 exceptional circumstances, the court
82 must, before entering the order,
83 require giving notice to the victim so
84 that the victim can move to quash or

85 modify the subpoena or otherwise
86 object.

87 **(4) *Subpoena by a Self-Represented Party.*** A
88 subpoena is available to a self-represented
89 party only after the party:

90 (A) files a motion;

91 (B) makes the showing described in
92 (2)(D); and

93 (C) obtains an order.

94 **(5) *Non-Grand-Jury Subpoena—Place to***
95 ***Produce the Designated Items.*** Unless the
96 court orders otherwise, a non-grand-jury
97 subpoena:

98 (A) must require the recipient to produce
99 the designated items to the court if the
100 subpoena:

101 (i) is requested by a self-
102 represented party; or

- 103 (ii) requires the production of
104 personal or confidential
105 information about a victim;
106 and
- 107 (B) may require the recipient to produce
108 the designated items to the requesting
109 party's counsel if the subpoena:
- 110 (i) is requested by a represented
111 party; and
- 112 (ii) does not require the
113 production of personal or
114 confidential information
115 about a victim.
- 116 (6) ***Disclosing to Other Parties the Items***
117 ***Received.*** A party must disclose to an
118 opposing party an item the party receives
119 from a subpoena's recipient only if the item
120 is discoverable.

155 witness to appear anywhere the court
156 designates.

157 **(g) Contempt Order for Disobeying a Subpoena.** The
158 court (other than a magistrate judge) may hold in
159 contempt a witness or subpoena recipient who,
160 without adequate excuse, disobeys a subpoena issued
161 by a federal court in that district. Under 28 U.S.C.
162 § 636(e), a magistrate judge may hold in contempt a
163 witness or subpoena recipient who, without adequate
164 excuse, disobeys a subpoena issued by that
165 magistrate judge.

166 **(h) Information Not Subject to a Subpoena.** No party
167 may subpoena a statement of a witness or of a
168 prospective witness under this rule. Rule 26.2
169 governs the production of the statement.

170

Committee Note

171 The amendments to Rule 17 respond to gaps and
172 ambiguities in its text that have contributed to conflicting
173 interpretations in the courts and difficulties in application.
174 The changes include revisions that clarify the procedures for
175 subpoenas to produce data, objects, or other items and the
176 availability of such subpoenas for proceedings other than
177 trial, as well as revisions that delineate which provisions
178 apply to certain types of subpoenas. The amendments also
179 include stylistic revisions to text and headings.

180 **Rule 17(a).** In addition to stylistic changes, the text
181 in (a)(1) has been revised to clarify that it applies to
182 subpoenas for producing items as well as those for
183 testimony.

184 **Rule 17(b)** formerly headed “Defendant Unable to
185 Pay,” has been retitled to clarify that it applies only to
186 subpoenas for testimony. Changes to the text are stylistic
187 only.

188 **Rule 17(c),** covering subpoenas to produce data,
189 objects, or other items, has been revised to address multiple
190 issues with the prior language that had contributed to
191 conflicting interpretations in the courts. Formerly it had
192 three subsections, now it has seven. The changes are
193 intended to promote clarity about what the Rule requires,
194 while safeguarding the discretion of courts to tailor subpoena
195 practice to the circumstances of a district or case. The
196 section’s heading —“Subpoena to Produce Information,
197 Objects, or Other Items”—has been revised to more
198 accurately describe the amended language in (c)(1).

199 **Rule 17(c)(1)** continues to describe what a subpoena
200 may obtain, but it has been revised to refer to “items” that
201 include not only data, but also any “information” or objects.

202 This recognizes that parties use subpoenas to obtain
203 electronically stored information and other intangible items
204 in addition to “data,” “documents” or other objects.

205 Perceived ambiguities in the language of the last two
206 sentences of former (c)(1) contributed to several conflicts in
207 case law, including when a subpoena may be sought ex parte,
208 and the rules for production and disclosure. The revised rule
209 replaces these two sentences with separate provisions
210 containing explicit direction about each of these issues.

211 **Rule 17(c)(2)** is new. The language formerly in (c)(2)
212 about motions to quash is now (c)(7). **Subparagraph (2)(A)**
213 clarifies that non-grand-jury subpoenas are available to
214 produce items for trial as well as proceedings where
215 subpoenas are most likely to be needed, presently used
216 regularly in many districts, or for which there is statutory or
217 rule authority for parties to present evidence: detention
218 hearings under the Bail Reform Act, sentencing hearings
219 under Rule 32, pre-trial suppression hearings, and
220 revocations. There is no other mechanism available to
221 compel evidence from third parties at these proceedings,
222 even though both parties may need to do so. Some decisions
223 have interpreted the prior text of the Rule to bar the use of
224 Rule 17 subpoenas to produce items at any hearing other
225 than grand jury proceedings and trial. This change to the
226 Rule’s text expressly authorizes the use of a non-grand-jury
227 subpoena to obtain evidence for introduction at the listed
228 hearings.

229 The ending clause explicitly recognizes the
230 discretion of the court in an individual case to permit a
231 Rule 17 subpoena to produce items in other evidentiary
232 hearings not listed in the Rule in which a party may be
233 allowed to present witnesses or evidence. Examples include
234 preliminary hearings and new trial hearings. The present use

235 of Rule 17 subpoenas for items in such proceedings is not as
236 common, in part because of the difficulties, costs, and delays
237 that may arise when subpoena practice is imported into these
238 less formal or more expedited proceedings.

239 Rule 17's provisions are not applicable to hearings
240 under § 2254, where a court may apply subpoena provisions
241 in the Federal Rules of Civil Procedure. *See* Rule 12 of the
242 Rules Governing § 2254 Proceedings. Rule 12 of the Rules
243 Governing §2255 Proceedings allows application of either
244 the Civil or Criminal Rules in § 2255 proceedings.

245 **Subparagraph (c)(2)(B)**, along with the
246 requirements in **(c)(2)(D)**, articulates a modified version of
247 the test announced by the Supreme Court in *Nixon v. United*
248 *States*, 418 U.S. 683 (1974), which interpreted the previous
249 text of Rule 17. Applying *Nixon*, all but a handful of lower
250 courts have read Rule 17 as limiting non-grand-jury
251 subpoenas to produce documents or other items to those that
252 met specificity, relevance, and admissibility requirements.
253 Many courts added one or more of the additional following
254 criteria: that the items sought were not otherwise obtainable
255 by due diligence, that advance inspection was needed to
256 properly prepare and avoid delay, and that the subpoena was
257 not a “fishing expedition.”

258 The Committee agreed that the basic character of
259 Rule 17 subpoenas as seeking evidence for a particular
260 proceeding should remain unchanged, and that the rule
261 should continue to prohibit the use of subpoenas for general
262 discovery from third parties. But it also determined that the
263 admissibility requirement, as well as other aspects of the
264 prevailing interpretation of the prior language, was being
265 applied inconsistently, resulting in harmful uncertainty and
266 unnecessarily restricted access to evidence needed from
267 third parties for trial and other proceedings.

268 The new text now codifies a modified version of the
269 *Nixon* standard intended to provide an adequate and more
270 predictable opportunity for both the prosecution and defense
271 to obtain from third parties the evidence they need for the
272 proceeding designated in the subpoena. The new text
273 imposes upon a party the duty to ensure that every subpoena
274 to produce items meets this standard, including those
275 obtained and served without motion.

276 As to specificity and the prevention of “fishing
277 expeditions,” **(c)(2)(B)** first requires that the subpoena
278 “describe each designated item with reasonable
279 particularity.” This requirement serves at least two functions.
280 First, it informs the recipient what is being requested so that
281 the recipient can decide how to comply and whether to file a
282 motion to quash. Second, it prevents parties from using such
283 subpoenas for discovery and “fishing expeditions,” which
284 can create unacceptable burdens for recipients, courts, and
285 those individuals and entities whose information the
286 recipient is ordered to produce. The requirements in
287 **(c)(2)(B)(i) and (ii)** advance this same goal by limiting the
288 subpoena to items “likely to be possessed by the subpoena’s
289 recipient,” and “not reasonably available to the party from
290 another source.”

291 The text of **(c)(2)(B)(iii)** requires that each item
292 either be, or contain information that is, “likely to be
293 admissible as evidence in the designated proceeding.” In
294 using “*likely* to be admissible,” the Committee deliberately
295 rejected stricter formulations applied by some courts. In
296 some circumstances, it will be impossible to be certain
297 *before* a proceeding begins that a precisely identified item
298 will be admissible. Such circumstances include when an
299 item’s admissibility depends on whether the opposing party
300 first presents other evidence. For example, impeachment
301 evidence should be available to a party by subpoena for use

302 at trial when a party knows that a witness will or is likely to
303 testify. That evidence should not be unavailable simply
304 because admissibility cannot be determined definitively
305 until after the witness has actually testified. The “likely to be
306 admissible” standard is already used by some courts
307 applying Rule 17 and more accurately describes the
308 appropriate inquiry. There is no separate reference to
309 “relevance” in **(c)(2)(B)** because it is not likely that
310 information would be admissible unless it was relevant.

311 If a court is concerned that without judicial oversight
312 some categories of subpoenas—such as those seeking
313 particular types of information, or seeking information for a
314 particular type of proceeding—pose a special risk of
315 noncompliance with the requirements in **(c)(2)(B)**, the court
316 has discretion to require that those subpoenas be authorized
317 by court order upon motion (*see (c)(2)(C)*) and/or to order
318 that the recipient produce the items to the court instead of
319 directly to the requesting party’s counsel (*see (c)(5)*).

320 The provisions in **Subparagraphs (c)(2)(C)-(F)**
321 resolve several disputed issues about obtaining subpoenas to
322 produce items that arose under the prior language of the
323 Rule.

324 **Rule 17(c)(2)(C)** defines when a motion and court
325 order are required before a party may serve a non-grand-jury
326 subpoena to produce items. Courts have disagreed about if
327 or when the former language in **(c)(1)**—which stated “the
328 court may direct the witness to produce the designated items
329 in court before trial or before they are offered in evidence”—
330 required a court to first approve a subpoena under 17(c). The
331 resulting practice has differed greatly from court to court
332 (and in some cases judge to judge), with some courts
333 requiring motions for every subpoena to produce items,
334 others permitting parties to obtain and serve such subpoenas

335 without judicial involvement (unless the subpoena sought
336 victim information under (c)(3)), and still others insisting on
337 prior approval in certain circumstances but not others.

338 The Committee concluded that mandating a motion
339 and court order for every subpoena to produce items—or for
340 every subpoena that seeks production before trial, as some
341 courts had interpreted the former language in (a)—places
342 unnecessary burdens on courts and parties alike and is
343 contrary to existing practice in many districts. Other
344 requirements stated in the Rule or otherwise available to the
345 court, such as protective orders, are adequate to control
346 potential abuse of the subpoena process by the parties.
347 Districts that have required, under the prior language of the
348 rule, a motion and court order whenever a subpoena seeks
349 production prior to trial may continue that practice by local
350 rule or court order. That level of judicial oversight before
351 service, however, is no longer required by the revised text of
352 the Rule.

353 The amended rule clearly specifies the circumstances
354 that will always require prior court approval via motion, and
355 it preserves the discretion of judges to require motions in
356 other situations. It provides that a motion and order are not
357 required before service of a non-grand-jury subpoena to
358 produce items “unless (3) or (4), a local rule, or a court order
359 requires them.”

360 **Rule 17(c)(2)(D).** When a motion is required for a
361 non-grand-jury subpoena, new (c)(2)(D) states exactly what
362 a party must do in the motion to prove that the proposed
363 subpoena does indeed comply with (c)(2)(B)’s requirements.
364 Rule 17(c)(2)(D)(i) requires the party to demonstrate to the
365 court that the subpoena describes each designated item with
366 reasonable particularity. And (2)(D)(ii) requires the party to
367 “state facts,” showing each item is “likely to be possessed by

368 the subpoena’s recipient,” “not reasonably available to the
369 party from another source,” and “likely to be admissible as
370 evidence in the designated proceeding.” Requiring a factual
371 basis is intended to prevent the use of Rule 17 subpoenas
372 based upon unsubstantiated guesses or mere speculation.

373 **Rule 17(c)(2)(E)** ensures that a court must, for good
374 cause, allow a party to file a motion for a subpoena to
375 produce items ex parte. Whether a party may seek a
376 subpoena ex parte has been another contested question under
377 the prior language of Rule 17(c). Although some courts have
378 read the Rule to preclude ex parte subpoena practice, most
379 allow it, some by local rule. Proceeding ex parte is important
380 when disclosure to another party of what the subpoena
381 requests, the identity of the recipient, or the explanation why
382 the subpoena complies with (c)(2)(B) could lead to damage
383 to or loss of the items that the party is attempting to obtain,
384 or divulge trial strategy, witness lists, or attorney work-
385 product. Without the ex parte option, defense counsel may
386 face the impossible choice of either not seeking a subpoena
387 and violating the ethical duty to prepare a plausible defense,
388 or seeking the subpoena and disclosing their trial strategy,
389 work-product, and other confidential information to the
390 government and co-defendants (who may have adverse
391 interests).

392 **Rule 17(c)(2)(F)** clarifies that unless required by a
393 local rule or court order, a party has no duty to inform the
394 other parties about a subpoena when no motion is required.

395 **Rule 17(c)(3)** retains the requirement in former
396 (c)(3) of a motion and court order for a subpoena seeking
397 personal and confidential information about a victim, now in
398 subparagraph (A), as well as the requirement of prior notice
399 to a victim absent exceptional circumstances, now in
400 subparagraph (B). Both requirements were added to the Rule

401 in 2008 to implement the Crime Victim’s Rights Act and are
402 unchanged, except for the addition of style revisions,
403 including adding the term “non-grand-jury” to (A).

404 The amendments also add a provision permitting ex
405 parte applications for good cause, but it is important to
406 distinguish that good cause requirement from the
407 “exceptional circumstances” concept in (c)(3). Exceptional
408 circumstances under (c)(3) would include that evidence
409 might be lost or destroyed if the subpoena were delayed or a
410 situation where the defense would be unfairly prejudiced by
411 premature disclosure of a sensitive defense strategy. It will
412 be uncommon that a notice to a victim will meaningfully
413 implicate the concern about disclosing defense strategy
414 because, unlike subpoena applications under this Rule, a
415 notice merely informs the victim of the request, not the
416 reasons why the subpoena is sought. In contrast, the showing
417 of “good cause” to file a motion ex parte would require an
418 explanation of the reason.

419 The amendment also responds to a few decisions that
420 had interpreted the rule as applicable only to subpoenas for
421 personal or confidential information served on third parties
422 other than a victim. The amendment adds the words
423 “including a victim” to clarify that the requirement of a
424 motion and court order before a subpoena seeking personal
425 or confidential information about a victim may be served on
426 a third party applies when that third party is a victim.

427 **Rule 17(c)(4).** This new provision extends the
428 motion requirement to a subpoena requested by a self-
429 represented party. Two reasons underlie this decision. First,
430 self-represented parties are not bound by ethical rules that
431 deter an attorney’s misuse of the court’s compulsory
432 authority, raising the risk that the subpoena would not
433 comply with (c)(2)(B). Second, requiring judicial oversight

434 of this very small subset of subpoenas would not
435 significantly add to the courts' burden, even in districts
436 where there is relatively little motion practice under Rule 17.

437 **Rule 17(c)(5)** is also new. It clarifies when a
438 subpoena must order the recipient to produce designated
439 items to the court, and when it need not do so. Again, the text
440 in former (c)(1) stating that the "court may direct the witness
441 to produce the designated items in court before trial or before
442 they are to be offered into evidence" produced conflicting
443 decisions on this point. Some courts read the rule as always
444 requiring returns to the court, others that it required returns
445 to the court whenever a subpoena ordered production before
446 trial, and still others that it permitted returns directly to the
447 requesting party unless the court ordered items produced to
448 it. The Committee concluded that judges should have
449 discretion to determine where (and how) production should
450 take place. To the extent the prior text of the rule was leading
451 to unnecessary limits on the discretion of the court to allow
452 returns to the requesting party, it created needless burdens
453 for courts and required revision.

454 Accordingly, subsection (c)(5) sets three defaults,
455 each subject to departure by court order.

456 First, (5)(A)(i) provides that a subpoena requested by
457 a self-represented party must require the recipient to produce
458 the designated items to the court. Judicial oversight at both
459 the issuance and production stages is added assurance that
460 parties without legal training or ethical responsibilities will
461 not deliberately or unintentionally access inappropriate or
462 non-compliant information that a judge would be able to
463 intercept if the recipient were required to provide the items
464 to the court.

465 The second default in (5) is for non-grand-jury
466 subpoenas that require the production of personal or
467 confidential information about a victim. Paragraph (5)(A)(ii)
468 provides that unless the court orders otherwise, such
469 subpoenas must require the recipient of such subpoenas to
470 produce the designated items to the court, not directly to
471 counsel. Production to the court provides an opportunity for
472 the court, before the information produced is disclosed to the
473 requesting party, to review the information produced in
474 camera, require redactions, restrict access, regulate
475 retention, add other protective orders, or take other actions
476 to protect the victim’s dignity and privacy.

477 The third default, in (5)(B), is that unless the court
478 orders otherwise, a subpoena that is requested by a
479 represented party and that does not require the production of
480 personal or confidential information about a victim may
481 require the recipient to produce the designated items to the
482 requesting party’s counsel. This default reflects present
483 practice in many districts.

484 The rule places no restrictions on the court’s
485 discretion to vary from these default rules. For example,
486 when a subpoena is likely to produce private or privileged
487 information, it is common practice for courts to order in
488 camera review before disclosure to anyone. And to provide
489 greater judicial oversight [for subpoenas requiring the
490 production of personal or confidential information], the rule
491 permits a court, by local rule or court order, to require the
492 return of such information to chambers before disclosure to
493 the requesting party.

494 New **Rule 17(c)(6)** states, “A party must disclose to
495 an opposing party an item the party receives from a
496 subpoena’s recipient only if the item is discoverable under
497 these rules.” This provision resolves another dispute about

498 the meaning of the Rule’s prior text, which some courts read
499 as requiring that each party have access to any item that a
500 subpoena recipient produces to another party. That position
501 undermines the careful calibration of discovery and
502 disclosure in Rule 16 and other discovery rules. For
503 example, even if every item produced by a subpoena is
504 admissible, it does not follow that the requesting party will
505 decide to use all of those items in its “case-in-chief at trial.”
506 And a defense subpoena may produce inculpatory evidence
507 the government did not know about, as well as evidence the
508 defense hopes to use at the designated proceeding. The new
509 text recognizes that disclosure of information and other
510 items between parties, including information and items the
511 party may obtain by subpoena, is regulated by the
512 Constitution, Rule 16, and other discovery rules. Rule 17
513 does not modify that carefully developed law.

514 **Rule 17(c)(7)** contains the text about motions to
515 quash previously in (c)(2). A second sentence has been added
516 clarifying that the showing described in new (c)(2)(D) must
517 be made by the party responding to a motion to quash a non-
518 grand-jury subpoena to produce items.

519 The second sentence of **Rule 17(d)** now includes the
520 words “or to the subpoena’s recipient” after “witness” to
521 clarify that it applies to both subpoenas for testimony and
522 subpoenas to produce items. The last sentence has been
523 restyled, adding “But” at the beginning and replacing
524 “when” with “if.”

525 **Rule 17(e)(1)** contains an addition similar to that in
526 (d) to clarify its application to subpoenas to produce items as
527 well as subpoenas for testimony.

528 The heading of **Rule 17(f)** has been restyled.

529 **Rule 17(g)** includes three changes: (1) the heading
530 has been revised to better describe its content; (2) “or
531 subpoena recipient” has been added to clarify its application
532 to both subpoenas for testimony and subpoenas to produce
533 items; and (3) the reference to 28 U.S.C. §636 has been
534 restyled.

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

1 **Rule 17. Subpoena**

2 (a) ~~Content~~**In General**. A subpoena must state the
3 court's name and the proceeding's title ~~of the~~
4 ~~proceeding~~, include the court's seal ~~of the court~~, and
5 ~~command the witness to~~ require that the recipient—
6 at a specified time and place—attend and testify ~~at~~
7 ~~the time and place the subpoena specifies.~~ produce
8 designated items, or do both. The clerk must issue a
9 blank subpoena—signed and sealed—to the ~~party~~
10 requesting it, ~~and that party,~~ who must fill in the
11 blanks before the subpoena is served.

12 (b) ~~Subpoena to Testify—~~**Defendant Unable to Pay**
13 Costs and Witness Fees. Upon a defendant's ex
14 parte application, the court must order that a

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

15 subpoena be issued for a named witness if the
16 defendant shows ~~an inability to pay the witness's fees~~
17 ~~and~~ the necessity of the witness's presence for an
18 adequate defense. ~~If the court orders a subpoena to~~
19 ~~be issued, the~~ and an inability to pay the witness's
20 fees. The process costs and witness fees will then be
21 paid ~~in the same manner as those paid~~ they are for
22 witnesses ~~the~~ responding to government subpoenas.

23 (c) ~~Producing Documents and~~ Subpoena to Produce
24 Data, Objects, or Other Items.

25 (1) *In General.* ~~—~~ Items Obtainable. A subpoena
26 may ~~order~~ require the witness recipient to
27 produce any ~~books, papers, documents,~~ item,
28 including any data or information or any
29 book, paper, document, or other ~~objects the~~
30 object.

31 (2) *Non-Grand-Jury Subpoena—When*
32 *Available; Required Content and*
33 *Limitations; Issuance; Disclosure.*

34 (A) *When Available. A non-grand-jury*
35 ~~subpoena designates. The court may~~
36 ~~direct the witness to produce the~~ is
37 available for a trial; for a hearing on
38 detention, suppression, sentencing, or
39 revocation; or—with the court’s
40 permission in an individual case—for
41 any additional evidentiary hearing.

42 (B) *Required Content and Limitations.*
43 The subpoena must describe each
44 ~~designated~~ item with reasonable
45 particularity and seek only items in
46 ~~court before trial or before they~~ that:

47 (i) are likely to be offered in
48 possession by the subpoena's
49 recipient;

50 (ii) are not reasonably available to
51 the party from another source;
52 and

53 (iii) are, or contain information
54 that is, likely to be admissible
55 as evidence. When in the
56 items arrive, the court
57 may designate proceeding.

58 (C) Motion and Order Not Ordinarily
59 Required. A motion and order are not
60 required before service of a non-
61 grand-jury subpoena unless (3) or (4),
62 a local rule, or a court order requires
63 them.

- 64 (D) Necessary Showing In a Required
65 Motion. The movant must:
66 (i) describe each designated item
67 with reasonable particularity;
68 and
69 (ii) state facts showing that each
70 item satisfies (2)(B) (i)-(iii).
- 71 (E) Ex-Parte Motion. The court must, for
72 good cause, permit the parties and
73 their attorneys to inspect all or part of
74 them party to file the motion ex parte.
- 75 ~~(2) Quashing or Modifying the~~
76 ~~Subpoena. On motion made~~
77 ~~promptly, the court may quash or~~
78 ~~modify the subpoena if compliance~~
79 ~~would be unreasonable or~~
80 ~~oppressive.~~ (F) Disclosure When No
81 Motion Is Required. When no motion

82 is required, a party need not disclose
83 to any other party that it is seeking or
84 has served the subpoena, unless a
85 local rule or court order provides
86 otherwise.

87 (3) ***Non-Grand-Jury Subpoena for Personal or***
88 ***Confidential Information About a Victim.***

89 (A) *Motion and Order Required.* After a
90 complaint, indictment, or information
91 is filed, a non-grand-jury subpoena
92 requiring the production of personal
93 or confidential information about a
94 victim may be served on a third party,
95 including a victim, only by court
96 order. ~~Before entering the order and~~
97 ~~unless~~ upon motion.

98 (B) *Notice to a Victim. Unless* there are
99 exceptional circumstances, the court

100 must, before entering the order,
101 require giving notice to the victim so
102 that the victim can move to quash or
103 modify the subpoena or otherwise
104 object.

105 **(4) Subpoena by a Self-Represented Party. A**
106 subpoena is available to a self-represented
107 party only after the party:

108 (A) files a motion;

109 (B) makes the showing described in

110 (2)(D); and

111 (C) obtains an order.

112 **(5) Non-Grand-Jury Subpoena—Place to**
113 Produce the Designated Items. Unless the
114 court orders otherwise, a non-grand-jury
115 subpoena:

116 (A) must require the recipient to produce
117 the designated items to the court if the
118 subpoena:
119 (i) is requested by a self-
120 represented party; or
121 (ii) requires the production of
122 personal or confidential
123 information about a victim;
124 and
125 (B) may require the recipient to produce
126 the designated items to the requesting
127 party's counsel if the subpoena:
128 (i) is requested by a represented
129 party; and
130 (ii) does not require the
131 production of personal or
132 confidential information
133 about a victim.

- 134 **(6) Disclosing to Other Parties the Items**
135 **Received.** A party must disclose to an
136 opposing party an item the party receives
137 from a subpoena's recipient only if the item
138 is discoverable.
- 139 **(7) Quashing or Modifying the Subpoena.** On
140 motion made promptly, the court may quash
141 or modify the subpoena if compliance would
142 be unreasonable or oppressive. A party
143 responding to a motion to quash a non-grand-
144 jury subpoena must make the showing
145 described in (2)(D).
- 146 **(d) Service.** A marshal, a deputy marshal, or any
147 nonparty who is at least 18 years old may serve a
148 subpoena. The server must deliver a copy of the
149 subpoena to the witness or to the subpoena's
150 recipient and must tender to the witness one day's
151 witness-attendance fee and the legal mileage

152 allowance. ~~The~~But the server need not tender the
153 attendance fee or mileage allowance ~~when~~if the
154 United States, a federal officer, or a federal agency
155 has requested the subpoena.

156 **(e) Place of Service.**

157 **(1) *In the United States.*** A subpoena requiring a
158 witness to attend a hearing or trial ~~—or~~
159 requiring a recipient to produce designated
160 items—may be served at any place within the
161 United States.

162 **(2) *In a Foreign Country.*** If the witness is in a
163 foreign country, 28 U.S.C. § 1783 governs
164 the subpoena's service.

165 **(f) ~~Issuing~~Subpoena for a Deposition-Subpoena.**

166 **(1) *Issuance.*** A court order to take a deposition
167 authorizes the clerk in the district where the
168 deposition is to be taken to issue a subpoena

169 for any witness named or described in the
170 order.

171 **(2) *Place.*** After considering the convenience of
172 the witness and the parties, the court may
173 order—and the subpoena may require—the
174 witness to appear anywhere the court
175 designates.

176 **(g) Contempt. Order for Disobeying a Subpoena.** The
177 court (other than a magistrate judge) may hold in
178 contempt a witness or subpoena recipient who,
179 without adequate excuse, disobeys a subpoena issued
180 by a federal court in that district. ~~A~~Under 28 U.S.C.
181 § 636(e), a magistrate judge may hold in contempt a
182 witness or subpoena recipient who, without adequate
183 excuse, disobeys a subpoena issued by that
184 magistrate judge ~~as provided in 28 U.S.C. § 636(e).~~

185 **(h) Information Not Subject to a Subpoena.** No party
186 may subpoena a statement of a witness or of a

187 prospective witness under this rule. Rule 26.2
188 governs the production of the statement.

189 **Committee Note**

190 The amendments to Rule 17 respond to gaps and
191 ambiguities in its text that have contributed to conflicting
192 interpretations in the courts and difficulties in application.
193 The changes include revisions that clarify the procedures for
194 subpoenas to produce data, objects, or other items and the
195 availability of such subpoenas for proceedings other than
196 trial, as well as revisions that delineate which provisions
197 apply to certain types of subpoenas. The amendments also
198 include stylistic revisions to text and headings.

199 **Rule 17(a).** In addition to stylistic changes, the text
200 in (a)(1) has been revised to clarify that it applies to
201 subpoenas for producing items as well as those for
202 testimony.

203 **Rule 17(b)** formerly headed “Defendant Unable to
204 Pay,” has been retitled to clarify that it applies only to
205 subpoenas for testimony. Changes to the text are stylistic
206 only.

207 **Rule 17(c),** covering subpoenas to produce data,
208 objects, or other items, has been revised to address multiple
209 issues with the prior language that had contributed to
210 conflicting interpretations in the courts. Formerly it had
211 three subsections, now it has seven. The changes are
212 intended to promote clarity about what the Rule requires,
213 while safeguarding the discretion of courts to tailor subpoena
214 practice to the circumstances of a district or case. The
215 section’s heading —“Subpoena to Produce Information,
216 Objects, or Other Items”—has been revised to more
217 accurately describe the amended language in (c)(1).

218 Rule 17(c)(1) continues to describe what a subpoena
219 may obtain, but it has been revised to refer to “items” that
220 include not only data, but also any “information” or objects.
221 This recognizes that parties use subpoenas to obtain
222 electronically stored information and other intangible items
223 in addition to “data,” “documents” or other objects.

224 Perceived ambiguities in the language of the last two
225 sentences of former (c)(1) contributed to several conflicts in
226 case law, including when a subpoena may be sought ex parte,
227 and the rules for production and disclosure. The revised rule
228 replaces these two sentences with separate provisions
229 containing explicit direction about each of these issues.

230 Rule 17(c)(2) is new. The language formerly in (c)(2)
231 about motions to quash is now (c)(7). Subparagraph (2)(A)
232 clarifies that non-grand-jury subpoenas are available to
233 produce items for trial as well as proceedings where
234 subpoenas are most likely to be needed, presently used
235 regularly in many districts, or for which there is statutory or
236 rule authority for parties to present evidence: detention
237 hearings under the Bail Reform Act, sentencing hearings
238 under Rule 32, pre-trial suppression hearings, and
239 revocations. There is no other mechanism available to
240 compel evidence from third parties at these proceedings,
241 even though both parties may need to do so. Some decisions
242 have interpreted the prior text of the Rule to bar the use of
243 Rule 17 subpoenas to produce items at any hearing other
244 than grand jury proceedings and trial. This change to the
245 Rule’s text expressly authorizes the use of a non-grand-jury
246 subpoena to obtain evidence for introduction at the listed
247 hearings.

248 The ending clause explicitly recognizes the
249 discretion of the court in an individual case to permit a
250 Rule 17 subpoena to produce items in other evidentiary

251 hearings not listed in the Rule in which a party may be
252 allowed to present witnesses or evidence. Examples include
253 preliminary hearings and new trial hearings. The present use
254 of Rule 17 subpoenas for items in such proceedings is not as
255 common, in part because of the difficulties, costs, and delays
256 that may arise when subpoena practice is imported into these
257 less formal or more expedited proceedings.

258 Rule 17's provisions are not applicable to hearings
259 under § 2254, where a court may apply subpoena provisions
260 in the Federal Rules of Civil Procedure. See Rule 12 of the
261 Rules Governing § 2254 Proceedings. Rule 12 of the Rules
262 Governing §2255 Proceedings allows application of either
263 the Civil or Criminal Rules in § 2255 proceedings.

264 **Subparagraph (c)(2)(B),** along with the
265 requirements in (c)(2)(D), articulates a modified version of
266 the test announced by the Supreme Court in *Nixon v. United*
267 *States*, 418 U.S. 683 (1974), which interpreted the previous
268 text of Rule 17. Applying *Nixon*, all but a handful of lower
269 courts have read Rule 17 as limiting non-grand-jury
270 subpoenas to produce documents or other items to those that
271 met specificity, relevance, and admissibility requirements.
272 Many courts added one or more of the additional following
273 criteria: that the items sought were not otherwise obtainable
274 by due diligence, that advance inspection was needed to
275 properly prepare and avoid delay, and that the subpoena was
276 not a “fishing expedition.”

277 The Committee agreed that the basic character of
278 Rule 17 subpoenas as seeking evidence for a particular
279 proceeding should remain unchanged, and that the rule
280 should continue to prohibit the use of subpoenas for general
281 discovery from third parties. But it also determined that the
282 admissibility requirement, as well as other aspects of the
283 prevailing interpretation of the prior language, was being

284 applied inconsistently, resulting in harmful uncertainty and
285 unnecessarily restricted access to evidence needed from
286 third parties for trial and other proceedings.

287 The new text now codifies a modified version of the
288 *Nixon* standard intended to provide an adequate and more
289 predictable opportunity for both the prosecution and defense
290 to obtain from third parties the evidence they need for the
291 proceeding designated in the subpoena. The new text
292 imposes upon a party the duty to ensure that every subpoena
293 to produce items meets this standard, including those
294 obtained and served without motion.

295 As to specificity and the prevention of “fishing
296 expeditions,” (c)(2)(B) first requires that the subpoena
297 “describe each designated item with reasonable
298 particularity.” This requirement serves at least two functions.
299 First, it informs the recipient what is being requested so that
300 the recipient can decide how to comply and whether to file a
301 motion to quash. Second, it prevents parties from using such
302 subpoenas for discovery and “fishing expeditions,” which
303 can create unacceptable burdens for recipients, courts, and
304 those individuals and entities whose information the
305 recipient is ordered to produce. The requirements in
306 (c)(2)(B)(i) and (ii) advance this same goal by limiting the
307 subpoena to items “likely to be possessed by the subpoena’s
308 recipient,” and “not reasonably available to the party from
309 another source.”

310 The text of (c)(2)(B)(iii) requires that each item
311 either be, or contain information that is, “likely to be
312 admissible as evidence in the designated proceeding.” In
313 using “likely to be admissible,” the Committee deliberately
314 rejected stricter formulations applied by some courts. In
315 some circumstances, it will be impossible to be certain
316 before a proceeding begins that a precisely identified item

317 will be admissible. Such circumstances include when an
318 item’s admissibility depends on whether the opposing party
319 first presents other evidence. For example, impeachment
320 evidence should be available to a party by subpoena for use
321 at trial when a party knows that a witness will or is likely to
322 testify. That evidence should not be unavailable simply
323 because admissibility cannot be determined definitively
324 until after the witness has actually testified. The “likely to be
325 admissible” standard is already used by some courts
326 applying Rule 17 and more accurately describes the
327 appropriate inquiry. There is no separate reference to
328 “relevance” in (c)(2)(B) because it is not likely that
329 information would be admissible unless it was relevant.

330 If a court is concerned that without judicial oversight
331 some categories of subpoenas—such as those seeking
332 particular types of information, or seeking information for a
333 particular type of proceeding—pose a special risk of
334 noncompliance with the requirements in (c)(2)(B), the court
335 has discretion to require that those subpoenas be authorized
336 by court order upon motion (see (c)(2)(C)) and/or to order
337 that the recipient produce the items to the court instead of
338 directly to the requesting party’s counsel (see (c)(5)).

339 The provisions in Subparagraphs (c)(2)(C)-(F)
340 resolve several disputed issues about obtaining subpoenas to
341 produce items that arose under the prior language of the
342 Rule.

343 Rule 17(c)(2)(C) defines when a motion and court
344 order are required before a party may serve a non-grand-jury
345 subpoena to produce items. Courts have disagreed about if
346 or when the former language in (c)(1)—which stated “the
347 court may direct the witness to produce the designated items
348 in court before trial or before they are offered in evidence”—
349 required a court to first approve a subpoena under 17(c). The

350 resulting practice has differed greatly from court to court
351 (and in some cases judge to judge), with some courts
352 requiring motions for every subpoena to produce items,
353 others permitting parties to obtain and serve such subpoenas
354 without judicial involvement (unless the subpoena sought
355 victim information under (c)(3)), and still others insisting on
356 prior approval in certain circumstances but not others.

357 The Committee concluded that mandating a motion
358 and court order for every subpoena to produce items—or for
359 every subpoena that seeks production before trial, as some
360 courts had interpreted the former language in (a)—places
361 unnecessary burdens on courts and parties alike and is
362 contrary to existing practice in many districts. Other
363 requirements stated in the Rule or otherwise available to the
364 court, such as protective orders, are adequate to control
365 potential abuse of the subpoena process by the parties.
366 Districts that have required, under the prior language of the
367 rule, a motion and court order whenever a subpoena seeks
368 production prior to trial may continue that practice by local
369 rule or court order. That level of judicial oversight before
370 service, however, is no longer required by the revised text of
371 the Rule.

372 The amended rule clearly specifies the circumstances
373 that will always require prior court approval via motion, and
374 it preserves the discretion of judges to require motions in
375 other situations. It provides that a motion and order are not
376 required before service of a non-grand-jury subpoena to
377 produce items “unless (3) or (4), a local rule, or a court order
378 requires them.”

379 **Rule 17(c)(2)(D).** When a motion is required for a
380 non-grand-jury subpoena, new (c)(2)(D) states exactly what
381 a party must do in the motion to prove that the proposed
382 subpoena does indeed comply with (c)(2)(B)’s requirements.

383 Rule 17(c)(2)(D)(i) requires the party to demonstrate to the
384 court that the subpoena describes each designated item with
385 reasonable particularity. And (2)(D)(ii) requires the party to
386 “state facts,” showing each item is “likely to be possessed by
387 the subpoena’s recipient,” “not reasonably available to the
388 party from another source,” and “likely to be admissible as
389 evidence in the designated proceeding.” Requiring a factual
390 basis is intended to prevent the use of Rule 17 subpoenas
391 based upon unsubstantiated guesses or mere speculation.

392 Rule 17(c)(2)(E) ensures that a court must, for good
393 cause, allow a party to file a motion for a subpoena to
394 produce items ex parte. Whether a party may seek a
395 subpoena ex parte has been another contested question under
396 the prior language of Rule 17(c). Although some courts have
397 read the Rule to preclude ex parte subpoena practice, most
398 allow it, some by local rule. Proceeding ex parte is important
399 when disclosure to another party of what the subpoena
400 requests, the identity of the recipient, or the explanation why
401 the subpoena complies with (c)(2)(B) could lead to damage
402 to or loss of the items that the party is attempting to obtain,
403 or divulge trial strategy, witness lists, or attorney work-
404 product. Without the ex parte option, defense counsel may
405 face the impossible choice of either not seeking a subpoena
406 and violating the ethical duty to prepare a plausible defense,
407 or seeking the subpoena and disclosing their trial strategy,
408 work-product, and other confidential information to the
409 government and co-defendants (who may have adverse
410 interests).

411 Rule 17(c)(2)(F) clarifies that unless required by a
412 local rule or court order, a party has no duty to inform the
413 other parties about a subpoena when no motion is required.

414 Rule 17(c)(3) retains the requirement in former
415 (c)(3) of a motion and court order for a subpoena seeking

416 personal and confidential information about a victim, now in
417 subparagraph (A), as well as the requirement of prior notice
418 to a victim absent exceptional circumstances, now in
419 subparagraph (B). Both requirements were added to the Rule
420 in 2008 to implement the Crime Victim’s Rights Act and are
421 unchanged, except for the addition of style revisions,
422 including adding the term “non-grand-jury” to (A).

423 The amendments also add a provision permitting ex
424 parte applications for good cause, but it is important to
425 distinguish that good cause requirement from the
426 “exceptional circumstances” concept in (c)(3). Exceptional
427 circumstances under (c)(3) would include that evidence
428 might be lost or destroyed if the subpoena were delayed or a
429 situation where the defense would be unfairly prejudiced by
430 premature disclosure of a sensitive defense strategy. It will
431 be uncommon that a notice to a victim will meaningfully
432 implicate the concern about disclosing defense strategy
433 because, unlike subpoena applications under this Rule, a
434 notice merely informs the victim of the request, not the
435 reasons why the subpoena is sought. In contrast, the showing
436 of “good cause” to file a motion ex parte would require an
437 explanation of the reason.

438 The amendment also responds to a few decisions that
439 had interpreted the rule as applicable only to subpoenas for
440 personal or confidential information served on third parties
441 other than a victim. The amendment adds the words
442 “including a victim” to clarify that the requirement of a
443 motion and court order before a subpoena seeking personal
444 or confidential information about a victim may be served on
445 a third party applies when that third party is a victim.

446 **Rule 17(c)(4).** This new provision extends the
447 motion requirement to a subpoena requested by a self-
448 represented party. Two reasons underlie this decision. First,

449 self-represented parties are not bound by ethical rules that
450 deter an attorney’s misuse of the court’s compulsory
451 authority, raising the risk that the subpoena would not
452 comply with (c)(2)(B). Second, requiring judicial oversight
453 of this very small subset of subpoenas would not
454 significantly add to the courts’ burden, even in districts
455 where there is relatively little motion practice under Rule 17.

456 Rule 17(c)(5) is also new. It clarifies when a
457 subpoena must order the recipient to produce designated
458 items to the court, and when it need not do so. Again, the text
459 in former (c)(1) stating that the “court may direct the witness
460 to produce the designated items in court before trial or before
461 they are to be offered into evidence” produced conflicting
462 decisions on this point. Some courts read the rule as always
463 requiring returns to the court, others that it required returns
464 to the court whenever a subpoena ordered production before
465 trial, and still others that it permitted returns directly to the
466 requesting party unless the court ordered items produced to
467 it. The Committee concluded that judges should have
468 discretion to determine where (and how) production should
469 take place. To the extent the prior text of the rule was leading
470 to unnecessary limits on the discretion of the court to allow
471 returns to the requesting party, it created needless burdens
472 for courts and required revision.

473 Accordingly, subsection (c)(5) sets three defaults,
474 each subject to departure by court order.

475 First, (5)(A)(i) provides that a subpoena requested by
476 a self-represented party must require the recipient to produce
477 the designated items to the court. Judicial oversight at both
478 the issuance and production stages is added assurance that
479 parties without legal training or ethical responsibilities will
480 not deliberately or unintentionally access inappropriate or
481 non-compliant information that a judge would be able to

482 intercept if the recipient were required to provide the items
483 to the court.

484 The second default in (5) is for non-grand-jury
485 subpoenas that require the production of personal or
486 confidential information about a victim. Paragraph (5)(A)(ii)
487 provides that unless the court orders otherwise, such
488 subpoenas must require the recipient of such subpoenas to
489 produce the designated items to the court, not directly to
490 counsel. Production to the court provides an opportunity for
491 the court, before the information produced is disclosed to the
492 requesting party, to review the information produced in
493 camera, require redactions, restrict access, regulate
494 retention, add other protective orders, or take other actions
495 to protect the victim’s dignity and privacy.

496 The third default, in (5)(B), is that unless the court
497 orders otherwise, a subpoena that is requested by a
498 represented party and that does not require the production of
499 personal or confidential information about a victim may
500 require the recipient to produce the designated items to the
501 requesting party’s counsel. This default reflects present
502 practice in many districts.

503 The rule places no restrictions on the court’s
504 discretion to vary from these default rules. For example,
505 when a subpoena is likely to produce private or privileged
506 information, it is common practice for courts to order in
507 camera review before disclosure to anyone. And to provide
508 greater judicial oversight [for subpoenas requiring the
509 production of personal or confidential information], the rule
510 permits a court, by local rule or court order, to require the
511 return of such information to chambers before disclosure to
512 the requesting party.

513 New **Rule 17(c)(6)** states, “A party must disclose to
514 an opposing party an item the party receives from a

515 subpoena’s recipient only if the item is discoverable under
516 these rules.” This provision resolves another dispute about
517 the meaning of the Rule’s prior text, which some courts read
518 as requiring that each party have access to any item that a
519 subpoena recipient produces to another party. That position
520 undermines the careful calibration of discovery and
521 disclosure in Rule 16 and other discovery rules. For
522 example, even if every item produced by a subpoena is
523 admissible, it does not follow that the requesting party will
524 decide to use all of those items in its “case-in-chief at trial.”
525 And a defense subpoena may produce inculpatory evidence
526 the government did not know about, as well as evidence the
527 defense hopes to use at the designated proceeding. The new
528 text recognizes that disclosure of information and other
529 items between parties, including information and items the
530 party may obtain by subpoena, is regulated by the
531 Constitution, Rule 16, and other discovery rules. Rule 17
532 does not modify that carefully developed law.

533 **Rule 17(c)(7)** contains the text about motions to
534 quash previously in (c)(2). A second sentence has been added
535 clarifying that the showing described in new (c)(2)(D) must
536 be made by the party responding to a motion to quash a non-
537 grand-jury subpoena to produce items.

538 The second sentence of **Rule 17(d)** now includes the
539 words “or to the subpoena’s recipient” after “witness” to
540 clarify that it applies to both subpoenas for testimony and
541 subpoenas to produce items. The last sentence has been
542 restyled, adding “But” at the beginning and replacing
543 “when” with “if.”

544 **Rule 17(e)(1)** contains an addition similar to that in
545 (d) to clarify its application to subpoenas to produce items as
546 well as subpoenas for testimony.

547 The heading of **Rule 17(f)** has been restyled.

548 Rule 17(g) includes three changes: (1) the heading
549 has been revised to better describe its content; (2) “or
550 subpoena recipient” has been added to clarify its application
551 to both subpoenas for testimony and subpoenas to produce
552 items; and (3) the reference to 28 U.S.C. §636 has been
553 restyled.

TAB 10

MEMO TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

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

DATE: April 10, 2026

This memorandum presents proposed amendments to Rule 49.1 and an accompanying committee note. The proposed amendment requires:

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

The Subcommittee seeks the full Advisory Committee’s approval for publication.

The current Appellate, Bankruptcy, Civil, and Criminal privacy rules are the product of a joint E-Government Committee, which was charged with codifying Judicial Conference privacy policy. To the extent possible, the rules are parallel and consistent.

Accordingly, a working group convened by Ms. Carolyn Dubay and including the reporters for the Appellate, Bankruptcy, and Civil Committees has been coordinating the consideration of parallel amendments. Proposed amendments will be presented at the spring meetings of each of these committees, and at our meeting Ms. Dubay will provide an oral report on the actions taken by the other committees. Our goal is to present a slate of parallel amendments at the June meeting of the Standing Committee for publication at the same time.

I. THE USE OF PSEUDONYMS TO REFER TO MINORS

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

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

The proposed language reflects a productive collaboration with the style consultants. Some practitioners who had been asked for comments on earlier versions of the text had interpreted the proposed language as requiring them to include—and then redact—certain information. The restyled text proposed here addresses this concern in the introductory clause by stating, “if any of the following types of information appear in the filing, include only . . . (B) a pseudonym in place of the name of an individual known to be a minor.” The proposed committee note also emphasizes that a filer has the option of omitting information such as a minor’s name or replacing it with a pseudonym.

One question that arose during the consideration of the proposed amendment was how the existing rule, along with similar privacy provisions in the Rules of Bankruptcy and Civil Procedure, applies to minors who reach the age of eighteen while litigation is still ongoing. Excellent research by Lara Venegas, who was detailed to the Rules Office, found that although the Rules do not expressly extend protection to individuals after they have turned eighteen,¹ the courts have used protective orders effectively to provide continued protection. The Subcommittee concluded that the current practice of using protective orders to extend the protection of minors is working well, and does not propose a change in the text of the rule.

Federal Rule of Criminal Procedure 49.1(e) itself allows a court, for good cause, to require the redaction of additional information through protective orders, and the commentary states that Rule 49.1 “does not affect the protection available under other rules . . . or under other sources of protective authority.” Fed. R. Crim. P. 49.1(e), Advisory Committee Notes. Other sources of protective authority, too, including 18 U.S.C. § 3509(d), support courts’ routine extension of protection of the identity of child victims even after they were no longer minors.²

Similarly, under the parallel privacy protections of Federal Rule of Civil Procedure 5.2(a)(3), courts have allowed the use of redactions or pseudonyms depending on the nature and circumstances of the case.³ Courts employ a balancing test to determine if particular

¹ Like Rule 49.1, Fed. R. Civ. P. 5.2(a)(3) and Fed. R. Bankr. P. 9037(a)(3) establish parallel privacy protection requirements but do not explicitly extend the protection to individuals in filings after they have turned eighteen.

² See, e.g., *Doe v. Menefee*, 391 F.3d 147, 151 n.4 (2d Cir. 2004) (“The surnames of all victims who were minors at the time of the events in question have been redacted throughout this litigation in order to protect the victims’ privacy.”); *United States v. Begay*, 673 F.3d 1038, 1040 n.4 (9th Cir. 2011) (referencing 18 U.S.C. § 3509(d) when noting continued reference by initials because the victims were previously minors); *United States v. Lewis*, No. CR415-196, 2017 WL 750456, at *5 (S.D. Ga. Feb. 27, 2017) (holding the protection of 18 U.S.C. § 3509(d) “applies even when victims are no longer underage”); *United States v. Weber*, No. 17-50033-JLV, 2020 WL 5531562, at *2 (D.S.D. Sep. 15, 2020) (“Adult witnesses who were child victims are entitled to have their identity protected.”).

³ The Tenth Circuit adopted the standard established by the Eleventh Circuit: “A [party] should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature,

circumstances that warrant anonymity outweigh the public’s interest in open judicial proceedings. Those circumstances include the nature of the individual, and whether they are a victim, witness, or party to the litigation.⁴

Members expressed an interest in using publication as an opportunity to solicit public comment on the question whether the rule should be revised explicitly to address the treatment of minors who age out. Ms. Dubay and the reporters agreed to explore this possibility.

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

A. Background and Subcommittee discussion

Senator Ron Wyden has expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules⁵—permit filings to include “the last four digits of the social-security number and taxpayer-identification number.”

B. Social-security numbers

As noted at previous meetings, although there has been agreement that neither the prosecution nor the defense need the last four digits of social-security numbers in public filings, the Subcommittee wanted to understand whether there was any harm in including this information. Then-Rules Law Clerk Kyle Brinker provided an excellent research memorandum explaining how this information could be misused by identify thieves and fraudsters.⁶ Moreover, full redaction is now considered a best practice by a variety of government agencies. The Subcommittee found this analysis very convincing, and it concluded the case had been made for complete redaction of social-security numbers in Rule 49.1.

The Subcommittee unanimously recommends that Rule 49.1 be amended to require the redaction of all digits of any social-security numbers that are included in public pleadings. Note,

real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the [party’s] identity. The risk that a [party] may suffer some embarrassment is not enough.” *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) (quoting *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992)). The Third Circuit recently noted that “minors who reach adulthood during the course of litigation may be able to justify [continued redactions] as a result of their continuing [privacy] interests.” *Ricketts v. Titusville Area Sch. Dist.*, 150 F.4th 634, 636 (3d Cir. 2025).

⁴ For matters that may fall under analogous civil matters, Federal Rule of Civil Procedure 5.2 may be employed to allow continued anonymous filings because courts “treat plaintiffs who were minors when their claim accrued differently because society has a transcendent interest in safeguarding the physical and psychological well-being of a minor.” *Katie M. and A.M. v. Aetna Life Ins. Co.*, No. 4:24-cv-00053-AMA-PK, 2025 WL 934458, at *1-2 (D. Utah Mar. 27, 2025) (internal citations omitted); see also *Doe v. USD No. 237 Smith Ctr. Sch. Dist.*, No. 16-cv-2801-JWL-TJJ, 2017 WL 3839416, at *11 (D. Kan. Sep. 1, 2017) (civil suit alleging sexual assault).

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

⁶ To avoid providing any sort of roadmap for misuse of this information, we did not include Mr. Brinker’s memorandum in the agenda book.

however, that the discussion draft highlights the filer’s option to “omit or completely redact all social-security . . . numbers.”

C. Other taxpayer-identification numbers

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

1. What are taxpayer-identification numbers?

The Internal Revenue Service (IRS) recognizes four principal types of taxpayer identification numbers: Social-Security Numbers (SSN), Individual Taxpayer Identification Numbers (ITIN), Adoption Taxpayer Identification Numbers (ATIN), and Employer Identification Numbers (EIN).⁷

The most common form of taxpayer-identification number other than an SSN is the ITIN. The Internal Revenue Service requires any individual who is not eligible to get a social-security number to apply for an ITIN under many circumstances, including filing a U.S. federal tax return.⁸ As of December 2023, the IRS had issued 26 million ITINs, and there were more than 5.8 million active ITINs.⁹ ITINs are now commonly used for a variety of non-tax purposes, including obtaining drivers’ licenses and credit cards, and opening bank accounts, and establishing a credit history.¹⁰

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

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

⁷ The IRS website also recognizes a Preparer Tax Identification Number (PTIN) as a type of taxpayer identification number. Mr. Brinker’s memo also discussed Preparer Tax Identification Numbers (PTINs), noting that these numbers were created to allow tax preparers to shield their own SSNs, and concluding that they do not raise the same privacy issues as ITINs, ATINs, and EINs.

⁸ The IRS website states:

You may need an ITIN if you’re a:

- Nonresident alien claiming a tax treaty benefit
- Nonresident alien filing a U.S. federal tax return
- Resident alien filing a U.S. federal tax return
- Dependent or spouse of a U.S. citizen/resident alien
- Nonresident alien student, professor or researcher filing a U.S. federal tax return or claiming an exception
- Dependent or spouse of a nonresident alien U.S. visa holder.

IRS, *Individual taxpayer identification number*, <https://www.irs.gov/tin/itin/individual-taxpayer-identification-number-itin#what> (last visited Apr. 12, 2026).

⁹ Treasury Inspector Gen. for Tax Admin., *Administration of the Individual Taxpayer Identification Number Program (Rep. No. 2024-400-012)* 1 (2023), <https://www.oversight.gov/sites/default/files/documents/reports/2023-12/2024400012fr.pdf> (last visited Apr. 11, 2026).

¹⁰ *Id.* at 1-2.

Although the Department of Justice initially opposed applying the same privacy redaction rules to social-security and taxpayer identification, the E-Government Subcommittee “determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.”¹¹ The E-Government Subcommittee also considered whether EINs should be included as identifiers to be redacted,¹² and it “discussed whether an EIN raised the same privacy risks as social security or tax identification numbers.”¹³ A Subcommittee member stated that an EIN “did not present the same privacy concerns” because it “was solely used to file taxes.”¹⁴ The Subcommittee then agreed and decided not to include EINs in the list of redacted identifiers.¹⁵ A “person’s . . . tax identification number” was changed to an “individual’s . . . tax identification number” to clarify that corporate tax identification numbers are not subject to the redaction requirement.¹⁶

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

Although there is virtually no caselaw interpreting the phrase “an individual’s . . . taxpayer-identification number,”¹⁷ we think it now includes ITINs and possibly ATINs. It does not currently include EINs.

As noted above, the E-Government Subcommittee clearly intended the privacy rules to encompass individual taxpayer identification numbers. Moreover, bankruptcy forms support the view that the parallel privacy rules always intended “individual’s . . . taxpayer-identification number” to include ITINs. For example, the Bankruptcy Official Form 21 was amended in 2007 to instruct debtors to state whether the debtor had an “Individual Taxpayer Identification (ITIN) Number(s),” and if so, to provide it.¹⁸ The committee note stated that the amendment instructing debtors to provide their ITINs was made “[i]n light of the new Rule 9037 which limits public disclosure to all but the last four digits of any individual taxpayer-identification number.”¹⁹ Several Directors Forms were also changed to require ITIN information “in order to comply with” Bankruptcy Rule 9037.²⁰ Current bankruptcy case policy likewise instructs debtors to

¹¹ Revised Privacy Template, in Agenda Book for Advisory Committee on Criminal Rules, Oct. 30, 2004, at 105 n.3, available at https://www.uscourts.gov/sites/default/files/fr_import/CR2004-10.pdf.

¹² Minutes of the June 16, 2004 E-Government Subcomm. Meeting, in Agenda Book for Advisory Committee on Criminal Rules, Oct. 30, 2004, at 119, available at https://www.uscourts.gov/sites/default/files/fr_import/CR2004-10.pdf.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Revised Privacy Template, in Agenda Book for Advisory Committee on Criminal Rules, Apr. 4-5, 2005, at 129, available at https://www.uscourts.gov/sites/default/files/fr_import/CR2005-04.pdf.

¹⁷ We have found only one case in which the privacy rules were applied to an ITIN; it assumed that Criminal Rule 49.1(a) covers ITINs. *United States v. Valdez-Morales*, No. 3:15-CR-56, 2016 WL 919029, at *4 (E.D. Tenn. Mar. 4, 2016).

¹⁸ Official Form 21: Statement of Social Security Number or Individual Taxpayer Identification Number (ITIN), in Agenda Book for Committee on Rules of Practice and Procedure, June 22-23, 2006, at 794, available at https://www.uscourts.gov/sites/default/files/fr_import/ST2006-06.pdf.

¹⁹ Admin. Off. of the U.S. Cts., *Official Form 21 - Cumulative Committee Note*, https://www.uscourts.gov/sites/default/files/b_021_cn_cum.pdf (last visited Apr. 9, 2025).

²⁰ Memorandum from Jeff Morris, Reporter, to Advisory Comm. on Bankr. Rules, in Agenda Book for Advisory Committee on Bankruptcy Rules, Mar. 29-30, 2007, at 258, available at https://www.uscourts.gov/sites/default/files/fr_import/BK2007-03.pdf.

redact ITINs in order to comply with Bankruptcy Rule 9037. The bankruptcy case policy provides that, “according to the criteria provided in Fed. R. Bankr. P. 9037,” only the last four digits of an ITIN should appear if an individual has an ITIN instead of a social security number.²¹

Our research identified no cases considering the application of this phrase to ATINs and EINs. But without discussing the privacy rules, many courts have included a sole proprietorship’s full EIN in an order, even when the EIN was not necessary.²² On the other hand, the U.S. Tax Court requires full redaction of EINs in filings,²³ and the IRS will not disclose an EIN unless the EIN holder gives its consent, the party requesting the EIN has a material interest in its disclosure, or the IRS is otherwise required to do so.²⁴ The IRS also provides for truncated EINs on statements and other documents.²⁵

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

a. ITINs

The disclosure of *full* ITINs presents privacy risks similar to those arising from the disclosure of SSNs. Although the IRS asserts that ITINs should not be used and are not valid for non-tax purposes,²⁶ they are frequently employed for a variety of non-tax purposes.²⁷ This may provide an opportunity for misuse by persons with fraudulent or malicious purposes. On the other hand, Mr. Brinker concluded it was unclear whether and to what extent persons with such purposes could benefit from the inclusion of only the last four digits of ITINs in public filings.²⁸ Moreover, it appears that ITINs rarely appear in public case files.

b. ATINs

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

²¹ [Vol. 4: Court and Case Management] Guide to Judiciary Policy, ch. 8 § 830.50(b).

²² See, e.g., *Stevenson v. Harford Mut. Ins. Co.*, 760 F. Supp. 3d 338, 341 (W.D. Pa. 2024).

²³ Fed. Tax Ct. R. 27(a)(1).

²⁴ See 26 U.S.C. § 6103; *Highland Cap. Mgmt., LP v. IRS*, 408 F. Supp. 3d 789, 806 (N.D. Tex. 2019).

²⁵ 26 C.F.R. § 301.6109-4(a)-(b).

²⁶ See, e.g., IRS, *Publication 1915: Understanding Your IRS Individual Taxpayer Identification Number ITIN 5* (rev. Dec. 2025), <https://www.irs.gov/pub/irs-pdf/p1915.pdf> (ITINs “are not valid for identification outside the tax system and should not be offered as identification for non-tax purposes”).

²⁷ “Contrary to its intended use for Federal tax purposes, an ITIN has become widely accepted by third parties outside of the IRS for use as a valid identification number for many nontax purposes.” *Administration of the Individual Taxpayer Identification Number Program*, *supra* note 9, at 1.

²⁸ As previously stated, *supra* note 6, we have not included Mr. Brinker’s research memoranda to avoid providing information that could be used for nefarious purposes.

c. EINs

Disclosure of a sole proprietorship's EIN would raise some privacy concerns, though less than the risks of disclosing the last digits of ITINs or ATINs. Unlike other taxpayer identification numbers, and contrary to the E-Government Subcommittee's view that an EIN is "solely used to file taxes,"²⁹ an EIN can be obtained without a federal tax purpose.³⁰ An EIN is used for many business needs, including opening a bank account, receiving credit, and applying for a business license.³¹ Given these functions, disclosing a sole proprietorship's EIN raises a risk of fraudulent use.

EINs are generally not public, which supports the view that their disclosure raises privacy risks. As noted above, the IRS will not disclose an EIN unless the EIN holder gives its consent, the party requesting the EIN has a material interest in its disclosure, or the IRS is otherwise required to do so.³² The IRS also provides for truncated EINs on statements and other documents.³³ Similarly, the U.S. Tax Court requires full redaction of EINs in filings.³⁴ But the disclosure of EINs is required in some circumstances. Tax-exempt organizations and public companies must disclose its EIN in public filings.³⁵ Further, EINs must be provided to any employees, and vendors often demand an EIN before conducting transactions.³⁶

5. The Subcommittee's views

As reported at the Committee's November 2025 meeting, the Subcommittee had initially concluded that Rule 49.1(a) should afford the same protection to ITINs, ATINs, and EINs as to social-security numbers—requiring full redaction in public filings if any of these taxpayer-identification numbers are included. At the Standing Committee meeting in January 2026, after the Department's representative indicated that other Divisions opposed extending protections to EINs, Judge Dever requested that the Department do further internal consultations and present a uniform position on EINs across the privacy rules.

At the completion of this internal consultation process, Ms. Ralston explained that the Department's preference was that EINs, whether personal or corporate, and ATINs not be subject to the redaction/omission requirement in Rule 49.1 (and the parallel Appellate and Civil Rules). She stated four reasons for this view:

²⁹ See Minutes of the E-Government Subcomm. Meeting, *supra* note 12, at 119.

³⁰ See IRS, *Employer Identification Number*, <https://www.irs.gov/businesses/employer-identification-number#needs> (last visited Apr. 12, 2026).

³¹ See *id.*

³² See 26 U.S.C. § 6103; *Highland Cap. Mgmt.*, 408 F. Supp. 3d at 806.

³³ 26 C.F.R. § 301.6109-4(a)-(b).

³⁴ Fed. Tax Ct. R. 27(a)(1).

³⁵ See IRS, *Public Disclosure and Availability of Exempt Organization Returns and Applications: Public Disclosure Overview*, <https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organization-returns-and-applications-public-disclosure-overview> (last visited Apr. 9, 2025); Secs. and Exch. Comm'n, Off. of Investor Educ. and Advoc., *Investor Bulletin: How To Read a 10-K* (Sep. 2011), <https://www.sec.gov/files/reada10k.pdf> (last visited Apr. 12, 2026).

³⁶ See IRS, *About Form W-2, Wage and Tax Statement*, <https://www.irs.gov/forms-pubs/about-form-w-2> (last visited Apr. 9, 2025); Wolters Kluwer, *Do You Need an EIN or FEIN for Your Business?* (June 29, 2023), <https://www.wolterskluwer.com/en/expert-insights/business-ein-your-federal-tax-id-number>.

First, omitting EINs and ATINs would not alter the existing privacy rules. The text is not explicit, and the rules' history does not support the view that they were intended to substantively sweep broader than ITINs.

Second, the Department found no evidence of any problems with fraud or identity theft with any tax numbers other than SSNs and ITINs. Corporate EINs show up from time to time in cases where the defendant uses an EIN (either real or fake) to commit fraud on the government or bank fraud; to the extent the numbers are genuine, the defendant got them from a public source. And EINs and especially ATINs are most likely to show up in the record of an administrative, agency proceeding, or state-court proceeding, which are exempt from the redaction/omission requirement (Rules 49.1(b)(2)-(3) and 5.2(b)(2)-(3)) anyway.

Third, including these numbers in the rule would still impose a burden on litigants, albeit not a huge one given the limited number of cases where the numbers show up and would be subject to the rule. The Department's tax prosecutors say that when they are present in filings, it's because they are relevant. In those cases, prosecutors would have to prepare both redacted and unredacted filings. The Department doubted that there would be a countervailing benefit for that effort.

Fourth, the default presumption that court records should be public weighs in favor of not requiring redaction/omission here.

Ms. Ralston also noted, however, that the treatment of EINs and ATINs was a lower priority for the Department than making the Civil and Criminal Rules consistent and keeping the process moving to permit publication this year.

Subcommittee discussion focused first on EINs. Noting reports from the Government Accountability Office and the Treasury Inspector General for Tax Administration that described the use of stolen EINs to fraudulently obtain tax refunds owed to existing businesses or file false W-2s,³⁷ members expressed continuing concern that EINs could be misused. Moreover, the rules should not facilitate fraud, regardless of whether the losses from misuse of EINs fell on the federal government or private parties. Another reason voiced for supporting the inclusion of

³⁷ Stolen EINs can be used in at least two distinct forms of tax fraud. Most straightforwardly, a stolen EIN can be used to fraudulently obtain a tax refund owed to an existing business. A 2020 GAO study found that the IRS's computerized filters identified almost 8,000 such cases of confirmed business identity theft, claiming \$384 million in fraudulent refunds, from January 2017 to August 2019. GAO, *Identity Theft: IRS Needs to Better Assess the Risks of Refund Fraud on Business-Related Returns* (GAO Rep. 20-174) (Jan. 30, 2020), <https://www.gao.gov/products/gao-20-174>. The study did not estimate how many fraudulent returns made it past the IRS filtering software. *See id.*

In a more involved form of fraud, a stolen EIN can be used to file false W-2s which report tax withholding that never occurred. The false W-2s are then used to file multiple fraudulent personal returns claiming refunds based on the fictitious withholding. Obviously, this poses a financial harm to the government: in 2013, Treasury Inspector General for Tax Administration (TIGTA) identified 277,624 stolen EINs used on individual tax returns claiming \$2.2 billion in fraudulent refunds in TY 2011. Treasury Inspector Gen. for Tax Admin., Off. of Audit, *Stolen and Falsely Obtained Employer Identification Numbers Are Used to Report False Income and Withholding* (Sep. 23, 2013), <https://content.govdelivery.com/accounts/USTREASTIGTA/bulletins/984411>.

ITINs and ATINs in the rule was the need to be proactive, given the rapidly changing forms of fraud being developed using new technologies. And members reiterated the point that even if fraud is not a significant concern, there is an interest in individual privacy, especially in the case of EINs for families and small businesses. Members thought the Tax Court’s Rules—which require complete redaction—were a good model. After discussion, the Subcommittee voted, with one dissent, to recommend that EINs be omitted or redacted.

Members agreed that ATINs should be treated consistently with EINs.

In sum, after reconsidering these issues in light of the Department’s position, the Subcommittee was not persuaded to reach a different conclusion than the one it had reached earlier—that all tax identification numbers, including EINs, should be omitted or redacted from public filings in criminal cases. Even before learning of the government reports described above detailing fraud from the use of EINs, the Subcommittee had initially supported redaction of EINs based on several reasons that remain convincing:

- There is no reason, much less need, to include the last four digits of these numbers in public criminal filings.
- EINs do implicate individual privacy interests, especially when used by individuals and families who employ domestic workers and by sole proprietorships.
- In the years since the E-Government Subcommittee concluded EINs had no use outside tax filings, EINs have been routinely used for non-tax purposes such as opening a bank account or applying for a business license.
- Significant changes in technology, such as machine learning, have made misuse of EINs more problematic, and the rules should not assist fraud by allowing the inclusion of full or partial EINs, even though some these numbers may be publicly available elsewhere.
- Other agencies like the Social Security Administration and Tax Court have changed the way they treat EINs and now extend the same protection to EINs as other tax identification numbers

D. Attachments and exhibits

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

The Subcommittee recognized the concern that the explicit inclusion of this phrase might create a negative implication for other rules. That appears not to be a major consideration for the Criminal Rules. Although the word “filing” appears 50 times in the Criminal Rules, all Criminal

Rules other than Rule 49.1 use this word as a verb, not as a noun.³⁸ When referring to the action of filing, there seems to be little or no chance of confusion arising from this clarification in Rule 49.1.

³⁸ We read the word “filing” in Rule 56 as a verb, although it could be interpreted as a noun. It reads, “A district court is considered always open for any filing and for issuing returning process, making a motion, or entering an order.”

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

- 1 **Rule 49.1. Privacy Protection For Filings Made with**
2 **the Court**
- 3 **(a) Redacted Filings.** Unless the court orders otherwise,
4 ~~in a party or nonparty making~~ an electronic or paper
5 filing with the court ~~that contains an individual's,~~
6 including any exhibit or attachment, must:
- 7 (1) omit or completely redact all social-security
8 ~~number, or other~~ taxpayer-identification
9 ~~number, or numbers, including employer-~~
10 identification numbers; and
- 11 (2) if any of the following types of information
12 appear in the filing, include only:
- 13 (A) the year of an individual's birth date;
14 (B) a pseudonym in place of the name of
15 an individual known to be a minor;

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

2 FEDERAL RULES OF CRIMINAL PROCEDURE

16 (C) the last four digits of a financial-
17 account number, ~~or the~~; and

18 (D) the city and state of an individual's
19 home address, ~~of an individual, a~~
20 party or nonparty making the filing
21 may include only;

22 ~~(1) the last four digits of the social security~~
23 ~~number and taxpayer identification number;~~

24 ~~(2) the year of the individual's birth;~~

25 ~~(3) the minor's initials;~~

26 ~~(4) the last four digits of the financial account~~
27 ~~number; and~~

28 ~~(5) the city and state of the home address.~~

29 * * * * *

30 **Committee Note**

31 In contrast to the current rule, which allows public
32 filings to contain the last four digits of social-security and
33 taxpayer-identification numbers, the amendment requires
34 the omission or redaction of all digits of social-security and

35 taxpayer-identification numbers in public filings. Recent
36 federal policy guidance recommends avoiding the
37 unnecessary display of any part of these numbers on forms,
38 reports, and computers. The Committee concluded that even
39 partial numbers are useful to identity thieves, and that the
40 omission of these numbers from public filings will impose
41 no hardship on either litigants or the courts. In cases in which
42 this information is pertinent, Rule 49.1(f) allows a party to
43 file an unredacted copy of a filing under seal.

44 Taxpayer-identification numbers (TINs) are
45 identification numbers used in the administration of tax
46 laws. In addition to Social Security numbers, TINs include
47 individual taxpayer-identification numbers (ITINs),
48 taxpayer-identification numbers for pending U.S. Adoptions
49 (ATINs), and employer-identification numbers (EINs).

50 The amendment's protection for "taxpayer-
51 identification numbers" includes employer-identification
52 numbers as well as individual taxpayer-identification
53 numbers and adoption-identification numbers. Although
54 employer-identification numbers for some corporations may
55 be publicly available, smaller businesses and individuals
56 who employ others have a privacy interest in these numbers,
57 and there is also a potential for their misuse.

58 To enhance the protection of minors' privacy and
59 safety, the amendment also requires the substitution of a
60 pseudonym, rather than initials, in place of a minor's name
61 in public filings. When it is feasible to do so, the use of
62 gender-neutral pseudonyms is preferable. The use of
63 gendered pseudonyms or pronouns, combined with other
64 information contained in public pleadings, may make it
65 easier to uncover the identity of a minor.

66 The requirement for omission or redaction applies to
67 exhibits or attachments. Parties and nonparties who include

4 FEDERAL RULES OF CRIMINAL PROCEDURE

68 exhibits or attachments in public filings are required to
69 review them to ensure that they do not contain information
70 protected by the rule.

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

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

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

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

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

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

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

16 (C) the last four digits of a financial-
17 account number; and

2 FEDERAL RULES OF CRIMINAL PROCEDURE

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

20 * * * * *



U.S. Department of Justice

Criminal Division

Acting Assistant Attorney General

Washington, DC 20530

March 7, 2024

The Honorable James C. Dever III
Chair, Advisory Committee on Criminal Rules
United States Courthouse
310 New Bern Ave.
Raleigh, NC 27601

The Department of Justice (the Department) proposes an amendment to Rule 49.1 of the Federal Rules of Criminal Procedure to require that in all publicly available court filings, the parties refer to minors by pseudonyms.

1. Federal Rule of Criminal Procedure 49.1, titled “Privacy Protection for Filings Made with the Court,” provides in relevant part that “[u]nless the court orders otherwise,” court filings “that contain[] ... the name of an individual known to be a minor ... may include only ... the minor’s initials.” Fed. R. Crim. P. 49.1(a)(3). It has become clear in recent years, however, that referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—is insufficient to ensure the child’s privacy and safety. Project Safe Childhood prosecutors and victim witness personnel, for example, know that child-exploitation offenders sometimes track federal criminal filings and take other measures in an effort to uncover the identity of child victims and contact and harass—and thereby further victimize—the minors. And this is to say nothing of the increased shame, embarrassment, and fear that a child victim or witness may face if their identity as a victim or witness were to become publicly known.

In 2022, the Department of Justice issued The Attorney General Guidelines for Victim and Witness Assistance (the AG Guidelines). As most relevant here, the AG Guidelines state that “Department personnel should scrupulously protect children’s privacy in accordance with 18 U.S.C. § 3509(d), the AG Guidelines, and other Department policies.” 2022 AG Guidelines, Article III.L.1.d. Although the prior version of the Guidelines had permitted use of initials or an alias to identify children,¹ the 2022 AG Guidelines direct that

¹ The 2011 Attorney General Guidelines for Victim and Witness Assistance provided that “[a] child’s name or other identifying information (other than *initials or an alias*) should not be

“[a] child’s name or other identifying information (*other than a pseudonym*) should not be reflected in court documents or other public records unless otherwise required by law.” 2022 AG Guidelines, Article III.L.1.d. (emphasis added). The 2022 AG Guidelines also caution that “Department personnel should be aware that information in multiple sources can be put together to trace the identity of victims or witnesses.” *Id.* at Art. II.D.1.

Federal courts have referred to minors by pseudonyms. *See, e.g., Paroline v. United States*, 572 U.S. 434, 439 (2014) (noting that the child victim “goes by the pseudonym ‘Amy’ for this litigation”); *United States v. Viarrial*, 730 F. App’x 694, 695 n.1 (10th Cir. 2018) (unpublished) (“To protect the privacy of those involved, this opinion refers to Mr. Viarrial’s child victims and his former partner with the pseudonyms [*e.g.*, Jane Doe] used in the indictment, jury instructions, and verdict form.”); *Brodit v. Cambra*, 350 F.3d 985, 995 n.1 (9th Cir. 2003) (Berzon, J., dissenting) (“The charging documents and much of the trial transcript refer to the child in this case by the pseudonym ‘Jane Doe.’ Accordingly, I will also use this pseudonym.”); *Collmorgen v. Lumpkin*, 2023 WL 6388551, at *5 (S.D. Tex. 2023) (“To protect the child victim’s privacy, the [state] appellate court used pseudonyms to refer to him and his family members. This Court will do the same—referring to the child victim as Maxwell and referring to the State’s rebuttal witness as Kaitlyn.”); *Doe v. Avon Old Farms School, Inc.*, 2023 WL 2742330, at *1 n.1 (D. Conn. 2023) (“I refer to the ... daughters with the ‘Jane Doe’ pseudonym throughout this opinion—as the parties do in their filings—because the girls are minors and this case includes sexual harassment and assault allegations.”); *United States v. Stivers*, 2020 WL 2804074, at *1 n.1 (S.D. Ind. 2020) (“‘Vicky’ is a pseudonym for the actual minor victim depicted in the series, which the Court will adopt to refer to the victim in this Order. All of the references to ‘Vicky’ in this Order and in the other criminal cases discussed herein refer to the same person.”). These cases support the Department’s policy and practice as well as the Department’s recommendation to amend Rule 49.1.

Finally, amending Rule 49.1(a)(3) to change “the minor’s initials” to “a pseudonym” will not prejudice criminal defendants. To the extent that a defendant has the right to know the actual identity (*e.g.*, name) of a minor, that right can be protected through sealed filings that identify the child while making sure that publicly available filings use only the pseudonym. *See generally* 18 U.S.C. § 3509(d)(2); *see also* 2022 AG Guidelines, Art. II.D.1. In addition, and where appropriate, a party can seek a protective order to help ensure that information that should not be released publicly is in fact not released publicly. *See* 18 U.S.C. § 3509(d)(3); Fed. R. Crim. P. 49.1(e); 2022 AG Guidelines, Art. II.D.1.

2. For the reasons set forth above, the Department proposes to amend Rule 49.1(a) as follows (stricken text in red; proposed new text in blue):

(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,

reflected in court documents or other public records unless otherwise required by law.” 2011 AG Guidelines, Article III.L.1.d (emphasis added).

taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) ~~the minor's initials~~ in reference to a minor, a pseudonym;
- (4) the last four digits of the financial-account number; and
- (5) the city and state of the home address.

* * *

We appreciate your assistance with this proposal, and we look forward to working with the Committee on this issue.

Sincerely,

NICOLE
ARGENTIERI

Digitally signed by
NICOLE ARGENTIERI
Date: 2024.03.07
10:41:35 -05'00'

Nicole M. Argentieri
Acting Assistant Attorney General



March 27, 2024

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

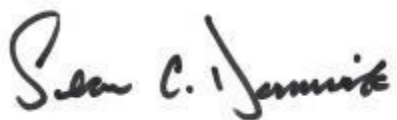
Re: DOJ Proposed Fed. R. Crim P. 49.1(a)(3) and Fed. R. Civ P. 5.2(a)

The American Association for Justice (AAJ) and the National Crime Victim's Bar Association (NCVBA) are voluntary bar associations whose members represent victims injured by sex abuse, trafficking, and violence. The AAJ and NCVBA support the proposed rules amendments from the U.S. Department of Justice requiring that all publicly available court filings refer to minors by pseudonyms instead of initials and encourage the Advisory Committees to undertake this rulemaking in conjunction with other important privacy protections already under evaluation involving the elimination of partial social-security numbers as identifiers.

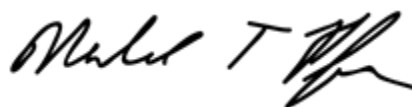
In addition, the AAJ and NCVBA strongly urge the Advisory Committees to consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence. While the use of a pseudonym is clearly preferable over a minor's initials, the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover.

Our organizations encourage the advisory committees to move forward with DOJ's proposals. If we can be of further assistance or provide additional information about how best to protect victims, please contact Sue Steinman, Senior Director of Policy and Senior Counsel at AAJ (susan.steinman@justice.org) or Renee Williams, Executive Director at NCVBA (rwilliams@victimsofcrime.org).

Sincerely,



Sean Domnick
President
American Association for Justice



Michael Pfau
President
National Crime Victims Bar Association

RON WYDEN
OREGON

CHAIRMAN OF COMMITTEE ON
FINANCE

221 DIRKSEN SENATE OFFICE BUILDING
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United States Senate
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COMMITTEES:
COMMITTEE ON FINANCE
COMMITTEE ON THE BUDGET
COMMITTEE ON ENERGY AND NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

August 4, 2022

The Honorable John G. Roberts, Jr
Chief Justice
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Dear Chief Justice Roberts:

* * *

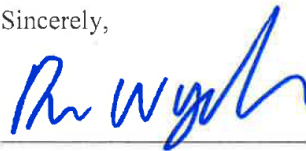
Twenty years ago, when Congress required federal courts to publish court records online, it required the Supreme Court to establish rules to protect the privacy and security of Americans whose information was contained in public court records. Congress also required the courts to report back every two years to describe whether the rules were in fact protecting Americans' privacy and security. * * *

* * *

The most recent report, which was provided to my office in draft form, * * * describes how in 2015-2016, the Judicial Conference considered a proposal to redact the entire SSN from court filings, as federal court rules currently permit, and in some cases require, records to include the last four digits. * * *

* * *

Sincerely,



Ron Wyden
United States Senator

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TAB 11

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Advice to Defendants (Rules 11 and 32(h)) ([25-CR-N](#))

DATE: April 3, 2026

Judge Mosman appointed the Rule 11 Subcommittee, chaired by Judge Boyle, to consider the suggestion from Judge Patricia Barksdale that the rule be amended to address recent amendments to the Federal Sentencing Guidelines.¹ Rule 11(b)(1)(M) now provides:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

- (1) *Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

- (M) in determining a sentence, the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)....

The Subcommittee unanimously recommends that the Committee approve and recommend for publication amendments to Rules 11 and 32 that reflect the 2025 amendments to the Sentencing Guidelines.

I. The 2025 Guideline Amendments

The 2025 amendments to the U.S. Sentencing Commission Guidelines Manual eliminated the term “departure.” The amendments deleted language in U.S.S.G. § 1B1.1(b) that formerly required the sentencing court to consider “Parts H and K of Chapter Five, Specific Offender Characteristics and Departures.” It also deleted most departures previously provided throughout the Guidelines Manual and made other related changes to Chapter 5.

¹ Judge Barksdale submitted her suggestion while the amendment was pending. It went into effect on November 1, 2025.

In its summary of the 2025 amendments, the Commission explained the rationale for the changes regarding departures:

In the years since *Booker*, the frequency of departures has steadily declined with courts relying to a greater extent on variances in a manner consistent with the statutory requirements in section 3553(a). The shift away from departures deepened as a direct result of the holding in *Irizarry v. United States*, 553 U.S. 708 (2008), in which the Court held that the “reasonable notice” requirement in Rule 32(h) of the Federal Rules of Criminal Procedure does not apply to variances.

U.S. Sentencing Comm’n, Amends. to the Sentencing Guidelines, April 30, 2025, at 79. The amendments sought to “better align the guidelines to practices under current sentencing law and to acknowledge the growing shift away from the use of departures.” *Id.* at 80. With the exception of the provisions pertaining to substantial assistance under § 5K1.1 and to early disposition programs in §5K3.1, the other departure provisions formerly included in Chapter 5 were eliminated.

Although the 2025 Guidelines retained § 5K1.1, § 5K1.1 no longer uses the term “departure.” Rather, it provides:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, a sentence that is below the otherwise applicable guideline range may be appropriate.

II. The Subcommittee’s Recommendations

Given the change in the Guidelines, the Subcommittee concluded that Rules 11(b)(M) and 32(h) require revision. Redline versions of the proposed amendments are provided.

A. Rule 11(b)(M) – Revision and Proposed Committee Note

The Subcommittee recommends that Rule 11(b)(M) be amended to remove the requirement that the court advise the defendant at the plea proceeding of “the court’s obligation to ... consider ... possible departures under the Sentencing Guidelines.” Its recommendation reflects the revised instructions in U.S.S.G. § 1B1.1(b), which now provides:

STEP TWO: CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a).—After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

- (h) **Notice of Possible Departure from Sentencing Guidelines.** Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party’s prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

To avoid renumbering (relettering) of the remainder of Rule 32, the Subcommittee recommends that subdivision (h) be reserved. The proposed amendment to Rule 32(h) would provide:

20

* * * * *

21

- (h) **[Reserved]** ~~Notice of Possible Departure from Sentencing Guidelines.~~ Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party’s prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

22

23

24

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26

27

* * * * *

The proposed committee note describes the purpose and effect of deleting 32(h).

28

The amendment reflects developments in the Supreme Court and the Sentencing Guidelines that eliminated the need for notice regarding departures.

29

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

1 **Rule 11. Pleas**

2 * * * * *

3 **(b) Considering and Accepting a Guilty or Nolo**
4 **Contendere Plea.**

5 **(1) *Advising and Questioning the Defendant.***

6 Before the court accepts a plea of guilty or
7 nolo contendere, the defendant may be placed
8 under oath, and the court must address the
9 defendant personally in open court. During
10 this address, the court must inform the
11 defendant of, and determine that the
12 defendant understands, the following:

13 * * * * *

14 (M) in determining a sentence, the court's

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

15 obligation to calculate the applicable
16 sentencing guideline range and to
17 consider that range, possible
18 departures under the Sentencing
19 Guidelines, and other sentencing the
20 factors under 18 U.S.C. § 3553(a),
21 including the Sentencing Guidelines;

22 * * * * *

23 **Committee Note**

24 The amendment reflects the 2025 changes to the U.S.
25 Sentencing Guidelines, which (1) deleted most of the
26 provisions in Chapter Five, Part K (Departures), and (2)
27 revised U.S.S.G. § 1B1.1(a) to eliminate the requirement
28 that the court consider departures at step two of a three-step
29 sentencing process. As revised, § 1B1.1 now provides for a
30 two-step process, considering at step one “the kinds of
31 sentence and the guideline range as set forth in the
32 guidelines,” and at step two “other applicable factors in 18
33 U.S.C. § 3553(a).”

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

1 **Rule 11. Pleas**

2 * * * * *

3 **(b) Considering and Accepting a Guilty or Nolo**
4 **Contendere Plea.**

5 **(1) *Advising and Questioning the Defendant.***

6 Before the court accepts a plea of guilty or
7 nolo contendere, the defendant may be placed
8 under oath, and the court must address the
9 defendant personally in open court. During
10 this address, the court must inform the
11 defendant of, and determine that the
12 defendant understands, the following:

13 * * * * *

14 (M) in determining a sentence, the court's
15 obligation to consider the factors
16 under 18 U.S.C. § 3553(a), including

2 FEDERAL RULES OF CRIMINAL PROCEDURE

17 the Sentencing Guidelines;

18 * * * * *

Hon. Patricia D. Barksdale (25-CR-N)

October 1, 2025

The U.S. Sentencing Commission published adopted amendments (effective November 1, 2025) to the *Guidelines Manual*. The amendments will simplify the current three-step sentencing process by removing the step that requires courts to consider departures.

Hon. Patricia Barksdale asked the Advisory Committee to consider amending Rule 11(b)(1)(M) of the Federal Rules of Criminal Procedure to delete “possible departures under the Sentencing Guidelines.”

Rule 11. Pleas

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(M) in determining a sentence, the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

TAB 12

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 40

DATE: April 3, 2026

This memo introduces a discussion draft of amendments to Rule 40, which currently provides:

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

- (a) **In General.** A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:
- (i) failing to appear as required by the terms of that person’s release under 18 U.S.C. §§ 3141 – 3156 or by a subpoena; or
 - (ii) violating conditions of release set in another district.
- (b) **Proceedings.** The judge must proceed under Rule 5(c)(3) as applicable.
- (c) **Release or Detention Order.** The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.
- (d) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

The Magistrate Judges Advisory Group (MJAG) and Judge Zachary Bolitho have recommended clarification of Rule 40.

As we reported at the November 2025 meeting, the Subcommittee agrees that Rule 40 needs clarification, and it has reached a series of tentative decisions that are reflected in its discussion draft.

A person arrested for violating a condition of release has a right to a detention hearing in the arresting district, prior to being transferred for a revocation hearing in the issuing district. The rule should cite the following applicable statutory citations, but without details about the burden of proof or showing required:

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

The rule should require the following procedures at the hearing:

- The government must produce proof of the warrant, and the judge must find that the defendant is the same person named in the warrant.
- The person who has been arrested and detained must be informed of the following:
 - the alleged violation prompting the arrest;
 - the privilege against compelled self-incrimination;
 - the right to consult with counsel if the defendant is already represented and the right to appointment of counsel if the defendant is not already represented;
 - because a defendant arrested for violating release may not have counsel, advice about the right to appointment of counsel; and
 - the text or note should acknowledge the practice of permitting the hearing to go forward with “stand in” or “courtesy” counsel in the jurisdiction of arrest.
- The rule should *not* require that the person be advised of the following:
 - the language in Rule 5(d) requiring advice of “the circumstances, if any, under which the defendant may secure pretrial release”;
 - the possibility under Rule 20 of transferring the case for purposes of plea and sentencing; and
 - the right to consular notification.
- The person arrested may consent to appear by videoconferencing, but the rule should not permit the judge in the issuing district to conduct the revocation proceeding virtually, even with the person’s consent.

The Subcommittee has now approved a discussion draft that implements these principles for presentation and discussion at the Committee’s spring meeting. The draft so far covers only arrests for violating conditions of release pending trial, sentencing, or appeal. *Rule 40 also mentions arrests of witnesses for failure to appear, a topic raising different issues that the Subcommittee will turn to next.* Please note that this language has not yet been styled, nor have we drafted a committee note.

After we incorporate any suggestions from this Committee into the text, the Subcommittee will consider a draft committee note, as well as suggestions from the Style Consultants.

Because magistrate judges conduct Rule 40 proceedings, the Subcommittee is also anxious to get feedback from more magistrate judges. Judge Harvey is now exploring options for seeking informal feedback on the discussion draft from other magistrate judges.

**DISCUSSION DRAFT OF A POSSIBLE REVISION
TO THE PROVISIONS IN RULE 40 ON ARRESTS
FOR VIOLATING RELEASE PENDING TRIAL,
SENTENCING, OR APPEAL, INCLUDING
FAILURE TO APPEAR¹**

- 1 **Rule 40.** ~~Procedures Upon Arrest for Failing to~~
2 ~~Appear~~**Under A Warrant Issued** in
3 **Another District** ~~or~~ **for Violating**
4 ~~Conditions of Release Set in Another~~
5 ~~District~~**Pending Trial, Sentencing, or**
6 **Appeal, Including Failure to Appear**
- 7 (a) ~~In General.~~**Appearance Upon Arrest – When and**
8 **Where.** A person is arrested under a warrant issued
9 in another district for violating conditions of release
10 pending trial, imposition or execution of sentence,
11 or appeal -- including a failure to appear -- must be
12 taken before a magistrate judge
- 13 **(1)** without unnecessary delay
- 14 **(2)** ~~before a magistrate judge in~~
- 15 **(A)** ~~the district of arrest~~ or

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

16 (B) in an adjacent district if either
17 (i) the appearance can occur
18 more promptly there, or
19 (ii) the warrant was issued there,
20 and the appearance can occur
21 on the day of arrest.

22 (b) At an appearance in district other than where
23 warrant was issued:

24 (1) Advice. The magistrate judge must inform
25 the person ~~has been arrested under a warrant~~
26 ~~issued in another district for~~of:

27 ~~(i) failing to appear as required by (A)~~
28 ~~the terms~~alleged violation of
29 ~~that~~release;

30 (B) the person's release under 18 U.S.C.
31 §§ 3141–3156 or by rights

32 (i) not to make a subpoena;
33 or statement, and that any

- 34 statement made may be used
35 against the person;
36 (ii) ~~violating conditions to a~~
37 reasonable opportunity to
38 consult with existing
39 counsel; and
40 (iii) to retain counsel or request
41 stand-in counsel for the
42 limited purpose of release set
43 ~~in another~~
44 district proceedings under
45 this rule.
- 46 ~~(b) Proceedings. The judge must proceed under Rule~~
47 ~~5(e)(3) as applicable.~~
- 48 ~~(c) Release or Detention Order. (2)~~
49 Identity.
- 50 (A) The government must produce
51 certified copies or copies by reliable

4 FEDERAL RULES OF CRIMINAL PROCEDURE

52 electronic means of the warrant and,
53 if readily available, warrant
54 application.

55 (B) The magistrate judge may
56 modify must [determine if/find
57 whether or not] the person is the
58 same person named in the warrant.

59 (3) Decision to release or detain. Regardless of
60 any previous release or detention order
61 ~~issued in another district, but must state in~~
62 ~~writing the reasons for doing so., the~~
63 magistrate judge

64 ~~(d)~~ (A) must determine whether to
65 detain or release the person on
66 conditions pending proceedings in
67 the district where the warrant was
68 issued; and

69 (B) must apply

- 70 (i) 18 U.S.C. §3142 if the person
71 was arrested for violating a
72 condition of pretrial release;
73 (ii) 18 U.S.C. § 3143(a) if the
74 person was arrested for
75 violating a condition of
76 release pending sentencing;
77 or
78 (iii) 18 U.S.C. § 3143(b) or (c) if
79 the person was arrested for
80 violating a condition of
81 release pending appeal.
- 82 (4) **Transfer.** If the magistrate judge determines
83 that the person should be detained pending
84 proceedings in the district where the warrant
85 was issued, the magistrate judge must
86 transfer the person to that district.

6 FEDERAL RULES OF CRIMINAL PROCEDURE

87 (5) Clerk's duty. Once the person is transferred
88 or-released, the clerk must promptly transmit
89 the papers [and any bail] to the clerk in the
90 district where the warrant was issued.

91 (c) Video Teleconferencing. Video teleconferencing
92 may be used to conduct ~~an appearance~~proceedings
93 under this rule if the ~~defendant~~person consents.

**DISCUSSION DRAFT OF A POSSIBLE REVISION
TO THE PROVISIONS IN RULE 40 ON ARRESTS
FOR VIOLATING RELEASE PENDING TRIAL,
SENTENCING, OR APPEAL, INCLUDING
FAILURE TO APPEAR**

- 1 **Rule 40. Procedures Upon Arrest Under A**
2 **Warrant Issued in Another District for**
3 **Violating Release Pending Trial,**
4 **Sentencing, or Appeal, Including Failure**
5 **to Appear**
- 6 **(a) Appearance Upon Arrest – When and Where. A**
7 person is arrested under a warrant issued in another
8 district for violating conditions of release pending
9 trial, imposition or execution of sentence, or appeal
10 -- including a failure to appear -- must be taken
11 before a magistrate judge
- 12 **(1)** without unnecessary delay
- 13 **(2)** in
- 14 **(A)** the district of arrest or
- 15 **(B)** in an adjacent district if either

2 FEDERAL RULES OF CRIMINAL PROCEDURE

- 16 (i) the appearance can occur
17 more promptly there, or
18 (ii) the warrant was issued there,
19 and the appearance can occur
20 on the day of arrest.

21 (b) **At an appearance in district other than where**
22 **warrant was issued:**

23 (1) **Advice.** The magistrate judge must inform
24 the person of:

25 (A) the alleged violation of release;

26 (B) the person's rights

27 (i) not to make a statement, and
28 that any statement made may
29 be used against the person;

30 (ii) to a reasonable opportunity
31 to consult with existing
32 counsel; and

- 67 (4) **Transfer.** If the magistrate judge determines
68 that the person should be detained pending
69 proceedings in the district where the warrant
70 was issued, the magistrate judge must
71 transfer the person to that district.
- 72 (5) **Clerk’s duty.** Once the person is transferred
73 or released, the clerk must promptly transmit
74 the papers [and any bail] to the clerk in the
75 district where the warrant was issued.
- 76 (c) **Video Teleconferencing.** Video teleconferencing
77 may be used to conduct proceedings under this rule
78 if the person consents.

Hon. Zachary Bolitho (23-CR-H)

November 27, 2023

A defendant from outside my district was arrested here on a warrant for violating her pre-sentencing release. I conducted her initial appearance under Fed. R. Crim. P. 40. At the initial appearance, the government moved for detention pending the defendant's release revocation hearing in the charging district under 18 U.S.C. 3148. The defendant requested a detention hearing in front of me. The government argued that I lacked the authority to conduct a detention hearing. The AUSA argued that Rule 40 says nothing about a detention hearing in the district of arrest and that 18 U.S.C. 3148 speaks only of a revocation hearing before a judge in the charging district. I rejected the AUSA's argument and found that the right to a detention hearing in the district of arrest was implicit in Rule 40(c), which permits a judge in the district of arrest to "modify any previous release or detention order issued in another district." I determined that it would be inconsistent with the Bail Reform Act for me to modify a release order and require detention without providing the defendant with a hearing on the issue. There are a few decisions from other magistrate judges that have reached the same conclusion. That led to the next issue, which was what standard to apply at the detention hearing. Neither the Bail Reform Act nor the Federal Rules provide a standard. My research revealed that magistrate judges have applied various standards. Because the defendant was awaiting sentencing, I determined the appropriate standard was that set forth in Rule 46(c) and 18 U.S.C. 3143(a). I felt that made the most sense under the circumstances, but I can't point to anything in the Federal Rules or the Bail Reform Act to confirm that I made the right call.

It would be very helpful to magistrate judges if Rule 40 could be amended to address the two questions I faced—(1) Does a defendant who has been arrested on a petition to revoke pre-trial or pre-sentencing release from another district have the right to a detention hearing in the district of arrest?; and (2) If so, what is the standard that applies in the detention hearing?

Chambers of
Janis van Meerveld
U.S. Magistrate Judge



UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street
New Orleans, Louisiana 70130

May 14, 2024

Honorable James C. Dever III
Chair, Advisory Committee on Criminal Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Sent by email to: RulesCommittee_Secretary@ao.uscourts.gov

Dear Judge Dever:

I write to you on behalf of the Magistrate Judges Advisory Group (MJAG) on which I serve as chair. On May 10, 2024, the Advisory Group voted unanimously to approve a package proposing changes to Fed. R. Crim. P. 40. The package, attached for your committee's consideration, would clarify and update procedures that apply when a previously released defendant is arrested in one district under a warrant issued in another district.

At its March 2023 meeting the MJAG began its discussions of Rule 40. Magistrate Judge David Horan (N.D. Tex.), wrote to the Advisory Group seeking feedback on a proposal to modify Fed. R. Crim. P. 40. The Advisory Group quickly discovered that a similar proposal from Magistrate Judge Patty Barksdale (M.D. Fla.) was circulating in the 11th Circuit, and that practices related to Rule 40 varied across the country. Magistrate Judge Joseph Volpe, the prior MJAG chair, asked Judge Barksdale to lead a group of judges to develop a proposal to address the concerns with Rule 40.

The resulting MJAG Rule 40 proposal identifies seven points of confusion involving procedures and substantive rights, such as the application of related rules, informing a defendant of an alleged violation, providing a defendant with notice of their right to counsel, applicable detention standards, and modification of detention orders. Advisory group judges also provided fiscal year 2023 statistics on the number of matters that involve Rule 40 in their districts.

The MJAG proposal would extract procedural provisions of Rule 40 to create a new Rule 5.2, "Revoking or Modifying Pretrial Release," that would model the structure of Fed. R.

Crim. P. 32.1, “Revoking or Modifying Probation or Supervised Release.” The new rule 5.2 would include seven specific provisions, including ones that ensure the defendant is informed of the alleged violation of pretrial release, has a reasonable opportunity to consult with counsel, and one to allow virtual revocation proceedings with the defendant’s consent.

The Rule 40 proposal was developed by a group of judges who worked diligently to produce an excellent document with the input of MJAG judges from across the country. The Advisory Group unanimously supports these changes to Rule 40 and we hope your committee will agree and act favorably.

Thank you for your consideration of this proposal.

Sincerely,


Janis van Meerveld
Chair, Magistrate Judges Advisory Group

Enclosure

cc: Michael Harvey
Joseph T. Phillips

Suggested Amendments

Rule 40, Federal Rules of Criminal Procedure

Contents

I.	Overview	1
II.	Rule 40.....	2
III.	History.....	2
IV.	Issues	3
V.	Previous Discussion	7
VI.	Frequency	7
VII.	Laws to Consider.....	9
VIII.	Select Cases.....	10
IX.	Suggestions.....	12

Attachment: Previous versions of Rule 40

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

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

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

- (i) failing to appear as required by the terms of that person’s release under 18 U.S.C. §§ 3141–3156 or by a subpoena; or
- (ii) violating conditions of release set in another district.

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

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

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

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; Pub. L. 96–42, §1(2), July 31, 1979, 93 Stat. 326; Apr. 28, 1982, eff. Aug. 1, 1982; Pub. L. 98–473, title II, §§ 209(c), 215(d), Oct. 12, 1984, 98 Stat. 1986, 2016, eff. Oct. 12, 1984, and Nov. 1, 1987; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.)

I. Overview

Rule 40 is confusing in at least seven ways. As a result, procedures vary from district to district and division to division. With little guidance, magistrate judges must determine the hearings to which a defendant is entitled and create resulting procedures. To promote clarity and uniformity, the Magistrate Judge Advisory Group requests consideration of revisions to Rule 40.

II. Rule 40

Rule 40 governs procedures that apply when a person is arrested in one district (“arresting district”) under a warrant issued in another district (“issuing district”) under three circumstances:

1. The issuing district issued the warrant for a criminal defendant's arrest based on a petition or motion alleging the defendant violated a condition of pretrial release.
2. The issuing district issued the warrant for a criminal defendant's arrest because the defendant failed to appear in court or at the designated place of incarceration as required by a condition of pretrial, pre-sentencing, or post-sentencing release.
3. The issuing district issued the warrant because a person failed to appear in court or elsewhere as required by a subpoena.

III. History

Rule 40 used to contain procedures for two additional circumstances:

1. The issuing district issued the warrant for a criminal defendant's arrest based on a charge in a complaint, information, or indictment.

2. The issuing district issued the warrant for a criminal defendant's arrest based on a petition alleging the defendant violated a probation or supervised release condition.

See Attachment (previous versions of Rule 40).

Procedures for those two circumstances were moved to Rule 5 (“Initial Appearance”) and Rule 32.1 (“Revoking or Modifying Probation or Supervised Release”) without substantive changes for the other circumstances.

IV. Issues

Rule 40 is confusing in at least seven ways.

1. **Which parts of Rule 5(c)(3) apply?** Rule 40(b) states the judge in the arresting district “must proceed under Rule 5(c)(3) as applicable.” Rule 5 governs initial appearances under a warrant or summons based on a criminal charge in a complaint, information, or indictment. Rule 5(c)(3) has five subsections. Which subsections apply is unclear.
 - a. **Informing the defendant of Rule 20.** Rule 5(c)(3)(A) states the judge in the arresting district “must inform the defendant about the provisions of Rule 20.” Rule 20 governs transferring a prosecution for a plea and sentencing “from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present.” This subsection does not apply under the second circumstance, where the order to appear is entered after a plea or sentencing. This subsection does not apply under the third circumstance because that circumstance addresses a person who has failed to appear as required by a subpoena. Does this

subsection apply under the first circumstance, where the defendant is alleged to have violated a condition of pretrial release?

- b. **Issuing a warrant.** Rule 5(c)(3)(B) states that “if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district.” This subsection does not apply because Rule 40 applies only when an arrest is made under a warrant.
- c. **Conducting a preliminary hearing.** Rule 5(c)(3)(C) states “the magistrate judge must conduct a preliminary hearing if required by Rule 5.1.” Rule 5.1 requires a preliminary hearing if “a defendant is charged with an offense other than a petty offense” unless the defendant waives the hearing, the defendant is indicted, the government files an information, or the defendant is charged with a misdemeanor and consents to trial before a magistrate judge. Rule 5.1 has a 21-day deadline for a defendant who is not detained. Does this subsection apply?
- d. **Conducting an identity hearing.** Rule 5(c)(3)(D) requires a magistrate judge to “transfer the defendant to the district where the offense was allegedly committed if: (i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and (ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant.” Does this subsection apply if the

defendant is being supervised in the arresting district (and whose identity therefore is known)?

- e. **Transferring papers to the issuing district.** Rule 5(c)(3)(E) states “when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.” This section applies.
2. **Why is “adjacent district” excluded as an option?** Rule 40(a) states that a “person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district.” Rule 5(c)(2) addressing an initial appearance on a complaint, information, or indictment, and Rule 32.1(a)(1)(B) addressing an initial appearance on an alleged violation of a condition of probation or supervised release permit taking a defendant without unnecessary delay before a magistrate judge in the arresting district or “an adjacent district if the appearance can occur more promptly there,” or, for Rule 5(c)(2), an adjacent district if the offense was allegedly committed there and the initial appearance will occur on the day of the arrest.” Why does Rule 40 exclude an “adjacent district”?
 3. **Why is informing the defendant of the alleged violation excluded?** Rule 32.1(a)(3), addressing an initial appearance on an alleged violation of a condition of probation or supervised release, requires the judge to inform the defendant about the alleged violation. Why does Rule 40 exclude this requirement?
 4. **Why is informing the defendant about the right to consult counsel excluded? How does the previous appointment of counsel in the issuing district affect the right?** Rule 32.1(a)(3), addressing an initial appearance on an alleged violation of a condition of probation or supervised release, requires the judge

to inform the defendant about the right to retain counsel or request an appointment of counsel. Why does Rule 40 exclude a similar requirement? How does the fact that the defendant already has counsel in the issuing district affect any right to counsel for any proceedings in the arresting district?

5. **What detention standard applies?** 18 U.S.C. § 3148 provides, “A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer **in the district in which such person’s arrest was ordered for a proceeding** in accordance with this section. To the extent practicable, a person charged with violating the condition of release that such person not commit a Federal, State, or local crime during the period of release, shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer (1) finds that there is—(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or (B) clear and convincing evidence that the person has violated any other condition of release; and (2) finds that—(A) based on the factors set forth in section 3142(g) ..., there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or (B) the person is unlikely to abide by any condition or combination of conditions of release.” What standard does the arresting district use to determine whether a defendant should be detained for transportation back to the issuing district (which can be lengthy) or should be released and ordered to appear in the issuing district?

6. **Under what circumstances would a judge in the arresting district modify a detention order?** Rule 40 permits the judge in the arresting district to modify a detention order. Under what circumstances would a defendant be arrested under a warrant

for violating a detention order, which assumes the defendant is detained? Does this provision refer to an order establishing a date to report to a designated facility? Does this provision refer to an order by the issuing court directing the defendant's detention upon arrest under the warrant by the issuing court (an outdated practice)?

7. **Does a magistrate judge in the issuing district have the authority to modify a detention order by a magistrate judge in the arresting district?** At least two courts have held no. *See U.S. v. Manley*, 659 F. Supp. 3d 15 (D.D.C. 2023); *U.S. v. Patterson*, No. 13-137, 2013 WL 5375438 (E.D. La. Sept. 24, 2013). Some magistrate judges in issuing districts modify orders entered by magistrate judges in arresting districts, including sua sponte to conform language to local bail practice and special conditions preferred by the issuing district's pretrial officers.

V. Previous Discussion

The Advisory Committee on Criminal Rules considered amending Rule 40 in May 2019 based on a suggestion in December 2018 ([18-CR-G](#)). See discussions beginning on page 169 of the [May 2019 agenda book](#) and page 169 of the [May 2019 meeting minutes](#).

The committee acknowledged Rule 40 is confusing but declined to pursue an amendment. Based on membership understanding, informal surveys, or both, the committee believed the circumstances occur infrequently. The discussion ended with this comment: “[E]very Rules committee could identify an example of a rule that could be clarified. But there is a cost to amending rules too often, and we do get complaints when they are amended too often. So unless there is a real need on the ground to solve a problem, it is best for the committees not to try to achieve every clarification that they could in the rules.” Minutes at p. 7.

VI. Frequency

It is unclear how often the first circumstance occurs (the issuing district issued the warrant for a defendant's arrest based on a petition alleging the defendant violated a condition of pretrial release). Empirically, the first circumstance occurs with some frequency in some districts. Here are FY 2023 figures for a few districts.

Eastern District Arkansas

- Total defendants with alleged violations submitted through petitions: 265
- Of 265, total defendants for whom pretrial requested warrants: 61 (23%)
- Of 61, total arrests occurring outside the district: 8 (13%)

Middle District of Florida

- Total defendants with alleged violations submitted through petitions: 114
- Of 114, total defendants for whom pretrial requested warrants: 52 (46%)
- Of 52, total arrests occurring outside the district: 6 (12%)

District of Kansas

- Total defendants with alleged violations submitted through petitions: 45
- Of 45, total defendants for whom pretrial requested warrants: 33 (73%)
- Of 33, total arrests occurring outside the district: 3 (9%)

Eastern District of Louisiana

- Total defendants with alleged violations submitted through petitions: 18
- Of 18, total defendants for whom pretrial requested warrants: 16 (89%)
- Of 16, total arrests occurring outside the district: 1 (6%)

Southern District of New York

- Total defendants with alleged violations submitted through petitions: 200
- Of 200, total defendants for whom pretrial requested warrants: 10 (5%)
- Of 10, total arrests occurring outside the district: 4 (40%)

Western District of Oklahoma

- Total defendants with alleged violations submitted through petitions: 150
- Of 150, total defendants for whom pretrial requested warrants: 50 (33%)
- Of 50, total arrests occurring outside the district: 9 (18%)

District of Oregon

- Total defendants with alleged violations submitted through petitions: 204
- Of 204, total defendants for whom pretrial requested warrants: 107 (52%)
- Of 107, total arrests occurring outside the district: 6 (6%)

Northern District of West Virginia

- Total defendants with alleged violations submitted through petitions: 121
- Of 121, total defendants for whom pretrial requested warrants: 59 (49%)
- Of 59, total arrests occurring outside the district: 18 (31%)

Western District Washington

- 8 defendants charged in other districts were seen in Seattle in FY2023

VII. Laws to Consider

18 U.S.C. § 3141	Release and detention authority generally
18 U.S.C. § 3142	Release or detention of a defendant pending trial
18 U.S.C. § 3143	Release or detention of a defendant pending sentencing or appeal
18 U.S.C. § 3144	Release or detention of a material witness
18 U.S.C. § 3145	Review and appeal of a detention order
18 U.S.C. § 3148	Sanctions for a violation of release conditions
18 U.S.C. § 3149	Surrender of an offender by a surety
18 U.S.C. § 3156	Definitions (for 18 U.S.C. §§ 3141–3150)
Fed. R. Crim. P. 4	Arrest Warrant or Summons on a Complaint
Fed. R. Crim. P. 4.1	Complaint, Warrant, Or Summons by Telephone or Other Reliable ... Means
Fed. R. Crim. P. 5	Initial Appearance
Fed. R. Crim. P. 9	Arrest Warrant or Summons on an Indictment or Information
Fed. R. Crim. P. 17	Subpoena
Fed. R. Crim. P. 32	Sentencing and Judgment
Fed. R. Crim. P. 32.1	Revoking or Modifying Probation or Supervised Release
Fed. R. Crim. P. 42	Criminal Contempt

Fed. R. Crim. P. 43	Defendant's Presence
Fed. R. Crim. P. 44	Right to and Appointment of Counsel
Fed. R. Crim. P. 46	Release from Custody; Supervising Detention
Fed. R. Crim. P. 50	Prompt Disposition
Fed. R. Crim. P. 59	Matters Before a Magistrate Judge
Fed. R. Civ. P. 45	Subpoena

VIII. Select Cases

Review of Issuing District's Order

U.S. v. Manley, 659 F. Supp. 3d 15 (D.D.C. 2023) (holding a magistrate judge in the issuing district lacks authority to reopen a detention hearing conducted by a magistrate judge in the arresting district)

U.S. v. Patterson, No. 13-137, 2013 WL 5375438 (E.D. La. Sept. 24, 2013) (holding a magistrate judge in the issuing district lacks authority to reopen a detention hearing conducted by a magistrate judge in the arresting district)

U.S. v. Godines-Lupian, 816 F. Supp. 2d 126 (D.P.R. 2011) (holding the district judge in the issuing district is the appropriate judge to review a release or detention order by a magistrate judge in the arresting district; staying the release order pending transportation to the issuing district within five days)

Authority to Conduct Detention Hearing in Arresting District; Standards Unspecified or Reversion to Standards in 18 U.S.C. § 3142

U.S. v. Thomas, No. 23-30099, 2023 WL 2523502 (E.D. Mich. Mar. 14, 2023) (rejecting the government's position that the magistrate judge in the arresting district had no authority to hold a detention hearing considering that the magistrate judge in the issuing district had entered an order revoking bond pending the defendant's return to the issuing district; applying standards in 18 U.S.C. § 3142)

U.S. v. Lank, No. 3:23-mj-339 (N.D. Fla. Nov. 21, 2023) (holding a defendant has a right to a detention hearing in the arresting district and determining standards to apply if the defendant is awaiting sentencing)

U.S. v. Alonzo, No. 3:22-MJ-1077-BN, 2022 WL 17182076 (N.D. Tex. Nov. 23, 2022) (holding the standards in 18 U.S.C. §§ 3142 and 3144 apply during a detention hearing by the magistrate judge in the arresting district)

U.S. v. Fellows, No. 1:21-MJ-0314 (DJS), 2021 WL 3025741 (N.D.N.Y. June 23, 2021) (holding a defendant has a right to a detention hearing in the arresting district; standards unspecified)

U.S. v. Savader, 944 F. Supp. 2d 209 (E.D.N.Y. 2013) (discussing the history of Rule 40; holding a defendant is entitled to a detention hearing in the arresting district; observing deference must be given to detention determinations in the issuing district but observing the arresting district may be in a strong position to make findings on the defendant's ties to the community; applying the standards in 18 U.S.C. § 3142)

U.S. v. Murphy, No. 1:11-mj-615-KPF, 2011 WL 5023534 (S.D. Ind. Oct. 19, 2011) (holding the issuing district is the more appropriate district to have a detention hearing than the arresting district)

Government's Motion for Transportation to the Issuing District as a Modification of the Issuing District's Release Order; Standards Unspecified

U.S. v. Turner, No. 1:02-CR-699, 2023 WL 2401581 (W.D.N.C. Mar. 8, 2023) (declining to conduct a preliminary hearing in the arresting district as "more appropriately reserved for the court in the charging district" and considering the government's motion for detention during transportation to the issuing district a motion for a temporary modification of the release order; standards unspecified)

U.S. v. Szczerbiak, No. 1:21 MJ 28 WCM, 2021 WL 1784341 (W.D.N.C. May 5, 2021) (observing the parties did not believe detention during transportation to the issuing district would be a temporary modification of the release order; noting "authorities clearly supporting that view have not been located immediately," and holding to the extent placing the defendant in

custody for transportation is a change, the change is warranted; standards unspecified)

Rule 40 Inapplicable Where Person is Arrested on Warrant for Civil Contempt

Civ. Contempt Proc. Pending in United States Dist. Ct., W. Dist. of Texas (Austin Div.) v. Schmidt, No. 1:20-CV-00273-RP, 2020 WL 2777495 (S.D. Fla. May 29, 2020) (ruling Rule 40 does not apply in a civil proceeding where a person is arrested in one district based on a civil-contempt warrant issued in another district)

No Right to Preliminary Hearing in Arresting District

United States v. Jaitly, No. 09-644-M, 2009 WL 3260554 (E.D. Pa. Oct. 8, 2009) (holding a defendant has no right to a preliminary hearing in the arresting district)

IX. Suggestions

The Magistrate Judges Advisory Group suggests considering these amendments to address the first circumstance and any other resulting amendments to address the second and third circumstances.

1. Move the procedures for the first circumstance (the issuing district issued the warrant for the arrest of a defendant based on a petition alleging the defendant violated a condition of pretrial release) from Rule 40, which is under Title VIII “Supplementary and Special Proceedings,” to a new Rule 5.2, which would be under Title II “Preliminary Proceedings.”
2. Title new Rule 5.2, “Revoking or Modifying Pretrial Release,” consistent with Fed. R. Crim. P. 32.1, “Revoking or Modifying Probation or Supervised Release.”
3. Include in new Rule 5.2 seven provisions:

- a. The requirement in current Rule 40(a) (“A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for ... (ii) violating conditions of release set in another district”) but modifying the language consistent with Rule 5(c)(2) to say, “A defendant must be taken without unnecessary delay before a magistrate judge if the defendant has been arrested under a warrant issued in another district for violating conditions of pretrial release set in another district.”
- b. A new requirement using language from Rule 5(c)(2) and Rule 32.1(a)(1)(B) that the initial appearance must be (a) in the district of arrest; or (b) in an adjacent district if: (1) the appearance can occur more promptly there; or (2) the warrant was issued there and the initial appearance can occur on the day of arrest.
- c. The procedure in Rule 32.1(a)(3)(A) that “[t]he judge must inform the person of ... the alleged violation of probation or supervised release” but change “probation or supervised release” to “pretrial release”;
- d. The procedure in Rule 5(c)(3)(D) that the judge must transfer the defendant to the district where the offense is pending upon production of the warrant and an identity finding but changing “the district where the offense was allegedly committed” to “the

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

- e. The right in Rule 5(d)(2) that the judge "must allow the defendant reasonable opportunity to consult with counsel." (Note: The defendant will already have counsel in the issuing district but usually not in the arresting district.)
- f. The videoconferencing option in current Rule 5(f) and Rule 40(d), but also enabling the issuing district to virtually conduct the revocation proceeding with the defendant's consent.
- g. A standard for determining whether the defendant should be detained for transport back to the issuing district, perhaps with reference to the 18 U.S.C. § 3142(d) and (g), considering whether the standard is different if the defendant is awaiting sentencing.

TAB 13

MEMORANDUM

DATE: April 8, 2026

TO: Advisory Committee on Criminal Rules

FROM: Catherine T. Struve

RE: Proposed draft amendments relating to self-represented litigants

Enclosed with this memo are proposed draft amendments to Criminal Rules 45 and 49. 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 Criminal Rules 45 and 49; (2) a redline showing how the clean version of the Criminal Rule 49 draft differs from the one in the fall 2025 agenda book;¹ 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.

¹ It seems most useful for the redline to show changes compared with the fall 2025 version. For the members of the Pro Se Filing Subcommittee, I note that the enclosed draft differs in only three particulars from the draft circulated to the Subcommittee before its March 2026 meeting: (1) the service-completeness provision in Rule 49(a)(3) has been revised per the Subcommittee's instructions and then lightly revised further as noted in Part III.B below; (2) the second sentence in proposed Rule 49(b)(2)(B)(ii) was revised as noted at the Subcommittee's meeting and shown in Part I below; and (3) the Committee Note's discussion of Rule 49(a)(3)'s service-completeness provision was revised per the Subcommittee's instructions.

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 structure² (shown for illustrative purposes in a clean version that would become part of Criminal Rule 49(b)):

(2) Electronic Filing and Signing.

(A) *[subpart (A) deals with represented parties]*

(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’s³ case, unless a court order or local rule prohibits the party from doing so.

(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

² The Committee Note to this provision has also been revised to track the new structure.

³ 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.

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.

II. Limitation of e-filing provision to self-represented “parties”

The Criminal Rules as amended in 2018 already make a considered choice to provide that *all* nonparties – even those represented by counsel – may “use the court’s electronic-filing system only if allowed by court order or local rule,” Criminal Rule 49(c). Though the participants in the Criminal Rules Committee’s fall 2025 discussion had varying perspectives on the matter, the fact that the Committee made this policy choice less than a decade ago seems to weigh in favor of leaving that choice undisturbed by the current project. In addition, the nature of the proposed amendment to the provision concerning electronic filing by self-represented litigants provides an additional reason to confine that amended provision to self-represented *parties*: The proposed amended 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. Accordingly, the updated draft restricts the new self-represented-litigant e-filing provisions (in the Appellate, Civil, and Criminal Rules) to self-represented “parties.”⁴

While the current e-filing rules in the Civil and Appellate Rules use “unrepresented person,” Criminal Rule 49(b)(3)(B) deals only with electronic filing by a “**party** not represented by an attorney” (emphasis added). Meanwhile, Criminal Rule 49(c) provides: “**Service and Filing by Nonparties.** A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court’s electronic-filing system only if allowed by court order or local rule.” The 2018 Committee Note to Rule 49(c) explains:

This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to

4 As discussed in Part IV, the Bankruptcy Rules Committee’s Technology Subcommittee is proposing to the Bankruptcy Rules Committee that it make a different choice for the Bankruptcy Rules provisions. The reasons for their proposal seem specific to the bankruptcy context.

serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

During the publication and comment cycle that produced the 2018 amendments to Rule 49, there was some focus on proposed Rule 49(c). Though NACDL stated that it was "satisfied with the Committee's proposed resolution of the question of filing by unrepresented parties and by non-parties,"⁵ the Pennsylvania Bar Association took a different view, stating:

Most of the proposals in the amendment are unobjectionable, reflect the evolving prominence of electronic filing, and conform with the civil rules. However, proposed Rule 49(c), governing service and filing by nonparties, is problematic. Proposed Rule 49(c) requires nonelectronic filing by nonparties, unless otherwise provided by court order or local rule. That may unfairly burden nonparties and may effectively truncate their time to respond to filings in some cases.

Two premises underlie this concern. First, non-electronic filing is complete only upon the physical delivery of the document to the clerk's office, not upon mailing. See Proposed Rule 49(b)(2)(B). Second, counsel for a nonparty intervenor will often be located at a substantial distance from the courthouse. Not every federal district requires out-of-district lawyers to engage local counsel, for example, and counsel for an intervenor may reside in an adjoining district or across the country. When a district is geographically large, even in-district counsel may have to travel a substantial distance to the courthouse. Without electronic filing capabilities, a nonparty filer represented by counsel at a distance will effectively have one day fewer to complete its filings if it can afford guaranteed overnight delivery, and still less time if it must rely on regular mail.

Under the proposed rule, access to electronic filing may be granted to nonparties on an individual (court order) basis or by local rule. It is questionable whether a non-electronic default is justifiable, however. Such a default makes sense for unrepresented parties (pro se defendants/movants), see Proposed Rule 49(b)(3)(B), the majority of whom are incarcerated with limited computer access. But nonparties are in the best position to weigh the pros and cons of electronic versus nonelectronic service and filing, and arguably should not be required to seek access to electronic filing on a case-by-case basis. Any needed change to the

5 National Association of Criminal Defense Lawyers, "Amendments to Criminal Rules Proposed for Comment," Feb. 15, 2017, at 2, available at <https://www.regulations.gov/comment/USC-RULES-CR-2016-0005-0010> .

CM/ECF architecture to facilitate nonparty electronic filing could be implemented.

Several of the Advisory Committee’s concerns underlying the proposed non-electronic default for nonparties appear to be unfounded. The concern that “it may not be desirable for [nonparties] to be served with pleadings and filings that are unrelated to those aspects of the case [in which the nonparty intervened],” could be addressed by a minor change to the ECF system allowing tagging of filings relevant to the nonparty, and in any event should be left to the nonparty to weigh. The concern that “[s]ome [nonparties], particularly victims, provide information to the court that they may not wish to have shared with the parties” appears to confuse non-electronic filing with filing *ex parte* and under seal. Even non-electronic filings are “shared with the parties” and are uploaded for public access on PACER, unless the court rules otherwise. Meanwhile, sealed and *ex parte* filings are shielded from disclosure under the current CM/ECF architecture, and any such nonparty electronic filings would be, as well.⁶

Additionally, Sai’s submission advocated changes that would have permitted both self-represented parties and self-represented nonparties broader access to CM/ECF.⁷

6 Comments of the Pennsylvania Bar Association on Proposed Amendments to the Federal Rules of Criminal Procedure, February 10, 2017, at 4-5, available at <https://www.regulations.gov/comment/USC-RULES-CR-2016-0005-0006>.

7 Though much of Sai’s discussion focused on self-represented parties, Sai also referred to the need for “access for independent journalists,” see Sai — Comments re proposed changes to CM/ECF filing rules for *pro se* litigants, at 27, available at <https://www.regulations.gov/comment/USC-RULES-CR-2016-0005-0009>. Sai expanded on this concern by noting the importance of nonparties being able to “track ‘cases of interest.’” At the time, Sai reported that “part of how the current CM/ECF system works is that CM/ECF filers — but not ordinary PACER users — can track ‘cases of interest.’” *Id.* at 29.

Though I have not been able to locate any general statement about the current scope of access for nonparties to track cases of interest, it appears that at least some federal courts now provide instructions on how members of the public can sign up for e-notices of filings in a case of interest. See, e.g., U.S. Court of Appeals for the Tenth Circuit, How to Receive Notices for Cases of Interest, available at <https://www.ca10.uscourts.gov/cmecf/how-receive-notices-cases-interest>; U.S. Court of Appeals for the Eleventh Circuit, How to Receive Notices for Cases of Interest, available at <https://www.ca11.uscourts.gov/e-filing/notices-cases-interest>; U.S. District Court, Northern District of California, Obtaining Information About Cases, available at <https://cand.uscourts.gov/cases-e-filing/obtaining-information-about-cases> (“The court ... makes it possible for journalists and interested members of the public to register for so-called ‘Special Mailing Group (SMG)’ accounts within the court’s Electronic Filing System (ECF). Once you have your ECF account, you can sign up for Notices of Electronic Filing (‘NEFs’) in particular

The minutes of the Criminal Rules Committee report that the Committee’s spring 2017 discussion addressed the comments on Rule 49(c) thus:

The Subcommittee discussed the comments, and it decided to stick with the original conclusion that in criminal cases presumptive electronic filing should be limited to the lawyer for the government and the lawyer for the defendant, and not expanded to these other categories.⁸ Respectfully disagreeing with these public comments, the Subcommittee suggested no change be made to the published version. Judge Molloy asked if anyone disagreed with that position, and no one did.”⁹

It seems that the Criminal Rules Committee’s decision to approve Rule 49(c) after that comment process provides a reason to maintain – in the current package of proposals – the same judgment call (that is, to limit the new proposed e-filing rule to self-represented *parties*). Moreover, as noted above, even in the other rule sets that currently apply to self-represented “persons,” it seems better to limit the new approach to self-represented “parties,” because shifting to a presumption that allows e-filing access could otherwise be misread by non-parties as granting them access. I included this change in the sketches that went to the Advisory Committees in fall 2025 and I flagged the issue in the accompanying memo.

The Criminal Rules Committee was the only Advisory Committee to hold a substantive discussion of this issue in fall 2025. The draft minutes elsewhere in this agenda book summarize those discussions, and note that the Committee asked the Pro Se Filing Subcommittee to further consider the matter. The Subcommittee met by Teams in mid-March and determined that the proposed e-filing provision should refer to self-represented “parties.” Accordingly, that is the approach taken in the enclosed draft, as well as in the proposed drafts presented in the agenda books for the Civil and Appellate Rules Committees.

cases and receive email notification when a document related to that case is available to be viewed electronically via PACER.”). *See also* PACER, Frequently Asked Questions, available at <https://pacer.uscourts.gov/help/faqs/how-can-i-receive-case-alerts-using-rss-feed> (“Some courts provide automatic case notification and alerts through Really Simple Syndication (RSS) feeds. PACER users can keep track of newly docketed events by subscribing to a court’s RSS feed, which is free and includes automatic notification of case activity, summarized text, and links to the document and docket report. You can view the document or docket report linked from the RSS feed by logging into PACER.”).

⁸ [N.B.: *The preceding portion of the minutes indicates that “these other categories” refers to “inmates ... , ... non-parties, and ... pro se filers.” April 17, 2017 Minutes of the Criminal Rules Committee at 28, available at https://www.uscourts.gov/sites/default/files/spring_2017_criminal_rules_committee_meeting_minutes_final_0.pdf.]*

⁹ April 17, 2017 Minutes of the Criminal Rules Committee, *supra* note 8, at 28-29.

III. Other developments since fall 2025

This section highlights three changes made since the Committee’s fall 2025 meeting: the deletion of the provision addressing service of papers not filed (Part III.A), revisions to the provision addressing when service by the notice of case activity is complete (Part III.B), and a revision to the provision addressing service of sealed filings (Part III.C). Part III.D notes a question that has been raised about a statement in the Committee Note to proposed Rule 49(b)(2). 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 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 49(a)(5): “**Serving Papers That Are Not Filed.** Rule 49(a)(4) 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 more recently, 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] is complete as of the notice’s date.” I should note that the bracketed language “by a notice of case activity” was not in the version approved by the Pro Se Filing 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.

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.”¹⁰ 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.

10 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 .

Accordingly, we retained the provision for local control (shown in the Criminal Rule 49 draft as proposed new Criminal Rule 49(a)(3)(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 49(b)(2)(B) includes a sentence concerning the permissibility of a local provision requiring unrepresented parties to obtain court permission to use the court’s e-filing system: “For example, local provisions that require self-represented 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.”

Because a project participant raised a question about the desirability of including this language in the note, I am flagging it for the Committee’s consideration. On one hand, including this language would recognize existing practices in more than half of the federal courts of appeals and district courts.¹¹ On the other hand, because it could 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

¹¹ 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”).

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 rejection of a filing for noncompliance with national or local rules on form¹² and the enforcement of local requirements on form.¹³ The consensus view is that the project should not expand to encompass those issues.

IV. Remaining variances across the rule sets in the package

As you know, we are proposing for publication possible amendments to Appellate Rule 25, Bankruptcy Rules 5005, 8011, and 9036, and Civil Rule 5, as well as to Criminal Rule 49.¹⁴ 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. The Supreme Court also used the term “self-representation” in *Faretta v. California*,

12 See Appellate Rule 25(a)(4), Bankruptcy Rule 5005(a)(1), Civil Rule 5(d)(4), and Criminal Rule 49(b)(5).

13 See Appellate Rule 47(a)(2), Bankruptcy Rule 9029(b), Civil Rule 83(a)(2), and Criminal Rule 57(a)(2).

14 We are also proposing for publication conforming amendments to the three-day rules in Civil Rule 6 and Criminal Rule 45; the Criminal Rule 45 amendment proposal has not changed since fall 2025.

422 U.S. 806 (1975), to describe the defendant’s Sixth Amendment right to represent himself.

- Notably, the proposed amendments to Criminal Rule 17 use the term “self-represented.” None of the public comments appears to address the choice of the term “self-represented.”¹⁵
- SRL e-filing: “individual” versus “party”
 - The current rules vary in the term that they use to denote an unrepresented filer. 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 will 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 plan¹⁶ 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

15 The comment that most extensively discusses the “self-represented” provision is from Mitchell Berger, but his concern is about differential treatment, not about the terminology used. See Comment ID USC-RULES-CR-2025-0003-0012, available at <https://www.uscourts.gov/sites/default/files/document/cr-comments-0003-0017.pdf>.

Professor Paul Cassell also submitted suggestions relating to the treatment of self-represented parties, but his comments, likewise, took no issue with the terminology. See USC-RULES-CR-2025-0003-0016 at 36-37 (“The Committee should also make appropriate changes to the language about ‘self-represented’ parties, where the potential for harassing victims is particularly pronounced.”). Professor Cassell used the term “unrepresented” in suggested language denoting an “unrepresented victim,” *id.* at 36, but did not appear to criticize the use of “self-represented” in proposed Rules 17(c)(4) and (5).

16 Subject, of course, to determination by the advisory committees of the question presented in Part II.

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 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 the person's

name on a signature block, constitutes the person's signature.” See, e.g., Criminal Rule 49(b)(2)(A).

- 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.

Criminal Rule 49 draft as of March 26, 2026

Here is Criminal Rule 49, marked to show the proposed amendments. Also included is the conforming change to Criminal Rule 45.

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

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

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

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

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

10 **Electronic-Filing System.** A notice of case activity sent to a person registered
11 to receive it through the court's electronic-filing system constitutes service on that
12 person. For any service deadlines, service by a notice of case activity is complete
13 as of the date of filing. For any deadlines that run from the date of service, service
14 [by a notice of case activity]¹ is complete as of the notice's date. But these
15 qualifications apply:

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

18 (B) a court may provide by order or local rule that if a paper is filed under seal,

1 See Part III.B of the accompanying memo.

19 it must be served by other means.

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

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

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

31 (A) handing it to the person;

32 (B) leaving it:

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

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

38 (C) mailing it to the person's last known address—in which event service is
39 complete upon mailing;

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

41 (E) sending it by electronic means that the person has consented to in writing – in
42 which event service is complete upon sending, but is not effective if the
43 sender learns that it did not reach the person to be served; or
44 ~~(E)~~ (F) delivering it by any other means that the person has consented to in
45 writing—in which event service is complete when the person making
46 service delivers it to the agency designated to make delivery.

47 **(5) Definition of “Notice of Case Activity.”** The term “notice of case activity” includes
48 a notice of docket activity, a notice of electronic filing, and any other similar
49 electronic notice provided to case participants through the court’s electronic-filing
50 system to inform them of activity on the docket.

51 **(b) Filing.**

52 **(1) When Required; Certificate of Service.** Any paper that is required to be served
53 must be filed no later than a reasonable time after service. No certificate of
54 service is required when a paper is served ~~by filing it with the court’s electronic-~~
55 ~~filing system~~ through the court’s electronic-filing system under Rule 49(a)(3).
56 When a paper is served by other means, a certificate of service must be filed with
57 it or within a reasonable time after service or filing.

58 **(2) Means of Electronic Filing and Signing.**

59 **(A) By a Party Represented by Counsel – Generally Required; Exceptions.** A
60 party represented by an attorney must file electronically, unless
61 nonelectronic filing is allowed by the court for good cause or is allowed or
62 required by local rule.

63 **(B) By a Self-Represented Party – When Allowed.**

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

68 **(ii) Conditions and Restrictions on Access.** A court may set and enforce
69 reasonable conditions and restrictions on self-represented parties’
70 access to the court’s electronic-filing system (including by denying
71 or revoking access for a particular self-represented party). But the
72 court may not prohibit all self-represented parties from using the
73 system unless that prohibition includes reasonable exceptions or
74 the court permits the use of another electronic method for filing
75 papers and receiving electronic notice of activity in the party’s
76 case.

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

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

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

84 ~~(B)~~ **(3) Nonelectronically Filing.** A paper not filed electronically is filed by delivering it:

- 85 (i) to the clerk; or
86 (ii) to a judge who agrees to accept it for filing, and who must then note
87 the filing date on the paper and promptly send it to the clerk.

88 ~~(3) Means Used by Represented and Unrepresented Parties.~~

89 ~~(A) Represented Party. A party represented by an attorney must file—
90 electronically, unless nonelectronic filing is allowed by the court for good—
91 cause or is allowed or required by local rule.~~

92 ~~(B) Unrepresented Party. A party not represented by an attorney must file—
93 nonelectronically, unless allowed to file electronically by court order or—
94 local rule.~~

95 **(4) Signature.** Every written motion and other paper must be signed by at least one
96 attorney of record in the attorney's name—or by a person filing a paper if the
97 person is not represented by an attorney. The paper must state the signer's address,
98 e-mail address, and telephone number. Unless a rule or statute specifically states
99 otherwise, a pleading need not be verified or accompanied by an affidavit. The
100 court must strike an unsigned paper unless the omission is promptly corrected
101 after being called to the attorney's or person's attention.

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

104 **(c) Service and Filing by Nonparties.** A nonparty may serve and file a paper only if doing so is
105 required or permitted by law. A nonparty must serve every party as required by Rule
106 49(a), but may use the court's electronic-filing system only if allowed by court order or

107 local rule.

108 **(d) Notice of a Court Order.** When the court issues an order on any post-arraignment motion,
109 the clerk must serve notice of the entry on each party as required by Rule 49(a). A party
110 also may serve notice of the entry by the same means. Except as Federal Rule of
111 Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not
112 affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to
113 appeal within the allowed time.

114 **Committee Note**

115 Rule 49 is amended to address two topics concerning self-represented parties.
116 (Concurrent amendments are made to Bankruptcy Rules 5005, 8011, and 9036, Civil Rule 5, and
117 Appellate Rule 25.) Rule 49(a) is amended to address service of documents filed by a self-
118 represented litigant in paper form. Because all such paper filings are uploaded by court staff into
119 the court's electronic-filing system, there is no need to require separate paper service by the filer
120 on case participants who receive an electronic notice of the filing from the court's electronic-
121 filing system. Rule 49(b) is amended to expand the availability of electronic modes by which
122 self-represented parties can file documents with the court and receive notice of filings that others
123 make in the case.

124
125 **Subdivision (a)(3).** Rule 49(a)(3) is revised so that it focuses solely on the service of
126 notice by means of the court's electronic-filing system. What had been Rule 49(a)(3)(B)
127 (concerning "other electronic means" of service) is relocated, as revised, to a new Rule
128 49(a)(4)(E).

129
130 Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a
131 litigant who is registered to receive a notice of case activity from the court's electronic-filing
132 system. Litigants who are registered to receive a notice of case activity include those litigants
133 who are participating in the court's electronic-filing system with respect to the case in question
134 and also include those litigants who receive the notice because they have registered for a court-
135 based electronic-noticing program. (Former Rule 49(a)(3)(A)'s provision for service by "on a
136 registered user by filing [the paper] with the court's electronic-filing system" had already
137 eliminated the requirement of paper service on registered users of the court's electronic-filing
138 system by other registered users of the system; the amendment extends this exemption from
139 paper service to those who file by a means other than through the court's electronic-filing
140 system.)

141
142 Amended Rule 49(a)(3) provides that, for purposes of any deadlines for making service,

143 service by a notice of case activity is complete as of the date of filing. But the amended rule
144 provides that, for purposes of any deadlines that run from the date of service, service is complete
145 as of the date of the notice of case activity. Thus, the amended rule ensures that if there is a delay
146 between the date the court receives a filing not made through the electronic-filing system and the
147 date the court uploads that filing into the electronic-filing system, that delay will not diminish the
148 time allowed to the party whose deadline runs from the date of service.

149
150 Amended Rule 49(a)(3)(A) continues to provide that service by means of the court’s
151 electronic-filing system is not effective if the filer learns that it did not reach the person to be
152 served.

153
154 New Rule 49(a)(3)(B) states that a court may provide by order or local rule that if a paper
155 is filed under seal, it must be served by other means. This sentence is designed to account for
156 districts in which parties in the case cannot access other participants’ sealed filings via the
157 court’s electronic-filing system.

158
159 **Subdivision (a)(4).** Rule 49(a)(4) is retitled “Service by Other Means” to reflect the
160 relocation into that subdivision – as new Rule 49(a)(4)(E) – of what was previously Rule
161 49(a)(3)(B). The subdivision’s introductory phrase (“A paper may be served by”) is amended to
162 read “A paper may also be served by.” This locution ensures that Rule 49(a)(4) remains an
163 option for serving any litigant, even one who receives notices of case activity. This option might
164 be useful to litigants who will be filing non-electronically but who wish to effect service on their
165 opponents before the time when the court will have uploaded the filing into the court’s system
166 (thus generating the notice of case activity).

167
168 Subdivision (a)(4)(E) carries forward – for service by other electronic means – prior Rule
169 49(a)(3)(B)’s provision that such service is not effective if the sender “learns that it did not reach
170 the person to be served”; a similar provision is carried forward in subdivision (a)(3)(A) with
171 respect to service via the court’s electronic-filing system.

172
173 **Subdivision (a)(5).** New Rule 49(a)(5) defines the term “notice of case activity” as any
174 electronic notice provided to case participants through the court’s electronic-filing system to
175 inform them of a filing or other activity on the docket. There are two equivalent terms currently
176 in use: Notice of Electronic Filing and Notice of Docket Activity. “Notice of case activity” is
177 intended to encompass both of those terms, as well as any equivalent terms that may come into
178 use in future. The word “electronic” is deleted as superfluous now that electronic filing is the
179 default method.

180
181 **Subdivision (b)(1).** Subdivision (b)(1) previously provided that no certificate of service
182 was required when a paper was served “by filing it with the court’s electronic-filing system.”
183 This phrase is replaced by “through the court’s electronic-filing system under Rule 49(a)(3)” in
184 order to conform to the change to subdivision (a)(3).

185
186 **Subdivision (b)(2).** Amended Rule 49(b)(2) governs electronic filing and signing. New

187 Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i),
188 the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is,
189 under new Rule 49(b)(2)(B)(i), self-represented parties are presumptively authorized to use the
190 court’s electronic-filing system to file documents in their case subsequent to the case’s
191 commencement. If a [court/district] wishes to restrict self-represented parties’ access to the
192 court’s electronic-filing system, it must adopt an order or local rule to impose that restriction.
193 New Rule 49(b)(2)(B)(i) grants this presumptive authorization to a self-represented ‘party,’ not
194 to a self-represented ‘person.’ There is no change to Rule 49(c), which provides that nonparties
195 may not use the court’s e-filing system unless allowed by court order or local rule.

196
197 New Rule 49(b)(2)(B)(ii) states that the court may set reasonable conditions and
198 restrictions on access by self-represented parties to the court’s electronic-filing system. For
199 example, access to electronic filing could be allowed only to self-represented parties who are not
200 incarcerated (in light of the distinctive logistical considerations that apply in carceral settings),
201 who satisfactorily complete required training and/or certifications, and who comply with any
202 other reasonable conditions on access.

203
204 New Rule 49(b)(2)(B)(ii) expressly states that a reasonable restriction would include,
205 where appropriate, orders barring a specific self-represented party from accessing the court’s
206 electronic-filing system, or revoking a specific self-represented party’s access to the court’s
207 electronic-filing system. Another example would be a local provision stating that certain types of
208 filings – for example, notices of appeal – cannot be filed by means of the court’s electronic-filing
209 system.

210
211 However, new Rule 49(b)(2)(B)(ii) also expressly prohibits a court from barring *all* self-
212 represented parties from using the court’s electronic-filing system, unless the court also either (1)
213 includes reasonable exceptions to the prohibition, or (2) permits self-represented parties to use
214 another electronic method for filing documents (such as by email or by upload through an
215 electronic document submission system) and an alternative electronic means for receiving notice
216 of court filings and orders (such as an electronic noticing program). For example, local
217 provisions that require self-represented parties who seek to use the court’s electronic-filing
218 system to obtain permission from the judge to whom the case is assigned would count as
219 including reasonable exceptions, so long as such permission is not unreasonably withheld in
220 practice.

221
222 **Subdivision (b)(3).** What had been Rule 49(b)(2)(B) (concerning nonelectronic means of
223 filing) is carried forward as new Rule 49(b)(3).

1 **Rule 45. Computing and Extending Time**

2
3 * * *
4

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

8 **Committee Note**

9
10 Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E) as Rule
11 49(a)(4)(F).
12

Redline showing March 26, 2026 version of Criminal Rules 49 and 45 compared with fall 2025 version:

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

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

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

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

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

10 **Electronic-Filing System.** A notice of case activity sent to a person registered
11 to receive it through the court's electronic-filing system constitutes service on that
12 person ~~as of the notice's date. But. For any service deadlines, service by a notice~~
13 of case activity is complete as of the date of filing. For any deadlines that run
14 from the date of service, service [by a notice of case activity] is complete as of the
15 notice's date. But these qualifications apply:

16 ~~((A))~~ such service is not effective if the filer learns that it did not reach the person
17 to be served; and

18 ~~((B))~~ a court may provide by ~~order or~~ local rule that if a paper is filed under seal,
19 it must be served by other means.

20 **~~(A) Using the Court's Electronic-Filing System.~~** A party represented by an

21 attorney may serve a paper on a registered user by filing it with the court's
22 electronic filing system. A party not represented by an attorney may do so
23 only if allowed by court order or local rule. Service is complete upon
24 filing, but is not effective if the serving party learns that it did not reach
25 the person to be served.

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

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

31 (A) handing it to the person;

32 (B) leaving it:

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

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

38 (C) mailing it to the person's last known address—in which event service is
39 complete upon mailing;

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

41 (E) sending it by electronic means that the person has consented to in writing – in
42 which event service is complete upon sending, but is not effective if the

43 sender learns that it did not reach the person to be served; or
44 ~~(E)~~ (F) delivering it by any other means that the person has consented to in
45 writing—in which event service is complete when the person making
46 service delivers it to the agency designated to make delivery.

47 ~~[(5) Serving Papers That Are Not Filed. Rule 49(a)(4) governs service of a paper that is~~
48 ~~not filed.]~~

49 ~~[(6) Definition of “Notice of Case Activity.” The term “notice of case activity” in this-~~
50 ~~rule~~ includes a notice of docket activity, a notice of electronic filing, and any
51 other similar electronic notice provided to case participants through the court’s
52 electronic-filing system to inform them of activity on the docket.

53 **(b) Filing.**

54 **(1) When Required; Certificate of Service.** Any paper that is required to be served
55 must be filed no later than a reasonable time after service. No certificate of
56 service is required when a paper is served ~~by filing it with the court’s electronic-~~
57 ~~filing system~~ [through the court’s electronic-filing system] under Rule 49(a)(3).
58 When a paper is served by other means, a certificate of service must be filed with
59 it or within a reasonable time after service or filing.

60 **(2) Means of Electronic Filing and Signing.**

61 **(A) By a ~~Person~~Party Represented by Counsel – Generally Required;**

62 Exceptions. A party represented by an attorney must file electronically,
63 unless nonelectronic filing is allowed by the court for good cause or is
64 allowed or required by local rule.

65 **(B) By a Self-Represented Party – When Allowed.**

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

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

77 ~~**(iii) Conditions and Restrictions on Access.** A court may set **(ii)**
78 **Conditions and Restrictions on Access.** A court may set and
79 enforce reasonable conditions and restrictions on self-represented
80 parties’ access to the court’s electronic-filing system (including by
81 denying or revoking access for a particular self-represented party).
82 But the court may not prohibit all self-represented parties from
83 using the system unless that prohibition includes reasonable
84 exceptions or the court permits the use of another electronic
85 method for filing papers and receiving electronic notice of activity
86 in the party’s case.~~

87 ~~(iv) Restrictions on a Particular Person. A court may deny a particular~~
88 ~~person access to the court's electronic filing system and may~~
89 ~~revoke a person's previously granted access for not complying~~
90 ~~with the conditions authorized in (iii).~~

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

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

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

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

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

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

106 **(B) Unrepresented Party.** A party not represented by an attorney must file
107 nonelectronically, unless allowed to file electronically by court order or
108 local rule.

132 filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by
133 court staff into the court’s electronic-filing system, there is no need to require separate paper
134 service by the filer on case participants who receive an electronic notice of the filing from the
135 court’s electronic-filing system. Rule 49(b) is amended to expand the availability of electronic
136 modes by which self-represented parties can file documents with the court and receive notice of
137 filings that others make in the case.

138
139 **Subdivision (a)(3).** Rule 49(a)(3) is revised so that it focuses solely on the service of
140 notice by means of the court’s electronic-filing system. What had been Rule 49(a)(3)(B)
141 (concerning “other electronic means” of service) is relocated, as revised, to a new Rule
142 49(a)(4)(E).

143
144 Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a
145 litigant who is registered to receive a notice of case activity from the court’s electronic-filing
146 system. Litigants who are registered to receive a notice of case activity include those litigants
147 who are participating in the court’s electronic-filing system with respect to the case in question
148 and also include those litigants who receive the notice because they have registered for a court-
149 based electronic-noticing program. (~~Current~~~~Former~~ Rule 49(a)(3)(A)’s provision for service by
150 “on a registered user by filing [the paper] with the court’s electronic-filing system” had already
151 eliminated the requirement of paper service on registered users of the court’s electronic-filing
152 system by other registered users of the system; the amendment extends this exemption from
153 paper service to those who file by a means other than through the court’s electronic-filing
154 system.)

155
156 ~~[The last sentence of amended Rule 49(a)(3)] [Rule 49(a)(3)(B)] states that a court may~~
157 ~~provide by~~ Amended Rule 49(a)(3) provides that, for purposes of any deadlines for making
158 service, service by a notice of case activity is complete as of the date of filing. But the amended
159 rule provides that, for purposes of any deadlines that run from the date of service, service is
160 complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there
161 is a delay between the date the court receives a filing not made through the electronic-filing
162 system and the date the court uploads that filing into the electronic-filing system, that delay will
163 not diminish the time allowed to the party whose deadline runs from the date of service.

164
165 Amended Rule 49(a)(3)(A) continues to provide that service by means of the court’s
166 electronic-filing system is not effective if the filer learns that it did not reach the person to be
167 served.

168
169 New Rule 49(a)(3)(B) states that a court may provide by order or local rule that if a paper
170 is filed under seal, it must be served by other means. This sentence is designed to account for
171 districts in which parties in the case cannot access other participants’ sealed filings via the
172 court’s electronic-filing system.

173
174 **Subdivision (a)(4).** Rule 49(a)(4) is retitled “Service by Other Means” to reflect the

175 relocation into that subdivision – as new Rule 49(a)(4)(E) – of what was previously Rule
176 49(a)(3)(B). The subdivision’s introductory phrase (“A paper may be served by”) is amended to
177 read “A paper may also be served by.” This locution ensures that Rule 49(a)(4) remains an
178 option for serving any litigant, even one who receives notices of filing-case activity. This option
179 might be useful to litigants who will be filing non-electronically but who wish to effect service
180 on their opponents before the time when the court will have uploaded the filing into the court’s
181 system (thus generating the notice of case activity).

182
183 ~~[Subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior~~
184 ~~rule’s Rule 49(a)(3)(B)’s provision that such service is not effective if the sender “learns that it~~
185 ~~did not reach the person to be served”; a similar provision is also included in subdivision (a)(3)–~~
186 ~~with respect to service via the court’s electronic-filing system.] [Although new subdivision–~~
187 ~~(a)(4)(E) carries forward— for service by other electronic means—the prior rule’s provision that–~~
188 ~~such service is not effective if the sender “learns that it did not reach the person to be served,” no~~
189 ~~such proviso is included in new subdivision (a)(3). This is because experience has demonstrated–~~
190 ~~the general reliability of notice and service through the court’s electronic-filing system on those–~~
191 ~~registered to receive notices of electronic filing from that system.] carried forward in subdivision~~
192 ~~(a)(3)(A) with respect to service via the court’s electronic-filing system.~~

193
194 ~~**Subdivision (a)(5).** New Rule 49(a)(5) addresses service of papers not filed with the–~~
195 ~~court. It makes explicit what is arguably implicit in new Rule 49(a)(3): If a paper is not filed with~~
196 ~~the court, then the court’s electronic system will never generate a notice of case activity, so the–~~
197 ~~sender cannot use Rule 49(a)(3) for service and thus must use Rule 49(a)(4).]~~

198
199 ~~**Subdivision (a)(6).** New Rule 49(a)(6)~~ **Subdivision (a)(5).** New Rule 49(a)(5) defines the
200 term “notice of case activity” as any electronic notice provided to case participants through the
201 court’s electronic-filing system to inform them of a filing or other activity on the docket. There
202 are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket
203 Activity. “Notice of case activity” is intended to encompass both of those terms, as well as any
204 equivalent terms that may come into use in future. The word “electronic” is deleted as
205 superfluous now that electronic filing is the default method.

206
207 **Subdivision (b)(1).** Subdivision (b)(1) previously provided that no certificate of service
208 was required when a paper was served “by filing it with the court’s electronic-filing system.”
209 This phrase is replaced by ~~“[through the court’s electronic-filing system]~~ under Rule 49(a)(3)”
210 in order to conform to the change to subdivision (a)(3).

211
212 **Subdivision (b)(2).** Amended Rule 49(b)(2) governs electronic filing and signing. New
213 Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i),
214 the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is,
215 under new Rule 49(b)(2)(B)(i), self-represented parties are presumptively authorized to use the
216 court’s electronic-filing system to file documents in their case subsequent to the case’s
217 commencement. ~~(The rule grants this presumptive authorization to a self-represented ‘party,’ not~~

218 a self-represented ‘person’; the rule does not grant nonparty nonlawyers any right to use the
219 court’s e-filing system. See Rule 49(e.) If a districtIf a [court/district] wishes to restrict self-
220 represented parties’ access to the court’s electronic-filing system, it must adopt an order or local
221 rule to impose that restriction. New Rule 49(b)(2)(B)(i) grants this presumptive authorization to a
222 self-represented ‘party,’ not to a self-represented ‘person.’ There is no change to Rule 49(c),
223 which provides that nonparties may not use the court’s e-filing system unless allowed by court
224 order or local rule.

225
226 UnderNew Rule 49(b)(2)(B)(ii), a local rule or general court order that bars persons not-
227 represented by an attorney from using the court’s electronic-filing system must include-
228 reasonable exceptions, unless that court permits the use of another electronic method for filing-
229 documents and receiving electronic notice of activity in the case. But Rule 49(b)(2)(B)(iii) makes
230 clear) states that the court may set reasonable conditions and restrictions on access to the court’s-
231 electronic-filing system.

232
233 A court can comply with Rules 49(b)(2)(B)(ii) and (iii) by doing either of the following:—
234 (1) Allowing reasonable access forby self-represented parties to the court’s electronic-filing
235 system, or (2) providing self-represented parties with an alternative electronic means for filing.
236 For example, access to electronic filing could be allowed only to self-represented parties who are
237 not incarcerated (in light of the distinctive logistical considerations that apply in carceral
238 settings), who satisfactorily complete required training and/or certifications, and who comply
239 with any other reasonable conditions on access.

240
241 New Rule 49(b)(2)(B)(ii) expressly states that a reasonable restriction would include,
242 where appropriate, orders barring a specific self-represented party from accessing the court’s
243 electronic-filing system, or revoking a specific self-represented party’s access to the court’s
244 electronic-filing system. Another example would be a local provision stating that certain types of
245 filings – for example, notices of appeal – cannot be filed by means of the court’s electronic-filing
246 system.

247
248 However, new Rule 49(b)(2)(B)(ii) also expressly prohibits a court from barring *all* self-
249 represented parties from using the court’s electronic-filing system, unless the court also either (1)
250 includes reasonable exceptions to the prohibition, or (2) permits self-represented parties to use
251 another electronic method for filing documents (such as by email or by upload through an
252 electronic document submission system) and an alternative electronic means for receiving notice
253 of court filings and orders (such as an electronic noticing program). ~~That is, a~~For example, local
254 rule generally prohibiting accessprovisions that require self-represented parties who seek to use
255 the court’s electronic-filing system to obtain permission from the judge to whom the case is
256 assigned would include “count as including reasonable exceptions” (within the meaning of the-
257 Rule) if it provided reasonable access to the court’s electronic-filing system, so long as such
258 permission is not unreasonably withheld in practice.

259
260 For a court that adopts the option of allowing reasonable access to the court’s electronic-

261 filing system, the concept of “reasonable access” encompasses the idea of reasonable conditions–
262 and restrictions. Thus, for example, access to electronic filing could be restricted to non–
263 incarcerated litigants (in light of the distinctive logistical considerations that apply in carceral–
264 settings) and could be restricted to those persons who satisfactorily complete required training–
265 and/or certifications and comply with reasonable conditions on access. Also, a court could adopt–
266 a local provision stating that certain types of filings—for example, notices of appeal—cannot be–
267 filed by means of the court’s electronic filing system. [Some courts have adopted local rules that
268 permit self-represented parties to use the court’s electronic filing system only if they obtain–
269 permission from the judge to whom the case is assigned; such a local rule would meet the Rule’s
270 requirement of “reasonable access” so long as such permission is not unreasonably withheld in
271 practice.] Rule 49(b)(2)(B)(ii) refers to “a local rule—or any other local court provision that
272 extends beyond a particular litigant or case” to make clear that Rule 49(b)(2)(B)(ii) does not
273 restrict a court from entering an order barring a specific self-represented litigant from accessing–
274 the court’s electronic filing system.–

275
276 For a court that opts to provide self-represented parties with an alternative electronic–
277 means for filing and an alternative electronic means for receiving notice of court filings and–
278 orders, the rule does not require the court to accept emailed or uploaded files in any and all–
279 formats. A court is free to set reasonable requirements such as that the files be in PDF format.–
280 [But see Criminal Rule 57(a)(2) (“A local rule imposing a requirement of form must not be
281 enforced in a manner that causes a party to lose rights because of an unintentional failure to–
282 comply with the requirement.”).]

283
284 Rules 49(b)(2)(B)(ii) and (iii) are intended to work in tandem. Where a local rule–
285 prohibits self-represented parties from using the court’s e-filing system, the “reasonable–
286 exceptions” required by item (ii) should align with the types of “reasonable conditions and–
287 restrictions” referenced in item (iii). That is, a local rule may allow self-represented parties e–
288 filing access only in particular circumstances—such as after completing a training or agreeing to–
289 specified formatting standards—provided those requirements are reasonable under item (iii).

290
291 Conversely, item (iii)’s authorization for courts to impose reasonable conditions on self–
292 represented parties’ access also informs what counts as a reasonable exception under item (ii).–
293 For example, a local rule that generally prohibits self-represented parties from e-filing might–
294 nonetheless provide an exception where the self-represented party meets conditions similar to–
295 those described in item (iii). The two provisions thus establish a flexible, complementary–
296 framework: item (ii) ensures that a blanket prohibition is not absolute, while item (iii) ensures
297 that courts retain authority to structure access responsibly.

298
299 Rule 49(b)(2)(B)(iv) provides that the court may deny a specific self-represented litigant–
300 access to the court’s electronic filing system, and that the court may revoke a self-represented–
301 litigant’s access to the court’s electronic filing system.

302
303 **Subdivision (b)(3).** What had been Rule 49(b)(2)(B) (concerning nonelectronic means of

304 filing) is carried forward as new Rule 49(b)(3).

1 **Rule 45. Computing and Extending Time**

2

3

* * *

4

5 **(c) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within

6 a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and

7 ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

8

Committee Note

9

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

12

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>
<p>Bankruptcy Rule 5005(a)(3)(B)(i): (B) By an Unrepresented Individual—When Allowed or Required.</p> <p>(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.</p>	<p>Bankruptcy Rule 8011(a)(2)(C)(i): (C) Electronic Filing By an Unrepresented Individual—When Allowed or Required.</p> <p>(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.</p>	<p>FRAP 25(a)(2)(C)(i): (C) Electronic Filing by an Unrepresented Party--When Allowed or Required.</p> <p>(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.</p>	<p>Civil Rule 5(d)(2)(B)(i): (B) By an Unrepresented Party—When Allowed or Required.</p> <p>(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.</p>	<p>Criminal Rule 49(b)(2)(B)(i): (B) By a Self-Represented Party – When Allowed.</p> <p>(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.</p>

<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>
<p>Bankruptcy Rule 5005(a)(3)(B)(ii): (ii) Conditions and Restrictions on Access.</p> <p>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.</p>	<p>Bankruptcy Rule 8011(a)(2)(C)(ii): (ii) Conditions and Restrictions on Access.</p> <p>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.</p>	<p>FRAP 25(a)(2)(C)(ii): (ii) Conditions and Restrictions on Access.</p> <p>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.</p>	<p>Civil Rule 5(d)(2)(B)(ii): (ii) Conditions and Restrictions on Access.</p> <p>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.</p>	<p>Criminal Rule 49(b)(2)(B)(ii): (ii) Conditions and Restrictions on Access.</p> <p>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.</p>

<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>
<p>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.</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>

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>

<p>Service by NCA:</p> <p>Rule 9036(c)(1): (c)</p> <p>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).</p>	<p>Service by NCA:</p> <p>Rule 8011(c)(1): (c)</p> <p>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.</p>	<p>Service by NCA:</p> <p>FRAP 25(c)(1): (c)</p> <p>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.</p>	<p>Service by NCA:</p> <p>Civil Rule 5(b)(2): (b)</p> <p>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.</p>	<p>Service by NCA:</p> <p>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.</p>
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<i>Service / other electronic means:</i>	<i>Service / other means:</i>	<i>Service / other means:</i>	<i>Service / other means:</i>	<i>Service / other means:</i>
<p>[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.</p>	<p>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.</p>	<p>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.</p>	<p>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;</p>	<p>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;</p>

			<p>(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</p> <p>(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.</p>	<p>(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</p> <p>(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.</p>
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Service / completeness:	Service / completeness:	Service / completeness:	Service / completeness:	Service / completeness:
<p>Rule 9036(d): (d) When Notice or Service Is Complete; Keeping an Address Current.</p> <p>(1) Notice of Case Activity Sent Through the Court’s Electronic-Filing System.</p> <p>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.</p> <p>(2) Other Electronic Means. Electronic notice or service by other electronic means is complete upon sending.</p>	<p>Rule 8011(c)(3): (3) When Service Is Complete.</p> <p>(A) For Service by a Notice of Case Activity.</p> <p>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.</p> <p>(B) For Service by Other Electronic Means.</p> <p>Service by other electronic means is complete on sending.</p> <p>(C) For Service by Mail or Commercial Carrier.</p> <p>Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier.</p>	<p>FRAP 25(c)(4): (4) When Service Is Complete.</p> <p>(A) For Service by Mail or Commercial Carrier.</p> <p>Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.</p> <p>(B) For Service by a Notice of Case Activity.</p> <p>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.</p> <p>(C) For Service by Other Electronic Means.</p> <p>Service by other electronic means is complete on sending.</p>	<p><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></p> <p>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.</p>	<p><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></p> <p>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.</p>

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.

<i>NCA defined:</i>	<i>NCA defined:</i>	<i>NCA defined:</i>	<i>NCA defined:</i>	<i>NCA defined:</i>
<p>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.</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>

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 14

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 15, Depositions for Discovery

DATE: April 7, 2026

At its April 2025 meeting, two suggestions for amendments to Rule 15 to authorize pretrial depositions for discovery—25-CR-B (Michael Kelly and Sergio Acosta) and 25-CR-E (Larry Krantz)—were placed on the Committee’s study agenda. At its November 2025 meeting, the Committee briefly discussed five additional proposals that supported amending Rule 15 to permit depositions or witness interviews. Several of these proposals explicitly supported the Kelly/Acosta proposal. Each new proposal discussed the need for depositions or witness statements and how their availability would improve the fairness of the criminal justice process. The new proposals also respond to concerns that depositions might endanger witnesses or result in delay. Several of the proposals drew on the writer’s experiences with cases in Florida, Indiana, and New Mexico, which currently provide for depositions in state prosecutions.

At the conclusion of this discussion, Judge Mosman stated that he took the proposals very seriously. But the Committee’s resources were stretched to the limit with other projects, including its multiyear work on Rule 17. Judge Mosman stated that he wanted to devote the right effort to Rule 15 when the Committee had completed some of its current projects and had the bandwidth to take this project on. Accordingly, he placed the new proposals on the study agenda as well.

The Committee has now received a total of 45 suggestions supporting the amendment of Rule 15 to permit a limited number of pretrial depositions for discovery. A list of these suggestions and a link the full text is included at the end of this memorandum.

The new submissions, like those submitted earlier, were detailed and thoughtful. All expressed support for amending Rule 15, saying that such amendment would promote fairness and efficiency in criminal proceedings. Many of the submissions called attention to the existing imbalance between the government’s pretrial access to information and the defense’s, noting the inability of defense counsel to compel witness testimony. The submissions also commonly highlighted the discrepancy between the information available to parties in civil litigation and those in criminal proceedings. Several submissions pointed to state criminal rules that allow for broader discovery that could provide guidance for an amended Rule 15, including Missouri, Florida, Arizona, Indiana, and Nebraska. Like earlier proposals, these submissions often acknowledged concerns about witness security and increased costs, but stressed that these could be managed by judicial oversight.

Because it appears that the Rule 17 project is nearing completion, and substantial progress has been made on the other projects on the Committee’s agenda, Judge Mosman has concluded that the time is right to appoint a subcommittee to begin a study of the Rule 15 proposals. The

Advisory Committee on Criminal Rules
Rule 15, Depositions for Discovery

subcommittee's work will include a study of the submissions and research on the various state laws and rules of procedure that currently provide for depositions in state prosecutions, as well as the scholarship analyzing the need for and issues raised by depositions in criminal cases.

#	Name of Individual or Organization	Date	Committee	Rule
1	Michael Kelly and Sergio Acosta (25-CR-B)	2/24/25	Criminal	Rule 15
2	Larry Krantz (25-CR-E)	3/26/25	Criminal	Rule 15
3	John Cline (25-CR-H)	9/2/25	Criminal	Rule 15
4	John Murphy (25-CR-J)	9/12/25	Criminal	Rule 15
5	David Markus (25-CR-K)	9/13/25	Criminal	Rule 15
6	Jonathan Bont (25-CR-L)	9/16/25	Criminal	Rule 15
7	Hecker Fink (25-CR-M)	9/26/25	Criminal	Rule 15
8	Lawrence Lustberg (25-CR-O)	10/7/25	Criminal	Rule 15
9	Kaplan Marino (25-CR-P)	10/23/25	Criminal	Rule 15
10	Williams & Connolly (25-CR-Q)	10/24/25	Criminal	Rule 15
11	Mololamken (25-CR-R)	10/24/25	Criminal	Rule 15
12	Dowd Bennett (25-CR-S)	10/29/25	Criminal	Rule 15
13	Nanci McCarthy (25-CR-T)	10/29/25	Criminal	Rule 15
14	A.J. Kramer (25-CR-U)	10/30/25	Criminal	Rule 15
15	Flowers Keller (25-CR-V)	10/30/25	Criminal	Rule 15
16	David Taft (25-CR-W)	10/31/25	Criminal	Rule 15
17	Lowell & Associates (25-CR-X)	11/4/25	Criminal	Rule 15
18	White & Case (25-CR-Y)	11/4/25	Criminal	Rule 15
19	Shapiro Arato Bach (25-CR-Z)	11/5/25	Criminal	Rule 15
20	Samuel Rabin (26-CR-1)	1/20/26	Criminal	Rule 15
21	Jessica Carmichael (26-CR-2)	1/21/26	Criminal	Rule 15
22	Dean Pregerson (26-CR-3)	1/21/26	Criminal	Rule 15
23	Frank Quintero (26-CR-4)	1/22/26	Criminal	Rule 15
24	Maggie Arias (26-CR-5)	2/11/26	Criminal	Rule 15
25	William Coates (26-CR-6)	2/27/26	Criminal	Rule 15
26	Michael Piccarreta and Louis Fidel (26-CR-7)	3/2/26	Criminal	Rule 15
27	Gibson Dunn (26-CR-8)	3/2/26	Criminal	Rule 15
28	National Association of Criminal Defense Lawyers (26-CR-9)	3/2/26	Criminal	Rule 15
29	Richard Jaffe (26-CR-10)	3/4/26	Criminal	Rule 15

#	Name of Individual or Organization	Date	Committee	Rule
30	Frederick Goetz (26-CR-11)	3/7/26	Criminal	Rule 15
31	Richard Kornfeld (26-CR-12)	3/9/26	Criminal	Rule 15
32	Drumheller Hollingsworth & Monthy (26-CR-13)	3/9/26	Criminal	Rule 15
33	Carissa Hessick & Russell Gold (26-CR-14)	3/11/26	Criminal	Rule 15
34	Alison Guernsey & Megan Graham (26-CR-15)	3/11/26	Criminal	Rule 15
35	Ellen Podgor (26-CR-16)	3/12/26	Criminal	Rule 15
36	Spears Manning & Martini (26-CR-17)	3/12/26	Criminal	Rule 15
37	Finch McCranie (26-CR-18)	3/6/26	Criminal	Rule 15
38	Thomas Marjerison (26-CR-19)	3/12/26	Criminal	Rule 15
39	Scott McKay (26-CR-20)	3/18/26	Criminal	Rule 15
40	Denise Frost (26-CR-21)	3/19/26	Criminal	Rule 15
41	Hon. Jane Magnus-Stinson (26-CV-22)	3/18/26	Criminal	Rule 15
42	New York Council of Defense Lawyers (26-CR-23)	3/24/26	Criminal	Rule 15
43	Arizona Attorneys for Criminal Justice (26-CR-24)	3/25/26	Criminal	Rule 15
44	Thomas Cranmer (26-CR-25)	3/18/26	Criminal	Rule 15
45	Kentucky Association of Criminal Defense Lawyers (26-CR-26)	4/7/26	Criminal	Rule 15